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Regulation v. Compensation in Land Use Control:

A Recommended Accommodation, A Critique, and an Interpretation

Essays by
JOHN J. COSTONIS
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STANLEY S. SCOTT

INSTITUTE OF GOVERNMENTAL STUDIES
University of California, Berkeley 1977

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Todd R. La Porte, *Acting Director*

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FOREWORD

"Fair compensation," the "accommodation power," the "police power," "regulation," and the "taking issue," as employed in analyses of the legal aspects of land use control, provide a kind of shorthand code for different approaches and philosophies guiding land use decisions. Legal writers have conducted much of the discussion, to which John C. Costonis has been an important contributor. It was while he was visiting professor at U.C.'s Boalt Hall that Costonis explored the possibilities of this volume with John Cummins, the Institute's Public Service Coordinator, and Stanley Scott, Assistant Director. Costonis agreed that after his article was published by the *Columbia Law Review*, the Institute could reissue it for a different audience. Later, when Columbia University Professor Curtis J. Berger prepared his "Reply . . ." he agreed to the same arrangement.

Stanley Scott's skillful "Introductory Interpretation" was written to help the non-lawyer reader consider the legal issues in broader policy perspective, and to link the discussion with California's own experience in establishing land use controls through coastal legislation.

The Institute welcomes this opportunity to present these significant contributions to the discussion of land use problems, equity issues, and the associated concerns that promise to become more pressing as public-sector efforts at environmental protection are intensified.

Todd R. La Porte
Acting Director

I

AN INTRODUCTORY INTERPRETATION

STANLEY SCOTT

AN INTRODUCTORY INTERPRETATION

STANLEY SCOTT

Assistant Director
Institute of Governmental Studies

This monograph comprises discussions in two recent law review articles, plus an introductory interpretation. It treats one of the most busily boiling public controversies in environmental regulation and land-use control. Curtis Berger characterized the central question as "the most stubborn of all property issues: how does one mark the outer bounds of the regulatory power beyond which government must compensate landowners for their losses?" (p. 67)

John Costonis outlines a system that he believes can achieve reasonable accommodation between the conflicting interests and objectives. He bases his formula on experience with efforts to preserve historic buildings or landmarks whose destruction and replacement with a "higher and better use" would otherwise be forced by the unregulated workings of the urban land market. Berger analyzes these recommendations for their potential utility and for limitations.

Introduction: Three Basic Themes

Three basic themes are explored: First, the views of those who would minimize regulation and require maximum compensation (the "private marketeers") are presented, as against those who favor using the regulatory power to a maximum (the "police power enthusiasts").

Second, the authors seek some means of accommodation, to resolve the dilemma and escape polarization between (1) relying on the private marketplace to insure optimum land uses and preservation of environmental resources, and (2) stringent regulation with little or no attention to impact on the affected owners.

Third, the articles go substantially beyond the formula presented by Costonis, developing an informative treatment of the objectives of accommodation, typologies of situations confronted by land-use regulators, and the community's efforts to respond. As noted later, these various processes are at work, with California's experiment with coastal regulation affording an excellent example.

The "Taking Issue" Controversy

The term "taking issue" derives from a land-use control question that is often subject to litigation. The courts are asked to decide when a land-use or

other regulation restricting an owner's use of his property is a legitimate employment of the police power that does not require the owner to be compensated, or alternatively, when it is an unduly severe restriction on the use of property. In the latter event, the courts construe an action as an actual taking of the property, necessitating compensation to the owner.

Some Illustrative Examples

Some illustrative examples may help the non-legal reader clarify the matter. When government seeks to influence the future use of land, it may take any of several steps. For example, (1) by regulation, government may prevent an owner from increasing the existing use of his property to a more intensive use that would nearly always have been more profitable. (2) By regulation, government may require an owner to reduce an actual or permitted use to a lower-intensity or less injurious use. This also nearly always reduces the owner's income or increases his cost. Examples are the enactment of "*down*-zoning" ordinances or of stringent pollution controls. (3) By regulation or purchase government may attempt to prevent an owner from making any appreciable use of his property (open-space restrictions or purchase of open-space easements). (4) By voluntary purchase or eminent domain acquisition, government may take an owner's land outright, paying him the "fair market value," or a negotiated purchase price.

An Either/Or Dilemma

The "taking issue" relates to the judicial response to zoning or other regulatory action. That is, under what circumstances will the courts approve such actions, or under what circumstances will they overturn an action because the regulation has gone "too far," and is found to constitute an actual "taking" of property, without compensation?

As Costonis emphasizes, this poses an either/or dilemma to the courts. Thus when an owner challenges a zoning action, the courts normally do one of two things. (1) They may find the zoning justifiable and consequently uphold it, giving the owner *no compensation*. (2) Or they may construe the action as a "taking," invalidating the zoning as applied to the particular case, thereby enabling the owner to do what he wishes without regard to the specific regulation in question, unless government acquires the property, presumably by condemnation under eminent domain proceedings.[1] In this case, the public agency is forced to *pay current market value, probably plus a bonus*. As Costonis notes, eminent domain valuation calls for compensation on the basis of a property's highest and best use "under the prior generous zoning plus such additional zoning increments as are deemed 'reasonably probable.' " (p. 27)

---

1. Berger points out that government may succeed in passing a subsequent and less stringent regulation giving the landowner something more—though not all that he wishes—and qualifying as a valid exercise of the police power. He notes that this begins to approach accommodation. (Berger letter to Scott, December 13, 1976.)

Costonis argues, in short, that the conventional regulatory machinery does not provide for an adequate middle ground between regulation and eminent-domain purchasing. He believes that there ought to be a negotiable range of in-between possibilities, permitting some form of compensation when a zoning or other regulation substantially restricts an owner's use of property. Otherwise he sees deadlock as "the inexorable outcome . . . because the legitimate interests of government and of private landowners cannot both be accommodated within this [either/or]. . . . framework." (p. 4)

The "Private Marketeers"

The conflict is reflected in the debate between "the private marketeers" who place maximum emphasis on property rights and would rely heavily on the marketplace to achieve community goals, and the "police power enthusiasts" who prefer to achieve social objectives principally through regulation, and would minimize the payment of compensation.

First off, neither Costonis nor Berger shows much sympathy for the "private marketeers," some of whom would virtually abolish regulation. They would decide all land uses by laissez-faire pricing, with little or no regulation. For example, Costonis notes the writing of Ellickson and Siegan, among others, and responds with some trenchant observations. He suggests that by following their recommendations, land use, environmental quality and community welfare "are delivered over to the tender mercies of the marketplace with the . . . assurance that 'equilibrium' will insure an optimum outcome." (p. 13)

He comments that the "cutting edge of the current environmental movement . . . was honed by . . . the deplorable failure of the marketplace to allocate . . . [air, water and land resources] efficiently." (pp. 11-12) He argues that Ellickson's prescriptions for laissez-faire distribution of property rights, if written into law, would mean that "public governance as we know it today would cease forthwith." (p. 14) Finally he sharply criticizes the real estate community for insisting "ritualistically" that eminent domain proceedings, acquisition and full compensation are the only acceptable "curative for stringent land use controls." (p. 27)

Berger largely shares the views expressed by Costonis. He alludes to the property rights advocates and identifies the "libertarian or Chicago School," which would "greatly weaken the bonds of governmental regulation," and in terms of judicial response, "extinguish much of zoning [because] government would be forced to pay . . . for imposing any restraint on the free market." (p. 83)

The "Police Power Enthusiasts"

Costonis is critical of the stringent regulators, as well as the private marketeers. He quotes two strict regulators as holding that a land use regulation that is "reasonably related to a valid public purpose, can never constitute a taking." (p. 6) Costonis sees this position as supporting "any regulation stopping short of

actual physical appropriation. . . ." (p. 6) He finds this position too extreme, considering that it gives "little heed to the fairness or feasibility of achieving sound land management on a wholly uncompensated basis." (p.6) Moreover Costonis believes that substantial expansion of the police power, applauded by the strict regulators, may have an adverse political backlash stemming from "such formidable private groups as the real estate community." (p. 28)

Instead of strict regulation with little or no compensation, Costonis argues for imaginative work toward an "accommodation power" that could combine regulation with judicious compensation when an owner suffers an injury, or is deprived of a future opportunity to realize a profit or income. Costonis would have legislative bodies develop this process, rather than the courts, and recommends that "the legislature . . . backstop . . . the police power dimension of . . . [land use] programs with a compensatory supplement predicated on the accommodation power and fair compensation." (p. 58) Much of the remainder of his article is devoted to explaining and making a case for a device that he sees as the seed for an effective accommodation system, at least in urban areas, i.e., the transfer of development rights.

Like Costonis, Berger comes down foursquare against the "private marketeers." In contrast to Costonis, he appears to side with the "police power enthusiasts," characterizing the school as follows:

> This group sees land ownership as a privilege . . . fee simple [ownership] gives no one an absolute right to develop; zoning benefits are an expression of community grace which the community can remove—and without compensation—when doing so will serve the general welfare. (p. 83)

Judicial Support for Strict Regulators

Turning to the field of jurisprudence, Berger finds substantial support for the strict regulators, pointing to

> . . . a considerable body of precedent—in California and elsewhere--that denies the owner of undeveloped land any vested interest in the zoning status quo. If the community is to plan . . . it must be able to alter its plan, and if courts can nullify zoning changes whenever landowner expectations suffer, plans would either petrify or be much less exacting at the outset. The law assumes that landowners understand this risk. . . . (p. 89)

In this connection, Berger singles out "a very recent and enormously significant decision" (p. 88) by the California Supreme Court.[2] In this case the court upheld a down-zoning from commercial use to low-density residential use that reduced the owner's land value from the $388,000 originally paid to an estimated $75,000.

Further, commenting on regulation employed as environmental protection, Berger argues for strong measures. He points out that accommodation between regulation and compensation for such a goal may be "infinitely harder to achieve" than with far simpler objectives such as protecting landmarks. But "the public injury [may be] far more serious," (p. 90) if accommodation is unable to preserve the resource. Reaffirming support for strong regulation in such situations, he asks "why *any* beneficial use . . . [could be considered] reasonable," if it would "upset a delicate ecological balance or eliminate a badly needed (e.g., agricultural) resource." (p. 91) [emphasis in original]

A Middle Ground: Will Accommodation Work?

The opposition between the strict regulators and the proponents of full compensation, noted above, brings us back to the confrontation that both Berger and Costonis see as a basic issue. Each in his own way argues for stronger intervention by the community's policymaking machinery, particularly the legislature. Costonis comments: "Primary responsibility for nurturing the accommodation power must rest with the legislature." (p. 58)

Costonis explains how this might work. His approach has two basic components: First, he would establish a concept of *reasonable beneficial use* of property. This value would be substantially below a property's value in the absence of a proposed regulation, but also appreciably and maybe substantially above the value it would have if the regulation were enacted.

Second, Costonis calls for an owner to be either (1) compensated in money for loss of his property's reasonable beneficial use, or (2) given the right to develop property situated somewhere else, a right whose economic value would roughly approximate the reasonable beneficial use he lost through regulation at the initial location. This last alternative is called *transfer of development rights* (TDR).

Costonis believes that by giving the owner *some* compensation, while shifting his activities to another location, accommodation would successfully lead us out of the standoff between regulators and compensators, while achieving the principal objectives of regulation.

Berger's essay extends and elaborates the explanation of the TDR concept, and analyzes the ways it has worked or might work in various illustrative situations. While basically sympathetic to and respectful of the concept and its objectives, i.e., to find a workable "middle ground," Berger nevertheless concludes that the approach is not sufficiently worked out in concrete terms, faces many legal

2. *HFH, Ltd. v. Superior Court of Los Angeles County* (1975).

and financial difficulties in practice, and in any event, would not settle the intense controversies regarding regulation and compensation:

> I applaud the stress upon accommodation; it invites an approach to dispute–i.e., mediation–which our adversarial "winner-take-all" attitude insufficiently values. (p. 89)
>
> . . .
>
> [Nevertheless] I do not see the accommodation power as closing out the controversy over the bounds of the regulatory power. (p. 89)

For example, Berger envisions great difficulties in arriving at a pragmatic dollar figure setting reasonable beneficial use in specific situations, and points out that Costonis deliberately (and admittedly) avoided:

> . . . telling us how he would fix the reasonable beneficial use standard in concrete instances. Yet until we have an answer to that, the taking impasse seems as insoluble as before. (p. 86)

Berger does acknowledge that development-rights transfer and the accommodation power could work, at least part of the time, in achieving the limited objectives for which initially devised, i.e., the preservation of valuable old buildings and historic landmarks. But he finds serious impediments when considering more general application of the concept, and especially in its use to regulate undeveloped land in the interest of environmental protection and resource preservation.

Moreover he considers the concept impractical for the larger-scale ecological and environmental objectives now often sought by regulation. Finding the concept "barely feasible" (p. 88) when limited to a single city's commercial and multiple-unit residential areas, he remarks:

> . . . to adapt the idea for all of the ecologically sensitive area throughout a metropolitan region, for example, seems well beyond the present capability of any government or planning organization. (p. 88)

In short, Berger concludes that Costonis has presented "a limited, albeit versatile tool." (p. 91) "Particularly as to landmark preservation, accommodation may furnish a set of options which will reduce the vulnerability of diminutive or uneconomic structures." (pp. 89-90)

The Future of Regulation/Acquisition

Where has this discussion brought us? And what about the bigger picture, which concerns both Berger and Costonis? Despite Berger's critique, Costonis presumably still believes that variants of the accommodation power and TDR have a large potential for resolving some of the dilemmas of the "taking issue." He would like to see the legislatures–principally the state legislatures–take the lead:

> Of the three departments of government . . . the legislature is best fitted to define those community values which should be protected through land use regimes, to assess the likely regulatory and fiscal impacts of those regimes, and to devise appropriate compensatory formats when necessary. (p. 58)

Moreover in the evaluation process itself, Costonis would place major reliance on contemporary judgment and community standards, rather than on property appraisal formulas. This is doubtless one reason for his reluctance, noted earlier, to tell us "how he would fix the reasonable beneficial use standard in concrete instances." (p. 86) Instead he sees these determinations as appropriately being "heavily interlaced with value judgments rooted in community standards," (p. 35) and as resting "as much on cultural as on narrower appraisal or technical grounds."

Berger anticipates a much more limited role for development-rights transfers than does Costonis, and presumably would support stricter regulation and less compensation, as well as compensation in fewer instances. But he shares wholeheartedly the emphasis that Costonis places on the need for policy decisions based on thoughtful, prudent judgments, with sensitivity to community attitudes and standards. Thus Berger argues that the "balancing process," weighing public benefit against private detriment:

> . . . depends upon human perceptions and attitudes and intuitions which we cannot reduce to metric measure, even if we could somehow quantify the many technological and economic variables. . . .
>
> . . . legislatures first and courts second must continue to balance private and public interests. We can ask that the process be intelligent, that it be open, that it be fair, that whenever possible it seek to accommodate. We should not also expect that the balancing . . .will become simpler. (p. 91)

In fact, this is precisely what has been going on, especially in recent years, in many contexts. California's own experience offers a working demonstration of some accommodation processes in action. The state's system of coastal governance was set up temporarily by a voter-approved initiative in 1972, and made permanent by statute in 1976. The coastal planning and permit processes represent a weighing and balancing of public benefits against private interests, like those called for by Berger and Costonis. Moreover the writer believes that most knowledgeable observers would characterize the coastal decision process in language similar to Berger's, i.e., as on the whole reasonably fair and open, especially considering the extreme time pressures applying.

On the other hand, some observers have challenged either specific performances or the overall concept. One such critical view is noted below, along with an accompanying rebuttal. The exchange helps elucidate the workings of the coastal planning process, which seems to meet the judgmental, community-standards criteria emphasized by Costonis and Berger.

Regional Coastal Commissioner Bruce Johnson writes in a coastal-critique volume that appears to be largely an attack on the concept of land-use regulation:

> My fellow commissioners were unwilling to discuss, let alone publish and disseminate, a set of standards, rules, or criteria that would have informed all interested parties what the commission wanted and did not want. No member of the public could reasonably infer the outcome on a particular issue until the case had been decided. Cases . . . were handled on an *ad hoc* basis, and in my opinion, were decided by whim or chance.[3]

Paul van Seters (graduate student, Center for the Study of Law and Society, UCB) counters Johnson:

> To expose and criticize "administrative arbitrariness" is commonplace in the literature on regulatory agencies. One of the major goals of . . . [this] paper is to show how misconceived these objections often are. With respect to the Coastal Commissions, it will be argued that the criticism is mistaken both on theoretical and on factual grounds.[4]

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3. Institute for Contemporary Studies, *No Land is an Island* (San Francisco, 1975), p. 80. (Johnson is Professor of Economics, University of California, Los Angeles, and formerly commissioner on the regional coastal body for Los Angeles and Orange counties.)

4. "The California Coastal Zone Conservation Commissions: An Exercise in Pragmatic Administration" (Draft manuscript, August 1976). p. 11.

Van Seters further notes Melvin Mogulof's comment, written in 1974, praising what may be called the "diplomatic" qualities of the commissions. Mogulof found some of the efforts "brilliant in their attempts to balance their options, while always reaffirming that they could and would use the option of denial."[5] Van Seters concludes from his own examination of state-commission permit activity that Mogulof's praise is justified:

> . . . the State Commission proved to be enough of a "realist" not to try to stop *any* project antagonistic to the intentions of the Coastal Act, thus avoiding both foolishness and political havoc. On the other hand, in the increasingly extensive and sophisticated use of conditional approvals, and in the bold manner in which the Commission moved into areas not explicitly covered by the Coastal Act, one may see illustrations of "administrative imagination" that refused to sell out wholesale to "reality." [emphasis in original][6]

Some Clues for the Future from the Coastal Experience

In short, California's coastal legislation and the coastal commissions' policies and practices, seem to provide an excellent example of the judgmental and imaginative balancing that both Costonis and Berger advocate. In several ways the process allows different kinds of properties and resources to be sorted out for appropriate treatment. This differentiation may provide the seed for at least a partial solution to the taking-issue impasse.

To begin with, urban and non-urban lands are dealt with separately and treated differently. (1) Thus in urban areas the coastal permit power has largely provided a back-stop for local zoning decisions, upholding those found to conform with coastal objectives, but handing down stricter judgments for those that differ. (2) Moreover the provisions that permit the building-out of urban areas already substantially committed to development, sets aside many otherwise troublesome situations as not being worth a regulatory struggle.

(3) Non-urban resources, on the other hand, can be considered for what they are, that is, *existing uses* carrying the presumption that their preservation and maintenance is in the interest of coastal conservation, unless proven otherwise. Accordingly where an existing non-urban coastal resource use can be changed to one that is more intensive and still comply with the objectives of the plan, the new use could be permitted without injury to the community. But if a proposed new use of a non-urban resource were to threaten the plan's objectives, the change could be denied and the existing use continued.

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5. Ibid., p. 58. Quoted from Mogulof, "Intergovernmental Relations in Land Use Control: The Case of the California Coastal Zone " (Washington, D.C., The Urban Institute, Land Use Center Working Paper 0785-01, May, 1974), p. 40.

6. Ibid., p. 58.

Under these circumstances, preservation of a non-urban use should not be traumatic or work a hardship, unless the use has become unprofitable. In that case relief might come from several sources, including appropriate governmental aids to help sustain and perpetuate the current use. Help can take many forms, such as the subsidies customarily provided for agriculture and most branches of industry, or various types of tax relief, e.g., the California Land Conservation Act of 1965 (the Williamson Act), designed to set up temporary agricultural preserves.[7] The 1976 timber preserve legislation is another example.[8]

Such deliberate measures of relief, to help perpetuate desirable existing land uses, seem clearly preferable to bailing out an ailing property by allowing its conversion to a more intensive use, particularly if the conversion would conflict with the community's land-use and environmental goals.

Still another approach was included in California's 1976 coastal legislative package, which established a promising new agency, the State Coastal Conservancy. Its purposes are acquisition of property or easements in order to protect agricultural lands that cannot be preserved by the police power, correct the consequences of premature subdivision, restore damaged natural areas, set up protective buffer zones around public parks and natural areas, and hold other properties for up to ten years pending purchase by the Department of Parks and Recreation.

The State Coastal Conservancy was carefully kept distinct from the State Coastal Commission, partly to separate the planning and regulatory functions from the acquisition and management functions. There was concern that pressures might be brought to acquire properties when regulation using the police power should appropriately be used. Moreover the coastal conservancy agency cannot acquire agricultural lands or easements unless the coastal commission identifies the property and finds that there "is no other reasonable means, including the use of police power, of assuring continuous use of such lands for agricultural purposes." (Public Resources Code § 31152) Despite these restrictions on conservancy as a substitute for the police power, negotiation and trade-offs will no doubt occur. So, although granted only modest initial funds, the conservancy agency will presumably be an active participant in accommodation efforts.

In conclusion, regardless of the type of property, California's coastal decision processes will seek accommodation among values and interests. In the case of "natural" areas, there may, of course, be little or no room for accommodation without allowing environmental degradation that would destroy the natural character of such areas. Other types of properties may offer a greater range of negotiation. In any event, under California's 1976 coastal legislation, local governments, regional coastal commissions and the state commission will pursue a complicated process of planning, regulation and negotiation intended to culminate by 1980 in local plans that have been certified as acceptable by the state commission.

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7. California Government Code, secs. 51200-51295.
8. AB 1258 (1976) Ch. 176.

Conclusion

To return to the discussions by Costonis and Berger, both seek options for accommodation in many forms. Both reject an extreme stance and a rigid formula guaranteeing "property rights," which would oversimplify problems, ignore community judgments, and deprive the public of practicable ways to implement plans.

Costonis suggests one train of thought for accommodation formulas he considers workable—at least in treating important classes of *urban* property. He would use the transfer of development rights to give owners a "reasonable" degree of compensation when more intensive land uses are denied. Berger suggests other approaches that place more emphasis on the community's power to govern through regulations, and less on compensation or purchase. Both agree that hard-line insistence on the preeminence of property rights over community interests would forestall accommodation and preclude effective environmental governance.

II

"FAIR" COMPENSATION AND THE ACCOMMODATION POWER

JOHN J. COSTONIS

"FAIR" COMPENSATION AND THE ACCOMMODATION POWER

JOHN J. COSTONIS*

"Dinah'll miss me very much tonight, I should think." (Dinah was the cat.) . . . . "Dinah, my dear! I wish you were down here with me! There are no mice in the air, I'm afraid, but you might catch a bat, and that's very like a mouse, you know. But do cats eat bats, I wonder?" And here Alice began to get rather sleepy, and went on saying to herself, in a dreamy sort of way, "Do cats eat bats? Do cats eat bats?" and sometimes, "Do bats eat cats?" for, you see, as she couldn't answer either question, it didn't much matter which way she put it.

Lewis Carroll[1]

Present commentary on the taking issue in land use controversies evokes the spectacle of the circus equestrian, feet planted on two charging stallions. Engrossed, the audience ponders what might happen if the stallions abruptly lurch off in opposite directions. Can the rider keep the beasts in tow? Will he tumble to the ground as penalty for his poor horsemanship? Or will he finesse his dilemma by leaping to one or the other of the miscreants?

Like the bedeviled horseman, government stands shakily astride the police and eminent domain powers as it seeks to give direction in land use affairs. Sadly for government, the horseman's treacherous plight is as child's

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For their review and comments on earlier drafts of this article, the author wishes to express his thanks to Dean John Cribbet and Professors Roger Findley, John Nowak and Thomas Morgan—colleagues at the University of Illinois College of Law—to Professors Donald Hagman and Harvey Goldschmid and to Chicago realtor-land economists Jared Shlaes and Robert De Voy. Homage is also due to Messrs. Shlaes and De Voy for their invaluable aid as co-authors in earlier undertakings with the author, *see* note 168 *infra*, conceiving of and investigating the feasibility of specific development rights transfer proposals as resource protection tools. The thesis advanced in this article traces to these undertakings and to the patient efforts of Messrs. Shlaes and De Voy to initiate the author into the mysteries of land economics and real estate appraisal. Finally, a special and much-deserved note of thanks is due Diane Zimmerman, *Columbia Law Review* Articles Editor, for her superb editorial assistance in the preparation of the final version of this article. Errors and distortions in this article, of course, are solely those of the author.

1. L. CARROLL, ALICE IN WONDERLAND & THROUGH THE LOOKING GLASS 4 (Grossett & Dunlap, Inc. ed. 1946).

play compared to its own. The steeds it rides are ill-matched, sharing little sympathy for one another or for their wobbly master. The stakes in mastering them are momentous, reaching ultimately to the very definition of the property concept itself. Yet, despite long-term wrestling with the dilemma, government's legislative and judicial branches seem distant from resolving it. And the commentators too are in discord, one side urging a dramatic leap to the police power and the other to the eminent domain power. They seem able to agree only that something must be done to avoid the otherwise inevitable fall.

Deadlock is the inexorable outcome of the taking issue so portrayed because the legitimate interests of government and of private landowners cannot both be accommodated within this taut framework. The thesis of this article is, therefore, that the framework must be enlarged to introduce a third power, the accommodation power, to fill the void that currently divides the police and eminent domain powers. Within this enlarged framework, the concept of "fair compensation" serves as an intermediary between the police power's absence of compensation and the eminent domain power's requirement of "just compensation."

Fundamental to this thesis is the belief that, by casting the police and eminent domain powers as correlatives, the phrase "taking issue" is a misnomer that accords neither with logic, legal doctrine nor sound policy. With rare exception, regulatory measures said to be takings are simply measures which exceed the allowable limits of the police power. Nor does it follow that the cure to this problem lies exclusively in eminent domain, which requires, in most states, that dollar compensation be fixed by a condemnation jury according to a "highest and best use" standard.[2] Instead, government may take one of three paths. Eminent domain is, of course, one solution, but government will seldom opt for it because it is often both fiscally impracticable and too drastic for the modest regulatory purposes at hand. It can retrench to the police power by liberalizing the overly restrictive measure, often at the cost, however, of compromising the measure's intended planning result. Or, under the thesis advanced in this article, it may avoid that result by predicating the measure on the accommodation power and affording the landowner fair compensation. Less demanding than just compensation, fair compensation may be secured by dollars or by some non-dollar but marketworthy alternative; it may bypass the jury trial and other procedural complexities prescribed for eminent domain actions by state statutes and constitutions; and it is not keyed to the restricted parcel's highest and best use

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2. *See* notes 76-110 and accompanying text, *infra*, for a discussion of the requirements of "just" compensation.

but to a standard based on a lesser economic return, designated in this article as the Reasonable Beneficial Use standard.

The accommodation power's differences from the two existing powers and its role in public governance generally are best understood not by some abstract definition of its quiddities, but by what it enables government to do better than either of these other powers. From this perspective, I view it as a vehicle for fair compensation, and I advance it only because fair compensation cannot find a predicate in either of the traditional powers, at least as conventionally understood. Were it otherwise, I would have been pleased to avoid the cutting edge of Occam's Razor, which advises against needless multiplication of concepts, and to take the less exposed route of folding fair compensation into one of the existing powers. In fact, an argument can be made that it could find a home in the much enlarged police power of contemporary times.[3] Nonetheless, I have chosen to use the accommodation power label because, in addition to my belief that it is conceptually necessary, it also dramatizes both the inadequacies of current police power/eminent domain doctrine and the fruitlessness of the debate now raging between police power enthusiasts and private market adherents over the future course of land use governance in America.

By breaking the logjam stymying current doctrine and debate, the accommodation power opens the way to a land use system that can effect stringent public governance where necessary while, at the same time, dealing equitably with those landowners who are sharply disadvantaged by that governance. My argument is developed in three sections. The first critiques the viewpoints of commentators who urge undue reliance respectively on either the police or the eminent domain power as the foundation of public land use governance. Extensive consideration is given to both schools in the conviction that their all-or-nothing proclivities best illustrate the underlying tensions that beset compensation jurisprudence today. The second details the unhappy consequences and multiple ironies of that jurisprudence. Singled out for special discussion is the evolution of eminent domain doctrines defining the highest and best use standard as the polestar of just compensation. This development, though intended to protect private rights, has instead all but guaranteed government's recourse to the police power in situations where that power's use not only is unfair but tends overall to defeat the successful implementation of public governance schemes. The third section offers a functional analysis of fair compensation and its accommodation power predicate, addressing both the relationship between that power and the Reasonable Beneficial Use standard and the institutional arrangements that its employment requires.

3. *See* text accompanying notes 152-67, 175-85 *infra*.

I. The Police Power Enthusiasts and the Private Marketeers: A Comparison and Critique

A. *The Police Power Enthusiasts*[4]

". . . [A] regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking."[5] So write the authors of *The Taking Issue* in their common drive with other police power enthusiasts to be rid of the irritant of compensation which attends stern land use regulation. The assumption of these authors that any regulation stopping short of actual physical appropriation may be founded exclusively on the police power is a noble sentiment, superficially appealing at a time of widespread despair over the destructive legacy of ill-regulated private development. Regrettably, however, it pays little heed to the fairness or feasibility of achieving sound land management on a wholly uncompensated basis.

The economic consequences of noncompensatory regulation are disdained as a "matter of indifference"[6] or ignored altogether, thereby shunting aside considerations of fairness to private landowners who become forced contributors to the common weal, and to government when its actions create windfalls it cannot recover under existing practices. Positions assumed to be antithetical, moreover, often are not. We are told, for example, that belief in the continued vitality of compensation practice commits one to the "myth" that "the taking clause protects this right of unrestricted land use regardless of its impact on society,"[7] or, what may be the same thing, to the view that "ownership of property necessarily implies a government guarantee to profit from it when and as the owner in his sole discretion wishes . . . ."[8] Their strawmanship[9] only detracts from the commentators' otherwise thoughtful appreciation of failing governmental leadership in land use affairs and of emerging attitudinal and doctrinal trends that promise to modify the nation's long-standing bias unduly favoring private rights.

Nor do they choose to address the repeated failure of police power-based

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4. That less space is devoted in text to a critique of the police power enthusiasts' position than to that of the private marketeers' is not reflective of the writer's assessment of the relative merits of the two positions. Instead, it is explained by his earlier preparation of lengthy critiques of the former, *see* Costonis, *Transferable Development Rights: Perspectives for the Future* at 57 *passim* (ASPO PAS Report No. 304 Mar. 1975); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L.J. 75, 82-85 (1973), as against the absence of an equivalently comprehensive critique by the writer or other commentators of the increasingly influential viewpoint of the private marketeers in land use affairs.

5. F. Bosselman, D. Callies & J. Banta, The Taking Issue 238 (1973) [hereinafter cited as Taking].

6. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 172 (1971).

7. Taking, *supra* note 5, at 2.

8. Sax, *supra* note 6, at 169.

9. There is, of course, a range of positions intermediate between those of the police power enthusiasts and of the private marketeers. *See generally* text accompanying notes 125-30 *infra*; *cf.* text accompanying notes 211-29 *infra*.

controls to tame discordant market forces. The sorry record of the last half-century is plain for those who care to read it. In mockery of well-intentioned police power programs, cherished landmarks fall, prime agricultural land and open space vanish, sprawl compounds, and comprehensive land use plans unravel. Disregarded by police power enthusiasts are stubborn political and administrative obstacles, frequently traceable to market forces, that cannot be dissipated by deft legal argument or by appeal to the intrinsic rightness of proper land management practice.

Wishful thinking also seduces the enthusiasts into overreading land use portents. Much has been written in recent years, for example, about "new moods," "quiet revolutions," and other myth-destroying trends that foretell better days ahead. Only the most obdurate cynic, of course, can doubt that American land use attitudes, institutions and practices are indeed in ferment. But he might properly observe that while the conception of property rights nurtured by William Blackstone, Adam Smith and John Locke is now suspect, no firm consensus has yet crystallized to take its place. The zig-zag fortunes of innovative land use measures in such jurisdictions as New York,[10] Oregon,[11] Vermont[12] and Puerto Rico[13] manifest that the pendulum has not and is not likely to swing over toward a consensus supporting noncompensatory regulation regardless of its economic impacts. Oregon Ex-Governor Tom McCall adverted to the self-defeating tensions that indiscriminate police power programs have generated in these and other jurisdictions when he opined in 1974 that compensatory zoning was the nation's "next great land-related issue."[14]

Also regrettable is the penchant of these advocates for shoehorning the complexities of the compensation question into a single box and then resolving them by sweeping formulae. *The Taking Issue* quotation that opens this section affords one example. Professor Sax offers another in his proposition that "the only appropriate question in determining whether or not compensation is due is whether an owner is being prohibited from making a use of his land

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10. *Compare* Golden v. Planning Board, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972) (sustaining restrictions on subdivision development for up to 18 years), *with* Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974) (invalidating landmark designation of the J.P. Morgan Mansion as a "taking"); Fred F. French Inv. Co. v. City of New York, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973) (invalidating the Tudor Parks protective transferable development rights program as a "taking"); and Penn Central Trans. Co. v. City of New York, Index No. 14763/69 (Sup. Ct. N.Y. Cty. 1975) (invalidating landmark designation of Grand Central Terminal as a "taking").

11. *See* Williams, *Oregon: The Fight for "Survival,"* SATURDAY REVIEW WORLD 1, Nov. 16, 1974.

12. *See* Trillin, *U.S. Journal: Vermont, Act 250 and Beyond*, 50 NEW YORKER, Oct. 1974, at 128.

13. *See* J. COSTONIS & R. DE VOY, THE PUERTO RICO PLAN: ENVIRONMENTAL PROTECTION THROUGH DEVELOPMENT RIGHTS TRANSFER (Conservation Trust of Puerto Rico & Urban Land Institute 1975) [hereinafter cited as PUERTO RICO PLAN].

14. Address by Tom McCall, Governor, State of Oregon, Middle Atlantic Regional Conference, Mar. 29, 1974, on file at the *Columbia Law Review*.

that has no conflict-creating spill-over effects."[15] Despite the finality or elegance of these ukases, they are unlikely to exorcise the taking demon.

Against them must be posed Professor Philbrick's sage observation that "the concept of property never has been, is not, and never can be of definite content."[16] Nowhere is this comment more vividly apt than in land use law which is, above all, a law of contexts. Even Proscrustes, I suspect, would shrink from confronting with a single measuring rod areas as diverse as growth management resource protection, incentive zoning, aircraft overflight, interim zoning and nonconforming use amortization; and these are only a few of the contexts whose unique features so complicate the compensation question. Nor would he find that yardstick adequate to resolve compensation issues whose outcome in a half-century of litigation has turned upon an entire matrix of variables, each of shifting weight depending upon context and current community values.[17]

B. *The Private Marketeers*

At the opposite pole from the police power advocates are those commentators who repose their faith in the marketplace and not in government as the regulator of land use affairs. As adherents of an economic philosophy associated principally with the University of Chicago, they would compel government to compensate when it regulates all but nuisance-like land uses. But their support for the eminent domain power instead of the police power is only a by-product of their more fundamental conviction that government ought largely to get out of the land use field, a conviction mirrored in Professor Ellickson's argument that "zoning is today out of control and must be severely curtailed if not entirely replaced."[18] Building on the work of Bernard Siegan[19] and other private market adherents,[20] Ellickson proposes a substitute founded on the "laissez-faire distribution of property rights," which he defines as "an imaginary legal world where each landowner can choose to pursue any activity within the boundaries of his parcel without fear of liability to his neighbors or governmental sanction."[21] Recognizing that some forms of land use do injure neighboring landowners, he also proposes that these harms be "internalized" to their authors by three devices: first, expanded use of private bargaining

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15. Sax, *supra* note 6, at 164.

16. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 696 (1938).

17. For a thoughtful enumeration and interpretation of the variables reflected in 20th Century American land use jurisprudence, *see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 *passim* (1967).

18. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 781 (1973) [hereinafter cited as *Alternatives*].

19. *See* B. SIEGAN, LAND USE WITHOUT ZONING (1972); Siegan, *Non-Zoning in Houston*, 13 J. LAW & ECON. 71 (1970).

20. *See* authorities cited in *Alternatives*, *supra* note 18, at 682 n.2.

21. *Id.* at 684.

arrangements in which landowners purchase from their neighbors the right to conduct nuisance uses;[22] second, revitalization of nuisance law to penalize nuisance-perpetrating freeloaders;[23] and, third, recognition of a limited role for government in dealing with "pervasive nuisances," (those that are not amenable to resolution by the first two devices).[24] The pervasive nuisance class is apparently quite limited and includes, in his representative listing, such matters as signs, building heights, overhead utility lines, offstreet parking, and yard, setback and subdivision requirements.[25] Government's role would be two-fold. It would administer a system of fines against pervasive nuisances whose degree of "noxiousness" can be objectively plotted.[26] And it would adopt mandatory regulations akin to conventional zoning measures to bar pervasive nuisances of indeterminate noxiousness.[27]

The private marketeers' position is provocative and, in many respects, enlightening. They see clearly what the police power enthusiasts choose to ignore and vice-versa. Foremost among their concerns is public governance's haphazard economic consequences. Hence, Bernard Siegan's quote from Mason Gaffney: "When the planning commission and the zoning board flit about sprinkling little golden showers here rather than there, they make millionaires out of some and social reformers of others."[28] Then too, they highlight the role of compensation in protecting individual liberty[29] and encouraging rational decision-making by exposing the true costs of collective judgments that impose severe charges on a few or afford benefits unequal to their costs.[30] Also welcome is their attention to the various private and quasi-private arrangements that contribute to efficient land use patterns while escaping many of zoning's well-known drawbacks.[31]

Unfortunately, these valuable insights are all but cancelled out by two grave deficiencies. First is their jaundiced view of the propriety of public governance in appropriate land use contexts. Second—and correlative to the

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22. *Id.* at 711-19.
23. *Id.* at 719-61.
24. *Id.* at 761-79.
25. *Id.*
26. *Id.* at 761.
27. *Id.* at 761-62.
28. Siegan, *Non-Zoning in Houston*, 13 J. LAW & ECON. 71, 128 (1970).
29. *See* A. DUNHAM, PROPERTY, CITY PLANNING, AND LIBERTY IN LAW AND LAND, 28 *passim* (Haar ed. 1964). Given Professor Dunham's status as Chief Reporter of the ALI MODEL LAND DEVELOPMENT CODE, an instrument which calls for increased rather than less centralized planning, it may seem anomalous to classify him with the private marketeers. As Professor Ellickson properly notes, however, Professor Dunham's writings place him "[a]mong the most distinguished and persistent . . . sceptics" of the "wisdom of greater governmental intervention in land markets." *Alternatives, supra* note 18, at 682 n.6.
30. *See* A. DUNHAM, *supra* note 29, at 40, 43; Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U. L. REV. 1238, 1253-54 (1960) [hereinafter cited as *Enclosure*].
31. *See generally Alternatives, supra* note 18; B. SIEGAN, LAND USE WITHOUT ZONING (1972).

first—is their indefensibly broad conception of private property rights. These deficiencies are treated in the following two subsections.

1. *The Marketplace as a Regulator of Urban Growth.* To this observer, the market's capacity to insure orderly urban growth without a framework of publicly determined goals and incentives is highly problematic. Perhaps the market is superior to zoning in resolving localized conflicts among neighboring landowners. But is it also superior to zoning and other forms of public governance in dealing with larger questions, such as growth management? Professor Ellickson believes so, arguing as follows:

> If a particular area becomes too dense, its residents will perceive the disadvantages of this high density and tend to leave; growth controls are thus not needed to protect people from "unlivable" conditions. When conditions are unlivable for many residents, emigration will reduce population densities and tend to establish equilibrium. If California's attractiveness as a place to live were to diminish because of rapid population growth and the resulting additions to traffic congestion and air pollution, private forces would end net migration to California; population planning is not necessary to accomplish this result.[32]

But his argument raises more questions than it resolves. Contrary to the assumption that pervades his and Siegan's work, zoning does not exhaust public governance; it is only one of a variety of planning tools, a point which is implicit in his reference to transportation, pollution and other concomitants of urban growth. Properly framed, the issue shifts to the comparative merits of zoning *and* other forms of public governance working in conjunction with market forces, versus the unregulated marketplace as the proper determinant of this growth. Again, while zoning is not the whole of public governance, it is certainly more than a nuisance-preventative. True, its field of operation does encompass such matters as compatibility of neighboring uses, yard and setback requirements, building heights and the like. To stop there, however, is to ignore modern zoning potential, either independent of or coordinated with other public governance devices, to deal affirmatively with a broad range of positive concerns that, while hardly categorizable as "nuisances," do serve health, safety and welfare goals firmly based in evolving community standards.[33]

These rather obvious facts are passed over because they jibe poorly with a model founding efficient land use control on private bargaining transactions backstopped somewhat—but not too much—by governmental machinery. More than this anachronistic model is needed, however, to deal with urban growth and other non-local planning problems, a point driven home by the California

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32. *Alternatives, supra* note 18, at 769-70.

33. *See generally* J. Costonis, Space Adrift: Landmark Preservation and the Marketplace 162-66 (1974); D. Hagman, Urban Planning and Land Development Control Law 86-99 (1971).

Supreme Court in recounting the factors that led to the creation of the (Lake) Tahoe Regional Planning Agency.

> The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threatens the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole. Indeed, the fact that the [Tahoe Planning Agency] Compact is the product of the cooperative efforts and mutual agreement of two states is impressive proof that its subject matter and objectives are of regional rather than local concern.[34]

The court's immediate object was to sustain the Compact against a charge that it invaded the home rule powers of local governments. Where even local governmental arrangements have fallen short of resolving growth problems, however, the hope that private arrangements can do so seems chimerical indeed.

Unsatisfactory too is the glib solution to the overdensity problem advanced by Professor Ellickson—that the community or the state need not be alarmed because "private forces" will produce "equilibrium." However useful the equilibrium concept may be for the economist, when transplanted to the planning context it begs a number of questions vital to basic community values. Why, for example, should the community or state meekly acquiesce in congestion, air pollution and the like when it could strive to anticipate and mitigate these scourges? Suggested by the author are two related responses, both concededly based on his "intuitive estimates of the allocative and distributional impacts of alternative internalization systems."[35] First, the market is better able than government to allocate resources efficiently.[36] Second, successful management of these problems is beyond the reach of existing public governance techniques and institutions in any event.[37]

If intuition is to be the guide, the first response surely rings false in its application to the nation's air, water, and land resources. The cutting edge of

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34. People *ex rel.* Younger v. County of El Dorado, 5 Cal. 3d 480, 493-94, 487 P.2d 1193, 1201, 96 Cal. Rptr. 553, 561 (1971).

35. *Alternatives, supra* note 18, at 781.

36. *Id. passim.*

37. As noted in the text accompanying note 42 *infra*, this point is not systematically addressed through empirical investigation or proof by either Ellickson or Siegan, who rely instead on an enumeration of public governance's abuses—most of which, incidentally, are remediable through judicial processes—and on the tautology that since the market is the best allocator of land resources, public governance is to be avoided whenever possible. For an illustration of Professor Ellickson's skepticism concerning the capabilities of public governance, *see Alternatives, supra* note 18, at 769 n.291.

the current environmental movement, in fact, was honed by none other than the deplorable failure of the marketplace to allocate these resources efficiently.[38]

But my objection to the efficiency argument runs deeper than intuition, reaching to the definition of the term "efficiency" itself. Efficiency is a weasel word which, as used by Professor Ellickson, has all the consistency of quicksilver. Its orthodox signification in economics is the maximization of total benefit from the use of resources through private choice based on calculations of private benefit or utility. When transported to the land use field, on the other hand, it must be expanded to incorporate the variable of community standards as authoritatively expressed in legislation, judicial precedents and other pertinent sources, a point Professor Ellickson explicitly acknowledges when he asserts that nuisance liability should attach to the "host landowner only if [his proposed land use] is perceived as unneighborly *according to contemporary community standards.*"[39]

Expansion of the definition is necessary for at least two reasons. First, the collective determination of efficiency in land use affairs involves value as well as fact judgments, the former encompassing a range of considerations that play little if any role in exclusively private calculations of private benefit. An outcome that might be perceived as "efficient" by a mortgagee and his developer may be quite the opposite if measured against such community objectives as those affording the policy basis for establishing the Tahoe Regional Planning Agency.

Second, a broadened concept of efficiency is required even at the factual level because public agencies may not only be better situated than private landowners to anticipate and assess the pertinent facts, but they may be the *only* entities in a position to do so. A case in point is the sorry plight of hundreds of purchasers of tract houses in Houston, a city lauded by Bernard Siegan for turning thumbs down on centralized planning and zoning. That city's unregulated growth has been so rapid in recent years that, to satisfy increased water demands, groundwater has had to be pumped from under these tract houses. The result: their subsidence and destruction.[40] That this wasteful outcome would not be anticipated by specific subdividers and their customers is entirely predictable, given the complex planning and civil engineerings factors that were unlikely to come to the attention of either—until it was too late.

Despite his apparent concession that community standards ought to play a key role in controlling nuisance behavior, Professor Ellickson gives short

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38. Economists more concerned with the phenomenon of "market failure" are less sanguine about the market's capacity to allocate resources efficiently in the environmental realm. *See generally* P. Barkley & D. Seckler, Economic Growth and Environmental Decay: The Solution Becomes the Problem (1972); T. Crocker & A. Rogers, Environmental Economics (1971); E. Mishan, The Costs of Economic Growth (1967).

39. *Alternatives, supra* note 18, at 732 (emphasis added).

40. Address by Honorable Robert Armstrong, Land Commissioner of the State of Texas, to Environmental Law Section of the State Bar of Texas, Mar. 2, 1974.

shrift in his excerpt both to what these standards are, and to the foregoing issues of value and fact determination. Land use, environmental quality and community welfare—each the object of profound deference under contemporary community standards—are delivered over to the tender mercies of the marketplace with the Panglossian assurance that "equilibrium" will insure an optimum outcome. Far better advice, I'm afraid, is afforded in Ada Louise Huxtable's warning that "if there were no other way than to let sound business practice take its course, there would be little hope for the urban environment."[41] The redwoods, prime agricultural lands, historic landmarks and general well being of community residents in the buffeted area are not going to reappear magically when equilibrium sets in. Loss of some of these resources, such as the redwoods and farmlands, will be total. Prospects for others, such as unique urban environments that are the work of decades or centuries are little better. The residents of the area that becomes "unlivable" through overdensity come off badly as well. Are the psychological and other attachments to the community of those wealthy enough to leave to be ignored? And what of the market's legacy of scrambled land use patterns and a deteriorated environment to those obliged by circumstance to stay behind?

To acknowledge these as serious problems is to recognize the need for public governance in contexts where private choice deviates markedly from community standards. Because such intervention is anathema to the marketeers' *a priori* dictates, however, these problems are largely ignored. To the extent that they are perceived, public governance is dismissed as a means of dealing with them on the formulistic basis that "city planning or public land use controls would only make matters worse from an efficiency standpoint."[42] The "proof" offered for this proposition consists of little more than recitation of the abuses to which public governance is vulnerable.

This tautological reasoning is especially disappointing because the question of public governance's capabilities is an important one meriting serious investigation. For the time being at least, it must be viewed as several steps short of conclusive. Establishing that public governance is subject to abuse proves neither that it is inherently unserviceable in its present or an upgraded form nor that the market alternative is itself free of abuse. Indeed, if the question is to turn on abuse, the marketeers surely have the worse of the argument! Only those blind to the market's dismal record as a deterrent to orderly growth would argue that public governance is its equal in this respect, however misconceived that governance may be. In the absence of persuasive evidence of public governance's inherent inadequacies, my own inclination is to deal with its conceded abuses by upgrading that governance. If sound land use manage-

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41. Huxtable, *What's Best for Business Can Ravage Cities*, N.Y. Times, Apr. 6, 1975, § 2 (Arts & Leisure), at 1, col. 6.
42. *Alternatives*, *supra* note 18, at 683.

ment should in fact be shown to exceed the capabilities of public governance, I too would fall back on the market. My reasoning, however, would not be that the market will make things better—a position that, frankly, is absurd in view of the market's track record over this century—but rather that public governance will only make them worse.

2. *Nuisance: A Dubious Criterion of Private Property Rights.* Under Professor Ellickson's proposed "laissez faire distribution of private property rights," all economic expectancies associated with property ownership other than those of a nuisance-creating variety are the property of the landowner. Nuisances excepted, government must compensate when its regulation frustrates any of these expectancies, and that compensation presumably would be keyed to the difference between the market values of the parcel before and after regulation. It is no understatement that, were these prescriptions constitutionally compelled, public governance as we know it today would cease forthwith. This result, of course, would sit well with the marketeers whose view on the eminent domain question is essentially a stalking horse for their dogmatic opposition to public interference in private land markets.

While they certainly can't be faulted for lack of *chutzpah* in their attempt to resurrect the property conceptions of Blackstone, Smith and Locke, they come off less well on social policy grounds. As pointed out in the previous subsection, once community standards are introduced as a determinant of efficiency, the field of licit public regulation is necessarily and substantially enlarged beyond the ambit described by conventional nuisance law. This is not to endorse *The Taking Issue*'s claim that compensation is never required for regulatory measures that further community standards, but only to underscore that entitlement to compensation should be determined by a yardstick less favorable to the private landowner than the nuisance criterion.

The marketeers' view of property rights is outmoded on another count in these times of extensive publicly-initiated capital improvements projects and regulatory programs, namely, in its insistence that the economic expectancies associated with the ownership of land ought always to be regarded as the "property" of the owner. To test out this proposition, suppose that, in implementing community standards favoring the retention of one sector of a town in residential use, government zones out motel and commercial uses there. Then, suppose government also decides to build a highway alongside this and an adjoining sector. The effect of these decisions is to quadruple the value of Farmer Brown's 50-acre tract in the latter sector, which he is now profitably farming. Because of the highway, the market anticipates that Farmer Brown's tract, if upzoned from its present agricultural-low density residential classification to a motel-commercial status, will be prized by national motel and retail chains as a site for their facilities. Should Farmer Brown be deemed to

"own" the economic expectancies that government initiated by its zoning of the residential sector and its decision to build the highway? Stated another way, if commercial-motel uses on Farmer Brown's tract are not "nuisances," ought he to be able to prevail in an inverse condemnation action for frustrated economic expectancies if government refuses to upzone his land?

For Professor Ellickson, the answer apparently is a confident "yes." But is the matter really that simple? If these expectancies are created through no effort of Farmer Brown, why should they be deemed his "property"? Again, if the marketeers are solicitous of landowners disadvantaged by the uneven distributional impact of land use controls, should they be so hasty to endorse a rule that mulcts government for the dubious end of providing Farmer Brown a windfall? And, as a corollary to the second question, if allowing government to recoup some portion of Farmer Brown's unearned increment would provide it with the resources to deal fairly with those landowners who are disadvantaged by public regulation,[43] is it defensible to bar this outcome by an approach that limits noncompensatory governmental intervention to the narrow sphere of nuisance control? Doctrinaire economic theory diverts the marketeers from paying serious attention to these questions despite intimations in their commentary suggesting less than a negative response to them.[44] For the time being, however, their position must be read to disagree with R. W. G. Bryant's observation that "there are various and different concepts of government, but it could not reasonably be suggested that it is a proper function of government to take a minority of its citizens for a free ride."[45]

II. The Police and Eminent Domain Powers: Of Cats and Bats

Despite their discordant outcomes, contenders in the public governance/private rights debate begin with the common premise that the police and eminent domain powers are correlatives. Responsible for that premise is Justice Holmes' famous aphorism in *Pennsylvania Coal Company v. Mahon* that "the general rule at least is, that while property may be regulated to a certain extent [under the police power], if regulation goes too far it will be recognized as a taking."[46] His aphorism, coupled with both legislative inattention to the compensation problem and a conservative state judiciary's elaboration of extravagant eminent domain doctrines, has contributed immeasurably to the impasse

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43. One illustration of a technique employing this approach is transferable development rights. *See* text accompanying notes 168-72 *infra*.

44. For example, Professor Ellickson apparently approves the transferable development rights technique in principle; *see* text accompanying notes 168-72 *infra*, and *Alternatives*, *supra* note 18, at 703. Professor Dunham approves of a system in which landowners are charged for the increases in the value of their property attributable to public planning schemes and compensated for losses attendant upon such schemes; *see Property, City Planning and Liberty* in Law and Land 28, 36-37 (Haar ed. 1964).

45. R. W. G. Bryant, Land: Private Property Public Control 160 (1972).

46. 260 U.S. 393, 415 (1922).

that today stymies the evolution of a rational compensation practice in land use controversies.

The impasse is by no means foreordained. In speaking but a half-truth, the aphorism did not necessarily bar the way to the evolution of rational practice. Reinterpreted in light of settled precedent subsequent to *Pennsylvania Coal*, Holmes' language offers no objection to the emergence of a power—the accommodation power—which is intermediate between the police and eminent domain powers and which, in providing fair compensation to meritorious claimants, affords government a feasible alternative to the prohibitively expensive "just compensation." Concurrent with and following *Pennsylvania Coal*, moreover, the federal judiciary not only laid the foundations for a less demanding body of eminent domain rules but for a re-evaluation of property conceptions along lines that mesh fully with the accommodation power and fair compensation theses advanced here.

These theses are treated in the following section. The concerns of this section are, first, a brief explanation of why Holmes' aphorism tells only half of the story; second, an account of the disparate evolution of eminent domain and related doctrines in the state and federal courts; and third, a portrayal of the multiple ironies characterizing compensation law at the present time.

A. *"Takings" That Are Not Takings*

With the benefit of a half-century's hindsight, furnished principally by land use litigation, the gold and the dross in the Holmes aphorism are readily separated. The gold obviously is its recognition that some, indeed most forms of regulation may be predicated on the police power. The dross is his statement that ". . . if regulation goes too far it will be recognized as a taking." Both as chief justice of the Massachusetts Supreme Judicial Court[47] and as an associate justice of the U.S. Supreme Court,[48] Holmes was deeply influenced by the laissez-faire property notions of his day, and he was not immune to overstatement in defending those notions. The quoted language is a clear case in point because all that *Pennsylvania Coal* actually decided was that the statute challenged in that case was an invalid police power measure, and not a literal taking.

Were that statute and the countless zoning measures that have been declared "takings" since *Pennsylvania Coal* truly exercises of the eminent domain power, a very different result would attend a decision favoring the private litigant. The very enactment of such measures would obligate government to pay just compensation and, in return, government would receive a property interest in the challenger's land or, under the special facts in *Pennsylvania Coal*, in the challenger's less-than-fee holding.[49] All such litigation, moreover,

47. *See* text accompanying notes 235-51 *infra*.
48. *See* TAKING, *supra* note 5, at 125-28, 240-46.
49. At issue in the case was whether a state legislature could employ the police power

would take the form of inverse condemnation actions. In reality, of course, neither courts nor private litigants visualize challenges to regulatory measures in these terms. Instead, the goal of this litigation in conventional land use disputes is simply to preclude application of the measure to the restricted parcel on the basis of its constitutional infirmity.[50] What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible.[51]

More significant for the purposes of this article is the aphorism's implication that the police and domain powers are correlatives. Under the correlatives model, the police power preempts the "regulatory" sphere as the tool for pursuing community health, safety and welfare goals on a noncompensatory basis; it is constrained only by the constitutional test of "public purpose." The eminent domain power, in its turn, is limited to outright appropriation of private land on a compensated basis; it is subject to the "public use" test which in Holmes' time connoted actual physical use by the public.[52] What could not be done under the police power had to be done under the eminent domain power or not at all.

The position offered in this article disputes the correlatives model on two counts. First, a third power should be recognized, the accommodation power, which furnishes an alternative to the eminent domain power for curing or enacting regulatory measures that cannot be sustained under the police power. Further discussion of this contention is deferred to the article's third section. Second, doctrinal and policy developments since *Pennsylvania Coal* dictate replacement of the correlatives model with an approach under which the police and eminent domain powers, along with the accommodation power, are perceived as functionally interchangeable tools—subject to constitutional compensation requirements—for achieving government's regulatory goals.[53]

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to abrogate a deed restriction reserving mineral rights to the corporate grantor and immunizing it from liability for subsidence damage resulting from its mining operations below the deeded parcel.

50. For a recent treatment of the point with an exhaustive collection of cases and authorities, *see* Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974). For the view that inverse condemnation rather than declaratory relief should be available at the private challenger's option, *see, e.g.*, Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 URBAN LAWYER 25 (1973); *Enclosure*, *supra* note 30. This contention was apparently sustained by a California appellate court in the controversial decision, HFH Ltd. v. Superior Court, 41 Cal. App. 3d 908, 116 Cal. Rptr. 436 (1974) (*semble*); *cf.* Brown v. Tahoe Regional Planning Agency, 385 F. Supp. 1128 (1973). The California Supreme Court has granted leave to appeal in *HFH*, and its resolution of the question is imminent. The general problem is re-addressed in text accompanying notes 167, 211-29 *infra*.

51. *See* Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, *supra* note 50, at 1447.

52. The evolution and desuetude of the use-by-the-public test is recounted in Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

53. Only the triad of the police, accommodation and eminent domain powers is treated

Judicial expansion of "public use" to comport with government's broadened involvement in land use affairs has deprived the correlatives model of whatever validity it may have had at the time *Pennsylvania Coal* was decided. The demise of the narrow use-by-the-public criterion[54] removed the legal objections that purportedly stood in the way of the eminent domain power's employment for any legitimate regulatory purpose. As decisions approving its employment for such varied purposes as historic preservation,[55] zoning,[56] comprehensive planning,[57] and urban renewal[58] signal, the public use limitation now differs little, if at all, from the police power's public purpose test.

Despite these developments, the correlatives model continues to distort understanding of the relationship that the police and eminent domain powers bear to one another and to their common goal of regulation. Perhaps the classic case in point is *Berman v. Parker*,[59] a U.S. Supreme Court opinion authored by Justice Douglas, that definitively confirmed that the Fifth Amendment's public use requirement is as ample as the police power's public purpose test. At issue in *Berman* was whether the District of Columbia's employment of the eminent domain power to achieve various regulatory goals of its urban renewal program comported with the public use criterion. Yet the reader is puzzled to find as the opinion's lead analytical sentence Justice Douglas' proposition that "[w]e deal, in other words, with what traditionally has been known as the police power."[60] Confusion compounds in his reasoning, first, that the eminent domain power is but a subcategory of the police power;[61] second, that aesthetic goals may be achieved as freely under the police power as under the eminent domain power (despite the former's absence of compensation);[62] and, finally, that "[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."[63]

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in the text as tools by which government may pursue its regulatory goals because the concern of this article is the inadequacy--functionally and conceptually—of the traditional police power/eminent domain bifurcation. That government can employ other powers, such as the taxing power, for this purpose is, of course, understood. *See generally* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 104-07 n.110 (1973).

54. *See* Comment, *The Public Use Limitation in Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

55. *E.g.*, Roe v. Kansas *ex rel.* Smith, 278 U.S. 191 (1929); United States v. Certain Parcels of Land, 99 F. Supp. 714 (E.D. Pa. 1951), *aff'd*, 215 F.2d 140 (3d Cir. 1954).

56. *E.g.*, Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969); State *ex rel.* Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920).

57. *Cf.* Commonwealth v. Rosso, 95 P.R.R. 488 (1967) (sustaining the Puerto Rico Land Administration Act, P.R. LAWS ANN. tit. 23, § 7 (1974), which permits condemnation of private land for an entire gamut of public governance purposes).

58. *E.g.*, Berman v. Parker, 348 U.S. 26 (1954); Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954).

59. 348 U.S. 26 (1954).

60. *Id.* at 32.

61. *Id.*

62. *Id.* at 33, 34.

63. *Id.* at 36.

Taken literally the opinion makes little sense. If the police power—conventionally defined as noncompensatory regulation—possesses the remarkable attributes claimed for it, why was it necessary for Justice Douglas to qualify these claims with the concluding proviso concerning compensation? Again, what does it mean to reduce the eminent domain power to peonage as a subcategory of the police power?

Given the opinion's expansion of the public use concept, a second interpretation of Justice Douglas' reasoning, one that comports with the logic though not the labels of my proposed substitute for the correlatives model, is plausible.[64] Under this interpretation, the Court's use of the phrase "police power" connotes the full range of government's legislative powers,[65] and makes that phrase equivalent to my term "regulation." So conceived, Justice Douglas' treatment of the police power as an umbrella power implementable by various subordinate powers—or, better yet, by tools such as eminent domain—is identical with my use of "regulation" as a genus including among its species the police, accommodation and eminent domain powers. As much is implicit in Justice Douglas' observation that "[o]nce the object [of a challenged legislative program] is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. *For the power of eminent domain is merely the means to the end.*"[66]

Despite the functional equivalence of my framework and the one offered in *Berman*, my nomenclature is employed in this article for several reasons. However the Supreme Court may use those terms, other courts have consistently treated the police and eminent domain powers as co-equal in status; for them, the police power has a narrower meaning—i.e., noncompensatory regulation—than for Justice Douglas. The transition from this settled understanding to the Douglas framework would not be frictionless; this is pointed up by the frequent mis-citation of *Berman* as a precedent approving the sweeping use of noncompensatory regulation to achieve aesthetic goals, regardless of the costs to private owners.[67] To add further to the confusion, if the Douglas nomenclature were adopted, a new name would then have to be invented for that tool which the state courts currently call the "police power." With the addition by this article of the phrase "accommodation power" and with the ambiguous meaning of "police power," introducing yet another term seems inadvisable.

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64. I am indebted to my colleague, John Nowak, for this suggestion.

65. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53-54 (1905); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 389 (1937); Bibb v. Navaho Freight Lines, 359 U.S. 520, 529 (1959).

66. Berman v. Parker, 348 U.S. 26, 33 (1954) (emphasis added).

67. *See, e.g.*, Art Neon Co. v. City and County of Denver, 488 F.2d 118, 121 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974); City of St. Paul v. Chicago, St. P., M. & O. Ry., 413 F.2d 762, 767 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969); *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 5 (1974) (Douglas J.).

B. *The Eminent Domain Power: An Implausible Tool for Land Use Governance*

The Holmes aphorism, coined to bar governmental overreaching, has had precisely the opposite effect. It instead confronts courts with a Hobson's Choice: they must either sustain a noncompensatory measure that imposes unfair losses on the landowner, or they must invalidate the measure altogether—thereby forcing government to walk the eminent domain plank to secure its desired planning outcome. As the readers of *The Taking Issue* are well aware, the courts have increasingly opted for the first solution. But it is my judgment that this choice is less the product of the courts' embrace of a "new mood" in land use law than of sober recognition that acquiescence in the legislative body's use of the police power is simply the lesser of two evils. Eminent domain, they rightly appreciate, is often neither a realistic nor a fitting corrective for overbroad police power regulation. As even an old-mood court stated with rare candor in upholding a nonconforming use amortization measure:

> The effectiveness of eminent domain is restricted by the necessity that the purchase must be for public use, by the complexities of administrative procedures and by the high cost of reimbursing the property owners.[68]

How did this polarity come about? An excellent clue is found in Mendes Hershman's plaint that "we have condemnation concepts and procedures which developed in an agrarian society prior to the middle of the 19th Century, which we are trying to fit into an urban society in a vastly different economy."[69] Little need and even less sympathy for stringent land use regulation was to be found in laissez-faire, 19th Century America. Eminent domain's function then was perceived as compensating landowners for the outright appropriation of their land for the condemnor's affirmative use; it was not seen as a curative for overly stringent land use controls.[70] Because this power was delegated to and often abused by such powerful private condemnors as the railroads, moreover, numerous state constitutional and statutory safeguards were adopted to circumscribe its use.[71] Elaborate procedural requirements, including mandatory use of juries to ascertain condemnation awards,[72] were imposed. And, substantively, the constitutional public use[73] and just compensation[74] stan-

68. Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 308, 129 A.2d 363, 365-66 (1957).

69. Hershman, *Compensation—Just and Unjust: A Study in Eminent Domain*, 21 BUS. LAWYER 285, 291 (1966).

70. *See generally* TAKING, *supra* note 5, ch. 7.

71. For an account of this evolution and of the various types of safeguards enacted, *see generally* 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN ch. 1, § 6 (2d ed. 1953) [hereinafter cited as ORGEL].

72. *See* examples cited in 1 ORGEL, *supra* note 71, ch. 1, § 8.

73. *See* text accompanying note 52 *supra*.

74. *See* text accompanying notes 77-109 *infra*.

dards were jealously construed, both to limit the instances in which the eminent domain power could be employed and to enlarge condemnation awards.

With the leap forward of public land use governance in the 20th Century, a corresponding shift in eminent domain doctrine was necessary to transform condemnation into a feasible tool for mitigating often harsh private impacts of that governance. But legislatures largely ignored the need for change and the state courts modified only the public use concept. Because there was no equivalent easing of eminent domain's procedural strictures and just compensation rules, expanding the public use concept only exacerbated the problem: it was futile to invite government to employ eminent domain to soften stern regulatory measures and then impose conditions on its exercise which placed it beyond government's reach. Little will be said here about its continuing procedural complexities other than to note that the federal judiciary ruled long ago that nothing in the federal constitution requires government to be hamstrung with the jury requirement found in many state constitutions and statutes.[75] Instead, the targets of this discussion are two doctrines, largely judicially evolved, that flesh out the just compensation requirement. The first mandates that compensation be paid in dollars. The second, that it be measured by a highest and best use standard. Of particular concern will be the grudging way that state courts have reformulated that standard to take account of the U.S. Supreme Court's decision in *Village of Euclid v. Ambler Realty Company*,[76] a decision which dethroned the market-oriented highest and best use standard as the determinant of permissible noncompensatory public intervention into private land markets.

1. *Just Compensation as Dollar Compensation.* Government has scarce dollar resources to offset the private impact of public regulation. As allocator and, frequently, outright creator of lucrative development opportunities, on the other hand, government has at its disposal a substantial pool of non-dollar but marketworthy compensatory alternatives that could be devoted to this purpose. This possibility is currently overlooked, in part because of the just compensation doctrines discussed below and in part because of a refusal to acknowledge that land regulation's fiscal consequences are as direct and significant as its physical development objects. It has also been stillborn because, to put it bluntly, private enrichment of unscrupulous public officials and favored landowners siphons off much of the wealth that would otherwise be available to equalize the gains and losses that attend public regulation.

Though the fact is widely ignored, the Fifth Amendment's just compensation requirement allows sufficient latitude to legitimize non-dollar compensation in the borderline situation where overly stringent public regulation is

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75. *See* Bauman v. Ross, 167 U.S. 548, 593 (1897); *see generally* Blair, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 HARV. L. REV. 29 (1927).
76. 272 U.S. 365 (1926).

declared to be a "taking." Since what would be condemned in these borderline cases if a literal taking were to occur would be a less-than-fee interest in the burdened parcel, non-dollar compensation in the form of "special benefits" could be used to offset amounts due the condemnee both for the less-than-fee interest taken and for any damages to the parcel remaining.[77] As to the other two factors, nothing short of a fundamental transformation of prevailing attitudes will overcome them as obstacles to acceptance of the non-dollar compensation position advanced here. A measure of the persistence of these factors is the tenor of the "taking" debate itself, in which the contending sides pay little heed to resolution through economic trade-offs leveraged on government's role as initiator and allocator of development opportunities, but urge instead the harsh extremes outlined earlier. Until the fiscal side of the public governance coin enjoys the attention that so far has been monopolized by its physical development side, the debate will remain barren, and the abuses cloaked by the present one-dimensional perception of public governance will continue to fester.[78]

The issue of whether or not just compensation must be paid in dollars has been ventilated most frequently in the partial taking context adverted to above. If the parcel remaining increases in value as a result of the public improvement that necessitated the taking, may government deduct this increment from the compensation otherwise payable for the portion taken? This question arose in 1897 in *Bauman v. Ross*,[79] the leading U.S. Supreme Court opinion on partial takings. In *Bauman*, a federal statute that authorized such a set-off had been invalidated below on the ground, *inter alia*, that it "attempted to pay for [the parcel taken] partly in future and contingent benefits, and failed to provide for the just compensation required by the Constitution to be made."[80] Reversing the lower court decision, the Supreme Court announced that "[*t*]*he Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and . . . no such prohibition can be implied.*"[81] The Court carefully emphasized that to qualify for set-off, the benefits conferred must be "capable of present estimate and

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77. *See* text accompanying notes 84-88 *infra*.

78. This thought is replicated in R. W. G. Bryant's comment that:

> . . . some arrangement [must be made] whereby public authorities can decide the use of this or that piece of land, from high-rise offices to greenbelt, without having to worry about financial consequences either to the owner or the public purse.

R. W. G. BRYANT, *supra* note 45 at 752. *See also* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 75-87, 95-103 (1973); Hagman, *A New Deal: Trading Windfalls for Wipeouts*, 40 PLANNING 9 (No. 8, 1974); Wexler, *Betterment Recovery: A Financial Proposal for Sounder Land Use Management*, 3 YALE REV. L. & SOC. ACTION 192 (1973).

79. 167 U.S. 548 (1897).

80. *Id.* at 562.

81. *Id.* at 584 (emphasis added).

reasonable computation,"[82] since its reason for sustaining non-dollar compensation was that the property owner should be no worse off after condemnation than he was before. In *Bauman*, the Court approved the set-off of "special benefits"—those enjoyed principally by the condemnee—against the parcel taken. Twenty-one years later, the Court enlarged the *Bauman* principle by holding that "general benefits"—described by the Court as "common to all property in the vicinity"—may also be set off.[83]

State courts, in contrast, have generally taken a much harder line on the set-off issue.[84] In some states, benefits cannot be set off at all.[85] In most, special, but not general, benefits may be set off.[86] Special benefits, moreover, typically cannot be set off against land of the condemnee not physically contiguous to the parcel taken.[87] And in many jurisdictions, they may not be set off against the compensation payable for the parcel taken—even though their value clearly exceeds damages to the remainder.[88] Not surprisingly, state courts have also proclaimed equally strong prohibitions against non-dollar compensation in other eminent domain contexts—for example, where government attempted to compensate in bonds[89] or with substitute land.[90]

The state court opinions, most of which are of 19th or early 20th Century vintage, evidence that period's bias toward private rights. They express the judiciary's unwillingness to permit government to recoup the increase in land values that it creates through its public projects—despite the obvious windfalls that accrue thereby to private landowners. They are suffused, moreover, with the fear that non-dollar compensation will prove illusory or will be exaggerated by condemnation juries anxious to keep awards low. Yet, benefit assessment programs for such public improvements as streets, sewers, and the like are universally sustained.[91] Surely it is no easier to compute increased land values in the benefit assessment context than in the partial taking context. And contrary to the courts' apprehension about the niggardliness of

82. *Id.*

83. McCoy v. Union Elevated R.R. Co., 247 U.S. 354 (1918). No partial taking had occurred in *McCoy*, which dealt instead with the issue of whether dollar compensation was due abutting landowners whose property had allegedly been damaged by the construction of an elevated railway.

84. On the subject of special benefits generally, *see* 1 ORGEL, *supra* note 71, ch. 1, § 7; 3 P. NICHOLS, THE LAW OF EMINENT DOMAIN ch. 8, § 8.6205 (Sackman ed. 1973); Bishop, *Enhancement Can Save Tax Dollars*, 1973 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN LAW 313 (Southwestern Legal Foundation).

85. *See, e.g.*, Finley v. Board of County Comm'rs, 291 P.2d 333 (Okla. 1955).

86. *See, e.g.*, Department of Public Works v. Divit, 25 Ill. 2d 93, 182 N.E.2d 749 (1962); State v. Bailey, 212 Ore. 261, 319 P.2d 906 (1957).

87. *See, e.g.*, Department of Public Works v. Fair, 229 Cal. App. 2d 801, 40 Cal. Rptr. 644 (1964); Celeste v. State, 56 Misc. 2d 991, 290 N.Y.S.2d 64 (Ct. Cl. 1968), *aff'd*, 40 App. Div. 880, 337 N.Y.S.2d 252 (1972).

88. *See, e.g.*, Department of Public Works v. Home Trust Investment Co., 8 Cal. App. 3d 1022, 87 Cal. Rptr. 722 (1970); Department of Public Works v. Morse, 3 Ill. App. 3d 721, 279 N.E.2d 150 (1972).

89. *See, e.g.*, Gardiner v. Henderson, 103 Ariz. 420, 443 P.2d 416 (1968).

90. *See, e.g.*, North Carolina State Highway Comm'n v. Farm Equipment Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

91. *See* P. NICHOLS, 1 THE LAW OF EMINENT DOMAIN § 8.6209 (Sackman ed. 1973).

condemnation juries, their disposition unquestionably has been to favor their fellow citizens with inflated awards, not to mulct them.[92]

2. *Just Compensation and the Highest and Best Use Standard.* The divergent attitudes of the federal and state courts are also reflected in their quite different regard for the highest and best use standard as the measure of just compensation. Defined as the price a willing buyer would pay to a willing seller in the private market, that standard invites serious problems where market forces and public regulation are deeply entwined. Refusing to make a "fetish . . . of market value,"[93] the U.S. Supreme Court has repeatedly questioned the adequacy of that standard in such instances.[94] In *United States v. Commodities Trading Corp.*,[95] for example, the question posed was whether the just compensation requirement precluded the federal government from paying an Office of Price Administration "ceiling price" rather than an allegedly higher market price for a quantity of pepper requisitioned by the War Department in 1944. Noting the complexities introduced by public regulation, the Court commented:

> This Court has never attempted to prescribe a rigid rule for determining what is "just compensation" under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. Since the market value standard was developed in the context of a market largely free from governmental controls, prices rigidly fixed by law raise questions concerning whether a "market value" so fixed can be a measure of "just compensation."[96]

Prior to the Supreme Court's 1926 decision of *Euclid v. Ambler Realty Co.*,[97] state courts rarely encountered similar complexities in applying the highest and best use standard when government condemned land. Because private land values in those days were seldom the subject of deliberate augmentation or diminution by public regulation, government wore only one hat—that of condemnor—and the fiction of analogizing it to a private buyer paying a market price made tolerable sense. But *Euclid* bestowed a second hat on government—that of land value regulator—by expanding governmental power in two fundamental respects. First it permitted government, within broad constitutional limits, to allocate development potential to private lands based on community goals as reflected in public governance measures;[98]

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92. *See* 2 ORGEL, *supra* note 71, at § 247.
93. United States v. Cors, 337 U.S. 325, 332 (1949).
94. *See, e.g.*, United States v. Commodities Trading Corp., 339 U.S. 121 (1950); United States v. Cors, 337 U.S. 325 (1949); United States v. Miller, 317 U.S. 369 (1943).
95. 339 U.S. 121 (1950).
96. *Id.* at 123.
97. 272 U.S. 365.
98. *Id.* at 389, 390.

second, it ruled that the resulting dollar value of land so regulated need not approximate—and indeed may fall drastically below—its value in an unregulated market.[99] From that time on, condemned private land has not differed from the War Department's requisitioned pepper with respect to its valuation for eminent domain purposes.

This seeming anomaly has caused the state courts no end of trouble. They have yet to grasp *Euclid*'s full implications—in large measure because they, like eminent domain commentators,[100] continue to view zoning and other forms of public governance as alien intrusions into the realm of land value appraisal. Appreciation of the anomaly's roots could have provided the courts with a basis for transforming the eminent domain power into a realistic tool for dealing with overly stringent regulation. Given the *Bauman* holding and the recognition in *Euclid* that within ample constitutional limits government may legitimately regulate private land's development potential and therefore its "market" value, the courts might have reformulated eminent domain doctrine in two respects. In place of the highest and best use standard, they might have allowed as compensation only that value increment necessary to cure the taking objection. And they might have broadened acceptable means of compensation to include, in addition to dollars, marketworthy development opportunities.

Shortsighted concern for private rights has not only barred this outcome but has insured that *Euclid*'s erosion of the highest and best use standard would be narrowly interpreted. True, state courts today do give weight to the impact of public governance on private land value.[101] But they have countered with two exceptions that undo much of *Euclid*'s force. First, the valuation formula now applied takes as its measure the condemned parcel's "highest and best use under existing or *reasonably probable land use controls*." As construed, the italicized phrase undercuts public governance as a valuation constraint because it requires that the award include both the land's value under existing land use restrictions *and* the premium that the market places on it in anticipation of future zoning changes that will increase its value.[102]

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99. According to Professor Ellickson's calculations, the zoning restrictions in *Euclid* reduced the value of the plaintiff's property from $870,000 to $540,000. *See Alternatives*, *supra* note 18, at 700 n.68.

100. It is startling, for example, to find in the index of Orgel's two-volume eminent domain treatise, ORGEL, *supra* note 71, only four references to zoning, two of which refer to footnotes in the main work and two to textual passages of less than a paragraph's duration.

101. Land use controls, if validly enacted and applied, do afford the basis upon which a condemned parcel's valuation is calculated—except where the valuation formula allows for "a reasonable probability of change," as noted in the text. *See* City of Beverly Hills v. Anger, 127 Cal. App. 223, 15 P.2d 867 (3d Dist. 1932); *see generally* Zipser, *Zoning Classification and Eminent Domain*, 1 URBAN LAWYER 89, 90 (1969); Sackman, *The Impact of Zoning and Eminent Domain Upon Each Other*, 1970 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 107, 124 (Southwestern Legal Foundation).

102. *See* Zipser, *supra* note 101, at 90; Sackman, *supra* note 101, at 125-26.

That this premium, which is solely the product of public action,[103] should be deemed an increment of the "private" land's value is a throwback to earlier times. The exception on which it is founded, moreover, offers a field day for inventive counsel, for sympathetic condemnation jurors, and for judges who, in the words of one of their number, see themselves as "Hector[s] at the bridge . . . defend[ing] the individual from the onslaughts of society."[104] Further, the exception is not even symmetrically applied: under it, the condemnee receives a windfall for prospective upzoning, but his award is not discounted when, instead, downzoning is imminent.[105]

Second, courts frequently ignore land use controls in determining value when these controls are imposed prior to condemnation of the fee or of a lesser interest in the parcel.[106] This result is unobjectionable if the condemning authority intended all along to appropriate the land for its own use and imposed the restriction merely as a sham to depress the condemnation award. But this is not the pattern that, I believe, will occur with increasing frequency in resource protection and related contexts.[107] That pattern is likely to include two and, possibly, three elements. First, government severely downzones land because market pressures, stimulated by the land's presently generous zoning, threaten a resource, such as an urban landmark or an ecological preserve. Then, to mitigate the downzoning's economic impact, and in return for proper assurances safeguarding the resource, government extends

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103. For rare judicial acknowledgment of this reality, *see* City of Miami Beach v. Hogan, 63 So. 2d 493 (Fla.), *cert. denied*, 346 U.S. 819 (1953), in which the court rejected a collateral attack on the low density zoning applicable to the condemnee's parcel, observing that, were the attack to succeed, "the city will be compelled to pay the increased value brought about by rezoning . . . ." *Id.* at 495. *Cf.* United States v. Miller, 317 U.S. 369 (1943) (refusing to include in a condemnation award value increments resulting from the public improvement necessitating the condemnation on the ground that "[t]he owners ought not to gain by speculating on probable increase in value due to the Government's activities." *Id.* at 377).

More representative of judicial attitudes is Levin v. State of New York, 17 App. Div. 2d 335, 234 N.Y.S.2d 481 (1962), *aff'd*, 13 N.Y.2d 87, 192 N.E.2d 155, 242 N.Y.S.2d 193 (1963), in which the condemnee on October 6, 1954, purchased a parcel zoned for residential use for $3,500 per acre; succeeded in having it upzoned to light industrial use on October 26, 1954; took title on December 1, 1954, entering into a net lease with an electronics firm under which it was to construct a facility for the latter; and suffered the condemnation of 21 acres of its parcel on December 31, 1954. Sustaining an eminent domain award that increased the value of the acreage condemned by some $18,000 per acre for a total incremental gain of $378,000, the court commented:

> The fact that claimants stood to make a handsome profit from their favorable acquisition of the subject property and subsequent favorable lease to [the electronics firm] should not deprive claimants of the rewards of a successful business enterprise, which was lost because of the appropriation.

Id. at 337, 234 N.Y.S.2d at 483. *Levin*'s moral is clear: government must pay for the "private" gains that its regulation fosters.

104. Young, *The Role of the Judge in a Condemnation Proceeding*, in REAL ESTATE VALUATION IN CONDEMNATION 683, 695-96 (PLI Real Estate Law & Practice Course Handbook Series, No. 10, 1969).

105. *See, e.g.*, Remdollar v. Kaiser, 195 Md. 314, 73 A.2d 493 (1950).

106. *See, e.g.*, Robertson v. City of Salem, 191 F. Supp. 604 (D. Ore. 1961); Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950). *See generally* Zipser, *supra* note 101, at 93; Sackman, *supra* note 101, at 124.

107. *See* text accompanying notes 168-210, 216-22 *infra*.

to the landowner a compensatory supplement which—though worth less than the drop in the land's value as a result of downzoning—does afford him a reasonable return when considered in conjunction with the return he enjoys from the land's present use. Finally, instead of dollars, the supplement might be in kind, including, for example, a governmentally protected, limited-use monopoly[108] or, perhaps, an authorization to transfer the regulated land's development rights to non-sensitive locations elsewhere.[109]

This approach could backfire in light of eminent domain's doctrinal bars against non-dollar compensation and prior downzoning. Indeed, the conscientious regulatory authority virtually invites this Catch-22 result because, in extending the compensatory supplement, it effectively acknowledges the implausibility of the police power as the sole basis for its program. Mesmerized by the correlatives model, the courts might well force the authority to the eminent domain extreme,[110] with its requirement of dollar compensation figured on the parcel's highest and best use under the prior generous zoning plus such additional zoning increments as are deemed "reasonably probable." Is it any wonder that public officials—alarmed by this vicious legal version of Russian Roulette—have little incentive to try to meet injured landowners half-way, but choose instead either not to regulate at all or to camouflage the measure in police power trappings and take their chances in court?

C. *The No-Win Outcome of the Police Power/Eminent Domain Deadlock*

Were the Man from Mars to swoop over the cratered battlefield of land use, what he might need most to appreciate the struggle is not legal acuity, but a strong sense of irony. For it is a struggle in which victories are pyrrhic and losers count themselves winners. It swirls in a void where public governance systems, because they pay little heed to their private impacts, win a battle or two, and then are undone. In their plight, these regulatory systems resemble the description Buckminster Fuller once gave of the world: an octopus constantly stepping on itself.[111] The void in which they swirl is perhaps American land use law's most characteristic feature; it is certainly its most self-defeating one.

1. *The Real Estate Community and the Environmentalists.* The real estate community, heartened by the pervasive bias of eminent domain doctrine for private rights, ritualistically proclaims that formal eminent domain proceedings alone are an acceptable curative for stringent land use controls.

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108. *See* text accompanying notes 155-67 *infra.*

109. *See* text accompanying notes 168-72 *infra.*

110. *See* Fred F. French Inv. Co. v. City of New York, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973), *aff'd* 47 App. Div. 2d 715 (1975), *discussed* in text accompanying notes 195-210 *infra; cf.* Parker v. Commonwealth, 178 Mass. 199, 59 N.E. 634 (1901), *discussed in* text accompanying notes 233-50 *infra*; Bissel v. Town of Bethel, 113 Conn. 323, 155 A. 232 (1931).

111. As quoted by Jonathan Barnett in an Address on Law, Development and Historic Preservation, given at the Columbia (N.Y.) International Center, Apr. 23, 1975.

It seems unable to understand that its hard-line position virtually guarantees the very result it wishes to avoid—untoward expansion of the police power. The interests of that community and of rational land use practice generally would be better served if its members continued their drumfire against unfair uses of the police power but, at the same time, lent their support to a search for intermediate compensatory formats. In doing so, they would discover that they are not a monolithic bloc. The interests of developers often conflict with those of landowners. Windfalls accruing to the latter are translated into the often exorbitant prices that developers must pay for land, driving up their enterprise and financing costs and, ultimately, the price to their customers. Some heavy intramural jostling is long overdue about this indefensible outcome.[112]

Imbalance also flaws the rhetoric of supporters of strong resource protection programs. Mistakenly, in my judgment, they view as an unmixed blessing the sweeping expansion of the police power recorded in occasional judicial decisions.[113] But the lasting impact of these decisions is threatened by the fierce political backlash they actuate among such formidable private groups as the real estate community.[114] This reaction, it must be underlined, is not wholly devoid of ethical or policy merit.[115] Moreover, it is one thing

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112. Some movement in this direction has already occurred. Over 15 years ago, HOUSE AND HOME, the trade organ of the house builders industry, strongly endorsed windfall recoupment by government, recognizing that it would lower the price that developers must pay for land, thereby lowering the price of housing for the ultimate customer. *See* 18 HOUSE AND HOME, Aug. 1960 *passim*. Unfortunately, the industry has not since systematically urged this hopeful initiative.

113. *See, e.g.*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Candlestick Properties, Inc. v. San Francisco Bay Conserv. & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

114. The opposition of real estate and financial interests, for example, has been influential in blocking Congressional efforts since 1972 to adopt national land use legislation. For an account of the demise of the most recent (1975) national land use bill, see N.Y. Times, July 16, 1975, at 15, col. 4.

115. For instance, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972), a celebrated favorite of the police power enthusiasts, is something less than a paragon of fair public governance, as revealed by Professor Delogu's scathing attack on the follow-up decision to *Steel Hill*, abstracted in 27 LAND USE AND ZONING DIGEST 1 (No. 1, 1974) (barring on res judicata grounds the same developer's challenge to the town's land use regime). See Delogu, *Steel Hill Development Incorporated v. Town of Sanbornton*, 27 LAND USE & ZONING DIGEST 6-7 (No. 3, 1975). Among the abuses sheltered by that decision's perception of the police power, Professor Delogu details the following:

> Aside from the injustice to plaintiff, who has now been rebuffed three times in his effort to develop land which he owns in the town of Sanbornton, the real mischief of the present holding is its capacity to encourage continued and wider misuse of the police power. Towns and environmental extremists will be led to believe that unwanted development can be frozen out indefinitely by legislating large lot size requirements [the town, which occupies 25 square miles, had zoned itself almost entirely for 3- and 6-acre minimum lot sizes, supposedly for environmental protection reasons]; that presumptions of validity are impenetrable barriers—a substitute for comprehensive planning; that exclusions are perhaps tolerable if it is only trailers [called for in the developer's amended rezoning request] and second homes [called for in his initial development application] that are excluded and the town votes for it; that interim or stop-gap measures can be

to score occasional dramatic victories in the courts; it is another to implement resource protection programs that are sufficiently responsive to the legitimate concerns of all affected groups to serve as a durable foundation for successful public governance. Enough has been said earlier[116] to raise grave doubts as to whether the police power, unaided by reasonable compensatory alternatives, can provide this foundation.

2. *The Courts.* Sympathy coupled with a sense of irony is appropriate in assessing the performance of the courts, upon which the brunt of the public governance/private rights struggle has improperly fallen. They now suffer from an advanced case of doctrinal schizophrenia. When presiding over eminent domain proceedings, they brim with confidence, comfortable in their role as guardians of constitutional rights and as interpreters (if not authors) of the rules that govern these rights. But when they are called upon to adjudicate the constitutionality of stringent land use measures, confidence evaporates and erratic opinions lacking in cogent or consistent reasoning abound. St. George was an odds-on favorite in his battle compared to the courts, with few resources of their own to handle the economic-appraisal issues that complicate these legal challenges, with scant guidance from the legislatures, and without a secure societal consensus about which economic expectancies are the landowner's and which the government's.

Doctrinal schizophrenia shows up in the courts' willingness to permit eminent domain doctrines to ossify in order to protect private rights, while simultaneously widening the police power to effectuate the public interest in resource protection. Logically, one would have assumed that economic expectancies in land merit the same degree of protection whether threatened by government's exercise of its eminent domain or of its police power. In fact, the courts have employed a double standard. Exemplifying their desire to have it both ways are two recent Wisconsin Supreme Court opinions. The first, *Just v. Marinette County,*[117] sustained as a proper exercise of the police power a "Shorelands Conservancy District" designation that essentially precluded Mr. Just from improving his lakeside site, even for personal use. No amateur in doctrinal sleight-of-hand, the court rested its result on the oracular pronouncement that "it is not an unreasonable exercise of [the police] power to prevent harm to public rights by limiting the use of private property to its natural uses."[118] Yet two years before, in *Luber v. Milwaukee County,*[119] the same court invalidated a Wisconsin eminent domain statute that denied

extended indefinitely by procedural devices which foreclose reexamination of initial, tentative, or inconclusive findings.
Id. at 7.

For a different view of another favorite of the enthusiasts, Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), *see* text accompanying notes 117-120 *infra.*

116. *See* text accompanying notes 10-14 *supra.*
117. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
118. *Id.* at 17, 201 N.W.2d at 768.
119. 47 Wis. 2d 271, 177 N.W.2d 380 (1970).

compensation for rental losses suffered by the condemnee a year or more *before* the taking. Overruling its own precedents and departing from the great majority of its sister state courts, the Wisconsin court further enlarged private rights in the context of eminent domain by declaring as a constitutional necessity that compensation awards must include an increment both for consequential damages, such as the rental losses in *Luber*, and for the condemned property's fair market value.[120] With *Just* and *Luber* in the books, one cannot help but wonder how the Wisconsin court would define the compensation a public agency would have to pay if it condemned an ecologically sensitive site which was also ideally situated for development as a regional shopping center.

What is especially ironic about the contradictory evolution of eminent domain and police power doctrine is that judicial excesses in one make inevitable off-setting distortions in the other. As noted earlier, the courts appreciate that financially pressed government cannot found public governance on the eminent domain power, and they are properly solicitous of the need for strong controls in resource protection and similar contexts. Having painted themselves—and government planning authorities—into a corner by sponsoring harsh eminent domain rules, they have little choice but to sanction the police power's lopsided expansion when resource protection schemes are challenged as takings.

3. *The Legislatures.* Properly skeptical of the courts' ability alone to master the compensation problem, other commentators[121] have rightly counseled a more active role for the legislatures. But the legislatures have not been listening. They have done little to revise eminent domain doctrines to meet modern needs. They have enacted ambitious regulatory programs that either ignore the programs' economic impacts[122] or, equally futilely, ordain recourse to formal eminent domain proceedings to save the programs if they are deemed confiscatory on judicial examination.[123] With a few striking exceptions noted below,[124] they have not devised intermediate compensatory formats. Most distressingly, they do not appreciate that theirs is the institution best fitted to address the compensation problem in a balanced and thorough manner. However unwisely, the National Association of Homebuilders can be expected to push 19th Century nostrums and the Conservation Foundation broad police power solutions; one does not denigrate either group in observing that they are, after all, special pleaders for particular interests. The courts have prob-

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120. *Id.* at 283, 177 N.W.2d at 386.

121. *See, e.g.*, Michelman, *supra* note 17, at 1248-57; Sax, *supra* note 6, at 175.

122. *See, e.g.*, LA. REV. STAT. tit 56, ch. 8, §§ 1841 *et seq.* (1975); IOWA CODE ANN. ch. 108a, §§ 108A.1 *et seq.* (1975).

123. *See, e.g.*, MASS. GEN. LAWS ch. 130, § 105 (1972); N.H. REV. STAT. § 483-A (1975).

124. *See* text accompanying notes 145-53 *infra* ("Ramapo Plan"); text accompanying notes 195-210 *infra* (Tudor Parks transferable development rights program).

ably done about as well as could be expected, but they obviously cannot handle the task by themselves. In the last analysis, it is the job of legislatures to hear the claims of competing groups and to accommodate their legitimate interests as fully as possible within a normative framework understandable both to these groups and to reviewing courts. Ultimately, it is their job to take the leading role in forging a value consensus concerning the entitlements of land ownership in 20th Century America. Their failure to get on with the job is the root cause of the nation's taking quandary.

III. The Accommodation Power

Express recognition of the accommodation power could prove a potent aid in untangling the compensation conundrum. The power would join with, but not displace, the police and eminent domain powers as a regulatory tool. Hence, accommodation would be unnecessary where government's pursuit of health, safety and general welfare goals does not unfairly impinge on property owners. Nor is it appropriate when government acquires private land outright.[125] But accommodation ought to be government's responsibility in the borderline cases, exemplified by the facts in *Just*, where fair compensation for burdened landowners would seem an ethical imperative.

How might legislatures define the borderline case when considering the adoption of strict regulatory programs, and how might courts define it when called upon to review private challenges to them? The lesson of a half-century of judicial wrestling with this problem is that it admits to no simple answer. Prior experience does teach, however, that it has both a substantive dimension —at what point do regulatory incursions on private land's development potential "go too far" to be sustained under the police power?—and an institutional dimension—what are the respective roles of legislatures, courts and administrative bodies in fixing that point and in assuring fair compensation when it is exceeded? Implicit in past experience also is embryonic judicial and legislative recognition of the accommodation power. Each of these topics is addressed in the paragraphs that follow.

A. *The Spectrum of Land Use Intensity: A Framework for Analysis*

One way to define the accommodation power's scope is to establish a framework that fixes the varying levels of a private parcel's development po-

125. While the eminent domain rules alluded to in text ought, in my judgment, to be reformulated to reflect a sounder balance between private property rights and public governance interests, more secure protection than the accommodation power affords is warranted when government directly expropriates private land. It should, perhaps, also be stressed that it is not the purpose of this article to assail all eminent domain rules as biased toward private rights, but only those rules singled out in text. As Professor Michelman convincingly argues, other eminent domain rules, such as those barring compensation for relocation expenses, unduly favor the government as condemnor, and warrant liberalization through legislative action. *See* Michelman, *supra* note 17, *passim*.

tential in terms of familiar land use and eminent domain categories. Recasting the facts in *Just*, for example, a spectrum of these intensities for a parcel within the Shorelands Conservancy District might appear as follows:

INCREASING DEVELOPMENT POTENTIAL ↑

SPECTRUM OF LAND USE INTENSITY

INTENSITY INDEX	USE	VALUE
Highest and Best Use Unrestricted by Public Regulation	Hotel	$4,000,000
Allowable Use	Single Family Housing, 10 Dwelling Units/Acre	$1,000,000
Reasonable Beneficial Use	Single Family Housing, 2 Dwelling Units/Acre	$ 200,000
Resource Protection Use	Shorelands Conservancy (Acquacultural Uses Only)	–$ 75,000
Zero Intensity Use	None	–$ 50,000

The first and last categories, Highest and Best Use Unrestricted by Public Regulation and Zero Intensity Use, need little explanation. The former, reminiscent of the pre-*Euclid* highest and best use standard, is simply the use promising the greatest dollar return from an unregulated parcel. The latter allows no use at all and is represented above as having a negative return because the owner must nevertheless pay real estate tax and other carrying costs that are incident to land ownership. No one today, except perhaps the private marketeers, seriously urges that landowners enjoy a legal entitlement to the first category. And, excluding some difficult-to-conceive situations in which *all* possible uses of a private parcel would result in proscribable harms, only the most rabid of police power enthusiasts would insist that government is free to deprive a property owner of the entire development potential of his land without affording him some compensatory relief.

The Resource Protection Use category is exemplified by the Shorelands Conservancy designation in *Just*—that is, tight land use controls, typically adopted to protect natural and man-made environmental amenities. But two qualifications are necessary here. First, this category is plotted below the Reasonable Beneficial Use category on the foregoing chart only for illustrative purposes; in some circumstances, resource protection control could permit a greater economic return than that possible under Reasonable Beneficial Use controls. A negative value is assigned to the Resource Protection Use category on the chart to reflect not only the private land's carrying costs but

also possible additional costs that might have to be absorbed to adapt the land for the uses permitted under the Conservancy designation.[126] Second, this category may apply to measures serving such ends as growth management, nonconforming use amortization or airport zoning, which are environmental only in the broadest sense.

The Allowable Use category denotes a level of development potential that is substantially more liberal than necessary to prevail against a confiscation challenge. It is, in fact, the category under which the vast majority of private land is zoned in America today. Accordingly, it usually corresponds to what, in eminent domain terminology, is the standard of "highest and best use under existing land use controls." If, in addition, the condemnee succeeds in demonstrating that liberalization of land use controls affecting his parcel is "reasonably probable," the further increment of development potential will fall somewhere between the Allowable Use and the Highest and Best Use Unrestricted by Public Regulation categories.

Though last discussed, the Reasonable Beneficial Use category[127] ranks first in importance because it defines the borderline between measures that are sustainable under the police power and those which must be predicated on the accommodation power. As such, this category refers to an intensity of development potential which affords a sufficient economic return on private land to escape invalidation on confiscation grounds. It is premised on the only generalization that can be confidently extrapolated from the welter of confiscation precedents: namely, that land use controls can bar a parcel's most profitable use or even uses of lesser profitability without being confiscatory if they allow the landowner a reasonable economic return or, under the label used here, a Reasonable Beneficial Use.[128]

Land use controls may be enacted under the police power if they permit an intensity of use that equals or is greater than that prescribed by the Rea-

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126. The "negative value" concept has been expressly recognized by the Wisconsin Supreme Court, author of the *Just* opinion, which, in Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W.2d 471 (1973), invalidated as confiscatory the designation of a landowner's parcel as Agricultural on the ground, *inter alia*, that the parcel would have a "negative value" if the landowner were forced to absorb the costs of adapting it for agricultural uses. *See id.* at 652, 211 N.W.2d at 477.

127. Readers familiar with English planning and compensation law will note the similarity between the Reasonable Beneficial Use category used in text and the criterion of capability of "reasonably beneficial use" found in England's Town and Country Planning Act of 1971, ch. 78, § 180. For a discussion of that criterion's function in English planning and compensation practice, *see* TAKING, *supra* note 5, at 268-75.

128. With few, if any, exceptions, none of the numerous cases labeled as "new mood" opinions in THE TAKING ISSUE support the proposition that "a regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking." TAKING, *supra* note 5, at 238. What they do support is the generalization that the economic return possible under public governance may deviate substantially from that possible in an unregulated market, provided that the former return does not fall below a Reasonable Beneficial Use standard. Even *Just*, which illustrates the outer range of the new mood opinions, does not reject that standard as the determinant of confiscation, but instead offers a novel interpretation of it—namely, that it may be calculated on the basis of an ecologically sensitive parcel's natural rather than improved uses.

sonable Beneficial Use level. If the permitted intensity is less than this, government must then employ the accommodation power. Accordingly, as the chart above is structured, the accommodation power—rather than the police power—would be the proper tool in the Resource Protection category because the economic return possible under it falls below that plotted for the parcel's Reasonable Beneficial Use. When such discrepancies occur, government would have two options. If it lacks the wherewithal to provide fair compensation, it must liberalize the challenged restriction. But, in doing so, it need allocate only enough additional density to satisfy the Reasonable Beneficial Use Standard. If it possesses the resources and wishes to save the defective measure, it must provide fair compensation.

Fair compensation under the accommodation power differs from the eminent domain power's just compensation in three basic respects. First, its measure is the difference between the parcel's economic return under the challenged restriction and under the Reasonable Beneficial Use standard; for just compensation, the relevant measure would be the difference between the return under the regulation and the return possible under the Allowable Use category or—through manipulation of the "reasonable probability" exception —under an even higher level. Second, fair compensation may take the form of any marketworthy alternative, whether or not monetary; just compensation, on the other hand, would probably have to be in dollars. Finally, procedures for the award of fair compensation can be streamlined by eliminating such features as the condemnation jury and the bifurcated system, currently existing,[129] that requires an initial declaratory action to determine whether a regulatory measure is a "taking" and then a formal eminent domain proceeding to fix the requisite compensation.[130]

So far, nothing has been said about how the Reasonable Beneficial Use standard is to be fixed in specific instances. What is a constitutional rate of return, for example, on an urban landmark building in a booming or depressed construction market or on prime agricultural land or an ecologically sensitive site in the path of or remote from imminent urbanization? The omission is deliberate. This article's goal is to clarify the currently misconceived treatment of the "taking issue" so-called, not to prescribe concrete rules for determining when, in specific cases, regulation deprives a landowner of a Reasonable Beneficial Use return.

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129. For examples of statutes expressly incorporating this bifurcation, *see* note 123 *supra*.

130. The distinctions between "fair" and "just" compensation demonstrate that statutes authorizing local governments to zone through the eminent domain power, *see* text accompanying note 56 *supra*, are pure instances of eminent domain, not, as Kansas City v. Kindle, 446 S.W.2d 807, 813 (Mo. 1969) states, a "blending of the two powers (eminent domain and police power) in the same legislative enactment." The compensation mandated by these statutes must accord with the procedural and substantive requirements of the eminent domain power rather than with those identified in text as pertaining to the accommodation power. Confusion on this point is simply another illustration of the misidentification of "regulation" with the "police power." *See* text accompanying notes 52-67 *supra*.

It is my belief that, up to now, we have behaved regarding the taking question very much like Lewis Carroll's dreamy Alice who, when faced with the question whether cats eat bats or, for that matter, whether bats eat cats, mistakenly concluded that "as she couldn't answer either question, it didn't much matter which way she put it." More important than seeking to "answer" the taking question at this stage is determining whether the right question is being asked. Because, in my judgment, we have been asking the wrong question, we still have little idea what a constitutional rate of return should be in the cases posed above. Devising fair responses will be the work of legislatures, courts and, to an increasing degree, administrative agencies which must begin by getting the question right; and they must be prepared to revise whatever responses seem appropriate for one period in light of shifting community values later.

Poaching somewhat on their territory, I would venture five preliminary suggestions. First, the tasks are principally legislative or administrative, with the courts playing an essentially supporting role. Their job will be to decide whether legislative standards or their application in specific cases comport with what Justice Douglas has called "the political ethics reflected in the Fifth Amendment."[131] Contrary to the fear that this approach will encroach on the proper role of the courts, it is my guess that the judiciary will welcome being freed from the frustrating task of setting fair rates of return with little or no help from these other institutions.

Second, legislative standards should be contextually derived. Precise quantitative formulae may be fitting in some cases[132]—as the analogies in the rent control and public utility rate-setting fields suggest—while broader qualitative standards, which perhaps merely codify the criteria that recur in land use decisions,[133] may be the best or most appropriate standards that can be offered in others.

Third, despite the apparent quantitative cast of the Spectrum of Land Use Intensity, I envisage a determination of Reasonable Beneficial Use rates that will be heavily interlaced with value judgments rooted in community standards.[134] These determinations, in other words, will rest as much on cultural as on narrower appraisal or technical grounds.

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131. United States v. Cors, 337 U.S. 325, 332 (1949).

132. The New York City landmarks ordinance exemplifies a precise quantitative standard measuring the Reasonable Beneficial Use level. That ordinance authorizes outright denial of a permit for alteration or demolition of landmark buildings which yield a "reasonable return"—defined as a six per cent return on the assessed valuation of the property. *See* N.Y.C. Admin. Code Ann. ch. 8-A, §§ 207-1.0, 207-8.0 (Cum. Supp. 1974-1975). The constitutionality of this provision has not yet been tested.

133. For a similar suggestion, *see* Van Alstyne, *Statutory Modification of Inverse Condemnation Criteria: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 737-8 (1967). This approach is illustrated in a resource protection plan developed by the writer and Robert De Voy for use in Puerto Rico. *See* PUERTO RICO PLAN, supra note 13, at 14-16.

134. For all the uneasiness that it may cause in some quarters, the significance of the cultural element as a determinant of the legal entitlements associated with land ownership cannot be overemphasized. *See generally* R. W. G. BRYANT, LAND: PRIVATE PROPERTY

Fourth, use of the accommodation power should increase only modestly[135] the instances in which compensation is required as a complement to regulation. It is not that power's mission to displace the police power or to freeze its evolution for all time, but merely to prevent it from serving as a cloak for governmental overreaching. With its less exacting procedural and compensatory features, the accommodation power should lessen government's understandable temptation to employ the police power where a compensatory approach is compelled by fairness, but is rendered economically unfeasible by the requirements of eminent domain.

Finally, the accommodation power may prove useful in overcoming equal protection objections that are often presented as confiscation problems. Despite their use of taking language, courts invalidate many measures, not because they drive the economic return of affected parcels below the Reasonable Beneficial Use standard, but because they do not grant to some landowners the economic benefits that they afford to others who are similarly situated. Richard Babcock's example[136] of the upzoning of one quadrant of a highway intersection for commercial uses comes to mind, as does the selective zoning of land into alternate bands of high and low density development to achieve phased development[137] or an orderly distribution of kinds of uses. Confiscation is not the objection of the disappointed owners of land in the other three quadrants or within the areas designated for low density development, re-

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PUBLIC CONTROL (1972). It is fruitless to attempt to answer in a cultural vacuum the question—Which economic expectancies in "private" land are the state's and which the landowner's? This question could be confidently resolved in a manner favoring private rights in the United States through at least the early part of this century because of a larger societal consensus that viewed land as an object of private commercial exploitation. While this consensus is now breaking down, it has by no means disappeared entirely. Because the expectation of some degree of economic return remains vital in the functioning of the American economic system and in American attitudes towards land generally, in my judgment it is as improper as it is futile to urge as a replacement for that consensus a view that wholly disdains private economic expectations. Hence, my disagreement with THE TAKING ISSUE'S jurisprudence or, if you will, anthropology. It is possible that the future may bring a shift in prevailing community standards as they bear both on priorities for regulatory goals and on the fairness of allowing the losses which their achievement under the police power portends to fall disproportionately on some in the private sector. Perhaps the nation will move to a situation akin to that in England where, according to R. W. G. Bryant, "purely speculative profit-making in land is . . . regarded as being not quite respectable," *id.* at 325, and owners of land in greenbelt areas who are virtually barred from developing at all "must simply accept this as one of the facts of life, whatever their financial loss." *Id.* at 127. If it does, a corresponding shift of the Reasonable Beneficial Use standard on the Spectrum of Land Use Intensity would be in order. There is no logical conflict, in short, between holding an essentially relativistic conception of property rights, such as that presented by Professor Philbrick, *see* text accompanying note 16 *supra*, and insisting that, in a given society at a given time, this conception nonetheless requires recognition of a residuum of private rights which the state may not invade without compensation.

135. This point is further developed at text accompanying notes 224-28 *infra*.

136. R. BABCOCK, THE ZONING GAME 169-70 (1966). In the hypothetical portrayed in THE ZONING GAME, Richard Babcock suggests that a true confiscation objection might also lie because the low density of the non-upzoned land in the three quadrants may amount to "permanent dedication of . . . open space without compensation." *Id.* at 169.

137. *See* Fairfax County v. Allman, 211 S.E.2d 48 (1975).

spectively, as long as the zoning applicable to these owners meets the Reasonable Beneficial Use test. Rather, it is that government has bestowed economic benefits on some landowners whose physical situation may differ imperceptibly from that of the unlucky plaintiffs.[138]

The possible unfairness to these disappointed landowners can be remedied in one of three ways: by compensating them;[139] by requiring the favored landowners to pay for the upzoning;[140] or by combining these alternatives, and using the payments of the favored owners to compensate the disfavored.[141] Whichever route is taken, the accommodation power should prove helpful in fixing both the medium and the extent of compensation—or recoupment—that are appropriate in specific instances. Although it is impossible to do more here than broach this suggestion, it could well occur that, in the long run, the accommodation power's contribution to the resolution of this problem will give a greater boost to rational land management than its aid in solving the confiscation dilemma.

B. *The Accommodation Power: Implicit Judicial and Legislative Recognition*

Judicial and legislative recognition of the accommodation power is nascent at best. Both institutions are backing into recognition rather than arriving at it through deliberate reflection and articulate choice. Emergent awareness, moreover, is encrusted with traditional conceptions, many of which deny the very tendencies that the power seeks to nurture. Despite or even because of these uncertainties and masked conflicts, examples of the tensions attending the power's emergence may aid in its further delineation. Selected for consideration from the judicial side is the well-known New York Court of Appeals decision, *Golden v. Planning Board (Ramapo)*,[142] which approved the Town of Ramapo's controversial growth management plan. Although *Ramapo* is celebrated—or reviled—for its treatment of exclusionary zoning, our concern will be with *Ramapo*'s other dimension—its holding that a regulatory measure that barred the subdivision of private land for up to 18 years was not a "taking." Culled from the legislative side is a resource protection technique called transferable development rights (TDR), which has attracted widespread attention. TDR compensates owners for restrictions on the development of

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138. *Id.* The *Allman* court conceded that the plaintiff's parcel could have been developed "without loss" under the existing zoning, but observed that the parcel would increase in value by almost $2.5 million if upzoned to a density equivalent to that which the county had permitted for proximate parcels. *Id.* The court's basic concern, however, was that the selective upzoning of these latter parcels was unfair to property owners, such as the plaintiff, whose land was retained in its low density classification, in order to achieve the county's planning objective of phased development. *Id.* at 52-55.

139. *See* R. Babcock, The Zoning Game 170 (1966).

140. *See* M. Clawson, Suburban Land Conversion in the United States 184-86 (1971).

141. *See generally* Hagman, *A New Deal: Windfalls for Wipeouts*, 40 Planning 9 (No. 8, 1974); *cf.* text accompanying notes 168-72 *infra*.

142. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

their land, not with dollars, but with the entitlement to transfer their unused development rights to parcels elsewhere.[143] Examined first is the question of whether TDR should be predicated on the police or the accommodation power; and, second is a 1974 New York trial court decision, *Fred F. French Investing Company v. City of New York (Tudor Parks)*,[144] which, in striking down a TDR program, illustrates the pitfalls that await programs based on the accommodation power if they are assessed using ill-fitting police or eminent domain power standards.

1. *The Courts:* Ramapo's *"Other Dimension." Ramapo* is properly regarded as heralding the unprecedented power of local governments to manage community growth. But *Ramapo*'s treatment of the taking problem, largely ignored in commentary, is no less dramatic. One searches the reports in vain for prior judicial sanction of regulatory measures which restrain the development of private land for nearly a generation. What are found are opinions that grouse over development moratoria of a few years or less,[145] or that go so far as to declare that official map reservations of school or park lands for only one year are literal takings.[146]

The *Ramapo* court was not unaware that it was sanctioning extraordinary restraints. Though dissenting from the majority view on the plan's exclusionary aspects, Judge Breitel intimated his concurrence that the plan was not confiscatory.[147] Observing that the taking problem is not "insuperable," he set forth the text for which this article is exegesis by commenting that "[t]here is little doubt that the compulsion of current interests and conflicts will require a re-examination of much legal and judicial thinking in this area."[148] Despite the absence of explicit recognition of the accommodation power, both the majority and, derivatively, the dissenting opinions effectively validated it in sustaining the 18-year restriction. What saved the plan from being confiscatory was, in their view, its deliberate inclusion of factors that mitigated its otherwise draconian impact and thereby satisfied fundamental considerations of fairness. Among the factors which elevated the economic return on affected lands from what was surely a negative value to what the majority[149] found to be a Reasonable Beneficial Use return were: a residual right to construct a single family residence on plattable land; an interim reduction in real estate taxes keyed to the depreciation caused by the restrictions; an option afforded to the landowner to accelerate the construction date by providing the requisite

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143. *See* authorities cited in note 168 *infra*.

144. 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973), *aff'd mem.*, 47 App. Div. 2d 715, 366 N.Y.S.2d 346, *motion for leave to appeal granted*, 47 App. Div. 2d 815 (1975).

145. *See, e.g.*, Meadowlands Regional Dev. Agency v. Hackensack Meadowlands Dev. Comm'n, 119 N.J. Super 572, 293 A.2d 192, *petition for cert. denied*, 62 N.J. 72, 299 A.2d 69 (1972); Mang v. County of Santa Barbara, 182 Cal. App. 2d 93, 5 Cal. Rptr. 724 (1960); Annot., 30 A.L.R.3d 1196 (1970).

146. Lomarch Corp. v. City of Englewood, 51 N.J. 108, 237 A.2d 881 (1968).

147. 30 N.Y.2d 359, 387-90, 285 N.E.2d 291, 307-09, 334 N.Y.S.2d 138, 160-62 (1972).

148. *Id.* at 390, 285 N.E.2d at 309, 334 N.Y.S.2d at 162.

149. *Id.* at 381-83, 285 N.E.2d at 304-05, 334 N.Y.S.2d at 154-56.

public facilities; the right to proceed with development in accordance with the town's capital improvements timetable, whether or not the town met that timetable; the present vesting and assignability of the future right to develop; the benefit of substantial incremental values that would accrue in time to the restricted land as a consequence of the phased installation of public facilities pursuant to a carefully elaborated comprehensive plan; and the "temporary" nature of the restrictions, which were imposed, not to enhance the town's resource position, but to coordinate private advantage with public facilities and needs.

It is not my purpose to argue that the court was correct in its conclusion that these features in fact afforded the plaintiffs a Reasonable Beneficial Use return. Indeed, one of the curiosities of the plaintiffs' presentation was their apparent failure to marshal precise economic data on this crucial issue.[150] Nor do I believe that these features exemplify the accommodation power in as pristine a form as does, for example, the TDR program employed to protect the Tudor Parks.[151] Certainly, neither the Ramapo public officials nor the Court of Appeals explicitly conceived of the plan as a showcase for that power, since the accommodation power nomenclature is original to this article. But my analysis is intended to demonstrate that the court's preoccupation with these features evidences its appreciation that the 18-year restriction could not be justified solely on conventional police power grounds. That power's hallmark, after all, is *noncompensatory* regulation to protect community health, safety and welfare, and not the compensation of land owners burdened by needful public regulation. Professor Freund emphasized this point in his now-classic distinction between the police and eminent domain powers:

> [I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.[152]

150. *Id.* at 380-81, 285 N.E.2d at 303, 334 N.Y.S.2d at 154.

151. See text accompanying notes 195-210 *infra*.

152. E. FREUND, THE POLICE POWER 546-47 (1904).

This position recurs in land use precedents both old and new. For example, one of the objections raised by the landowner in Hadacheck v. City of Los Angeles, 239 U.S. 394 (1915), against a zoning ordinance barring the use of his land for brickmaking purposes was that, in prohibiting his business altogether, the ordinance was unduly harsh. Rejecting this contention, the court declared that ". . . we cannot declare invalid the exertion of a power [the police power] which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions [that it sought to achieve] or that some other exercise would have been better or less harsh." *Id.* at 413-14. More recently, in Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969), a California court invalidated an exaction imposed by a public authority pursuant to its approval of a rezoning application, despite the latter's insistence that the exaction would redound to the developer's economic benefit. "[F]ulfiliment of public needs emanating from the proposed land use is the sine qua non of the exaction's reasonableness," the court insisted. *Id.* at 422, 79 Cal. Rptr. at 880. Further, it reasoned:

> Standing alone, the landowner's economic benefit supplies inadequate underpinning for the exaction. The police power forms the exaction's constitutional foundation. That power is aimed at public need, not private profit. The landowner should be free to reject the paternalism which forces him into an exaction conceived for his personal benefit.

A straightforward way of testing the proposition is to ask what the *Ramapo* result would have been had the town simply barred subdivision for 18 years, wholly ignoring the restriction's private economic impacts. Prior case law and the obviously drastic nature of that restriction leave little doubt that the court would have struck down the plan as confiscatory. But through its elaborately crafted network of economic trade-offs—none of which, incidently, entails direct dollar compensation—the Ramapo plan was saved from this outcome and, more to the point, demonstrated that there is indeed a middle ground between the police and eminent domain powers.

But isn't the argument plausible that the plan's economic trade-offs simply brought the 18-year restriction under the police power's "reasonableness" umbrella? Yes, if it is conceded that the police power has developed since the time when Professor Freund wrote into two separate branches, each with its distinctive "reasonableness" test. Whichever labels are chosen, however, the essential point, reflected in *Ramapo,* is that *there is a class of regulatory measures that fits neither into the traditional police nor eminent domain power niches and that escapes the confiscation objection only by affording burdened landowners fair compensation in the form of appropriate economic trade-offs.*

I prefer the accommodation power label because it promises to nurture a "fairness discipline"[153] that is all too often ignored when measures are indiscriminately lumped under the police power heading. The label signals more clearly the necessity for a form of accounting that, while less demanding than that of formal eminent domain, is assuredly more searching than its traditional police power equivalent. The latter's impressionistic and typically conclusionary speculation, tied to some vague "balancing" of public and private interests, invites grave injustice when restrictions of the magnitude of those in *Ramapo* and *Just*[154] are in issue.

The label also promises greater rationality in judicial opinions evaluating borderline restrictions. Illustrative of the confusion that currently reigns in the reports are the federal district[155] and circuit court[156] opinions in *Art Neon Company v. City and County of Denver.* In treating the plaint of billboard interests that a six-year amortization provision of Denver's sign ordinance was confiscatory, both courts became ensnared in the conceptual inadequacies of police and eminent domain doctrine, as traditionally conceived.[157] The lower court (*Art Neon* I) defined as the issue whether or not the amortization pro-

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Id. at 422, 79 Cal. Rptr. at 880. Taken together, *Hadacheck* and *Scrutton* emphasize that the absence of economic benefit to the landowner does not impugn a police power measure, just as its presence does not validate as a police power measure a restriction purportedly founded on that power.

153. The phrase is that of Professor Michelman. *See* Michelman, *supra* note 17, at 1246.

154. *See* notes 117, 126, 142-52 and accompanying text *supra.*

155. 357 F. Supp. 466 (D. Colo. 1973).

156. 488 F.2d 118 (10th Cir. 1974).

157. Although only *Art Neon* I and II are discussed in text, the disagreement of these two courts recurs in the voluminous litigation dealing with nonconforming use

vision afforded just compensation for a formal taking.[158] Adverting to a United States Supreme Court[159] holding that, in leasehold condemnation cases generally, just compensation must include a premium for the likelihood of leasehold renewal (a routine practice among billboard lessors and lessees), the court ruled that the amortization period alone failed to measure up, and it admonished that "legislative rough approximations of just compensation won't do."[160]

But in the eyes of the circuit court (*Art Neon* II), eminent domain law had nothing to do with the piece. To the appellate court, the case turned instead on the amortization provision's "reasonableness" under the police power.[161] Rebuking the trial court, it proclaimed that the reasonableness test "is not a test of concept of 'just compensation,'" and that the amortization technique "contains no connotation of compensation or a requirement therefor."[162] But its analysis belied these categorical assertions on two counts. First, the considerations it enumerated in profiling the reasonableness test contradicted the court's alleged disinterest in the provision's compensatory dimension. These included:

> the nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes, and depreciation for other purposes, and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area.[163]

If the provision were a police power exercise, pure and simple, most of these considerations would be gratuitous; like the factors identified in *Ramapo*, they speak to the mitigation of private loss, not to the prevention of land uses that, in Professor Freund's formulation, are "harmful" to the public.

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amortization measures. As with these two cases, the opinions conflict sharply in their assessment of whether these measures are police power- or eminent domain power-based. *Compare* Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965) (eminent domain), *with* City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954) (police power). *See generally* Annot., 22 A.L.R.3d 1134 (1968).

Other opinions can be found, however, which implicitly recognize that neither power affords an appropriate predicate for these measures. *See, e.g.*, Naegele Outdoor Adv. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968); Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957). As noted in text, *see* text accompanying note 68 *supra*, *Grant* concedes its willingness to place amortization on a police power footing only because of the awkwardness of eminent domain doctrine. And though *Naegele* too terms amortization a police power exercise, its analysis falls just short of treating it as an eminent domain concept. Hence, it reasons:

> If the value of the plaintiff's property interest was extinguished before the running of the three-year [amortization] period, there would be no taking, or if the value of freedom from new competition for the statutory period equalled the value of the property interest remaining at the end of the period, there would be just compensation [sic] for the taking.

Id. at 501, 162 N.W.2d at 213.

158. Art Neon Co. v. City and County of Denver, 357 F. Supp. 466, 471, 473 (D. Colo. 1973).

159. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).

160. Art Neon Co. v. City and County of Denver, 357 F. Supp. 466, 478 (D. Colo. 1973).

161. Art Neon Co. v. City and County of Denver, 488 F.2d 118, 121 (10th Cir. 1974).

162. *Id.*

163. *Id.* at 122.

Second, the court expressly relied upon *Berman v. Parker* as authority for its broad reading of the police power's scope, and quoted in full Justice Douglas' famous dictum extolling aesthetics as a planning goal.[164] As noted earlier,[165] however, *Berman* dealt not with the police power but with the propriety of governmental use of eminent domain for urban renewal purposes. Since the question in *Art Neon* was not whether government may pursue aesthetic goals—the litigants and both courts conceded that it could—but whether government must compensate when it seeks to achieve those goals by eliminating unsightly billboards, *Berman* is obviously inapposite. Its role as the centerpiece of the circuit court's opinion does point up, perhaps unwittingly, that court's ambivalence on the compensation problem.

In short, the circuit court was correct in its premise that the reasonableness test "is not a test of 'just compensation,' " but wrong in concluding therefore that the amortization technique contains "no connotation of compensation or a requirement therefor."[166] This non sequitur resulted because the court failed to recognize that fair compensation was an intermediate approach between just compensation and no compensation, despite its use of reasoning that in fact pointed in this direction. One would have liked to have seen a third opinion, an *Art Neon* I ½ as it were, in which the conceptual inadequacies of tired police power/eminent domain doctrine were frankly acknowledged and the corresponding need for a third alternative addressed.[167]

164. *Id.* at 121.

165. *See* text accompanying notes 59-67 *supra*.

166. 488 F.2d at 121.

167. An example of implicit judicial use of the Spectrum of Land Use Intensity appears in Justice Hall's opinion in Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963) (*Morris County* I). Rejected as unconstitutionally confiscatory in that case was the zoning of the developer-plaintiff's land as a "Meadows Development Zone." This classification precluded him from any but agricultural or aquaculture-related uses. Embroidering somewhat on the facts in *Morris County* I, the parcel's economic value might be portrayed as follows on the Spectrum of Land Use Intensity:

SPECTRUM OF LAND USE INTENSITY

INCREASING DEVELOPMENT POTENTIAL ↑

INTENSITY INDEX	USE	VALUE
Highest and Best Use Unrestricted by Public Regulation	Industrial	$4,000,000
Allowable Use	Gravel Extraction	$2,000,000
Reasonable Beneficial Use	Single Family House 1 Dwelling Unit/Acre	$ 500,000
Resource Protection Use	Meadows Development Zone (Aquaculture Use)	$ —40,000
Zero Intensity Use	None	$ —20,000

2. *The Legislatures: Transferable Development Rights (TDR) as a Harbinger of the Accommodation Power.*

a. *An Overview of TDR Programs.*[168] TDR programs modify conventional property conceptions in two respects. First, they divide "property" into

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If the court had deemed the zoning a literal taking, it would have had no choice but to direct the township to pay for the less-than-fee interest "condemned" or, at the least, to leave the land unzoned, freeing the developer to do as he wished with it. In fact, Justice Hall approved neither alternative. Disdaining any discussion of payment, he warned that voiding all zoning "would permit the establishment of any use by any means—a result which might well be damaging to the overall local public interest." *Id.* at 559, 193 A.2d 243-44. Instead, he directed the township to increase the parcel's development potential sufficiently to cure the constitutional objection, but authorized it to give full weight, consistent with constitutional constraints, to the "special characteristics and particular problems of the district." *Id.* at 559, 193 A.2d at 244. The decree splits the difference between the extremes of the police and eminent domain power resolutions. *Cf.* ALI MODEL LAND DEVELOPMENT CODE § 9-112(3) (Proposed Official Draft 1975) [hereinafter cited as CODE].

Morris County I shows that there is an alternative to leaving the land "completely unzoned" when a regulation is declared invalid. *See Enclosure, supra* note 30, at 1253. For results analogous to *Morris County* I, *see, e.g.*, Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 167 N.E.2d 406 (1960); City of Miami Beach v. Weiss, 217 So. 2d 836 (Fla. 1969). *See generally* 2 C. RATHKOPF, THE LAW OF ZONING AND PLANNING, ch. 36, § 6 (3d ed. 1972). The view that invalidation leaves the land unzoned may be shaped in part by the loose assertion in some precedents that if the courts went further, they would violate the separation of powers doctrine. *See, e.g.*, Fairfax County v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975); City of Miami Beach v. Weiss, *supra*. This is a misconception. Justice Hall's resolution only brackets the area on the Spectrum of Land Use Intensity within which the township may permissibly zone; it does not mandate a specific outcome for local legislative officials. Moreover, some interpenetration of judicial and legislative roles in this area is inevitable. A better explanation for the judicial deference is the greater familiarity of legislators with local circumstances, planning goals, and resources allocable to compensatory regulation.

A direct judicial application of the accommodation power would occur where, in an "eminent domain" proceeding, the condemnee successfully attacks the zoning of his parcel as confiscatory, and the court provides for its valuation on a Reasonable Beneficial Use level rather than on its status as "unzoned,"—*i.e.*, its Highest and Best Use Unrestricted by Public Regulation. *Cf.* CODE § 5-303(5). Although this result would seem to be called for by Justice Hall's reasoning, a New Jersey intermediate court granted relief based on the Highest and Best Use standard in a companion case to *Morris County* I, Jersey Central Power & Light Co. v. Morris County Land Improvement Co., 91 N.J. Super. 40, 219 A.2d 180 (App. Div. 1966) (*Morris County* II). While *Morris County* I was pending before the New Jersey Supreme Court, the power company initiated eminent domain proceedings to acquire a public utility easement over nine acres of the developer's land. Prior to the completion of those proceedings, Justice Hall rendered his decision. Had the *Morris County* II court honored Hall's reasoning, the nine acres would have been valued on a Reasonable Beneficial Use level, which presumably would have been skewed between its Resource Protection level (Meadowlands Development Zone) and its Allowable Use level (Gravel Extraction). Instead, the court opted for the Highest and Best Use Unrestricted by Public Regulation level (Industrial), incorrectly assuming that *Morris County* I

> must be held as having declared the "Meadows Development Zone" regulations void in their very inception. Accordingly, there was no valid zoning regulation with regard to the property in question at the time of the taking, and defendant was entitled to an instruction [refused by the trial court] to that effect.

Id. at 49, 219 A.2d at 184. The *Morris County* II result, apparently replicated elsewhere, see Zogby v. State, 53 Misc. 2d 740, 279 N.Y.S.2d 665 (Ct. Cl., N.Y. 1967), is unfortunate both in its failure to heed Justice Hall's actual reasoning and in its resulting imposition of an indefensible surcharge on the public fisc—results that could be avoided in future litigation of this type by explicit use of the accommodation power.

168. For more detailed treatment of the TDR concept, *see, e.g.*, THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION (Rose ed. 1975); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Transferable Development Rights (ASPO PAS Report No. 304, Mar. 1975); *Transfer of Development Rights*, 34 URBAN LAND 1 (1975).

Specific TDR proposals and accompanying case studies include J. COSTONIS & J.

two root components: the physical land itself and the development potential or "development rights" of that land, usually measured by the zoning restrictions applicable to it. Second, they authorize the transfer of these development rights from the host parcel to other parcels whose total development rights are thereby proportionately augmented. Although the rationale for permitting transfers encompasses a variety of urban design, planning and land transactions goals, TDR's major attraction is its role in offsetting economic hardships incurred by private landowners as a result of resource protection programs. Examples of such hardships might include the plight of the owner who must preserve a diminutive landmark building in a central business district zoned for New Brutalist megastructures, or the owner who must retain as open space prime land lying in the path of, and zoned for, commercial or residential development. Fundamental to TDR is the premise that the resource owner's confiscation objection to such regulation will be blunted by the benefits that he is enabled to receive, either by selling his package of development rights to owners of transferee parcels, or, should he also be the owner of the transferee site, by retaining the market value of the additional development potential that the rights represent.

The typical TDR program proceeds in four phases. First, the administering authority must pinpoint the sites from which development rights may be transferred. The criterion for selection may be either protection of improvements on the sites, as in the case of landmark buildings, or protection of the sites themselves, as in the case of ecologically sensitive prime agricultural or open-space lands. In both cases, the authority fears that the present low density of the sites renders them vulnerable to market pressures for more intensive development—from landmark to office tower or from nature preserve to condohotel.

Second, the authority must identify correlative "transfer districts," areas to which the rights may be transferred. These districts must be appropriate receiving areas for added density both in light of the community's over-all planning goals and of the capacity of the districts' physical and service infrastructures to absorb the density. Next, machinery for the actual transfer of

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SHLAES, DEVELOPMENT RIGHTS TRANSFERS: A SOLUTION TO CHICAGO'S LANDMARKS DILEMMA (Chicago Chapter Foundation of the American Institute of Architects & National Trust for Historic Preservation, 1971); J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE (1974) (with Robert De Voy and Rai Okamoto); PUERTO RICO PLAN, *supra*. In the first of these studies, Mr. Shlaes prepared the economic feasibility section and contributed major insights to its conceptual and legal portions. Mr. De Voy, aided by his associates at Real Estate Research Corporation, prepared the basic draft and reviewed the final draft of the economic chapters (3 and 4) of SPACE ADRIFT, *supra*, as well as providing valuable assistance on that TDR study as a whole; Mr. Okamoto played a similar role regarding the urban design chapter (5) of SPACE ADRIFT. Likewise, the economics section of the PUERTO RICO PLAN is the work of Mr. De Voy, who again contributed broadly to that study's other sections.

Other pertinent TDR studies are referenced in the footnotes to the subsection that follows. A more complete TDR bibliography and a listing of pending or adopted TDR legislation can be found in *Transferable Development Rights, supra* at 63-64.

rights must be set in motion. Under some schemes, transfers occur exclusively between private landowners subject to general public supervision. Under others, only government can transfer the rights, and the resulting income is used to create an "Environmental Trust Fund"[169] from which cash awards are made to resource owners. A mixed pattern of private and governmental transfers is prescribed by a third variant; here, government makes the transfer only if the resource owner declines to do so. Again, the income generated through public sale is used to cancel the costs to government of compensating affected owners. In return for compensation, the resource owner must provide firm assurances that his site will be developed consistently with the Resource Protection restrictions; typically, a less-than-fee protective interest is conveyed to government for this purpose.

Lastly, criteria must be devised to determine exactly what the owner ought to receive for his losses under the program, whether payment is made in development rights or in dollars. Two patterns prevail. One determines the compensation by measuring the difference between the quantity of rights actually used at the resource site and the total quantity of rights authorized for the site by existing zoning.[170] For example, if a landmark site is currently zoned to permit the construction of an office building containing 1,000,000 square feet and the landmark itself contains only 250,000 square feet, the site's owner may transfer the remaining 750,000 square feet or, under TDR programs incorporating the cash alternative, receive a dollar award equal to the value of that increment of space. The second pattern, on the other hand, entitles the resource owner to transfer only that quantity of rights—or to receive its cash equivalent—required to take up the slack between the economic return possible at his site under the Resource Protection zoning and the return under zoning fixed at the Reasonable Beneficial Use level.[171] If a marginal increase in development potential would not endanger the protected resource, government may alternatively increase the site's development potential to the latter level, much as it does when it grants a variance under traditional zoning procedures.[172]

Should TDR be predicated on the eminent domain power, on the police power or on the accommodation power? Before that question can be answered, it is necessary to identify the particular TDR variant addressed. Aside from possible procedural complications, the question can confidently be answered for those TDR variants that compensate the resource owner in dollars for

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169. The Environmental Trust Fund is an element of the proposal advanced in the PUERTO RICO PLAN, *supra* note 13, at 9-24.

170. This approach is taken, *inter alia*, under the New York City TDR program for landmark preservation. *See* New York, N.Y., Zoning Resolution art. VII, ch. 4, §§ 74-79, 74-791 to -793 (1975). *See generally* Gilbert, *Saving Landmarks: The Transfer of Development Rights*, 22 HIST. PRESERVATION 13 (1970).

171. For an example of this approach, *see* PUERTO RICO PLAN, *supra* note 13, at 9-24.

172. *Id.*

the difference in his site's value before and after the program is instituted. By hypothesis, these variants square with eminent domain doctrine. Given a jurisdiction, moreover, in which the special benefits doctrine is liberally interpreted, TDR variants compensating the owner in development rights calculated by the above measure will also comport with eminent domain doctrine. If these rights are equal to the combined value of the parcel acquired (the less-than-fee protective interest in the site) and to the damages, if any, accruing to the remainder (the resource site itself and, if relevant, its improvements), then they will cancel out any compensation due the owner in a jurisdiction which permits special benefits to be set off against amounts due under both headings.[173]

In its differences from these patterns, the variant addressed below may properly be termed TDR's hardest case. Under it, acceptance of non-dollar compensation in the form of development rights is mandatory, not optional, with the resource owner.[174] Further, the quantum of transferable rights is

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173. *See* text accompanying notes 79-89 *supra*.

The position offered in text reflects a substantial evolution of my view on the constitutional status of development rights as adequate compensation. In an earlier article, I posed, but did not resolve, the question whether TDR would be constitutionally defective because development rights are not cash compensation and, in the case of jurisdictions permitting special benefits to be set-off against the parcel taken, because development rights might be deemed to have too speculative a value to qualify as special benefits. *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 598 n.75 (1972). As indicated in text, however, I am now confident, first, that the dollar compensation objection is not compelling if TDR is predicated on the accommodation power, and, second, that in jurisdictions permitting the set-off of special benefits against the parcel taken, development rights ought clearly to qualify as special benefits even from the perspective of eminent domain doctrine. The latter judgment is the direct outgrowth of the three case studies undertaken by the writer with Messrs. Shlaes and De Voy, see note 168 *supra*, which are persuasive that the value of development rights is no more speculative and, in fact, a good deal less so, than other economic opportunities that have traditionally comported with the special benefits doctrine.

174. Fur-Lex Realty, Inc. v. Lindsay, 376 N.Y.S.2d 388 (Sup. Ct. 1975) confirms that it is the mandatory character of TDR as forced compensation rather than the TDR concept itself that will prove a sticking point for the courts. At issue in that case was the validity of a transaction in which the City of New York entered into a lease of the site of the Appellate Division (First District) Courthouse, a designated landmark, which enabled the lessee, the owner of an adjoining site, to transfer 100,000 square feet of the unused development rights of the Courthouse site to his site. The Courthouse site was then subleased back to the city for continued use as a courthouse, less the development rights. This arrangement is further described in Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 586 n.44 (1972). Joining both the city and the private lessee as defendants, Fur-Lex Realty, a lessee of a nearby city parcel, challenged the transaction on the grounds, *inter alia*, of spot zoning and of improper disposition of municipal property. The court rejected both contentions on the defendants' motion for summary judgment.

Fur-Lex' treatment of the spot zoning objection is to be contrasted with that in *Tudor Parks*, which suggested, as an alternative basis for its ruling, that the latter TDR scheme invaded the rights of property owners at sites adjoining the site or sites to which transfers could be made, *see* Fred F. French Inv. Co. v. City of New York, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. N.Y. Co. 1973). This position has been endorsed in an article critical of the various New York City TDR programs. *See* Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 383 (1972). For the view that coordinating a specific TDR program with the regulatory authority's overall planning regime should obviate this objection, *see* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 87-91, 124 (1973).

equal in value to the difference between his site's Resource Protection and Reasonable Beneficial Use values rather than between its Resource Protection and Allowable Use (or higher) values. Since this variant clearly conflicts with eminent domain's standard of just compensation, the question is whether it rests instead on the police or the accommodation power. Under the analytical framework developed in this article, the answer is the accommodation power.

i. *The Police Power: A Dubious Predicate for TDR.* My view is not universally shared. Norman Marcus, for example, has placed TDR squarely on a police power footing.[175] In his argument, he advances a cogent, indeed brilliant, analysis of TDR's two basic postulates: first, that strong legal, planning and policy considerations favor the concept of severing development rights from their host parcel and transferring them to other land;[176] and second, that "because the essence of property [in 20th century America] is its potential for profitable use"[177] and not its "location in space and dominion over a defined surface of land"[178] as in earlier times, authorizing resource owners to transfer their frozen development rights can be a fair and practicable way of mitigating their losses.

But to conclude from these premises that TDR is therefore founded on the police power is unpersuasive. The conclusion resurrects the misconception fathered by the Holmes aphorism and compounded, perhaps inadvertently, in *Berman v. Parker* that "regulation" is the exclusive province of the police power. In reality, regulation is a goal of all three powers—police, accommodation and eminent domain.[179] The conclusion, moreover, does violence to the settled view, formulated by Professor Freund and consistently affirmed in precedent, that the police power's object is to safeguard community health, safety and welfare independently of any concern for compensating burdened landowners.[180] TDR's *raison d'être*, on the other hand, is precisely to insure that landowners are fairly treated. Finally, the conclusion's reliance on the vague "reasonableness" test of current police power doctrine threatens to erode the fairness discipline nurtured by TDR because it implies that TDR's compensatory supplements are a matter of legislative grace and not a constitutional imperative.[181]

Perhaps my disagreement with Marcus is little more than a *querelle des mots* between friends coming at the compensation question from opposite directions. Obviously more sympathetic to *The Taking Issue*'s philosophy

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175. *See* Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFF. L. REV. 77, 77-78, 104-05 (1974).
176. *Id.* at 89-94.
177. *Id.* at 88.
178. *Id.* at 87.
179. *See* text accompanying notes 52-67 *supra*.
180. *See* text accompanying notes 150-52 *supra*.
181. *See* text accompanying notes 153-67 *supra*.

than I, Marcus questions why, since the Fifth Amendment is given short shrift under recent environmentally-oriented decisions, conscientious governmental efforts to extend some compensation to resource owners should not prevail when challenged on confiscation grounds.[182] Skeptical of that philosophy's fairness and its accuracy as a portrayal even of recent taking jurisprudence,[183] I am a good deal more reluctant to fold TDR into the spongy batter of police power reasoning. In our results, however, we are not far apart. Marcus alludes to two kinds of compensation—the more stringent just compensation of eminent domain law and the less exacting "equitable" or "fair" compensation of TDR. Our difference is that he urges employment of the latter "*where legitimate police power restrictions on private property are at issue.*"[184] As I have acknowledged earlier,[185] linking fair compensation to the police power is not an inherently implausible course, but the basic transformation of the police power which such a linkage works must be understood clearly by planning authorities and the courts. Because I am apprehensive that it will not be understood, the linkage approach is less satisfactory in my judgment than recognition of an independent accommodation power.

ii. *The Accommodation Power: A More Fitting Predicate for TDR.* The *Tudor Parks* decision, discussed below, confirms that TDR will be challenged because it does not measure up to formal eminent domain standards. The challenge should not succeed. A TDR program's validity should depend instead upon whether its promise of compensation is real or illusory. If those rights, together with the economic return possible under the parcel's Resource Protection zoning, satisfy the Reasonable Beneficial Use standard, the matter should end there. But if the development rights certificates are mere bogus bills cranked out on some government printing press, firm judicial intervention is in order.

Fear that development rights will afford illusory compensation recurs in commentary[186] contesting TDR's constitutionality and tipped the balance against the TDR program in *Tudor Parks*. Concern on this score is certainly not unreasonable but it should be tempered with an appreciation of the formal requirements of constitutional argument and of the capabilities of standard appraisal practice. As to the first, it is important to distinguish facial constitutional challenges from challenges to a measure as applied. The marketability of development rights would be in issue in a facial challenge only if the premise of marketability were so far-fetched as to be absurd. But appraisal sources

182. *See* Marcus, *supra* note 175, at 104.
183. *See* notes 128, 134 *supra*.
184. Marcus, *supra* note 175, at 104 (emphasis added).
185. *See* text accompanying note 153 *supra*.
186. *See* Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975); Note, *Development Rights Transfers in New York City*, *supra* note 174.

and judicial precedent established just the opposite. Appraisal theory[187] and at least three TDR case studies[188] fully support the unsurprising proposition that increasing a parcel's development potential by transferring development rights to it will increase its fair market value, so long as there is a market demand for new construction incorporating the transferred rights. Whether that market will exist, of course, is a fact question, turning wholly upon the contingencies affecting the litigant's parcel and the relevant TDR program and land use regime.

Judicial support appears indirectly in numerous decisions equating property rights with the right to exploit land for profit[189] and directly in the majority[190] and concurring[191] opinions in the New York Court of Appeals' decision, *Newport Associates, Inc. v. Solow*. Disputed in that case was whether the holder of a long-term lease could transfer the leased parcel's unused development rights to an adjoining parcel. The question was resolved favorably to the defendant-lessee on the ground that the lease did not by its terms preclude the transfer. More important for our purposes is language in both opinions explicitly describing the contested development rights as a "valuable asset."[192] Judge Breitel's concurring comments in this regard merit quotation in full:

> Plaintiff has lost by defendant's action . . . a valuable asset in the air development rights over its building. It has thereby lost its right to "transfer" or use its air development rights by alienation of the reversion to an abutting owner, or by acquiring an abutting property. That right to transfer or exploit the air development rights required no warrant in the zoning ordinance. Air rights, including the special floor area ratios defined in the ordinance, are valuable and transferable, even if only as an adjunct to a reversion or to a long-term leasehold.[193]

The appropriate mode, therefore, for challenging a TDR program is as it applies to specific landowners. Centering on the marketworthiness of the rights, such challenges will require careful preparation by the resource owner and the planning authority, and will call for substantially more than the impressionistic judicial scrutiny typifying current zoning litigation. On the other hand, they will be markedly less taxing for the courts and litigants than are formal eminent domain proceedings. Standard appraisal methodologies and

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187. *See, e.g.*, Shlaes, *The Economics of Development Rights Transfers*, 42 APPRAISAL J. 526 (1974); Graaskamp, *Impressions on the Marketability of TDRs* (ASPO PAS Report No. 304, Mar. 1975).

188. *See* note 168, *supra*.

189. *See, e.g.*, Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966); Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923).

190. 30 N.Y.2d 263, 283 N.E.2d 600, 332 N.Y.S.2d 617 (1972), *cert. denied*, 410 U.S. 931.

191. *Id.* at 268, 283 N.E.2d at 602, 332 N.Y.S.2d at 621.

192. *Id.* at 267, 268, 283 N.E.2d at 602, 332 N.Y.S.2d at 620, 621.

193. *Id.* at 268, 283 N.E.2d at 602-03, 332 N.Y.S.2d at 621.

market analysis techniques can establish the value of development rights with a degree of precision that will enable the courts to insure that resource owners are not gouged.[194] Nor should it be forgotten that the courts are not strangers to the types of valuation questions posed by TDR. This point is underscored by the large volume of litigation dealing with such matters as benefit assessment levies, special benefits in partial takings situations, and growth control and resource protection programs—which, if the thesis of this article is correct, are harbingers of the accommodation power. And with the wildfire adoption of these programs in the 70's, a corresponding increase in judicial familiarity with, and sophistication in resolving, questions arising under that power can be anticipated.

b. Tudor Parks: *Old Wine in New Bottles.* The occasion for the *Tudor Parks* litigation was New York City's enactment of a TDR program[195] in 1972 to bar the construction that the R-10 zoning then in effect permitted on two privately owned parks surrounded by the Tudor City apartment-hotel complex. The program places the parks in a P overlay district, limiting their use to passive recreational uses, and authorizes the developer-owner to transfer their full complement of unused rights to a mid-Manhattan transfer district; it also requires that the parks be opened to the general public but only *after* the city has certified the first transfer of rights from them.[196] In permitting the transfer authorization to exceed the minimum amount of rights necessary to insure a Reasonable Beneficial Use return, the program is more lenient than our hard case. It is significant too that land values in the commercially zoned transfer district, where the developer-owner has extensive holdings, are double those in the residentially zoned Tudor City area[197]—although this advantage must be temporarily discounted in light of the currently overbuilt state of New York City's office-commercial space market.

Despite these advantages, the developer's self-initiated attempt to transfer the park's rights to a contemplated project sited adjacent to the Tudor City complex,[198] and the tender of a "substantial offer"[199] to the developer for the rights transferable under the TDR program, both the developer and its mortgagee brought an inverse condemnation action against the city. They sought summary judgment on the ground that the P zoning is a literal taking for which just compensation must be paid. Although the trial court agreed that a "taking" had occurred, it did not award compensation, but reinstated the prior R-10 zoning classification instead.[200]

194. *See* authorities cited in notes 168, 187 *supra.*
195. New York, N.Y., Zoning Resolution, art. IX, §§ 91-00 *et seq.* (1973).
196. For a detailed discussion of the Tudor Parks TDR program, *see* Marcus, *supra* note 175, at 79-85.
197. *Id.* at 83-84.
198. *Id.* at 80-81.
199. *Id.* at 84, n.22.
200. Fred F. French Inv. Co. v. City of New York, 77 Misc. 2d 199, 204-05, 352 N.Y.S.2d 762, 767-68 (Sup. Ct. 1973).

Employing a divide-and-conquer rationale, the court rigidly compartmentalized the program's two components, evaluating each in isolation from the other. Looking first to the P zoning, it concluded that the use restriction was an unreasonable exercise of the police power because it "significantly deprives the [mortgagee] of its security for the mortgage," and "bars the [developer] from any economic use of [its] property."[201] Were P zoning the whole of the program, of course, the court's reasoning would be incontrovertible. Indeed, the program would then be the legal equivalent of a Ramapo plan which retained only the 18-year subdivision restriction and not the network of economic trade-offs that saved that restriction from invalidation.

But there *is* more to the Tudor Parks program—namely, its transfer component. If the court had treated this component as an integral part of the overall scheme, it might have altered its conclusion that the P zoning was enacted under the police power, and tested the compensation afforded by the transfer authorization against a measure less demanding than that of eminent domain law. Regrettably, the court did neither; instead, its assessment of the transfer authorization is as perfunctory as it is unenlightening. Viewing the authorization as evidence that the city recognized the "need of some modicum of compensation,"[202] the court dismissed it in the following single sentence:

> Pursuant to [the TDR program] the owner is confronted with the problem of acquiring 30,000 square feet of property suitable for his purpose in the newly proscribed [sic] area but he is left to his own resources for acquisition and funding in what may be an unpredictable market of the future.[203]

The trial court's opinion is unfortunate, both in its offhand consideration of the transfer authorization's potential as fair compensation and in its decision to invalidate the TDR program by summary judgment. In neither regard does its handling of the case respect the constraints attaching to what was really a constitutional attack on a TDR program as applied. This is not neces-

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201. *Id.* at 202-03, 352 N.Y.S.2d at 766.
202. *Id.* at 201, 352 N.Y.S.2d at 764.
203. *Id.* at 201, 352 N.Y.S.2d at 765.
The court erred in its assumption that the TDR program limits transfers only to transferee sites that the transferor owns. In fact, the rights are transferable to sites of non-transferors as well, thereby vastly enlarging their market. *See* New York, N.Y., Zoning Resolution art. IX §§ 99-00 *et seq.* (1973). Also prejudicial in the program's analysis was the court's implication that the developer's prospects for financial success at the Tudor Parks' site is all but guaranteed, while development elsewhere would be a high risk venture. As the unhappy outcome of the Old Stock Exchange controversy, *see* text accompanying notes 251-52, warns, however, prospects for success in either case are hardly assured. Relevant to this point is Ada Louise Huxtable's tongue-in-cheek suggestion that, in view of the collapse of New York City's office space market in the early 70's, the owner of the Grand Central Terminal should perhaps compensate the City of New York for rescuing it from the financial debacle that almost certainly would have occurred had it not been blocked by the city from going ahead with plans for the construction of a second Pan American-type office building atop that landmark structure. *See*, Huxtable, *Why Did We Lose Grand Central as a Landmark?*, N.Y. Times, Feb. 2, 1975, § 2 (Arts & Leisure), at 26, col. 1. The litigation arising from the city's attempt to prevent this construction is discussed in notes 210, 229 *infra*.

sarily to claim that the result should go the other way if premised on a thorough consideration of *Tudor Parks'* facts, but rather to underscore that, by failing to make proper inquiry, the court reached its conclusion in an informational vacuum.

Paradoxically, the ingredients that might have led to a denial of the summary judgment motion and a trial on the compensation question are present in the trial court's reasoning. To its credit, the court rejected the plaintiffs' premise that the police and eminent domain powers are correlatives.[204] By dismissing their inverse condemnation claim out of hand, it recognized that a regulatory measure exceeding the police power's ambit is not *ipso facto* an exercise of the eminent domain power. Further, it affirmed the Reasonable Beneficial Use standard as the determinant of when a regulatory measure requires compensation.[205] In remarking on the developer's earlier self-initiated request for a transfer authorization,[206] moreover, the court surely was aware that, even from the developer's viewpoint, the TDR solution contains enough promise of recompense to be taken seriously. Again, it appears to have had a glimmering of the propriety of intermediate compensatory formats because it spoke of a "modicum of compensation"[207] and of compensation that is "fair" and "reasonable."[208] Finally, it appreciated the futility of forcing the city down the eminent domain path in observing that the cost of outright public acquisition of the parks would be "extremely high."[209]

Tudor Parks is now pending before the New York Court of Appeals. As the author of the *Ramapo* and *Newport Associates* decisions, that tribunal, it can be ventured, will prove more discerning in its evaluation of these factors. Hopefully, it will not overlook the opportunity that *Tudor Parks* affords for the "re-examination of . . . judicial and legal thinking in [the compensation] area" called for by Judge Breitel in *Ramapo*.[210]

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204. *Id.* at 204-05, 352 N.Y.S.2d 767-68.
205. *Id.* at 202, 352 N.Y.S.2d 765-66.
206. *Id.* at 201, 352 N.Y.S.2d 764.
207. *Id.*
208. *Id.* at 203, 352 N.Y.S.2d 766.
209. *Id.* at 204, 352 N.Y.S.2d 767.
210. Although the discussion in text focuses on *Tudor Parks*, its ramifications for two recent New York cases invalidating landmark designations as takings are patent because the TDR option provided under the New York City landmarks program, *see* note 170 *supra*, was available to both landmark owners. *See* Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974) (J. P. Morgan Mansion) and Penn Central Trans. Co. v. City of New York, Index No. 14763/69 (Sup. Ct. N.Y. Co. 1975) (Grand Central Terminal). Of the two cases, *Lutheran Church* is the more inexplicable because the landmark owner had not made a factual showing of economic hardship, absent which the Reasonable Beneficial Use standard presumably ought to have applied to bar its taking claim. *See* Lutheran Church in America v. City of New York, *id.* at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 17 (Jasen, J., dissenting). Since the court expressly refrained from declaring the landmark ordinance facially invalid, *see id.* at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16, and yet did not have before it facts establishing the ordinance's invalidity as applied, its decision is doubly puzzling. Moreover, even if economic hardship is assumed, the court's failure to examine the TDR option's suitability as an adequate compensatory alternative hardly squares with its reasoning in *Ramapo*, *see* text accompanying notes 145-52 *supra*, a

C. *Institutional Responsibilities Under the Accommodation Power*

1. *Integration of the Police and Eminent Domain Powers: An Incomplete Model.*

A convenient point of departure for deciding who should do what under the accommodation power is to look at its closest theoretical analogue—the notion of "integrating" the police and eminent domain powers. A perennial source of contention among the commentators, this notion has precipitated a cleavage as sharp as the one dividing the police power enthusiasts and the private marketeers, whose dispute derives from roughly parallel considerations.

Opponents of integration[211]—which they tend to equate with permitting inverse condemnation actions against regulatory authorities—have put forth a catalog of by-now familiar objections: the notion's potential for unexpected and drastic liability would inhibit public planning initiatives; its reliance on monetary relief to cure "illegal" public actions rather than on injunctive relief (which merely revokes the defective regulation) is misconceived; integration would put courts in the business of allocating public resources at the behest of private claimants, instead of leaving that job to legislatures responding to general public needs; and, finally, it is pregnant with all manner of administrative complexities—the kind of property interest if any (fee or less-than-fee, permanent or temporary) that government would receive for the compensation paid, which measure of compensation to prescribe, and the legal contingencies

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point implicitly recognized by Judge Jasen in a dissenting opinion in which Chief Judge Breitel joined. *Id.* at 133 n.2, 316 N.E.2d at 313 n.2, 359 N.Y.S.2d at 18 n.2.

Penn Central, on the other hand, is a twin to *Tudor Parks* in its blithe dismissal of the TDR option. Dubiously interpreting *Lutheran Church* as holding that "landmarks designation generally constitutes a taking for which compensation is mandated," *id.* at 8, the court rejected the TDR option with the blanket assertion that it "neither provided compensation to plaintiffs nor minimized the harm suffered by plaintiffs due to the designation of the Terminal as a landmark." Penn Central Trans. Co. v. City of New York, Index No. 14763, Findings of Fact and Declarations of Law at 8 (Sup. Ct. 1975). But the option clearly does both, as the city established at trial. The issue that the court ought to have explored is a good deal more fine-grained: whether the *extent* of compensation or *degree* of minimization of harm afforded by the option (as well as by tax abatement advantages and other concessions that the city has long afforded to Penn Central and its predecessor) reduced the plaintiffs' injury to a level that comports with the Reasonable Beneficial Use standard. Since the court failed to discuss the standards that it was applying—though it apparently leaned strongly toward those of eminent domain—its opinion is both elliptical and conclusory. *Penn Central*'s oracular posture, together with its extreme reading of the admittedly confusing *Lutheran Church* decision, bespeaks the need for searching review and clarification in the appeal that the city has lodged.

Taken together, *Lutheran Church* and *Penn Central* cast a pall not only on the future of landmarks preservation in New York City, *see* Huxtable, *Landmarks Are in Trouble with the Law*, N.Y. Times, Dec. 22, 1974, § A at 2, col. 1, but on the entire fabric of legitimate public governance so thoughtfully woven in *Ramapo*. At their very best, these cases represent a serious retrogression from Judge Breitel's call for the sorely needed re-evaluation of outmoded doctrine that serves neither public nor private interests.

211. *See, e.g.*, Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1968 URBAN L. ANN. 1; Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974); 66 HARV. L. REV. 1134 (1953).

circumscribing government's power to repeal obsolete restrictions. Supporters[212] of integration counter with an equally familiar litany: requiring government to compensate would enhance rational public decision-making by exposing the true costs of regulation; it would protect individual liberty by safeguarding private rights from governmental over-reaching; and it would insure the integrity of comprehensive planning by preventing rather than licensing discordant private development.

How is one to choose sides if, as this writer believes, the arguments of both are equally plausible in the abstract? Intelligent choice is impossible absent a coherent conception both of what is meant by "integration" and of the quite different contexts to which it pertains. Current commentary and case law afford neither. Their persistence in mis-equating the "police power" with "regulation" retards progress on both counts. Further, while many commentators have rightly impugned the either/or posture of current thought,[213] they have not as yet offered prescriptions that dissolve the policy and doctrinal blockages of the two powers. Illustrative of unproductive judicial attitudes are the vague musings of one court about achieving fairer public governance by "overlaying the police power with the requirement of just compensation,"[214] a neat trick which is likely to be about as helpful as trying to make toast by plugging an AC toaster into a DC circuit.[215]

The debate's edge has been similarly dulled by its inattention to contexts. Two can be identified, each entailing private challenges to a regulatory program's restrictions, but differing from each other in terms of their legislative character. The first, exemplified by conventional zoning, comprehends those

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212. *See, e.g.*, R. BABCOCK, THE ZONING GAME 168-72 (1966); Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 URBAN LAW. 25 (1973); Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967); Bosselman, *The Third Alternative in Zoning Litigation*, 17 ZONING DIGEST 113 (1965).

213. *See* authorities cited in note 212 *supra*.

An especially thoughtful treatment of the inadequacies of the either/or syndrome appears in the Bosselman article cited in note 212 *supra*. Although Mr. Bosselman's views on the compensation question appear to have changed substantially in recent years, *see* TAKING, *supra* note 5, his 1965 proposal for a "third alternative" to the traditional police and eminent domain power responses to that question is, in my judgment, a fresh contribution to land use thought. Despite fundamental differences between the approaches advocated in that and the present article—Mr. Bosselman, for example, does not call for an independent third power as do I—Mr. Bosselman's thesis has significantly influenced the viewpoint expressed in this article, and my debt to him is substantial. It has also influenced the ALI Model Land Development Code, of which Mr. Bosselman is Associate Reporter, with respect to Code provisions authorizing courts to key eminent domain compensation awards to what is an analogue to the Reasonable Beneficial Use standard, *see* Code § 5-303(5), and to grant local governments the option of curing confiscatory land use measures through compensation. *Id.* at § 9-112(3).

214. HFH, Ltd. v. Superior Court, 116 Cal. Rptr. 436, 441 (2d Dist. App. Ct. 1974); *cf.* Brown v. Tahoe Regional Planning Agency, 385 F. Supp. 1128 (D. Nev. 1973).

215. The oversimplification that the police and eminent domain powers can somehow be merged or superimposed on one another without undergoing a fundamental transformation in kind also appears in judicial reasoning approving programs in which zoning is predicated on the eminent domain power. *See* note 130 *supra*. *See generally* text accompanying notes 52-67.

restrictions adopted by legislatures in the good faith belief that they comport with the police power.[216] The second, illustrated by the kinds of resource protection[217] and growth management[218] initiatives considered earlier, covers borderline restrictions. Because they are recognized as such by the legislature, it buttresses them with a compensatory supplement, such as the network of economic trade-offs in *Ramapo* or TDR in *Tudor Parks*. The legislature may direct the administering authority to extend the compensatory supplement automatically, as in these examples, or it may provide that compensation be afforded only if a court rules that, without it, the restriction would be invalid.[219] Under the first alternative, the court reviews the proffered compensation's compatibility with the fair compensation standard; under the latter, it decides the threshold question whether or not the restriction passes muster under the police power. In neither case may it enjoin enforcement of the restriction, however. Instead, it must provisionally grant appropriate compensatory relief, staying its order for a reasonable period to allow the administering agency to elect between compensating or, if necessary resources are lacking, liberalizing the offending restriction in accordance with the Reasonable Beneficial Use standard.[220]

Restrictions in this second context can be reviewed in alternative ways. In one, the courts alone can pass on whether the challenged restriction is constitutional as applied, and can fix fair compensation if the program of which it is a part affords an insufficient compensatory supplement or none at all.[221] In the second, these responsibilities devolve initially upon an administrative agency whose determinations on both counts are expressly made subject to judicial review.[222]

By introducing the accommodation power and distinguishing between the two frameworks, the terms of the debate about integration are sufficiently clarified, I believe, to weigh properly the various arguments advanced for and against a more systematic compensation practice. Offered here is a compromise position: private litigants should not be permitted to compel government to compensate for overbroad regulatory measures; but, to deal fairly with landowners and to enhance the prospect for effective regulation, government should resort to the accommodation power whenever it recognizes beforehand that restrictions it imposes may not be defensible under the police power.

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216. For a treatment of alternative remedies that are appropriate in this framework, *see* text accompanying notes 49-51 and note 167 *supra*.

217. *See* text accompanying notes 168-73 *supra*.

218. *See* text accompanying notes 145-53 *supra*.

219. *See* PUERTO RICO PLAN, *supra* note 13; *cf.* text accompanying notes 233-51 *infra*, discussing Massachusetts statutes imposing height limitations adjacent to the state capitol building and providing public access to the state's beaches.

220. An analogous judicial role is prescribed in Code § 9-112(3).

221. *Cf.* the Massachusetts statutes discussed in text accompanying notes 233-50 *infra*.

222. *See* PUERTO RICO PLAN, *supra* note 13, at 9-16.

None of the objections to a systematic compensation practice is persuasive against this resolution. Under it, compensation costs will be neither unexpected nor drastic. For one thing, the legislature will have the chance to anticipate them in formulating the regulations, while courts will not be able to award them on their own authority. Second, compensation can take the form of dollar or non-dollar awards keyed to the Reasonable Beneficial Use standard, rather than dollars only, keyed to the Highest and Best Use standard. Finally, if the administering authority lacks the resources, or power, to compensate, it can still implement its program by easing a defective restriction, much as local governments grant variances under conventional zoning. With such flexibility, any apprehension that public planning initiatives will be inhibited seems misplaced. The argument which favors injunctive over compensatory relief for illegal public action also loses force when a range of curatives for the possible illegality are built into the very program under which the action is taken. Similarly academic is the issue of who, as between legislatures and courts, should be the allocator of public resources. The legislature's adoption of programs under the accommodation power signals its decision that, if available, compensation be afforded where necessary. And since courts may not compel compensatory relief in either context, the decision to compensate always remains with the legislature or administering agency.

Nor is the potential complexity of administering accommodation power-based programs fatal to their adoption.[223] Against this complexity must be weighed fairness and government's capacity to manage land use. If complexity outweighs fairness, then by the same reasoning, the Fifth Amendment should be excised from the federal Constitution because the administrative burdens of eminent domain far surpass those of the accommodation power. As to the programs' technical demands, confidence in government appears warranted in view of the favorable results recorded in recent years under a variety of innovative land use techniques[224] which rival accommodation power-based programs in complexity. Experience with these innovations, moreover, suggests that legislatures will enact accommodation power-based programs on a selective, tightly circumscribed basis, and can thus progressively refine their treatment of technical issues.

Last to be evaluated is the prediction that a systematic compensation

223. The most detailed catalog of the legal and administrative conundrums associated with the integration notion is found in Beuscher, *supra* note 211. Extensive consideration and rebuttal of Professor Beuscher's specific objections are beyond the scope of this article. For a comprehensive analysis of these objections, concluding that they are not insuperable in the context of the second framework identified in text, *see* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 589-602, 611-20 (1972); PUERTO RICO PLAN, *supra* note 13, at 9-26.

224. *See generally* J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE 28-42 (1974); THE NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES (N. Marcus and M. Groves eds. 1970); Elliott & Marcus, *From Euclid to Ramapo: New Directions in Land Use Controls*, 1 HOFSTRA L. REV. 56 (1973).

practice will unleash a firestorm of litigation. It is difficult to gauge whether accommodation power-based programs will generate more litigation than arises currently from the practice of pushing the police power to its outer limits and beyond. Experience in England[225] and, on a more limited basis, at home[226] shows that surprisingly few claims tend to be prosecuted when compensation is afforded as a curative for overbroad regulatory measures. Litigation can also be restrained, should a particular program nonetheless trigger a large number of claims, by the use of administrative agencies to screen and, in many instances, to dispose of these claims. Even a material increase in litigation, however, would seem an acceptable price to pay for the concomitant advantage of strengthening the legal, political and ethical foundations of public governance.

The proposed resolution is also sensitive to the concerns of the advocates of the integration notion although it does stop short of endorsing their insistence upon inverse condemnation as the tool to control excesses under the police power. Enactment of regulatory programs within the accommodation power framework assumes that the legislature has assessed their probable costs and has made the policy judgment that, as a matter of fairness, the public sector should either bear these costs or reduce them to a constitutionally tolerable level by the variance route. Incursions on individual liberty will certainly occur less frequently than under current practice. Further, the comprehensive plan will be less vulnerable to hole-poking: this outcome will be avoided altogether when compensation is afforded, and it will be held within narrower bonds when, lacking compensatory resources, government instead permits incremental density increases.

Left unremedied by my proposed resolution are the private losses incurred between passage of a defective measure and a decision by the regulatory authority to forego the compensatory option. The decision to leave these losses with the landowner is not reached lightly. Time truly is money for the real

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225. *See* TAKING, *supra* note 5, 276, 279-83.

226. Empirical data on this question is scant because of the limited compensation practice in the United States. Two possibly useful indicators of the probability of a minimal claims response can be cited, however. First, the Massachusetts Coastal Wetlands Act of 1965, 130 MASS. GEN. LAWS ANN. § 105 (Supp. 1971), authorizes local governments to impose "coastal protective orders," which effectively prohibit any substantial development activity in the area protected. Should a reviewing court agree with a private challenge that a given order is confiscatory, it may grant the local government an option to cure the order through compensation. In a study of experience under the act, Fred Bosselman and David Callies reported that while over "two thirds of [the state's] coastal wetlands [are] covered by protective orders . . . actual negotiations have been required with only about 100 owners and . . . only one objection will come to trial in the courts;" F. BOSSELMAN and D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 225 (1971). Second, while municipal landmark ordinances typically provide for a real estate tax reduction for designated landmark properties, a survey of 12 American cities conducted by the writer in 1970 indicated that such reductions had been afforded in only one city and were seldom requested by landmark owners. *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 578 n.18 (1972).

estate community,[227] and more than one regulatory authority has forced a developer into bankruptcy by playing a waiting game in which it holds the trump card. But, while courts should deal sternly with bad faith or palpably unreasonable exercises of the police power,[228] they should not otherwise compel government to compensate for a "temporary taking."[229] Here, those favoring leeway for government to discharge its planning responsibilities have the better of the argument, in my judgment. But the question of how to treat these losses is a close one, the most troublesome policy issue posed by the discussion in this subsection.

2. *The Accommodation Power: A Blueprint for Institutional Teamwork.*

a. *The Legislatures.* Primary responsibility for nurturing the accommodation power must rest with the legislature. Cognizant that desirable land use programs can cast undue losses on some landowners, the legislature should backstop what is currently regarded as the police power dimension of these programs with a compensatory supplement predicated on the accommodation power and fair compensation.

In addition to their status as program formulators, legislatures will have other leadership functions. If local governments are to implement the program, they will need some legal foundation to do so, such as an enabling act adopted by the state legislature. Of the three departments of government, moreover, the legislature is best fitted to define those community values which should be protected through land use regimes, to assess the likely regulatory and fiscal impacts of those regimes, and to devise appropriate compensatory formats when necessary. In addressing these issues, of course, they will also fix standards that determine which private expectancies are "property," in the sense

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227. For a breakdown of the dollar costs that developers in Puerto Rico incur as a result of delays in receiving development approvals from the Puerto Rico Planning Board, *see* PUERTO RICO PLAN, *supra* note 13, at 46-47.

228. *Cf.* Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).

229. An example of the staggering liabilities that the government might incur appears in the saga of Grand Central Terminal, which was designated as a New York City landmark in 1967. The predecessor to the Penn Central Corporation, the site's present owner, had entered into a groundlease with a developer which anticipated construction of a second Pan American-type office building over the landmark and called for annual lease payments in the order of $2.2 million. But construction was barred by the New York City Landmarks Commission because of the Terminal's landmark status. In 1975 a New York trial court declared the designation a taking. *See* note 210 *supra*. Assuming that damages for a temporary taking between 1967 and 1975 were calculated on the basis of the groundlease's income stream, they could run upwards of $15 million. *See generally* Huxtable, *Why Did We Lose Grand Central as a Landmark?*, N.Y. Times, Feb. 2, 1975, § 2 (Arts & Leisure) at 26, col. 1. For the view that compensation for a temporary taking ought to be payable in such instances, *see* Comment, *Landmark Preservation Laws: Compensation for a Temporary Taking*, 35 U. CHI. L. REV. 362 (1968); *cf.* Lomarch Corp. v. City of Englewood, 51 N.J. 108, 237 A.2d 881 (1968).

that their invasion requires compensation at all. This last determination will also afford the kind of guidance so long neglected and sorely needed for the rational development of police and eminent domain doctrine generally.

b. *Administering and Administrative Agencies.* While some accommodation power-based programs will be directly implemented by state or regional entities, many will fall within the province of local governments. To the extent that these local bodies prosecute such programs under general enabling acts, they can be regarded as legislatures in the sense used here. City councils and county boards of supervisors can be expected to delegate the programs' actual administration to the entity referred to in the American Law Institute Model Land Development Code as the "local land development agency."[230] This umbrella term includes existing plan commissions, urban renewal authorities, landmark commissions, and the like. Because it will be the job of that agency to implement legislative mandates in light of the circumstances in the pertinent jurisdiction, it must be staffed with individuals knowledgeable in the legal, planning and land economics-appraisal fields, and it must receive forceful political backing.

Administrative agencies may also serve as claims commissions. State and regional agencies are more likely to carry out this function because their administrative staffs, resources and broader planning concerns permit a more sophisticated and systematic treatment of private claims than would be feasible for many local governments. While it might be inappropriate to vest both program administration and claims adjudication functions in the same agency, the separate agencies charged with these respective tasks should routinely touch base with one another to coordinate the pertinent program's regulatory and fiscal aspects.

c. *The Courts.* And then there are the courts. Their role in the compensation quandary has been so troubled that influential commentators have urged that it be sharply de-emphasized, if not eliminated altogether.[231] While active legislative involvement of the type described above should diminish the courts' role considerably, it will not and, in my judgment, should not, reduce them to bit players. The federal and state constitutions, after all, install the courts as the ultimate arbiters of the compensation question, a mainstay in contemporary land use litigation. As *Ramapo* and *Tudor Parks* confirm, it is inevitable that accommodation power-based programs will come before the courts, especially in the early years of that power's doctrinal elaboration. The assessment of the judiciary's role found in the earlier discussion of those cases[232] will not be repeated here. Instead, this section closes with a critique

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230. *See* CODE *supra* note 167, §§ 2-301 to -312.
231. *See* authorities cited note 121 *supra*.
232. *See* text accompanying notes 145-67, 195-210 *supra*.

of three Massachusetts decisions—two vintage[233] and one modern[234]—which, in negating the judicial-legislative teamwork required for the conduct of these programs, threaten to strangle the accommodation power in its crib.

The sequence commences innocently enough with *Attorney General v. Williams*,[235] in which the court sustained an 1898 statute that imposed height limits on the buildings around Boston's Copley Square and provided eminent domain relief for the burdened landowners. Sustaining the measure against a public use objection, the court also volunteered that "it would be hard to say that the statute might not have been passed in the exercise of the police power."[236]

Emboldened by that dictum, the Massachusetts Legislature imposed similar restrictions the following year on parcels adjoining its capitol building and provided for eminent domain damages only "if and insofar as the act and proceedings to enforce it may deprive the [landowners] of rights existing under the constitution."[237] In *Parker v. Commonwealth*,[238] the State Attorney General's demurrer to the landowners' petition for eminent domain damages was sustained by the trial court. On review, the then-Chief Justice Holmes, in his opinion for the Massachusetts Supreme Judicial Court, stated that the attorney general construed the statute "as importing an exercise of the police power so far as the legislature could constitutionally go, and as saving a remedy for all damages beyond that point."[239] Without deciding whether the measure was valid under the police power, Holmes rejected this construction, reasoning that:

> while we can gather that the legislature was willing to take anything without paying for it that this court should say that it could, we do not find anything that even suggests a legislative adjudication that the public welfare requires that petitioners' property should be restricted without compensation to them.[240]

The defect in the attorney general's position, according to Holmes, was that the statute:

> gives a remedy if the act deprives the parties of rights existing under the constitution. In the absence of an adjudication by the Legislature that the public needs require the petitioners' property to be restricted without compensation, the statute does deprive the parties of such rights, and on the construction of the statute which we adopt there has been no such adjudication.[241]

233. Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899); Parker v. Commonwealth, 178 Mass. 199, 59 N.E. 634 (1901).
234. *In re* Opinion of the Justices, 313 N.E.2d 561 (1974).
235. 174 Mass. 476, 55 N.E. 77 (1899).
236. *Id.* at 478, 55 N.E. at 77.
237. Parker v. Commonwealth, 178 Mass. 199, 203, 59 N.E. 634, 634 (1901) (as paraphrased by Holmes, C. J.).
238. *Id.*
239. *Id.* at 204, 59 N.E. at 635.
240. *Id.* at 204-05, 59 N.E. at 635.
241. *Id.* at 205, 59 N.E. at 635.

Accordingly, he remanded the action so that damages could be assessed and awarded to the landowners.

The *Parker* result turned on statutory construction rather than on constitutional grounds. Seventy-five years later in *In Re Opinion of the Justices*,[242] however, the Massachusetts Supreme Judicial Court hinted that such a measure, inviting the court to determine whether or not there was a taking and to fix appropriate eminent domain damages if there were, might run afoul of the separation of powers doctrine. At issue in that advisory opinion was the constitutionality of a clumsily drafted bill[243] intended to provide public access to the stretch of state coastline between the mean high water and extreme low water line. Because a colonial legislature in 1649 had granted title to this zone to littoral owners subject to a general reservation of public rights, the Massachusetts Legislature was uncertain of the measure's status under the police power. Wishing to insure public access even if it had to compensate, the legislature authorized record owners of littoral property to test the question under the state's condemnation statute and to be awarded compensation should the court determine that the public rights reserved under the 1649 act did not include beach access. Invalidating the 1974 measure on a variety of grounds not pertinent here, the court also warned that the legislature's forward pass to the judiciary "raise[s] serious constitutional questions"[244] with respect to the separation of powers doctrine.

A critique of *Parker* and *In Re Opinion of the Justices* might best commence with the latter's hint that the legislative-judicial teamwork envisaged under accommodation power-based programs encroaches on the separation of powers doctrine. In addition to those fundamental differences which allow the beach access bill to be readily distinguished from the accommodation power variants portrayed earlier,[245] the opinion affords on other grounds a poorly reasoned basis for vetoing this teamwork. As the court viewed it, the bill "attempts to transfer from the Legislature to the courts . . . the decision whether or not to compensate, that is, whether or not to exercise the power of eminent domain."[246] Were this truly so, there would indeed be cause both for constitutional concern and for doubts about a policy of allowing courts rather than legislatures to allocate public resources. But the beach access bill and, even more certainly, the accommodation power variants envisage noth-

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242. 313 N.E.2d 561 (1974).

243. An Act Authorizing Public Right-of-Passage Along Certain Coastlines of the Commonwealth, House No. 481, reproduced in *id.* at 563-64.

244. 313 N.E.2d 561, 569 (1974).

245. The key difference is that the Massachusetts bill was facially unconstitutional, *see id.* at 568, while accommodation power-based measures, such as the Tudor Parks TDR program, if unconstitutional at all, will be so only in their application to specific properties. *See* text accompanying notes 186–94 *supra*. As a result of poor draftsmanship, moreover, the Massachusetts bill was defective on a number of procedural due process grounds, *see In re* Opinion of the Justices, 313 N.E.2d 561, 569-71 (1974).

246. *In re* Opinion of the Justices, 313 N.E.2d 561, 569 (1974).

ing of the sort. In both instances, the legislature itself has already made the decision to award compensation if necessary to reach the desired regulatory result. Recognizing that compensation may not be required in borderline cases —witness the dictum in *Attorney General v. Williams*[247]—and being properly chary of the needless expenditure of scarce public resources, the legislature has simply chosen to await a judicial determination of the measure's adequacy before committing these resources. Under these circumstances, the court is no more a party to violation of the separation of powers doctrine than it is in any run-of-the-mill eminent domain case.

In short, if it is no violation of that doctrine for a court to adjudicate these two issues in separate proceedings, why is it violated if a court determines them in consolidated proceedings under circumstances in which the legislature has already agreed that compensation be paid if necessary?

Taken at face value, moreover, the court's reasoning would directly impugn the constitutionality of inverse condemnation proceedings. These proceedings address the same issues--whether the challenged public action is sustainable under the police power and, if not, what compensation is due the private challenger—without being tagged illegal. Yet, under the court's rationale, they are even more objectionable because they take place in a setting where the legislature not only has given no prior indication of its willingness to compensate but has instead indicated precisely the opposite.

If constitutional objections to legislative-judicial teamwork are spurious, does the team work do violence to the judiciary's status in any other credible respect? I think not. Holmes' opinion in *Parker* is elliptical in this regard, resting instead on a narrow question of statutory interpretation. Yet even on that level, the opinion dissembles. First, he construes the 1899 statute not to be a "legislative adjudication that the public welfare requires that the [landowners' property] should be restricted without compensation to them,"[248] and then he concedes that, under the statute, "the legislature is willing to take anything without paying for it that the courts should say that it could."[249] Though made conditional on the outcome of subsequent judicial review, it is evident that the legislature did "adjudicate" that compensation be paid—unless Holmes would have us believe that all conditional propositions are ambiguous.

Although the reason for Holmes' strained construction must remain a matter of speculation, the suggestion is plausible that, because Holmes and the courts generally were imbued with the laissez-faire attitude of their times,[250] they were unlikely to be sympathetic to innovations like the 1899 statute. Also, they were likely to be reluctant, in any event, to become em-

247. *See* note 236 and accompanying text *supra*.
248. Parker v. Commonwealth, 178 Mass. 199, 205, 59 N.E. 634, 635 (1901).
249. *Id.* at 204-05, 59 N.E. 634, 634-35 (1901).
250. *See* authority cited in note 48 *supra*.

broiled in the type of fine-tuning that the legislature requested, when it offered the court only a passing reference to "constitutional rights" to guide it in resolving the taking question. Today, if not then, that reluctance is misconceived. Private rights are no longer accorded great deference when they conflict with sound public goals. And, while both the complexity of the required fine-tuning and the legislative default in aiding the courts continue, a judicial retort of "After you, Alphonse" will only serve to perpetuate confused taking doctrine and, in the process, to condone unfair land use measures. Whether they like it or not, courts are and will continue to be faced with a plethora of actions challenging regulatory measures on confiscation grounds. It would serve their interests, as well as those of regulatory authorities and the private sector, to encourage legislative initiatives, such as accommodation power-based programs, that afford a fair, rational and systematic judgmental framework for dealing with the compensation question.

Conclusion

The Old Stock Exchange Building, a fragile business palace marrying grace with utility, stood proudly in the heart of Chicago's Loop in 1971. Conceived by Louis Sullivan and Dankmar Adler, the Exchange won national and international acclaim as a gem of the Chicago School of Architecture, which, at the turn of the century, created the foundations for modern architectural design and engineering. Though fully rented and a profitable office building in 1968, the Exchange was chastised in 1971 by its new owners, a development syndicate, as economically unviable. The developers then gave substance to their charge by refusing to renew the leases of the building's tenants. Spurred on by the easy availability of mortgage financing and the rash of construction that was then adding five million square feet of office space annually to Chicago's total inventory of 60-million square feet, they had little use for the 13-story Exchange when Chicago's zoning permitted upwards of a 40-story building on the site. Despite the eleventh-hour efforts of the press, citizens groups and others to bring the Exchange under the limited protection of the city's preservation ordinance, the city council refused to go along—lest the Exchange, in the words of one Daley alderman, become known as "Chicago's White Elephant."[251] The building was torn down in 1972, a casualty of market forces.

But the story does not end there. Shortly after completion of the Exchange's pedestrian, 43-story replacement in 1975, the developers sought a court-sanctioned financial reorganization because the new building, they said,

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251. *See* Committee on Cultural and Economic Development of the Chicago City Council, Special Report Relative to Designation of the Old Stock Exchange Building at 6, 1970.

was "economically unviable."[252] Like many other developers in Chicago and other American cities during the late 60's and early 70's, they had badly misread the market, and had failed to see that it would soon be glutted by the construction orgy then going on; as a result, two-thirds of their new building was left untenanted.

The terrible irony of this tale recurs again and again, not only for landmark buildings, but for other man-made and natural amenities. To this observer, the near-bankruptcy of the Exchange's developers is dwarfed by the larger social bankruptcy that market fatalism portends. But tragic as the loss of the Exchange and other amenities surely are, they do not warrant the emasculation of constitutional constraints against governmental overreaching either, in my judgment. These losses, instead, proclaim two clear messages. First is our urgent need for a fresh look at current property conceptions, whose inertness all but guarantees mindless repetition of the Stock Exchange debacle. Second is the need to preclude future debacles by transforming our legal and institutional arrangements so they can accommodate the tensions between the dictates of fairness and of effective public governance.

These tensions, gratuitously inflamed by the current police power/eminent domain deadlock, are the subject of this article. The necessity for recognition of the accommodation power and fair compensation is its thesis. Prevention of the irony recounted in the Old Stock Exchange tale is its goal. Bonding these elements together is the underlying conviction--and a greater irony still--that government has at hand the means for resolving these tensions but, immobilized by doctrinal rigidities, doesn't seem to know it.

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252. *See* Warden, *Trouble Plagues New Loop Building*, Chicago Daily News, Jan. 23, 1975 at 1, col. 1.

III

A REPLY . . .

CURTIS J. BERGER

A REPLY . . .

CURTIS J. BERGER*

Recently in these pages Professor John Costonis fashioned a remarkable article that he called *"Fair" Compensation and the Accommodation Power*, subtitled *Antidotes for the Taking Impasse in Land Use Controversies*.[1] It was an article not lacking in nerve, for it contained an assault against the most stubborn of all property issues: how does one mark the outer bounds of the regulatory power beyond which government must compensate landowners for their losses? Professor Ernest Freund worried about it at the turn of the century.[2] Justice Holmes tried to reduce it to an aphorism.[3] In our time, legal scholars of the importance of Dunham,[4] Michelman,[5] Sax,[6] and Van Alstyne[7] all have pitted their intellects against it. The issue goes beyond the academy, however, and today more so than ever. Even as government seeks to lengthen its control over land development, it is less able to afford (i.e., to compensate for) stringent land use controls. This has led to a growing legislative response: impose the controls and trust that some court's expansive reading of the police power will force private owners to absorb their own losses.

Costonis argues that the "taking impasse" continues because we are asking the wrong question. What we pose as a two-legged choice, between regulation and compensation, creates a dilemma that neither the constitution nor politics requires. By treating the police power and the eminent domain power as correlatives, so that an abuse of police power forces us either to abandon the control or pay just compensation, we spring the trap Justice Holmes set for us when he wrote in *Pennsylvania Coal Co.* v.

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1. 75 COLUM. L. REV. 1021 (1975).

2. [I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.

E. FREUND, THE POLICE POWER 546-47 (1904).

3. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

4. Dunham, *A Legal and Economic Base for City Planning*, 58 COLUM. L. REV. 650 (1958).

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

6. Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971). In this article, Professor Sax abandoned his earlier approach to the taking issue. *See* Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964).

7. Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

Mahon: " . . . if regulation goes too far it will be recognized as a taking."[8] Given this alternative, either we stretch notions of police power to avoid compensation or cut back on government control. The first choice results, too often, in our treating landowners unfairly. The second choice makes it increasingly difficult to manage our land resources effectively.

Costonis believes that we have a middle way, that the police and the eminent domain powers cover only the ends of the spectrum, and that lying between them is a third force, which he labels the Accommodation Power. This power would be triggered whenever a public control denied any landowner what Costonis calls the "Reasonable Beneficial Use" of his property. Should that occur, the measure need not be nullified, nor must the community—if it still wishes to curb development—acquire the land and pay "just compensation." Instead, the government could invoke its accommodation power, which provides a further range of options. These might include: (1) a variance that would allow owner a reasonable beneficial use; (2) a payment in dollars for the difference between the land's reasonable beneficial use and controlled values (Costonis calls this "fair compensation"—often a less expensive alternative than eminent domain's "just compensation"); (3) a fair compensation payment in non-dollar equivalents, such as tax benefits or the issuance of transferable development rights.

To illustrate how the accommodation power would work, Costonis cites the troubling result in *Just* v. *Marinette County*,[9] which upheld the county's "Shorelands Conservancy District" law as within the police power, despite Just's inability to improve his lakeside site, even for his own use. This case could not have been easy for the Wisconsin court. Undeniably, drastic controls alone would protect the state's wetlands against ecological ravage; yet the state could hardly afford to pay every landowner what the market might pay for the site's full development potential. Under the conventional learning, the court could either nullify the law as a taking, which would leave the wetlands imperiled, or uphold the law, which would make the plaintiff's ownership virtually worthless. The court went with the law, but the barrenness of the court's opinion underlines the basic difficulty in reasoning one's way to the result. Reduced to its essence, the opinion simply declares that "it is not an unreasonable exercise of [the police] power to prevent harm to public rights by limiting the use of private property to its natural use."[10]

Enter Costonis and his accommodation power as a means for treating Just more fairly, without bankrupting the state or despoiling the wetlands. The power assumes that every parcel emits a spectrum of land use inten-

8. 260 U.S. 393, 415 (1922).
9. 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).
10. *Id.* at 17, 201 N.W. 2d at 768.

sity, which ranges from "zero intensity" to "highest and best use unrestricted by public regulation." Located on the spectrum are several intermediate categories; of these "reasonable beneficial use" and "allowable use" form the crucial counterpoint. "Allowable use," Costonis defines, as that level of permitted development which is ordinarily more than adequate to overcome a confiscation claim; it is that level at which most private land in America is presently zoned; in eminent domain terms, it would correspond to the "highest and best use" which measures *just* compensation. By contrast, "reasonable beneficial use" denotes a less intensive development potential; it offers the landowner only enough economic return to avoid "confiscation"; it fixes a value that would correspond to *fair* compensation if the landowner were to get redress under the accommodation power.

Having established this spectrum of values, Costonis would then oblige the state to invoke its accommodation power whenever land use controls deprived the owner of reasonable beneficial use. Costonis asserts that this would entirely alter the framework for analyzing the issues in the *Just* case. In attacking the measure, Just must show that he has lost the reasonable beneficial use of his land (assumed value: $200,000). Even if Just makes this showing, however, the measure may still survive. The state can now enlist its accommodation power. This might permit the state to choose, for example, whether to grant Just a variance, so as to raise his land value to $200,000, to pay him the difference between $200,000 and the parcel's lesser value as restricted, or to award him that differential in kind—such as the right to develop some other land under his ownership more intensively than the zoning law would otherwise allow. If the state refuses to make any satisfactory accommodation, however, the measure falls. But the accommodation power, Costonis argues, offers our legal system an escape from the winner-take-all trap into which it has fallen. It will subject all regulation to the "fairness discipline," a phrase he borrows from Michelman.[11] It will recognize private expectancies in property without disabling government from saving our endangered land resources. It might, if Costonis is correct, even silence the academic debate which might otherwise continue relentlessly.

This theme of accommodation power has not emerged full-blown from Costonis' fertile pen. Those of us who have followed his scholarship since the early 1970s see it as a chain reaction, in which accommodation power is the latest, but hardly the ultimate stage.[12] Demolition of Chicago's Old Stock Exchange Building, which Costonis and many others vainly tried to

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11. *See* Michelman, *supra* note 5, at 1246.

12. *See, e.g.*, Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75 (1973) [hereinafter cited as *An Exploratory Essay*]; J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE (1974) [hereinafter cited as SPACE ADRIFT].

prevent, was the original catalyst. If that building could not survive, despite its profitability, its architectural renown, and the earnest efforts of influential laymen and politicians, few landmarks in private hands could look hopefully to the future. Costonis proposed what is now widely known as the "Chicago Plan"—which became the centerpiece of his book, *Space Adrift*.[13] Key to the Chicago Plan is a concept of development rights transfer (TDR), not original with Costonis, but raised by him to a much higher level of sophistication.

As Costonis worked with TDR, his vision expanded. He saw the analogue between endangered urban landmarks and similarly threatened environmental preserves.[14] Neither were economically self-sustaining if man could freely exploit their development potential. Ecologically sensitive shorelands, watersheds, woodlands, would disappear as inevitably as the Old Stock Exchange Building, unless government could find the means, legally and financially, to curb private development. TDR, Costonis thought, could play an important role here also, and these thoughts appear in the ambitious Puerto Rico Plan,[15] which he co-authored with Robert De Voy, a real estate economist.

Before I discuss TDR and its relation to the accommodation power, let me turn first to the Chicago Plan as it appears in *Space Adrift*. The Plan assumes that urban landmarks have become an imperiled species because they are too diminutive for their locations. The importance of location lies in the fact that modern zoning laws regulate not only use but also bulk, especially in commercial and apartment districts. Bulk, usually expressed in terms of floor-area ratio (FAR), fixes a relationship between the size of the parcel and the maximum floor space within any structure that is built upon the site. Thus a FAR of 10, which is a medium density ratio, would allow the owner of a 20,000 square foot parcel to construct a structure containing 200,000 square feet of space. Disregarding any set-back or similar restrictions, the builder might erect a conforming 20-story tower averaging 10,000 square feet of space per floor, a 25-story tower at 8,000 square feet per floor, etc. Needless to say, the greater the allowable FAR—all else unchanged—the more valuable the site.

The evenhandedness of zoning, which treats all parcels uniformly within a district, results in the landmark parcel bearing the same FAR as its undistinguished neighbor. Consequently, the parcel's underlying value—free and unencumbered—is unrelated to the distinction of the edifice above. Most landmarks built 75 or 100 years ago are simply much smaller than the structures that could replace them. Costonis cites an

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13. SPACE ADRIFT, *supra* note 12.
14. *See generally*, *An Exploratory Essay*, *supra* note 12.
15. J. COSTONIS & R. DE VOY, THE PUERTO RICO PLAN: ENVIRONMENTAL PROTECTION THROUGH DEVELOPMENT RIGHTS TRANSFER (Conservation Trust of Puerto Rico & Urban Land Institute 1975).

existing landmark—typical of many others—that contains 300,000 square feet on a site zoned for 807,000.[16] For the owner of that site, it would be far more profitable to tear down the existing structure and replace it with the much larger building than to continue the landmark's operation.

This disparity between the landmark site's intrinsic value and its sharply reduced restricted value has posed a problem for preservationists. Landmark laws, as they are now written, usually call for a process of designation, followed by regulation—and if that fails—eminent domain.[17] The landmark designated, its owners can neither alter the structure nor tear it down without official approval. But such regulation faces serious due process objections if, because of his inability to replace or alter the structure, the landowner can not earn a fair yield on his investment. To anticipate that objection, ordinances often define "fair return" and promise either to lift the restriction or purchase the property if the building—qua landmark—cannot yield sufficient income.

But if the city is forced to acquire the fee (or the unused development rights) in order to save the edifice, the laws of just compensation, which the city must satisfy in eminent domain, look to the intrinsic value of the site zoned for its allowable (i.e., maximum FAR) use. Whether the city takes the entire parcel, or only the unused development rights, it must pay a pretty penny.* For example, one landmark site alone would cost the Chicago taxpayer $5.2 million for the fee, or $3.5 million for the unused development rights.[18]

In *Space Adrift*, Costonis argues that this system of landmark preservation is neither fair nor effective. Where the designation survives attack, as it would when the landmark owner gets his statutory fair return (but no more), the financial burden of preservation falls unevenly upon the designated few; we require them to forego their unused development rights while non-landmark neighbors may gain all the FAR allowable. On the other hand, if the landmark owner can force the city either to condemn or delist, the city's inability to afford just compensation often will result in a lost landmark. Having failed, the system gets no second chance.

The Chicago Plan is intended to strengthen the preservation system by making it less reliant upon scarce public funds. Moreover, the Plan would eliminate the "subsidy" we extract from the landmark owner by giving him economic parity with other owners. Instead of watching his unused FAR lie fallow—without compensation—the landmark owner could put those rights into commerce. In one variant of the scheme, he would be able to sell his unused FAR (e.g., 200,000 square feet) to the highest bidder—for whatever price a builder would pay to put that incremental volume into a

16. *See* SPACE ADRIFT, *supra* note 12, at 69, fig. 5.
17. *See, e.g.*, N.Y.C. ADMIN. CODE ch. 8A (Supp. 1975).
18. *See* SPACE ADRIFT, *supra* note 12, at 76, table 5.

structure. Development rights would thus move from the landmark site to a transferee site elsewhere in the city. Ideally, the landmark owner should gain from this sale as much as he would receive were the city to acquire the development rights in condemnation. Unlike condemnation, however, the public treasury would not finance the private transfer. Crucial to the Chicago Plan is that development rights would survive transfer. In condemnation, the rights simply disappear.

The Plan would require the city to designate transferee districts, which might be few or many, large or small, next to or distant from the landmark sites themselves. Any property owner within a transfer zone could acquire a landmark's unused FAR, which would then permit him to exceed the FAR on his own site by an equivalent footage. Upon the sale of his development rights, the landmark owner would then grant a preservation easement to the city and also promise to maintain the structure in accordance with sound management practices. In return, the city would reduce his tax assessment appropriately.

Several other features of the Chicago Plan deserve mention. Landmark owners might compel the public to purchase their unused FAR rather than search for a private buyer. This alternative, which seems to revive the problem of inadequate municipal funding, would be financed by a newly created development rights bank which, the Plan anticipates, would eventually be self-sufficient, even profit-making. This prospect stems from the bank's own activity in marketing development rights, selling them to owners in transfer zones, and using the moneys to buy unused FAR from those landmark owners who preferred to deal with the bank rather than to sell to transferee owners directly. The bank's inventory of development rights would consist both of these forced-purchase interests and, more significantly, donated rights—coming chiefly from public agencies and nonprofit organizations.

The Chicago Plan, to date, remains only a proposal; there still lie ahead the writing and enacting of an ordinance. If legislation is to ensue, however, plan advocates must dispose both of valid criticism[19] and the normal skepticism which awaits any unusual new idea. To his credit, Costonis seeks to meet the criticism head on, and much of *Space Adrift* and his later writings constitute a defense of the Plan.

Criticism, Costonis notes, falls into three broad categories. These challenge the Plan's financial, urban design, and legal aspects. Putting their case in its most uncompromising form, the critics would say: the Plan is financially unworkable; the Plan is bad for urban design; the Plan violates

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19. *See, e.g.*, Newsom, *Critique of the Chicago Plan* in AMERICAN SOCIETY OF PLANNING OFFICIALS, TRANSFERABLE DEVELOPMENT RIGHTS (Planning Adv. Serv. Rep. No. 304) 9 (1975); Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L. J. 1101 (1975); Baker, *Development Rights Transfer and Landmarks Preservation—Providing a Sense of Orientation*, 9 URBAN L. ANN. 131, 144-56 (1975).

the constitutional and statutory rights of both landmark and other owners.

Financial criticism:

The Chicago Plan assumes, as we have seen, that the landmark site's unused development rights have value; that this value can be measured; that a private market elsewhere in the city exists for the unused rights; and that the city can step forward—without draining general revenues—to purchase the rights from landmark owners unwilling or unable to sell the rights privately.[20]

That the unused FAR has a finite value to the owner of the landmark site were he free to put a larger structure on the plot is no guarantee, however, that he has a commodity that landowners elsewhere will value comparably. Thus, financial criticism of the Chicago Plan has centered on the *saleability* of the landmark's unused development rights.[21] Costonis himself recognizes that the Plan can not rely upon a serendipitous balance between willing sellers and willing buyers. That is why the development rights bank is so germane to the scheme; the bank must act, as do the stock exchange specialist and the Federal National Mortgage Association, to maintain a market any time the balance goes awry. But I think that the problem of a market may go deeper than temporary imbalance. Very possibly, a market for development rights will not exist at all, or the call price (value to the developer) will be so far below the put price (value to the landmark owner) as to make an effective market unattainable.

In the present context, there are four factors that would shape the market for development rights: the number of landmark structures; the size and location of the transferee districts; the present zoning; and the underlying demand for new construction. Every time a "diminutive" structure joins the landmark list, the city has minted more development rights, which the market must then absorb; ironically, by curbing its appetite for landmarks, the city improves the survival prospects of those it does select. As for the transfer area, it may be a few blocks, or the entire city; the districts' size—and present state of development—can theoretically yield a market of many potential buyers, or only a few. The third factor—also within the city's control—is the overlay of zoning upon the transfer districts. For example, consider a block that allows FAR 10 but is already developed to that degree; it offers no customers for transfer rights. Nor does a block that has not reached its allowable FAR but lies in a neighborhood where the *market* cannot absorb a higher concentration.

But the ultimate zoning variable affecting the Plan's market feasibility is the zoning law's *efficiency*. Even if the transfer area can support new

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20. *See* SPACE ADRIFT, *supra* note 12, at 65-88. That the rights have a theoretical value, which appraisal techniques can readily account for, is the central argument of *Space Adrift*'s third chapter, *supra*. The layman may find this passage rough going, but one cannot fault the analytical structure.

21. *See, e.g.*, Newsom, *supra* note 19, at 9; Baker, *supra* note 19, at 153-55.

development, the Plan must fail unless builders can buy development rights more cheaply from a landmark owner than from the owner of a developable parcel within the transfer zone. Costonis understands this, of course, and concedes that the transfer rights would benefit a builder only if they let him *exceed* the zone's basic FAR. To erect the "conforming" structure, the builder can buy his rights directly from the site owner; the transfer rights do not yet have even theoretical value at the transfer site. At the superstructure level, however, transfer rights would begin to hold value only if they were the sole means for breaching the basic FAR. Such exclusivity might be possible under some existing ordinances, but in most urban centers, and especially those faced with a landmark crisis, the codes stand replete with zoning bonuses: builders may go beyond the basic FAR—sometimes well beyond it—by agreeing to provide prescribed amenities ranging from plazas and wider set-backs to shopping arcades and theatres.[22] Thus the transfer rights would be worthwhile to the builder, that is, he would be willing to pay something for them, only if they let him build *more efficiently* than do the existing bonuses. Yet the efficiency route for transfer rights collides with the zoning code's urban design goals. Bonus rights, when cities allow them, tend to lower construction efficiency, since the design changes that earn the bonus usually compress the building envelope (fewer rentable feet per floor) and force the tower skyward (construction costs rise directly with building height). To make the transfer right more valuable to the builder than the bonus right would be, the city must relax design restrictions on the transfer right—for example, having purchased such a right, the developer might simply raise his tower—or, better still, increase floor size—without providing any new amenities. As Costonis himself admits, not all cities will find this course appealing.

There may be another economic flaw in the Chicago Plan, one that we will know about only with experience. This concerns the fiscal capacity of the development rights bank to serve its market role when construction activity is in the doldrums. The Plan requires the bank to acquire—via compensation—the transfer rights of any landmark owner who chooses a sale to the bank over one in the open market. If the Chicago Plan gets underway during an up-phase in the economic cycle, the demand for transfer rights may absorb whatever rights the bank is forced to buy. But were a city to launch the plan during a recession, one could foresee sellers greatly outnumbering buyers. Would the bank then have the funds to maintain the market?

Although Costonis recognizes the problem, here, I think, his answer is weak. "[I]t is anticipated that returns from development right sales will be more than adequate to cover these costs given a reasonable market for space."[23] He continues that "certain 'start-up' costs will be encountered

22. *See* SPACE ADRIFT, *supra* note 12, at 30-32.
23. *See id.* at 105.

as the bank is established"—which would include the absence of a reasonable space market at the outset, but Costonis finds that "funds for this purpose could come from a variety of sources," such as revenue bonds, a combination of federal and state grants or loans, municipal budget allocations, private financial donations, and "most important, the early sale of donated private or public development rights."[24]

Few of us could foresee, back in 1973, the shaky state of municipal finances three years later. It now seems inconceivable, however, that we can rely either upon city borrowing or general revenues to tide the development rights bank over its formative stage. State and federal aid seem no more promising, and private donation—in the magnitude which might be needed—also appears unlikely.[25] While the bank must try for an early sale of any donated transfer rights, this avenue, too, depends upon a resurgent market.

Perhaps there is a way out of this fix. The Chicago Plan now gives the landmark owner—immediately upon designation—the right to sell his excess FAR. Thus, if the Plan were enacted tomorrow, every landmark owner, both private and non-profit, could make a run on the development rights bank. Moreover, the automatic right to sell would accompany each new designation. But one might modify the Chicago Plan so as to defer the right to sell: in the case of a for-profit owner, when he can establish that a market currently exists for more intensive development of his site; in the case of a not-for-profit owner, when it can establish that the designation has greatly impaired the ability to carry out its charter. In short, both groups of landmark owners would only be able to sell their excess FAR when it becomes apparent that the landmark designation creates an immediate, not eventual injury. To defer compensation in this way seems not to derogate from the fairness discipline of the Chicago Plan, for the owner of a diminutive landmark suffers little injury until he sacrifices the untapped development potential for his site.

Urban design criticism:

We have already exposed the urban design nerve that is rooted in the marketing need to make transfer rights more efficient than bonus rights. Other urban design criticisms that the Plan evokes appear more tractable.

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24. *Id.* at 106.

25. Perhaps a Chicago Plan would create transfer rights in publicly owned landmarks, viz., museums, state houses, memorials, etc., which could then be "donated" to the bank. So, too, as to various religious and educational structures, although their owners might find their charitable impulse caught in the bind of pressing financial need. The first group of transfer rights and, to a lesser degree, the second group as well, might supply the bank with an early inventory which—in a strong market—could provide back-up capital for buying out private, profit-oriented, landmark owners. But there is artificiality in creating transfer rights just to insure a donation. The city might as well drop the fiction and simply mint development rights which builders would be required to purchase. We would then be moving toward a system of paid-for development permits, not unlike the British short-lived (1947-1952) scheme of development charges.

Those objections are as follows: Development rights that can drift across the city and touch down anywhere within a transfer district must necessarily upset the zoning design, which assumes an optimal development within an area, and which the FAR provisions embody. Moreover, intensifying development within an area—via the purchase of transfer rights—must overburden the infrastructure supporting development. Finally, site owners within the transfer district will acquire their transfer rights at random, which will result in concentrations of hyperintensive activity that must burden unevenly and even dislocate supporting facilities.

I agree with Costonis that—stated in this form—the urban design criticism is unconvincing. I do not believe that neighborhoods have a finite, optimal FAR, except within a broad range. Rather I believe that FARs track far more closely with market dynamics than with scientific calculations about the number of building occupants the road system, or the water and sewer system, can service. In short, I doubt that zoning laws have much normative balance that the use of transfer rights would upset. Moreover, even if such balance should exist, it is reached only when a district has used all its available FAR. But few districts of any size are, in fact, fully developed; and, indeed, it would only be in areas of underdevelopment—areas presumably having excess infrastructure capacity—that site owners might find transfer rights a worthwhile asset.

The more difficult urban design problem lies in the competition between transfer rights and bonus rights. Costonis' prescription—that the developer be able to engage transfer rights "efficiently," demands a trade-off: architectural landmarks for plazas and arcades. I do not judge the trade-off ill or good, although Costonis points out—quite correctly—that much of our bonus-garnered urban design has yielded far fewer benefits than planners had hoped for. But I think it imperative, before anyone enacts a Chicago Plan, that the trade-off be made explicit, and that communities decide sensibly whether they want landmarks, or arcades, or conceivably both, and, if both, where and in what volume.

There are other approaches to the efficiency of transfer rights, but these, too, have a design impact, and may face legal challenges as well. Rather than increase the relative value of transfer vis-à-vis bonus rights, a Chicago Plan might simply rescind bonus rights and require any owner wishing to exceed the FAR both to acquire transfer rights and provide the stipulated amenities. This option presents a different order of problem, however; for transfer rights would then be far less valuable at a transfer site than at their original site. To explain this disparity: at the landmark site, the unused FAR carries no amenity obligation, resulting in greater efficiency and a premium price that transferees would be unable to pay. Thus, the abolition of existing bonus rights would undermine a plan that assumes that the landmark owner's excess FAR is as valuable to others as it would be to him—if he were able to build. To restore parity between the

value of the landmark's excess FAR on and off the site, the city might lower the basic FAR throughout the transfer district and make transfer rights the sole means for restoring the FAR's status quo ante; if the city then wished, it could gain amenities through the use of bonus rights. This Draconian step would give transfer rights their greatest market boost, but even if one could satisfy the design and legal objections, where does one find political support for so extreme a measure?

Costonis' most novel idea for undoing the urban design tangle would be to locate transfer districts—whenever possible—in transition areas, i.e., neighborhoods moving to higher densities as a result of market forces or local planning. To illustrate: a low density residential neighborhood stands at the verge of attracting apartment investors. A city might well wish to rezone the area from R-2 to R-7 to accommodate this market force. With the Chicago Plan in mind, however, rezoning might fix R-5 as a permitted use, R-7 as a conditional use. Those wishing to build beyond R-5 could do so by acquiring development rights from landmark owners.

The scheme's very novelty may finish it politically. Like the downzoning plan, it "taxes" landowners for the privilege of using their land beyond a certain density. But when the city downzones (let us say, from R-7 to R-5), this implies that R-5 has become the new norm which a developer may occasionally breach, if he pays the price, to further preservation elsewhere. By contrast, the partial upzoning scheme admits that R-5 is an artificial and R-7 the preferred density, yet only those who submit to the "tax" can realize the norm. This takes us, I believe, a step nearer to the ill-fated British system of tying all private construction to the state sale of development rights and, for the present, a step farther from political realization.

Legal criticism:

The legal problems underlying the Chicago Plan can be placed into two groups: those intrinsic to any scheme for the transfer of development rights and those resulting from steps to strengthen the marketability of such rights. In the first group the questions are: do any statutory or constitutional barriers inhibit the "compensation" of landmark owners via the transfer scheme; does the creation of transfer districts violate the "comprehensive plan"[26] requirement for the zoning ordinance; does the benefit accorded site owners who acquire transfer rights violate the "uniformity"[27] requirement for the transfer district? In the second group the questions center on the prejudice suffered by non-landmark owners whose develop-

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26. *See, e.g.*, U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 3 (1926 rev.): "Such regulations shall be made in accordance with a comprehensive plan. . . ." Most state enabling laws borrowed this and the uniformity requirements, *see* note 27 *infra*.

27. *Id.* at § 2: "All such regulations shall be uniform for each class or kind of buildings throughout each district. . ."

ment rights are made less valuable in order to make transfer rights more valuable. These questions would become extreme if the city should reduce the basic FAR within the transfer zone.

I know of no serious constitutional objection to the central principle of the Chicago Plan that a city may preserve landmarks by acquiring their owners' excess FAR and reselling the rights to private developers. Preservation as a goal of government is no longer debatable: the community may both regulate the use of landmark property and spend public moneys to further preservation.[28] Once the "public purpose" test is met, condemnation permits the taking of interests less than a fee,[29] and the taking of property interests from one private owner for resale to another.[30] For the landmark owner, the Chicago Plan avoids the "fair return" problems associated with regulation, since it provides a vehicle (the development rights bank) to compensate him *fully* for the preservation burden.

The statutory objections to the Chicago Plan are less trivial. At the very least most communities lack enabling power to carry on preservation via the purchase and resale of development rights.[31] Any enabling grant must also be broad enough to include creation and funding of the development rights bank. With respect to the zoning law, however, the city should be able to deal with any objections rooted in "uniformity" and the "comprehensive plan." The latter requirement speaks to the ordinance's planning input; an ordinance must flow from a plan that has content and rationale.[32] The intelligence needed to select transfer districts, to place limits on the use of transfer rights, to establish procedures to monitor the plan's impact on both the preservation of landmarks and development within transfer areas, would seem to assure the critical input that the comprehensive planning requirement demands. Uniformity requires only that no owner within a zone be subject to restrictions more burdensome than his neighbors';[33] it does not bar procedures that would allow one owner to gain a special benefit, so long as all other owners within the district have the same opportunity. Thus, zoning devices such as exceptions, planned-unit developments, and bonus rights themselves, all satisfy the uniformity requirement.

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28. *See, e.g.*, Manhattan Club v. Landmarks Preservation Comm'n., 51 Misc. 2d 556, 273 N.Y.S. 2d 848 (Sup. Ct. 1966) (N.Y.C. regulation upheld); Maher v. City of New Orleans, 371 F. Supp. 653 (E.D. La. 1974) (Vieux Carré regulation upheld); *cf.* Berman v. Parker, 348 U.S. 26, 33 (1954) (urban renewal upheld): "It is within the power of the legislature to determine that the community should be beautiful as well as healthy. . . ."

29. *See, e.g.*, Kamrowski v. State, 31 Wis.2d 256, 142 N.W.2d 793 (1966) (acquisition of "scenic easements").

30. *See, e.g.*, Taft Hotel Corp. v. Housing and Home Finance Agency, 262 F.2d 307 (2d Cir. 1958), *cert. denied* 359 U.S. 967 (1959).

31. Illinois may be the only state whose (amended) preservation enabling law would empower local governments to adopt the Chicago Plan. ILL. REV. STAT. ch. 24, § 11-48.2-1A (1972). *See* SPACE ADRIFT, *supra* note 12, at 182.

32. *Cf., e.g.*, Udell v. Haas, 21 N.Y.2d 463, 469-71, 235 N.E.2d 897, 900-01, 288 N.Y.S. 2d 888, 893-95 (1968).

33. *See* SPACE ADRIFT, *supra* note 12, at 158-59.

More serious, however, are the legal objections to steps needed to enhance the marketability of transfer rights. Costonis' most radical suggestion, a lowering of the basic FAR throughout the transfer zone, is legally the most problematic. If this idea can survive legal attack, a fortiori his milder schemes should also prevail. To the site owner within a transfer zone who sees his FAR drop from 15 to 12, for example, this loss of potential may seem alarming. Yet even if the site value should fall a full 20 percent, matching the loss of FAR, this effect does not seem facially unconstitutional.[34] We are too far along in the zoning game to treat as "confiscatory" an economic injury of that magnitude. Costonis makes this point and the authorities support him. Moreover, since we are dealing with development values (and not ongoing activity), the vested right which an unfavorable zoning change must overcome is much attenuated.[35] This is true for both the landowner who bought his property years ago and passively watched its value rise and the landowner who paid a premium price based on a higher FAR just the day before.

Yet abstract theory rarely decides concrete cases, and the doctrine which should support an area-wide reduction of FAR might not control here. What makes the outcome problematic is that a court might not accept this measure, which amounts to an "up-zoning," as substantially related to the general welfare. Upzoning analogies usually result in stepped-up acreage requirements for single home development or in district changes from commercial to residential. Courts will uphold such moves, despite the hardship to some landowners, when shown that the *community* benefit outweighs individual privation. Per contra, when courts believe that one group of landowners (not the community generally) is to benefit from the "sacrifice" borne by others (i.e., a particularized versus a generalized benefit), the zoning change is likely to fail.[36] Two courts viewing the same benefit, moreover, may see its incidence quite differently. As to the reduction of FAR in order to increase the marketability of unused landmark rights, one can discern both public and private benefit. While it abets the community's interest in preserving landmarks, it ultimately benefits the landmark owner by enhancing the saleability of his transfer rights. The

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34. *See, e.g.*, Euclid v. Ambler, 272 U.S. 365 (1926) (zoning upheld despite value reduction from $870,000 to $540,000); HFH, Ltd. v. Superior Court of Los Angeles County, 15 Cal.3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (Sup. Ct. 1975) (*-idem-* value reduction from $388,000 to $75,000).

35. *See, e.g.*, *id.* at 515, 542 P.2d at 242, 125 Cal. Rptr. at 370.

Plaintiffs are apparently attempting to recover profits they might have earned if they had been successful in getting their land rezoned to permit subdivision into small residential lots, but *landowners have no vested right in existing or anticipated zoning ordinances*" . . . . A purchaser of land merely acquires a right to continue a *use* instituted before the enactment of a more restrictive zoning. (*Quoting* Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967) (emphasis in original; footnote omitted)).

36. *Compare, e.g.*, Dunlap v. City of Woodstock, 405 Ill. 410, 416, 91 N.E. 2d 434, 437 (1950) ("The exercise of police power, in any form, will almost invariably reduce the value of

measure's opponents—or, at least, their lawyers—will call it a private subsidy, in which the landowners who have suffered a loss of FAR are indirectly compensating landmark owners. Forced private subsidies are not unheard of (viz. rent control subsidization of tenants by landlords), and to some extent they are inevitable in a system that permits any economic regulation, but we do not embrace them, and to a responsive court, the notion that a regulatory scheme is, in part, a veiled private subsidy, may be enough to upset the scheme. Ironically, this could be the same court that—in a different lawsuit—would uphold the basic landmark controls, despite the claim that they exact a subsidy from the landmark owner.

Thus, a FAR write-down would confront an uncertain outcome in the courts. Less drastic changes within the transfer zone, such as the rescission of bonus rights, would face a scaled-down legal peril, but anything less than a FAR write-down may deny transfer rights the market support they must have. I think it unlikely, however, to expect passage of FAR write-downs in support of a Chicago Plan. Advocates of landmark preservation simply lack the political muscle to subdue the real estate interests that would organize against a change.

In sum, the Chicago Plan faces an awful dilemma. Its economic viability depends upon the marketability of the unused landmark rights; but marketability cannot be assured (unless the City becomes the buyer of last resort—unfeasible in today's climate) without drastic FAR reductions within the transfer zones or the abandonment of many present design goals. Yet accommodation of the marketing needs of the landmark rights must ultimately weaken the political and legal support for the plan.

Costonis has himself suggested a way to unravel the dilemma in *The Accommodation Power* article. In a sense, this later work cuts much of the ground (but not all of it) from under the Chicago Plan, for it weakens the very predicate that seemed to require a Chicago-like solution to the problem of landmark preservation. *Space Adrift* resulted from the premise that the present system treats unfairly the landmark owner who cannot profit from his site's unused development rights. The philosophical mandate of the Chicago Plan is to find an avenue for that profit, so that the landmark owner can enjoy parity with his non-landmark neighbor. Yet, *The Accommodation Power* sees neither virtue nor constitutional command in parity. Each landowner must be treated fairly, but fair treatment—according to *The Accommodation Power*—does not require

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rights of some individuals. The justification for the restriction is the greater benefit which accrues to the public as a whole.") *with* Pearce v. Village of Edina, 263 Minn. 553, 118 N.W. 2d 659 (1962) (zoning invalid where it rendered plaintiff's parcel less valuable to assure the competitive position of nearby shopping center); *and* Langguth v. Village of Mount Prospect, 5 Ill. 2d 49, 124 N.E. 2d 879 (1955) (rezoning invalid where "gain to the public is slight and the loss to the individual property owner is substantial"); *and* Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E. 2d 499 (1951) (rezoning invalid where change made for benefit only of neighboring residents).

that the community treat every landowner alike. That is why—to illustrate with zoning—two neighbors may own acreage zoned for apartments and single-family homes, respectively, but the disparity, which translates into more and less valuable acreage, does not violate the R-1 owner's rights so long as (a) the zoning promotes the general welfare and (b) the R-1 owner can beneficially develop his parcel. By contrast, the Chicago Plan assumes that if two neighbors own parcels zoned "landmark" and "non-landmark," the regulation treats the landmark owner unfairly if he, too, cannot put his parcel to the highest-and-best use. Indeed, virtually all of the theory and system of the Chicago Plan serve the goal of parity.[37]

But, as Costonis reminds us, the goal of parity is quite different from (and far more rigid than) the goal of fairness. And it is the fairness standard that the accommodation power would serve. The current litigation over the Grand Central Terminal—at this writing its landmark status is very much in limbo[38]—illustrates the tension between fairness and parity. The Terminal, owned by the bankrupt Penn Central Railroad, occupies one of Midtown Manhattan's finest locations. Zoned R-16, the Terminal site can support more than 1.9 million square feet of office space. The existing structure, which bears the landmark designation, contains terminal facilities and a modest inventory of office and retail space. The unused FAR became the subject of negotiations between the railroad and developers. When negotiations ended in 1968, the railroad had agreed to lease the airspace to a firm that would erect a 50-story tower above the Terminal. The tenant was to pay a $1 million annual net rental during the construction phase and a minimum $3 million net rental annually thereafter. Since the proposed tower would alter the Terminal's exterior appearance, the tenants sought approval for the change—as required by law—from the City's Landmark Commission. When the Commission refused, the railroad and its tenant sued to invalidate the landmark designation.

At the trial, the plaintiffs sought to quantify the economic hardship that would ensue from their inability to erect the tower. For the railroad,

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37. In a sense, Costonis himself saw that a Chicago Plan did not depend *constitutionally* upon each landmark owner receiving transfer rights for the full unused FAR. He mentions at pp. 58-59 of *Space Adrift*, *supra* note 12, that more "courageous" cities might key the compensation due on landmark designation to the landmark's reasonable beneficial use. It is political courage that Costonis writes of. *Space Adrift* assumes, however, that few cities would dare to restrict landmark owners to this lesser measure of compensation: therefore, cities would not enact Chicago Plans that did not offer parity between landmark and non-landmark owners. In a letter to the author, Costonis states that in downtown Chicago only a dozen landmark structures exist. If the Plan offered only these landmark owners parity, this would mitigate the financial and urban design issues which stem from the more generous measure of transfer rights. But he concedes that an expansion of the plan to include a "huge number of landmarks creates corresponding complications of an economic and planning nature." Letter to Author from John J. Costonis, May 4, 1976. Many large, older cities have scores of landmark-potential structures. Any plan that did not treat each *landmark* owner alike would, in my judgment, face serious equal protection obstacles.

38. Penn Central Transport Co. v. City of New York is presently on appeal in the N.Y. Court of Appeals. The Appellate Division decision, which is not yet reported, appeared in N.Y. L. J., December 18, 1975, p. 1, col. 6.

the net annual rental loss would begin at $2.3 million upon completion of the tower (the difference between $3.0 million and the loss of $700,000 from existing commercial tenants whom the tower would displace). Currently, the railroad was experiencing an operating deficit, which the court fixed at nearly $2.0 million. The court deemed impracticable a city suggestion that would have allowed the plaintiffs to transfer the Terminal site's excess FAR to a nearby site which the railroad also owned. Finding no other way to relieve the railroad of the economic hardship resulting from landmark designation, the court nullified the law as applied as a taking of plaintiff's property without just compensation, a denial of equal protection, and a deprivation of property without due process.[39]

The city's appeal to the Appellate Division led to a 3-2 reversal of the trial court decision and a reinstatement of the landmark designation.[40] In writing for the divided court, Justice Murphy reaffirmed the city's power to regulate private property to protect landmark values and stressed that the landmark owner, in attacking the designation, must prove that his hardship amounts to a taking. To do so—and this is the critical standard—the owner must show that he has been denied all "reasonable use" of his property. Testing the evidence against *this* standard, the court's majority ruled that the railroad had not shown the requisite hardship. The court acknowledged that plaintiffs' burden in this regard was "exceedingly heavy," that at best "plaintiffs have shown that they have been deprived of the property's most profitable use, but that is not the constitutional test." In short, "plaintiffs have shown hardship but not confiscation."[41]

At least one appellate stage still remains and given the factual complexities of the case, as well as the significance of the legal issues, even a decision by New York's Court of Appeals may not define the Terminal's future. But the Appellate Division opinion draws our attention for its sharp distinction between the "reasonable beneficial use" standard, somewhat clumsily applied here, and the "most profitable use" standard, which both the trial court and the two dissenting justices impliedly embraced. The Costonis article would not have been available when the city argued the Penn Central appeal, yet the opinion anticipates the Costonis thesis that due process and equal protection are served—in the landmarks setting—even though the landmark owner is unable to maximize his investment.

So Grand Central illustrates the tension between Costonis I (*Space Adrift*) and Costonis II (*The Accommodation Power*). Legal principle that would deny the landmark owner a constitutional right to profit fully from his site advantage removes the *legal* imperative from a Chicago Plan. Only those landmark owners who cannot derive the "reasonable beneficial use" of their properties would have a claim for added compensation, which

39. N.Y. L. J., Jan. 23, 1975, p. 16, col. 3.
40. *Supra* note 38.
41. *Id.*

could then take the form of transferable development rights; however, such rights would be allotted only as needed to yield a "reasonably beneficial" return. This limited grant of transferable rights is a far cry from investing every landmark owner with the "highest and best use" potential of his non-landmark neighbor. If Costonis II is correct in its constitutional prescription (and I believe that it is), then the Chicago Plan goes well beyond the repair of any legal flaw in the preservation law, except partially in the case of the "sub-reasonably beneficial" property. And if so generous a Plan does not serve the constitution, do we need the Plan at all?

Further comment and critique

I imagine that Costonis invented the accommodation power in order to provide an intellectual framework for such innovative regulatory techniques as the use of transfer rights to protect landmarks and ecological preserves. But having developed the concept, Costonis has enlarged his vision, and now sees the Power as providing the vectors that can locate a middle ground between uncompensated control and fully compensated taking. Two jurisprudential schools have surfaced in the wake of these polar alternatives. The libertarian or Chicago School—typified by Professor Robert Ellickson,[42] would greatly weaken the bonds of governmental regulation. Left unregulated, market forces would factor in community preferences about the environment and the use of land. Translated into judicial response, the libertarian view would extinguish much of zoning; government would be forced to pay (and, presumably, taxpayers would then decide whether they wanted to pay) for imposing any restraint on the free market.

Leagues away lies the "land socialists" school, for whom Fred Bosselman has become a key spokesman.[43] This group sees land ownership as a privilege—in the non-Hohfeldian sense; fee simple gives no one an absolute right to develop; zoning benefits are an expression of community grace which the community can remove—and without compensation—when doing so will serve the general welfare. Thus the landowner whose ecologically sensitive parcel would be better left undeveloped has no redress even if regulation makes his holdings worthless.

Costonis disapproves of these polar attitudes, arguing that regulatory choices need not be couched in ideological extremes. He has harsh words for the libertarians.[44] He sees no need to turn the zoning clock back to ante-*Euclid* times, and he mocks the faith that a free market will either act responsibly or respond to the community interest. In faulting the land socialists, he uses somewhat gentler rhetoric, but his dislike for their views

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42. *See* Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).
43. F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973).
44. *See* Costonis, *supra* note 1, at 1026-33.

shines through.[45] It is simply unfair, Costonis asserts, to ask a few owners—in the interests of the community—to relinquish their land's entire development potential.

Through the mean of the accommodation power, Costonis would return the struggle over governmental regulation from the extreme flanks where it now is being waged back to the ideological center. When deciding whether to validate a land use measure, courts would no longer be forced to take an all-or-nothing stance. The touchstone, as in the Grand Central case, would be whether a reasonable beneficial use survived the control. If the measure passed this muster (and Costonis is silent as to whether the landowner must overcome the presumption of regularity), it would stand up even though it caused some individual hardship. On the other hand, if the measure failed this test, both the court and the community would have options beyond deregulation or full compensation. The court might itself award compensation based on the difference between the reasonable beneficial use and the more highly restricted value. Alternatively, the community might relax the control enough to restore the beneficial use value or, if such relaxation would defeat the goals of regulation, the community might give the landowner compensation in cash or in kind. The latter could include tax remission, operating subsidies, or—relevant to Grand Central Terminal—transferable development rights.

Costonis argues that the accommodation power contributes significantly to the flexibility of land use control. Regulation might proceed without the worrisome prospect that an entire system of controls will be overthrown as too drastic. Courts could review regulatory challenges with the assurance that mediation rather than winner-take-all might be the appropriate outcome. Given "accommodation" as a companion to eminent domain and uncompensated control, the community planner would gain a far more versatile set of legal devices. The controversy over the Grand Central Terminal could be settled by negotiation over the volume of transferable air rights which the Terminal owners would be privileged to move elsewhere.

Costonis has spun an intriguing web of argument but I wonder whether his accommodation power may not lure us into a false sense of certainty just as fatal as Justice Holmes' inviting aphorism. For Costonis promises nothing less than that he has found the philosopher's stone, which he calls "reasonable beneficial use" (RBU). All that we must do, he asserts, whenever land use controls are challenged, is first establish a parcel's RBU. Once we know that, we can ask the accommodation power to work its will.

My skepticism centers on whether Costonis has really unearthed a new matter. Does RBU offer a novel valuation and constitutional standard;

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45. *Id.* at 1024-26.

or does it simply restate—without expanding the content of—an idea that had been rattling around for a long time? My guess would be the latter.

Shortly after its decision in *Euclid* v. *Ambler Realty Co.*,[46] the Supreme Court moved beyond the principle of zoning, which the earlier case had approved, and examined its application. The landowner in *Nectow* v. *City of Cambridge*[47] attacked his zoning classification as a deprivation of property, and the Supreme Court agreed. Justice Sutherland's terse opinion contains several legal formulae for testing whether the regulation—as applied to a specific parcel—would survive attack. Significantly, the formulae—as applied—would not compel the same outcome in every challenge. One standard, however, deserves close attention, for both its later importance to judicial review of zoning and its direct relevance to the Costonis thesis.

The Nectow tract contained 140,000 square feet; it was originally part of an unrestricted industrial area. The westerly end of this tract, containing 29,000 square feet (or less than 25 percent of the total) was first zoned R-3 (dwellings and hotel) shortly after Nectow had bargained to sell it, as part of a larger parcel, for $63,000. Because the R-3 zoning lowered the parcel's overall value, the contract buyer refused to perform. Nectow then attacked his tract's partial R-3 classification.

In overturning the ordinance, the Supreme Court drew heavily from the report of the Master whom the state court had named to hear the matter and issue findings of fact. The Master, looking only at the economic impact of the R-3 zoning on the smaller parcel, concluded that "no practical use can be made of the land in question for residential purposes[;] . . . [thus] there would not be *adequate return* on the amount of any investment for the development of the property."[48] While Justice Sutherland expressed the Court's doubt about the planning wisdom of the measure, it was the economic hardship imposed upon the plaintiff by the R-3 designation which proved decisive to the Court. In the nearly half century that has elapsed since *Nectow*, the "no adequate return" test establishes when—in its economic impact—a zoning law becomes constitutionally unacceptable. Reciprocally, any measure that would yield the landowner "adequate return" should satisfy the economic constraints of due process.

It seems to me that "reasonable beneficial use," which is at the seat of the accommodation power, is simply another way of describing "adequate return." They are equivalent terms not only in their likeness, which would allow free substitution between them, but also in their opposition to two other, equally fungible valuation standards. Costonis would set off "reasonable beneficial use" against the "highest and best use" standard that measures just compensation. For its part, "adequate return" is coun-

46. 272 U.S. 365 (1926).
47. 277 U.S. 183 (1928).
48. *Id.* at 187 (emphasis added).

terpoint to a far more demanding standard of testing a regulation's economic brunt, one that courts have rarely invoked: does the measure preclude the use for which the parcel is most readily adapted?[49] In sum, our system accepts land use control—in principle and in application—despite the inevitable economic losses individual landowners often suffer. It is not enough that controls deprive landowners of the opportunity to turn their property to its highest and best return. Landowners can defeat a control only when it denies them the potential of an adequate return or, in Costonis' phrase, a reasonable beneficial use.

But if reasonable beneficial use and adequate return are constitutionally equivalent ideas, then Costonis has left us with a crude substance that must yet be refined. We who work regularly with zoning—as practitioners and as scholars—know how slippery the adequate return standard can be, how stubbornly it resists being reduced into quantifiable units. From the 1928 *Nectow* decision to this day, court opinions have failed to furnish guidelines for testing the adequacy of return. Costonis, too, deliberately avoids telling us how he would fix the reasonable beneficial use standard in concrete instances.[50] Yet until we have an answer to that, the taking impasse seems as insoluble as before.

Costonis would encourage the legislature to establish fair return, as it has, for example, in enacting rent control or landmark preservation laws. Fair return, or reasonable beneficial use, is a product of two variables: investment base and rate of return. In the case of rent control,[51] the legislature has managed quite well. In New York and other cities, as well as in several state and federal subsidy programs, the ownership of rental housing compares to investment in a regulated industry, where we have a settled tradition in rate-fixing. One can quickly gain consensus around a reasonable yield, a basis definition, and a method of calculating profit-and-loss. Moreover, political pressures aside, the system can quickly raise ceiling rentals to produce for the owner the statutorily acceptable yield, should changes occur in operating costs, capital investment, or the general understanding as to what percentage constitutes a fair return. Moving to landmark controls, however, the accommodation power becomes less resilient, for even if the legislature can agree (as it has) on the definition of yield and investment base, once the power has acted to give the owner—let us say—his six percent return,[52] it may become impracticable for the power to act again should six percent no longer be deemed reasonable, or should there be either investment or operational changes.

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49. *See, e.g.*, Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 499, 121 N.E.2d 517, 520 (1954).

50. *See* Costonis, *supra* note 1, at 1052.

51. *See, e.g.*, 7 N.Y.C. ADMIN. CODE, ch. 51, tit. 51 §Y51-5.0 g(1)(a) (1975) (provision for individual upward adjustment of maximum rents where "rental income from a property yields a net annual return of less than six per centum of the valuation of the property").

52. *See, e.g.*, 2 N.Y.C. ADMIN. CODE, ch. 8-A, § 207-1.0 v (Supp. 1975).

But when we turn from rent control and landmark preservation—which concern operating properties—to the regulation of undeveloped acreage, efforts to predicate a fair return or to establish an investment base create difficulties defying solution. Let me illustrate this with the *Just* case, whose outcome has so disturbed Costonis. Assume that an environmental statute would allow Just either the reasonable beneficial use of his parcel or the right to insist upon compensation. Assume further that the statute purports to define reasonable beneficial use—in the manner of rent control—by reference to an investment base. Yet how do we define Just's investment in 36.4 acres of lakefront property bought several years prior to the ordinance? Do we look at what Just paid for the parcel or at its current market value? If current market value, do we consider the impact of the control itself upon that value? Since Just had actually sold off more than two-thirds of his frontage before the lawsuit began, how should the sales transaction alter the investment base? If Just has already recouped his original outlay, does he have any investment base in the remainder? Easy answers do not leap to mind.

One approach might be to look at the original investment and to allocate that investment per acre. If Just paid $36,400 for the entire parcel, each acre would have $1,000 as its capital base (plus carrying charges and imputed investment return during his holding period). This sort of allocation grants a boon to the landowner, however, for it assumes a development right whatever the size, shape, or topography of a site, and by ignoring the landowner's overall development or marketing activity, guarantees him a minimally acceptable return on every part of his holding even if he has already achieved that return on an overall basis.

But suppose, instead, that Just has retained his entire tract, which he purchased prior to a boom in shorefront properties. Suppose that Just has paid $50 a front foot for land that he can now sell to homebuilders for $300 a front foot—if there were no environmental curbs. If *original* cost is still the statutory standard for measuring investment base, then Just must be granted that scale of development that would translate into a present value of $50 per foot. We can probably calculate what that development should be. But notice how capricious the environmental controls become once the allowable level of lake front development depends upon whether the present owner bought his parcel as a speculation years before, as did Just, or purchased the site with his building plans complete, shortly before the curb on new construction. In sum, the fine tuning of the development permission process, to insure every landowner his fair treatment, invites an eccentric land use pattern.

Costonis might reply that he does not advocate a right to develop but rather a right to derive the economic benefit that a development would yield, and that this benefit might come—as with the Chicago Plan—from the sale of *unused* development rights. But as we have argued, such a

scheme is barely feasible within the narrow limits of a city's built-up commercial and multi-family areas; to adapt the idea for all of the ecologically sensitive area throughout a metropolitan region, for example, seems well beyond the present capability of any government or planning organization. Possibly the idea has promise, as Costonis has urged in Puerto Rico, but it will not become law tomorrow. And challenges to environmental regulation, as with Just, are taking place today.

I have glanced at the legislative aspects of an accommodation power—seen in the hypothetical attempt to enact a comprehensive environmental control that would "fairly" compensate all landowners subject to that control. This systematic approach to treating landowners fairly can at least be thought about in an integrated way. A planning body can weigh alternatives, make cost-benefit analyses, explore the trade-offs that could make accommodation feasible. What of a court, however, faced with an individual claim that a regulation—whose general application causes little hardship—so oppresses him as to become a confiscation? This is the very issue of *Pennsylvania Coal Co. v. Mahon* and thousands of more recent cases, the issue that Costonis believes is not two-dimensional, as Justice Holmes assumes, and the issue that the third dimension—the accommodation power—would help us to resolve.

We have had a chance to consider how a court might apply the power in a very recent and enormously significant decision of the California Supreme Court, *HFH, Ltd. v. Superior Court of Los Angeles County*.[53] This was a suit in inverse condemnation brought by landowners who had suffered serious economic loss after a zoning change had reclassified their parcels from commercial to low density residential use. Rather than suing to invalidate the ordinance, the usual avenue for landowners aggrieved by a zoning change, plaintiffs sought to force a city purchase of the development rights that reclassification had taken from them. Despite the unusual manner of suit, the California court gave the claim its respectful attention. Nevertheless, with one judge dissenting, the California court upheld a demurrer to the complaint.

Plaintiffs had paid $388,000 for a 5.87 acre tract in the City of Cerritos. They had made the purchase in 1966 *after* the city had rezoned the parcel for commercial development. Although plaintiffs then submitted a commercial subdivision plan which the city approved, no further activity occurred for five years. In 1971, the city in an environmental awakening, decided to curb headlong growth. Land throughout the city became subject to a moratorium on development. When plaintiffs asked the city to restore their commercial privilege, they received instead a permanent reclassification to low-density residential. This reduced the parcel's value to $75,000 and precipitated the lawsuit.

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53. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

One might say that the plaintiffs' action was foredoomed. Lying athwart their path was a considerable body of precedent—in California and elsewhere—that denies the owner of undeveloped land any vested right in the zoning status quo.[54] If the community is to plan its pattern of land use, it must be able to alter its plan, and if courts can nullify zoning changes whenever landowner expectations suffer, plans would either petrify or be much less exacting at the outset. The law assumes that landowners understand this risk and somehow factor it into the price they will agree to pay for the raw land.

Yet that assumed behavior may be illusory, especially in such cases as *HFH*, where the 1966 contract price of $388,000 was tied to the commercial rezoning. Moreover, five years later, commercial value had risen slightly, an event which implies market concurrence in the original price. Rezoned to residential, however, the original investment had plunged to less than twenty cents on the dollar.

The court acknowledges the plaintiffs' hardship, but hardship alone would not lead to nullification of the ordinance. The court reaffirms the rule of non-vesting, especially where plaintiffs cannot show that rezoning will render their parcel valueless. In the context of the Costonis thesis, I find ironic the court's discussion of this last point. Plaintiffs had complained of confiscation because rezoning deprived them of the reasonable beneficial use of their parcel. That the parcel kept a residual value of $75,000 belied its uselessness. What this disagreement signals is the breakdown of RBU as the universal solvent which will settle regulation disputes. To decide whether plaintiffs have lost their RBU requires us to recognize RBU when we see it. Yet how do we conduct our search until we can agree where to start from? In *HFH* the court started from ground zero and saw $75,000 as evidence of RBU. The landowners per contra started from $388,000 and saw $75,000 as negation of RBU. Costonis would let the legislature define RBU and set the analytical framework within which individual cases would be decided. I believe, however, that this is easier said than done. And without legislative help, I have little faith that the courts can establish workable rules that would readily distinguish the vaguely compensable from the vaguely noncompensable situations.

Thus, unlike Costonis, I do not see the accommodation power as closing out the controversy over the bounds of the regulatory power. I applaud the stress upon accommodation; it invites an approach to dispute—i.e., mediation—which our adversarial "winner-take-all" attitude insufficiently values. Applied to some forms of land use dispute, the power offers a flexibility which can ease the conflict between the public and the private owner. Particularly as to landmark preservation, accommodation

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54. *Id.* at 515, 542 P.2d at 242, 125 Cal. Rptr. at 370.

may furnish a set of options which will reduce the vulnerability of diminutive or uneconomic structures. Thus, the owners of Grand Central Terminal, after showing that the landmark could no longer support a "reasonable" investment return, might receive an operating subsidy, or marketable development rights, or—if feasible without destroying the landmark—the minimal variance needed to yield the necessary return. But even as to landmarks, accommodation may not always resolve a particular dispute. Consider, for example, the church-owned structure whose congregation has outgrown it. In the absence of accommodation, the church may upset the landmark designation by showing that the building no longer adequately serves its owners. Given that outcome, the city must either condemn the structure or passively await demolition. Accommodation strengthens the city's hand: possibly a minimal variance will serve the church and save the landmark; more imaginatively, the church—with city assistance—might market the structure to an organization for whom it would be serviceable; the proceeds from the sale of the landmark site, and some transferable development rights, could enable the church to build elsewhere—not too unfairly disadvantaged by having started with a landmark structure. But the very complexity of the package needed to gain accommodation suggests that in some situations imagination will fail and that an acceptable solution simply will not exist. I believe that Costonis would then let the landmark go, unless the city were prepared to buy it.

This may be the appropriate outcome as to landmarks where accommodation has failed. We are dealing with an ongoing activity, which enjoys some vestedness, and—in the grand scheme—there are far more compelling public hardships than the loss of another landmark. But in other contexts, such as environmental protection, accommodation may be infinitely harder to achieve and, where accommodation can not save the resource, the public injury far more serious. I have tried to show, using the *Just* facts for illustration, the complexities of arriving at a value which fairly measures any parcel's RBU; yet valuation difficulties seem as child's play compared with the logistics of trying to transmute that value into other development currency. What might be involved are Puerto Rico plans—or their equivalent—for all ecologically sensitive areas. Absent such ingenious trade-offs, affected landowners could either demand compensation or an end to regulation. But even if, constitutionally, "just" compensation meant "fair" compensation, so that "reasonable beneficial use" value replaced "highest and best use" value as the appropriate standard for fixing damages when property was taken, I doubt that large-scale compensation would yet be feasible. It is not that regulation denies swamp-owners the privilege of building shopping centers that makes condemnation too costly an alternative to regulation; it is that regulation would deny the swamp-owner the privilege of landfill for *any* structural use. To put this somewhat differently, for most affected owners the reasonable beneficial use *is* the

highest and best use; to change the compensation standard to RBU would not, in the environmental context, significantly change the regulation cost-out.

But an issue larger than valuation and economic feasibility, which the Costonis article fails sufficiently to address, is why *any* beneficial use is reasonable should that use upset a delicate ecological balance or eliminate a badly needed (e.g., agricultural) resource. As our scientific and technological understanding expands, we find that activities once thought innocent may cause incalculable harm. Where harm is shown, nuisance law—and, by analogy to nuisance, the police power—can stay the activity, even if this would leave property with little value. Yet not all harmful activity is immediately toxic; generations unborn may suffer from activities that we fail to control today. The regulatory power can guard the future, and, indeed, we trust it to do so. If Just were to poison his neighbor's well, we would stop it as a nuisance. The poison of land-fill may be slower working, and the incidence of harm less predictable, but if the Wisconsin legislature wants to control it, regulation should not (necessarily) require compensation. But relative to *Just*, Costonis has either assumed that compensation must follow regulation or—if I have misunderstood him—has failed to provide a blueprint to distinguish the regulation which requires compensation from the regulation which does not.

That missing blueprint explains why we cannot reduce the taking issue to simple formulation. Unless nuisance law were repealed—and I'm sure that Costonis does not want that—we will continue to curtail the externalities of land use. The most offensive uses will give way, regardless of the offender's economic loss. But uses vary in their degree of harm, as do opinions on the nature of harm; and as we move from more to less harmful uses, or as the consensus over harmfulness weakens, we become increasingly aware of what regulation costs the offender. At some point, his hardship may well outweigh the perceived benefit which the community gains from removal of a "harmful" use. At that point, further regulation may then be deemed a taking.

This balancing process—public benefit versus private detriment—suggests why the taking issue remains so intractable and why Costonis, despite his marvelous effort, has given us—at best and at worst—a limited, albeit versatile tool. For balancing depends upon human perceptions and attitudes and intuitions which we cannot reduce to metric measure, even if we could somehow quantify the many technological and economic variables. Thus, unless we turn to the absolutes of either universal compensation or universal socialization, legislatures first and courts second must continue to balance private and public interests. We can ask that the process be intelligent, that it be open, that it be fair, that wherever possible it seek to accommodate. We should not also expect that the balancing itself will become simpler.

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