New Jersey's Pinelands Plan and the "Taking" Question

I. INTRODUCTION

New Jersey, the most urbanized of the fifty states,[1] has what one homebuilders' industry spokesman labels "the toughest environmental plan in the United States."[2] It is a regional zoning master plan to protect the million-acre Pine Barrens ("Pinelands") from piecemeal development.

The target of this massive regulatory experiment is a surprising wilderness—in the opinion of many, the last one[3]—in the midst of the Boston-New York-Washington megalopolis. Occupying the heart of South Jersey, the land area covered is larger than Rhode Island.[4] Most of this land is privately owned. Settlement is still relatively sparse.[5] The varied topography is dominated by sandy-soiled forests of pigmy pine and scrub oak which give the region its name. Agriculture, which abides at the fertile fringes and interlacings of the wooded central plain, is still the keystone of the local economy: blueberries from the sandy soil, cranberries from productive but ecologically sensitive marsh bogs, and, to a lesser extent, field crop.[6] Beneath the sand of the eerie pine barrens is a

1. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 11 (101st ed. 1980). This table, based on 1970 census data, shows New Jersey to have 953 persons per square mile of land area. California, the most populous state, had only 128 inhabitants per square mile; New York, second in population, had a density of 381 persons per square mile. The North East Region is four times more densely populated than any of the other three great regions of the nation.

2. N.Y. Times, Nov. 30, 1980, § 11, at 11, col. 3-4 (N.J. ed.).

3. J. MCPHEE, THE PINE BARRENS 4-5 (1968). *See also* FEDERAL WRITERS' PROJECT, WORKS PROGRESS ADMINISTRATION, NEW JERSEY: A GUIDE TO ITS PAST AND PRESENT 605-07 (1939).

4. N.Y. Times, Jan. 13, 1981, at B9, col. 1.

5. *Id.*

6. PINELANDS COMMISSION, STATE OF NEW JERSEY, COMPREHENSIVE MANAGEMENT PLAN FOR THE PINELANDS NATIONAL RESERVE (NATIONAL PARKS AND RECREATION ACT, 1978) AND PINELANDS AREA (NEW JERSEY PINELANDS PROTECTION ACT, 1979) 130-31 (1980) [hereinafter cited as COMPREHENSIVE PLAN].

unique and significant fresh water resource, as yet unpolluted, the Cohansey Aquifer.[7]

But even as planning for the Pinelands began, its central location and the imminent resurrection of Atlantic City threatened to antiquate its agrarian ways overnight.[8] With the expected boom in gambling and service employment, it would be only a matter of time before the map showed a filling in of the empty space between Philadelphia and the Boardwalk. Atlantic City would be the phoenix on whose back the regional economy would soar. But the ashes scattered by its flight would bury a way of life.

In recognition of the unique character of this area, Congress in 1978 created the Pinelands National Reserve,[9] the first so designated under a new national parks regime.[10] New Jersey responded to the federal initiative with aggressive enabling legislation.[11] By December, 1980, the Governor had signed and forwarded to Washington a controversial master plan which would be binding upon the Pinelands' more than fifty municipalities. Zoning jurisdiction for the entire area would vest in the agency which had drafted the master plan, the statutorily-created Pinelands Commission.[12] In one of his last acts before the change in administrations, outgoing Interior Secretary Cecil Andrus gave the plan the federal government's approval.[13] With this approval the master plan for land use regulation in the Pinelands took effect.

The regulatory strategy has two components. Its underlying principle is to preserve intact the ecosystem in the geographic center of the Pinelands. To this end the plan carves out a 368,000-acre core, called the Preservation Area.[14] Other than in established

7. NEW JERSEY SENATE ENERGY AND ENVIRONMENT COMMITTEE, STATEMENT, SEN. NO. 3091 (1979), *reprinted in* N.J. REV. STAT. § 13:18A-1 (Supp. 1980). *See* J. MCPHEE, THE PINE BARRENS 13-18 (1968).

8. Atlantic City is a seashore community just beyond the eastern perimeter of the Pinelands National Reserve. Camden and Philadelphia lie close to the Reserve's western boundary.

9. National Parks and Recreation Act of 1978, § 502, 16 U.S.C. § 471i (Supp. II 1978).

10. *Id.*

11. N.J. REV. STAT. §§ 13:18A-1 to 13:18A-29 (Supp. 1980).

12. *Id.* § 13:18A-4.

13. Letter from Secretary Cecil D. Andrus to Chairman Franklin E. Parker, N.J. Pinelands Commission (Jan. 16, 1981). Approval was required by the federal legislation, note 9 *supra*, in order for New Jersey to receive $10 million for the Pinelands National Reserve.

14. COMPREHENSIVE PLAN, *supra* note 6, at Pt. I, 195-96.

population centers, large-scale development for housing, commerce or heavy industry is effectively banned outright.[15] The second operating principle is to harness and direct the powerful impetus for construction, through careful controls, in a surrounding 730,000-acre buffer zone called the Protection Area.[16]

There is one other important feature. By operation of law, landowners subject to the strict Preservation Area controls receive transferable development rights ("TDRs"),[17] formally called Pinelands Development Credits.[18] The grant is in the ratio of two credits for each thirty-nine acres already devoted to "active agriculture;"[19] one credit for each thirty-nine acres of other upland;[20] and two-tenths of a credit for each thirty-nine acres of other wetlands.[21] The sole transferee districts are within the Protection Area, where the credits are applied to obtain one-time variances to permit greater density of development.[22] The credits are at the disposal of the Preservation Area owner. He may exploit them on land he owns in the Protection Area;[23] if he owns nothing there, he may sell the credits to one who does,[24] who in turn can put them to use.[25]

Unlike the ambitious national park programs of an earlier day, this is not an attempt to stop time dead in its tracks. It is a compromise, born perhaps of the modesty of the terrain itself, the scarcity of our current housing supply,[26] and limits on public finance.

This note will explore whether the Pinelands plan infringes federal constitutional guarantees of due process or of just compensa-

15. *Id.* at Pt. II, § 5-302.

16. *Id.* at Pt. I, 195-96.

17. *See generally* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973) [hereinafter cited as Costonis].

18. COMPREHENSIVE PLAN, *supra* note 6, at Pt. II, § 5-403(A).

19. *Id.* at Pt. II, § 5-403(B)(2)(a).

20. *Id.* at Pt. II, § 5-403(B)(1)(a).

21. *Id.* at Pt. II, §§ 5-403(B)(1)(b), 5-403(B)(2)(b).

22. *Id.* at Pt. II, § 5-403(A).

23. *Id.*

24. COMPREHENSIVE PLAN, *supra* note 6, at Pt. I, 210, and by implication at Pt. II, §§ 5-404, 5-407.

25. COMPREHENSIVE PLAN, *supra* note 6, at Pt. II, §§ 5-404, 5-407.

26. The compromised interests include two competing ones: the maintenance of housing supply through new construction, and the avoidance of the environmental, energy and capital costs of suburban sprawl through controlled maximum density development. *See* Train, *The EPA Programs and Land Use Planning*, 2 COLUM. J. ENVT'L L. 255, 261 (1976).

tion for public takings of private property. Should the plan survive judicial scrutiny, it will serve as a versatile, potent tool in land use policy. If an opposite result obtains, then greater public expense is in store for states that would exclude significant urban development from region-scale, ecologically unique preserves.

II. DUE PROCESS AND TAKINGS UNDER THE FOURTEENTH AMENDMENT

> "No State shall . . . deprive any person of . . . property, without due process of law.[27]
>
> "nor shall private property be taken for public use without just compensation."[28]

A. *The Case Law*

1. Takings: General Jurisprudence

Since Justice Holmes' pronouncement that "if regulation goes too far it will be recognized as a taking,"[29] courts have often treated as identical the above two apparently independent safeguards of the rights of property.[30] Recently, text-conscious jurists and commentators on land use cases have on several occasions tried to invigorate the distinction between the due process and takings checks on state action.[31] Certain similarities are inescapable. Judicial method-

27. U.S. CONST. amend. XIV, § 1.

28. U.S. CONST. amend. V, cl. 4.

29. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

30. *See* Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974); Brown v. Tahoe Regional Planning Agency, 385 F. Supp. 1128 (D. Nev. 1973); Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959).

31. [W]hen a purported "regulation" . . . impose[s] so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value . . . such a regulation, does not constitute a "taking," . . . but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.

Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 593-94, 350 N.E.2d 381, 384-85, 385 N.Y.S.2d 5, 8, *cert. denied*, 429 U.S. 990 (1976). *Accord*, Pamel Corp. v. Puerto Rico Highway Auth., 621 F.2d 33 (3d Cir. 1980); Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 28, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). *See also* Lang, *Penn Central Transportation Co. v. New York City: Fairness and Accommodation Show the Way Out of the Takings Corner*, 13 URB. LAW. 89, 92 (1981); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974). *But see* San Diego Gas & Elec. Co. v. San Diego, 101 S. Ct. 1287 (1981) (Brennan, J., dissenting) (for confis-

ology has employed an array of tests no less shifting, qualitative and confounding under one clause than the other.[32] More usefully, the clauses have consistently been held to require, in essence, that state interference with private property rights be reasonable both in purpose[33] and in effect.[34] For practical purposes they have operated along parallel lines, and in this note will be referred to collectively as the "taking" guarantee.

The Supreme Court has conceded its inability to define in formulaic terms when a "taking" has occurred.[35] Instead, the Court proceeds on a case-by-case basis, weighing "the character of the action and nature and extent of the interference with property rights."[36] But three themes have emerged from the Court's analyses. Where the regulation is meant to quell a nuisance, as were the earliest land use controls, the courts readily condone severe inter-

catory regulation of land, inverse condemnation should lie for period between imposition of regulation and judicial invalidation).

The classic concept of the due process clause of the fourteenth amendment was as a limit on the police power of the state, and the "taking" clause as a limit on the quite different power of the state to resort to eminent domain. For example, in Mugler v. Kansas, 123 U.S. 623 (1887), in which the Court rebuffed a brewery owner's attack on a state ban on the manufacture or sale of alcoholic beverages, Justice Harlan addressed the "taking" issue thus: "[t]he exercise of the police power by the destruction of property . . . or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from *taking* the property for public use." *Id.* at 669. (emphasis added). The inclusion of even "the destruction of property" within this definition of the police power justifiably led to Justice Holmes' famous corrective. Modern courts have laid emphasis on the differing remedies which the two safeguards afford: under the due process clause, invalidation; under the takings clause, "just compensation" (through incorporation of that language from the fifth amendment).

32. Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976) [hereinafter cited as Berger]. *Accord*, Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101, 1105 (1975). *See generally* Dunham, *A Legal and Economic Base for City Planning*, 58 COLUM. L. REV. 650 (1958); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

33. *See* United States v. Cent. Eureka Mining Co., 357 U.S. 155 (1958) (to close gold mines so that skilled miners would be available for other mining work in national emergency); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (to separate industrial activities from residential zones).

34. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (deprivation of "most beneficial" use not a taking where regulation leaves reasonable use intact for owner).

35. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

36. *Id.* at 130.

ference with rights of the offending user.[37] On the other hand, state action such as airport overflight which physically invades private property to advance a distinctly public enterprise will be deemed a taking if it imposes substantial hardship on a property owner.[38] These relatively easy cases display an organizing principle: in the absence of a noxious private use, the public's substantial impairment of the private right through physical intrusion will invalidate the ordinance or give rise to a cause of action for damages.

In a third group of cases, however, decision has never been easy. Here, typically, Lockean[39] property rights are pitted against the "police power"[40] impliedly reserved to the states in the federal Constitution. The courts weigh the ordinance's relation to the public health, safety, morals or welfare, against the costs owners are forced to bear.[41] Reasonableness is the point of equipoise, not nu-

37. *See* Miller v. Schoene, 276 U.S. 272, 279 (1928) (upholding order to destroy claimant's cedar trees because they produced cedar rust fatal to apple trees cultivated nearby); *see also* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 74 (1978).

38. United States v. Causby, 328 U.S. 256 (1946).

39. A coarse synthesis of Locke's concept of property might run thus. In a "state of nature," man lives in perfect freedom, on terms of absolute equality with other human beings, and is endowed with an inherent "property in his own person," *i.e.*, in his survival. Moreover, by this law of nature a man is permitted to remove from the commonalty that which "he hath mixed his labor with," and thereby make it his property. Yet perfect freedom gives rise to the threat of invasion of one's property rights by others, a chronic insecurity of property and even of life. Accordingly, men enter into society—and organize a government—whose "great and chief end, therefore . . . [is] the preservation of their property." J. LOCKE, OF CIVIL GOVERNMENT, SECOND TREATISE §§ 1-28 (London 1689).

40. *See* E. FREUND, THE POLICE POWER (1904).

41. In Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), the Court acknowledged "several factors" which recur in its analyses: first, the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," *id.* at 124; second, "the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* As the opinion goes on to explain, these two analytic inquiries have produced judicial decisions with several strong themes. In addition to the "relatively easy cases," *see* text accompanying notes 37-38 *supra*, the following principles emerge. First, diminution in value, without more, does not prove that the governmental action which caused it is a "taking." The exercise of the taxing power is but one example of the "wide variety of contexts" in which the Court has upheld government action which adversely affected "recognized economic values." By the same token, where a claim sounding in property is neither "distinct" nor "sufficiently bound up with reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes," Penn

merical equality of costs and benefits.[42]

The abstractness of the adjudications has imbued all land investment with uncertainty. At least one commentator[43] proposes to solve this by means of legislative formulae: for example, an urban landmark designation would lapse once it prevented the owner from maintaining a statutory minimum return on investment.[44] Some writers have despaired of ever escaping the balancing dilemma, with all its difficulty.[45] This is the jurisprudence accepted by the Supreme Court today. Though several factors figure prominently in decision, the Court makes "essentially ad hoc, factual inquiries."[46]

2. The Test of "Reasonable Use"

Though the Court's analysis is indeed flexible, it has focused increasingly on the reasonableness of the enjoyment left to owners under the regulation at bar.[47] The Court's decision in *Goldblatt v. Town of Hempstead* (*"Goldblatt"*)[48] typifies the use of this standard. In *Goldblatt*, a city ordinance forbade excavation below the water table, effectively barring the plaintiff from continuing a sand and gravel mining enterprise he had been carrying on there for thirty years. The Court rejected the "taking" claim and upheld the ordinance even though it denied claimant the highest and best use of his land. The Court also accorded little weight to the fact that one owner in particular shouldered much of this regulation's burden. The Court said "reasonable use" was still available to him since he had made no showing of adverse effect on the value of his land.

Twenty years after *Goldblatt*, its underlying logic is still followed. The fourteenth amendment cannot be invoked against land use control merely on the grounds that an ordinance *dimin-*

Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-28 (1978), the Court has likewise dismissed "taking" challenges. *See, e.g.*, United States v. Willow River Power Co., 324 U.S. 499 (1945) (interest in high-water level of river for runoff of tail waters to maintain power head is not property); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (no property interest can exist in navigable waters).

42. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

43. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975).

44. *Id.* at 1052.

45. Berger, *supra* note 32, at 822-23.

46. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

47. *See* Andrus v. Allard, 444 U.S. 51, 66 (1979).

48. 369 U.S. 590 (1962).

ishes the value of regulated land.[49] Similarly, landowners have no vested right in a prior zoning classification.[50] Neither do they have a vested right in the "highest or best use."[51] The underlying requirement is that the effect of regulation be "reasonable." Upholding the exercise of the police power, then, courts have, in effect, forced John Locke to break bread with Ralph Nader.

On the other hand, the Supreme Court has invalidated an ordinance which deprived a property owner of return on his investment.[52] In *Nectow v. City of Cambridge* ("*Nectow*"),[53] claimant challenged the rezoning of his property from unrestricted to residential.[54] The invalidation relied on the trial level findings of a master that "'no practical use can be made of the land in question for residential purposes.'"[55] The Court in *Nectow* also relied on its finding that the zoning was not rationally related to the promotion of the very uses (residential) which it purported to permit.

The *Nectow* "no adequate return" test probably differs little from the "reasonable use" standard of *Goldblatt*. Each requires a judicial determination of economic impact; also, each leaves the court with flexibility to call the same numbers to account for differing results

49. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (diminution of 66 to 80%); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75%); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87%); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976) (80%).

50. *See* Haas v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

51. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

52. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Lutheran Church v. City of New York, 35 N.Y.2d 121, 130, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 15 (1974); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 557, 193 A.2d 232, 241-42 (1963).

53. 277 U.S. 183 (1928).

54. Claimant Nectow owned a 140,000-acre tract which was in an unrestricted area. To the north and west (across the streets bounding claimant's land) were private homes. To the east and south was an industrial area, crossed by railroad tracks. Nectow had bargained to sell the greater part of his parcel for $63,000. Shortly after he had struck his bargain, the city zoned a narrow strip at the westerly end of claimant's land as R-3 (dwellings and hotel), in effect creating a 65-foot wide buffer against the unrestricted development to the east and south. Because the new zoning lowered the land's overall value, Nectow's contract buyer refused to perform. Nectow then challenged his tract's partial R-3 classification.

55. Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928).

in the proper circumstances.[56] *Nectow* directly follows from the precedent of *Pennsylvania Coal Co. v. Mahon*,[57] in which a ban on mining beneath a residential area nullified (without formal confiscation) claimant's entire interest (mineral rights) in the land. In *Goldblatt*, by contrast, owner retained discretion for remunerative use. This demonstrates *Goldblatt*'s significance: while *Nectow* guarantees property rights will limit the application of zoning, *Goldblatt* points out a regulatory course which is properly observant of those rights.

3. The Court's Flexible Approach to "Reasonable Use"

As one might expect in light of *Goldblatt*, the decisions have shown the Court's willingness to deal resourcefully with the question of what return is reasonable in a given set of circumstances. The recognition that there are normally multiple incidents of real property ownership is an underpinning of this flexible analysis.[58] Referring collectively to the holding of title, possession, quiet enjoyment, collection of rentals, and other rights and interests, the Court has repeatedly invoked the image of a "bundle,"[59] each right or interest constituting a separate stick or "strand."[60] By implication, a primary test as to reasonable use should be whether regulation has emptied or destroyed a bundle.

In fact, the Court has followed this approach. In *Penn Central Transportation Co. v. New York City* ("*Penn Central*"),[61] the Court used the *Goldblatt* rationale to uphold development restrictions on an urban landmark, New York City's Grand Central Terminal. The city's zoning commission had interpreted a landmark designation to forbid erection of a proposed fifty-story office tower atop the historic railroad station. Although the owners stood to lose an estimated $3,000,000 in annual office tower income, the Court sustained the restriction as valid since the terminal itself still gen-

56. C. BERGER, LAND OWNERSHIP AND USE 687 (2d ed. 1975) [hereinafter cited as C. BERGER].

57. 260 U.S. 393 (1922).

58. *See* United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

59. Andrus v. Allard, 444 U.S. 51 (1979); United States v. Twin City Power Co., 350 U.S. 222 (1956).

60. Andrus v. Allard, 444 U.S. 51 (1979); United States v. Twin City Power Co., 350 U.S. 222 (1956).

61. 438 U.S. 104 (1978).

erated $700,000 to $1,000,000 annually—a "reasonable" return in commercial rentals. The Court added that the plan left other strands of benefit intact: 1) the claimant had not proven the city would reject a smaller project harmonizing in style with Grand Central's Beaux Arts facade; 2) TDRs, granted along with landmark status, would "mitigate" the financial burden.[62]

In its most recent pronouncement, *Andrus v. Allard* ("*Andrus*"),[63] the Court was even more explicit. In unanimously adhering to precedents on partial diminution in value, the Court said: "[t]he destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[64] The Court added a significant comparison.[65] In cases where state action effected a partial suppression of real property interests, the regulation was upheld. In cases where the holder saw his entire interest nullified, the Court found a taking.[66]

In *Andrus*, Interior Department regulations promulgated pursuant to statute forbade the sale or purchase of artifacts of the rare bald eagle, including remains already reduced to artifact form before the statutes took effect.[67] A vendor of bald eagle feathers challenged the regulation. The Court rejected his taking claim, citing *Penn Central* and other land use cases.[68]

In order not to isolate *Andrus* as an avian oddity, one must ponder the versatility of the Court's "bundle" model. The "strands" left by *Andrus* allowed affected owners to continue to hold, benefit from[69] and dispose of[70] their eagle parts. Of these prerogatives only the power of testamentary transfer seems *not* to offer the owner any promise of economic benefit during his lifetime. Significantly, the Court considered this a "reasonable use" even without

62. *Id.* at 141.
63. 444 U.S. 51 (1979).
64. *Id.* at 66.
65. *Id.*
66. *Compare, e.g.*, United States v. Twin City Power Co., 350 U.S. 222 (1956) (claimant in condemnation proceeding entitled to market value of riverbank land minus value attributable to suitability as site for hydropower dam in light of government's navigational servitude) *with* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (where claimant's sole interest in land was mineral rights which regulation effectively destroyed, compensation was required).
67. 50 C.F.R. § 22 (1980); *see* 16 U.S.C. §§ 668(a), 703 (1976).
68. Andrus v. Allard, 444 U.S. 51, 65 (1979).
69. The benefit could come in the form of profits from the exhibition of the artifacts, or (one may infer) from tax deductions arising from a charitable donation. *Id.*
70. Owner could still dispose of artifacts by gratuitous transfer ("devise"). *Id.*

the right to sell. But courts will be tempted to limit *Andrus* to its special circumstances. Trafficking which lengthens the Endangered Species List is not conducive to judicial approval of laissez faire. By contrast, restrictions on the alienation of land run against the strongest currents of Anglo-American property law.[71]

It would be a mistake to treat *Andrus* as diminishing the respect previously accorded "distinct investment-backed expectations"[72] by the Supreme Court. But after *Andrus* it remains unclear what constitutes de minimis economic benefit. Must a positive profit potential be preserved? Is the mere "benefit" of tax deductions enough? Or would the right to sell, standing by itself, be sufficiently "reasonable?" If not, how much more must a valid regulation permit?

Courts have not looked with favor on ordinances which in the name of regulation effectively ban development outright.[73] But so far no legislative body has been bold enough thus starkly to couch its work.[74] And in a recent case, *Agins v. City of Tiburon*,[75] in which challenged zoning permitted up to five units or "open space uses"[76] on a five-acre tract, the Court took pains to point out that the issue of open-space zoning was not necessary to its decision. Thus, we have no square holding on a bundle emptied of all but the "strand" of open space use. Rather, there is the rule, found also in the law of personal property,[77] that "destruction" of the whole bundle is invariably a taking; there is much rhetoric and some unhelpful dicta;[78] and there remains the problem of defining a threshhold "reasonable" use.

71. C. BERGER, *supra* note 56, at 96, 107-14.

72. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). A limited exception to this rule may apply to the sale of privately-owned land endowed with a "public purpose." Bridgeport Hydraulic Co. v. Council on Water Quality, 453 F. Supp. 942 (D. Conn. 1977), *aff'd mem.*, 439 U.S. 999 (1978) (restrictions on sale of private water company lands not a taking).

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

74. Most zoning ordinances on their face authorize some type of use. *See, e.g.*, Candlestick Properties v. San Francisco, 11 Cal. App. 3d 557, 573, 89 Cal. Rptr. 897, 906 (1970) (permitted limited dredging in tidelands of San Francisco Bay); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963) (permitted agricultural use in swamp).

75. 447 U.S. 255 (1980).

76. *Id.* at 257.

77. Armstrong v. United States, 364 U.S. 40 (1960) (government's complete destruction of materialmen's liens a taking).

78. "[I]f height restriction makes property wholly useless 'the rights of property . . . prevail over the other public interest' and compensation is required." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 128 (1978) (quoting Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908)).

4. TDRs: A Form of Reasonable Use

The TDR strategem is designed to relocate, not thwart, exploitation of the development potential of a parcel of land.[79] Behind this shift in locus is the legislative judgment that development of the restricted (transferor) parcel would be contrary to the planning policies for the area.[80]

The Pinelands plan operates by a simple mechanism, analogous to that already employed in ordinances in New York City and elsewhere.[81] For the transferor-parcel's owner, TDRs represent a right supplemental to the beneficial use allowed on his land. If he owns land in a qualifying "transferee" district, he may use TDRs there to build in greater bulk or density than the applicable zoning would normally permit. It also provides that an owner in the transferor zone may sell his TDRs to another private party for use in the transferee zone. This makes the bonus density available to entrepreneurs as well as to transferor-zone owners.

Proponents of TDRs say these rights make it possible to employ zoning for fiscal as well as planning leverage.[82] Critics assert the TDR mechanism will usually entail a compensable taking.[83] This regulatory tool is so new there are only two important judicial decisions. Both involve use of TDRs in New York City. Neither supplies a definitive holding.

In *Penn Central*, discussed above, the local regulation afforded TDRs pursuant to a plan for landmark preservation. The restrictions on improvement of the landmark Grand Central Terminal were sustained principally on the ground they left intact a "reasonable" beneficial use.[84] But the Court noted in dictum that TDRs granted by the city would "mitigate" the burden of landmark owners.[85] This echoed reasoning by New York's highest court also

79. Costonis, *supra* note 17, at 85-95.

80. *Id.* at 85-86.

81. COMPREHENSIVE PLAN, *supra* note 6, Pt. II, §§ 5-401 to 5-407. For other applications of the technique, including the landmark-preservation scheme applied to Grand Central Terminal, *see* Costonis, *supra* note 17, at 95 n.82, 96 n.84.

82. Costonis, *supra* note 17, at 103.

83. *See, e.g.*, Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101, 1107 (1975).

84. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 134 (1978). *See also* Goldblatt v. Town of Hempstead, 369 U.S. 690 (1962).

85. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).

holding that TDRs offered "reasonable compensation" to the Terminal's owner.[86]

At issue in *Fred F. French Investment Co. v. City of New York* ("*French*")[87] was a new zoning restriction placed on a tree-shaded, privately-owned Manhattan park which a developer had targeted for a high-rise. Unlike the ordinance in *Penn Central*, this restriction effectively barred all economic development of claimant's land, leaving TDRs as the sole vehicle to recoup his investment.[88] New York's Court of Appeals unanimously voided the measure.

The decision by Chief Judge Breitel appears to rest on two independent grounds. First, the court stressed that with up-zoning the owner no longer retained either "reasonable income productive *or* other private use."[89] This places the case outside the conventional "reasonable use" analysis. It is more directly governed by the rule against leaving property owners "uncompensated custodians of de facto public land."[90] Significantly, the court in *French* phrased the use requirement in the alternative, *i.e.*, as one of "income productive" *or* "other private" use. The opinion did not elaborate, but it left a provocative suggestion that these might be interchangeable—a principle recognized implicitly by the Supreme Court in *Andrus*. Second, and more to the present point, the *French* court found the TDRs granted by the city to be of so speculative a value that market quirks and administrative red tape might perpetually

86. Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 335, 366 N.E.2d 1271, 1278, 397 N.Y.S.2d 914, 921 (1977), *aff'd*, 438 U.S. 104 (1978). The "reasonable compensation" rationale played a larger part in the New York Court of Appeals decision than in the affirmance by the United States Supreme Court. The New York court also reasoned that even if rentals from the terminal itself do not afford reasonable use, some of the income from owner's nearby properties must be imputed to the terminal. *Id.* at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 916.

87. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976).

88. The affected parcels had been a private park for the benefit of residents of the Tudor City apartment complex on Manhattan's densely built-up East Side. The new classification imposed on the owner a legal duty not only to refrain from residential development but to maintain the parcels as a park which would be open to the *public* between 6 a.m. and 10 p.m. each day. *Id.* at 593, 350 N.E.2d at 384, 385 N.Y.S.2d at 8 (1976).

89. *Id.* (emphasis added).

90. *Accord*, Pumpelly v. Green Bay, 80 U.S. (13 Wall.) 166, 177-78 (1871); Trager v. Peabody, 367 F. Supp. 1000, 1002 (D. Mass. 1973). *But see* Bridgeport Hydraulic Co. v. Council on Water Quality, 453 F. Supp. 942 (D. Conn. 1977), *aff'd mem.*, 439 U.S. 999 (1978).

keep them "in limbo."[91] The opinion does not make clear whether the court was appraising TDRs particularly with respect to takings, or to the question of just compensation.

Penn Central and *French* show that the courts are ready to assess the dollar value of TDRs in specific cases, yet are unauthoritative on the important issue of TDRs, functional significance. *French* requires that TDRs have market value—though how *much* value remains unclear—where they are the sole device by which an owner may exploit his restricted land's development potential. At most, then, these cases hold that the TDR technique is foreclosed not as a matter of law but by those factual settings in which the market accords TDRs inadequate worth.[92]

But such a rule begs the question: should courts categorize TDRs as a form of "use" not "taken," or as a form of constitutionally compelled "just compensation?" The distinction is of potentially great importance, because the compensation test is probably more exacting than that for "reasonable use."[93]

(a) A form of reasonable use

A ready conceptual basis exists for treating TDRs as a form of residual use. For example, assume a strictly zoned transferor district (R-1) and a designated transferee district (R-2). The purpose of the TDR, after all, is to permit holders to develop in district R-2 at a density exceeding the applicable local limits. Without any TDRs, the R-2 owner is held to a limit on which the TDR holder next door may incrementally enlarge. The TDR holder enjoys a use which is rooted not in his interest in R-2 land but in the more stringently controlled R-1 parcel. Any income stream which flows from the incremental density is attributable to the more restricted R-1 land. By the same token, when an R-1 owner sells his TDRs to an entrepreneur or R-2 owner, the purchase price should be classed a use or benefit arising from his R-1 land.

91. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 598, 350 N.E.2d 381, 388, 385 N.Y.S.2d 5, 11 (1976).

92. Outside the takings context, courts have acknowledged that TDRs function acceptably (though not without complexity) in the legal system. *See* Newport Assocs., Inc. v. Solow, 30 N.Y.2d 263, 268, 283 N.E.2d 600, 602, 332 N.Y.S.2d 617, 621 (1972) (Breitel, J., concurring), *cert. denied*, 410 U.S. 931 (1973).

93. *See* text accompanying notes 94-102, *infra*, for discussion of just compensation. *Compare* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 150 (Rehnquist, J., dissenting) (1978), *with* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

Where open-space zoning is to be accomplished with TDRs, then, the "reasonableness" of controls should be a factual question hinging on the market value of TDRs. In the ideal TDR planning environment, a market would be assured by phalanxes of willing new-home buyers massing at the borders of an ecosensitive preserve. The pressures for housing construction would generate high prices for TDR credits in the transferee zones. In fact, this may aptly—albeit incompletely—describe the Pinelands situation.

(b) A form of just compensation

The sparse case law on TDRs reveals several suggestions that TDRs should be analyzed as a form of public compensation to property owners under the fifth and fourteenth amendments. The very structure of New Jersey's Pinelands plan implies that TDRs are in the nature of compensation for restrictions on Preservation Area land.[94] If the courts embrace this conclusion it is unlikely the TDR technique would provide compensation sufficient in law for the burdens of Preservation Area zoning.

The constitutional imperative of "just compensation" exacts a higher toll in rectification than TDRs would be held to under the "reasonable use" standard. The requirement of recompense is commonly phrased as one of "full and perfect equivalence"[95] for the property taken. In practice, the Court has held this to mean the market value[96] as of the time of the taking,[97] except when market value is inappropriate[98] or when it is unavailable in the circumstances.[99] The generosity of this principle is illustrated by the fact that market value was held inappropriate in one case because it

94. Within Article 5 of the COMPREHENSIVE PLAN, *supra* note 6, the "Pinelands Development Credit Program" (TDR) provisions appear at Section 4, immediately after the land use restrictions of Section 3.

95. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 150 (1978) (Rehnquist, J., dissenting) (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893) (condemnation of bridge toll franchise)).

96. Shoemaker v. United States, 147 U.S. 282, 303-05 (1893) (condemnation of lands for a park).

97. United States v. Creek Nation, 295 U.S. 103, 111 (1935) ("just" value was as of 1891 when the United States disposed of incorrectly surveyed Indian lands, not as of 1873 when erroneous survey was made).

98. United States v. General Motors Corp., 323 U.S. 373, 383-84 (1945) ("just compensation" included not only market value of condemned leasehold, but also value of fixtures destroyed when government took possession).

99. Olson v. United States, 292 U.S. 246, 257 (1934). *See generally* Annot., 19 L. Ed. 2d 1361 (1968).

was an underinclusive index.[100] However, compensation shall not include consequential losses[101] such as lost profits or moving expenses.[102]

Substantive as well as jurisprudential considerations militate against applying the just compensation rule. First, to require that TDRs satisfy that principle would undermine the logic of the zoning cases. The police power may constitutionally diminish property value if it effects a rational distribution of burden and benefit. Yet just compensation would measure the "taking" by a highest and best value standard.[103] To hold TDRs to that standard would inhibit the legitimate exercise of the regulatory power in the community interest. Second, unlike classical cases for just compensation (involving eminent domain), the TDR situation often leaves owners not only title or possession but economic use. In the case of eminent domain, government itself has exploited the development opportunity, an expropriation for which generous payment ought to follow quite naturally. In the Pinelands model, government has to some extent renounced the development opportunity (in the form of a more rapidly expanding tax base). Especially where the owner retains some beneficial use, this should issue in a less extensive liability to the affected landowner.

Even if the measure of value taken is not highest-and-best but merely "reasonable use," a third objection to the TDR-compensation formula arises. The objection is this: the rule would require courts to enter judgments based on essentially hypothetical facts. Courts would have to concoct, evaluate the dollar value of, and rely for decision upon a hypothetical "reasonable use." To add this to the already rampant uncertainty in the "taking" field would ultimately be the greatest disservice to property owners.

B. *New Jersey's Pinelands Master Plan: "Taking" or Valid Regulation?*

The Pinelands regime will fall into that category of "hard cases," which will trigger extended judicial balancing. That is, the plan is like neither the nuisance controls (normally upheld)[104] nor the

100. United States v. General Motors Corp., 323 U.S. 373, 381-84 (1945).

101. United States ex. rel. TVA v. Powelson, 319 U.S. 266, 284 (1943).

102. *Compare* United States v. General Motors Corp., 323 U.S. 373, 385 (1945) (Douglas, J., concurring), *with* the opinion of the Court, *id.* at 383.

103. *See* text accompanying notes 96 and 100 *supra*.

104. *See* text accompanying note 37 *supra*.

physical invasion of private property by government (usually actionable)[105] for which courts have clearly articulated and predictable rules of decision. Instead, courts will probably apply the balancing tests so carefully enunciated in *Penn Central* to determine whether the Pinelands plan leaves intact a "reasonable use" for affected owners.

For clarity the ensuing discussion of the Pinelands plan and the taking issue is divided into three subtopics: (1) Preservation Area—economically productive land; (2) Preservation Area—purely speculative landholdings; (3) Protection Area.

1. Preservation Area: Income Productive Land

Probably no more than thirty percent of the land in private hands in the Preservation Area is currently income productive.[106] Of these lands, the greater part is devoted to berry agriculture, with resource extraction second most widespread.[107] Even the most restrictive features of the plan will permit the following Preservation Area uses: agriculture,[108] resource (sand, gravel, minerals) extraction,[109] limited residential construction,[110] beekeeping,[111] forestry,[112] fish and wildlife management,[113] camping and other recreational facilities,[114] and "required" public services.[115]

The plan is on firm legal footing with regard to land where reasonable income productive use is not only permitted but actually ongoing *ab initio*. This inference is readily drawn from *Penn Central*. So long as the cranberry or blueberry still generates a reasonable return, no IBM plants will crop up on Old MacDonald's farm. Note that resource extraction and isolated residential construction are also among the permitted fall-back sources of income short of full transformation to commercial-industrial use. Probably the

105. *See* text accompanying note 38 *supra*.

106. *Cf.* COMPREHENSIVE PLAN, *supra* note 6, at Pt. I, 127 (Table 4.2), 131 (Table 4.5).

107. *Id.* at Pt. I, 130.

108. *Id.* at Pt. II, §§ 5-302(B), 5-302(C).

109. *Id.* at Pt. II, § 5-302(J).

110. *Id.* at Pt. II, § 5-302(A). Minimum lot size under this section is 3.2 acres. Even with this restriction, construction cannot go forward, under the regulation, if owner does not have substantial business or family ties to the region.

111. *Id.* at Pt. II, § 5-302(E).

112. *Id.* at Pt. II, § 5-302(D).

113. *Id.* at Pt. II, § 5-302(F).

114. *Id.* at Pt. II, §§ 5-301(H), 5-302(G).

115. *Id.* at Pt. II, § 5-302(I).

"strands" of property rights left intact in this situation are substantial enough to support the regulation.

2. Preservation Area: Purely Speculative Landholdings

The conflict between speculators and regulators ought to generate the most heat in this setting.[116] Although no authoritative surveys on the subject exist, it is likely that most private holdings in the Preservation Area do not presently throw off income.[117] It is unquestioned, on the other hand, that developers now own or are eyeing large tracts in hopes of realizing profit through future resale or construction.[118]

The inquiry into "reasonableness" must examine remnant property rights from two vantage points. First, do the "strands" left to the owner other than TDRs constitute a right to reasonable use? This could depend on whether the permitted uses are income productive, or it could depend on whether other privileges of ownership are sufficiently beneficial. One can conceive of an argument that the liberal "strand" analysis of *Andrus* should uphold the regulation even where no income productive use survived the controls. But this reasoning either overlooks the special facts of *Andrus*, or loosely equates the endangerment of species with the disappearance of rural and wilderness areas from the landscape. In either event, *Andrus* is too tenuous a precedent to sustain the result.

The second inquiry would then follow: can the granting of TDRs provide Preservation Area speculator-owners with "reasonable use?" If TDR value is to be treated as an element of residual property right, as I suggest, valuation should provide the clue to "reasonableness" or lack thereof. Assuming a substantial TDR value —to pick a figure the courts have used in other contexts,[119] fifteen to twenty percent of unrestricted property value—the analysis might treat the extra R-2 density as alternate siting,[120] find the residual value reasonable, and uphold the plan. Of course, if TDR

116. *But see* N.Y. Times, Dec. 3, 1980, at B2, col. 6. Apparently the potentially higher profits obtainable from Protection Area development have stirred investors to greater wrath than have the generally more severe Preservation Area controls.

117. *See* COMPREHENSIVE PLAN, *supra* note 6, at Pt. I, 127 (Table 4.2), 131 (Table 4.5).

118. N.Y. Times, Jan. 13, 1981, at B1, col. 1.

119. *See* note 49 *supra*.

120. *Cf. In re* Loveladies Harbor, Inc., 176 N.J. Super. 69, 73, 422 A.2d 107 (1980).

value was insubstantial, it alone would not sustain the plan if other "strands" likewise failed to afford reasonable use.

3. Protection Area

The Protection Area is a 730,000-acre buffer completely enclosing the core Preservation Area. In general, land in the Protection Area is more suitable for development in the sense that existing use patterns are less sensitive to the ecological impact of development.[121] In addition, Protection Area land is more immediately in the path of expansion from the Atlantic City and Camden-Philadelphia metropolitan areas.

The plan fetters Protection Area development in three ways: it funnels much of projected growth into "Regional Growth Areas" ("RGAs"),[122] comprising in total only seventeen percent of the Protection Area;[123] it channels *all* TDR conversion into these RGAs[124] (thus making RGAs the sole transferee or R-2 districts); and it places a ceiling on TDR augmentation of density on any given acre.[125] The method behind all this, of course, is to enhance the market for TDRs.

The problem with this regime is that it may not have the substantial relation[126] to community welfare[127] required of zoning ordinances. In this instance, the "community" interest is that of the Protection Area municipality, not the Preservation Area (R-1). The plan's vulnerability stems from a preference for R-2 development which is nonetheless still not enough for those preferred. That is, all R-1 owners are restricted in order to create a market for development rights in R-2. Likewise, those in the Protection Area but not in an R-2 district are also comparatively hindered. Lastly, R-2 owners are forced into extra outlays for TDRs in order to maximize exploitation of their lands. Thus, even the class of owners with greatest discretion to build (those in R-2) may with reason claim their property rights are restricted for the benefit of *another* class of owners (those in R-1).[128]

121. COMPREHENSIVE PLAN, *supra* note 6, at Pt. I, 195.
122. *Id.* at Pt. I, 193-96.
123. *Id.* at Pt. I, 196.
124. *Id.* at Pt. I, 210.
125. COMPREHENSIVE PLAN, *supra* note 6, at Pt. II, § 5-404(B).
126. *See* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).
127. Berger, *supra* note 32, at 811-12. *See also* note 31 *supra* for discussion of due process issues.
128. One already hears variations on this theme. A local politician in the

While there is merit in this "substantial relation" attack, one can conceive of a plausible response to it. The broad principle of planning for growth is unimpeachable. The Pinelands has a unique ecology which justifies systematic preservation for the value to society of its scenic, food and water resources.[129] The state has used rational means to reach its goal, and each segment of the diverse Pinelands community will benefit. Preservation Area owners will benefit by enjoying possession of their pristine woods and wetlands, and by the income producing potential of their permitted uses or TDRs, as the case may be. As to Preservation Area owners, the Protection Area scheme promotes appreciation in the price of their TDRs. Protection Area owners as a class will benefit by their proximity to the unspoiled core landscape. By itself this will tend to stimulate property values. In particular, non-R-2 Protection Area owners will enjoy financial and aesthetic benefits of residence in a well-planned community. So long as an individual owner is not treated arbitrarily, he has no cause for complaint.[130] Finally, R-2 owners are perhaps the least affected of all. The plan positively advances the value of their investments, in that it secures for these owners the potential for intense development within the framework of comprehensive regional land use control. The requirement that these owners buy TDRs to exploit R-2 properties more fully is but a typical "cost" of zoning; its burden is no greater than that which landowners have traditionally been required to bear to secure "the advantage of living and doing business in a civilized community."[131] The density limits permit reasonable R-2 activity even without the TDRs; owners there need not buy them if they do not care to.

The benefit to non-R-2 owners in the Protection Area is compar-

Pinelands contends the plan would "drastically reduce" the tax base of covered municipalities. N.Y. Times, Nov. 30, 1980, § 11, at 11, col. 2 (N.J. ed.). Apparently this is an assertion that the entire plan is for the benefit of non-residents and tourists—a notion one can expect to hear echoing on the Preservation versus Protection Area scale, on the RGA versus "forest" district scale within the Protection Area, and parcel to parcel.

129. COMPREHENSIVE PLAN, *supra* note 6, at Pt. I, 202, 217 (surface and groundwater), 229 (vegetation and wildlife), 232 (wetlands), 234 (forests), 234 (air), 236 (cultural resources), 240 (scenic resources), 242 (agriculture), 249 (minerals), 250 (recreational resources).

130. *See* note 133 *infra*.

131. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).

atively remote. Yet they could probably not prove the absence of rational link to their community's welfare. Past complainants who have made out such a case have shown benefit that is highly individualized[132] or that otherwise fails to register on the community-wide scale.[133]

The second major issue here is whether regulation of the various Protection Area districts is in any instance a taking of all reasonable use. The R-2 owner, who is permitted to build as many as twelve units per acre (or possibly more if allowed by a municipality)[134] even before considering TDRs, hardly seems in a position to complain. He may have been "up-zoned" but the hindrance to his beneficial use is not of constitutional magnitude.[135]

As we move down the four-step scale of density limits for the other four Protection Area districts, the hardship to owners increases. In the most restricted one, the "forest" district, the average permitted density is one unit per 15.8 acres of upland.[136] Notice how stark the speculator's position might become. The plan grants no TDRs to this class of owners in mitigation of potential hardship caused by the zoning. Judicial decision may turn, as a primary matter, on perceptions of what income potential remains in the land. The restriction seems forbidding even for development of luxury vacation homes. Resource or timber extraction might be a saving alternative.[137] Absent the prospect of significant profits, the regime is cast back upon the treacherous shoals of the only ration-

132. Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962) (zoning ordinance voided where purpose appeared to be to assure competitive position of nearby shopping mall and effect was to diminish value of claimant's land); Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951) (rezoning voided where change made solely for benefit of neighboring residents). *See* Berger, *supra* note 32, at 811-12 n.36.

133. Langguth v. Village of Mount Prospect, 5 Ill. 2d 49, 124 N.E.2d 879 (1955) (rezoning voided on finding of remote gain to public and substantial hardship to owner).

134. COMPREHENSIVE PLAN, *supra* note 6, at Pt. II, § 5-308(A)(2)(i).

135. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

136. COMPREHENSIVE PLAN, *supra* note 6, at Pt. I, 202.

137. *Compare* Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963) (ordinance banned practically all development of wetlands) *with In re* Loveladies Harbor, Inc., 176 N.J. Super. 69, 422 A.2d 107 (1980) (statute specifically exempted cultivation of salt hay and other agriculture from wetlands restrictions) *and* Sands Point Harbor, Inc. v. Sullivan, 136 N.J. Super. 436, 441, 346 A.2d 612, 614 (1975) (the only activities barred from claimant's wetlands tract were ones which claimant did not seek to conduct).

ale left, that suggested by the special circumstances of *Andrus*. Of all applications of the Pinelands plan examined to this point in this note, this one seems most vulnerable to constitutional attack.

As discussed above, *Andrus* does not lessen the rigor of the "reasonable use" requirement in land use cases. But perhaps another argument will be advanced to sustain the plan with respect to "forest" district owners: the special nature of regional (as opposed to municipal) zoning.[138] The inclusion of vast land areas ensures that zoning controls (if sophisticated) within the covered region will vary from sector to sector. It follows that the regime will channel growth into certain sectors, leaving stringent controls in place elsewhere. But to argue that this makes "reasonable" the one dwelling unit per 15.8 acres "forest" district zoning proves too much. If one accepts this logic, then courts would be bound to accept the analogous point with respect to local zoning, *i.e.*, that a radical barrier to development in one district can be "reasonable" because it helps to maintain pressure for construction in a growth-designated zone located across town. This is untenable. Thus, the most strict of the non-R-2 protection area controls in the Pinelands would likely be held unconstitutional.[139]

III. CONCLUSION

Interpreting the constitutional ban on "taking" of private property, the Supreme Court has held that a valid regulation must

138. *See* Horizon Adirondack Corp. v. State, 88 Misc. 2d 619, 630, 388 N.Y.S.2d 235, 243 (1976) (zoning for private land within Adirondack State Park; "local jurisdictions . . . [may be] incapable or unwilling, for political, fiscal or other reasons, . . . [to take] appropriate action [to preserve region-scale natural resources]"); CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 313 n.4, 118 Cal. Rptr. 315, 320 n.4 (1974) (California Coastal Zone Conservation Act of 1972; suggestion that state or regional zoning in environmental spirit may be a form of nuisance prevention and "may warrant different constitutional treatment" than local zoning because "the nature of the governmental interest differs substantially from that involved in conventional local zoning").

139. Another possible basis for challenge, the fourteenth amendment's equal protection clause, has not yet proven to be an effective weapon against most of the excesses of zoning. The Court has long held that deference toward the legislative branch is proper for most economic regulation. Williamson v. Lee Optical, 348 U.S. 483 (1955). Supreme Court review of a zoning case will probably require no more than some rational basis for the legislative classification. City of New Orleans v. Dukes, 427 U.S. 297 (1976) (exclusion of most street peddlers from New Orleans' French Quarter); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (ordinance prohibiting occupancy of "one-family" dwellings by groups of more than two unrelated persons).

leave incidents of ownership, especially those with income producing potential, intact so as to preserve a "reasonable use" for the owner. Regulation of the use of land, under which an existing use (such as agriculture) may continue, will easily satisfy this requirement. Even on land held purely for speculation, TDRs under the Pinelands plan may assure owners of a reasonable use sufficient to sustain the regulation.

Legal ramifications in the transferee zone may differ among its various districts. In the designated growth districts, the plan probably allows a use level vigorous enough to withstand constitutional attack. The regulation seems most vulnerable as applied to the so-called "forest" districts, where neither commercially practicable density levels nor TDRs are granted.

In the event a court finds a taking, TDRs are likely to fall short of the constitutional requirement of just compensation. This command has been interpreted to require the "full and perfect equivalence" of the market value of the property taken, a measure which only the strongest pressure from surrounding growth might give rise to.

Under any analysis this accommodation between fully compensated takings and the police power can be upheld only if the market accords "reasonable" value to the TDRs. But this argues for testing on the market such schemes as New Jersey's Pinelands plan, not for striking it down on its face.

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