From Euclid to Ramapo: New Directions in Land Development Controls

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FROM EUCLID TO RAMAPO: NEW DIRECTIONS IN LAND DEVELOPMENT CONTROLS

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If city planners are to succeed in shaping the growth and development of modern American cities, they must regulate the use of land in far more affirmative ways than they were able to achieve with their traditional zoning ordinances. Land use regulations have historically been designed to prevent harm, e.g., to separate incompatible uses, to limit density and scale of particular neighborhoods, to prohibit or restrict development where public services are unavailable and to protect adjoining parcels from invasions of their light and air. These regulations, based on single lot development, are not concerned with how a section of the city actually works, i.e., what positive relationships between single lot development in a unique area should be encouraged—whether office workers have room to walk on the sidewalk or can get into a subway entrance. As general rules, single lot regulations tend to codify minimal standards. They encourage inexpensive and often inadequate solutions to circulation problems and amenity needs. Traditional zoning has thus helped turn the concentration of activities that is essential to the success of a city into congestion.

In our view, government should intervene in the development process, creating zoning and other techniques that will encourage and even coerce private investment to make the city a more pleasant and efficient place in which to live and work. Public steps will still have to be taken in certain situations to prevent development where necessary. Accentuating the positive does not mean eliminating the negative in all cases.

New York City has developed and refined a series of tools to shape the nature of private development. The techniques that have been used raise interesting questions about the legitimate extent of government control and about the nature of new interests in land that have been created. It is the purpose of this article to explore

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1. Zoning admittedly has minimal impact in areas where private investment is unprofitable. In these areas the City has relied most heavily on its capital budget and eminent domain urban renewal powers which have traditionally employed use and design parcel controls in the public interest which were individualized to reflect the needs of a particular neighborhood.
the legal aspects of some of these questions as well as to explore the use of zoning as a creative device for eliciting public benefit from private development.¹

In recent years central business district office development, and to some extent luxury housing, have seen the major thrust of private investment in New York City, and hence were most susceptible to a kind of zoning which called forth buildings which did more for the people of New York than the structures the City was getting under more traditional zoning.²

New York City's national center function³ does not rest solely on its ability to attract large numbers of office buildings within the Central Business District. The distinctiveness and the excitement that the City generates is derived to a large extent from the relatively uneconomic amenities—both tangible and intangible—that it offers to residents and visitors alike. There are few cities in the world that can rival New York's cultural complexes, its shopping streets, its variegated residential communities and other sources of civic pride. And yet, in New York, as in other urban centers, there exists a "tension" between those forces that provide the economic power that keeps the City's dynamo churning and those relatively "uneconomic" forces that are constantly threatened by new construction and development and which supply the vitality and personality that are integral parts of city life. Shaping and directing these conflicting forces is a delicate but necessary task. Public control can be exercised to preserve relatively "uneconomic" but desirable elements of city life without stifling private initiative or requiring unnecessary public investment. Certain carrot-and-stick techniques have been evolved to achieve this objective including incentive zoning, development rights transfer, privately reimbursed exercise of eminent domain powers and restrictions running with the land. A brief review of the traditional police power rubrics indicates the legitimacy of these techniques for such a purpose.


3. NEW YORK CITY PLANNING COMMISSION, I PLAN FOR NEW YORK CITY 31 (1969); see also NEW ZONING at xvi.
I. THE TRADITIONAL POINT OF DEPARTURE

Traditionally, most municipalities avoided abridgement of an individual's free exercise of his property rights. During the early part of the twentieth century, however, legislative attempts to control the development of the nation's rapidly expanding cities were upheld in the courts.

In 1916, New York City enacted the nation's first comprehensive zoning ordinance. A year later, the State legislature granted the City the power to "regulate and limit the height, bulk and location of buildings . . . the area of yards, courts and other open spaces, and . . . the density of population in any given area . . . ." While these regulations were generally considered as extensions of the police power to "promote the public health, safety and general welfare," they were also viewed by some as a taking of private property without just compensation or due process of law.

Despite such serious challenge, however, it was not until 1926 that the constitutionality of a zoning ordinance was tested by the Supreme Court. In a landmark decision, Village of Euclid v. Ambler Realty Co., the Supreme Court validated a comprehensive zoning plan. The Court's holding was narrow. However, the general test of a zoning ordinance suggested by the Court is still instructive. Before a zoning ordinance can be declared unconstitutional, its provisions must be shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."

Euclid and its progeny reflect the idea that "general welfare" is a constantly growing and necessary aspect of the sovereign police power. Euclid also suggests that the use of zoning is a legitimate

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4. President George Washington imposed height restrictions on buildings of the nation's capital in 1791 only to have them suspended five years later in order to attract "Mechanics and others whose Circumstances did not admit of erecting houses authorized by the said Regulations." THOMAS JEFFERSON AND THE NATIONAL CAPITAL (S. Padover ed. 1946) quoted in C. HAAR, LAND-USE PLANNING 157 (2d ed. 1971) [hereinafter HAAR].
7. In August of 1922, the Department of Commerce drafted a Standard State Zoning Enabling Act, which was similar to New York's statute. See C. BERGER, LAND OWNERSHIP AND USE 611 (1968) [hereinafter BERGER].
8. 272 U.S. 365 (1926). The Court held: "It is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them." Id. at 397.
9. Id. at 395 (emphasis added).
mode of protecting the ever-changing general welfare. Justice Sutherland recognized this trend:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . While the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.

Courts have continued to review zoning ordinances against the "clearly arbitrary and unreasonable" test and as the New York Court of Appeals recently noted, "[r]estrictions upon the use of property, which were deemed unreasonable in 1909, are regarded today as entirely reasonable and natural." In Euclid, the effect of the zoning ordinance was to reduce the value of the plaintiff's land by two-thirds from $150 to $50 per front foot. As such, it was averred that the regulation attempted to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value. Courts have consistently held that where the property was not deprived of all profitable remaining use and where the regulation is rationally related to a comprehensive plan, the zoning ordinance will be upheld.

The fact that such restrictions apply only to certain properties

10. Id. at 386-87.
11. Note 9 supra.
13. See HAAR at 160.
14. See generally Sackman, Impact of Zoning and Eminent Domain Upon Each Other, 1971 SOUTHWESTERN LEGAL FOUNDATION, INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 107, 112. In Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), appeal dismissed, 371 U.S. 36 (1962), a zoning regulation, rendering a gravel pit worthless, was upheld. The public health of the adjacent communities was adversely affected, and the land presumably had other uses. But see Chase v. City of Glen Cove, 41 Misc. 2d 889, 246 N.Y.S.2d 975 (Sup. Ct. 1964), where private property was placed in a public housing zone which precluded all other uses. This was found confiscatory since it excessively limited, if not totally vitiated, the owner's earning capacity.
within a zoning district is not necessarily discriminatory, provided there is a rational basis in the community plan for such distinctions. The constitutional guarantee of equal protection does not require the universal application of legislative act, and distinctions may properly be made in the application of regulations. The key to the “equal protection” test is that the proposed regulation be not only uniformly applied but also “in accordance with a comprehensive plan.”

A judicial determination as to whether a zoning ordinance is arbitrary, confiscatory or discriminatory is necessary to delineate the fine line that separates a valid regulation from an unconstitutional “taking.” The courts, in invalidating a zoning law, seldom rest their decision explicitly on this ground, for normally such a law would also violate the more familiar rule against confiscation. But the New York courts apparently have recognized as a distinct ground of invalidity the following principle: Even though a zoning law is not confiscatory, it is still invalid if it imposes upon a landowner the cost of a land use beneficial to the public, where there is no rational ground for singling out the landowner to bear this cost.

How far a state’s police power may extend to effectuate the broadening concepts of “public purpose” and “general welfare” remains a subject of judicial interpretation. The parameters discussed above suggest analytic criteria, but as Justice Sutherland

17. The fifth amendment provides: “nor shall private property be taken for public use, without just compensation.” See N.Y. Const. art. 1, § 7.
18. The leading New York case which demonstrates this point is Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 498, 121 N.E.2d 517 (1954). There a landowner, desiring to erect a shopping center, sued to invalidate a zoning resolution which placed his property in a “public parking” classification. The land adjacent to the railroad station and otherwise surrounded by the downtown business district, had always been used for parking purposes. The town fathers wished to preserve this use since the parking facility was needed, and its elimination would cause traffic congestion on the streets. The Court of Appeals invalidated the ordinance in an opinion which lacks clarity but appears to rest on the “taking” rationale, noting that: “However compelling and acute the community traffic problem may be, its solution does not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose.” Id. at 519. It should be obvious that the “discrimination” and the “taking” tests are in reality only two sides of the same coin which is stamped “equal protection” on one side and “substantive due process” on the other. For a thorough analysis of the “taking” vs. “regulating” issue see Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971) and Van Alstyne, Taking or Damaging by Police Power: the Search for Inverse Condemnation Criteria, 44 S. Cal. L. Rev. 1 (1970-71).
From Euclid to Ramapo

noted in *Euclid*, the line that “separates the legitimate from the illegitimate . . . is not capable of precise delimitation.”

II. NEW DIRECTIONS

A. Incentive Zoning

The concept of incentive zoning is based on the premise that certain uneconomic uses and physical amenities will not be provided in new development without an economic incentive. By amenity, we refer to a non-revenue producing building feature, be it plaza, park, covered pedestrian space, arcade, on-site subway access, etc. By incentive, we mean an economic advantage to a developer not present under traditional zoning such as additional floor area beyond the district's stipulated maximum or greater use freedom, which is granted on condition that specified uneconomic uses or physical amenities are provided.

Density increments in the form of “bonus” floor area are usually accompanied by density-ameliorating amenities which rationalize the development result against sound planning standards. Where an uneconomic use is “bonussed” in a special district without attendant density-ameliorating amenities, it reflects the planning judgment that the necessary services to support additional density are present in the area.

In most of the cases discussed, the special district incentives and obligations are optional. This means that a developer may elect to proceed under the residual or pre-existing zoning without taking advantage of the density increment and without providing the amenity. However, the incentives in each case are structured so as to make the cost-benefit equations come out in favor of electing to provide the suggested uneconomic use or physical amenity.

The incentive zoning approach was first outlined in New York City's 1961 Zoning Resolution. A developer who provided plazas and arcades at street level in high density districts was allowed up to 20 percent floor area beyond the district maximum. Although initial attempts at incentive zoning yielded mixed results—primar-

19. 272 U.S. at 387.
20. See *NEW YORK, N.Y. ZONING RESOLUTION* §§ 24-14 to 24-16 (1972) [hereinafter ZONING RESOLUTION].
21. Random and unintegrated plaza placement in connection with development along the Avenue of the Americas in the 1960's has been criticized as a missed opportunity for New York City. The lack of focus for pedestrians either in the form of shops or recreation has been particularly criticized.
ily because of its questionable underlying assumption that plazas and arcades were good anywhere—subsequent more discriminating use of this technique has been well-received nationwide and has served as a prototype for other examples of creative urban zoning.

Special District incentive zoning establishes an individualized form of regulation allowing flexibility and administrative discretion. It reflects a shift from the traditional zoning classifications and a departure from "the variance," and the "small parcel amendment"—two modes of reclassifications which some commentators consider to have outlived their original usefulness.

The principle of individualized parcel regulation inherent in conditional zoning is at the root of the special district approach. This approach offers a municipality a means to provide individualized attention to particular area problems and opportunities. Other cities have used this device, which permits preservation of historic, cultural and perhaps most significant of all uneconomic but functional uses. The municipality additionally benefits from increased tax revenues and the developer capitalizes the value of additional rental income.

1. To Encourage an Uneconomic but Necessary Use (The Special Theatre District)

The traditional zoning ordinance regulates all properties within a relatively homogeneous district so that they may be developed to bulk and density levels which would not over-strain city services and permits them to house a variety of uses found compatible with the character of the area. Such an ordinance permits many commercial uses in a commercially zoned central business district. Some of these uses, however, are more profitable than others, and it is the profitable uses that the traditional ordinance encourages through its unweighted, equalitarian approach.

The uneconomic but necessary use will disappear in an area of high and ever-increasing land values unless the municipality can

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23. See, e.g., SAN FRANCISCO, CAL., PLANNING CODE § 122, in NEW ZONING, Appendix D at 227.
24. Heyman in NEW ZONING at 23-42.
25. See discussion of zoning classification in Section II D of this article infra.
27. See note 25 supra.
afford to subsidize it through urban renewal land write-down, capital budget allocation or a departure from the traditional zoning approach which would expressly stimulate its provision.

In 1967, the New York City Planning Commission proposed an innovative zoning technique that would preserve New York’s position as the national theater capital without curtailing construction of the high-rise office buildings which were steadily replacing the old, uneconomic, two- and three-story theaters. This plan reflected more than just sentiment and nostalgia. There were compelling findings linking New York’s pre-eminence as national corporate headquarters to its legitimate theaters around which so many related activities, such as radio and television, shopping, dining and tourism, clustered. The device used was incentive zoning. Rather than inhibit the building of new office space in the Times Square area which was well served by the City mass transit network, the Special Theater District offered the developer an incentive in the form of a floor area ratio (FAR) bonus of up to 20 percent to build a legitimate theater as part of his project. Incentive zoning subsidized use through the carrot of additional density and thus sought to attract theaters and shape development in accordance with the City’s comprehensive plan.

An opponent of the Special Theater District zoning legislation raised the legal objection of discrimination in connection with the procedure of reviewing individual applications for the 20 percent FAR bonus instead of ministerially according the bonus district-wide upon provision of pre-determined theatrical facilities. Although free from the tinge of discrimination, this suggested alternative was hardly likely to meet the area’s planning goals which included a selective infusion of new theaters of type and seating capacity related to the area’s needs over time. The objector never filed suit and ultimately came in to discuss a development project in the area which included a theater.

The demonstrable linkages in the City’s comprehensive plan

29. NEW YORK CITY PLANNING COMMISSION REP., CP-20000 (Nov. 1, 1967). See also ZONING RESOLUTION § 81-01 et seq. The district stretches from 57th Street to 40th Street and is bounded by Eighth Avenue on the west and the Avenue of the Americas on the east, an area within which most of the City’s legitimate theaters presently exist. See New York City Zoning Map, 8c and 8d, effective Mar. 25, 1971, City Planning Commission.

30. FAR (Floor Area Ratio) is a concept which is used to control the amount of building on a lot. The FAR “number” represents the multiple of the lot area which produces the allowable maximum floor area in the development.

31. The owner of half of New York City’s legitimate theaters operating under the terms of an anti-trust consent decree.
between a flourishing legitimate theater and a healthy national center in New York City made any claim of arbitrariness in the Special Theater District legislation difficult to sustain. The general welfare has been served by the legislation which has so far produced five new legitimate theaters in the Theater District.\footnote{2}

2. To Protect a Major Public Investment (The Special Lincoln Square District)

One of the purposes of urban renewal is to bring about a renewal of private interest in developing urban land. Where the urban renewal project is successful in realizing this goal, the area surrounding the project begins to “take off” in real estate parlance and private redevelopment takes up where public redevelopment leaves off. A problem arises, however, when the particular, often sophisticated design mandated under the urban renewal plan abruptly terminates at its boundaries and the optional physical forms of traditional zoning take over.

The alternative of extending the urban renewal designation to this surrounding area and imposing particularized development controls designed to integrate the pre-existing project into the balance of the neighborhood is probably unavailable under the assumed hypothetical because blight has been eliminated and the surrounding area is clearly valuable for redevelopment. For an urban renewal designation to lie, land has to be substandard and insanitary.\footnote{3}

In such a situation the traditional zoning must be reshaped to encourage development compatible with the urban renewal project and should include mandatory controls where necessary. If an incentive zoning approach is taken it may even be possible to cope with some of the more subtle economic and social impacts of the urban renewal plan.

Such a problem faced New York City upon completion of the $180,000,000 Lincoln Center for the Performing Arts. Luxury rental apartment houses with banks, travel bureaus and plazas on street

\footnote{2} On Sixth Avenue and 46th Street a new forty-six story office building contains a 120-seat cabaret theater and a below-grade 850-seat space for the “American Place Theater” company. In return for providing these amenities, the developer was granted a total FAR of 20.5 (a FAR bonus of 2.5) which was translated into approximately three floors of rentable office space. See Zoning Rebuilds the Theater, \textit{Progressive Arch.}, Dec. 1970, at 76. Two new legitimate theaters have opened as part of the 50 story office-theater complex at Broadway and 50th Street because of this zoning provision, as has a large stage house fronting directly on Times Square contained within the high office building at Broadway and 44th Street.

\footnote{3} N.Y. GEN. MUNIC. LAW §§ 502(3) and (4) (McKinney Supp. 1972-73).
level threatened to replace existing moderate income shops and old-law tenements housing persons of moderate means. Despite the presence of enormous crowds generated by the many activities of Lincoln Center, traditional zoning neither required nor encouraged provision of useful pedestrian circulation improvements, additional subway access, covered public spaces, or complementary shops in connection with burgeoning private redevelopment. The Special Lincoln Square District\textsuperscript{34} permits developers 20 percent more floor area on sites within the district as an incentive for providing certain amenities.

These amenities include pedestrian malls, gallerias, covered plazas, and pedestrian-oriented circulation improvements. The district further mandates the height of building walls along certain streets, the location of arcades\textsuperscript{35} and types of commercial use at street level in order to guide the orderly redevelopment of the affected area. These design and planning restrictions relate to the general character of Broadway as a diagonal street intersecting the district and to the character of the Lincoln Center development.

\textbf{3. To Realize a Precise Plan of Public Amenities in an Area Ripe for Future Private Development (The Greenwich Street Development District)}

All too often an area overlooked for central business district expansion is suddenly ripe for development. An elevated subway

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spur may have been demolished, other office expansion areas may have become exhausted, or the construction of a substantial public improvement may have made an area particularly desirable at a given point in time.

Traditional zoning with its single lot focus allows each property to go its own way with minimal relation to its neighbors.\(^{80}\) It does not provide such advantages as a continuous pedestrian shopping spine, and linked subterannean access between major office buildings. The result, where substantial buildings often standing cheek by jowl succeed in ignoring each other or where such structures tower in the splendid isolation of arid plazas, has been universally deplored by architectural critics and the public.

Where it is possible, without the aid of a divining rod, to predict the imminent likelihood of private redevelopment, incentive zoning can be the device through which to realize a coordinated area-wide series of public amenities. Such a scheme could turn disparate properties into an interrelated area-wide development, heretofore thought achievable only under unified private ownership like Rockefeller Center in New York or under the unifying urban renewal controls of a Charles Center in Baltimore. These amenities will take shape at the same pace as the principal development and at the conclusion of the area's redevelopment process the area will be left with its self-provided parks, appropriately located shops, superior subway access and stations among other potential urban assets.

The boundaries of the Special Greenwich Street Development District in Lower Manhattan\(^{37}\) were drawn to encompass an area in which major development had just begun and in which it is expected to continue, at a rate depending largely on the requirement for additional office space, for the next decade or so. Redevelopment had been anticipated in this special district for three reasons. First, the area is adjacent to the Wall Street financial area as well as to the World Trade Center. Second, it is well served by the subway and within walking distance of both the PATH New Jersey service and the Staten Island Ferry. Finally, more than half of the sites included within the district are undeveloped or underdeveloped and, therefore, considered likely locations for new buildings.

This special district implements a comprehensive plan for the growth of an area which now has an employee population of about

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36. This includes sky exposure planes which insure adequate access of light and air to the streets and to neighboring properties.
37. ZONING RESOLUTION § 88-00 et seq. (added Jan. 14, 1971).
55,000 people on 45 acres. The zoning regulations provide for the development of the district at elective incentive density increments above the residual middle density commercial zone which require, alternatively or in combination, improved pedestrian circulation, easier access to the subway, increased shopping opportunities, additional open space, preservation of the historical character of the area, or other specified amenities.

The Special Greenwich Street Development District is unlike previous special zoning districts since it operates with a minimum of administrative action. The elements of the plan are described in sufficient detail to obviate both discretionary design review and the individual approval of negotiated incentive bonuses by the City Planning Commission. Public hearings are not required, and the open-ended delays which tend to discourage development are thereby avoided. The Special Greenwich Street Development District has been generally received with approval.

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38. The residual pre-existing classification provides a medium commercial density (FAR 10) and the minimal controls of traditional zoning which regulate a development which foregoes the elective incentives and their concomitant obligations.

39. Provision of amenities earns credits which may not exceed a maximum FAR 18 and 55% lot coverage. Compare this technique with Ramapo's point system, Section II F of this article infra.

40. Both the Special Theater and the Lincoln Square Districts require developers interested in the incentive to make an application to the City Planning Commission for a special permit. The permit is granted at the discretion of the Planning Commission, and authorizes modifications of applicable district bulk regulations for any development that complies with the special districts requirements, conditions and safeguards.

41. Detailed pre-development regulation, however, runs the risk of minimizing design flexibility and necessitating resort to the zoning amendment procedure, New York City Charter § 200, or variance procedure, § 666(5), both of which can be fraught with open-ended delays. Statutory justification for the issuance of a variance is that the owner suffers a unique hardship. The variance was originally viewed as a constitutional safety valve to permit administrative flexibility. See Heyman at 32 and Marcus at 97 et seq. in NEW ZONING; ZONING RESOLUTION § 72-21; N.Y. GEN. CITY LAW § 81(4) (McKinney 1968).

42. It does not control design. It merely lists the conveniences and amenities the city says must be constructed. The developer makes his choice and builds. He does not have to "barter" bonuses for improvements because the process is automatic. This eliminates city-builder negotiations for special features as the price of special permits. No permits or variances are needed.

The Greenwich Street Development District is an extraordinarily shrewd and progressive scheme, at once a visionary and pragmatic investment in the future. Huxtable, Concept Points to 'City of Future', N.Y. Times, December 6, 1970, § 8, at 7, col 6, 8.

The first development in this district incorporates all on-site amenity requirements including the 2-level pedestrian shopping spine, a pedestrian bridge across Liberty Street to the World Trade Center and a one million dollar contribution to the cost of a subterranean connection between the U.S. Steel building on Broadway and the World Trade Center.
4. To Preserve a Historic Retail Avenue (The Special Fifth Avenue District)

Every city has a special street which over the years has come to symbolize quality retail merchandising. Before the automobile, it was patronized by the carriage trade and people often frequented the street as much to be seen as to shop. With the change in retailing patterns following the automobile and the advent of regional sub-centers as well as more outlying shopping centers, a municipality may have to consider additional actions to preserve such an area, if it is not to lose its historic and functional character.

While retailing is falling off, the street may still retain sufficient cachet to attract other uses such as offices, airline travel bureaus and banks which can afford higher rents in today's market than can major retail department store tenants. Such basic real estate market vitality precludes serious thought of eminent domain approaches to the problem. And the negative zoning alternative of restricting uses to retail establishments only probably would preclude substantial new investment from entering the area, thus insuring its continued decline without guaranteeing retention of the classy old stores.

Incentive zoning would appear to be the logical device to harness the still vital development investment engine in such a situation and nudge it in the direction of continued support of the street's ailing retailing function. This was the approach New York City took to Fifth Avenue.

The Special Fifth Avenue District was created to assure the continuation of Fifth Avenue as Manhattan's major retail street as well as to preserve it as a showcase of national and international prestige shopping. The district encourages the concentration of high quality department stores, retail clustering, restaurants and related activities that complement the unique character of the avenue. To further this purpose, attempts were made to maintain the existing uniformity of front wall lines on both sides of Fifth Avenue. Mid-block connections in the form of porte-cocheres, through-block arcades and covered pedestrian spaces, are encouraged, rather than zoning's traditional avenue block-front plazas which could interfere with the continuity of avenue retail frontage.

43. Best and Co. and DePinna's, practically facing each other across the Avenue at 51st Street, had announced their closings within weeks of each other. Georg Jensen, a block away, had earlier made the decision to move to Madison Avenue in the same area.

44. ZONING RESOLUTION § 87-00 et seq. The district embraces east and west frontages of Fifth Avenue running from 58th Street south to 38th Street.
A developer must comply with mandatory allocation of floor area to retail use, lot improvement and setback regulations. He may elect to devote still more area to retail use or provide certain specified lot amenities in return for a floor area bonus incentive which may not exceed 20 percent of the basic FAR permitted by the underlying district regulations.

The FAR bonus in this district may only be used for residential floor area. It was felt that, in addition to supporting the area's primary function (retail stores), a residential density increment would not have a cumulative effect in relation to commercial use in the area, i.e., use at different hours would provide the area with 24 hour life rather than produce excessive congestion from nine to five. Ultimately, the new ultra-luxe residential community over the avenue would, it was felt, restore the waning carriage trade so essential to the flavor and style of Fifth Avenue and recreate the original interdependence between the retail avenue and its immediate mansion-lined hinterland.

5. To Provide Relocation Housing (Special Lower 3rd Avenue District)

Standard zoning ordinances provide classifications for residential development based on differing density models: low density, middle density and high density. Reclassification to a higher density invariably proves to be an incentive to redevelopment which in turn tends to produce such undesirable consequences as neighborhood stratification and reduction in the City's inventory of older low rent housing.

The ability to condition such a zoning reclassification on provision of on-site or within-the-vicinity housing for the class of families dislocated would permit a municipality to enjoy the benefits to its tax base flowing from such construction while avoiding its most tragic consequence. It is permissible to prevent landowners from creating various sorts of external harms, and the legislature has considerable leeway in defining what is a harm. The imposition of social costs through the demolition of low-income units could justify an exaction for general relocation housing purposes.

45. Id. §§ 87-03, 87-04, 87-05.
46. Id. § 87-06.
47. Up to 30 dwelling units per acre.
48. From 30 to 140 dwelling units per acre.
49. From 140 to 400 dwelling units per acre.
50. Heyman in NEW ZONING at 44.
In *Jenad, Inc. v. Village of Scarsdale,* the New York Court of Appeals approved the application of an ordinance that authorized the Planning Commission to require the developer to pay $250 per lot to the village recreation fund as a condition to their approval of his subdivision plat. The court viewed the exaction as a reasonable form of village planning. The decision is important because the court did not require the expenditure to be made for the “direct benefit” of the subdivision in question and suggested that courts will not invalidate such a requirement merely because the exaction will aid the general public as well as the subdivision residents.

A New York City proposal to rezone unconditionally—without exactions for relocation—a largely underutilized and deteriorating stretch of Third Avenue south of 14th Street from middle density to high density in conformity with the luxury housing band that extends north on Third Avenue from 14th Street was criticized by the public.

The problem facing the City was how to encourage this private growth without abandoning its responsibility to the low- and moderate-income tenants and SRO's who occupied approximately 450 dwelling units in the area. A new plan for a Special Lower Third Avenue District was made in direct response to the needs of such tenants who had too often been forced to vacate their apartments in high land value inner city core areas because of impending urban redevelopment and who had usually been foreclosed from returning to their neighborhoods because of an insufficient supply of subsidized replacement housing and because of prohibitively high new rents.

The new proposal permitted high density luxury apartment development, built in accordance with certain design requirements such as widened sidewalks and arcades, only if a developer shouldered the relocation burden being created by the rezoning in one of two ways. He could utilize 15 percent of his residential floor area for low- or moderate-income tenants. Or he could make a payment to the City representing his pro rata share of the City's cost of acquiring

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52. See Heyman in *New Zoning* at 44-45.
53. This rezoning would have yielded a net increase of 2,017 dwelling units to the City's housing supply in an area where existing City transit, school and health facilities were deemed adequate to handle the load.
54. Single Room Occupants.
55. This scheme would at the very least replace the lost units with an equal number of lower income apartments. Dwelling units would qualify if their rentals were 50% of those in equivalent apartments or if they were subsidized through an appropriate government program.
two public housing sites capable of producing 450 dwelling units within the district. If the developer resisted these exactions, he was free to build at the underlying residual middle density zone.

Like other "incentive zoning" proposals the Special Lower Third Avenue District would provide the City and the local residents with an uneconomic but extremely important use: non-luxury housing. The goal of adding non-luxury units to the City's housing supply is hardly arbitrary and would appear to promote the general welfare. This technique was also not "confiscatory" since the residual zone alternative was always present, and would be unconstitutional only if the City had imposed a "public housing zone," over certain parcels, thereby depriving the landowners of any profitable use of their property.

An indirect analogy can be drawn between the "incentive zoning" plan and the typical special assessment technique. When a landowner is specially benefitted from some government actions in a manner distinct from the general public's benefit, he can be required to pay the cost of the improvement required by his development. The rezoning of Third Avenue could thus be regarded as a public improvement which specially benefits landowners; the non-luxury housing requirement can be seen as their "special assessment."

The Special Lower Third Avenue District was approved by the City Planning Commission but defeated at the Board of Estimate. Various reasons have been suggested for its defeat. The adjacent community did not want high density luxury housing, did not trust the municipal promise of low-rent housing and feared the "ripple

56. This would have written down the high land cost which would otherwise have been an obstacle to choosing a public housing site in this location. The concept of a fund has been incorporated in several provisions of the ZONING RESOLUTION. It is used for "small change" in the Special Greenwich Street Development District § 86-0410 when the provision of physical amenities in a development is not quite commensurate with the value of the up-zoning. The Commission has sought to incorporate physical amenities within a development rather than to receive cash to be used for future amenities. The density ameliorating rationale of amenities under incentive zoning breaks down when receipt of cash defers amenities for a substantial interval.

The landmark air rights transfer zoning regulations require under § 74-791 a program for continuing maintenance of the landmark. This has involved, in the case of the Amster Yard Landmark, provision for a $100,000 trust fund. The danger of accepting money for zoning changes is self-evident. Under the lower Third Avenue scheme, the public housing would have been built first and the City reimbursed as private development occurred over time.

57. See note 14 supra.
58. See Fonoroff in New ZONING at 92.
59. Id. See also N.Y. REAL PROP. TAX LAW § 102(15)(16) (McKinney 1960). For a case involving misuse of special assessment technique see Stuart v. Palmer, 74 N.Y. 183 (1878).
effect" of increasing zoning density on adjacent property which they saw soaring in value so as to put it out of reach of the middle class. In our opinion, however, the proposal was defeated because the development community which urged increasing the allowable density feared a precedent which would make proximate or on-site provision of relocation housing a condition of zoning density increase. Under this technique the high land value deterrent to class integration would have been removed.

B. Development Rights Transfers

Any city where land scarcity pushes land values to the point they have reached in Manhattan's central business district will be interested in exploring the extent to which development rights transfers afford the means of preserving low-density landmarks and recreational islands essential to the livability of a metropolis. After a brief presentation of the central concept, examples from New York City's experience will be discussed with particular attention paid to the mandatory development rights transfer imposed on the owner of the Tudor City Parks.

The development potential of a lot is defined by zoning controls. New York City's Zoning Resolution allows a certain height, bulk and density for structures on each lot, proportionate to the size of the lot and appropriate to its location. Where an underdeveloped lot is occupied by landmarks or private parks FAR controls in high-density areas provide every incentive to the owner of such a lot to demolish the present use and rebuild to the allowable FAR maximum.

Traditional zoning ordinances do not permit transfer of unused development rights to non-contiguous lots. Such conveyances are regarded as contrary to the prevailing notions about the need for uniformity of controls in a given area. It is felt that the essential interrelationship of zoning density controls to street width, transit access, school seats, and other objects of planning concern could not survive indiscriminate transferability of unused development rights between widely spaced parcels. The unit of development control chosen by most ordinances was the zoning lot. Had a different unit of control been chosen as its basis—perhaps a block basis, or a square mile basis—there would have been no bias against wider area transferability of development potential. A block-by-block control can achieve density objectives as successfully as a lot-by-lot approach. Seeing

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It became necessary to find another location for the unused development potential of socially beneficial lots if the present desirable underdevelopment was to be retained. The three development rights transfer schemes discussed below all solved this problem. In the case of Amster Yard, the valuable unused development rights are transferred to a contiguous adjacent lot. In the case of the South Street Seaport, transfer may be made to designated non-contiguous lots within a radius of a few blocks.

In the case of the Tudor City private parks, their development rights are transferred out of the immediate vicinity to the adjacent midtown Manhattan business district.

1. Next Door: Amster Yard

Amster Yard is a 19th century collection of small residential structures and stores in Midtown Manhattan. A logical outgrowth of the courts' gradual acceptance of "aesthetic zoning" as an extension of the police power has been the demand for the preservation of landmark buildings like Amster Yard and historic districts. Early efforts in this area relied primarily on the use of private capital for the acquisition of threatened buildings. It was not until 1956 that the New York State legislature passed enabling legislation for the designation of landmarks and historical districts. Nine years later, the City responded with its Landmarks Preservation Law and the creation of the Landmarks Preservation Commission.

Landmark officials were still faced with the problem of finding a way to make zoning regulations work for, rather than against, landmarks. In areas zoned for high density development, small landmark structures like Amster Yard are ripe for demolition and

61. Amster Yard is located on a through-block property east of Third Avenue between 49th and 50th Streets.
62. People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), appeal dismissed, 375 U.S. 42 (1965). (Ordinance prohibiting clotheslines from yards abutting a street was upheld as a valid exercise of police power in order to preserve the residential appearance of the area.)
63. LAWS OF NEW YORK OF 1956, ch. 216 § 1, now N.Y. GEN MUNIC. LAW § 96(a) (McKinney Supp. 1972). See, J. J. Loflin, Zoning and Historic Districts in New York City, 36 LAW & CONTEMP. PROB. 303, 394 (1971). The passage of this law (the Bard Act) empowered the City to:
provide, for places, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value, special conditions or regulations for their protection, enhancement, perpetuation or use, which may include appropriate and reasonable control of the use or appearance of neighboring private property within public view, or both. In any such instance such measures, if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, or if constituting a taking of private property shall provide for due compensation. . . .
64. NEW YORK CITY ADMINISTRATIVE CODE, ch. 8-A, § 205-1.0 et seq. (Supp. 1970).
redevelopment. A technique was needed to fine tune the municipality's police power so that it would neither ride roughshod over the property rights of the landmark owners nor force the City to become ultimately bankrupt rather than face the destruction of its cherished heritage.

The City's solution was to offer the landmark owner the option to sell the development rights from a landmark and transfer them to an eligible receiving lot in the form of a developmental floor area bonus for such lot. This innovation differed from the approach adopted in the special districts in two ways. First, the floor area bonus mechanism was being used to save pre-existing bricks and mortar threatened with demolition. Second, the development rights were being transferred across zoning lot lines, rather than being generated on the zoning lot by new development which itself contained a desirable amenity or uneconomic use.

Traditionally, the New York City Zoning Resolution has permitted the transfer of development rights between two contiguous zoning lots which are in the same ownership. Structures on such lots can be held in fee ownership or through a long-term lease arrangement. In 1968, a zoning amendment was adopted which permitted the landmark's development rights to be transferred to a non-contiguous lot.

In effect, the development rights transfer was used to add rentable floor space to a new development contiguous to or across the street from the low height and unique character of the landmark. The rationale for this approach was founded in traditional land regulation theory: the contiguous or across-the-street lot benefits from the low landmark in terms of light and air and the City preserves part of its heritage.

Saving a landmark from the wrecker's ball does not ensure its preservation. The 1968 amendment while requiring a program for continuing maintenance does not, however, favor one particular solution to the problem. In some cases, a historic structure can be made self-supporting either by virtue of tourist fees or profitable commercial or residential use. In 1970, the City recommended that

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65. Many of the four- and five-story midtown landmarks are located in zones which could accommodate residential or commercial structures many times their size.
66. N. Marcus, Air Rights Transfers in New York City, supra note 60, at 374.
67. "For the purposes of this definition, ownership of a zoning lot shall be deemed to include a lease of not less than 50 years duration, with an option to renew such lease so as to provide a total lease of not less than 75 years duration." ZONING RESOLUTION § 12-10 (definition of "zoning lot").
68. ZONING RESOLUTION § 74-79 et seq.
69. Examples include Boston's Old City Hall, now thriving as a private office building, and Ghiradelli Square in San Francisco, where a former candy factory is
income from a $100,000 trust fund be applied to the maintenance of the 19th century Amster Yard, a privately owned series of homes, stores and interior garden.\textsuperscript{70} The owner of this landmark proposed to sell a portion of his unused development rights to a contiguous parcel on Third Avenue, where an office building was going to be built. This private transaction was consummated and blessed by the City which made sure that the facade of the new building would be compatible with that of the smaller landmark structure.\textsuperscript{71}

2. \textit{Within the Immediate Vicinity: South Street Seaport}

An even more ambitious development rights transfer scheme involved the transfer of air rights within an urban renewal area.\textsuperscript{72} The purpose of the Special South Street Seaport District was to make it possible to preserve and restore a number of approximately 200 year old historic buildings from the Fulton Fish Market in Lower Manhattan while accommodating, at the same time, the construction plans of the developers.

The Special District contains a preservation area and a redevelopment area.\textsuperscript{73} In accordance with the detailed urban renewal plan, the low-scale of the Seaport will be retained by transferring development rights above the low buildings to specified neighboring locations for commercial development. All of the floor area potential not exhausted by the old structures\textsuperscript{74} may be shifted onto specified parcels within the district.

In addition to conveyances to specified redevelopment lots, conveyance to middlemen was authorized, as well as subsequent conveyance in a chain that was required to end on one of the specified redevelopment lots. The attempt was to make the development rights as marketable as possible. An early sale would mean an early start on the historic building renovation. In effect, a bank of development rights was authorized, under the immediate management of private individuals, whose ultimate disposition was directed by the City in the Special South Street Seaport District zoning legislation.\textsuperscript{75}

\textsuperscript{70} NEW YORK CITY PLANNING COMMISSION REP. CP-21236 (July 20, 1970).
\textsuperscript{71} N. MARCUS, \textit{AIR RIGHTS TRANSFERS IN NEW YORK CITY}, supra note 59, at 376.
\textsuperscript{72} SPECIAL SOUTH STREET SEAPORT DISTRICT, ZONING RESOLUTIONS § 89-00 et seq.
\textsuperscript{73} Id. § 89-02, 89-05. Preservation areas are designated as granting lots; redevelopment areas are designated as receiving lots.
\textsuperscript{74} These landmark buildings were rezoned for a bulk of FAR 10.
3. **Outside the Immediate Vicinity: Tudor City Parks**

Adjacent to Manhattan's densely populated Central Business District a small patch of green can bring to passersby a welcome sense of escape from monolithic skyscrapers and the cacophony of the City streets. In many respects, the small park is more important as an amenity than a landmark building or a shopping arcade. In the past, a few public-spirited citizens have seen fit to donate such urban oases to the City, but such demonstrations of generosity are rare. The recently enacted “Special Park District” amendment to the Zoning Resolution will ensure the preservation as public parks of existing private parks without cost to the City through a development rights transfer system.

The impetus for this proposal came from the plan announced by a developer to build on two small private parks that he had acquired as part of the Tudor City complex on Manhattan's east side. Local residents, however, urged the City to save the forty-year-old parks which are valued at more than three million dollars. The land costs precluded purchase of the parks by the City. Instead, the Planning Commission took the unusual step of scheduling a public hearing to outline five different development strategies. The final option, the creation of a special park district prohibiting development on designated parks and mandating transfer of development rights therefrom, was the one ultimately approved.

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76. Two examples are Paley Park at 53rd Street near Madison Avenue and Greenacre Park at 51st Street between Second and Third Avenues.

77. ZONING RESOLUTION § 91-00 et seq. An interesting question is posed by the existence of a security interest in the designated park. The instrument establishing the terms and conditions of such security interest should be amended to encumber the development rights with the same security interest as had attached to the designated park.

78. a. The City could do nothing and allow two towers under existing traditional zoning.

b. Zoning and mapping changes could be granted permitting development of a 46-story tower on a platform spanning 42nd Street.

c. The tower could be built on the northern park, which would be replaced by a new park on a bridge over 42nd Street.

d. Two towers would replace the existing private parks, but a new park would be created on a deck over 42nd Street.

e. Creation of a special park district.


79. “It was a rare outburst at a City Planning Commission hearing—the audience standing up and applauding the Commissioners after a vote. ‘I wish I could kiss all of you’, said one elderly woman, while her neighbors in the Tudor City complex . . . talked happily about their victory.” Freiberg, 2 Parks Saved in Tudor City, N.Y. Post, Nov. 9, 1972, at 11, col. 1.

The “Special Park District” which may be located anywhere from 38th to 60th Streets, river to river, will require owners of designated existing private parks to sell or
The "P" District provisions could add a number of privately-owned parks, in addition to those at Tudor City, to a public classification. The legislation will also accord the same transfer rights to privately-owned land in the Midtown core which has been mapped as a public park, but has not as yet been acquired. The zoning amendment stipulates that all such areas must meet uniform standards and be properly maintained. It will thereby enable the City to add new parks within this high land value area without adding to its capital or expense budgets.

The question that legal scholars must address themselves to is how far may the police power be extended in a regulation of this type without encroaching upon constitutionally protected property rights. The Special Park District proposal would seem a logical extension of the municipality's general police power:

a. The provision of open space and parkland for City inhabitants falls within the scope of the "general welfare" requirement.

b. The forced dedication of land for park and recreational purposes has been upheld by the courts as within the police power.

c. The case of the owner of a private park can be readily distinguished from that of the owner of a revenue-producing facility, where the courts will be more disposed to find that a purported regulation amounts to a "taking" for which just compensation must be paid.

80. An existing mapped park in private ownership on Tenth Avenue could qualify under this provision.


82. E.g., Gorieb v. Fox, 274 U.S. 603 (1927). It is hard to see any controlling difference between regulations which require the lot owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not the same extent, with the owner's right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. See also HAAR at 494-95.


The special needs of New York City add credence to the "public purpose" rationale of the regulations. The Supreme Court itself has indicated that the zoning power of municipalities increases as their size and problems increase. In *Euclid*, the court said that "a regulatory zoning" ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.85

e. The Special District calls for the preservation of an existing use, rather than a dedication of land for use in the future by an indeterminate group of people. Such innovative techniques of land regulation have found great receptivity in the courts, especially where the regulations' rationality is supported by a firm comprehensive planning basis.86

f. The Special "P" District would serve to provide amenities to the public without further threatening the liquidity of the City's fiscal resources. "The economic and physical well-being of the municipality and its inhabitants, both governmental and personal, depends on the ability to furnish the necessary governmental services without at the same time bringing about a confiscatory tax levy."87

g. The use of the City's eminent domain power is neither a justifiable nor viable alternative in terms of fiscal policy. First, the protection of economic position—the most salient effect of the constitutional prohibition against uncompensated takings—is not compromised by the Park District proposal. Given the provision allowing the transfer of development rights, the proposal would not take from the owner of a granting lot the economic benefit of his property; it would merely direct him to exploit his property's development potential in a way that, while perhaps unorthodox, would nevertheless be economically beneficial. Second, the City's shortage of funds would preclude or seriously delay any attempt to acquire and maintain private parks.88

85. Village of Euclid v. Ambler Realty Co., 272 U.S. 865, 887 (1926). In *Southern Pacific Co. v. City of Los Angeles*, 242 Cal. App. 2d 38, 46-47, 51 Cal. Rptr. 197, 202 (Dist. Ct. App. 1966), *appeal dismissed*, 385 U.S. 647 (1967) the court upheld a zoning ordinance that prohibited the improvement of certain property abutting a highway unless half the highway is dedicated and improved to the master plan width, saying that a property owner assumes certain risks of police power regulation when living in modern society under modern conditions, "particularly if he lives in the metropolitan area . . . ."


C. Privately Reimbursed Exercise of Eminent Domain

As incentive zoning seizes upon the typical developer's hunger for more rentable floor area, so would exercise of the condemnation power to eliminate holdouts\textsuperscript{89} permit a developer to exploit the full potential of his land assemblage. Use of this eminent domain technique can achieve trade-offs in the public interest, provided that reimbursement of the City's condemnation cost together with the cost of City-exacted amenities in the future development do not outweigh the developer's advantage in eliminating the holdout.

Incentive zoning is far from the only means that the government has to shape public development. Special assessment\textsuperscript{90} and administrative codes\textsuperscript{91} have already been suggested as alternatives. Professor Allen Fonoroff has proposed that the eminent domain power be exercised more often since "it relieves many courts of the unenviable choice of either upholding a regulation which in fact is a taking of considerable rights or rejecting a regulation thereby leaving the future use of the land to the developer."\textsuperscript{92}

The traditional use of eminent domain, however, has its practical and conceptual limitations. It has been generally opposed by community groups who feel that the loss of their homes to "The Federal Bulldozer"\textsuperscript{93} is not for their general welfare. In recent years, City administrators have been loathe to exercise this power both in deference to the demands of the community groups and in recognition of the scarcity of fiscal resources. Conceptually, a taking must be for a public purpose, but this need not involve a public reuse.\textsuperscript{94}

The City, acting as a conduit, could acquire certain land in fee simple for the public purpose of redevelopment in the public interest and instead of keeping it in public ownership, reconvey or lease it to a developer, "subject to specified covenants, restrictions, conditions, or affirmative requirements designed to protect the

\textsuperscript{89} Holdouts tend to cut good sites into relatively useless islands, thereby discouraging the orderly development of business centers. But the City cannot indiscriminately condemn every little parcel that blocks large-scale commercial development. The right to condemn involves a careful balancing of an individual's property rights against the broader "general welfare."

\textsuperscript{90} Fonoroff in NEw ZONING at 92.

\textsuperscript{91} See note 63 supra.

\textsuperscript{92} Fonoroff in NEw ZONING at 91.


public interest and to accomplish the [public] purposes of the special district.’’

New York City has supported this concept and has backed the introduction of legislation in the New York State Legislature that would create a central business development district in Manhattan. Such enabling authority would permit the City, after two public hearings, to exercise its power of condemnation and acquire interests in non-residential holdout property within the district unreasonably blocking a development. The public review of a redevelopment plan would not begin until the developer had obtained fee title interest in at least 85 percent of a development site covering at least one city block or 40,000 square feet, whichever is less. After condemnation, the holdout parcel would be sold to the developer who would be required to build on his site in conformance with a publicly-approved plan as well as to assist in relocating the holdout.

The public purpose of such a privately reimbursed exercise of eminent domain primarily rests upon its importance to the City’s economic base. In the holdout situation, there is an identity between public and private purpose which arises out of a common recognition that the holdout robs valuable land of its great potential.

The historical concern of municipalities and states in protecting the economic base on which communities are founded has manifested itself in many other ways which reflect other regional problems. The Supreme Court of the United States has sustained numerous statutes with economic protection as their admitted purpose. In Clark v. Nash and Strickley v. Highland Boy Mining Co., the Supreme Court approved Utah statutes which permitted condemnation of private rights-of-way for irrigation and mining purposes against charges that the statutes authorized taking for private rather than public purposes. In doing so, the Court deferred heavily to regional differences and to the significance of irrigation and mining to the economic vitality of the State.

In Clark v. Nash, the Court sustained a statute that permitted condemnation for privately used irrigation drains because it was “made for the very purposes of thereby contributing to the growth

95. Fonoroff in New Zoning at 91. This can ensure that the design quality of new office construction remains first-rate and contains such public improvements as transit connections, pedestrian amenities, libraries and parks.
96. § 5605c, A 6905c. New York State Legislature (1972) (not acted upon).
97. Id. This district would generally run south of 59th Street in Manhattan.
98. 198 U.S. 361 (1904).
100. See also Marrs v. City of Oxford, 32 F.2d 134 (8th Cir.), cert. denied, 280 U.S. 573 (1929); Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).
and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil by means of irrigation." The Court expressed apprehension as to the State's future growth and prosperity should the statute be declared invalid.

In Strickley, a private owner was permitted to condemn a right-of-way for an aerial bucket to carry his mining materials across other private land. The Court said:

While emphasizing the great caution necessary to be shown [in the use of eminent domain], it has proved that there might be exceptional times and places in which the very foundations of a public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent. In such unusual cases there is nothing in the 14th Amendment which prevents a State from requiring such concessions. . . . In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sites and railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong.

The New York Court of Appeals sustained the World Trade Center legislation in Courtesy Sandwich Shop, Inc., v. Port of New York Authority. Among the issues on appeal was the question of whether centralization of world trade was a "public purpose." The court concurred with the Appellate Division on that issue and noted as follows:

The Appellate Division has stated that the concept of the World Trade Center is a public purpose. We understand this to mean that any use of the property sought to be condemned that is functionally related to the centralizing of all port business is unobjectionable even though private persons are to be the immediate lessees. The "concept" referred to by the Appellate Division can mean only that. It is the

101. 198 U.S. 361, 370 (1904).
102. 200 U.S. 527, 531 (1906).
104. Id. at 386, 190 N.E.2d at 409, 240 N.Y.S.2d at 12 (dissenting opinion).
105. Id. at 388, 190 N.E.2d at 404, 240 N.Y.S.2d at 5.
gathering together of all business relating to world trade that is supposed to be the great convenience held out to those who use American ports and which is supposed to attract trade with a resultant stimulus to the economic well-being of the Port of New York. This benefit is not too remote or speculative as to render the means chosen to achieve it patently unreasonable; nor is the benefit sought itself an improper concern of government.

In addition to the eminent domain approach to the holdout problem, alternative new zoning tools could permit public benefit to be reaped from holdout situations. Instead of letting these vestiges become parking lots, as is usually the case, we could encourage their development as small parks. It would be possible in many instances to permit the transfer of development rights from such parcels to the project of which they had, initially, been intended to become part. The isolated lot, its development potential utilized, could become a park.

The isolated property would then have a value similar to the properties comprising the major assemblage and no penalty would be imposed on the owner by requiring him to develop and maintain the isolated lot as a landscaped park. Appropriate standards, including minimum lot size and location requirements for such parks, could be developed. The effect of such a zoning technique would be to reduce the leverage exerted by the hold-outs, since the economic utilization of the isolated parcel would no longer be a problem.

The holdout problem is thorny, but its resolution is important to the continued vitality of the commercial core—which is integral to the well-being of the City and the region. We believe the solution suggested in the proposed eminent domain legislation and its zoning alternative meet the tests of public purpose, fairness and equity.

D. Restrictions Running with the Land

Traditional land use regulation classifies areas of the City into zoning districts. Roughly similar areas receive common classification. Districts contain use, density, bulk and parking controls which form a common denominator of its areas' characteristics. This system rarely recognizes uniqueness in neighborhoods as a basis for higher or special standards and often by their omission promotes develop-

106. The zoning approach would be similar to that employed in the Special Park District, note 79 supra, except that it would be optional rather than mandatory.
ment which is incompatible with the character of such neighborhoods. Conditional zoning, involving imposition of restrictions running with the rezoned land, is one method of remedying this problem.

Conditional zoning involves the reclassification of an applicant’s property to another zoning category coupled with the imposition of conditions designed to ameliorate the impact of the new development on neighboring properties. Early cases viewed this approach as tantamount to “spot zoning” or “special privilege legislation.” Later cases, however, almost uniformly approve the device. In *Church v. Town of Islip*, the New York Court of Appeals would not accept appellant’s arguments that the ordinance was illegal as “contract zoning” because the Town Board, as a condition for rezoning, required the owners to execute and record restrictive covenants as to maximum area to be occupied by buildings and as to a fence and shrubbery. Echoing decisions which justified similar restriction as part of the municipality’s police power, the court concluded that the zoning “conditions were intended to be and are for the benefit of the neighbors.”

Under the authority of *Church v. Town of Islip*, New York City has used restrictive declarations or covenants running with the land as a prime means of controlling development. Although this tool often accompanies special permits and other expressly conditional forms of zoning approval, its principal exercise has occurred in the traditionally unconditioned areas of zoning.

Zoning classifications are not forged for eternity and the dynamic of change continually brings about requests for alteration of a zoning classification.

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107. Spot zoning is a pejorative expression usually denoting an intention to benefit a single property owner rather than zone in accordance with a comprehensive plan. The ”spot zone”, instead of constituting a part of a larger area which is zoned uniformly, sticks out like a sore thumb from its more restrictively zoned neighbors. For an extensive discussion of spot zoning, see R. M. Anderson, American Law of Zoning §§ 5.04 to 5.13 (1968).


111. Contract zoning is a pejorative expression used by courts in striking down a zoning amendment which is coupled with an agreement by a property owner to develop in a certain way. The prohibited contract involves a constraint on the municipality’s theoretically untrammelable exercise of its police power. Courts which approve of this technique label it “conditional zoning” and find no “contract” or obligation on the part of the municipality to refrain from exercising its police power functions.

112. 8 N.Y.2d at 259, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.
A changed classification by no means assures the object sought by the City in agreeing to the requested change. Each classification usually permits a variety of uses and arrangements of bulk and parking on a lot. Some of those uses and some of those building arrangements may be perfectly acceptable to neighboring property owners while other permutations permissible within the classification may be utterly unacceptable either to neighbors or to the larger community including the City. For the zoning reclassification to command support, a way must be found to permit its desirable consequences and prevent the undesirable ones.113

In those cases where the potential harm of standard classification poses a serious threat, the City's practice is to require the property owner to record a restrictive declaration incorporating special conditions and restrictions controlling development so that any new development will blend into its surrounding neighborhood.114

The value of this procedure is twofold. Development which benefits the City is not stifled because of valid fears concerning the other alternatives unlocked by a zoning reclassification. Accidental and unintended erosion of neighborhoods by unconditional zoning reclassification is avoided.

Ancillary benefits often emerge under an incentive zoning rationale. The reclassification sought may materially increase the value of the property affected. It may be appropriate, either on an externalities justification or simply as a neighborly gesture for the zoning applicant to covenant a major public amenity such as a park, or grant a subway access easement as an additional condition justifying the rezoning in the eyes of the City.

Perhaps the most dramatic use of this technique came in 1971, when the City conditioned its approval of a large-scale residential development on the privately-owned Glen Oaks Golf Course in Queens upon a restrictive declaration filed in the Queens Property

113. A typical case might involve a religious institution, its residentially-zoned property having appreciated in value as a regional commercial center edged ever closer. The institution decides to sell out and move to a quieter area. The contract vendee requests a zoning reclassification from residential to regional commercial so that it may put up a department store. If the reclassification were granted without conditions, the property could be subdivided to permit a variety of other commercial uses resulting in parking lots with entrances and exits cutting across residential and school pedestrian routes and night lighting shining directly into apartments.

114. The declaration additionally recites the beneficiaries of its provisions among which is the City, the fact that it is a covenant running with the land, and it sets forth a procedure for modification which requires City approval. See New York City Planning Commission Rep. CP-21651 (Aug. 11, 1971).

115. See note 50 supra.

116. The golf course was zoned R3-2, a relatively low-density residential classification.
Register's Office. Under the terms of the declaration, which runs with the land and binds the owner and his successors and assigns, almost 100 acres of unique and irreplaceable open space topography would be left forever in its natural state, regardless of future zoning reclassification of the property.¹¹⁷

E. Incentive Planned Unit Development Zones

In the early Sixties, as virgin land areas diminished, planned unit development and cluster zoning proposals were adopted by which permits apartment houses as well as one- and two-family houses. New York City Zoning Map 11d, effective Mar. 25, 1971, City Planning Commission.

¹¹⁷. The Commission's discussion of the choices with which it was faced in this instance is instructive:

Much of the testimony at the public hearing was addressed to the height of the three apartment houses. Speakers argued that 32-story structures would destroy the suburban character of the neighborhood, were visually offensive and environmentally destructive. Some speakers simply urged the Commission to reject the request for a special permit. Other speakers suggested as an alternative that the City acquire the 106 acre tract and map it as a public park.

The Commission is sympathetic to the community's desire for a new public park. However, this would be a costly solution. The property is reported to have cost the developer $12 million. In the light of the City's limited financial resources, an outlay of this magnitude for this purpose cannot be justified.

The proposed development leaves untouched almost all of the existing open space. The ground floor area of the buildings will cover only some two percent of the site. Moreover, the open space is further protected by a covenant contained in a declaration attached herewith which prevents the owner of the property from ever building outside a certain circumscribed area regardless of what the zoning may call for in the distant future. The permanent dedication of open space under this covenant will be nearly 100 acres...

If the special permit were denied, the developer would still have the as-of-right option to build more than 2,500 one-family homes. This would satisfy the community's desire to retain a low level profile, of course. But it would totally destroy the golf course and open space. At least 20 percent of the area would have to be devoted to paved streets which, in turn, would substantially increase the requirement for storm sewers since the run-off would be greater. In fact, material requirements for all utilities would be much heavier for the one-family homes than for the apartment towers. The one-family development would also generate more traffic.

Ecologists who appeal to the Commission to reject the special permit overlook the fact that one-family developments place a far greater strain on the environment than do apartment buildings in park-like settings, a common practice in British and Scandinavian suburbs.

In making its decision, the Commission is not deciding whether there should or should not be high rise development on the Glen Oaks golf course. The Commission's choices are limited: to grant the special permit and guarantee the protection of most of the open space or to reject the special permit and thus allow the developer to either cover the open space with one-family homes or to build high rise apartments but no stores or underground parking. It is the Commission's judgment that it is in the best interest of the community to protect the open space and to insure its future protection as well by granting the special permit.

communities interested in setting aside land for schools, recreation areas and green spaces.118 Most courts held that "such an ordinance reasonably advances the legislative purposes of securing open spaces, preventing over-crowding and undue concentration of population, and promoting the general welfare."119 Such ordinances waived normal setback from streets and yard requirements in order to create larger and more usable common open spaces.120

Because of New York City's concern over the quality of development in the remaining vacant land areas121 as well as with the retention of as much natural landscape as possible, planned unit development provisions were incorporated in the zoning resolution.122 This particular type of floating zone123 may be overlaid on low-density residentially-zoned areas upon application of a developer who owns a parcel of sufficient size.124

The floor area bonus technique of incentive zoning is used to foster better design and to protect open space and natural topography. A 15 percent density increment is the maximum bonus obtainable.125

The problems of large-scale protection of natural resources are not going to be solved by development regulations alone. In rare cases, such as Glen Oaks, as much as 100 acres of natural topography

118. ZONING RESOLUTION § 78-00, et seq. [Planned Unit Development].
120. Consider a standard subdivision layout with look-alike houses separated by useless side yards on a gridiron street pattern. Major dredging of a swampy area may be required before such residential construction can proceed. A planned unit development, on the other hand, could achieve considerable economies by inexpensively converting the swamp into a common open space and clustering the bonussed number of units on the somewhat smaller balance of the site. The converted swamp, with resident ducks, rowboats or swimmers, reasserts, albeit in modified form, a semblance of the natural landscape and ecological balance pre-existing in the area.
121. Most of the vacant land in New York City lies in South Richmond.
122. See note 118 supra.
123. A floating zone describes a district set up in the zoning ordinance but not, at least at the outset, mapped in a particular location. The regulations for the district spell out . . . the variety of circumstances that must exist to enable a land owner successfully to apply for a reclassification to the floating zone. The criteria also typically set forth a variety of performance standards that enable quite individualized treatment of details. Heyman in NEW ZONING at 39. See Rogers v. Village of Tarrytown 302 N.Y. 115, 96 N.E.2d 731 (1951).
124. In New York City the threshold is one and one-half acres. ZONING RESOLUTION § 78-02.
125. This bonus is for good site design and provision of common open space. The latter arrangement patterned after the successful 19th Century Gramercy Park close, requires a recorded instrument setting forth the rights to this space and the obligations incurred by those enjoying such rights. See URBAN LAND INSTITUTE, TECHNICAL BULLETIN 50 (1964) for typical agreements.
were preserved. Many planned unit developments are smaller and conserve proportionately less open space. The primary purpose of their regulations is improvement in the quality of residential environment, not prevention of development in order to preserve the environment of a much larger region.128

F. Development Easements

All of the techniques discussed above have employed some combination of carrot and stick to achieve a greater degree of public control over private investment. Perhaps the smallest carrot coupled with the biggest stick is contained in the development easement system devised by a small community in New York State. And the prize sought is nothing less than orderly growth, timed in accordance with a public plan for provision of municipal services and facilities.127

Ramapo, New York128 is a suburban town thirty miles away from New York City. Large and small municipalities share the common problems of runaway residential growth and rapid tax hikes129 that far outpace the community's ability to provide relief in the form of supportive services and capital facilities. The Ramapo town supervisor has devised a regulatory scheme that coordinates development with an 18-year capital improvement plan for sewers, drainage facilities, improved public parks or recreation facilities, public

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126. Regulations which "freeze" land in its natural state, rendering it valueless, have been struck down. In *Morris County Land Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 555-56, 193 A.2d 292, 241-42 (1963), the court invalidated a regulation which limited use of the Jersey Great Swamp to conservation-oriented uses, observing that:

> These are laudable purposes and we do not doubt the highmindedness of their motivation ... [but the] public uses are necessarily so all-encompassing as practically to prevent the exercise by a private owner of any worthwhile rights or benefits in the land. So public acquisition rather than regulation is required. See *Dooley v. Town Plan and Zoning Commission of the Town of Fairfield*, 151 Conn. 204, 197 A.2d 770 (1964) (ordinance limiting uses of flood plain district was invalidated). *But see Commissioner of Natural Resources v. Volpe and Co.*, 349 Mass. 104, 111, 206 N.E.2d 666, 671 (1965) where the court did not strike down a statute prohibiting dredging or filling of marshlands without the consent of proper authorities. Instead, the case was remanded to the lower court for a determination as to the degree of private deprivation:

> In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interests of the former, and it is the duty of the courts to stand guard over the constitutional rights.

128. Ramapo’s total population is 76,700, but the Town Supervisor’s “planning and zoning jurisdiction encompasses only the unincorporated area where 45,400 citizens live, and not the incorporated villages of Sloatsburg, Hillburn, Suffern, Spring Valley, New Square and Pomona.” *Id.* at 6.
129. “In the same period that the population was doubling, the school tax was increasing threefold.” *Id.*
schools, roads and firehouses. In accordance with a "development easement system" owners of property would be unable to build on their land until it amassed fifteen "points," which are assigned as capital improvements are supplied. Developers have the option of either providing the facilities themselves or foregoing their construction rights for specific time periods during which they may receive tax abatements on their property from a Development Easement Acquisition Commission. These controls do not amount to an absolute moratorium on all growth, since the zoning amendments contemplate a definite term of years during which the town is committed to the construction and installation of capital improvements.\textsuperscript{131}

The development easement system proved to be innovative and controversial. Fourteen law suits have been brought against the Ramapo Town Supervisor. On May 3, 1972 the New York Court of Appeals reversed two lower court decisions and held the Ramapo regulatory plan to be constitutional. A closer look at \textit{Golden v. Planning Board of Ramapo}\textsuperscript{132} is warranted, since the decision has important legal and planning ramifications that could directly influence development patterns in other areas of the State, and by imitation, throughout the country. Despite the case's modernity, it also reflects a struggle that has been waging within communities since before the time of \textit{Euclid} between the rights of the property owner to resist confiscation and the rights of the municipality to protect the community from the harmful effects of urban redevelopment. It also reflects the current concern over total environment which is adversely affected by runaway development discharging untreated sewage into public waters, accelerating erosion and runoff through rapid increase in paved surfaces, etc.

Judge Scileppi, in his majority opinion, recognized these conflicting forces and noted that the potential harm alleged by the complaining landholders was "immediate and . . . sufficient to raise a justiciable issue as to the validity of the subject ordinance."\textsuperscript{133}

In effect, the central inquiry that the court makes is not into

\textsuperscript{130} In residential zones, "points" are awarded as follows: five points for a public sewer, three points for a package sewerage plant, from five points for optimal drainage capacity to one point for 50 percent capacity, five points if a school is within a quarter of a mile, one point if it is within a mile. \textit{Town of Ramapo Building Zone Ordinance}, § 46-13.1D. See \textit{Planning, The ASPO Magazine} 108, July 1972.

\textsuperscript{131} See \textit{Albrecht Realty Co. v. Town of New Castle}, 8 Misc. 2d 255, 167 N.Y.S.2d 843 (1957).


\textsuperscript{133} \textit{Id.} at 266, 285 N.E.2d at 294, 334 N.Y.S.2d at 142.
the laudatory goals of the Ramapo plan but into the mechanism that the Town has seen fit to adopt in order to attain these goals.

Judge Scileppi held that the Town’s use of its police power was not *ultra vires* and void. The “power to zone” was necessarily complemented by the requirement that “the development of unimproved areas be accompanied by provision of essential facilities.”

Taken together, they “seek to implement a broader, comprehensive plan for community development.”

The court did not find the zoning amendments to be arbitrary. It carefully examined the potentially confiscatory nature of the regulations. The situation in Ramapo differs from the typical subdivision case where the developer’s obligation to provide an amenity is secured by a performance bond. In this case, plat approval is conditioned upon the Town’s obligation to undertake the improvements. “Whether it is the municipality or the developer who is to provide the improvements, the objective is the same—to provide adequate facilities, off-site and on-site; and in either case subdivision rights are conditioned, not denied.”

The Ramapo ordinance therefore calls for a temporary and not a permanent restriction. The burden that is imposed on the property owner is relieved somewhat by the tax abatement provision and by the ultimate benefit inuring to him in the form of a substantial increase in future valuation. Any diminution in value is a “relative” factor and though its magnitude is an indication of a taking, it does not of itself establish confiscation.

The major issue raised by Judge Breitel in his dissenting opinion dealt with what he viewed to be an “exclusion in effect or by motive, of walled-in urban populations of the middle class and the poor.” Although his criticism was rebutted by the Town Attorney in Ramapo, it is an important reminder that the “police power” to zone and regulate is still subject to constitutional limitations. Judge Scileppi, however, views Ramapo’s system as a “first step . . .

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134. *Id.* at 372, 285 N.E.2d at 298, 334 N.Y.S.2d at 147.
135. *Id.*
136. *Id.* at 373 n.7, 285 N.E.2d at 298 n.7, 334 N.Y.S.2d at 148 n.7.
137. *Id.* at 374, 285 N.E.2d at 299, 334 N.Y.S.2d at 149.
138. *Id.* at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 154.
139. *Id.* at 383, 285 N.E.2d at 306, 334 N.Y.S.2d at 156.
140. In *Golden v. Town of Ramapo*, *Establishing a New Direction in American Planning Law*, 4 THE URBAN LAWYER ix, xiii (Summer 1972) the attorney for the town of Ramapo wrote that “Ramapo was the first suburban town in New York State to voluntarily, as part of its planning process, develop integrated public housing for low income families over the objection of thousands of its citizens.”
toward controlled growth achieved without foresaking broader social purposes."\textsuperscript{141} He added that:\textsuperscript{142}

Ramapo asks not that it be left alone, but only that it be allowed to prevent the kind of deterioration that has transformed well-ordered and thriving residential communities into blighted ghettos with attendant hazards to health, security and social stability . . . .

At best, the exclusionary issue raised in the Ramapo dissent would be a criticism of the Ramapo development easement system \textit{as applied}, not an attack on the validity of the device itself. The device clearly merits consideration as a planning tool of considerable strength and effectiveness.

The Ramapo plan is significant in that it offers a community a way to marry the demands for growth to a growing concern for the environment. By relating the pace of development to a plan for capital improvement, the municipality can plan for the ever-broadening general welfare without imposing an impermissible restriction on the private landowner. New York City's use of the Planned Use Development in Staten Island\textsuperscript{143} or the restrictive declaration in Glen Oaks\textsuperscript{144} are pieces of a puzzle that the Village of Ramapo is on its way to solving. Ramapo's solution suggests a way for New York City to proceed with the development of predominantly vacant, unstreetered and unsewered South Richmond and other large-scale development sites\textsuperscript{145} in the City.

The South Richmond Development Corporation legislation which relies heavily upon eminent domain powers, currently pending before the State Legislature is an alternative step towards the goal of tying residential development to the availability of fiscal resources for the construction of a network of infrastructure and supportive facilities.\textsuperscript{146} Prompting this legislation was the fear that premature subdivision and development without the proper environmental infrastructure would repeat the mistakes of the past.

The Ramapo method achieves this objective over an 18-year period based on an assessment of its own resources and the resources of likely developers. The South Richmond legislation looks to bond

\textsuperscript{141} \textsuperscript{142} See discussion in Section II E of this article \textit{supra}.
\textsuperscript{143} See discussion in Section II D of this article \textit{supra}.
\textsuperscript{144} Compare AN ANALYSIS OF DEVELOPMENT TRENDS AND PROJECTIONS AND RECOMMENDATIONS FOR A NEW CITY IN SOUTH RICHMOND (The Rouse Company, May 1970).
\textsuperscript{145} S 8892, New York State Legislature (1972) (not acted upon).
financing secured by the value of vacant city-owned land in the area and the resources of likely developers as well. Both Ramapo and the South Richmond legislation are motivated by common concerns:

1. The need to economize on the costs of municipal facilities and services.
2. The need to retain municipal control over the eventual character of development.
3. The need to maintain a desirable degree of balance among various uses of land.
4. The need to achieve greater detail and specificity in development regulation.
5. The need to maintain a high quality of community services and facilities.

III. CONCLUSION

The actual impact on development of the techniques discussed above has been dramatic. Eighteen million dollars of new theaters have been constructed; new circulation improvements have been built; the first mixed use (retail stores, offices and apartments) building ever built on Fifth Avenue is under construction; development rights potentially worth $10 million will make possible the preservation in high land value areas of historic buildings and vest pocket parks; a $12,000,000 open space resource in Eastern Queens has been permanently preserved; an entire community has insured its orderly growth over an 18-year period. In every instance intervention by the government has been far greater than that previously tolerated and planning goals have been more explicitly achieved. Such techniques do not violate any private rights while permitting far more effective City growth. The goal remains constant: public control of private investment without violation of constitutional safeguards or the municipal treasures.
