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THE NATIONAL RESERVE SYSTEM AND TRANSFERABLE DEVELOPMENT RIGHTS: IS THE NEW JERSEY PINELANDS PLAN AN UNCONSTITUTIONAL "TAKING"?

Ellen M. Randle*

I. INTRODUCTION

The New Jersey Pinelands (Pinelands) contains "about one million acres of pristine pine oak forest, cedar bogs and wetlands and extensive ground and surface water resources of high quality which provide a unique habitat for a wide diversity of rare, threatened and endangered plant and animal species."1 This ecologically-sensitive area is set in the midst of the country's most densely populated region.2 Located in the southeast portion of the state, the Pinelands covers 20 percent of New Jersey's land mass3 and is larger than the state of Rhode Island.4 As the last, vast, untouched expanse in the northeast, this "environmental treasure"5 is in danger of being whittled away by the intense development pressures confronting southern New Jersey. The suburbanization of Philadelphia in the west and the recent phenomenon of casino gambling in the east pose a particularly substantial threat to the Pinelands.6 In response to these pressures, a massive and sustained regional planning effort is needed before

* Staff Member, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
5. CMP, supra note 2, at xvii.
scattered and piecemeal development inflicts irreparable damage on water quantity and quality, and on the region's existing, unique character.7

Proposals for the preservation of the Pine Barrens8 were devised and discussed at the local, state, and federal levels for several decades,9 without success. Finally, in November, 1978, the national interest in protecting and preserving this unique resource prompted action, as Congress enacted the National Parks and Recreation Act,10 establishing the Pinelands as the country's first National Reserve. The National Reserve concept foregoes the traditional route of outright federal acquisition and management of entire areas. Instead, this new approach combines limited public acquisition with comprehensive land use controls developed and implemented through a cooperative program involving local, state, and federal governments, as well as concerned private groups and individuals.11 Under this Reserve system, the federal contribution is mostly financial,12 whereas the state takes the lead in devising and implementing effective land use controls. The Reserve system, therefore, allows a state to address its major environmental concerns and to responsibly plan for the future on a regional scale without being subject to its own financial limitations.

In June, 1979, the New Jersey Legislature supplemented the federal law by passing the Pinelands Protection Act,13 endorsing the Reserve system and further enunciating the means for its implementation. A regional master plan14 was formulated by the Pinelands Commission—the statutorily-created15 planning body also responsible for the mandatory implementation of the plan.16 Essentially, the regional plan is divided along geographical lines into two distinct development schemes. In the remote interior of the Pinelands (the Preservation Area),17 zoning and regulation under the plan prohibit

8. The "Pine Barrens" is another name commonly used when referring to the Pinelands. "Pinelands" and "Pine Barrens" will be used interchangeably throughout this article.
11. STATE ENERGY & ENVIRONMENT COMMITTEE STATEMENT, supra note 9.
12. 16 U.S.C. § 471i(k) (Supp. III 1979) authorizes appropriations of up to $26 million to carry out the plan, with no more than $3 million to be available for planning.
17. For a brief description of the Preservation Area, see infra text and notes at notes 115-18.
virtually all new development;\textsuperscript{18} whereas, in the outer ring of the Pinelands (the Protection Area),\textsuperscript{19} less stringent zoning regulations direct future development into those areas where the environmental effect will be minimal.\textsuperscript{20} The Pinelands Commission has attempted through this plan to fulfill its legislative mandate by "use of [s]tate and local police power responsibilities to the greatest extent practicable."\textsuperscript{21} Landowners upset with restrictions imposed by the plan's implementation, however, have already gone to the courts\textsuperscript{22} with their claims that the regulations have "go[ne] too far"\textsuperscript{23} and that a "taking"\textsuperscript{24} has occurred in violation of the fifth and fourteenth amendments to the United States Constitution.\textsuperscript{25}

One particularly innovative aspect of the Pinelands Plan is the use of "transferable development credits"\textsuperscript{26} to alleviate any personal hardship caused to landowners in the most strictly regulated areas. Those landowners who can no longer develop their property may effectively sever their unusable development rights from the land and sell them as credits on the open market. Landowners who purchase these Pinelands Development Credits\textsuperscript{27} may then apply them to property in designated areas, thereby enabling the owner to develop his land at a greater level than would normally be allowed.\textsuperscript{28} Through this sale of development rights, the strictly regulated landowner may

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\textsuperscript{18} The Pinelands Comm'n, A Summary of the Pinelands Plan, DRAFT (Feb. 6, 1981) [hereinafter cited as DRAFT Summary].
\textsuperscript{19} For a brief description of the Protection Area, see infra text and notes at notes 119-21.
\textsuperscript{20} DRAFT Summary, supra note 18, at 9.
\textsuperscript{23} See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
\textsuperscript{24} See infra Section IV for a detailed discussion of the judicial interpretation of the term "taking."
\textsuperscript{25} The fifth amendment of the United States Constitution states in relevant part that "[n]o private property [shall] be taken for public use, without just compensation." U.S. CONST. amend. V, cl. 4.
\textsuperscript{26} CMP, supra note 2, pt. I at 210-12. This article will discuss transferable development credits in detail at section III infra.
\textsuperscript{27} "Pinelands Development Credits" is the official term assigned to the transferable development rights created by the Pinelands Plan. See CMP, supra note 2, pt. I at 210-12.
\textsuperscript{28} Id. at 210. If an owner of strictly regulated land also owns land in an area designated for development, he has the option of simply transferring the development credits from one parcel to the other, thereby gaining the additional development potential himself.
\end{flushleft}
share in the increasing value of those parcels of land which are not restricted to the same severe degree.\textsuperscript{29}

For years, commentators have espoused the usefulness of transferable development rights\textsuperscript{30} as a tool to preserve landmarks\textsuperscript{31} and open spaces\textsuperscript{32} without "taking" the property from its owners. Yet, the Pinelands Plan is the first attempt to apply the transferable development right (TDR) concept on any significant scale. As such, this ambitious plan raises numerous legal issues. The most important issues—those relevant to the future successful utilization of both the TDR and National Reserve concepts—are those to be considered and resolved in this article: namely, (1) whether TDR's are in themselves unconstitutional, as one oft-cited commentator argues;\textsuperscript{33} (2) whether TDR's as specifically applied in the Pinelands are unconstitutional; and (3) whether the Pinelands Plan as a whole, or in part, results in the unconstitutional "taking" of the regulated land.

In analyzing these issues and the regulatory scheme as a whole, this article will first discuss the master plan in order to convey the ecological significance of the Pinelands and the ambitiousness of the goals, policies, and procedures devised to protect the region. Second, this article will examine fully the concept of transferable development rights and the mechanics of the Pinelands Development Credit system. Third, this article will analyze relevant case law on the "taking" issue and sketch the contours of the test which courts apply when evaluating whether a "taking" has occurred. Finally, the article will apply this "taking" test to the Pinelands regulatory scheme to determine how the Pinelands Plan, and the Pinelands Development Credit system, should fare under judicial scrutiny.

\section*{II. The Pinelands Comprehensive Management Plan}

To place the Pinelands Comprehensive Management Plan in the proper perspective, one must look behind the Plan to its inspiration

\begin{footnotesize}
\begin{enumerate}
\item CMP, \textit{supra} note 2, pt. I at 210.
\item The terms "transferable development rights" and "transferable development credits" differ little in meaning and will be used interchangeably throughout this article.
\item See, \textit{e.g.}, J. Costonis, \textit{Space Adrift: Saving Urban Landmarks Through the Chicago Plan} (1974); Marcus, \textit{Air Rights Transfers in New York City}, 36 LAW \& CONTEMP. PROBS. 372 (1971); Elliott \& Marcus, \textit{From Euclid to Ramapo: New Directions In Land Development Controls}, 1 Hofstra L. Rev. 56 (1973).
\item Note, \textit{The Unconstitutionality of Transferable Development Rights}, 84 YAL\textsc{e} L. J. 1101 (1975).
\end{enumerate}
\end{footnotesize}
—the untouched natural beauty and abundant resources of the Pinelands expanse set in the midst of the most urbanized state in the union. The national interest in preserving the Pinelands stands in contrast to the regional need to provide for the inevitable future development of southern New Jersey. The resulting Pinelands Plan is an attempt to accommodate both of these interests. The land use regulations devised under the Plan allow for development in those areas where the land is capable of supporting it with minimal damage to the environment; whereas, where the environmental effect would be great, development is prohibited.

A. The Pinelands—Its Resources and Factors Influencing Those Resources

1. Natural Resources and Land Use

The Pinelands is a "unique and self-maintaining ecosystem" which has evolved over thousands of years. The most important abiotic element in this ecosystem is water, stored in the extensive sand aquifers below the surface and replenished solely by precipitation. The most important water aquifer in the Pinelands—the Cohansey—alone has been estimated to store as much as 17 trillion gallons. The water, vast and plentiful, also remains bacterially sterile, odorless, and clear. These fresh water aquifers are highly susceptible to pollution, however, as the uppermost soil is chemically inert and therefore incapable of filtering out waste; also, the com-

34. BUREAU OF THE CENSUS, UNITED STATES DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 11 (101st ed. 1980).
35. See infra Section II(A)(2).
36. For the specific regulatory provisions set out in the Plan, see infra Section II(C).
38. An aquifer is defined as "a geological formation or layer of material that is porous or permeable to water, thus capable of containing or carrying ground water. Sometimes the term is restricted to those formations actually containing water." 7 C. DAVIS, H. COBLENTZ & O. TITELBAUM, WATER AND WATER RIGHTS 273 (R. Clark ed. 1976).
39. CMP, supra note 2, pt. 1 at 12.
40. The Cohansey aquifer lies below the eastern coastal plain, a large area which includes the eastern coast and southern portion of the state. See id. at 14.
41. Id. John McPhee most impressively described the immenseness of the Pinelands water supply:

[U]nder the pines is a natural reservoir of pure water that, in volume, is the equivalent of a lake seventy-five feet deep with a surface of a thousand square miles. If all the impounding reservoirs, storage reservoirs, and distribution reservoirs in the New York City water system were filled to capacity . . . the Pine Barrens aquifer would still contain thirty times as much water.

J. MCPHEE, supra note 7, at 13.
42. J. MCPHEE, supra note 7, at 13. See also CMP, supra note 2, pt. I at 16.
43. CMP, supra note 2, pt. I at 12.
position of the water itself renders it a weak buffer against chemical change. Particular land use activities in localized areas are already beginning to have an effect on the groundwater aquifers and streams of the Pinelands. Thus, the actual or potential pollution sources associated with development—septic tanks, landfills, and chemical and industrial waste dumping, for example—pose an immediate and severe threat to individual localities and to the entire region.

The soils of the Pinelands on the whole are unusually porous and acid, and have a relatively low capacity to retain both water and nutrients. As such, the soil tends not to produce vegetation of the garden variety. Rather, the soil composition is responsible for the less common vegetation which is characteristic of the Pinelands, such as the thousands of acres of dwarf pines no taller than a person. In addition, the Pinelands soil is significant because of the variation in its composition throughout the region. The composition of the soil directly influences land use patterns in the region since certain land uses, such as farming, are better suited to certain types of soils.

Just as water levels and soil composition have helped to shape the landscape of the Pinelands, so have two other interrelated elements of more recent origin: fire and human disturbance. The Pinelands area has shown a remarkable propensity to recover from the ravages of fire yet, not without certain effects. The distribution of plants shifts according to their susceptibility to fire damage; as the pattern of vegetation changes, so do the animal communities living nearby. How far this ecological system can be pushed by fire before certain plant and animal species disappear entirely from the Pinelands is an

44. This is a matter too complex for this writer to attempt to explain. However, for details, see id. at 15-16.
45. Id. at 15.
46. Id. at 18.
47. Id. at 16.
48. Id. at 40.
49. See J. McPhee, supra note 7, at 2; Roberts, Don’t Call It ‘the Barrens,’ Audubon, July, 1981, at 77.
50. CMP, supra note 2, pt. I at 43.
51. Id. at 4-6.
52. Id. at 4. See also J. McPhee, supra note 7, at 116-37. The worst fire in Pinelands history demonstrates the seriousness of this problem. The fire, which occurred in April, 1963, destroyed 183,000 acres, 186 homes and 197 out-buildings, and killed 7 persons. The estimated property loss exceeded 8.5 million dollars. CMP, supra note 2, pt. I at 67. As to the frequency of fires, although official statistics were unavailable, one estimate is that there are about 400 forest fires in the Pinelands every year, with 15 to 20 of them considered to be major. Id. at 121.
unanswered question. This is a matter of concern at present because increased development in recent years has greatly increased the human risk factor and fire potential.\textsuperscript{54}

Other human disturbances have been kept to a minimum, as the explosive population growth which has occurred in New Jersey since the mid-1800's did not press on the Pinelands until the last two decades.\textsuperscript{55} Timbering, hunting, drainage of lowlands, and the advent of intensive recreation, pollution, and pest control are a few examples of activities which, on a small scale, affect but will not destroy the character of the Pinelands.\textsuperscript{56} However, as is true of scattered and piecemeal housing development which interferes with the continuity of the landscape,\textsuperscript{57} an increase in intensity of these activities will ultimately have a drastic and destructive effect.\textsuperscript{58}

The distinctive character of the Pinelands landscape—a product of interacting environmental factors such as water, soil, fire and human disturbances—\textsuperscript{59} is defined by the vegetation and wildlife. Pinelands vegetation includes more than 850 species of plants, 580 of them being native species.\textsuperscript{60} Seventy-two of these species currently face extinction in the Pinelands.\textsuperscript{61} In addition, the Pinelands contains 299 species of birds, 59 reptile and amphibian species, 91 fish species, and 35 species of mammals.\textsuperscript{62} Included are two species listed as endangered under federal standards\textsuperscript{63} and 32 listed as threatened or endangered by the State of New Jersey.\textsuperscript{64} The area is also "extremely rich"\textsuperscript{65} with insects, as approximately 10,000 species reside in the region.\textsuperscript{66}

Historically, the Pinelands have been utilized for such resources as lumber and forest products, bog iron, hydropower, sand for glass-making, and berries for commercial marketing.\textsuperscript{67} Current land use does not break with tradition.\textsuperscript{68} Forest and wetland areas support

\textsuperscript{54} Illustrative of a dangerous trend is that, in the five-year period from 1974 to 1978, the majority of wildfires occurred around developed areas. Id. at 67.
\textsuperscript{55} Id. at 6.
\textsuperscript{56} Id. at 4-5.
\textsuperscript{57} Id.
\textsuperscript{58} See id.
\textsuperscript{59} Id. at 58.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 76, 78.
\textsuperscript{63} Id. at 76.
\textsuperscript{64} Id. Certain species, such as the black bear, wolf, heath hen, and native turkey have already been eliminated by hunters. Id. at 5.
\textsuperscript{65} Id. at 88 (citation omitted).
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 97, 124-26.
\textsuperscript{68} Excluding the recent advent of retirement community development and casino gam-
such activities as timber and mineral extraction, hunting and gathering, as well as all types of recreation. 69 Agricultural lands yield food crops, fruits and vegetables, and berries, particularly cranberries and blueberries. 70 That land within the Pine Barrens which has been developed is almost exclusively devoted to residential uses. 71 That commercial development which does exist is primarily limited to small businesses, services, and retail trade along roadways. 72

The extensive use of the land and its resources as a way of life is generally associated with older cultures. 73 Yet, until recent years, the long-time residents of the Pinelands—the “Pineys,” as they call themselves—were almost totally dependent on the resources of their land. Although most rural residents now also hold jobs unrelated to the land, these people have retained their underlying traditional independent attitude and self-sufficient lifestyle. 74 The Pine Barrens, for the rural residents, is still a place where “nobody bothers you” and “you can be alone.” 75

Unfortunately for those rural inhabitants who desire solitude, the population of the Pinelands region has been rising steadily since 1950. 76 Although this is consistent with the historical trend of steady growth in southern New Jersey in general, the bulk of the population increase has shifted inward from the non-Pinelands areas (the eastern coast and the area immediately surrounding Philadelphia) bbling in Atlantic City, discussed infra, Section II(A)(2).

69. CMP, supra note 2, pt. I at 128. Note that a sizeable acreage of forest and wetlands are publicly owned and held by state and local land management agencies. Some 48,000 acres of land are devoted to military and aviation facilities. Id.

70. Id. Berry agriculture is a major aspect of the Pinelands culture and character. Berries have been cultivated there for the past century and a half. New Jersey ranks third nationally in cranberry production, with 3000 acres of bogs; 7800 acres are committed to the production of blueberries. Both berries depend on high-quality acidic water in large volumes, making their cultivation perfectly compatible with the character of the Pinelands. Id. at 130-31.

71. There are only 16 major industrial employers of more than 100 workers in the Pinelands region, compared to nearly 4000 in New Jersey as a whole. Id. at 128.

72. Id. at 129. The largest employers in the Pinelands are the four federal military and aviation facilities: Fort Dix; McGuire Air Force Base; Lakehurst Naval Air Station; and Federal Aviation Administration Technical Center. Further employment is provided by state facilities, namely a state college, a hospital, and a prison. Id. at 148-50.

73. Id. at 108.

74. Id. See generally J. McPhee, supra note 7; Roberts, Don’t Call It ‘the Barrens,’ AUDUBON, July, 1981, at 77.

75. J. McPhee, supra note 7, at 59.

76. CMP, supra note 2, pt. I at 161. In 1950, the Pinelands population was approximately 118,000. By 1970, the population had more than doubled. Currently, the population of the Pinelands Reserve is estimated at 323,000. Id.
toward the heart of the Pinelands. The perimeter is slowly being whittled away.

2. Development Threats

The development pressure within the Pinelands is not linked to internal employment growth, as there has been no significant surge of economic activity in the area. Rather, a substantial part of the past and present residential development is linked to economic activity outside its borders. The continuing expansion of the suburban ring around Philadelphia has exerted development pressures on the northwestern edge of the Pinelands. Likewise, on the eastern periphery looms the recent resurgence of Atlantic City as a center of economic activity founded on casino gambling and the resulting service needs of the gambling populace. A third major source of development pressure is unrelated to economic activity. Rather, the peaceful setting and affordable acreage along the northeastern edge of the Pinelands has attracted a large number of retirees and large-scale retirement communities.

The Pinelands counties situated closest to the Greater Philadelphia Area—Burlington, Camden, and Gloucester counties—have experienced a steady and significant increase in the construction of homes. However, there has been little parallel activity in the purchase of vacant land. This means that current growth is being accommodated by gradually developing land already held for the purposes of development or investment. This development is occurring in the fringe area immediately outside the Reserve boundaries, as well as within the borders of the Pinelands communities themselves.

77. In the 1960's, the Pinelands municipalities accounted for 29 percent of the total Southern New Jersey population growth. In the 1970's, this percentage had jumped to more than 50 percent. Id. at 162.
78. Id. at 165.
79. Id. at 164. See supra text at note 71.
80. CMF, supra note 2, pt. I at 164, 175-78.
81. Id. at 165, 170-71.
82. Id. at 168-69. Note that many of the counties discussed in these pages are not totally contained within the Pinelands Reserve.
83. Id.
84. Id. Land market activity in the Pinelands was very active in the early 1970’s, peaking in 1973, and thereafter sharply declining for several years. Although the market had not fully recovered by 1978, recent figures show a steady increase in the dollar value of land transactions since 1975. Id. at 165.
85. Id. at 167.
The situation is quite different in the Pinelands counties situated on the eastern shore near Atlantic City—Atlantic and Cape May Counties. These counties have experienced high levels of vacant land transactions in the past several years; yet, this active sale of land has not been reflected in housing production. Presumably, therefore, the recently purchased land is being held speculatively, to be sold or developed sometime in the future. The bulk of land transactions have occurred in those parts of the counties closest in proximity to Atlantic City and therefore technically outside of the Pinelands region. This land sale increase is occurring, however, in the Pinelands portions as well.

Just how much employment, population, and housing growth will be triggered by casino-gambling development in Atlantic City is "the most significant unknown [variable] in the entire regional development picture." Experts disagree among themselves (and from day to day) as to their projections. One estimate predicts that casino and casino-related jobs will employ 133,600 persons by 1985 and 165,600 by 1990. Secondary employment generated by the demands of the casinos, hotels, motels and their employees for goods and services will affect thousands more throughout the region. The resulting population increase will trigger an explosive demand for housing which clearly cannot be met by the existing level of housing production. Development pressures of such magnitude could hardly be restricted to Atlantic City proper, but will be felt throughout the entire region.

At present, the largest land market and center of housing development activity in the Pinelands is to the northeast, in Ocean County, where there has been a significant influx of senior citizens. The ad-

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86. Id. at 168-70.
87. Id.
88. Id.
89. Id. at 175.
90. Id.
91. This projection is considered to be conservative. See id. at 176, Table 5.14.
92. Casino-related jobs include those jobs in the casinos, hotels and motels; and constructing the casinos, hotels and motels. Id. at 176.
93. Id.
94. Id. at 176-77.
95. Id. at 177. Inevitably, the law of supply and demand being what it is, the housing shortage will particularly affect workers at lower wage levels; an estimated 50 percent of casino workers will fall into this category. Having been "priced out" of the housing market in the areas closest to Atlantic City, it is these people who will likely seek the more affordable housing further inside the Reserve's boundaries. Id.
96. Id.
97. Id. at 170.
vent of retirement communities has added a new wrinkle to the development picture of the Pinelands area. Whereas the gradual suburban growth around Philadelphia and the steady expansion of Atlantic City have retained a pattern of sorts, the development in Ocean County is "far more idiosyncratic and irregular, particularly in terms of geographic spread." These retirement communities have sprung up wherever land is available at a reasonable price. Moreover, there is no reason to believe that this trend will not continue, as demographic studies show that the over-age-sixty-five population will likely continue to grow until the 1990's. The cost to the environment of such unrestricted scattered development for another decade would be high indeed.

The New Jersey Pinelands is an anachronism—a vast expanse immeasurably rich in natural resources and as yet untouched by progress. However, it is only a matter of time before the increased residential, commercial, and industrial development of the Pinelands periphery affects the entire region. In recognition of this fact, bold action was taken to protect the natural wonders of the Pinelands—the creation of the Pinelands National Reserve.

B. Legislative and Administrative Origins

The Pinelands National Reserve was established by federal law in November, 1979. The Reserve consists of approximately one million acres, encompassing parts of seven southern New Jersey counties and all or parts of fifty-six municipalities. The Act authorized the creation of a fifteen-person planning entity to formulate a comprehensive regulatory plan to manage the vast reserve. Then-New Jersey Governor Brendan Byrne established the Commission through an executive order issued in February, 1979. In addition to creating the Pinelands Planning Commission (Pinelands Commission), the Governor's order made most develop-

98. Id.
99. Eighty percent of all retirement communities in New Jersey are in Ocean County. Id. at 172.
100. Id. at 174.
101. Id. at 161.
104. CMP, supra note 2, at xviii.
ment in the Pinelands subject to Commission approval during the planning period.¹⁰⁸

In June, 1979, the New Jersey Legislature supplemented the federal law by passing the Pinelands Protection Act.¹⁰⁹ The state act endorsed the planning effort,¹¹⁰ the designation of the Pinelands Commission as the regional planning entity,¹¹¹ and the interim restrictions on development.¹¹² In addition, the act called upon the Pinelands Commission to produce a comprehensive management plan¹¹³ to which county and municipal master plans and land use ordinances must conform.¹¹⁴

The state law differentiates between the remote interior of the Pinelands and the surrounding portion.¹¹⁵ The former, known as the Preservation Area, consists of 368,000 acres of semiwilderness¹¹⁶ which is especially vulnerable to environmental degradation.¹¹⁷ Therefore, the legislature felt that the area requires highly stringent restrictions on the development of land, as well as public acquisition of that property requiring a greater degree of protection than regulation can provide.¹¹⁸ The latter is the 566,000-acre Protection Area, consisting of somewhat more developed land¹¹⁹ containing a “mix of valuable environmental features.”¹²⁰ The legislative man-

¹⁰⁸. CMP, supra note 2, at xviii. The original planning period was to be 18 months from the receipt of the appropriated federal funds. However, an extension of some four months was later granted to allow finalization of portions of the Plan. See id. at xviii-xix.


¹¹¹. Id. § 13:18A-4. For state constitutional purposes, the Commission is considered part of the Department of Environmental Protection. However, the Act specifies that “the Commission shall be independent of any supervision or control by such department” and “shall exercise all the powers and duties as may be necessary in order to effectuate the purposes and provisions” of the Act. Id.

¹¹². Id. § 13:18A-10.

¹¹³. Id. § 13:18A-8. The statute also provides for public hearings on the issue to be held in the Pinelands area prior to preparing the CMP; furthermore, periodic revision and updating are mandated. Id.

¹¹⁴. Id. § 13:18A-10. The required county and municipal master plans and land use ordinances were to be submitted to the Commission within one year of the adoption of the CMP (Nov. 21, 1980). Id. § 13:18A-12.

¹¹⁵. DRAFT Summary, supra note 18, at 3.

¹¹⁶. CMP, supra note 2, at xix.


¹¹⁹. CMP, supra note 2, at xix.

¹²⁰. DRAFT Summary, supra note 18, at 3.
date with regard to this portion was less clear, leaving the Commission with greater discretion in devising a plan which would strike a balance between the environmental and development interests involved.\footnote{121}

In complying with its legislative mandate to formulate a management plan, the Pinelands Commission successfully gathered and analyzed information on natural, physical, and historic resources; sociocultural factors; growth patterns; land management techniques; financial components; as well as other pertinent topics.\footnote{122} Advice and assistance from appropriate officials, interested professionals, scientific and citizen organizations, as well as input arising from a series of public meetings, aided the Commission in forming recommendations and identifying issues of concern.\footnote{123} The end result of this intensive and extensive investigation was the completion of the Comprehensive Management Plan (the Pinelands Plan), which was adopted by the Commission in November, 1980; approved by Governor Byrne in December, 1980; and given federal approval in January, 1981, by then-Secretary of the Interior Cecil Andrus.\footnote{124} As of the early months of 1982, the Plan is in its implementation phase.\footnote{125}

The Pinelands Plan, as adopted, is comprised of two parts. Part I "describes the region's natural, cultural, and physical resources, the factors influencing those resources, and the programs which have been developed to respond to the state and federal mandates."\footnote{126} Part II contains the "substantive land use programs and development standards," providing the specific language to put these pro-

\footnote{121. \textit{Id.} at 9. The Pinelands Area—the combined acreage of the Preservation and Protection Areas—is approximately 150,000 acres smaller than the Pinelands Reserve as delineated by the federal Act. The regulation of this excess 150,000 acres, mostly along the New Jersey coast, is outside the State Pinelands Commission's jurisdiction. Development there is governed by the Coastal Area Facility Review Act (CAFRA), which is required to carry out the purposes of the state and federal Pinelands Acts. DRAFT Summary, \textit{supra} note 18, at 10; Roberts, \textit{Don't Call It 'the Barrens,'} \textit{AUDUBON}, July, 1981, at 77.}


\footnote{123. CMP, \textit{supra} note 2, at xxi.}

\footnote{124. DRAFT Summary, \textit{supra} note 18, at 3; \textit{Hearings on S. 3335 before the Natural Resources and Agriculture Comm. of the N.J. Senate 4} (July 7, 1981) (testimony of the Natural Resources Defense Council, Inc.) (unpublished) [hereinafter cited as \textit{N.R.D.C. Testimony}].}

\footnote{125. \textit{N.R.D.C. Testimony, supra} note 124, at 4. The Plan's implementation requires that all Pinelands municipalities and counties bring their master plans and land use ordinances into conformance with the CMP. The Pinelands Commission is responsible for the review and certification of municipal and county plans which are yet incomplete. \textit{See CMP, supra} note 2, pt. I at 273-75.}

\footnote{126. CMP, \textit{supra} note 2, at xix-xx. Much of the substantive information contained in Part I of the CMP is reflected in the previous section of this article. \textit{See supra} Section II(A).}
grams into effect.\textsuperscript{127} It is the latter which is central to the effort to protect the Pinelands—the regulatory program devised to manage the Pinelands National Reserve.

\textbf{C. The Pinelands Management Program}

The heart of the Pinelands Management Program is the provision of an adequate supply of land in those areas best able to accommodate new development so as to meet the regional need for housing.\textsuperscript{128} The extensive examination and cataloging of natural resources and of historical, cultural, and economic trends in the Pinelands was necessary to determine the "critical areas"—those areas deemed by the planners to be most vulnerable to degradation by incompatible development.\textsuperscript{129} The planners then attempted to reconcile their findings as to the critical areas with their analyses of population and housing demand estimates.\textsuperscript{130} The desired result of the planners' efforts was to satisfy both the environmental and development needs of the Pinelands region.

In formulating its plan, the Pinelands Commission was guided by goals set out by the federal and state acts.\textsuperscript{132} The state Pineland Protection Act set forth specific goals to be attained in the management of the Preservation and Protection Areas.\textsuperscript{133} The goals for the Preservation Area included: the preservation of an extensive and contiguous area of land in its natural state; the promotion of compatible agricultural, horticultural, and recreational uses; the prohibition of any construction or development incompatible with preservation of the area; the provision of a sufficient amount of undeveloped land to accommodate particular wilderness management practices; and the protection and preservation of the quantity and quality of existing surface and ground waters.\textsuperscript{134} With respect to the Protection Area, the goals included: the preservation and maintenance of the essential character of the existing Pinelands environment; the protection and maintenance of the quality of surface and ground waters; the promotion of the continuation and expansion of agricultural and

\begin{footnotes}
\item[127] CMP, \textit{supra} note 2, at xx.
\item[128] \textit{Id.} pt. I at 161.
\item[129] \textit{See id.} at 183-91.
\item[130] \textit{Id.} at 183.
\item[131] \textit{Id.} at 178-80. One estimate predicts an increase in the Pinelands of 141,300 households during the 1980's, and an increase of 83,500 in the 1990's. \textit{Id.} at 179, Table 5.16.
\item[134] \textit{Id.}
\end{footnotes}
horticultural uses; the discouragement of piecemeal and scattered development; and the encouragement of appropriate patterns of compatible residential, commercial, and industrial development, in or adjacent to areas already utilized for such purposes, to accommodate regional growth influences in an orderly way while protecting the Pinelands environment from the cumulative adverse impacts thereof. 135 These goals in essence were formally adopted by the Pinelands Commission. 136

The basic premise behind establishing the Pinelands as a National Reserve was that the government could not achieve its desired goals by the outright purchase of the entire area. 137 The area was too vast, the development pressures were legitimate and intense, and the history of the Pinelands was grounded in private land ownership. However, despite these factors, the Commission enacted a system of land acquisition 138 as one of its many programs for the area. 139 The Commission selected as potential areas for acquisition those parcels of land “meriting the greater level of protection implicit in public ownership because of their ecological, historical, recreational, or other value to the public.” 140 The acquisition may be in fee simple or involve only a partial acquisition of interest, 141 whichever is required to further the goals of the state. The initial evaluation by the Commission identified more than 65,000 acres as potential areas of acquisition. 142

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135. Id.
136. The actual goals and policies as adopted by the Commission and reproduced in the CMP are much more detailed. However, the underlying ideas are identical. See CMP, supra note 2, pt. I at 193-94.
137. DRAFT Summary, supra note 18, at 4-5.
139. Other management programs are: Surface and Groundwater Resources Program; Vegetation and Wildlife Program; Wetlands Program; Fire Management Program; Forestry Program; Air Quality Program; Cultural Resources Program; Natural Scenic Resources Program; Agricultural Program; Waste Management Program; Resource Extraction Program; Data Management Program; and Pinelands Development Credit Program. All but the last are outside the scope of this article. See generally id.
140. Id. at 213. The Commission does not have the authority to actually purchase the land itself. Rather, the Commission makes recommendations to the Dep’t of Environmental Protection which, in turn, enters into the formal agreements to purchase. Id. at 214.
141. Such partial acquisition would likely be in the form of a “conservation easement.” A conservation easement is the acquisition by the government of the owner’s right to develop the land, leaving the owner with all other rights of ownership, including the right of continued possession. Its purpose is to conserve environmental amenities of land, air, soil, open space, and historic areas. The easement runs with the land and binds all subsequent purchasers. Rose, A Proposal for the Separation of Marketable Development Rights as a Technique to Preserve Open Space, 2 REAL ESTATE L.J. 635, 640 (1974).
142. CMP, supra note 2, pt. I at 217.
The thousands of acres not recommended for public acquisition also needed to be regulated in a manner consistent with the aforementioned goals of the Plan. Of necessity, the level and type of regulation had to vary according to the particular characteristics of the land. Therefore, the Commission divided the Pinelands Reserve into several land use planning areas, each environmentally distinguishable and requiring individual regulatory treatment.

The Preservation Area District contains 334,000 acres and represents what is readily identifiable as the "essence of the Pinelands." This district contains "the most critical ecological values in the region and is the least populated." The land uses deemed appropriate by the Commission for this district include berry agriculture, horticulture of native plants, other compatible agricultural activities, forestry, low intensity and selective intensive recreational uses, limited resource extraction, and public service infrastructure to serve the needs of the district.

Housing opportunities in the Preservation Area District are limited to those persons owning at least 3.2 acres of land who can demonstrate a cultural, social, or economic link to the essential character of the Pinelands. The parcel of land must have been owned by the applicant before the implementation of the Pinelands Plan in February, 1979. In addition, either the applicant's family must have resided in the Pinelands for at least 20 years prior to February, 1979, or his primary source of income must be a "resource-related" activity. Furthermore, the Plan requires that the applicant may not have built a dwelling within the previous five years and that the dwelling sought must be the applicant's principle place of residence.

143. See supra text at notes 134-36.
144. CMP, supra note 2, pt. I at 195.
145. The land use planning area classification should not be confused with the original statutory Preservation Area-Protection Area delineation. Both the Preservation and Protection Areas contain several smaller land use planning areas. The Preservation Area contains the Preservation Area District, Special Agricultural Production Areas, and a portion of the Agricultural Production Areas. The Protection Area includes the Forest Area, the Regional Growth Areas, and most of the Agricultural Production Areas. Id. at 195-96.
146. An area of 176,000 acres is state-owned land and was so before the Plan was formulated. Id. at 201.
147. Id.
148. Id.
149. Id. at 201; id., pt. II, § 5-302. Municipalities are authorized to designate Special Agricultural Production Areas to be devoted exclusively to berry agricultural and native horticultural uses, other environmentally compatible agricultural activities, and related agricultural housing. Id., pt. I at 195; pt. II, § 5-305.
150. The lot must be at least 3.2 acres to meet the Plan's water quality standards dealing with nitrate contamination from septic systems. DRAFT Summary, supra note 18, at 7.
narrowly-drafted "Piney" exception, as it is called, is a manifestation of the Commission's conclusion that the people of the Pinelands constitute one of the area's most important cultural resources. As such, the essential character of their lifestyle must be maintained.152

The Commission classified those lands outside the Preservation Area District which also possess the "essential character" of the Pinelands as Forest Areas.153 These largely undisturbed forest and coastal wetland areas adjoining the Preservation Area and extending southward contain some 420,000 acres.154 The same land uses permitted in the Preservation Area District are allowed in Forest Areas. In addition, municipalities, at their option, may allow certain other uses, such as commercial establishments, industries related to Pinelands resources, and extraction of sand, gravel, or minerals.155

The Forest Areas have little residential development as human influences have been minimal.156 The Pinelands Plan calls for assigning each municipality within the Forest Area a specified number of housing units which may be built, the number equalling one dwelling unit for each 15.8 acres of privately held, undeveloped land within the municipality.157 These houses must be built on lots of no less than 3.2 acres.158 Independent of this specified residential development, the "Piney" exception, as in the Preservation Area District, provides additional housing for residents who can show the requisite cultural or economic ties to the land.159 Furthermore, each municipality with jurisdiction over land in the Forest Area must provide for the clustering of residential development rights away from any parcel of land located in the municipality's Forest Area to other areas in the municipality.160 These cluster areas must contain at least


154. DRAFT Summary, supra note 18, at 10. About one fourth of this area is already in public ownership as state forests, parks, and wildlife management areas. About one third, while within the National Reserve along the coast, is outside the state's Pinelands jurisdiction. Id.


156. Id.

157. Id.

158. DRAFT Summary, supra note 18, at 10.

159. CMP, supra note 2, pt. I at 202; see infra text and notes at notes 150-51 for the full requirements. Two other situations may arise where the persons involved are exempt from development limitations: (1) when the owner of a one-acre or larger lot owned the land prior to Feb., 1979, he is entitled to a one-year exemption (municipalities have the option to extend the period); (2) when the developer had obtained final local approval for the project prior to Feb., 1979. These exemptions also apply in the Agricultural Production and Rural Development Areas. DRAFT Summary, supra note 18, at 14-15.

500 acres capable of handling development with minimal environmental damage. 161

A third designated land use planning area encompasses “[b]locs of more than 1,000 acres of active farmland and adjacent farm soil.” 162 Such land has been designated under the Plan as Agricultural Production Areas where farming and related activities will remain the dominant land use. 163 About 79,600 acres fall into this category, all but 2,000 acres of which lie in the Protection Area. 164 Single family residential development is allowed in this area at a density of one unit per ten acres, as long as the house is part of a farm and is intended for the use of the farm’s owner or employees. 165 In addition, any person able to show a link to the social and economic character of the Pinelands, thereby qualifying under the “Piney” exception, is permitted to build in these areas. 166

Some 145,000 acres of land, spread throughout all seven counties, are in a transitional period—somewhat fragmented by existing development, but with some highly viable agricultural land. 167 These lands are designated as Rural Development Areas. Under the Plan, the municipalities retain discretion as to land use and residential dwelling density in these areas, provided that the land uses are compatible with the essential character of the Pinelands. Furthermore, the total number of new units may not exceed 200 per square mile of private, nonwetland, undeveloped land. 168 These areas are to serve as “municipal growth reserves” 169 for future community development as needed.

A key element of the Pinelands Plan is the direction of present community development into those areas “where the capability to absorb development is high and the pressure to develop is great” 170—designated Regional Growth Areas. The Plan stipulates overall densities, ranging from one to three and one-half units per acre of developable land, at which municipalities will allow new development in their Growth Areas. 171 In Atlantic City, for example, where the greatest level of development is expected, the Plan allows for the

162. DRAFT Summary, supra note 18, at 10.
163. CMP, supra note 2, pt. I at 203; DRAFT Summary, supra note 18, at 10.
164. CMP, supra note 2, pt. I at 203.
168. Id., pt. I at 205; pt. II, § 5-306(A). This figures out to one dwelling unit per 3.2 acres.
170. Id.
construction of 45,300 housing units to be accompanied within 28,600 acres designated as Growth Areas, for an average of 1.6 units per acre.\textsuperscript{172} Any other land uses are permitted in the Growth Area at a municipality's option, provided that the Plan's environmental standards are met.\textsuperscript{173} The Regional Growth Areas encompass 119,050 acres, with approximately half considered developable. At the overall base densities specified in the Plan, 141,350 new units could be built in these areas.\textsuperscript{174}

One likely consequence of channeling development into the Growth Areas is that there will be an upward shift in land values in those areas.\textsuperscript{175} At the same time, the limited residential development in environmentally sensitive parts of the Pinelands restricts the landowner's chance to develop and increase the value of his land.\textsuperscript{176} In an effort to share the burden and the profits, as well as to further the overall Pinelands protection effort, the Commission instituted an innovative program known as the Pinelands Development Credits.\textsuperscript{177} As this program is perhaps the most controversial aspect of the overall Pinelands Plan, close examination of transferable development rights and the Pinelands Development Credit Program is required.

III. TRANSFERABLE DEVELOPMENT RIGHTS

A. TDR's Generally

1. The TDR Concept

A development right is essentially a creature of property law. It is one of the bundle of rights included in the fee simple ownership of real estate.\textsuperscript{178} The basic concept of transfer of development rights is the severance of the right to develop from the bundle of rights implicit in land ownership and the conveyance of that development right to the owner of a nearby, or even a distant, tract of land.\textsuperscript{179} The

\textsuperscript{172} DRAFT Summary, supra note 18, at 11.
\textsuperscript{173} Id.
\textsuperscript{174} DRAFT Summary, supra note 18, at 11-12.
\textsuperscript{176} CMP, supra note 2, pt. I at 210. See generally Economic Analysis, supra note 175, at 11-14.
\textsuperscript{177} CMP, supra note 2, pt. I at 210-12; pt. II, §§ 5-401 to 5-407.
\textsuperscript{179} 3 Ross, HARDIES, O'KEEFE, BABCOCK & PARSONS, SUBSTANTIVE ELEMENTS, PRO-
transferor's title thereby incurs a permanent prohibition against development, although the remainder of his bundle of rights remains intact.180

The idea of severing property rights is not foreign. The separation and alienability of such components of title as mineral rights and mortgage liens has long been accepted.181 This idea is thus being applied to that right which permits an owner to build upon or develop his land.182 For years TDR systems have been widely acclaimed as a method of preserving landmarks or open spaces while imposing neither a hardship on the landowners, nor the expense of acquisition on the municipality.183 Yet, extension of the severance concept to development rights has been a long time coming. Undoubtedly, the uncertain legal status of the TDR technique has been a major cause of this delay.184

The development rights transfer technique requires that a master plan identify two areas, or districts: "one from which rights may be transferred and a second to which rights may be transferred."185 As to the latter, the plan must also specify the development density186 at which the average landowner can build, as well as the higher development density allowed with the purchase of development credits. Then the method for assigning and allocating the development "rights" or "credits" must be determined. The four principal methods of allocation that have been suggested are acreage, fair market value, assessed value, and development potential.187 Fair market value and development potential are the more complex methods, as they are less easily ascertainable and highly speculative;188 the simpler method of raw acreage, or some derivation thereof, seems to be the most popular.189


181. THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION 3 (J. Rose ed. 1975) [hereinafter cited as Rose].

182. Chavooshian, supra note 178, at 171.

183. Note, supra note 180, at 1101.

184. Ross REPORT, supra note 179, at 95-96.

185. Id. at 86.

186. This term simply refers to the number of dwelling units per acre.


188. Ross REPORT, supra note 179, at 86.

189. J. WYNN, APPENDIX B, THE TRANSFER OF DEVELOPMENT RIGHTS: A PRELIMINARY
Once the allocation method has been determined, the development rights must be assigned and certified to the landowners in the transferor district. Those certified development credits may then be sold on the open market to a landowner in the specified district who desires to develop his land to a greater density or intensity of use than that allowed by the applicable zoning ordinance. Roughly speaking, the market price should be equal to what it would cost the transferee owner to purchase an adjacent tract of land that would enlarge the size of the transferee owner's land sufficiently to permit the proposed development. However, if the governing body does not want to allow potentially unstable market forces to control the ultimate price, a development rights bank may be established. This bank would purchase the rights directly from the transferor district landowners at a stable rate and resell the rights as credits to transferee district landowners. A third option would be to allow the holder of the development rights to sell them on the open market if desired and possible; the bank would be ready to step in as a purchaser if the holder so desired or in hardship cases as a last resort.

2. Application of the Concept

As mentioned above, application of the transferable development right concept has been limited to date. TDR's have been used to an extent in some major urban areas to preserve historic landmarks. For example, New York City utilized TDR's in connection with its landmark preservation program enacted in 1965. Under this system, buildings designated as landmarks could not be destroyed or altered, thereby resulting in substantial underdevelop-
ment of the location sites.\textsuperscript{197} The New York City landmarks ordinance\textsuperscript{198} allowed the unused development potential of sites occupied by landmark structures to be sold and transferred to adjacent and nearby properties. The floor area of the transferee lot could then be increased by more than 20 percent over prevailing zoning ceilings.\textsuperscript{199} Similar programs designed to encourage landmark preservation were attempted in San Francisco\textsuperscript{200} and Washington, D.C.\textsuperscript{201}

A well-documented program was also devised to encourage the preservation of landmark structures in Chicago.\textsuperscript{202} This proposed plan differed from the New York system in that development rights could be transferred anywhere in a transferee district encompassing most of Chicago’s central business district.\textsuperscript{203} Also, a development rights bank was to be utilized as a transfer medium.\textsuperscript{204} Although the Chicago Plan stirred up much of the current interest in the TDR concept,\textsuperscript{205} it was never adopted.\textsuperscript{206}

The other instances of experimentation with the TDR concept have involved attempts to preserve open space. One such attempt was in the Tudor Parks area of New York City.\textsuperscript{207} Private parks in this area were rezoned as public parks. Because of this, the parks’ owners were granted the option to transfer their unusable above-surface development rights to certain other property in midtown Manhattan.\textsuperscript{208} The property to which the TDR’s were transferred

\begin{footnotes}
\item[197.] Ross Report, supra note 179, at 88.
\item[199.] J. Costonis, supra note 194, at 54. Additionally, there were a “wide array of controls” over these transfers to insure compatibility of the resulting development with the surrounding area. Id. at 54-55.
\item[200.] Id. at 54.
\item[203.] Ross Report, supra note 179, at 88.
\item[204.] J. Costonis, supra note 194, at 105-06.
\item[205.] Ross Report, supra note 179, at 88.
\item[206.] Exactly why this plan was never adopted is unclear. However, one commentator claims that the reason is simple: Chicago is a “developer’s town;” the developers oppose the plan; therefore, the city administration will not take action to implement it. Newsom, Transferable Development Rights: Critique of the Chicago Plan, 304 Planning Advisory Service 9 (1975).
\item[207.] This plan was successfully challenged by the affected landowners. See infra text and notes at notes 376-86; Fred F. French Inv. Co. v. City of N.Y., 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.5th 5, appeal dismissed, 429 U.S. 990 (1976).
\item[208.] Lots eligible to receive the TDR’s were limited to those within the boundaries of 60th Street, Third Avenue, 38th Street, and Eighth Avenue. Furthermore, only those lots with a minimum lot size of 30,000 square feet and zoned to permit development at the maximum com-
could then enjoy a 10 percent or more increase in floor area ratio density.\textsuperscript{209} This attempt to preserve open space, however, was unsuccessful.\textsuperscript{210}

At least twelve other TDR programs have been established by ordinance with the primary objective being the preservation of environmentally sensitive areas, open space, or agricultural lands.\textsuperscript{211} These twelve programs are TDR programs only in its broadest sense, as they vary greatly.\textsuperscript{212} All are voluntary in that landowners have the option of developing their land in compliance with preexisting zoning laws or with the zoning established in the TDR ordinance.\textsuperscript{213} Only one program could be classified as at all restrictive.\textsuperscript{214} More importantly, under these voluntary TDR programs, only a very small number of landowners have exercised their option to transfer development rights.\textsuperscript{215} Thus, it appears that the TDR programs to date have enjoyed only limited success and provide little insight as to how TDR’s can be most effectively utilized.\textsuperscript{216} The recently proposed Pinelands Plan, therefore, represents a dramatic and experimental change in the modern approach to the use of TDR’s.

B. The Pinelands Development Credit Program

The Pinelands Development Credit (PDC) Program is the first major attempt to implement TDR’s in conjunction with a comprehen-

\textsuperscript{209} Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan’s Tudor City Parks, 24 BUFFALO L. REV. 77, 83 (1974-75).

\textsuperscript{210} The plan was declared invalid by the New York Supreme Court in Fred F. French Inv. Co. v. City of N.Y., 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, 8, appeal dismissed, 429 U.S. 990 (1976).

\textsuperscript{211} WYNN REPORT, supra note 189, at 2. Air rights transfer programs and landmark preservation were excluded from the study. Those programs reviewed are located in Chesterfield and Hillsborough, New Jersey; Eden and Southampton, New York; Windsor, Connecticut; Birmingham, Buckingham, and Upper Makefield, Pennsylvania; Calvert County, Maryland; Collier County and St. Petersburg, Florida; Santa Monica—Malibu, California. Id. 212. Id.

\textsuperscript{212} Id. at 6.

\textsuperscript{213} Id. The semirestrictive program is the Collier County Program. Id.

\textsuperscript{214} Id. at 3-5. In all there have been only 89 transfers. The California Program accounted for 80 of the 89 transactions, four programs each had one transfer, and five programs report no transfers. Id. at 3-4.

\textsuperscript{215} However, for more details as to the mechanics of the various programs, see WYNN REPORT, supra note 189, or ROSS REPORT, supra note 179, at 89-96.

In contrast, several ambitious TDR programs have been proposed as methods of land use management in Maryland, Virginia, and California; to preserve fragile ecological resources in Puerto Rico; and to preserve open space in New Jersey. For details, see Rose, supra note 181. These were never adopted by the appropriate governing bodies.

Legislation authorizing the use of TDR techniques has been prepared and introduced in the
The New Jersey Legislature recommended, and the Pinelands Commission agreed, that the PDC program would be an equitable supplement to the regulatory elements of the Pinelands Plan. It would provide an alternative use to property owners in the Preservation Area District, Special Agricultural Areas, and the Agricultural Production Areas. The development credits allowed to landowners in these districts may be purchased by landowners in Growth Areas to gain bonus development potential. Thus, the credits provide a mechanism by which the restricted landowner may participate in any increase in development values which are realized in the Growth Areas.

The development credits are allocated on the basis of both acreage and productivity of land. This system recognizes the higher value of farmland and so provides fewer credits to owners of nonproductive wetlands. In the Preservation Area District, landowners are entitled to 1.0 credit for each thirty-nine acres. Wetlands yield only 0.2 credits for thirty-nine acres. In Agricultural Areas, all uplands and areas of active agriculture, including bogs and fields used for berry cultivation, are allocated 2.0 credits for thirty-nine acres. Wetlands which are not active agricultural bogs or fields collect the basic 0.2 credits for thirty-nine acres.

These Pinelands Development Credits (PDC's) can be sold on the open market, using a legal instrument similar to a conventional property deed. The Commission recommends the establishment of a development rights bank which would provide loan guarantees and

New Jersey Legislature with some regularity, but has never been passed. ROSS REPORT, supra note 179, at 96.

217. See generally CMP, supra note 2, pt. I at 210-12.


219. See supra note 149.


221. Id.

222. Id.

223. Id; id., pt. II, § 5-403(B)(1)(a). Owners of less than the 39 acres receive the appropriate fraction thereof.


225. This includes both the Agricultural Production Areas and Special Agricultural Areas.


227. Id., pt. I at 210; pt. II, § 5-403(B)(2)(b). The program also provides that "owners of lots ranging in size between a tenth of an acre and 9.75 acres will be allocated at least one-fourth credit, provided that they owned the lot on February 7, 1979, that the property is vacant, and that it is not in common ownership with contiguous land." DRAFT Summary, supra note 18, at 13.

228. CMP, supra note 2, pt. I at 210. When the landowner sells her credits, she is required
serve on a limited basis as a buyer for credits in hardship situations.\textsuperscript{229} To date, the appropriate enabling legislation to create such a bank has not been adopted by the New Jersey Legislature.\textsuperscript{230}

When a PDC is transferred to a Regional Growth Area,\textsuperscript{231} the transferee landowner gains four bonus housing units.\textsuperscript{232} Local governments in the Growth Areas are required to adopt land use regulations which allow for the use of these credits. To encourage the even distribution of bonus housing units and the maintenance of consistent housing types in various neighborhoods, residential densities must be presented in a range.\textsuperscript{233} The low density establishes the base density for a zone; by applying development credits to a parcel of land within that zone, development could take place at the higher end of the density range.\textsuperscript{234} The bonus housing capacity created by the zoning density ranges could increase the number of potential units allowed in the Growth Areas by about 50 percent, or approximately 70,000 units.\textsuperscript{235} However, the number of development credits allocated to landowners, and thus available for purchase, would generate the bonus housing potential for only about 30,000 units.\textsuperscript{236} The overall ratio of potential housing capacity (70,000) to available bonus units (30,000) is about 2.3 to 1.0. It is this ratio of demand to supply which is expected to provide the necessary market for the PDC's.\textsuperscript{237}

There are two other aspects of the PDC program worth noting. First, the Commission acknowledges that the success of the program to record a deed establishing a restriction which limits the future use of her land to those allowed under the Plan for the area in which the land is located. \textit{Id.}

\textsuperscript{229} \textit{Id.}, pt. I at 212. \textit{See} general discussion \textit{supra} text and notes at notes 192-94.

\textsuperscript{230} Telephone conversation with the Pinelands Commissioner (Oct. 9, 1981). Legislation to establish a development rights bank was proposed. However, it was attacked by opponents of the Pinelands Plan to an ill-fated bill which sought to "water down" the Plan. The "Perskie Amendment," if it had been passed, would have stripped the Pinelands Commission of its power in the Protection Area, making it advisory only, and deleted from the Pinelands Protection Act the specific goal of discouraging scattered and piecemeal development. Legislation to create a bank is expected to be proposed again in the next legislative session.

\textsuperscript{231} \textit{Id.}, pt. I at 210. \textit{See} supra text and notes at notes 170-74.

\textsuperscript{232} CMP, \textit{supra} note 2, pt. I at 210. The fractions of credits allocated in certain situations can be aggregated from different transfers and used as a whole when the unit is assembled. \textit{Id.}

\textsuperscript{233} \textit{Id.} The Plan sets these ranges as: less than 0.5 to 0.5 dwelling units per acre; 0.5 to 1 unit per acre; 1 to 2 units per acre; 2 to 3 units per acre; 3 to 4 units per acre; 4 to 6 units per acre; 6 to 9 units per acre; 9 to 12 units per acre; and 12 or more dwelling units per acre. \textit{See} \textit{id.}, pt. I at 211, Table 7.4.

\textsuperscript{234} \textit{Id.}, pt. I at 210.

\textsuperscript{235} \textit{Id.}, pt. I at 212.

\textsuperscript{236} \textit{Id.}

\textsuperscript{237} \textit{Id.} If and when development conditions and housing demands warrant, Municipal Reserve Areas are ready to act as "safety valves" to provide the additional capacity to utilize bonus units. \textit{See} supra text and notes at notes 165-67.
depends on the ability of developers to utilize their bonus units without any additional delays or review requirements which might add incremental costs to the development project and discourage transfers. Therefore, the program requires municipalities to enact zoning ordinances which provide clear standards for the expeditious utilization of the credits.\textsuperscript{238} Second, the Plan requires that public information about the PDC program be thoroughly distributed to all those persons who might have an interest in the program. The Commission believes that a clear understanding of the Plan is essential to its proper implementation and to the creation of a viable private market for PDC's.\textsuperscript{239}

The validity of the transferable development right concept is as yet unascertained. In virtually every instance in which the concept has been put into effect, "the system has been accompanied by either threatened or actual litigation, some of which has been settled and some of which has been disposed of at the trial court level without a reported decision."\textsuperscript{240} The controversy over TDR's centers on whether or not the use of such systems results in an unconstitutional "taking." In the two reported decisions dealing with TDR's,\textsuperscript{241} the courts were less than definitive as to the answer. Some commentators interpret these cases as being wholly negative reviews of the TDR concept;\textsuperscript{242} others view the "score" as being "one to one."\textsuperscript{243} In order to understand this limited judicial evaluation of TDR's as a regulatory tool,\textsuperscript{244} however, the cases must be viewed in light of the historic controversy between noncompensable regulation and unconstitutional "takings."

IV. THE "TAKING" ISSUE: LAND USE PLANNING & TDR'S

The issue of what constitutes an unconstitutional "taking" has been much debated in the courts.\textsuperscript{245} The root of the controversy appears to be a basic judicial inability to define the contours of two

\textsuperscript{238} CMP, supra note 2, pt. I at 210.
\textsuperscript{239} Id., pt. I at 212.
\textsuperscript{240} Ross REPORT, supra note 179, at 96. To date, there is no pending litigation actually challenging the validity of the PDC program, although suits have been brought challenging other provisions of the Plan. See supra notes 22 and 152.
\textsuperscript{242} E.g., Note, supra note 180, at 1107.
\textsuperscript{243} Ross REPORT, supra note 179, at 96; Marcus, supra note 196, at 731-32.
\textsuperscript{244} The TDR cases will be discussed fully infra at Section IV(B)(2).
\textsuperscript{245} See cases cited infra throughout this section.
separate concepts: eminent domain and the police power. Eminent
domain is derived from the fifth amendment of the federal Constitu­
tion and similar state provisions. The use of eminent domain is
limited to "taking" for a public purpose and must be accompanied by
the giving of just compensation to the owners of the property
"taken." The police power, on the other hand, is the authority con­
ferred upon the states by the tenth amendment of the federal Con­
stitution to regulate in furtherance of the public order, safety,
health, morals, and the general welfare. This power is subject to
limitations imposed by federal and state constitutions and particu­
larly by the requirement of due process. The literal interpretation of
this due process safeguard would not suggest that its abuse would
lead to a "taking." However, this was exactly the conclusion reached
by the Supreme Court in 1922, as Justice Holmes declared: "while
property may be regulated to a certain extent, if regulation goes too
far it will be recognized as a taking.""250

Therefore, it is the Court's view that property can be "taken" in
two ways: the state may "take" property by eminent domain
because it is useful to the public; or it may "take" property under the
police power to avoid harm to the general welfare. Although some
might consider this an insignificant question of semantics, there re­
mains a major distinction between the due process and fifth amend­
ment "taking" checks on government action. When property has
been "taken" by eminent domain, just compensation is due the
owner. To the contrary, when oppressive regulation under the
police power is determined to be tantamount to a "taking," the
remedy is invalidation of the regulation itself. As long as this
remedial distinction remains, the particular characterization of any
"taking" by a court could have serious financial ramifications for the
responsible government entity.254

246. U.S. Const. amend. V.
247. The fifth amendment states in relevant part: "nor shall private property be taken for
248. The tenth amendment reads in full that "[t]he powers not delegated to the United
States by the Constitution, nor prohibited by it to the States, are reserved to the States
respectively, or to the people." U.S. Const. amend. X.
249. The relevant part of the fourteenth amendment of the United States Constitution
states that "[n]o State shall . . . deprive any person of . . . property, without due process of
law." U.S. Const. amend. XIV.
members of the Court (one of whom was the recently retired Justice Stewart) agreed in a
The leading case dealing with the issue of "taking" is Pennsylvania Coal Co. v. Mahon (Penn. Coal). There the claimant coal company sold the surface rights to certain parcels of land to the Mahons, expressly reserving the right to remove all the coal thereunder. After the transactions, however, Pennsylvania enacted a statute known as the Kohler Act which prohibited the mining of anthracite coal in such a way as to cause the subsidence of any house unless the house was owned by the owner of the underlying coal and was 150 feet from the improved property of another. The effect of this regulation was to make it "commercially impracticable" to mine the coal, thereby destroying the property rights intentionally retained by the claimant. Thus, when the Mahons brought suit to enjoin the coal company from mining under their house, as prescribed by the Kohler Act, the company countered with the claim that the Act was unconstitutional. Specifically, the company argued that the Act was not a police power regulation at all, but, rather, amounted to a public taking of private property without the requisite just compensation.

Justice Holmes, writing for the majority, admitted that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," However, regulations properly issued pursuant to separate dissent and concurrence that it was time that the Court recognize that just compensation is the proper remedy for all "takings." Therefore, where government regulatory action is determined to constitute a "taking," the Constitution requires that the government entity pay "just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." Id. at 653.

The State of New Jersey, as amicus curiae expressed its concern that such a decision by the Court would undermine further land use planning. A reversal by the Court could impose serious financial burdens on small municipalities and even greater impacts at the State and regional levels. Government officials charged with planning and regulatory responsibilities for environmentally important areas would fear potential liability in those many situations where the public interest collides with development pressures. Government agencies could suffer severe financial hardship even though officials acted in good faith and in accordance with the best available technical and legal advice. The State's land use planning efforts would be rendered nugatory in such circumstances.


255. 260 U.S. 393 (1922).
256. Id. at 412-13.
257. Id. at 414.
258. Id.
259. See id. at 396-404.
260. Id. at 413.
the police power, such as the Kohler Act, could go "too far . . . [and would] be recognized as a taking." rendering the regulation invalid. The difference between permissible regulation and a "taking" was one of degree, to be determined by an examination of the particular facts. In this case, the degree of regulation was too great to be sustained.

Justice Brandeis, in dissent, viewed police power regulation and public "taking" as different in kind, not in degree as Holmes had written. He felt that a restriction "imposed to protect the public health, safety or morals from dangers threatened is not a taking." Therefore, Brandeis concluded, the restriction on coal mining under or near residences was merely "the prohibition of a noxious use" to protect the public and so was valid despite the degree of incidental burden placed on individual property owners.

The Penn. Coal case remains a strong influence on modern "taking" analysis. As prescribed by Holmes, the courts have looked to the particular circumstances of each "taking" challenge and have made their decisions on a case-by-case basis. Approaching the "taking" issue in this ad hoc fashion, the Supreme Court, by its own admission, has been unable to "develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." Yet, upon review of the myriad of "taking" challenges which have reached the courts, particularly in recent years, two general themes appear to run through the courts' challenges—which were at the heart of the Holmes' and Brandeis' opinions in Penn. Coal. Courts, when attempting to discern whether government action is an unconstitutional "taking," look to: (1) the character, or

261. Id. at 415.
262. Notice that the proper remedy for this "taking" via the police power was invalidation of the statute and not just compensation. Id. at 416.
263. Id. at 413.
264. Id. at 416.
265. Id. at 417 (Brandeis, J., dissenting). One report claims that Holmes "rewrote the Constitution;" in partial reliance on Justice Brandeis' dissent, the authors urge that the Court overrule the Penn. Coal case and hold that "a regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking." F. BOSSERT, D. CALLIES & J. BANTA, THE TAKING ISSUE 238, 124-38, 238-55 (1973) [hereinafter cited as THE TAKING ISSUE].
266. 260 U.S. at 417-18 (Brandeis, J., dissenting).
of interference with individual property rights; and (2) the “degree” of interference. A closer examination of the application of this two-prong analysis is required.

A. Character of Action—“Difference in Kind”

The “difference in kind” between regulation under the police power and “taking” by eminent domain is that between acting to “protect the public from detriment and danger” and acting to “confer benefits upon property owners” in general. Extreme examples of this difference in kind are found in two early cases: *Pumpelly v. Green Bay Co.*, and *Mugler v. Kansas*. In *Pumpelly*, a dam built pursuant to a state statute caused water to flood the complainant’s land, inflicting irreparable damage and rendering the property valueless. This was held to be a “taking,” because the permanent flooding caused by the physical invasion by water had produced a practical ouster of possession. This type of state action was deemed to be more appropriate to eminent domain than to the police power, as the property had in effect been devoted to the public use in furtherance of improved river navigation. As such, compensation was required. The rule of *Pumpelly* has been strictly followed in cases where, in pursuit of public goals, real estate has been permanently and directly invaded by water, earth, sand, or other material or artificial structure effectively destroying or impairing its usefulness.

270. *Pennsylvania Coal*, 260 U.S. at 416-22 (Brandeis, J., dissenting). However, this is not the absolutist view—i.e. given a proper goal, regulation is always valid, despite the degree of interference—that the distinguished Justice, and some modern commentators, would prefer. See *The Taking Issue*, supra note 265.


272. *Id.* at 422 (Brandeis, J., dissenting).

273. *Id.*

274. 80 U.S. 166 (1871).


278. Government action such as this might be, and has often been, characterized in other terms—as the acquisition of an individual’s resources “to permit or facilitate uniquely public functions.” *Penn Central Transp. Co.*, 438 U.S. at 128. Examples of “taking” involv public function include: United States v. Causby, 328 U.S. 256 (1946) (direct overflights above claimant’s chicken farm deemed a “taking” of an easement); *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (direct overflights determined to constitute “taking”); *Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327 (1922) (United States military installation’s repeated firing of guns over claimant’s land deemed a “taking”); United States v. Cress, 243 U.S. 316 (1917) (repeated floodings of land caused by water project tantamount to a “taking”).

279. *The Taking Issue*, supra note 265, at 115; see, e.g., United States v. Lynch, 188 U.S. 445 (1903) (“taking” occurred when land turned into a bog); *Bedford v. United States*, 192
In *Mugler v. Kansas*, a state law prohibiting the manufacture or sale of alcohol rendered complainant’s brewery relatively worthless. Unlike *Pumpelly*, however, the regulation in this case was held to be a valid exercise of the police power. In *Mugler*, there had been no direct encroachment of property, but merely a prohibition of a use declared by legislation to be a nuisance detrimental to the health, morals, and safety of the community. The Court stated that such a prohibition of a noxious use would not be deemed “a taking or an appropriation of property for the public benefit.” Therefore, in contrast to physical invasion cases which are viewed as actionable under the principles of the eminent domain power, challenged regulations designed to abate nuisances are generally upheld as a valid exercise of the police power.

“Taking” challenges which do not fall into the “physical invasion” or “nuisance” categories discussed above are the more difficult cases for the courts to decide. In such cases, the court must examine the facts to determine whether the interference with individual property rights is of the kind properly derived from the police power. For the interference to be of the proper kind, thereby justifying the state’s imposition of its authority in behalf of the public, it “must appear, first, that the interests of the public generally . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose.”

1. In the Public Interest

Traditionally, the police power has been used to protect the health, safety, and morals of the community in such forms as fire regulations, garbage disposal control, quarantines, and restrictions upon

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280. 123 U.S. 623 (1887).
281. Id. at 657.
282. Id. at 675.
283. Id. at 668-69.
284. Id.
285. See, e.g., Hadacheck v. Sebastian, Chief of Police of the City of Los Angeles, 239 U.S. 394 (1915) (ordinance prohibiting the establishment or operation of a brickyard upheld as valid); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance regulating dredging and pit excavation on property upheld as valid).
286. Lawton v. Steele, 152 U.S. 133, 137 (1894); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962). A third requirement is that the interference be “not unduly oppressive upon individuals.” Lawton v. Steele, 152 U.S. at 137. However, this portion of the test has gained prominence and so will be discussed separately infra at Section IV(B).
liquor and prostitution.\textsuperscript{287} However, the scope of goals properly achievable through the use of police power regulation has been widening for many decades.\textsuperscript{288} As early as 1926, in \textit{Euclid v. Ambler},\textsuperscript{289} the Supreme Court recognized that the state’s police power would necessarily have to expand to deal with the complexities and problems of the modern world. The High Court stated:

[U]ntil 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, perhaps would have been rejected as arbitrary and oppressive.\textsuperscript{290}

In recognition of the need to widen the state’s police power, the \textit{Euclid} Court held that a person who asserts the unconstitutionality of a land use regulation has the burden of demonstrating that the provisions are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.”\textsuperscript{291} Furthermore, there is a presumption in favor of validity—if the legitimacy of the zoning legislation is fairly debatable, the court must allow legislative judgment to control.\textsuperscript{292}

Despite the strong language used in \textit{Euclid} favoring the broadened use of police powers, the presumption in favor of the valid use of police power is not irrebuttable. Two years after \textit{Euclid}, in \textit{Nectow v. City of Cambridge},\textsuperscript{293} a zoning ordinance similar to that upheld in \textit{Euclid}\textsuperscript{294} was declared invalid to the extent that it applied to plaintiff’s property.\textsuperscript{295} The ordinance divided the city into three districts—residential, business, and unrestricted—with plaintiff’s land falling

\begin{thebibliography}{99}
\bibitem{287} Sax, supra note 252, at 36, n.6.
\bibitem{289} 272 U.S. 365 (1926).
\bibitem{290} \textit{Id.} at 386-87.
\bibitem{291} \textit{Id.} at 395.
\bibitem{292} \textit{Id.} at 388. The Court never reached the “taking” issue in \textit{Euclid}, saying only that there would be time enough to deal with the actual application of particular premises as cases arise. \textit{The Taking Issue}, supra note 262, at 137; Village of Euclid v. Ambler Realty Co., 262 U.S. 365, 395-97 (1926).
\bibitem{293} 277 U.S. 183 (1928).
\bibitem{294} \textit{Id.} at 185.
\bibitem{295} \textit{Id.} at 188-89.
\end{thebibliography}
within the residential zone. The Court held that there was no clear community interest in classifying plaintiff's land as residential, and so the action of the zoning authorities came within the ban of the fourteenth amendment. Therefore, the presence of a particular community interest, or the lack thereof, turns on the facts of each individual case.

Similarly, several courts have held in past decades that zoning ordinances enacted to preserve land in its natural state have exceeded the limits of the police power. These "greenbelt" zoning laws were held to be " takings" because the courts viewed them as a means of acquiring lands for the public benefit rather than as regulations to protect the public interest. By enforcing these ordinances, the government would itself be enriched at the expense of private landowners. Such an unjust result violates the guarantee of the fifth amendment and, therefore, cannot be accomplished by use of the police power.

While the police power has been broadening in scope since the 1920's, there has recently been a dramatic increase in the number of goals now accepted as necessary for the protection of the public interest. "New and sophisticated public purposes" upheld by the courts have broadened the scope of the police power during a period of transition which some commentators term "the quiet revolution in land use control." During this time period, the courts recognized as valid, for the first time, such government goals as the preservation of water quality, the preservation of exhaustible resources, and the preservation of open space, the preservation of the en-

296. Id. at 185. Under such zoning, only dwellings, hotels, clubs, churches, schools, philanthropic institutions, greenhouses, and gardening were allowed in the residential zone. Id.

297. Id. at 188-89. Cf. Miller v. Schoene, 276 U.S. 272 (1928) (Court held that the community's interest in protecting its apple industry warranted the destruction, without compensation, of nearby diseased red cedar trees pursuant to a local ordinance).


299. A "greenbelt" is a belt of parkways, parks, or farmland which encircles a town or community and is designed to prevent undesirable encroachment. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 996 (1976).

300. THE TAKING ISSUE, supra note 265, at 260.

301. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971) [hereinafter QUIET REVOLUTION].


304. Assoc'd Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).
environmental character of a region,\textsuperscript{305} and the discouragement of premature and unnecessary conversion of open-space land to urban uses.\textsuperscript{306} The judicial view of such goals is no longer that these are governmental attempts to produce a public benefit and, therefore, more appropriate to eminent domain. Rather, courts view such regulation as aimed at preventing harm to the environmental status quo.\textsuperscript{307} Consequently, these environmental considerations are increasingly recognized as a proper "kind" of interference with individual property rights and, as such, are valid goals achievable by use of the police power.\textsuperscript{308}

2. Reasonableness of Means

Once a court determines that a valid government goal is being pursued, it must then consider whether the means chosen to achieve the desired goal are reasonable and nonarbitrary.\textsuperscript{309} If the court finds that the means are unreasonable or arbitrary the state will be deemed to have exceeded the scope of its police power, despite the presence of a valid goal, and the regulation will be invalidated.\textsuperscript{310} As discussed above,\textsuperscript{311} however, there is a presumption favoring the validity of every regulation\textsuperscript{312}—a presumption which the claimant in a "taking" challenge has the difficult burden of rebutting.\textsuperscript{313}


\textsuperscript{306} Agins v. City of Tiburon, 447 U.S. 255 (1980); see also Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972) (allowed "phased growth" plan geared to limitations of existing physical and financial resources to provide essential services).

\textsuperscript{307} The court in Just v. Marinette County, 56 Wis.2d 7, 16, 201 N.W.2d 761, 767-68 (1972), expressly made this distinction.

\textsuperscript{308} If it is determined that the goal sought to be achieved is improper under the police power, but, rather, is more appropriate under eminent domain, two remedies are available. Most often, if the effect on the regulated property is reversible by invalidating the regulation, the regulation will be struck down. If, however, the damage is irreversible and the owner will remain under a substantial hardship (as is often true with physical invasion cases, such as Pumpelly, 80 U.S. at 166) just compensation will be awarded as required by the fifth amendment.

\textsuperscript{309} This is the second requirement that must be satisfied in order to justify the imposition of the state's authority on behalf of the public—the first requirement being that the goal pursued must be in the public's interest. See supra text at note 286.

\textsuperscript{310} Lawton v. Steele, 152 U.S. 133, 137 (1894).

\textsuperscript{311} See supra text at note 292.

\textsuperscript{312} Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

\textsuperscript{313} Id.
One relatively successful method of demonstrating the unreasonable-ness of means is to show that the regulation, despite serving a strong community interest, tends to further additional, improper goals. Whether this side-effect is intentional or not, it will render the regulation invalid.\textsuperscript{314} For example, in a series of cases, zoning regulations for population control and environmental protection were declared invalid because the land use restrictions produced an exclusionary effect—in particular, low- and moderate-income families were effectively and unlawfully excluded from the municipalities involved.\textsuperscript{315} Although some regulations might be held valid despite such an exclusionary impact,\textsuperscript{316} when the adverse consequences become "too predominant" the zoning provision cannot stand despite the fact that it bears some relationship to legitimate zoning purposes.\textsuperscript{317} Thus, while courts may highly commend zoning as a "means by which a governmental body can plan for the future," they will not sanction their use as a "means to deny the future."\textsuperscript{318}

Courts tend to presume that regulations which are part of a comprehensive plan are reasonable, and, therefore, judicial deference is shown.\textsuperscript{319} Such deference does not extend to review of local zoning regulation of selected parcels on a piecemeal basis because, in the latter situation, the element of collective judgment which a comprehensive plan contains is lacking.\textsuperscript{320} Thus, although there were significant victories for local government zoning plans in the early 1970's,\textsuperscript{321} some courts expressed hesitation in light of the absence of a plan for

\textsuperscript{314} Although a court will generally treat the exclusionary aspects of legislation as an impermissible side-effect, it is more likely that the court suspects, but perhaps cannot prove, that exclusion was the primary motivation behind the legislation. As such, it cannot stand.


\textsuperscript{320} Williamson, \textit{supra} note 319, at 165.

\textsuperscript{321} \textit{See THE TAKING ISSUE, supra} note 265, at 229; Turnpike Realty v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973); Assoc'd Homebuilders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).
a larger area. The trend toward state-wide and region-wide comprehensive planning is judicially recognized as a practical and reasonable means necessary to deal with the problems of modern society. As such, the presumption in its favor is not easily rebuttable.

To summarize, judicial review of police power regulation initially focuses on whether the goal sought to be achieved is of the proper kind allowed under the police power, as opposed to eminent domain. With the ever-broadening scope of the state’s police power, this is not likely to be a difficult requirement to meet. The next consideration is whether the means used to attain this goal are unreasonable or arbitrary. There is a presumption in favor of legislative determinations, particularly when there is a comprehensive plan involved; yet, this presumption is rebuttable.

The final consideration in analyzing a potential “taking” is the extent to which the regulation interferes with property rights. Given a valid goal and a reasonable relationship between ends and means, the challenged regulation may still fail to survive judicial scrutiny if the interference with property rights is too severe. This second prong of the “taking” test—the “extent of interference” issue—must be examined separately both because of the importance recent court decisions have placed on this factor and because the “taking” analysis has shifted from a “difference in kind” to a “difference in degree.”

B. Extent of Interference—“Difference in Degree”

Over the years, courts and commentators have attempted to devise standards defining at what point a regulation becomes so extreme as to constitute a “taking.” The conventional view is that any governmental regulation that makes a private right essentially worthless is a “taking” of property. The terminology used by the Supreme Court is that a regulation is so onerous as to constitute a “taking” if it “denies an owner economically viable use of his land;” or, more


324. See The Taking Issue, supra note 265, at 229.

325. See supra note 308 for a discussion of remedies.

326. Sax, supra note 252, at 50.

commonly, if it does not permit the owner the "reasonable beneficial use" of his property. Here, too, the courts have been unable to formulate a precise rule as to when the facts of a particular case fall below the standard. Courts look at each individual case to decide what "justice and fairness" requires. Thus, in an attempt to understand how the term "reasonable beneficial use" has been judicially construed, one must necessarily survey the vast amount of case law on the subject.

1. Reasonable Beneficial Use

It is well established that a police power regulation is not invalid simply because it prevents the highest and best use of the land. Similarly, a showing that the regulated land might generate a more profitable return if it were free of restrictions does not diminish the community's power to regulate it in the manner chosen. Principles such as these, frequently espoused by courts and commentators, reflect the view that society is "drawing away from the 19th century idea that land's only function is to enable its owner to make money." It can no longer be assumed that a property owner has a constitutional right to use and develop land for any purpose which will result in personal profit, regardless of its effect on the public. Although this trend strains against the weight of the Anglo-American tradition of virtually unlimited property rights, the modern landowner's actions are, by necessity, restricted as a burden of living in a civilized society. Thus, the prevailing modern view is that only when the owner is deprived of all reasonable use of his property will the courts invalidate a restriction as unjust and unfair.

330. This survey of case law, to be accurate, must include decisions of federal and state courts of all levels. However, the emphasis in this article will be on United States Supreme Court decisions.
333. QUIET REVOLUTION, supra note 301, at 314-18.
334. THE TAKING ISSUE, supra note 265, at 240.
Judicial analysis of a potential constructive "taking" focuses on those factors which reflect the economic impact which the regulation has had on the property owner; particularly, the extent to which the regulation has interfered with the owner's "distinctive investment-backed expectations." One factor generally considered in this analysis is the diminution in property value caused by the regulation. However, most courts have held that even a dramatic loss in value is not essential or controlling in finding a "taking." Indeed, regulatory schemes which have deprived landowners of more than three quarters of their land value have been held not to constitute "takeings." In such cases, the courts imply that the owner's ability to realize the reduced value through sale of the property indicates that a reasonable use remains.

Another factor generally considered by courts is whether the challenged regulation affects present or future uses. Interference with present uses has traditionally been the more compelling grounds on which to rest a "taking" claim. This is largely due to the speculative nature of the injury claimed when the interference is with future uses—namely, the loss of anticipated gains. In addition, the extent to which restrictions on future use actually infringes on property rights is questionable; an owner has no absolute or unlimited right to change the essential character of his land so as to use it for its most profitable purpose. Furthermore, landowners

337. The term "constructive taking," as used in the text, refers to any "taking" which occurs in a manner other than by formal eminent domain proceedings.
338. The term "distinctive investment-backed expectations" as used by the Supreme Court seems to refer merely to an individual's reasonable expectation of economic return on an investment. See Penn Central Transp. Co., 438 U.S. at 124.
340. Andrus v. Allard, 444 U.S. at 66; Penn Central Transp. Co., 438 U.S. at 131; Just v. Marinette County, 56 Wis.2d at 23, 201 N.W.2d at 771; Am. Savings & Loan Ass'n v. County of Marin, 653 F.2d 364, 368 (9th Cir. 1981).
have no vested right in existing or anticipated zoning ordinances as the history of zoning law makes change foreseeable. The denial of the right to exploit a property interest previously believed to be available for development is "quite simply untenable" as the basis for a successful "taking" challenge.

Just how the courts apply this potpourri of legal principles may be understood through an examination of the "taking" analysis recently applied by the Supreme Court in Penn Central v. New York City. At issue in this case was an ordinance placing various development restrictions on an urban landmark—New York City's Grand Central Station—while at the same time allowing for the transfer of the owners' unused development rights to nearby or adjacent land. The owners brought suit when they were denied permission to build a multistoried office building above the historic terminal. Neither the validity of the City's objectives nor the appropriateness of the means used to achieve those goals were disputed. Thus, the issue before the Court was whether the interference with the owners' rights was of such an extreme magnitude so as to deprive them of all reasonable beneficial use of the property.

The Court, in analyzing the issue, placed a heavy burden on the claimant to show that all reasonable beneficial use of the property had been denied and that no reasonable return was possible under

347. Id., 15 Cal.3d at 521, 542 P.2d at 246, 125 Cal. Rptr. at 374. Theoretically, the chance of change in the zoning laws is to be reflected in the price of the property.
350. Specifically, the restrictions placed on owners of designated historic landmarks pursuant to the Landmark Preservation Law consists of keeping the building's exterior in "good repair" and requiring Commission approval before exterior alterations are made. The owners of Grand Central Station were denied approval of their plans for the construction of a multistory office building over the terminal because the plan would be destructive of the terminal's historic and aesthetic features. The owners filed suit claiming their property had been "taken" in violation of the fifth and fourteenth amendments. See Penn Central Transp. Co., 438 U.S. at 107-19.
351. Id. at 116-17.
352. Id. at 129. The City's objective in enacting such an ordinance was to "protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character." The citizens of New York City would thereby benefit culturally, economically, intellectually, and aesthetically. Id. at 109.
353. Id. at 129. Therefore, it was not necessary for the Court to apply the first prong of the "taking" analysis.
354. Id. at 136.
any of the uses permitted.355 Under the facts of the case, the Court held that the claimant had fallen far short of meeting this burden.356 The Landmark Preservation Law was found not to interfere with the owners’ “primary expectation”357 concerning their use of the parcel, as the ordinance both allowed and encouraged the continuation of the terminal’s present uses.358 Thus, although disapproval of the planned tower construction359 would cause the owners to lose an estimated $3 million in annual office rentals, the facts showed that the terminal itself provided a “reasonable return” of approximately $1 million in annual net rentals.360 Furthermore, there was no showing that the owners had been denied all use of the air development rights above the terminal. The Court reasoned that, while the construction plan for a large office tower had not gained Commission approval, there was no evidence to suggest that the construction of a smaller, more harmonious addition would not be allowed.361 Even to the extent that the owners had been denied the right to build above the terminal, the Court found that the preexisting air rights could still be put to some use—they could be transferred.362 The net result of all these factors was the Court’s conclusion that the regulation had not effected a “taking” and that, indeed, the landmark’s owners had retained significantly more than the minimum reasonable beneficial use of their property.363

*Penn Central* is an important case in that it identifies a number of factors which the Court focuses on when evaluating the extent of regulatory interference. Unfortunately, the Supreme Court’s more

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357. *Id.* at 136.
358. *Id.*
359. *See supra* text and note at note 351.
360. *Penn Central Transp. Co.*, 438 U.S. at 116. In fact, the appellants did not challenge the factual determination of the lower courts that the terminal income itself was a “reasonable return” on the owners’ investment. *See id.* at 129. One must assume that appellants misjudged the significance of this finding.
361. *Id.* at 136-37. The possibility that a construction plan might be approved in the future serves a similar function to “special permit” provisions included in certain comprehensive zoning regulations. The fact that a property owner has the option of applying for a special use permit is often cited as “one more reason” for the court to declare that the regulation has not gone too far. *See, e.g.*, Just v. Marinette County, 56 Wis.2d at 22, 201 N.W.2d at 770-71; Am. Dredging Co. v. State, 169 N.J. Super. 18, 21, 404 A.2d 42, 44 (App. Div. 1979); Sands Point Harbor, Inc. v. Sullivan, 136 N.J. Super. 436, 441, 346 A.2d 612, 614 (App. Div. 1975).
recent pronouncements on the "taking" issue have contributed little towards clarifying the Court's concept of reasonable beneficial use. One case worth noting, however, is Agins v. City of Tiburon. In Agins, the owners of a five-acre parcel of prime residential property challenged a California land use regulation which limited development on the parcel to a range of one to five dwelling units. The Supreme Court held that under this ordinance the owners had remained "free to pursue their reasonable investment expectations" and, therefore, had not been denied the "justice and fairness" guaranteed by the fifth and fourteenth amendments. It is unclear from the Court's brief opinion what specific factors led the Court to this conclusion; however, the conclusion itself, given the stringency of the challenged regulation, suggests just how low the threshold for establishing "reasonable beneficial use" has become.

The Court in Agins appeared to stress that this was not a case where an ordinance has prohibited all development, thereby designating claimants' land as "open space." Therefore, although the Court has, in previous cases, indicated what it considers to be reasonable use, it has not yet reached the question of whether a regulation designating property as open space renders this land so "use-less" to the owner as to constitute a "taking." In anticipation of the resolution of this question, or perhaps as a means to avoid

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366. Id. at 257. The claimants would be allowed to build one to five houses only after a development plan was submitted to, and approved by, local officials. At the time the case was decided, the property owners had submitted no such development plan. Id.
367. Id. at 262-63.
368. The opinion is rather like a collection of general "taking" principles—many extracted from the Penn Central opinion—with little reference to the facts of the case itself.
369. If local officials allow the Agins to develop their land to the fullest extent permissible under the statute, they will be able to build only one dwelling unit per acre of "prime residential property." Agins v. City of Tiburon, 447 U.S. at 262.
370. Id. at 262-63.
372. In a recent "taking" case, Andrus v. Allard, 444 U.S. 51 (1979), the Supreme Court presented an opinion comprised of broad statements and interesting analogies which, at first glance, might appear to indicate in which direction the Court is leaning on this issue. The Court wrote that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Id. at 66. Therefore, applied to the land use regulation context, the one "strand" destroyed might be the right to develop; whereas the remaining strands—the rights to hold,
it, land use planners are beginning to utilize transferable development rights in an attempt to mitigate the financial burden placed on landowners by regulation. Yet, it remains to be seen whether the Court will find that TDR's are of sufficient value in themselves as to be of reasonable beneficial use to an owner of tightly-regulated land.

2. TDR's as Reasonable Beneficial Use

As mentioned earlier, judicial commentary on the validity of the TDR concept has been limited to two cases: *Fred F. French Investment Co., Inc. v. City of New York*; and *Penn Central*.

The first of the TDR "taking" challenges—*Fred F. French Investment Co., Inc. v. City of New York*—went before the New York Court of Appeals in 1976. In this case, the challenged ordinance rezoned two "buildable private parks" which had been part of a Manhattan residential complex (Tudor City) into parks open to the public. Simultaneous with this rezoning, the owners were given the right to transfer their development rights to designated "receiving lots" which would then be allowed to enjoy an increased floor area ratio density. This zoning regulation expressly prohibited any and all future development of the park property. Therefore, the TDR's were the only vehicle remaining through which the owners could profit. On the basis of these facts, the court struck down the zoning ordinance, holding that the park owners had been unreasonably deprived of the use of their property.

transfer, or devise, for example—would presumably be sufficient to prevent a taking from occurring.

A broad application of the "bundle-strands" model in this manner would represent a bold step on the part of the Court. More likely, the Court will seize the opportunity to limit *Andrus* to its rather unusual facts. The claimant, a vendor of artifacts produced from bald eagle parts, challenged the constitutionality of a regulation which prohibited the sale or purchase of such articles. Although the language of the opinion is broad, and the Court cites land-use taking cases in the text, in the final paragraphs the Court goes out of its way to characterize the challenged regulation as one of many "regulations that bar trade." *Id.* at 67. That the Court did not utilize the "bundle-strands" model in *Agins v. City of Tiburon*, a subsequent land-use regulation case, suggests that the Court will be hesitant to extend the use of the model beyond the scope of trade regulation challenges.

373. See supra text and notes at notes 240-44.
Chief Judge Breitel, writing for the majority, criticized the ordinance for requiring private landowners to maintain public parks. The majority ruled that the ordinance deprived the owners of all property rights except the "bare title and a dubious future reversion of full use." Taking into consideration all of the factors except TDR's, the opinion of the court was that the restricted property had been drained of all reasonable use and so had been virtually "taken." Therefore, when examining the TDR's and their potential value to the park's owners, the court was concerned with whether the TDR's provided the owners with some degree of compensation for their loss. Viewed by the court in this compensatory light, these development rights, severed from the land, were too abstract, and their value too speculative, to meet constitutional standards. In making such a determination, the court emphasized that the receiving lot had yet to be identified, acquired, and approved by administrative agencies—any of which might never occur because of "exigencies of the market" and "contingencies and exigencies of administrative action." Thus, although the court admitted that development rights were a "potentially valuable and even a transferable commodity," under the facts of this particular case the use of TDR's was not to be given judicial approval.

One year later, the Supreme Court addressed the TDR issue in Penn Central, with quite a different outcome—the Court gave a...
favorable review of New York City’s application of the TDR concept. The landmark preservation ordinance under constitutional attack in *Penn Central* contained a provision whereby development rights could be transferred from the regulated landmark to property on adjacent blocks. The Grand Central development rights were, therefore, transferable to at least eight nearby parcels, several of which had been deemed “suitable for the construction of new office buildings.” Thus, while noting that the TDR program was far from ideal, the Supreme Court agreed with the finding of the New York Court of Appeals that “at least in the case of the Terminal, the [transferable development] rights afforded are valuable.” As such, the Court stated that these rights “undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.” This language seems to suggest that the existence of the transferable development rights, and their accompanying economic value to the terminal owners, were important in preventing the landmark ordinance from being held to be a “taking.” In other words, these valuable TDR’s were some evidence that a “reasonable beneficial use” remained.

While the language used by the Supreme Court in its discussion of TDR’s was favorable, it must be noted that the Court relegated the matter of TDR’s to a single paragraph of dicta. Yet, the Court’s limited statement is still helpful in anticipating what stand the Court will eventually take when it chooses to address the constitutionality of TDR’s directly. Although any decision by the high Court will likely turn on the particular mechanics of the challenged TDR program, given a proper, workable transfer system, it appears likely that the Supreme Court will hold that TDR’s constitute a valuable asset for those landowners who possess them.

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388. Id. at 137.
389. Id. The New York Court of Appeals described some of the program’s many defects: “The area to which transfer is permitted is severely limited, complex procedures are required to obtain a transfer permit, and the program, it has been said, has the unfortunate consequence of encouraging large, bulky buildings around landmarks which are dwarfed by comparison.” *Penn Central Transp. Co.*, 42 N.Y.2d at 335, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920.
392. Id.
393. Id.
394. Just what such a program might entail is discussed infra Section V(B).
It does not appear that the factual differences between French and Penn Central account for the significant disparity in their outcomes. Rather, the difference lies in the modes of analyses used. In Penn Central, the Supreme Court viewed the value of the TDR's as a factor bearing on the issue of whether or not a "taking" had occurred in the first place—i.e., whether reasonable use remained. In contrast, the view of the court in French was that the TDR's were only to become a factor once the court found that a "taking" had occurred. At that point, the court would have to find that TDR's constituted "just compensation" for the "taking," or else strike down the regulation as unconstitutional. "Just compensation" is a higher standard than that of "reasonable use." This fact is illustrated by the Court's statement in Penn Central that, although the TDR's undoubtedly mitigated the financial burden imposed by regulation, they "may well not have constituted 'just compensation' if a 'taking' had occurred." Therefore, if the Supreme Court in Penn Central had characterized TDR's as a method of compensation, rather than a means of mitigation, the likelihood of any TDR's program meeting the requisite constitutional standard would have been small indeed.

396. See supra text and notes at notes 207-10, 376-86.
397. See supra text and notes at notes 196-99, 349-63, 387-88.
399. See supra text and notes at notes 380-86. The issues as framed for appeal by the Penn Central Transport Company were:
   (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a 'taking' of appellants' property for a public use within the meaning of the Fifth [and] Fourteenth Amendments, and,
   (2) if so, whether the transferable development rights afforded appellants constitute 'just compensation' within the meaning of the Fifth Amendment.

Id. at 122 (citations omitted).


401. Penn Central Transp. Co., 438 U.S. at 137. Case law suggests that the chances of satisfying the higher standard of "just compensation" are even lower than the Penn Central opinion seems to admit. "Just compensation" requires that the "full and exact equivalent" of the market value of the property "at the time of the taking [be] contemporaneously paid in money." Olsen v. United States, 292 U.S. 246, 254-55 (1934). This principle has been strictly enforced, resulting in the invalidation of statutes which attempted to provide for payment of "just compensation" by something other than money, such as warrants, or stocks and bonds (Gardiner v. Henderson, 103 Ariz. 420, 443 P.2d 416 (1968); Martin v. Tyler, 4 N.D. 278, 60 N.W. 392 (1894)), or other land (La. Power and Light Co. v. Lasseigne, 220 So. 2d 462 (La. Ct. App. 1969)). Consider how TDR's would fare under such scrutiny.

402. The appellants in Penn Central gambled on the fact that the Court would apply a higher-than-reasonable-use standard. They chose not to challenge the Court of Appeals' determination that the terminal, as it was, could earn a "reasonable return" and that the TDR's were "valuable." Penn Central Transp. Co., 438 U.S. at 129. Therefore, when the Supreme Court decided to consider not only the terminal's income, but also the value of the TDR's, in
Examination of the limited judicial review of TDR's suggests the following: the courts are willing to admit that development rights, even those severed from property, are valuable; and, under the right circumstances, it is likely that TDR's will be considered acceptable as a form of "reasonable beneficial use" sufficient to prevent a "taking." Thus, the constitutionality of land use regulations utilizing TDR's will ultimately turn on the specifics of each individual program.

V. CONSTITUTIONALITY OF THE PINELANDS PLAN AND PINELANDS DEVELOPMENT CREDITS

A. The "Kind" of Regulation: Is There a Proper Police Power Goal?

As seen in the progression of cases from Euclid to Agins, the Supreme Court has, over the years, dramatically increased the range of goals deemed properly attainable by use of state and local police powers. In its most recent pronouncement in this area, the Court in Agins summarily acknowledged the legitimacy of the city's interest in protecting its residents from the "ill effects of urbanization," such as the "disturbance of the ecology and environment." The matter-of-fact manner in which the Court accepted as valid the goal behind the strict zoning regulation illustrates just how far the Court has moved in the past several decades. It now seems apparent that the Court will scrutinize less strictly the motives behind state and local government actions designed to protect the general welfare. The complexities and problems of the modern world, so insightfully recognized by Justice Holmes in 1926, have necessitated judicial acceptance of stated goals as valid, absent strong evidence to the contrary.

403. There is some evidence which suggests that, in certain cases, severed development rights will be even more valuable than rights attached to land. One authority reports that the "Phillip Morris Corporation paid more per foot for development rights than it would have for land when it built at the Southwest corner of 42nd Street and Park Avenue." ROSS REPORT, supra note 179, at 97.


406. See supra Section IV(A).


408. Agins, 447 U.S. at 261, n.8.

409. See id. at 260-62.

The specific goals of the Pinelands Plan, as discussed above, are to preserve and protect the natural, historic, and cultural resources of the Pine Barrens, while at the same time accommodating the development needs of the area. These goals do not significantly differ from those pursued in Agins. Both the Pinelands Reserve system and the challenged density restrictions in Agins were legislative attempts to promote orderly future development by discouraging the "premature and unnecessary conversion of open-space land to urban uses." Since this goal was unhesitatingly declared to be legitimate in Agins, it seems likely that the same will hold true regarding the Pinelands. Furthermore, the need to avoid piecemeal development and the resulting environmental degradation of the region was recognized by both the federal and New Jersey legislatures. Thus, there is an extremely strong presumption that the legislative determination is correct and, therefore, should stand.

In addition, the means chosen by the federal and state legislatures to achieve the desired end—a regional comprehensive land use management plan—has been recognized, and indeed recommended, by the courts as a presumptively nonarbitrary and reasonable method of regulation to which judicial deference is generally shown. Thus, it appears that every available presumption favors judicial validation of both the goals and the means chosen by the protectors of the Pinelands. Furthermore, there is virtually no evidence to suggest how these presumptions might be overcome. An opponent of the Plan might claim, as is often done, that such a strict regulatory program has as an impermissible goal, or at least as an intended consequence, exclusion of certain "undesirable" groups. However, the Pinelands Plan emphasizes the fact that the degree of dev-
velopment in the Pinelands as a whole will not be limited. Rather, the pattern of development will merely be shifted to different areas in order to minimize possible negative effects on the environment. Therefore, this exclusionary argument seems unlikely to succeed.

Thus, in light of the recent expansive judicial view of the police power, it is likely that the goals of the Pinelands program will be upheld as valid. A modern court would be in the minority if it were to hold such a program to be an eminent domain action "in disguise." It appears, then, that the vulnerability of the Pinelands Plan lies not in its intentions, but in its resultant effect on the property rights of individual landholders. Thus, the bulk of the Court's "taking" analysis will entail evaluating the extent of interference and determining whether that interference is too severe to let stand. It is to this issue which this article now turns.

**B. The Extent of Interference:**

*Does "Reasonable Beneficial Use" Remain?*

1. The Preservation Area

The Preservation Area, at the core of the Pinelands, is the most strictly-regulated acreage in the Reserve, and, as such, it is perhaps the most likely target of a "taking" claim. Development in this area is prohibited, except by permits granted upon a showing of sufficient ties to the land or to long-term residents. Land use is restricted to traditional Pinelands activities such as agriculture, forestry, resource extraction, and beekeeping.

Although restrictive, these development and land use standards do not appear to deprive landowners of all reasonable use of their land as defined by the courts. First, no present use of the land is prohibited; rather, only those uses which might have arisen in the future are effected. The Preservation Area landowner has no vested right in a future use, particularly if it would alter the essential character of the land. For those who have lived in the Pinelands for generations and whose livelihood is derived from the land, this loss of possi-

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424. See supra Section IV(A).
425. See supra text and notes at notes 146-52, 163-66; also, CMP, supra note 2, pt. I at 201-09. Note that the Preservation Area is comprised of the Preservation Area District and Special Agricultural Production Areas as well as part of the Agricultural Production Area. See supra text and notes at notes 146-52, 163-66.
426. See supra text and notes at notes 150-52.
428. See supra text and notes at notes 344-48, 163-66.
ble future land uses is not likely to create a conflict. The very uniqueness of the Pinelands natives is their desire to avoid change and to continue an isolated existence in the “Piney” tradition. The prohibition on development is, therefore, not something highly objectionable, but is perhaps more likely to be appreciated by the majority of the populace. As to land uses, the traditional land uses of the Pinelands are allowed under the Plan, and so a resident’s activities will be left largely undisturbed. Thus, a person who has been able to live off the land for many years may continue to do so. Because of this, Pinelands natives in general are not likely to be the plaintiffs in any future “taking” action.

The same, however, will not be true for those Preservation Area landowners who hold property as a speculative investment. Speculators invest their money with an eye to the future and, therefore, will be most affected by the Plan’s restrictions. As such, they are the most likely challengers of the Plan. Yet, these landowners have no greater “right” to future land use than do native Pinelanders. Inherent in the concept of speculation is the foreseeability that there will be change; just as society refuses to refund the price of a losing sweepstake ticket, so must the courts refuse to compensate the “losing” speculator-landholder. Both Pinelander and speculator must be judged by the same reasonable use standard despite the disparity in the perceived losses. Thus, the program’s permitted land uses which afford the resident-landowner a legally acceptable return of value must be deemed to provide the speculator-landowner with the same.

A second aspect of the Plan suggests that reasonable use remains for Preservation Area land—the Plan’s provisions for permits and waivers. A true Pinelander may, through the “Piney” exception, be allowed to engage in limited development. Also, a Pinelands landowner may submit a proposal for an alternative land use not specifically provided for in the Plan, but consistent with its provisions. If a permit is denied, the Plan provides for reconsideration and judicial review of the Commission’s decision. In the first six months of the Program’s implementation, approval was granted for

429. See supra text at note 149.
431. See CMP, supra note 2, pt. II, §§ 4-101 to 4-104.
432. See CMP, supra note 2, pt. II, §§ 4-501 to 4-507.
433. See supra text and notes at notes 150-52; see also CMP, supra note 2, pt. II, § 5-302(A).
434. See CMP, supra note 2, pt. II, §§ 4-101 to 4-104.
435. CMP, supra note 2, pt. II, §§ 4-801 to 4-802.
twelve new homes and five other commercial/industrial uses; there have been no denials.\textsuperscript{436} The existence of a functioning permit system which expands the landowner's scope of future land use options is a factor looked upon with favor by the courts.\textsuperscript{437} The possibility that a landowner can, by permit, put his property to yet another use places a formidable obstacle in the path of a claimant who must prove that no reasonable use remains.

The Pinelands Plan also provides for the waiver of strict compliance with its provisions where those restrictions "create an extraordinary hardship or where [their] waiver is necessary to serve a compelling public need."\textsuperscript{438} Included in the standards specified for granting such waivers is the situation whereby an individual's property is not capable of yielding a reasonable return if used or developed as authorized by the provisions of the Plan.\textsuperscript{439} This waiver provision acts as a constitutional "safety net" which the Commission can fall back on in any case where the landowner successfully proves that his land, because of circumstances unique to that parcel, cannot provide him with a reasonable return. There is evidence to date that the Commission is very willing to utilize this option when necessary. In the Program's initial six months, two thirds of the waivers sought were granted.\textsuperscript{440} Although environmentalists might claim that the spirit of the Comprehensive Plan is being undercut by allowing so many exceptions, a court is likely to approve of the Commission's attempts to stay firmly on the constitutional side of the "taking" line.

A third, and particularly significant, aspect of the Pinelands Plan which suggests that reasonable use remains is the Pinelands Development Credit (PDC) Program.\textsuperscript{441} The PDC's allotted to Preservation Area landowners\textsuperscript{442} may be utilized in any one of three ways. These credits may be held unused by the owner, applied to the owner's land which lies in a Regional Growth Area, or sold on the

\textsuperscript{436} The Pinelander, Aug. 31, 1981, No. 14, at 3 (newsletter of the New Jersey Pinelands Commission) [hereinafter cited as The Pinelander).

\textsuperscript{437} See supra note 361.

\textsuperscript{438} CMP, supra note 2, pt. II, § 4-501.

\textsuperscript{439} Id. § 4-505(A)(1).

\textsuperscript{440} The Pinelander, supra note 436, at 3. Of the 32 requests submitted, 48 were approved. It is unclear from the information provided how many of these waivers were granted in the Preservation Area as opposed to the Protection Area. However, the end result is the forthcoming construction of 791 new homes in the Pinelands. Id.

\textsuperscript{441} See CMP, supra note 2, pt. I at 210-12; see supra Section III(B).

\textsuperscript{442} PDC's are allotted to landowners in the Preservation Area District, Special Agricultural Production Areas, and Agricultural Production Areas. CMP, supra note 2, pt. I at 210. The latter area is comprised of acreage in both the Preservation Area and the Protection Area. This discussion should be considered relevant as to all PDC holders, whether they fall inside or outside the core area.
open market to a Regional Growth Area landowner. With each scenario, the potential exists for the Preservation Area landowner to realize economic benefit.443

Whether or not the PDC value can be realized depends on the mechanics of the transfer system. In this case, the mechanics appear to be sound. The major fault of most transferable development rights systems is the provision of an insufficient area to which the TDR's may be transferred.444 The Pinelands TDR system provides receiving areas—the Regional Growth Areas—which encompass well over 100,000 acres of land spread throughout the region.445 A receiving area of this magnitude obviously contains a great number of potential buyers for the PDC's, an element essential to any viable transfer system. Furthermore, there appears to be a demand for increased density development in the Growth Areas sufficient to create an active market for PDC's,446 thereby prompting the actual transfer of these as yet intangible assets. The Pinelands Growth Areas have been designated as such because they are most affected by the present regional growth influences and, therefore, have the greatest estimated future housing needs in the area.447 The base development densities set by the Plan's regulations448 are insufficient in themselves to satisfy future housing needs. Thus, the bonus units made available through the transfer of PDC's will be needed to accommodate the housing demand created by the area's rising population. The demand for PDC's, therefore, should be great.

In order to make the transfer of PDC's attractive to the Preservation Area owner, the number of PDC's allotted has been calculated to fall far below the predicted demand for bonus units,449 thereby encouraging competition for each available PDC. The limited supply of PDC's insures that, absent severely erroneous predictions on the part of the Pinelands Commission450 or a plain "bad deal" on the

443. In the case of a landowner who holds on to his PDC's, given a viable transfer system, the value potential exists even though the holder chooses not to realize it.

444. Economic Analysis, supra note 175, at 13. This was explicitly identified as a defect in the Penn Central system, 42 N.Y. 324, 335, 366 N.E.2d 1271, 1277, 397 N.Y.S.2d 914, 920 (1977), and was implicitly recognized in Fred F. French Inv. Co., 39 N.Y.2d at 587, 350 N.E.2d at 381, 385 N.Y.S.2d at 5.

445. See CMP, supra note 2, pt. I at 206, Table 7.2.

446. See supra text and notes at notes 232-37.

447. See supra Section II(A)(2). Of course, environmental criteria was also used in delineating the Regional Growth Area boundaries. Those areas already fragmented by piecemeal development were chosen so that the gaps could be filled in an orderly manner with minimal environmental damage. See CMP, supra note 2, pt. I at 205-07.

448. See supra text and notes at notes 170-74.

449. See supra text and notes at notes 235-37.

450. A certain amount of error was provided for in the calculations themselves because of their speculative nature.
part of the transferor, each credit should provide its holder with a reasonable return when sold. There is no guarantee that the value of the PDC will approximate the return which the development rights might have produced if used on the original site. However, as seen earlier, it is not "just compensation" which is constitutionally required, but merely a fair return. 451

The PDC Program was formulated so as to avoid two additional common TDR defects criticized by courts 452 and commentators 453—namely, excessive administrative "red tape" and insufficient public knowledge. Either of these defects could sufficiently discourage the active transfer of PDC's despite the proper mix of supply and demand. The Pinelands Plan, therefore, requires local authorities to devise clear standards to expedite utilization of the credits 454 and to thoroughly distribute information about the Plan to the interested public. 455 Such actions should promote the efficient and economically beneficial transfer of development credits by injecting a much needed dose of stability into the entire process. This, in addition to the above-mentioned factors, virtually assures that each landowner will have the opportunity to put his development rights to a reasonable use.

Thus, analysis of the Preservation Area restrictions leads one to the conclusion that landowners under the Pinelands Plan are not being denied the reasonable beneficial use of their land. Present uses are allowed to continue. Alternative uses consistent with the provisions of the Comprehensive Plan might be allowed by special permit; in certain cases where extreme hardship would result, waivers can be issued. Finally, even those property development rights rendered useless within the Preservation Area may, through the utilization of the PDC Program, be used in a reasonably beneficial manner. Therefore, a "taking" challenge by a Preservation Area landowner seems destined to fail.

2. The Protection Area

The land which lies within the Protection Area 456 is far less restricted under the Pinelands Plan than that in the Preservation Area. 451 See supra text and notes at notes 396-402.


454. See supra text and note at note 238.

455. See supra text and note at note 239.

456. This includes the Forest Area, Rural Development Areas, and Regional Growth Areas, as well as most of the Agricultural Production Areas. See supra text and notes at notes 152-73.
Area. Development in this area is allowed to a specified degree, with the allowable density being dependent on the environmental characteristics of each land use planning area. Land uses similar to those allowed in the Preservation Area are allowed in the surrounding area; in addition, other land uses may, at the option of each municipality, be permitted. These include institutional uses, Pinelands resource-related industries, airport facilities, campgrounds, and other specified activities. A Protection Area landowner who is unhappy with the restrictions on his land may, like his counterpart in the Preservation Area, apply for a special permit or, under unique circumstances, a waiver. Thus, it appears highly unlikely that a landowner under these conditions could satisfy his burden on proving that his land had been deprived of all reasonable use.

Perhaps the landowners with the strongest argument that their land has been “taken” are those residing in the Forest Area. The Forest Area, because it possesses the “essential character” of the Pinelands, has the most severe development density restrictions in the Protection Area—only one dwelling unit is allowed for every 15.8 acres held. And, unlike the neighboring Agriculture Production Areas which are held to a lesser standard (one unit per 10 acres), Forest Area owners are not allotted TDR’s to mitigate their burden. While at first glance this appears to be troublesome inconsistency, there is some justification for the Plan’s provisions. The one unit allowed for every ten acres of Agricultural land must be part of an active farm; whereas there is no such restriction on the one dwelling unit permitted for every 15.8 acres of Forest Area land. Thus, the Forest Area landowner, although he may build fewer units, has more freedom as to the type of dwelling unit he may ultimately build.

While this distinction between development in Agricultural Areas and Forest Areas might not fully justify allocating TDR’s to the

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457. The Forest Area is allowed one dwelling unit per 15.8 acres; the Agricultural Production Areas, one unit per 10 acres; Rural Development Areas, one unit per 3.2 acres; and in Regional Growth Areas, one to three and one-half units per acre. See CMP, supra note 2, pt. II, §§ 5-303, 5-304, 5-306, 5-308.
458. Id. §§ 5-303(B), 5-304(B), 5-306(B).
459. See supra text and notes at notes 431-37.
460. See supra text and notes at notes 438-40.
461. See supra text and notes at notes 153-61. One commentator has predicted that the Forest Area restrictions will not withstand constitutional scrutiny. Greenbaum, New Jersey’s Pinelands Plan and the “Taking” Question, 7 COLUM. ENV. L.J. 227 (1981).
463. See supra text and notes at notes 153-61; see also CMP, supra note 2, pt. I at 202.
464. See supra text and notes at notes 163-66.
former but not to the latter, the presence of many other provisions favorable to the Forest Area landholder makes it unlikely that this “flaw” will be viewed by the courts as fatal. Overall, Forest Area landowners have appreciably more land use options than do Preservation Area owners. Residential development is allowed in the Forest Area at the specified density level of one unit per 15.8 acres, above and beyond the present housing level. In addition, residents who qualify under the “Piney” exception\textsuperscript{468} will be allowed to construct dwelling units on lots of 3.2 acres\textsuperscript{469} or more. Waivers may also be granted in the case of hardship.\textsuperscript{470} Furthermore, a landowner may apply for a special development permit.\textsuperscript{471} Moreover, if the land the owner intends to build on is too special to allow any exceptions to the rules, then the Plan provides for the clustering of residential development rights.\textsuperscript{472} Under this provision, the Commission would effectively give the landowner the right to transfer his development rights within the Forest Area, away from his land, to designated cluster zones of at least 500 contiguous acres. The Plan provides that these acres will be suitable for building under the environmental protection standards of the CMP as well as accessible to areas of existing growth and development.\textsuperscript{473} This cluster zone provision must, therefore, be considered a mitigating factor when assessing the burden of the Forest Area landowner.

As to land uses other than development, no activities presently in use in the Forest Area are prohibited under the Plan. Forest Area land may be put to such uses as low- and high-intensive recreational uses, agricultural commercial establishments, and roadside retail sales and service establishments,\textsuperscript{474} as well as to uses comparable to those allowed in the Preservation Area.\textsuperscript{475} Landowners may also apply for permission to expand the scope of uses to include others which are compatible with the special character of the land.\textsuperscript{476} In light of these factors, it appears likely that, despite the unavailability of PDC’s, a court would find that a Forest Area claimant can put his land to some reasonable use.

As one moves down the four-tiered density limitation\textsuperscript{477} scale, the plausibility of a “lack of reasonable use” claim sharply diminishes.

\textsuperscript{468} See supra text and note at note 159.
\textsuperscript{469} CMP, supra note 2, pt. II, § 5-303(A).
\textsuperscript{470} See supra text and notes at notes 438-40.
\textsuperscript{471} See supra text and notes at notes 431-37.
\textsuperscript{472} CMP, supra note 2, pt. II, § 5-310.
\textsuperscript{473} Id., pt. I at 203; pt. II, § 5-310.
\textsuperscript{474} Id., pt. II, §§ 5-303(A)(6),(7), 5-303(B)(5),(6).
\textsuperscript{475} See supra text at note 149.
\textsuperscript{476} See supra note 427.
\textsuperscript{477} See supra note 457.
Rural Development Areas, residential development is presently allowed at a level of one dwelling unit for every 3.2 acres. In the future, development is likely to be at an even higher level, as the CMP provides that these areas will serve as extensions of the Regional Growth Areas once the latter have been substantially developed. Furthermore, the variety of permissible land uses in Rural Development Areas exceeds that of the Forest Area, allowing greater industrial and commercial development, thereby insuring the opportunity for every landowner to realize a reasonable return on his investment.

The Regional Growth Area landholder also has no real basis to claim that his land has been “taken” by overregulation. No land uses are expressly prohibited in this area. Development is allowed at a base level of one to three and one-half units per acre with the option for higher density development available through the purchase of PDC’s. There is no evidence of significant downzoning specifically to create a market for the PDC’s, as the base density level is certainly not unreasonable. The density level set is still much higher than the average degree of development existing in the area prior to the Plan’s implementation. Therefore, to require the purchase of PDC’s to further develop one’s land imposes no great burden on the landowner. He is not compelled to buy these development rights, as he is free to develop within the zoning limitations. Also, in general, the landowner will only purchase the PDC’s if they are cheaper than purchasing additional land. The purchaser, then, along with the Preservation Area landowner, benefits economically from this TDR system. Further benefits may also be derived by proximity to the natural wealth of the Pinelands core. Some potential benefits are intangible, such as aesthetic pleasure; whereas other benefits are

478. See supra text and notes at notes 167-69.
480. Id., pt. II, §§ 5-501 to 5-503. Regional Growth Areas are zoned at one to three and one-half units per acre. See supra text and notes at notes 170-74.
481. CMP, supra note 2, pt. II, § 5-308(A)(2).
482. Downzoning is a term meaning the intentional lowering of development intensity levels by a change in zoning regulations. See Williamson, Constitutional and Judicial Limitations on the Community’s Power to Downzone, 12 URB. LAW. 157 (1980).
483. Many commentators warn about the added complications which come with downzoning. See, e.g., Schlaes, From an Economic Perspective: Who Pays for the Transfer of Development Rights?, in Rose, supra note 181, at 330. The basic issue of the constitutionality of such action would have to be considered. In this case, because every Regional Growth Area landowner is being treated uniformly, it is likely that such downzoning would be judicially approved. An unwanted result of downzoning would be that those landowners “caught in the squeeze” will blame the TDR system and cooperative buyers and sellers are critical to the success of TDR’s.
484. Schlaes, supra note 483, at 332-33.
485. Admittedly, such benefits will vary according to the location of each parcel of land.
more easily recognizable, such as increased land values.\textsuperscript{486} Overall, the benefits to the Regional Growth Area landowner appear to far outweigh any burdens placed on him by the Pinelands Plan or the PDC Program.

The end result of this examination of the Protection Area standards is a determination that the regulation of each land use planning area leaves the landowner with much more than the minimal requirement of reasonable beneficial use. Property rights may be exercised in several ways: through compliance with the CMP standards; by applying for a permit or waiver; or through the clustering of development rights or the purchase of PDC's. Under these conditions, it would be the rare case in which a landowner could show that he had been totally deprived of the reasonable use of his property.

VI. CONCLUSION

The New Jersey Pinelands is widely recognized as an environmental asset of national importance. It is a vast, untouched expanse rich in natural resources set precariously in the middle of the urbanized Northeast. The tremendous development pressures emanating in southern New Jersey—particularly from the suburbanization of Philadelphia, the advent of retirement communities in Ocean County, and the booming gambling trade in Atlantic City—threaten the sanctity of the Pinelands region. Recognizing these threats, bold, aggressive action was taken to protect the Pinelands’ unique ecosystem, while at the same time providing for the future housing needs of the area. The result was the creation of the country’s first national reserve—the Pinelands National Reserve.

The National Reserve system is a cooperative effort involving federal, state, and local governments. It combines limited public acquisition with comprehensive land use controls. The key element in the system is a regional regulatory master plan—a comprehensive set of restrictive standards devised particularly for the region to which all local plans must conform. By this use of police power regulations, a state can address its major environmental concerns and responsibly plan for the future to a degree previously possible only through the expense of public acquisition.

The master plan for the Pinelands National Reserve is the Pinelands Comprehensive Management Plan. The Plan is, in essence, divided along geographic lines into two broad regulatory schemes: in the remote and vulnerable interior of the Pinelands (the

\textsuperscript{486} Schlaes, \textit{supra} note 483, at 334.
Preservation Area), virtually all new development is prohibited; in the surrounding portions (the Protection Area), less stringent regulations encourage development in those areas where the adverse environmental effect will be minimal. In addition to specific land use and development restriction standards, the Plan includes several provisions which allow for exceptions to the standards set. Some exceptions, such as permits and waivers, apply when conformance would cause hardship; whereas others, such as housing development exceptions for long-time residents, are included because the history and culture of the Pinelands demand it. These provisions are an attempt to lighten the burden placed by the restrictions on individual landholders, particularly on those owners in the Preservation Area.

An additional and innovative attempt to alleviate the burden on the most strictly regulated landowners was made by including a provision for the use of transferable development rights (TDR's). Landowners in the Preservation Area who, under the Plan, have been deprived of the right to develop their own land are allotted a specified number of development "credits." These development credits can be sold on the open market to owners in designated portions of the Protection Area. By this transaction, the purchaser-landowner gains bonus development rights to be applied to his property; the seller-landowner receives dollar value for the development rights which would otherwise go unused on his land. Thus, in effect, the TDR's allow the strictly regulated landowners to share in the increasing value of that Pinelands property which need not be restricted as severely as their own.

Despite this novel use of TDR's to mitigate the burden of regulation, landowners have already gone to the courts with their claims that their land has been "taken" in violation of the fifth and fourteenth amendments. The line between valid regulation under the police power and an unconstitutional "taking" has for years been somewhat unclear. Since 1926, when Justice Holmes stated in Pennsylvania Coal Co. v. Mahon that regulation could "go too far" and result in a "taking," courts have been struggling with the question of just when the unconstitutional line is crossed. The modern "taking" analysis appears to focus on two issues: (1) is the goal being pursued by use of the police power in the interest of the public health, safety and welfare?; and (2) is the degree of interference caused by the regulation such that the regulated owner retains the reasonable beneficial use of his property? Only an affirmative finding as to both these questions will lead a court to hold that no "taking" has occurred.
Most regulations will not fail the first prong of the "taking" test. The scope of goals properly achievable by use of police powers has been continuously broadened by the courts over the years. Thus, goals which twenty years ago would have been invalidated as being more appropriate to eminent domain will now most likely be upheld. Supporting this trend is the presumption in favor of legislative determinations which has left many a "taking" claimant with too heavy a burden to bear. A property owner with a "taking" claim may, however, also challenge the means used to attain the goal. If the means are unreasonable or arbitrary, the regulation will be rendered invalid. Here, too, however, the claimant has the burden to rebut, as there is a presumption in favor of reasonableness, particularly if the regulation is part of a comprehensive regulatory scheme.

The case law suggests that the focus of the modern courts' "taking" analysis is the second prong of the test—the degree of interference caused by the challenged regulation. The standard established by the Supreme Court as the threshold for constitutionality is "reasonable beneficial use." However, just what constitutes reasonable use is as yet unsettled, as determinations are made on a case-by-case basis. The pattern which emerges from the case law is that courts focus on the degree to which a property owner's economic expectations have been frustrated. Only if an owner is unable to put his land to any reasonable use, and so, therefore, cannot accrue a reasonable return, will the interference be so great as to constitute a "taking."

As for TDR's, a recent Supreme Court decision indicates that their function is not to provide a restricted landowner with just compensation. Rather, the value of TDR's is a factor to be considered when evaluating whether an owner has retained the reasonable use of his property. Thus, where TDR's are determined to be a valuable asset to the landholder, the Court suggests that the existence of the TDR's is an indication that reasonable use remains. Whether or not TDR's are sufficiently valuable in any given situation depends on the mechanics of the particular TDR system involved.

The Pinelands National Reserve was created in an attempt to prevent the destruction of a national treasure while simultaneously respecting the property rights of individual landholders. The goals of the Reserve system are proper, even laudable. The means—a comprehensive management plan—is judicially recognized as reasonable and should therefore be shown deference. The Pinelands Plan, having been devised following a thorough examination of the region's natural, cultural, and economic climate, is carefully drafted to
preserve the reasonable beneficial use of each individual's property. Furthermore, the inherent flexibility in the Plan reduces the possibility that it will be applied in an unconstitutional way.

As for the pioneer application of the TDR concept, such a comprehensive land use plan appears to be the ideal vehicle for their use. The regional forum provides the necessary receiving lots and potential buyers; the booming economy of the Pinelands region provides the demand for more development; and clear transfer procedures and an educated public will encourage the utilization of the system. In borderline cases, where the strictest regulation might arguably leave the landowner with uncertain reasonable use of his property, the value of the TDR's will serve to mitigate his burden and ensure a reasonable return. Thus, the Pinelands Plan and the Pinelands Development Credit Program appear to be on constitutionally firm ground.