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Property Rights in Land: New Statutory Approaches

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PROPERTY RIGHTS IN LAND: NEW STATUTORY APPROACHES

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The legal profession has traditionally viewed the definition of property rights as a constitutional matter, left primarily to the judicial decisionmaking process. But as rules controlling the use of land become more restrictive and complex, interest in transfering this function to the legislature grows. Ideally, legislative definitions of property rights would set down more detailed guiding principles than are usually achieved through the judicial route of constitutional interpretation. However, legislative errors could be more damaging or expensive than is a bad case holding.

This paper explores some alternatives for statutory redefinition of property rights. After noting current changes in attitudes toward property rights and reviewing recent judicial decisions, the article will analyze three different approaches to systems of providing compensation to landowners. The first is a system which has been in use for some years in England. The second has been proposed in various drafts of the American Law Institute Model Development Code. The final approach describes a system analogous to that established by the Federal Uniform Relocation Act.

CHANGES IN ATTITUDES

To understand the pressure for statutory redefinition it is necessary to recognize the changes that have taken place in the way the judiciary has treated property. Judicial attitudes are affected by general changes in public attitudes. At least three areas of change have been important in recent years.

First, there is a growing recognition that land is a resource of immense environmental value:

> Basically, we are drawing away from the 19th century idea that land's only function is to enable its owner to make money. One example of this change in attitude is that wetlands, which were once characterized as 'useless,' are now thought of as having 'value.' As we increasingly understand the science of ecology and the web of connections between the use of any particular piece of land and the

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> impact on the environment as a whole we increasingly see the need to protect wetlands and other areas that were formerly ignored.[1]

This has led to the strengthening of efforts to protect land from flooding, erosion, filling, and other forms of degradation that may accompany certain types of development. The conservation of land as a resource is no longer the concern solely of agricultural interests, and the expanded interest in land use has lent the traditional conservation movement new strength.

Second, it has become a common popular assumption that urbanization inevitably leads to problems of air and water pollution:

> Most of the serious environmental problems the United States faces today are concentrated in our giant urban agglomerations. The most notorious example of air pollution is the smog of Los Angeles and its suburbs. Water pollution is most apparent in urban areas, where concentrations of industrial plants emit enormous, concentrated amounts of pollutants. Problems of the quality of life, or amenity, are especially associated with modern city life. The dirt, and noise, and hectic pace of life in cities are contrasted by social critics with the relative peace and tranquility of the farm and small town. Indeed, it is remarked that we need to preserve recreation, rest, and rehabilitation areas outside the cities in order to allow urban dwellers to survive continued exposure to the unnatural environment of the modern city.[2]

As a result, environmental groups have become concerned about land use practices. Congress and the federal Environmental Protection Agency (EPA) have also begun to realize that solutions to problems of air and water pollution probably require more extensive land use controls.

Finally, homeowners in many communities believe that further development of the land in their community is not in their best interests. They view new people coming into the community as carriers of crime, congestion, and increased taxes. Roger Starr has provided a biting portrait of these attitudes:

> In semisuburbia at the edge of the city, when the pressure of population growth means that apartment houses must be built, home owners raise the cry that the community is being destroyed. Proposed actions must be measured not on their merits, but on what they do to the so-called community. The same cries are raised in other middle-class environs when new school patterns threaten a change in racial constituency, or when the suggestion is made that

1. F. Bosselman and D. Callies, The Quiet Revolution in Land Use Controls 413 (1971).
2. J. Seneca and M. Taussig, Environmental Economics 301 (1974).

> low-income families must be provided with a place to live nearby, or when someone proposes that well-planned industrial developments will benefit the tax rolls and provide employment. The so-called community may have been a potato farm five years ago; it may consist of old buildings whose inhabitants never spoke to each other before the new school was proposed; it may—as the last Census demonstrated in New York City—contain a population no more than 58 percent of which was living at the same address five years before. These facts matter not. What does seem to matter is the attachment of the portentous community label to the mild, spasmodic and entirely particular kinship that might spring up about an ambulance service or a new school. The cry of community has overstressed the significance of roots, an invisible part of the human anatomy, and underrated the presence of feet. The American community which is being talked of so often, and so profoundly, is essentially superficial and highly mobile. Provided only that a certain homogeneity of social class and income can be maintained, American communities can be disassembled and reconstituted about as readily as freight trains.[3]

Regardless of the merits of these beliefs, residents in many communities throughout the country have been sufficiently convinced to elect new officials on anti-growth platforms. Election analysts suggest "that environmental lobbyists and political activists have not lost much of their impact in Washington despite the countervailing pressures for accelerated development of the nation's natural resources . . ."[4]

In its book, *The Use of Land,* the Rockefeller Task Force characterized these changes in attitude as a "new mood."[5] This new mood has generated tighter restrictions on the use of land at the local and occasionally state levels. These restrictions often take the form of down-zonings or new growth management techniques which shatter many landowners' expectations of profitability—expectations that they regard as property rights.

JUDICIAL DECISIONS

The fifth amendment to the U.S. Constitution states in part: "Nor shall private property be taken for public use without just compensation." Most state constitutions contain similar language. The United States Supreme Court has interpreted this language to mean that "if

3. R. Starr, The Living End: The City and Its Critics 43 (1966).

4. Walters, *Political Report: Voter Independence, Disenchantment Afflict Parties,* 6 Nat. J. Rep. 1716, 1722 (1974).

5. Task Force on Land Use and Urban Growth, The Use of Land: A Citizens' Policy Guide to Urban Growth (1973).

regulation goes too far it will be recognized as a taking."[6] But the Court left the question of what is "too far" to case-by-case determination.

In recent years courts have tended to permit greater restrictions on the use of land. As a result, landowners have often not received the profit they expected to obtain from their property. Private landowners have reacted by creating pressure for provision of a system of governmental compensation to those landowners who suffer an economic penalty because of environmental protection and related social goals.

An analysis of recent court decisions indicates that most courts are willing to uphold restrictive land use regulations regardless of their impact on property values if:

> (1) the court finds a sound scientific basis for protecting important environmental resources through regulation, and
> (2) the regulation implements an overall state or regional policy rather than mere local concerns.[7]

Restrictive local regulations not based on sound planning and scientific study are much more likely to be overturned by the courts.

A recent opinion of the New Jersey Supreme Court is illustrative.[8] The plaintiff owned a 120 foot deep lot on a commercial street. The zoning ordinance designated a commercial zone along the street for a depth of 100 feet, leaving the rear 20 feet of plaintiff's property in a residential district. Plaintiff sought a variance to allow him to construct a structure on the back half of his lot, leaving the front for parking. He argued that a 20 foot land-locked parcel could not possibly be used for residential purposes, and that the residential zoning of that land constituted a taking of his property without just compensation.

The New Jersey Supreme Court agreed and directed the local government to issue the variance. (In a Solomonesque twist, the court said the plaintiff should put the parking on the back half of the lot because parking was more compatible with the nearby residential district.) However, the court said that its holding that a taking had occurred was limited to the facts of this particular local regulation. If the case had arisen under state-authorized regulations to protect wetlands or flood plains, the court said the fact that plaintiff was deprived of effective use of his property might not be sufficient reason to invalidate the regulation.

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6. Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).
7. F. Bosselman, D. Callies and J. Banta, The Taking Issue (1973).
8. AMG Associates v. Township of Springfield, 65 N.J. 101, 319 A.2d 705 (1974).

In response to the increased willingness of courts to uphold restrictive land use regulations, laws have been proposed which would compensate landowners whose property is reduced in value by certain types of regulations. To define when such compensation should be awarded and measure the amount of the compensation is not an easy task. Three possible approaches to this problem will now be discussed.

THE ENGLISH SYSTEM

The English have no written constitution, and the courts have no power to declare anything unconstitutional. Any system of landowner compensation would, therefore, have to be created pursuant to statute. Consequently, the English long ago recognized the need for such a statutory scheme, whereas Americans have been able to rely on the courts to resolve difficult cases.

The English Town and Country Planning Act provides that a land owner who is refused permission to develop his land because of a restrictive regulation may receive compensation. Before filing a "purchase notice" with the local government, the landowner must assert one of three claims. If development has been refused, he must allege that the land is "incapable of a reasonably beneficial use." If development plans have been granted on a conditional basis, the owner must declare that the conditions make beneficial use of the land unfeasible. And, finally, if permission has been granted for a type of development other than that requested, the owner must assert that the new plan would not render the land capable of a beneficial use.[9]

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9. This standard is set forth in the Town and Country Planning Act 1971, C.78 § 180, which provides that:

> 180. (1) Where, on an application for planning permission to develop any land, permission is refused or is granted subject to conditions, then if any owner of the land claims
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> (a) that the land has become incapable of reasonably beneficial use in its existing state; and
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> (b) in a case where planning permission was granted subject to conditions, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with those conditions; and
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> (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which planning permission has been granted or for which the local planning authority or the Secretary of State has undertaken to grant planning permission,
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> he may, within the time and in the manner prescribed by regulations under this Act, serve on the council of the county borough, London borough or county district in which the land is situated a notice requiring that council to

Upon filing of the purchase notice, the government must decide within three months to purchase the land (or some interest in the land such as the development rights), to relax the regulations so that the landowner may make some "reasonably beneficial" use of the land, or to refuse such compliance.[10]

Refusal of the local government to award compensation triggers an automatic appeal to the Secretary of State for the Environment,[11] who issues appropriate notice and holds a hearing chaired by an examiner.[12] The statute gives the Secretary a number of options:

> 183. (1) Subject to the following provisions of this section and to section 184 of this Act, if the Secretary of State is satisfied that the conditions specified in section 180(1) (a) to (c) of this Act are fulfilled in relation to a purchase notice, he shall confirm the notice.
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> (2) If it appears to the Secretary of State to be expedient to do so, he may, in lieu of confirming the purchase notice, grant planning permission for the development in respect of which the application was made, or, where planning permission for that development was granted subject to

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purchase his interest in the land in accordance with the following provisions of this Part of this Act.

The section also lists a series of exceptions dealing with special circumstances not quoted here.

10. *Id.* The options of the local council are stated in § 181 of the Act:

> 181. (1) The council on whom a purchase notice is served under section 180 of this Act shall, before the end of the period of three months beginning with the date of service of that notice, serve on the owner by whom the purchase notice was served a notice stating either
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> (a) that the council are willing to comply with the purchase notice; or
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> (b) that another local authority or statutory undertakers specified in the notice under this subsection have agreed to comply with it in their place; or
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> (c) that, for reasons specified in the notice under this subsection, the council are not willing to comply with the purchase notice and have not found any other local authority or statutory undertakers who will agree to comply with it in their place, and that they have transmitted a copy of the purchase notice to the Secretary of State, on a date specified in the notice under this subsection, together with a statement of the reasons so specified.
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> (2) Where the council on whom a purchase notice is served by an owner have served on him a notice in accordance with subsection (1) (a) or (b) of this section, the council, or the other local authority or statutory undertakers specified in the notice, as the case may be, shall be deemed to be authorized to acquire the interest of the owner compulsorily in accordance with the relevant provisions, and to have served a notice to treat in respect thereof on the date of service of the notice under that subsection.

11. *Id.* § 181(3).

12. *Id.* § 182.

conditions, revoke or amend those conditions so far as appears to him to be required in order to enable the land to be rendered capable of reasonably beneficial use by the carrying out of that development.

(3) If it appears to the Secretary of State that the land, or any part of the land, could be rendered capable of reasonably beneficial use within a reasonable time by the carrying out of any other development for which planning permission ought to be granted, he may, in lieu of confirming the purchase notice, or in lieu of confirming it so far as it relates to that part of the land, as the case may be, direct that planning permission for that development shall be granted in the event of an application being made in that behalf.

(4) If it appears to the Secretary of State, having regard to the probable ultimate use of the land, that it is expedient to do so, he may, if he confirms the notice, modify it, either in relation to the whole or in relation to any part of the land to which it relates, by substituting another local authority or statutory undertakers for the council on whom the notice was served.[13]

A range of exceptions are provided for situations in which compensation is not required. For example, the local government need not pay compensation if it can show that services are not yet available for the property but will be in the reasonable future, or if the restrictive regulation is needed to prevent flooding or subsidence.[14]

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13. *Id.* § 183 (1) (2) (3) and (4).
14. *Id.* Other exceptions are stated in § 147 of the Act:

147. (1) Compensation under this Part of this Act shall not be payable

(a) in respect of the refusal of planning permission for any development which consists of or includes the making of any material change in the use of any buildings or other land; or

(b) in respect of any decision made on an application in pursuance of regulations under section 63 of this Act for consent to the display of advertisements.

(2) Compensation under this Part of this Act shall not be payable in respect of the imposition, on the granting of planning permission to develop land, of any condition relating to

(a) the number or disposition of buildings on any land;

(b) the dimensions, design, structure or external appearance of any building, or the materials to be used in its construction;

(c) the manner in which any land is to be laid out for the purposes of the development, including the provision of facilities for the parking, loading, unloading, or fueling of vehicles on the land;

(d) the use of any buildings or other land; or

(e) the location or design of any means of access to a highway, or the materials to be used in the construction of any such means of access,

Interviews with many developers, planners and environmentalists in England disclosed a general agreement that the system worked quite well. Most claims for compensation were negotiated and settlements reached that were reasonably satisfactory to both parties. Some local governments did end up paying fairly substantial amounts of compensation but apparently not enough to disrupt their local budgets.[15]

AMERICAN LAW INSTITUTE PROPOSALS

In the United States courts will not ordinarily entertain suits requesting damages from state or local governments on the grounds that regulations have reduced property values. Adoption of the British approach would require a significant departure from American traditions of land use litigation.

The American Law Institute's proposed draft for a Model Land Development Code[16] suggests an alternative which does not involve a specific request for compensation by the landowner, but instead

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or in respect of any condition subject to which permission is granted for the winning and working of minerals.

In this subsection "means of access to a highway" does not include a service road.

(3) Compensation under this Part of this Act shall not be payable in respect of the application to any planning permission of any of the conditions referred to in sections 41 and 42 of this Act or in respect of the imposition of any conditions to which sections 71 or 82 of this Act applies.

(4) Compensation under this Part of this Act shall not be payable in respect of the refusal of permission to develop land, if the reason or one of the reasons stated for the refusal is that development of the kind proposed would be premature by reference to either or both of the following matters, that is to say

(a) the order of priority (if any) indicated in the development plan for the area in which the land is situated for development in that area;

(b) any existing deficiency in the provision of water supplies or sewerage services, and the period within which any such deficiency may reasonably be expected to be made good:

Provided that this subsection shall not apply if the planning decision refusing the permission is made on an application made more than seven years after the date of a previous planning decision whereby permission to develop the same land was refused for the same reason, or for reasons which included the same reason.

(5) Compensation under this Part of this Act shall not be payable in respect of the refusal of permission to develop land, if the reason or one of the reasons stated for the refusal is that the land is unsuitable for the proposed development on account of its liability to flooding or to subsidence.

(6) For the purposes of this section, a planning decision whereby permission to develop land is granted subject to a condition prohibiting development on a specified part of that land shall be treated as a decision refusing the permission with respect to that part of the land.

15. F. Bosselman, D. Callies, and J. Banta, *supra* note 7, at 275-83.
16. ALI, A Model Land Development Code, Proposed Official Draft No. 2 (1975).

retains the traditional American approach by which the landowner asks the court to declare the restrictive regulation invalid, thus allowing him to build on his property.

The proposed code adds a special procedure that takes effect when the landowner challenges the validity of a regulation. If the court finds "that as applied to his land the regulation constitutes a taking of his property without just compensation, the regulation could be lawfully imposed if compensation were paid."[17] The court then notifies the local government that it will declare the regulation invalid unless within 90 days the local government begins proceedings to acquire the property or some appropriate interest in it, such as the development rights.[18]

If the local government chooses to condemn the land, the court must determine its proper valuation for condemnation purposes. Under existing law, land is ordinarily valued only on the basis of the uses that would be allowable under the local regulations.[19] If the court has already ruled the regulations unconstitutional, it would hardly be fair to use the same regulations for valuation purposes. On the other hand, because the local governments could undoubtedly impose other valid types of land use regulation, it would clearly be unfair to the local government if the landowner were allowed to assume that his land would be completely unregulated, and consequently more valuable. As an example, suppose the developer owns only a single vacant lot in a neighborhood built up with single-family homes. The town zones the land to permit only cattle ranches, which the court deems to be unreasonable. But the developer says he wants to build a high-rise, and claims damages on the basis of his lost potential for profit.

What is the appropriate measure of valuation? The proposed ALI code would resolve this question by valuing the land on the basis of the minimum development necessary to eliminate the unconstitu-

17. *Id.*, § 9-112(3).

18. *Id.* The proposed Code states in § 9-112(3):

> If the complainant is a landowner challenging the validity of an order, rule or ordinance applicable to his land and if the court is satisfied that as applied to his land the order, rule or ordinance constitutes a taking of his property without just compensation, the court shall retain jurisdiction if it further determines that the limitation on development could be lawfully imposed if compensation were paid and request the local government to determine whether it wishes to institute proceedings under Article 5 to pay compensation. If the governmental agency making the order, rule or ordinance fails to respond within 90 days, the court shall enter an order of invalidity. If a proceeding to determine compensation is commenced, the court shall continue the proceeding until compensation has been determined.

19. *See* Zipser, *Zoning Classification and Eminent Domain,* 1 The Urban Lawyer 89 (1969).

tional taking. The landowner is paid on the basis of as little development as he could be permitted within constitutional limits:

> If any interest in land is condemned under this Article the court shall assume for purposes of valuation that development would have been permitted on the land only in accordance with such combination of the following assumptions as shall produce the highest market value
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> (1) any development for which the landowner can obtain a general development permit under the terms of the development ordinance then applicable to the land; or
>
> (2) any development for which the landowner can obtain a special development permit under the terms of the development ordinance then applicable to the land, except to the extent that the Land Development Agency prior to the date of the award has limited its willingness to issue a special development permit for the land by the issuance of a declaratory order under § 2-308; or
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> (3) any development for which the landowner can obtain a general or special development permit under an amendment to the ordinance adopted after the valuation date but prior to the date of the award; or
>
> (4) any development permit previously granted which has not by its terms expired; or
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> (5) if the assumptions in the previous subsections would result in an unconstitutional taking of property, the minimum development necessary to eliminate the unconstitutional taking.[20]

In other words, the court is to value the property as if the local government had imposed strict but reasonable and therefore constitutional regulations on it.

Unlike the British system the proposed ALI code requires that the developer seek permission to build as his primary remedy. Compensation is only a secondary option available in certain cases. This is consistent with the American tradition of litigating the merits of land use proposals in the courts.

ADMINISTRATIVE COMPENSATION

A third possible solution is a system of administrative compensation through which the issue could be taken out of the hands of the courts entirely. An analogous administrative mechanism, the Uniform Relocation Act,[21] was adopted by Congress for dealing with

20. ALI, A Model Land Development Code, Proposed Official Draft No. 1 § 5-303 (1974).

21. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et. seq.* (1970).

persons relocated by the construction of highways, urban renewal projects and other federally aided public works programs.

The Uniform Relocation Act establishes certain dollar amounts to be paid through an administrative process to people displaced because of federally-funded projects. The payment of this compensation is completely independent of any condemnation proceedings that might be used to acquire the land involved:

> (a) Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person on or after January 2, 1971, the head of such agency shall make a payment to any displaced person, upon proper application as approved by such agency head, for
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> (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
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> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency; and
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> (3) actual reasonable expenses in searching for a replacement business or farm.
>
> (b) Any displaced person eligible for payments under subsection (a) of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (a) of this section may receive a moving expense allowance, determined according to a schedule established by the head of the Federal agency, not to exceed $300; and a dislocation allowance of $200.
>
> (c) Any displaced person eligible for payments under subsection (a) of this section who is displaced from his place of business or from his farm operation and who elects to accept the payment authorized by this subsection in lieu of the payment authorized by this subsection in lieu of the payment authorized by subsection (a) of this section, may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall not be less than $2,500 nor more than $10,000. . . .[22]

The act also provides for a supplemental payment to homeowners of a bonus not to exceed $15,000 to cover the cost of finding new housing.[23] Each agency administering a federal or federally-funded

22. 42 U.S.C. § 4622 (1970). *See also* La Raza Unida of Southern Alameda County v. Volpe, 488 F.2d 559 (9th Cir. 1973); Lewis v. Brinegar, 372 F. Supp. 424 (W.D. Mo., 1974).

23. 42 U.S.C. § 4623 (1970).

program involving land acquisition is to establish its own procedure for administering the payments.[24]

Congress adopted this approach because it was more concerned with the personal circumstances of the people being relocated than with the specific characteristics of the land being acquired. It went completely outside the whole system of property rights, and treated the problems of people who are injured as personal problems rather than as problems involving property rights. Condemnation proceedings, however, are traditionally blind to the nature of the individual owner. As a result, General Motors is entitled to exactly the same dollar amount for its land as the widow and orphans next door.[25] Therefore, it was necessary for Congress to set up a separate administrative system in order to establish a schedule of payments based primarily on the hardship to the particular people being injured by the regulation.

Providing compensation for landowners through an administrative system also has some advantages over using traditional condemnation proceedings. Such a system would, for example, enable the state to authorize compensation for the elderly farmer about to retire, while denying it to the land speculator from out of state. Many other situations exist in which differing treatment of landowners would produce greater equity.

On the other hand, there is a potential for abuse of power to differentiate among landowners. Any administrative system of this type would need tightly drawn legislative criteria and frequent and careful review.

SOURCES OF FUNDS

Finding a readily available source of funds to compensate landowners may prove to be a difficult problem. Any responsible system that would involve compensating landowners ought to include some source of revenue from which payment can be made. Most of the people who have thought and written about this question have suggested systems which would tax those who benefit by new development in order to pay those who are injured by restrictive regulations.[26] In the long run, of course, this is a tax on the consumer of new development, and is likely to be passed on to the purchaser of

24. 42 U.S.C. § 4632-33 (1970).

25. Juries may not always appreciate this principle of equality, but the rules of condemnation law limit the extent to which they can treat landowners differently.

26. Hagman, "Windfalls for Wipeouts," in The Good Earth of America 109 (C. Harriss, ed. 1974).

new housing or other people who consume the goods produced by new development.

In England the funds come out of general governmental revenues, and in some cases are shared between local and national governments. Some sort of sharing between state and local governments would appear to be equally appropriate in this country, since the purpose of land use regulations may often benefit state, regional, local or mixed groups.

A number of techniques are available for providing compensation to landowners by taxing the "windfall" profits of other landowners who sell at large profits to developers, particularly those who sell within a short period of time after having purchased the land. The Province of Ontario recently enacted a heavy tax on the capital gains on land sold to foreign nationals. Other more complex types of "betterment levies" have been used in other countries.[27]

An important factor in the consideration of such taxes is whether they will be passed on to the consumer. In 1973 the government of New South Wales abandoned its betterment levy because it reached the conclusion that the consumer was bearing the major burden.[28] Any system that taxes the consumer of a new development to insure the speculative values of existing landowners is likely to be acceptable politically only if most potential purchasers are outside the jurisdiction of the taxing government.

In the next few years we will undoubtedly see increasing experimentation with new compensation techniques which will be tested on the state and local levels before they are imposed in a more general manner. Finding an equitable procedure and formula will provide an imposing challenge.

27. For an excellent summary see O. Grimes, Urban Land and Public Policy: Social Appropriation of Betterment (International Bank for Reconstruction and Development, Staff Working Paper No. 179, 1974).

28. G. Neutze, The Price of Land and Land Use Planning 29 (1973).