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UPZONING, PUBLIC POLICY, AND FAIRNESS—A STUDY AND PROPOSAL

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When the planning commission and the zoning board flit about sprinkling little golden showers here rather than there, they make millionaires of some and social reformers of others.¹

INTRODUCTION

The legal literature and the legal profession are finally beginning to come to grips with the obvious fact that land use planning decisions do not take place in a vacuum.² A similar awakening is taking place in the field of taxation.³ It is becoming apparent that neither property taxes nor land use planning are hermetically sealed, but each has spillover effects on the other field.⁴

This belated awakening has brought to the surface what was known for a long time to speculators and investors: governmental decisions in the field of zoning, subdivision regulation, capital expenditures, transportation planning, and other areas have a profound effect on land

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1. Gaffney, *Containment Policies for Urban Sprawl*, in *APPROACHES TO THE STUDY OF URBANIZATION* 114, 124 (R. Stanber ed. 1964).

2. See, e.g., Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 691-711 (1973).

3. See, e.g., D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 344-67 (1971); G. PETERSON, A. SOLOMON, H. MADJID & W. APGAR, *PROPERTY TAXES, HOUSING AND THE CITIES* (1973).

4. See, e.g., *Property Taxation, Effects on Land Use and Local Government Revenues*, Prepared for Subcomm. on Intergov. Rel. of the S. Comm. on Gov. Op., 92d Cong., 1st Sess. (Comm. print 1971); D. NETZER, *ECONOMICS OF THE PROPERTY TAX* 32-40, 129-36 (1966); Lefcoe, *How Taxes Affect Urban Design—And How to Make Them Do a Better Job of It*, 4 REAL EST. L.J. 244 (1976); Stocker, *Effects of Taxation on Urban Land Use*, 39 APPRAISAL J. 57, 62-66 (1971); Zimmerman, *Tax Planning for Land Use Control*, 5 URBAN LAWYER 639 (1973).

After this Article was written, a substantial contribution to the literature on the subject was published that indicates the continuing interest in the field. Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27 (1975).

owners.⁵ Some decisions create wealth overnight; others destroy economic values. Because these phenomena were not officially recognized in the past, the windfalls enriched the few, frequently at the expense of taxpayers at large, while the destructions of value were borne solely by the hapless land owners.

A growing body of literature has discussed these phenomena since their recognition. Some commentators have proposed methods of recapturing for the public treasury the windfall benefits caused by changes in the law or by public improvements.⁶ These advocates generally do not recognize any particular responsibility to the victims of governmental decisions that have wealth-destroying aftereffects.⁷ The opposite approach, adopted by advocates of curtailed governmental activity in land use planning, would require compensation in most cases of wealth impairment, but would still leave "windfalls" to enrich the favored few.⁸ Finally, some writers have devised methods of bringing a measure of justice into the area that would mitigate both the unearned increments and the fortuitous wipeouts that are incidental to governmental activity.⁹

One governmentally induced phenomenon that has a spillover effect is upzoning.¹⁰ It generally is assumed that upzoning increases the value of land; this may be true for those who hold unimproved or minimally improved land, which can be improved readily or disposed of for improve-

5. See, e.g., d'Arge, *Economic Policies, Environmental Problems, and Land Use*, in *ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING* 157 (D. McAllister ed. 1973); Levi, *Some Economic Implications of Land Use Planning for Real Estate Owners and Investors*, 43 *APPRAISAL J.* 363 (1975). For a nontechnical discussion that may overstate the point see Balk, *Invitation to Bribery*, *HARPER'S*, Oct. 1966, at 18.

6. E.g., Comment, *Betterment Recovery: A Financial Proposal for Sounder Land Use Planning*, 3 *YALE REV. OF L. & SOC. ACTION* 192 (1973).

7. See, e.g., Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 *YALE L.J.* 75, 82-85 (1973).

8. See, e.g., Ellickson, *supra* note 2, at 699-705; Gramm & Ekelund, *Land-Use Planning: The Market Alternative*, 43 *APPRAISAL J.* 562 (1975).

9. See, e.g., Costonis, "Fair" *Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 *COLUM. L. REV.* 1021 (1975). There is also a growing body of literature on how to anticipate and capitalize on governmental activity. See, e.g., M. SELDIN, *LAND INVESTMENT* 109-11, 137-51 (1975).

10. "Upzoning" is a change in zoning classification from less intensive to more intensive; "downzoning" refers to the opposite phenomenon. The change may be in the use (e.g., from single family to multiple residential use), bulk (e.g., from 15,000 sq. ft. minimum lot size to 7,500 sq. ft.), or height (e.g., from 30 ft. maximum height to 60 ft. maximum); occasionally upzoning may involve all three elements. Upzoning is most frequently a result of a map amendment, although a text amendment may also be involved.

ment. In many cases, therefore, the enrichment may accrue to individuals who, in anticipation of governmental action, withheld their land from development. These landowners are being rewarded financially for behavior that, although economically beneficial to the individual, is not beneficial to the community. Less obvious is the effect of upzoning on landowners who developed their land to the full extent permissible under the prior, more restrictive regulations. Their plight is presumably quite considerable; saddled with improvements that might prematurely become obsolescent and that will face competition from more efficient units simply because of the changes in the law, these landowners may be harmed by the increase in value of the land. Owners of improved property cannot benefit immediately from its increased value and presumably will have to pay additional real estate taxes after the land is reassessed following upzoning.

This scenario is the one usually found in law review articles,¹¹ based on abstract reasoning. Although the conclusions are logical and probably true, it would be beneficial and instructive to test them by a field study. Additionally, some recently developed legal concepts, if consciously applied to the problem of upzoning, may serve to reduce the increment of value to the property owner who held his land for development, while decreasing the burdens on the property owner who contributed toward the orderly development of the community through improvement of his or her land.

Before setting forth the methodology and results of the study undertaken for this Article, a discussion of these emerging legal concepts is necessary. From this discussion, the Article proceeds to a brief summary of the zoning laws of a particular state to set the study within its legal framework and to illustrate the applicability of the results to the country at large. Finally, based on the findings of the study, recommendations are developed that should be useful in injecting a measure of fairness into the effects of upzoning.

TRANSFERABLE DEVELOPMENT RIGHTS

Starting in the early 1950's,¹² and increasing in intensity in the 1960's,¹³ widespread dissatisfaction was voiced with the rigidities imposed by

11. E.g., Comment, *Betterment Recovery: A Financial Proposal for Sounder Land Use Planning*, 3 YALE REV. OF L. & SOC. ACTION 192, 193-94 (1973).

12. Note, *Building Size, Shape, and Placement Regulations: Bulk Control Zoning Re-examined*, 60 YALE L.J. 506 (1951).

13. See, e.g., O'Harrow, *Zoning: What's the Good of It?*, in 2 TAMING MEGALOPOLIS

euclidean zoning.¹⁴ This criticism extended to all three basic elements of zoning ordinances: use, bulk, and height. Writers criticized absolute height limitations coupled with set-back, side-yard, and back-yard requirements as means of controlling bulk and density, and objected to rigidities imposed by bulk regulations on a lot-by-lot or parcel-by-parcel basis. In response to these criticisms, experimentation with different approaches was undertaken.

The major innovation in bulk controls in residential areas was the introduction of the concept of planned unit developments by which bulk and density regulations were applied to large areas rather than to individual lots.¹⁵ This gave the developer added flexibility to mold a livable community and either to preserve open lands in a natural state or to create recreational facilities not otherwise easily available.¹⁶

For areas zoned commercially, and particularly for downtown areas of large cities, the concept of bulk regulations based on a floor-area ratio (FAR) was developed.¹⁷ The traditional method of bulk regulation by means of required setbacks and side-yards coupled with a maximum height leaves very little room for ingenuity or creative approaches. For instance, it does not lend itself readily to the construction of office or residential towers surrounded by attractively landscaped plazas that

760 (H. Eldredge ed. 1967); Reps, *Requiem for Zoning*, in 2 *Taming Megalopolis* 746 (H. Eldredge ed. 1967); von Eckardt, *Well Meant Zoning is a Plague on Our Society*, Washington Post, Oct. 9, 1966, § G, at 11, col. 1. For a study of Houston, the largest unzoned city in America, see Siegan, *Non-Zoning in Houston*, 13 J. LAW & ECON. 71 (1970). But cf. Lilley, *In Defense of Zoning*, 42 APPRAISAL J. 596 (1974).

14. Until quite recently many courts and writers equated euclidian zoning with zoning. E.g., *Rockhill v. Township of Chesterfield*, 23 N.J. 117, 127, 128 A.2d 473, 478-79 (1957); Morris, *Toward Effective Municipal Zoning*, 35 WASH. L. REV. 534, 535-36 (1960).

15. Direct bulk regulations result in indirect density regulation. See generally Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959). Symposium, *Planned Unit Development*, 114 U. PA. L. REV. 3 (1965). In this connection the Federal Housing Administration developed a rather sophisticated system to measure the intensity of use, known as land use intensity rating. For a discussion of the concept see URBAN LAND, vol. 22, Oct. 1963, at 1; *id.*, vol. 28, Nov. 1969, at 3.

16. There is some question whether these desired results have been achieved. See, e.g., Babcock & Bosselman, *Conflicts in Land Use*, in ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING 143, 146-7 (D. McAllister ed. 1973).

17. For a description of the FAR concept see D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 111 (1971); PRINCIPLES AND PRACTICE OF URBAN PLANNING 429-31 (W. Goodman & E. Freund eds. 1968); E. ROBERTS, LAND-USE PLANNING 4-111 to 4-121 (1971); Williams, *Recent Decisions in Planning Law: 1966*, 33 A.I.P.J. 184 (1967); Note, *Building Size, Shape and Placement Regulations: Bulk Control Zoning Reexamined*, 60 YALE L.J. 506, 518-19 (1951).

leave more open space and enhance aesthetic qualities of the area. To accommodate such projects, New York¹⁸ and other cities have experimented with new approaches to commercial zoning.

The FAR Concept

The basic FAR concept is simple, establishing a relationship between total land area and total floor space. Thus, under a FAR regulation of 1:1, a developer could build a one-story structure covering the whole lot, a two-story structure covering half of the lot, or a four-story structure covering a quarter of the lot. The maximum height of any building would depend on whether FAR is introduced in its pure form or is coupled with an absolute height limitation; minimum setbacks might also be included to prevent construction to the lot line. In downtown areas of large cities the FAR ratios may be 10:1, or even 20:1.

FAR has been adopted in the zoning regulations of downtown areas of most major cities in the country.¹⁹ Few decisions have dealt directly with the validity of FAR, but when the validity of the concept has been at issue, it uniformly has been sustained.²⁰ This is not surprising; once the proposition is accepted that the bulk of buildings and the intensity of use may be regulated, the means to accomplish this end should be left to legislative discretion.

After this basic approach of FAR had been worked out, some planners broadened their thinking. With the experiences of planned unit develop-

18. Apparently New York City has experimented with the concept since 1940. See Note, *Building Size, Shape, and Placement Regulations: Bulk Control Zoning Re-examined*, 60 YALE L.J. 506, 518 n.50 (1951).

19. See 1 N. WILLIAMS, *AMERICAN PLANNING LAW* 689, 711-14 (1974); 4 *id.* at 281-3 (1975).

Detroit is a notable exception to this trend. The city has foregone the adoption of FAR regulations because they were deemed inappropriate to the downtown area. Apparently the Director of Planning was of the opinion that there should be a relationship between the height of a building and the width of the abutting streets. Thus the concept was not implemented because of Detroit's narrow streets. See Canevaro, *The Detroit Public Center & Public Center Area: Mandatory Design Review & Control Over Building Bulk*, in *THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES* 181, 183-84 (N. Marcus & M. Groves eds. 1970).

20. *Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 767, 427 P.2d 810, 59 Cal. Rptr. 146 (1967); *People ex rel. Interchemical Corp. v. Chicago*, 29 Ill. 2d 446, 194 N.E.2d 199 (1963); *Woods v. City of Newton*, 351 Mass. 98, 217 N.E.2d 728 (1966); *Pondfield Road Co. v. Village of Bronxville*, 141 N.Y.S.2d 723 (Sup. Ct. 1955), *aff'd mem.*, 1 App. Div. 2d 897, 150 N.Y.S.2d 910, *aff'd mem.* 1 N.Y.2d 841, 135 N.E.2d 725, 153 N.Y.S.2d 221 (1956); *Village of Bronxville v. Francis*, 206 Misc. 339, 134 N.Y.S.2d 59 (Sup. Ct. 1954), *aff'd*, 1 App. Div. 2d 236, 150 N.Y.S.2d 906, *aff'd mem.*, 1 N.Y.2d 839, 135 N.E.2d 724, 153 N.Y.S.2d 220 (1956).

ments and bulk regulations on an area basis as a background, planners began to ask whether a similar approach could be applied to downtown business areas. In other words, rather than enforcement of bulk regulations on a lot-by-lot basis in neighborhoods that were likely to be divided into many small holdings, optimum densities for an entire downtown area conceivably could be established, without necessarily enforcing uniformity on all parcels. Thus, if the past history of a lot or the economic plans of its present owner had preserved part of the FAR allotment of that parcel of land, perhaps another parcel could exceed its share without doing violence to the plan. Secondary considerations, such as the preservation of open spaces and historical landmarks, played a role in the development of these ideas as they were translated into concrete proposals²¹ and, in turn, into legislative enactments.²²

Transferability of FAR Allotments

Property, in the legal sense of the term, is a purely mental concept consisting of a rather complex bundle of rights, powers, privileges, and immunities.²³ It has been the genius of the common law to strive for maximum flexibility of the incidents of ownership, thus permitting an owner almost unlimited means of separating, transferring, rearranging, and reassembling the constituent parts of the bundle. These divisions can consist of separate parts of the bundle held concurrently by two or more persons²⁴ or of undivided interests in the whole bundle, or in some desig-

21. See, e.g., J. COSTONIS, *SPACE ADRIFT—LANDMARK PRESERVATION AND THE MARKET-PLACE* (1974); Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35 (1974); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Morris, *Air Rights are "Fertile Soil,"* 1 URBAN LAWYER 247 (1969); Morris, "Zoning Imagination"—*Dimensional Zoning*, 46 ST. JOHN'S L. REV. 679 (1972); Pedowitz, *Transfers of Air Rights and Development Rights*, 9 REAL PROP., PROB. & TR. J. 183 (1974); Shales, *The Economics of Development Rights Transfers*, 42 APPRAISAL J. 526 (1974); Report, *Zoning: Air Lot Regulation/Title Insurance*, 5 REAL PROP., PROB. & TR. J. 260 (1970).

22. See ILL. REV. STAT. ch. 24, §§ 11-48.2-1 to -48.2 7 (1973); CHICAGO, ILL., MUNICIPAL CODE, ZONING ORDINANCE, ch. 194A, art. 3.2 (1970); NEW YORK, N.Y., ZONING RESOLUTION art. I, ch. 2, § 12-10, art. VII, ch. 4, §§ 74-79 to -792 (1971); SEATTLE WASH., ZONING & PLANNING CODE § 26.34.080; Los Angeles, Cal., Ordinance No. 145,043, Sept. 7, 1973.

23. These terms are used in the Hohfeldian sense. See W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (W. Cook ed. 1919).

24. These include the concurrent interests of lessors and lessees, as well as of mortgagors and mortgagees.

nated portion, apportioned among two or more owners.²⁵ They can involve divisions of the whole bundle, or parts of the bundle, into successive time periods.²⁶ These divisions can be spatial ones, with separate interests carved out above, below, and on the surface.²⁷ Finally, limited interests in one parcel of land can be carved out for the benefit of another.²⁸ Thus, although certain writers seem to believe that the concept is new and startling, representing a break with traditional property law,²⁹ it has long been recognized that an owner may transfer individual incidents of ownership from the complex bundle that his property comprises.

With this background, it is not surprising that the FAR allotment of a particular parcel can be looked upon as yet another stick in the bundle. The owner of land to which a FAR allotment has been made may be given a choice of either developing his property to the legal limit or of transferring his allotment to another owner of property in the same zone, who then could develop his own land in excess of its allotment.³⁰ This is not an all-or-nothing approach; on the contrary, it permits anything between the absolutes, with the owner deciding how much of the allotment to use and how much, if any, to transfer. The result is not unlike that achieved by easements for light and air, which by agreement limited the development potential of one parcel for the benefit of another; these

25. These undivided interests are tenancies in common, joint tenancies, and tenancies by the entirety.

26. Thus, the fee may be subdivided into life estates, remainders, executory interests, or reversions.

27. Mineral fees are well known to the law of mining. See, e.g., 3 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, AMERICAN LAW OF MINING § 15.13 (1960). Similarly, the "upper chamber" concept that a room could be owned apart from the building goes back at least to the reign of Elizabeth I and the practices of the Middle and Inner Temple Inns of Court. See R. WRIGHT, THE LAW OF AIRSPACE 67-71 (1967).

28. This refers to such interests as easements, covenants, and profits a prendre.

29. Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77, 85-91 (1974); cf. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1061-62 (1975).

30. Developments in land use planning and its implementing legal tools are very rapid. Although the concept of transferable development rights was started in downtown sections, it is now being transplanted into residential settings to preserve open spaces in suburban development. This approach is used by the city of Livermore, which is located in the San Francisco Bay area, some 30 miles southeast of Oakland. See Note, *Development Rights Transfer in Livermore: A Planning Strategy to Conserve Open Space*, 5 GOLDEN GATE L. REV. 191 (1975). It also has been attempted in Southampton Township, Suffolk County, New York. Chavooshian & Norman, *Transfer of Development Rights: A New Concept in Land-Use Management*, 43 APPRAISAL J. 400, 403 (1975). Further, it has been used in Pierce County, Washington. Interview with Mr. William LeDrew, Assistant Planner, Pierce City, Washington.

distributions of property owners' rights historically have been recognized and their implications appreciated for the purpose of valuation.³¹

For the municipality, the owner, and the developer, such an arrangement is attractive because it permits the maximum development compatible with the master plan. The developer may be able to maximize his returns by buying additional FAR allotments, up to the total allowable, and constructing a larger and economically more attractive project. The owner who is unable or unwilling to develop his property to the full legal potential under its allotment may sell the excess, thereby realizing the economic potential of the property and insuring that in the future he will not be taxed on values he is not utilizing.³²

For society at large the arrangement may permit the preservation of certain noneconomic values that otherwise would have to yield to the pressure of property taxes and other market place determinants.³³ The amenities to be preserved by transferable FAR allotments are usually listed either as private open spaces in high density, high land value areas,³⁴ or as historical and architectural landmarks.³⁵ The success of these attempts, however, is doubtful at present.³⁶

31. See, e.g., *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910).

32. For a discussion of taxation of air rights that present similar problems of non-use, see, e.g., Comment, *Tax Liability of an Air Rights Conveyance*, 7 URBAN L. ANN. 285 (1974). Cf. *Macht v. Dep't of Assessments*, 266 Md. 602, 296 A.2d 162 (1972), discussed in Comment, *Taxation of Easements in Airspace*, 33 MD. L. REV. 159 (1973).

33. See, e.g., J. COSTONIS, *supra* note 21, at 6-11; Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 579-84 (1972).

34. See Report of New York City Planning Commission, No. 224, Dec. 7, 1972, dealing with the preservation of private parks in Tudor City. But see *Fred F. French Investing Co. v. City of New York*, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Supp. Ct. 1973). For a comprehensive discussion, compare Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974), with Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975). See also 4 N. WILLIAMS, *AMERICAN PLANNING LAW* 274-77 (1975).

35. As Professor Costonis points out, certain innovative zoning techniques, such as the zoning bonus system, render uneconomical small parcels on which landmarks are typically located. J. COSTONIS, *supra* note 21, at 10. But see *Penn Central Transp. Co. v. City of New York*, 43 U.S.L.W. 2353 (N.Y. Sup. Ct. Feb. 25, 1975) (attempt to preserve Grand Central Station). Cf. *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

36. See, e.g., Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975). Despite its broad title, the note is concerned only with the validity of such transfer rights in connection with an attempt to preserve open spaces and historical or architectural landmarks. These issues, although very interesting, are not directly involved in this Article.

At the national level there are proposals pending to solve the historical preservation

Newport Associates, Inc. v. Solow

The only reported decision dealing directly with the transfer of unused FAR allotments³⁷ is *Newport Associates, Inc. v. Solow*.³⁸ The plaintiff in *Newport Associates* had leased to the defendant an improved parcel of land in downtown Manhattan; the building on this lot did not exhaust its current FAR allotment. The defendant lessee was also the owner in fee of two adjoining parcels of unimproved real estate. The two lots owned by defendant in fee and the third leased by him constituted a zoning lot, as defined by the New York zoning resolution.³⁹ The long-term lease between the parties had a minimum term of 21 years that could be extended by the exercise of successive options to a total of 99 years.⁴⁰ The defendant decided to improve his two fee lots with a 45-story office building that would have exceeded the FAR allotments for those two lots alone. The building, however, would have been well within the bulk regulations if the unused FAR allotment of the leased lot could have been incorporated. The city building department issued a building permit to defendant that incorporated the "borrowed" allotment from the leased premises; this action was challenged by the lessor on the ground that the lease did not include a transfer of unused development rights. The lessee counterclaimed for an adjudication that its "borrowing" of the unused allotment was valid.⁴¹

Although the successive courts litigating this dispute disagreed as to the

issue by income tax benefits. S. 667, 94th Cong., 1st Sess. (1975), H.R. 6225, 94th Cong., 1st Sess. (1975). However, as former Internal Revenue Commissioner Mortimer Caplin warned at a tax policy forum sponsored by the National Trust for Historic Preservation, such approaches will not be successful unless they are supplemented by appropriate zoning and planning. DAILY TAX REPORT, Feb. 5, 1976, at G-5 to -6.

37. *Fred F. French Investing Co. v. City of New York*, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973) and *Penn Central Transp. Co. v. City of New York*, 43 U.S.L.W. 2523 (N.Y.S. Ct. Feb. 25, 1975), involved the validity of a grant of transfer rights as compensation for the denial of the right to develop or redevelop the property.

38. 30 N.Y.2d 263, 283 N.E.2d 600, 332 N.Y.S.2d 617 (1972), *cert. denied*, 410 U.S. 931 (1973).

39. NEW YORK, N.Y., ZONING RESOLUTION, art. I, ch. 2 § 12-10(c) (1971), defines a zoning lot as "[a] tract of land, located within a single block, which . . . is designated by its owner or developer as a tract all of which is to be used, developed, or built upon as a unit under single ownership . . ." The section further provides that, "[f]or the purposes of this definition, ownership of a zoning lot shall be deemed to include a lease of not less than 50 years duration, with an option to renew such lease as to provide a total lease of not less than 75 years duration." See SEATTLE, WASH., ZONING & PLANNING CODE § 26.34.080. For a discussion, see Marcus, *Air Rights Transfers in New York City*, 36 LAW & CONTEMP. PROB. 372 (1971).

40. 30 N.Y.2d at 267, 283 N.E.2d at 602, 332 N.Y.S.2d at 620.

41. *Id.* at 266, 283 N.E.2d at 601, 332 N.Y.S.2d at 619.

proper disposition, they all assumed without any discussion that the transfer of unused FAR allotments was valid. The trial court had sustained the contentions of the defendant on the ground that under the zoning ordinance the defendant was "the owner" of the "zoning lot." The court reasoned that, for purposes of the issuance of the building permit, full dominion was exercised over both the fee lots and the leased lot.⁴² This was reversed, *per curiam*, by the appellate division, which granted summary judgment to plaintiff.⁴³ On appeal to the court of appeals, the judgment of the appellate division was reversed and the order of the special term was reinstated.

In disposing of the plaintiff's contention that a valuable property right was being taken from it, the court of appeals reasoned that pursuant to the provisions of the ordinance the lessor was not treated as owner of such development rights and, therefore, was not deprived of anything.⁴⁴ The court based its determination on the long-term nature of the lease. Although it is true that as long as the lease is in good standing the lessor has not been deprived of anything, the court overlooked several contingencies.

It does not require a great deal of expertise in real estate development to know that large commercial structures are constructed primarily with borrowed funds.⁴⁵ Therefore, it is safe to assume that the 45-story office building to be constructed would be encumbered by a large mortgage. Both mortgages and leases occasionally fall into default; if several years after the completion of the project the defendant owner-lessee were economically unable to fulfill its obligations and defaulted on both its lease and its mortgage, the single ownership of the "zoning lot" would be severed as a result of a mortgage foreclosure sale and repossession of the leased premises by the lessor. The purchaser at a foreclosure sale

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

43. 36 App. Div. 2d 519, 317 N.Y.S.2d 715 (1971).

44. "But [plaintiff's argument] overlooks the fact that, in view of defendant's ownership of the adjoining building, his lease from plaintiff and the Zoning Resolution itself, plaintiff possesses no such right of sale. There is nothing in the ordinance which treats its reversionary interest as ownership for the purpose of floor area ratios or air space rights" 30 N.Y.2d at 268, 283 N.E.2d at 602, 332 N.Y.S.2d at 620.

45. For example, there is a trend toward longer maturities and higher loan-to-value ratios of such loans. R. FISHER & B. OPPER, MORTGAGE COMMITMENTS ON INCOME PROPERTIES: A NEW SERIES FOR 15 LIFE INSURANCE COMPANIES, 1951-70, at 43, charts 3-4 (1973).

For a discussion of leveraging and of the difficulties recently experienced by operators of commercial buildings in New York City, see Meyer, *Leveraged Losses—Real Estate Empire Crumbles as Values in New York Decline*, Wall St. J., Mar. 4, 1976, at 1, col. 6.

would acquire a larger building than the land he purchased would justify, a benefit to which he otherwise would not be entitled. At the same time, the lessor would recover less than the totality of the property rights it transferred upon the execution of the lease. Property rights, therefore, would be taken from the lessor without any compensation.

It is regrettable that the attorney for the plaintiff did not raise, and the courts did not discuss, these potentially serious problems. Although many of these difficulties may be obviated if the transfer of the excess development rights is made by a voluntary agreement between the parties, either in the form of a sale or a lease, for which an appropriate consideration is paid, it would behoove draftsmen of leases and ordinances alike to consider the possibility of default.

The Uses of Transferable Development Rights

Assuming the validity of transferable development rights, questions arise concerning possible uses. The first and foremost use, of course, is that of density controls applied on an area-wide basis. Although questions have been asked about the validity of density controls and about what constitutes acceptable density,⁴⁶ it is evident that the density of an area, present or prospective, has a direct impact on many municipal decisions. Planning for transportation needs, infrastructure, and municipal services obviously is concerned in part with densities. Therefore, whatever optimum is established for acceptable density, any kind of municipal, public, or even private planning has to take it into account.⁴⁷

Once this primary objective was accepted, writers immediately proposed the use of transferable development rights for all manner of secondary purposes. It was suggested that these rights could, and should, be used to protect architectural landmarks,⁴⁸ urban parks,⁴⁹ open areas,⁵⁰ phosphorescent bays,⁵¹ and anything else that the imagination of writers in the field could suggest. It is not always clear from these articles whether the authors refer to the transfer of excess FAR allotments or

46. See, e.g., Babcock & Bosselman, *Conflicts in Land Use*, in ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING 143, 146 (D. McAllister ed. 1973). This article, however, speaks about residential areas.

47. But cf. Ellickson, *supra* note 2, at 769 n.291.

48. See generally J. COSTONIS, *supra* note 21.

49. Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77-79 (1974).

50. Note, *Development Rights Transfer in Livermore: A Planning Strategy to Conserve Open Space*, 5 GOLDEN GATE L. REV. 191, 192-93 (1975).

51. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 91-95 (1973).

whether they speak of the acquisition or transfer of scenic easements or similar interests.⁵² Less publicized, but also advanced, were more questionable applications, such as an attempt to stave off the financial crisis of New York City by the sale of additional transferable development rights from municipal buildings.⁵³ Recently, doubts were cast on the usefulness of transferable rights in some of these contexts.⁵⁴

It has been suggested recently that transferable development rights could play a role in adjusting social burdens in the gray area between the police power and the power of eminent domain.⁵⁵ Traditionally, these two powers have been treated as if they were completely separate;⁵⁶ under the police power, no compensation is required, but when property is taken under the power of eminent domain, the owner must receive just compensation. In fact, however, there is a continuum between them; the dividing line is not clear. The shadowy distinction between these powers has been perceived in a few contexts in which, by legislative fiat, compensation has been provided, although from a traditional point of view no "taking" has occurred because the regulatory measure does not exceed the limits of the police power.⁵⁷ In this setting the availability of transferable rights may provide the means for a modicum of adjustment without simultaneously imposing impossible burdens on already depleted local treasuries.

52. For a discussion of scenic easements and similar interests limiting the development potential of land without reference to zoning, see, e.g., Krasnowicki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961); Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL EST. L.J. 635, 646-48 (1974).

53. Professor Ellickson reports that New York City leased excess transferable development rights applicable to the appellate division courthouse for 75 years. Ellickson, *supra* note 2, at 703 n.78. See also Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338, 358-61 (1972).

54. Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975); cf. Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972).

55. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1061-81 (1975).

56. See 1 P. NICHOLS, EMINENT DOMAIN § 1.42[2] (3 ed. J. Sachman ed. 1973); Kucera, *Eminent Domain Versus Policy Power—A Common Misconception*, 1959 INST. EMINENT DOMAIN 1; cf. F. BOSSELMAN, D. CALLIES, J. BANTA, THE TAKING ISSUE (1973).

57. See, e.g., Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-55 (1970). Similarly, some courts are beginning to reject an all-or-nothing approach, e.g., *Brown v. Tahoe Reg'l Plan. Agency*, 385 F. Supp. 1128, 1132 (D. Nev. 1973).

THE LAW OF WASHINGTON

To increase the understanding of the significance of transferable development rights, an extensive study of a particular zoning case was undertaken. But before discussing the methodology of the study undertaken for this Article it is necessary to put the study in its proper legal setting: the law of planning, zoning, and real estate assessments in the State of Washington.

Washington Law of Planning in a Nutshell

In any discussion of planning and zoning by Washington municipalities, a distinction must be made between charter cities and all other municipal corporations.⁵⁸ Charter cities derive their powers directly from the state constitution⁵⁹ and can enact zoning ordinances before the legislature passes enabling legislation.⁶⁰ Furthermore, the passage of a comprehensive state statute does not deprive such cities of their independent powers as long as they do not elect to come under its provisions.⁶¹ As a result, Seattle and other charter cities in the state are undoubtedly in a position to enact ordinances authorizing transferable development rights,⁶² and could adopt the recommendations set forth in this Article without any state enabling legislation. This, however, is not true of many other municipal corporations.

In recent years, Seattle and other charter cities have been responding to increased demands on the planning process and public reactions to its operation by making structural changes. The most important of these was the creation in Seattle of a Department of Community Development,⁶³

58. For general discussions which are now primarily of historical interest, see Morris, *Toward Effective Municipal Zoning*, 35 WASH. L. REV. 534, 543-49 (1960); Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 WASH. L. REV. 743, 765-83 (1963).

59. WASH. CONST. art. XI, § 10, amend. 40. For a general discussion of home rule or charter cities see, e.g., Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 (1975); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968).

60. *Nelson v. City of Seattle*, 64 Wash. 2d 862, 395 P.2d 82 (1964).

61. *Id.* at 867, 395 P.2d at 84.

62. SEATTLE, WASH., ZONING & PLANNING CODE § 26.34.080. Copied from New York City, the Seattle plan permits a transfer to an adjoining parcel only: "However, for the purpose of computing the gross floor area ratio adjacent properties and properties located across an abutting alley, under common ownership, or linked for this purpose by appropriate legal agreements and deed restrictions, may be considered together" The ordinance fails to define the appropriate legal agreements.

63. Seattle, Wash., Ordinance No. 97473, Feb. 13, 1969.

which superseded the prior planning commission and absorbed within it many other functions. Similarly, to streamline administrative adjudication and to make it fairer and more responsive, the city adopted a hearing examiner process.⁶⁴

Serious doubts long existed concerning the power of municipalities other than charter cities⁶⁵ to plan and zone.⁶⁶ These doubts were the result of "Dillon's Rule,"⁶⁷ which requires the powers of municipalities to be construed narrowly.⁶⁸ To clarify the matter and to put the planning and zoning powers of municipalities on a firm footing, the legislature adopted an enabling statute⁶⁹ based on the Model Planning Act.⁷⁰ Although this act is not an exact copy of the model statute, it parallels it rather closely, providing for the formation of planning commissions,⁷¹ the undertaking of planning studies,⁷² the development and adoption of comprehensive plans,⁷³ as well as the preparation and adoption of zoning ordinances,⁷⁴ subdivision regulation ordinances,⁷⁵ and official map ordinances.⁷⁶ The recommendations made in this Article could not be adopted by noncharter Washington municipalities subject to Dillon's Rule without amendments to the enabling statute.⁷⁷

64. *Id.* No. 102290, June 21, 1973.

65. See WASH. CONST. art. XI, § 11.

66. "While the power of charter cities to zone was established, this court had consistently held that the powers of other cities and counties were to be narrowly construed. The doubts as to the power of such municipal units to zone were expressly disposed of by the enactment of RCW 35.63." *Nelson v. Seattle*, 64 Wash. 2d 862, 867, 395 P.2d 82, 85 (1964).

67. The rule is named after its formulator, an early commentator on the law of municipal corporations. See 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-51 (5th ed. 1911).

68. For examples of this adoption see, e.g., *City of Aberdeen v. Nat'l Surety Co.*, 151 Wash. 55, 275 P. 62 (1929); *Farwell v. City of Seattle*, 43 Wash. 141, 86 P. 217 (1906).

69. Wash. Sess. Laws [1935], c. 44. The act, as amended, is codified in WASH. REV. CODE ANN. §§ 35.63.010 to .120 (1965).

70. U.S. Dep't of Commerce, Standard City Planning Enabling Act (1928).

71. WASH. REV. CODE ANN. § 35.63.020 (1965).

72. *Id.* § 35.63.060.

73. *Id.* §§ 35.63.090 to .100.

74. *Id.* §§ 35.63.080 & .110.

75. *Id.* § 35.63.080.

76. *Id.* § 35.63.110.

77. Those municipalities that elect to come under the provisions of the Optional Municipal Code and whose land use planning is, therefore, governed by WASH. REV. CODE ANN. ch. 35A. 63 (Spec. Pamphlet 1974), might be able to do so, however.

The Washington Assessment Process

The Washington Constitution provides for the imposition of tax rates on assessed valuation of both personal and real property.⁷⁸ This valuation was to be 50% of fair market value. In implementing these provisions, the legislature has directed that land and improvements be assessed separately.⁷⁹ Not surprisingly, for many years this constitutional provision was not closely followed.⁸⁰ Thus, for instance, the 1966 average assessment ratio for all taxable property in King County was about 23.7 percent of market value, and in Snohomish County it was 19.1 percent.⁸¹ In a taxpayer action brought against the assessors of King and Snohomish Counties in 1969, the Supreme Court of Washington held that the constitutional provision was mandatory, leaving no room for discretion, and ordered an immediate compliance with the provision.⁸² The precipitous attempt by the county assessors to comply with the order of the court accounts for the almost uniform 100 percent increase in assessed valuations between 1966 and 1971.⁸³ The constitution was amended in 1972 to provide for a 100 percent assessment.⁸⁴

In 1955, the legislature, endeavoring to improve the assessment practices in the state, passed a statute that required all property in each county to be reassessed at least once every 4 years.⁸⁵ The validity of such cyclical reassessment practices was approved by the supreme court of the state on pragmatic grounds.⁸⁶ At least in King County, however, because of the number of parcels involved and budgetary and personnel limita-

78. WASH. CONST. art. VII, § 2, amend. 17.

79. WASH. REV. CODE ANN. § 84.40.030 (1962): "In assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; also, the value of all improvements and structures thereon . . ."

80. In this respect Washington was typical of the nation as a whole. Shannon, *Conflict Between State Assessment Law and Local Assessment Practice*, in PROPERTY TAXATION USA 39 (R. Lindholm ed. 1967); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 428-29 (93d ed. 1972).

81. *Carlonen v. Williams*, 76 Wash. 2d 617, 623, 458 P.2d 280, 284 (1969).

82. *Id.* at 626, 458 P.2d at 285-86. See also *Snohomish County Bd. of Equalization v. Dep't of Revenue*, 80 Wash. 2d 262, 493 P.2d 1012 (1972); *State ex rel. Barlow v. Kinnear*, 70 Wash. 2d 482, 423 P.2d 937 (1967).

83. See appendices IV and V *infra*.

84. WASH. CONST. art. VII, § 2, amend. 55; see *Dep't of Revenue v. Hoppe*, 82 Wash. 2d 549, 512 P.2d 1094 (1973). The 1975 assessment figures were not used in this study because that was the first year for which the new rules were applicable. WASH. REV. CODE ANN. § 84.40.030 (Supp. 1974).

85. *Id.* § 84.41.030.

86. *Carlonen v. Williams*, 76 Wash. 2d 617, 630-34, 458 P.2d 280, 288-90 (1969).

tions, the 4-year cycle was never achieved and the county operated on a 6 to 7-year cycle.⁸⁷

METHODOLOGY OF THE STUDY

Objective of the Study

The objective of the study explicated in this Article was to test empirically whether upzoning would be followed by tax increases because of reassessment of the parcels involved, particularly where market responses would not seem to justify such increases. The problem, of course, was to try to separate the inevitable increases in value caused by factors unrelated to zoning, such as persistent inflation, from those that were solely or primarily caused by changes in zoning classification. Of particular interest were any data that might indicate whether a change in assessment would follow if sales and development, failing to take advantage of the more intensive use permitted by the upzoning, indicated that the upzoning was premature, illjudged, or the result of overly optimistic projections. If statistically significant changes could be established under such unlikely circumstances, a strong nexus between changes in zoning and assessment levels would be demonstrated.

Area Involved

For purposes of the study, a well-defined, limited geographical area in a representative metropolitan setting was needed. Furthermore, the area had to be transitional in the sense that, although upzoning had occurred relatively recently, the new zoning classification had been recognized by the tax assessor in the periodic reassessment process. Additionally, to test the hypothesis, the area needed to have a mixture of undeveloped and underdeveloped land.

The city of Seattle was chosen for several reasons. Seattle has a population of more than 500,000⁸⁸ and constitutes the central city of an ex-

87. *Id.* at 622, 458 P.2d at 284. For this reason there was no reassessment of the area involved in this study from 1958 to 1966. See appendices IV and V *infra*.

88. Seattle ranks 25th in size among American cities, but like most central cities has been losing population.

1960—557,000

1970—531,000

1973—503,000

U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 25 (96th ed. 1975).

panding metropolitan area of close to 1.5 million persons.⁸⁹ Its size falls into the middle range of American cities and, although the community has many, if not most, of the usual problems associated with urbanization, such problems are not as yet unmanageable. Seattle, therefore, is representative enough to allow application of the findings to both smaller and larger communities.

The specific area within the city of Seattle chosen for purposes of this study is known as the Denny Regrade and is located to the northwest of the downtown business center.⁹⁰ This area was selected because of its interesting and somewhat unusual history,⁹¹ its immediate proximity to the downtown area, and its appropriate characteristics. These include the large amount of land on the regrade that was undeveloped or underdeveloped and the recent upzoning of part of the regrade, done close enough to the present to be representative but nevertheless already reassessed,⁹² and not followed by large scale development. Finally, the regrade itself is again in a state of transition, and interesting new plans are being developed for its future by the Seattle Department of Community Development.⁹³

Because Seattle is situated on a number of hills, some of them quite steep, the number of level building sites is limited. One of those hills, Denny Hill, named after an early Seattle pioneer, was situated directly to the northwest of the developing downtown area. For a time in the

89. The Seattle-Everett Standard Metropolitan Statistical Area (an urban area of 250,000 or more) ranks 22nd out of 138 and has shown the following population fluctuations:

1960—1,107,000
1970—1,425,000
1973—1,383,000

Id. at 22.

This, however, does not give a complete description. Seattle is located in King County, and Everett is located in Snohomish County. Portions of these two counties form the Seattle-Everett Standard Metropolitan Statistical Area. Tacoma, which ranks 84th among the standard metropolitan statistical areas, is located in Pierce County, immediately south of King County. These three counties account for more than half of the state's population.

90. For the location and characteristics of the Regrade, see appendices I and II *infra*.

91. See DEP'T OF COMMUNITY DEVELOPMENT, CITY OF SEATTLE, DENNY REGRADE DEVELOPMENT PLAN 4 (1974) [hereinafter cited as REGRADE PLAN]; N. JONES, SEATTLE 19-20, 201-02 (1972).

92. The upzoning under study took place in 1966. The reassessment of the entire area involved in our study occurred in 1958, 1966, 1971, and 1973.

93. See REGRADE PLAN, *supra* note 91. For a short description and critical comment, see Smith & Brewster, *A Wise, Improbable Plan to Upgrade the Denny Regrade*, ARGUS, vol. 82, May 16, 1975, at 1.

late 19th century it was an exclusive residential area. With the growth of the community, however, the demand for level land increased and property owners petitioned for the removal of the hill. In 1906, the City Council passed an ordinance authorizing the regrading of 77 acres;⁹⁴ this work was done between 1908 and 1911. Initial regrading left a part of Denny Hill still standing, but many considered it an unnecessary barrier. In 1926, a further ordinance was passed authorizing additional regrading,⁹⁵ and the balance of the hill was removed by 1930.

The completion of the regrading coincided with the beginning of the Great Depression. As a result, the anticipated construction boom did not materialize. By the time construction started again in earnest at the end of World War II, technological changes caused the central business district to expand vertically rather than horizontally. This accounted in part for the lack of large scale development on the Regrade. The other major factor inhibiting development was that a great deal of the land in the area has been held by a single family.⁹⁶ In anticipation of ever-rising land values, part of this land was deliberately withheld from the market.

In the late 1940's, one high rise residential development, the Grovenor House, occupying an entire block, was built in the northwest periphery of the Regrade. This structure still stands out today and is a nonconforming use in bulk and height. Nothing of comparable bulk was added during the 1950's; in the mid 1960's two 12- or 13-story office buildings were constructed in the portion of the regrade closest to the central business district. This, of course, does not mean that no other construction took place in the area in the intervening years; to the contrary, many structures were built between 1945 and the 1960's. Most of these, however, were low rise structures and did not represent an intensive use of land.

Today the Regrade is a mixed area; approximately 35 percent of the usable land is vacant, utilized primarily for parking lots and used car lots. Of the remaining developed acreage, nearly half of the improvements are reaching the end of their economically useful lives and, in most cases, do not warrant rehabilitation.⁹⁷ Most of the more recent construction does not make intensive use of the land. In the opinion of a prominent Seattle appraiser, the area involved in the study has uniform characteristics and

94. Seattle, Wash., Ordinance No. 13776.

95. *Id.* No. 50890, May 3, 1926.

96. Information based on the author's interview with Ms. Barbara Dingfield, Seattle Department of Community Development, Oct. 23, 1975. Ms. Dingfield was Project Manager of the Denny Regrade Development Plan.

97. REGRADE PLAN, *supra* note 91, at 5.

the same highest and best use.⁹⁸ Virtually all of the area is zoned in a commercial classification;⁹⁹ the differences in zoning relate primarily to height and bulk rather than to use. Therefore, the changes in zoning deal with relatively few variables and facilitate evaluation of the raw data.

The Procedure

Rezoning of part of the Regrade took place in 1966.¹⁰⁰ The change was from a general commercial (CG) classification to a metropolitan commercial temporary (CMT) classification. There is a slight difference in uses permitted under CG and CMT, but the overlap is large enough to indicate that the use change is not the crucial factor. Changes in the bulk and height classifications are more drastic. The CG zone had an absolute 60-foot height limitation on buildings. On the other hand, a CMT zone treats bulk classification on the FAR principle allowing a 10:1 ratio excluding accessory parking. Neither zone requires any setback lines for commercial and industrial uses.

An example may illustrate the consequences. In the CG zone a building of a maximum of six stories can be constructed, assuming an average of 10 feet per floor. This, of course, would include any ancillary off-street parking facilities incorporated into the building. In a CMT zone, however, a commercial building covering the entire lot could be ten stories, or approximately 100 feet high, excluding parking facilities which could add two or three floors. Therefore, a 20-story tower with one-half lot coverage could be built on a base of three or four stories having parking and other ancillary uses for a total of 23 to 24 floors.

For purposes of comparison, a control area that remained in the CG classification was selected immediately to the northwest of the rezoned area. Both visual observation and block-by-block comparison of the characteristics and improvements found in the records of the assessor of King County indicated that the two areas were fully comparable. Although the control area is admittedly smaller than the rezoned or noncontrol area, it is compact, contiguous, and large enough for comparison.¹⁰¹

98. Interview with Falker Junglov, S.R.A., President, Seattle Chapter #20, Society of Real Estate Appraisers, Feb. 23, 1976.

99. For the zoning classifications of the Regrade, see appendix III. The rezoning of the Regrade to the CG classification took place in 1957. Seattle, Wash., Ordinance No.

100. Seattle, Wash., Ordinance No. 94606, Apr. 9, 1966.

101. For the identification of both the noncontrol and the control areas, see appendix III.

After the noncontrol group and the control group were identified, the assessment cards from the office of the assessor for King County for each parcel of land within both groups were assembled. Both the non-control and the control areas were reassessed in 1958, 1966, 1971, and 1973.¹⁰² From this raw data the relative changes in assessed valuation of land were compared. The results were double checked in an interview with the personnel of the assessor's office to establish whether the office consciously had used zoning classifications as one of the elements in determining assessed valuation;¹⁰³ the zoning classification was confirmed to have been a criterion employed in arriving at the valuation.¹⁰⁴

*The Findings*¹⁰⁵

The appendices to this Article indicate the valuation figures both in absolute and in relative terms on a block-by-block basis.¹⁰⁶ For the group as a whole the assessed valuation of land in the noncontrol group increased between 1971 and 1973 much more rapidly than in the control group; the difference was in excess of 12 percentage points. This is considerably greater than the difference between the two groups for the period from 1958 to 1966 when the just-completed rezoning of the non-control group might have already affected the result. Although these

102. It was undesirable to use pre-1958 assessments because both the noncontrol and control areas were rezoned CG in 1957; thus, earlier assessments would have introduced additional variables.

The reassessments of 1971 were a precipitous attempt to comply with the order of the Supreme Court of Washington in *Carkonen v. Williams*, 76 Wash. 2d 617, 623, 458 P.2d 280, 284 (1969); see notes 81-83 *supra* & accompanying text. This factor had to be taken into account in evaluating our results.

103. Interview with Wilbur Furrand, Office of Assessor of King County, Feb. 19, 1976.

104. This practice has been instituted legislatively since the date of this study. "The appraisal shall take into consideration restrictions such as zoning . . ." WASH. REV. CODE ANN. § 84.40.030(1) (a) (Supp. 1974).

105. All of the land in the Regrade was originally platted for residential purposes and is therefore legally described in terms of lots and blocks. On the other hand, the assessor's files are kept on an economic unit basis by which an assessment unit corresponds to the smallest identified economic unit. As a result, an assessment unit may represent a single lot, a portion of a lot, or two or more lots. In the control group, in fact, one entire block is assessed as a unit. This should not distort the findings, however, because the building on this block is only three stories high and does not exhaust the limitations under the CG classification.

106. Appendix IV indicates the figures for the noncontrol group, and appendix V for the control group. For purposes of identification we have numbered the blocks in both groups consecutively in an arbitrary fashion.

figures are not dramatic, they certainly are statistically significant, and the resulting difference in annual taxes cannot be dismissed as *de minimis*.

The reappraisal figures for 1966 to 1971 show the opposite trend; the control group increased at a faster rate, although by a smaller margin of 1.3 percentage points. However, the reappraisal of 1971 is nonrepresentative because it is clear that the assessor in most cases simply doubled the values to comply with the judicial mandate.¹⁰⁷

Initially, these differences appeared less than would have been expected from abstract reasoning. Further reflection, however, indicates that the difference is exceedingly significant. In view of the abundance of undeveloped land in the Regrade and the sporadic and slow development of the past two decades, values could not be expected to double or treble overnight.¹⁰⁸ If, even under these circumstances, a significant difference in assessed valuation has been found, there clearly is a relationship between assessed value and changes in zoning.¹⁰⁹

RECOMMENDATIONS

The study of the Regrade proves empirically that upzoning is followed by increases in assessment of the land values, which, in turn, translate themselves into higher taxes.¹¹⁰ It remains to be determined whether anything can or should be done about this effect of upzoning. The problem is very broad, and a general approach would involve at least the reforma-

107. See notes 82-84 *supra* & accompanying text.

108. The study prepared as a background for the proposed plan for the Regrade indicates that the available land on the Regrade, under the present zoning classification, could not be utilized for 50 to 75 years. REGRADE PLAN, *supra* note 91, at 6. If this is correct, the rezoning should not affect values and the results will become even more significant.

109. This relationship is verified further by the opinion of the Washington Board of Tax Appeals in *Zeta Psi Fraternity v. July, 1969 King County Board of Equalization*, No. 453 (Wash. Bd. of Tax App., April 24, 1970), setting the taxable value of a lot located in another part of King County. As the opinion indicates, an upzoning for high rise apartments, followed by no actual development in the area, resulted in substantial increases in assessment.

110. Typically, the real property tax in the United States is computed by applying a certain percentage to the assessed value of the property to arrive at the tax liability. Therefore, the higher the assessed value, the higher the tax. The Washington statute is representative. WASH. REV. CODE ANN. § 84.52.010 (Supp. 1974). For a discussion of other models of real property taxation see, e.g., J. HEILBRUN, *REAL ESTATE TAXES AND URBAN HOUSING* 60-73 (1966). A discussion of the economic impact of property taxes can be found in, e.g., D. NETZER, *ECONOMICS OF THE PROPERTY TAX* (1966); G. PETERSON, A. SOLOMON, H. MADJID & W. APGAR, *PROPERTY TAXES, HOUSING AND THE CITIES* (1973).

tion or revision of the property tax system in general, and of assessment procedures in particular.¹¹¹

The concept of transferable development right may be used effectively to bring a measure of justice to reassessments. Obviously, in a situation such as the one disclosed by our study of the Regrade, however, the use of transferable development rights would be inappropriate. The reassessment does not correspond to real changes in value because there is an oversupply of land and there is no demand for high rise building sites on the Regrade. This simply indicates that the upzoning was either premature or the result of mistake or overly optimistic projections.¹¹² In this respect the Regrade upzoning is not typical of most zoning reclassifications.¹¹³

In the usual situation in which the rezoning is followed or even preceded by an active demand for available land to be used in a more intensive way, the transferable development rights may indeed provide something akin to "fair compensation," as advanced by Professor Costonis.¹¹⁴ The value of land, of course, is measured by its capacity to produce an economic return. Other things being equal, if the land is suitable for a more intensive use it should be able to generate a higher

111. G. PETERSON, A. SOLOMON, H. MADJID & W. APGAR, *PROPERTY TAXES, HOUSING AND THE CITIES* 109-22 (1973); Comment, *The Michigan Property Tax: Assessment, Equalization, and Taxpayer Appeals*, 17 WAYNE L. REV. 1397 (1971). Some suggestions were made recently regarding the reformation of assessment procedures. See testimony introduced in *Hearings on S. 1255 Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations*, 93d Cong., 1st Sess. (1973); *Conference Hour Discussions*, in *PROPERTY TAXATION USA* 267 (R. Lindholm ed. 1967).

112. The Seattle World's Fair, staged in 1962, precipitated exaggerated expectations, ultimately unfulfilled, of growth and development of the general area just beyond the Regrade. Interview with Falker Junglov, S.R.A., President, Seattle Chapter #20, Society of Real Estate Appraisers, Feb. 23, 1976.

113. In many cases upzoning is initiated by property owners or purchasers who believe that the land is ready for a more intensive use. M. SELDIN, *LAND INVESTMENT* 146-48 (1975). See also Comment, *Rezoning in New Orleans—Legal Requirements and Decision-Making Criteria*, 50 TUL. L. REV. 352 (1976).

Our findings may indicate disquieting possibilities. Hard pressed municipalities with large deficits may be tempted to upzone marginal areas to raise the tax base artificially. In the long run, such an attempt would be self-defeating.

114. Costonis, "Fair" Compensation and the Accommodation Power: *Antidotes for Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975). The concerns of this Article, however, are not entirely the same as those of Professor Costonis. He is primarily concerned with finding a pragmatic compromise between effective control and acceptable costs to the public treasury. This Article, on the other hand, is concerned with the mitigation of random incidents of benefits and detriments caused by governmental action. These concerns are not antithetical but complementary.

return and therefore command a higher price in the marketplace.¹¹⁵ For this reason, the price of unimproved land rises as it becomes ripe for development. The problem faced by the property owner who has already improved his land at the prior, less intensive scale, is that although technically his land has become more valuable, he has no practical way of utilizing the increased value, at least in the short run,¹¹⁶ and he is taxed almost immediately on the increment in value through reassessment. A new kind of equilibrium could be reached by a transfer of this unusable development potential.

The new equilibrium presumably would aid the owner of developed land while controlling the increase in market value of unimproved land. It would permit the owner who has less intensive improvements to receive some monetary or other economic equivalent for his added development potential and to avoid an increased tax burden. After parting with his development rights he should not be assessed on the basis of the redevelopment potential.¹¹⁷ At the same time this availability of incremental development potential should have a dampening effect on the increase in the market values of the available unimproved land because a purchaser who could construct the same type of improvement on less land by buying or leasing the development rights of other property owners would not be likely to pay the same kind of premium for the land if this option were unavailable. The type of equilibrium achieved would depend on the relative availability of unimproved land and transferable development rights, on the willingness of owners to sell or lease, on the parties' understanding of the market, and on the degree of sophistication employed in negotiating the details of the transfers.¹¹⁸

115. For one discussion of the mechanics, see M. SELDIN, *LAND INVESTMENT* 46-48 (1975); cf. Gramm & Ekelund, *Land-Use Planning: The Market Alternative*, 43 *APPRAISAL J.* 562, 566-69 (1975). Although these works are illustrative, the authors of this Article do not endorse the conclusions.

116. In the long run the owner may achieve a new equilibrium, either by upgrading his improvements, if this can be done, or by substituting new ones. This can be done indirectly by a sale to one who will improve the property.

117. This would seem to follow from the logic of the transaction. See *Opinion of Wash. Att'y Gen.*, No. 53-55-285, July 16, 1954 (easements). It would be desirable, however, to include a specific provision to this effect in any enabling legislation. This provision would not result in any loss of revenue to the municipality, because the acquired development rights should then be assessed as part of the parcel to which they have been transferred.

118. One of the principal problems in this area would be the question of the degree to which the prospective transferors could weigh the relative benefits of an immediate financial return, coupled with the avoidance of property tax increases, against the prospective loss of the development potential increment.

The transferability of development rights should not be included in the same ordinance that upzones the area. The transferability issue should be decided separately and should predate the upzoning ordinance to foreclose the argument that the municipality provided compensation because its zoning action constituted a "taking" within the meaning of the fifth amendment or appropriate state constitutional provisions. Although the law at present makes it quite clear that in most cases changes in zoning will not constitute a compensable taking,¹¹⁹ the inclusion of transferability in zoning ordinances may suggest an attempt to compensate and might bring into question the adequacy of that compensation.¹²⁰

The ordinance authorizing development right transfer should establish specific machinery to implement these transfers. The Chicago Plan calls for a development rights bank that creates an independent source of revenue from the sale of these rights and thus avoids dependency upon the general revenue of the city.¹²¹ The direct market approach may be preferable to keep transaction costs low.¹²² The transfer could be accomplished by lease as well as by sale, or, in the alternative, by determinable fee. The lease or determinable fee approach may be preferable; when the economic life of the improvement ends, the development right would revert to the original parcel for reuse or reassignment. This would increase the flexibility of the system. In this connection, the possible problems such as those raised by *Newport Associates, Inc. v. Solow*¹²³ should be kept in mind. Full payment at the time of transfer would avoid the very difficult problems of enforcement of periodic payments on default.

The process could be encouraged further by the provision of tax benefits. Since the United States repealed the stamp tax on deeds,¹²⁴

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

120. Cf. *Fred F. French Investing Co. v. City of New York*, 77 Misc. 2d 199, 352 N.Y.S. 2d 762 (Sup. Ct. 1973) (*Tudor Parks*) and *Penn Central Transp. Co. v. City of New York*, 43 U.S.L.W. 2353 (N.Y.S. Ct., Feb. 25, 1975) (*Grand Central Station*). In both of these decisions the transfer was offered ad hoc to a specific location. It is interesting to speculate on the result if the right to transfer were more liberal and granted pursuant to a general policy.

121. E.g., ILL. REV. STAT. ch. 24, § 11-48.2-1A(3) (1971). For a discussion, see J. COSTONIS, *supra* note 21, at 52-54.

122. For an interesting proposal, see Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL EST. L.J. 635, 651-52 (1974). See also Shales, *The Economics of Development Rights Transfers*, 42 APPRAISAL J. 526, 529 (1974).

123. 30 N.Y.2d 263, 283 N.E.2d 600, 332 N.Y.S.2d 617 (1972), *cert. denied*, 410 U.S. 931 (1973). See notes 37-45 *supra* & accompanying text.

124. INT. REV. CODE OF 1954, § 4361. See Excise Tax Reduction Act of 1965 § 401(b), Pub. L. No. 89-44, 79 Stat. 136, 148.

states have generally adopted such taxes.¹²⁵ In addition, some states impose a sales tax on land transfers,¹²⁶ and the practice is likely to spread. If transfers of development rights were exempted from such taxes, the device would become more attractive. This in turn might be expected to further cushion the swings in value of rezoned land.

For the system to have any appreciable impact or chance of success, the area of transfer must be sufficiently wide. In this context limitations of transfer to neighboring parcels only, such as those imposed by New York or Seattle,¹²⁷ are counterproductive. This problem could be solved easily by permitting the transfer of development rights in any contiguous area in which densities and bulk are regulated under the FAR principle with a FAR allotment of at least 10:1. This would eliminate any implications or fears of favoritism or direct barter between the municipality and a particular landowner to achieve ends which otherwise might be precluded.¹²⁸ To forestall construction of structures of monstrous dimensions, however, the right to use acquired development rights may be qualified by providing absolute height or coverage limitations or by creating a ceiling of a predetermined multiple of the FAR allotment for the acquiring parcel. These limitations should be flexible enough to adapt to local conditions. As in bonus or incentive zoning plans,¹²⁹ the use of the acquired development rights also could be qualified by the requirement of specified public amenities.

There is, of course, no certainty that these suggestions will be successful if implemented. On the other hand, there are no compelling reasons why they should not be tested; if they fail, society would lose nothing, but if they succeed, a measure of fairness would be introduced into the effects of upzoning. The market reaction to an availability of transferable

125. See, e.g., FLA. STAT. ANN. § 201.02 (Supp. 1975) (30 cents for each \$100.00 of value); MICH. COMP. LAWS ANN. §§ 207.501 to .513 (Supp. 1975) (55 cents for each \$500.00 of value); WASH. REV. CODE ANN. §§ 82.20.005-.070 (1962) (50 cents for each \$500.00 of value).

126. See, e.g., PA. STAT. ANN. tit. 72, §§ 3283-3292 (1964) (tax equal to one percent of sales price); WASH. REV. CODE ANN. §§ 28A.45.010-.120 (1970) (tax not to exceed one percent of sales price to be imposed by counties). All counties have imposed the tax; 1 CCH State Tax Rep., Wash ¶ 56-541 to -542 (1969).

127. NEW YORK, N.Y., ZONING RESOLUTION art. I, ch. 2, § 12-10 (1971); SEATTLE ZONING & PLANNING CODE § 26.34.080(a).

128. One such undesirable transfer was the lease by New York City of excess FAR allotments for the appellate division courthouse to the owner of an adjoining parcel. See Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338, 358-61 (1972).

129. See J. COSTONIS, *supra* note 21 at 28-39; Comment, *Bonus or Incentive Zoning—Legal Implications*, 21 SYRACUSE L. REV. 895 (1970).

rights will affect both sides of the ledger, dampening the exaggerated effects of the rezoning. On the one hand, transferable development rights should help to alleviate the plight of the property owner who has contributed to the orderly development of the community by improving his property to the extent permissible under the prior classification.¹³⁰ At the same time, although transferable development rights will not eliminate the windfall benefits to those who hold unimproved land, the extent of such benefits should be depressed because those who want to purchase land for development into economically productive units would have an additional source of supply.¹³¹

This suggestion is modest; it is offered as a potentially worthwhile contribution toward the alleviation of some spillover effects of the zoning process. At the same time, the proposal should not be dismissed out of hand because it is modest. The problems encountered in land use management are far too complex to be subject to easy and all-encompassing solutions. A more promising method is a pragmatic approach to fashioning workable solutions to smaller and manageable segments, particularly when the proposed approaches pose fewer possibilities of creating new problems of their own.

CONCLUSION

There is considerable disillusionment with zoning. This was inevitable as a reaction to optimistic expectations of those who nurtured it in its infancy.¹³² Perhaps, however, there is another, deeper reason for this dissatisfaction. Zoning is by no means the only or the most important tool of land use planning.¹³³ It has done certain things very well,¹³⁴ but

130. Although this may require the owner to try to discount the future, he is better off because, at the very least, he is given a choice where he had none before. Moreover, any decision to sell a property interest realistically involves an element of discounting the future.

131. These suggestions will not satisfy those who believe that these incremental values should accrue to the public treasury. This position is, however, controversial and no satisfactory tools have been developed to implement it. See Babcock & Bosselman, *Conflicts in Land Use*, in ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING 143, 145 (D. McAllister ed. 1973); Comment, *Betterment Recovery: A Financial Proposal for Souther Land Use Planning*, 3 YALE REV. OF L. & SOC. ACTION 192 (1973); cf. Hagman, *Windfalls for Wipeouts*, 44 APPRAISAL J. 69 (1976).

132. E.g., 1 J. METZENBAUM, LAW OF ZONING 60-68 (2d ed. 1955); 1 E. YOKLEY, ZONING LAW AND PRACTICE §§ 1-12 to -15 (2d ed. 1953).

133. For a short list of other tools, see Bartke & Shinn, *Land Use Planning in Iran—A Critical Survey*, 20 WAYNE L. REV. 87, 113 (1973).

134. *Id.* at 105-09. See also Rueter, *Externalities in Urban Property Markets: An Empirical Test of the Zoning Ordinance of Pittsburgh*, 16 J. LAW & ECON. 313, 337

this does not mean that it can do everything. Some of the dissatisfaction with zoning arises because it has been employed to do too many disparate things. Attempts to use zoning to preserve a wildlife sanctuary,¹³⁵ to keep avant garde architecture out of a neighborhood,¹³⁶ to silence a protest against the taxing policies of the community,¹³⁷ to keep X-rated movie theaters out of residential neighborhoods,¹³⁸ to preserve a parking lot,¹³⁹ or to relieve pressures on a sewage treatment plant¹⁴⁰ simply stretched the tool beyond the breaking point. It is much better to do a few things well than to try to do many things badly.

Land use management becomes ever more complex in an increasingly interdependent society. The diverse problems involved will not be solved by simplistic approaches.¹⁴¹ Thus, the proposition that regulatory powers, already stretched to the breaking point, can do the job virtually by themselves¹⁴² will not hold true. Whether this is because of constitutional

(1973). After this Article was written, the results of a study based on data from the Boston Metropolitan area were published and indicate a statistically significant relationship between the value of single-family residential property and zoning. Stull, *Community Environment, Zoning, and the Market Value of Single-Family Homes*, 18 J. LAW & ECON. 535 (1975).

135. *Morris County Land Imp. Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963) (property zoned to preclude any use other than as a hunting and fishing preserve or a wildlife sanctuary, partly at the instance of a conservation foundation that owned land in the same area).

136. *State ex rel. Stoyanoff v. Berkeley*, 458 S.W. 2d 305, 307 (Mo. 1970) (architectural board of controls prevented construction of a pyramid shaped "monstrosity of grotesque design" among Colonial, French Provincial and English homes).

137. *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed sub nom. Stover v. New York*, 375 U.S. 42 (1963) (zoning ordinance amended to prohibit clotheslines in front yards as means to get rid of rags and scarecrows hung as protest over local taxes).

138. *American Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir. 1975), *rev'd sub nom. Young v. American Mini Theatres*, 44 U.S.L.W. 4999 (U.S. June 24, 1976) (ordinance prohibiting movie theatres exhibiting X-rated movies from being closer than 1,000 feet apart in residential areas).

139. *Vernon Park Realty, Inc. v. City of Mount Vernon*, 307 N.Y. 493, 121 N.E.2d 517 (1954) (86,000 square foot parcel in front of railroad station in suburban community, previously used for parking, rezoned "designated parking district" to prohibit all uses except parking).

140. *Westwood Forest Estates, Inc. v. Village of South Nyack*, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969) (downzoning a parcel to prevent the construction of a high-rise apartment building because of inadequacy of the sewage treatment plant in the municipality).

141. The truth of this becomes apparent in many contexts. See, e.g., Verbit, *The Urban Transportation Problem*, 124 U. PA. L. REV. 368 (1975), which subjects the problem to a searching analysis and suggests that solutions must combine several approaches, including land use planning tools.

142. Donaldson, *Regulation of Conduct in Relation to Land—The Need to Purge*

restraints, or because of the belief within the community that justice is not being done, is irrelevant. By the same token, the marketplace alone cannot cope with the issues presented by land use decisions,¹⁴³ although it is true that many resolutions are better made by the marketplace. Attempts to provide new mechanisms for internalization of harmful spill-over effects through private agreements and revamped nuisance rules, coupled with the imposition of a new layer of bureaucracy, are not necessarily going to be an improvement.¹⁴⁴ The principal fault with these proposals is that they try to create universally applicable systems. Such systems are unattainable.

There should be a move from extreme and doctrinaire positions to a much more pragmatic approach. The sterile debate about the level of government that is best suited to the task has long since run its course;¹⁴⁵ in the abstract, there is no such level. On the contrary, the approach to land use management should be based on the nature of the problems.¹⁴⁶

Natural Law Constraints form the Fourteenth Amendment, 16 WM. & MARY L. REV. 187 (1974); Elliott & Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls*, 1 HOFSTRA L. REV. 56 (1973). But see F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 302-09 (1973) (discussion of the concept of "compensable regulations").

143. This, of course, fully is realized by sophisticated advocates of the market approach, e.g., Ellickson, *supra* note 2, at 761-79; Stroup & Baden, *Externality, Property Rights, and the Management of our National Forests*, 16 J. LAW & ECON. 303 (1973). But see Siegan, *Non-Zoning in Houston*, 13 J. LAW & ECON. 71 (1970). Compare Gramm & Ekelund, *Land-Use Planning: The Market Alternative*, 43 APPRAISAL J. 562 (1975), with Reynolds & Reynolds, *Winds of Change*, 43 APPRAISAL J. 554 (1975). For an empirical study and the conclusion that some form of zoning may be desirable and economically efficient, see Rueter, *Externalities in Urban Property Markets: An Empirical Test of the Zoning Ordinance of Pittsburgh*, 16 J. LAW & ECON. 313 (1973).

144. See, e.g., Professor Ellickson's suggestions in this respect. Ellickson, *supra* note 2, at 719-61; for a critique, see Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1026-32 (1975).

145. See, e.g., Symposium, *Restructuring Metropolitan Area Government*, 58 GEO. L.J. 663 (1970).

146. See, e.g., Bartke & Shinn, *Land Use Planning in Iran—A Critical Survey*, 20 WAYNE L. REV. 87, 110-11 (1973) (recommendations based on experiences in a country where all planning decisions are made centrally, although decentralization is necessary to some extent).

There is increasing evidence of such a subject matter approach, e.g., Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969) (interstate compact dealing with Lake Tahoe drainage area). See *Brown v. Tahoe Reg. Plan. Agency*, 385 F. Supp. 1128 (D. Nev. 1973); *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971). Similarly, the San Francisco Bay Conservation and Development Commission was created to deal with the entire San Francisco Bay. CAL. GOV'T CODE §§ 66600-60.1 (Supp. 1975). See *Candlestick Properties, Inc. v. San*

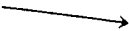
Similarly, the various legal tools available should be used only in those contexts in which they can perform efficiently.¹⁴⁷ An attempt to expand them into new areas in which they do not fit is in most cases doomed to disappointment and results only in discrediting the tools. It is with these broader considerations in mind that this study was undertaken and these findings are presented. This Article does not offer panaceas to urban ills; rather, a workable approach to solving one specific land use problem is suggested, and even if the problem discussed in this Article may be relatively minor, it should not continue to be ignored.

Francisco Bay Conserv. & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); *People ex rel. San Francisco Bay Conserv. & Dev. Comm'n v. Town of Emeryville*, 69 Cal. 2d 533, 446 P.2d 790, 72 Cal. Rptr. 790 (1968). An agency to plan for the entire Adirondack Park area was established by the Adirondack Park Agency Act, N.Y. EXEC. CODE §§ 800-819 (McKinney Supp. 1975). See Note, *Preserving Scenic Areas: The Adirondack Land Use Program*, 84 YALE L.J. 1705 (1975). Cf. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, cert. denied, 96 S. Ct. 18 (1975).

147. Thus, Professor Hagman quoted a California planning official to the effect that transferable development rights work well only in law review articles. Hagman, *Windfalls for Wipeouts*, 44 APPRAISAL J. 69, 81 (1976). This may result from an attempt to make a transferable development right do too many things. These rights may be very useful in their primary role, permitting area-wide density controls and more imaginative urban design. They may also be useful in the context discussed in this Article, particularly if the transferability is over a large enough area and transaction costs are low. On the other hand, it is doubtful whether they can be expected to perform well in many other contexts.

APPENDIX I

1906 Regrade area (completed)

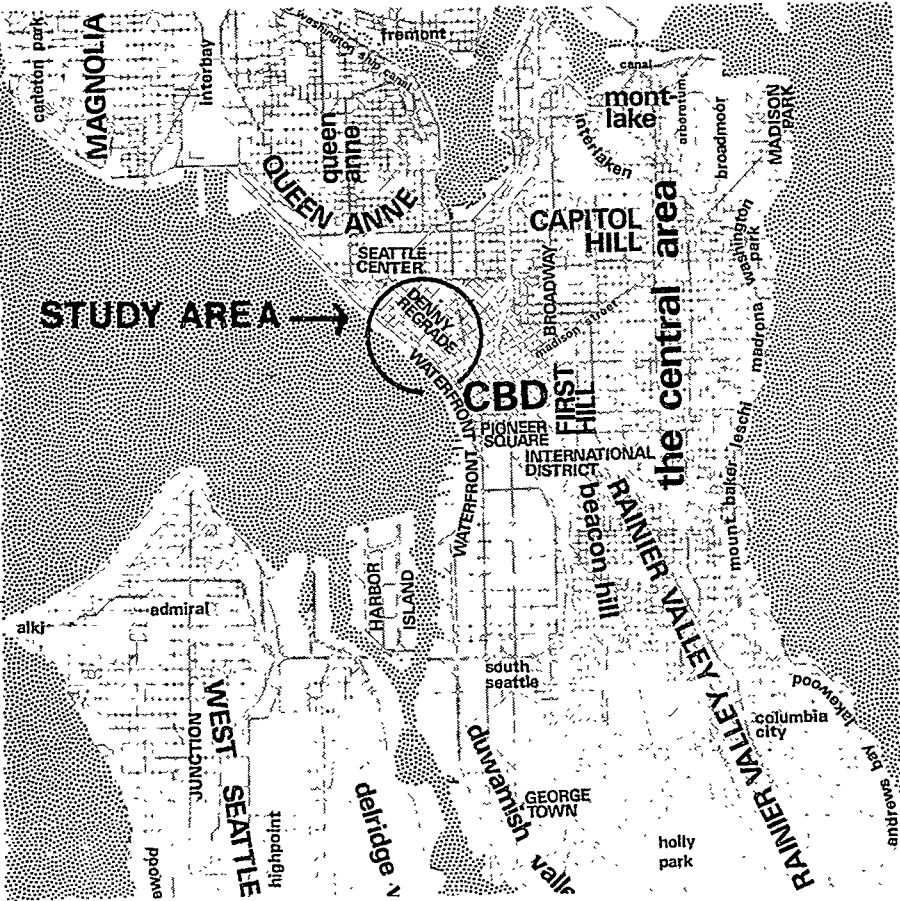


1929 Regrade area (note hill)





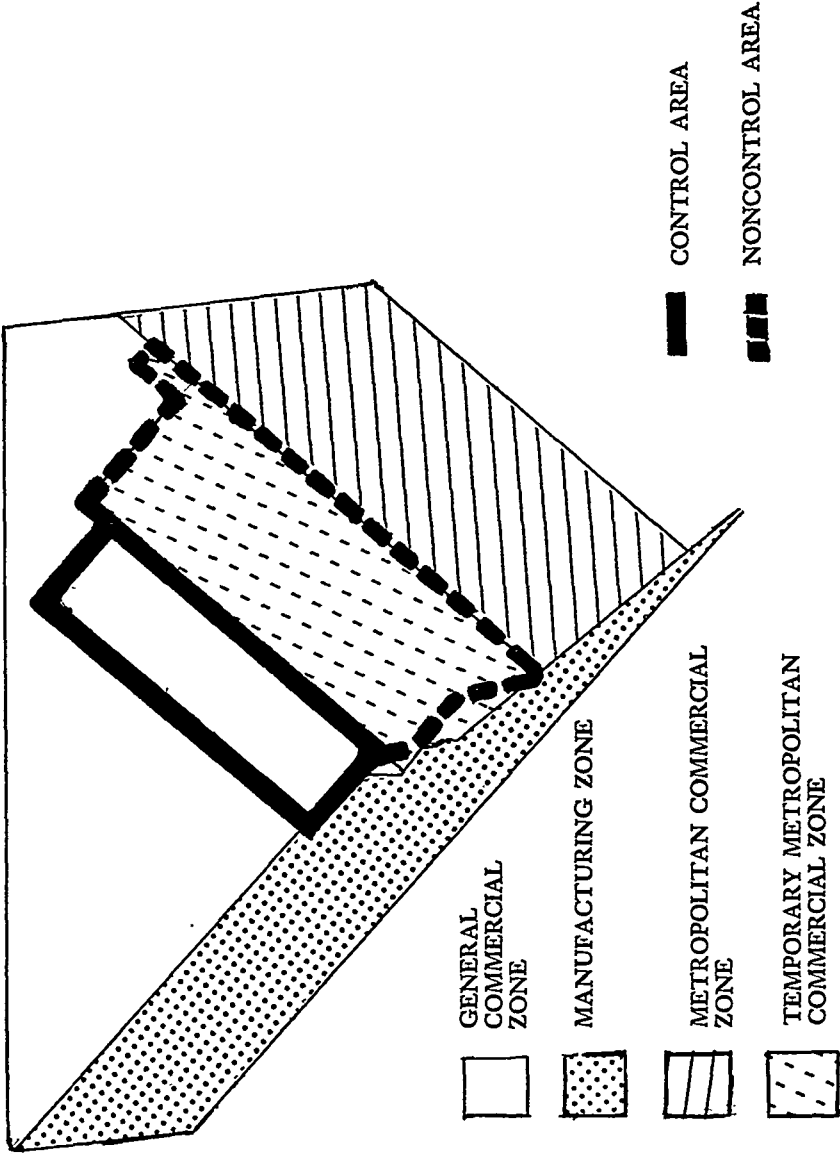
APPENDIX II



Schematic map of the central portion of Seattle showing the relationship of the Denny Regrade to the downtown area.

Source: Department of Community Development, City of Seattle, Denny Regrade Development Plan 3 (1974).

APPENDIX III



Non-Control Group - Land Assessment Figures and Percentage Changes on a Block Basis

No.	1958	Percentage Change	1966	Percentage Change	1971	Percentage Change	1973
1	\$11,350.00	81.2335	\$20,570.00	100.0972	\$41,160.00	24.4898	\$51,240.00
2	25,110.00	43.8072	36,110.00	100.	72,220.00	40.8197	101,700.00
3	33,400.00	16.4072	38,880.00	100.	77,760.00	50.	116,640.00
4	36,400.00	12.4176	40,920.00	100.	81,840.00	54.3988	126,360.00
5	39,900.00	9.7243	43,780.00	100.2284	87,660.00	58.5216	138,960.00
6	111,140.00	20.1188	133,500.00	100.	267,000.00	67.4607	447,120.00
7	75,820.00	17.1063	88,790.00	100.	177,580.00	89.7511	336,960.00
8	49,150.00	- 4.9440	46,720.00	93.5788	90,440.00	84.6970	167,040.00
9	100,380.00	28.4618	128,950.00	100.	257,900.00	80.9073	466,560.00
10	24,850.00	26.4789	31,430.00	100.	62,860.00	85.5552	116,640.00
11	49,900.00	67.8557	83,760.00	100.	167,520.00	36.0315	227,880.00
12	70,740.00	48.4733	105,030.00	100.	210,060.00	59.5973	335,250.00
13	36,590.00	51.8174	55,550.00	100.	111,100.00	85.6796	206,290.00
14	48,610.00	49.8046	72,820.00	100.	145,640.00	83.4729	267,210.00
15	70,740.00	30.5484	92,350.00	100.	184,700.00	83.6058	339,120.00
16	2,660.00	59.3985	4,240.00	100.	8,480.00	52.4764	12,930.00

APPENDIX IV—CONTINUED

No.	1958	Percentage Change	1966	Percentage Change	1971	Percentage Change	1973
17	94,130.00	23.3932	116,150.00	100.	232,300.00	79.9225	417,960.00
18	102,680.00	25.7986	129,170.00	100.	258,340.00	61.7868	417,960.00
19	70,900.00	23.6107	87,640.00	100.9872	182,280.00	79.5260	327,240.00
20	78,560.00	26.6802	99,520.00	100.	199,040.00	96.9654	392,040.00
21	92,800.00	24.3211	115,370.00	100.	230,740.00	79.7348	414,720.00
22	48,840.00	24.9386	61,020.00	100.	122,040.00	91.1504	233,280.00
23	16,200.00	32.0988	21,400.00	100.	42,800.00	81.6822	77,760.00
Total	1,290,850.00	28.1071	1,653,670.00	100.2491	3,311,460.00	73.3030	5,738,860.00

APPENDIX V

Control Group - Land Assessment Figures and Percentage Changes on a Block Basis

	1958	Percentage Change	1966	Percentage Change	1971	Percentage Change	1973
1	\$66,550.00	35.9730	\$90,490.00	100.	\$180,980	84.5950	\$334,080.00
2	48,580.00	31.7826	64,020.00	100.	128,040	43.7598	184,070.00
3	74,200.00	13.7601	84,410.00	100.	168,820	68.8899	285,120.00
4	76,930.00	9.2292	84,030.00	100.	168,060	69.6537	285,120.00
5	6,820.00	2.6393	7,000.00	198.5714	20,900	26.3158	26,400.00
6	67,800.00	19.3363	80,910.00	100.	161,820	56.1735	252,720.00
7	70,400.00	.7955	70,960.00	100.	141,920	88.3033	267,240.00
8	72,840.00	10.4887	80,480.00	106.7097	166,360	53.8591	255,960.00
9	63,240.00	19.8767	75,810.00	100.	151,620	59.2402	241,440.00
10	18,160.00	79.7357	32,640.00	100.	65,280	22.4265	79,920.00
11	50,000.00	39.1800	69,590.00	100.	139,180	46.1417	203,400.00
12	66,820.00	14.4418	76,470.00	100.	152,940	46.1417	236,520.00
13	682,340.00	19.7072	816,810.00	101.5059	1,645,920.00	61.1251	2,651,990.00