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LAND USE PLANNING IN THE COASTAL ZONE: PROTECTING A SENSITIVE ECOSYSTEM WITH TRANSFERABLE DEVELOPMENT CREDITS

I. INTRODUCTION

California's coastline offers a spectrum of natural and scenic beauty, extending from rugged bluffs in the north to warm white sand beaches in the south. The coastal region also provides an economic base as diverse as its geography. Rich in natural and man-made resources, the coastal economy supports productive industries including agriculture, manufacturing, tourism, and housing.¹

The interaction between these contrasting and often conflicting environmental and economic factors has also fostered heated political debate over appropriate governmental policy toward coastal resources. Developers and property owners are anxious to fully realize economic returns while conservationists advocate restrictive growth policies.

The California Legislature has addressed the complex issues confronting coastal decision-making with correspondingly comprehensive legislation. Beginning in 1972 with the original California Coastal Act, the Legislature has enacted expansive

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¹ There are approximately 3.5 million acres of agricultural land in the California coastal zone, providing 350,000 jobs and an annual harvest valued at over $500 million. The coastal zone produces 98-100% of all of California's artichokes, brussels sprouts, broccoli, celery, and avocados. Other coastal crops include lima beans, cabbage, cauliflower, cucumbers, lettuce, green onions, spinach, apples, lemons, strawberries, grapefruit, and tomatoes. The area is also well suited for grazing, and is able to support at least twice as many animals per acre as the statewide average.

Los Angeles, one of the coastal counties, is the state's leading manufacturing county and the center of California's major industrial complex. Manufacturing and construction account for over 25% of total personal income in the coastal zone, a figure approaching $15 billion. The Southern California Visitor Council has estimated that 8.5 million out-of-state visitors spent over $2 billion in the 10-county southern California coastal zone in 1973.

According to the 1970 U.S. census, over 5 million people live within six miles of the California coastline and 700,000 of those live within a thousand yards of the beach.

legislation to regulate the scope and rate of economic development in the coastal zone. The California Coastal Act adopts a protective state policy toward the coast, and delegates authority to the California Coastal Commission (hereinafter Commission) to effect broad statutory objectives regarding the preservation, utilization, development, and enjoyment of coastal resources. The Commission has used its statutorily delegated permit and planning powers to condition, limit, and plan new development in accordance with the policies and provisions of the Coastal Act.

On June 21, 1979, the Commission adopted Guidelines that are intended to apply the policies of the Coastal Act in the Malibu-Santa Monica Mountain coastal region. The Guidelines establish certain criteria to aid the Commission in its evaluation of permit applications for development, and adopt a pilot program of transferable development credits (hereinafter TDC's) to regulate the spatial pattern of new housing in the area.

While the TDC pilot program is the first implementation of TDC's in California, the concept is by no means novel.


3. The Malibu-Santa Monica Mountain area lies in Los Angeles County, approximately ten miles west of the city of Los Angeles. The Guidelines are discussed in depth at text accompanying notes 46-82 infra.

4. The TDC concept has been the subject of planning and feasibility studies conducted by various local jurisdictions, including Sonoma and Marin counties, and the city of Livermore, but has not been adopted outside the coastal zone. See Peterson, Development Rights Transfer in Livermore: A Planning Strategy to Conserve Open Space, 5 GOLDEN GATE L. REV. 191 (1975); Kikel, Transfer of Development Rights: Legal Implications and Legislative Requirements—Report for Marin County Planning Department (June 1975); Official Memorandum from Steven Rikala to Bill Press, State of California Office of Planning and Research (Feb. 9, 1979); Sedway-Cooke, Central Sonoma County Density Transfer Project—Report to the Sonoma
Other jurisdictions, primarily in the eastern United States, have used TDC's as a method of preserving historic landmarks and prime agricultural land. TDC's have had limited practical application, however, and many questions remain concerning their legality and feasibility in land use planning.

Two essential issues in determining the legality of any TDC program are: (1) whether the acting governmental body has the authority to adopt TDC's; and (2) whether the TDC regulation amounts to an unconstitutional taking of private property without just compensation. The first issue can be addressed by evaluating the applicable enabling legislation to determine the scope of authority vested in the acting governmental agency. The second issue requires an analysis of the extent to which the governmental action deprives restricted landowners of their rights to realize reasonable economic returns from their property.

This comment will address the two issues outlined above by tracing the legislative history of the Coastal Act and analyzing policy as reflected in the statute. The Guidelines them-

County Planning Department (June 1976). These studies conclude that while TDC's can be a lawful planning tool, administration of a TDC program on a county-wide basis makes it a cumbersome alternative to such traditional planning techniques as zoning, planned unit developments (PUD) and conservation easements.


6. Collier County, Florida, and Southampton, Long Island, New York have adopted zoning ordinances that allow voluntary transfer of development rights as an alternative to normal subdivisions. Chesterfield and Hillsborough Townships in New Jersey have utilized a TDC system as an extension of the PUD concept in conjunction with the adoption of new master plans. The city of St. George, Vermont has implemented a successful transfer program to preserve open space; the program is unique insofar as receiver areas are publicly owned. Buckingham Township, Pennsylvania adopted a revised zoning ordinance in 1975, using TDC's to preserve agricultural land. As will be discussed at text accompanying notes 115-25 infra, New York City has also used TDC's successfully to preserve historic landmarks.
selves will then be tested to determine whether TDC's are consistent with statutory objectives, and whether enactment is within the delegated authority of the Commission. After concluding the Commission does have the authority to implement TDC's, the comment will analyze whether the TDC program as presently formulated will unconstitutionally deprive property owners of their rights to realize reasonable economic returns from their property.

I. The California Coastal Act and the Coastal Commission

A. The California Coastal Zone Conservation Act of 1972

After passage of "The Coastal Initiative," a public initiative appearing on the November 1972 ballot, the Legislature enacted the California Coastal Zone Conservation Act of 1972 (hereinafter the 1972 Act). Prior to 1972, the coastal region had been subject to the planning discretion of local jurisdictions. Such a piecemeal approach afforded maximum local flexibility in governing coastal activity, but led to a significant deterioration of the coastal environment. The Coastal Initiative was a clear public demand for comprehensive statewide legislation to conserve coastal resources and plan future development.

The 1972 Act established a four-year program for planning and managing the coastal zone. It declared that the

7. The Coastal Initiative appeared as Proposition 20 on the November 1972 ballot.


9. Prior to the passage of Proposition 20, California's 1,072 miles of mainland coastline (excluding the San Francisco Bay, which since 1965 has been subject to the jurisdiction of the Bay Conservation and Development Commission) and its 300 miles of offshore channel island coastline were subject to the jurisdiction of 15 counties, 45 cities, and 42 states and 70 federal agencies.

10. The 1972 Act defined the coastal zone as "that land and water area of the State of California . . . extending seaward to the outer limit of the state jurisdiction, . . . and extending inland to the highest elevation of the nearest coastal mountain range, except that in Los Angeles, Orange, and San Diego Counties, the inland boundary of the coastal zone shall be the highest elevation of the nearest coastal mountain range or five miles from the mean high tide line, whichever is the shorter distance." CAL. PUB. RES. CODE § 27100 (Deering 1976) (repealed 1977).

The successor to the 1976 Act, the California Coastal Act of 1976 (hereinafter the 1976 Act) (discussed at text accompanying notes 23-45 infra), limits the inland boundary of the coastal zone to 1,000 yards from the mean high tide line. In signifi-
coastal zone is a "distinct and valuable natural resource," and that the policy of the state is "to preserve, protect, and where possible, to restore the resources of the coastal zone." It further found the coastal zone exists "as a delicately balanced ecosystem" and invoked the state's police power to "preserve the ecological balance of the coastal zone and prevent its further deterioration and destruction."

The 1972 Act created the California Coastal Zone Conservation Commission and six regional commissions to implement statutory provisions. The Commission was directed to prepare and submit for legislative approval a comprehensive, long-range plan for the coastal zone. The Act required that the Commission's plan be consistent with several objectives, including: "the preservation . . . of all living and non-living coastal resources" and the "enhancement of the overall quality of the coastal zone environment." The Act also outlined certain specific components for inclusion in the plan, including a land use element, a public access element, a recreation element, and a population element for the establishment of maximum desirable population densities.

The Commission was further given "Interim Permit Control" over development in the zone prior to adoption of the
ultimate plan. Any person wishing to perform any development was required to obtain a permit from the regional commission.\textsuperscript{22} Permit approval was left largely to the discretion of the regional commission, although the statute required that development not have "substantial adverse environmental or ecological effect" and placed the burden of proof on the developer.\textsuperscript{23}

The 1972 Act established a protective state policy toward the coast. It sought to halt the rapid ecological demise of the coastal zone by placing strict environmental constraints on economic expansion and creating a state agency with broad powers to enforce the statute. The 1972 Act addressed long-term policy issues by initiating a process of comprehensive study and planning for the conservation of coastal resources. Many conclusions of the planning study were incorporated into the 1976 Act.

B. \textit{The California Coastal Act of 1976}

The 1972 Act was scheduled to expire on January 1, 1977.\textsuperscript{24} In 1976, the California Legislature enacted The California Coastal Act of 1976.\textsuperscript{25} The 1976 Act retreated from the

\textsuperscript{22} Id. \textsuperscript{23} Id. \textsuperscript{24} Id. \textsuperscript{25} Id.
protective language of the 1972 Act, emphasizing instead a “balanced utilization . . . of coastal zone resources taking into account the social and economic needs of the people.”

The 1976 Act recognizes that “carefully planned” future development is “essential to the economic and social well-being of the people . . . of this state.” Although the 1976 Act continues to recognize the coastal zone as “a delicately balanced ecosystem,” it stresses utilization of coastal resources as well as conservation and protection.

The 1976 Act seeks to achieve this balanced result by providing more specific conditions and standards for new development, including a requirement that new development be in close proximity to existing developed areas that are able to accommodate it. Even if the location of a proposed development is deemed appropriate, the developer is further required to minimize the risk of geological instability to the site, and minimize energy consumption and vehicle miles traveled. In considering a permit application, the Commission must evaluate scenic and visual impacts likely to result from the proposed development, and any effect the proposed development will have on public access to the beach.

poses of clarity, will still be referred to as the 1976 Act.

26. Id. § 30001.5(b) (West 1977).
27. Id. § 30001(d) (West Supp. 1980).
28. Id. § 30001(a) (West 1977).
29. The change in legislative policy is illustrated by comparing former CAL. PUB. RES. CODE § 27001 (Deering 1976) (repealed 1977), and CAL. PUB. RES. CODE § 30001.5(a) (West 1977). The 1972 Act provided “it is the policy of the state to preserve, protect, and where possible, to restore the resources of the coastal zone.” CAL. PUB. RES. CODE § 27001 (Deering 1976) (repealed 1977). The 1976 Act declares “the basic goals of the state for the coastal zone are to . . . [p]rotect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment.” CAL. PUB. RES. CODE § 30001.5(a) (West 1977). The 1972 Act does not specifically define “possible.” However, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1771 (15th ed. 1966), defines “possible” as “capable of happening or being done.” The 1976 Act defines “feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” CAL. PUB. RES. CODE § 30108 (West 1977).
31. Id. §§ 30253(2), (4) (West 1977).
32. Section 30251 requires approved development to “be sited and designed to protect views to and along ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.” Id. § 30251.
33. Section 30001.5(c) states that one of the primary goals of the 1976 Act is to provide public access to the coast. Id. § 30001.5(c). Section 30212(a) requires that
The 1976 Act extended the life of the Commission, but returned primary responsibility for the long-range management of the coastal zone to local jurisdictions. The Act directs jurisdictions to prepare Local Coastal Programs (hereinafter LCP's) to implement the Act at the local level. The LCP's, which are subject to final state approval, are to contain the local jurisdiction's "(a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within the sensitive coastal resources areas, other implementing actions which when taken together, meet the requirements of, and implement the provisions and policies of, [the Act] at the local level." The Commission has the authority to approve or disapprove LCP's and has adopted procedures governing the LCP certification process. The standards for LCP acceptability are provided in chapter 3 of the Coastal Act, and the Commission maintains an advisory role as to the precise contents of each LCP.

Once an LCP has been certified, the local planning authority will assume responsibility for reviewing permits for development. The regional commission will be abolished and the state Commission relegated to the status of an administrative appeals board. Prior to LCP certification, developers are still required to obtain permits from the regional commission. The process is still largely discretionary, although spe-

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new development projects provide public access from the nearest public roadway to the shoreline and along the coast. Id. § 30212(a) (West Supp. 1980). Section 30252 provides that public access should be maintained and enhanced in locating new development. Id. § 30252 (West 1977). Sections 30530-30534 establish that there is a need for a coastal public access program. Id. §§ 30530-30534 (West Supp. 1980).

34. Id. § 30500(a) (West 1977).

35. Id. § 30108.6 (West Supp. 1980). The Commission is required to designate "sensitive coastal resource areas" in accordance with the provisions of section 30502. Id. § 30503 (West 1977).


39. The local jurisdiction is authorized to request that the Commission prepare its LCP. Id. § 30500(a) (West Supp. 1980).

40. Id. § 30305 (West 1977). The regional commissions are scheduled to terminate by statute on June 30, 1981, whether or not all LCP's have been certified. Id. (West Supp. 1980).

41. Id. § 30519(a) (West 1977).

42. Id. § 30600(b). The local jurisdiction may elect to exercise permit control even prior to LCP certification by establishing adequate "procedures for filing, processing, review, modification, approval, or denial of a coastal development permit." Id. § 30600(b). See Cal. Pub. Res. Code §§ 30604, 30620.5 (West 1977 & Supp.
cific statutory standards such as those indicated above guide the commissions.

In sum, the 1976 Act seeks to achieve long-term harmony between the conflicting environmental and economic factors outlined in the introductory remarks of this comment. Based on extensive planning studies conducted between 1972 and 1975, the Legislature determined the most efficient long-term utilization and protection of coastal resources could best be achieved by effective planning at the local level. However, since balanced resource utilization and conservation require consideration of the entire coastal environment, the Act retains the statewide Commission as a guiding force in the development of the coastal zone. Until the final planning scheme incorporating LCP’s is established, the state agency continues to have interim permit control over most development.43

II. THE SOUTH COAST REGIONAL INTERPRETIVE GUIDELINES

A. Generally

The 1976 Act directs the Commission to establish interim procedures for the submission, review and appeal of permit applications prior to LCP certification.44 This interim process includes the issuance of “interpretive guidelines designed to assist local governments, the regional commissions, the [state] commission, and persons subject to the provisions of [the Coastal Act] in determining how the policies of [the Act] shall be applied in the coastal zone prior to certification of local coastal programs.”45

Pursuant to this statutory directive, the South Coast Regional Commission adopted Interpretive Guidelines on June 21, 1979. These Guidelines “interpret the policies of the Coastal Act” by creating new criteria for the approval of

1980).  
43. Some development does not require a permit from the regional commission. Exempted development includes certain improvements to existing single family residences (Id. §§ 30610(a), (b) (West 1977)); some maintenance dredging (Id. § 30610(c)); certain repair or maintenance activities (Id. § 30610(d)); certain developed urban areas (Id. § 30610.5); power plants operating under the jurisdiction of the State Energy Commission (Id. § 30413); and land held by the federal government (Id. § 30008).
44. Id. § 30620.
45. Id. § 30620(a)(3).
Recognizing the increasing demand for housing in an attractive area with significant resources, the Guidelines seek to "fairly allocate the area's limited service and environmental carrying capacity." The 1976 Act establishes a high priority for development within or near "existing developed areas able to accommodate it." The Guidelines identify existing developed areas within the region that are able to accommodate more development and provide that such designation makes these areas likely sites for new housing. The Guidelines further identify those existing developed areas that would be best suited for immediate expansion prior to adoption of the county's LCP. These designations are based on standards for expansion set forth in the Commission's Statewide Interpretive Guidelines. The Statewide Interpretive Guidelines provide that existing developed areas may be expanded prior to LCP certification if the following conditions are satisfied: 1) coastal resources within the expansion area are permanently protected; 2) the lands are near employment centers; 3) necessary urban services are easily available; and 4) development of alternative sites would pose a greater threat to coastal resources. The regional Guidelines further provide that expansion of existing developed areas should be decided on a case-by-case basis, and that a permit will be issued only if all direct and cumulative environmental effects of the expansion are mitigated.

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46. California Coastal Commission, South Coast Regional Interpretive Guidelines (June 21, 1979) (hereinafter cited as Guidelines).
47. Id.
48. CAL. PUB. RES. CODE § 30250(a) (West 1977).
49. Guidelines, supra note 46, § A-3. The areas currently designated as "developed" are considered substantially committed to urban or suburban development, as indicated by lot and parcel configuration, the substantial build-out of available parcels, and the existence of public and commercial services necessary to support the community.
50. The Statewide Interpretive Guidelines were adopted pursuant to CAL. PUB. RES. CODE § 30620(b) (West 1977) which directed the Commission to adopt permanent procedures regulating the issuance of permits. The Statewide Guidelines are designed to assist in applying various Coastal Act policies to individual permit decisions; they do not, however, supersede the provisions of the Act or alter the Commission's statutorily created authority.
52. Guidelines, supra note 46, § A-4. Expansions to existing developed areas naturally raise significant issues concerning coastal resources. The long-term policies governing expansion of particular areas should therefore be addressed in the final
The regional Guidelines also consider undeveloped parcels in the Malibu-Santa Monica Mountain coastal zone and determine that only those parcels that are best suited for development should be built-out prior to LCP certification. Although each undeveloped parcel is theoretically capable of supporting at least a limited amount of development, the Guidelines determine that, based on certain site-specific environmental and economic factors, some parcels are better suited than others for present development. The Guidelines do not preclude the possibility of developing less suitable parcels, but encourage present development of certain parcels and defer consideration of other parcels to the final LCP.

The objective of the Guidelines is thus to meet the immediate need for housing in the region by directing growth into areas best able to accommodate it. Such areas may be either developed areas capable of expansion or undeveloped parcels that are suitable for growth. The determination of whether an area is suitable for present development was based on such factors as efficient resource utilization, conservation and protection, and the impact of new development on LCP preparation. Designation of a parcel as unsuitable for present development does not necessarily preclude even immediate

53. Guidelines, supra note 46, § B. There is currently a large inventory of undeveloped parcels in this area. The final LCP will ultimately address the potential development of all the undeveloped parcels. Prior to LCP certification, expansion should be allowed only in those areas best suited for immediate development in order to reduce the potential for adverse environmental impacts, to protect coastal resources, and to preserve planning options for the local jurisdictions.

54. The Commission considered the following factors, among others, in deciding which areas are best suited for present build-out: 1) the existence of road access to the parcel; 2) the existence of adequate water service; 3) the presence of utility service in the area; 4) the suitability of the parcel for adequate driveway construction; 5) whether the parcel is located within a designated "sensitive habitat" area; 6) whether there are adequate water run-off measures; 7) whether there are any natural hazards (such as landslides or rockfalls) in the area; 8) the slope intensity of the parcel; 9) the development's impact on views; 10) whether there are any archeologically or paleontologically significant sites in the area; 11) the impact of the proposed development on public access; and 12) the nature of the proposed development (i.e., single family residential, multiple-family, or commercial). See Cal. Pub. Res. Code §§ 30210-30264 (West 1977 & West Supp. 1980).
construction; it means only that the parcel’s ultimate development potential will be addressed in the county’s LCP.

B. The TDC Pilot Program—Theory and Application

The implementation of a TDC system is the mechanism proposed by the Guidelines for directing new construction into the region’s most desirable areas. Simply stated, the program is designed to compensate owners of parcels found to be unsuitable for immediate construction by allowing them to sell the development potential of their lots to builders with projects in developing areas. By purchasing development credits, the builders in turn are allowed to intensify the use of their lots beyond current zoning limitations.

To initiate the process, the program designates two classes of land: donor areas and receiver areas. The donor areas are undeveloped small lot subdivisions that have been determined to be least suited for present development. The receiver areas are parcels located in developed areas that are presently able to accommodate intensified use. The program identifies the development potential in the donor area, quantifies it according to various site-specific factors, and severs this potential from the donor parcel by creating equivalent development credits for transfer to receiver parcels. The transfer of credits to receiver areas is encouraged by permitting intensified use there, provided the developer has purchased a sufficient number of credits.

The TDC theory recognizes that, although there is an overriding public interest in sound land use planning, a property owner should have the right to realize a reasonable economic return on the property investment. Whether economic return manifests itself in equity appreciation, rental income,

55. Guidelines, supra note 46. The Guidelines specify a formula for determining the development potential of a given lot. Id. § E-5(c). One development credit is generated for each acre of donor area property, or, for the combination of two or more donor parcels with a combined area of at least 2000 square feet, according to the following formula: A/5 x (50-S)/35. (A is the area of the donor parcels in square feet and S is the average slope intensity.)

56. Small lot subdivisions were selected as donor areas in order to reduce the development potential of parcels deemed unsuitable for present development, and because the uniformity of lot sizes makes credit valuation easier. The pilot program is confined to those small lot donor areas so as to establish a foundation for predicting the impact of TDC’s on the real estate market under a larger scale program.

57. As determined by the factors described in note 54 supra.
or even "just compensation" paid by the government when it takes private property for public use, a property owner's "distinct, investment backed expectations" have historically been considered one element in the proverbial "bundle of rights." TDC's incorporate this concept into an equitable application that completely severs the right to develop the property from the property itself, and allows the owner to then sell this development right to other parties.

The policy goals of avoiding waste and inequity that would result from unregulated development activity underlies the legal separation of transferable development rights from other incidents of ownership. These same policies can be seen in other areas of property law such as mineral rights law. For example, the law recognizes the right of a property owner to sell the right to drill for oil on the property to others. Because the right of the individual owner to drill into oil reservoirs that extend beyond surface boundaries is subordinate to the public interest and the interest of adjacent owners in fairly and efficiently exploiting the underlying resource, the law encourages optimum utilization of the oil by allowing all owners above the oil to "unitize" their drilling rights and transfer them. The oil is thereby most efficiently exploited and delivered without depriving the owners of title to, possession of, or a reasonable economic return from their property.

The surface development potential of a given geographic area can be analogized to the underground oil reservoir described above. The natural carrying capacity of the area is analogous to the oil itself, and, like the oil, may not coincide with legal property lines. Certain lots may be better suited than others for development just as some may be more desirable than others for oil drilling, and, unless the owner is able to market mineral rights, surface development is practically the only way to generate any form of economic return on the property. Just as allowing each owner to drill his own oil well

60. Cal. Pub. Res. Code §§ 3630-3690 (West 1977). The public's interest in the resource development potential of private property can be traced back to common law principles that originated in medieval England. For example, in The King's Prerogative in Saltpetre, 77 Eng. Rep. 1294 (K.B. 1606), the King was allowed to extract saltpeter from private land without compensating the owner because it could be used to make gunpowder, which in turn would be used to defend the country. The common defense was an activity "in which every subject hath benefit." Id. at 1295.
would result in wasteful and inefficient utilization of the oil resource, allowing each owner to engage in unregulated surface development would result in development patterns that are not ecologically sound for the entire area. In resolving this dilemma, mineral rights law does not defeat the right of any one owner to strike oil on his property by only permitting certain owners to drill. Since such selective drilling rights would be inherently inequitable, the law recognizes each owner's right to a fair share of oil income. Conversely, current zoning practices approach the dilemma by subjecting individual owners to the planning discretion of the government. TDC's seek to avoid this inequity by recognizing that an individual owner should not be forced to sacrifice a reasonable economic return on his property so that the public can enjoy the benefits of proper planning. As mineral rights law prevents the waste and inequity that would result from unregulated drilling by separating oil drilling rights, TDC's discourage wasteful development practices and the harshness of zoning policies by separating the right to develop property from other incidents of ownership. By allowing the donor parcel owner to sell the property's development potential, the public interest in proper planning and the private interest in economic return are both recognized and respected.

The government's power to regulate development by using TDC's is also supported by the idea that a parcel's value is partially created by the government. Although the development potential of a given lot is largely dependent on its natural carrying capacity, various zoning ordinances and nuisance laws place limitations on the absolute right of the property owner to develop his land. The natural carrying capacity of a parcel has little direct impact on its value unless its carrying capacity corresponds favorably to present zoning classifications. In this sense, whatever development rights the property owner has "trickle down" from the government via zoning and nuisance laws. According to this "trickle down" theory, the government has broad powers to exercise its police power to regulate development, and need not recognize any inherent development rights in favor of the property owner.61 In this

61. F. Bosselman, D. Callies, and J. Banta, The Taking Issue (1973). The authors argue that any regulation short of actual physical appropriation by the government may be founded exclusively on the police power and need not be compensated. See also Carmichael, supra note 5; Costonis, 'Fair' Compensation and the Ac-
context, the TDC program is considered a gratuitous gesture by the government intended to reduce the harshness of zoning by compensating the landowner for the restrictions imposed on the use of his property.\(^\text{62}\)

Whether development rights are considered incidental property rights similar to mineral rights, or are considered to be created by the government as a function of zoning, TDC's are consistent with accepted principles of modern property law. Regardless of the legal status given development rights, TDC's recognize the property owner's large economic stake in the right to develop the property, as well as the public interest in assuring that development activities are consistent with the wise utilization of resources. TDC's are an attempt to equitably merge these competing interests.

The Guidelines apply the TDC concept in the region by designating three geographically distinct transfer zones,\(^\text{63}\) each containing donor areas and potential receiver sites. Receiver site developers will be granted building permits provided they purchase sufficient development credits from donor areas within the same geographically related transfer zone. The geo-

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\(^{62}\) The California courts apparently have embraced the "trickle down" theory regarding the property owner's right to develop his property. See, e.g., HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975). In HFH, the California Supreme Court held that a zoning ordinance which merely decreases the market value of property does not constitute a taking. The plaintiffs were real estate developers who had purchased a tract of land that was zoned for commercial uses. Before they developed the property, the local zoning body rezoned the property for agricultural uses only, causing a decrease in market value from $400,000 to $75,000. Plaintiffs sought damages in inverse condemnation, claiming the rezoning deprived them of "any reasonably beneficial use of the property commensurate with its value." Id. at 512 n.2, 542 P.2d at 240 n.2, 125 Cal. Rptr. at 368 n.2. The court ruled that "value" is of course not an objective quality, but a social attribute of legal rights." Id. The court clearly rejected the argument that landowners enjoy a vested right in a zoning classification. Id. at 516, 542 P.2d at 242, 125 Cal. Rptr. at 370. See also Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925); Navajo Terminals v. BCDC, 46 Cal. App. 3d 1, 4, 120 Cal. Rptr. 108, 110 (1975) ("no support for a claim that planning designations constitute takings").

\(^{63}\) Zone I consists of the Western Mountain Area, which is the major pilot program area. Major receiver areas along the coast are eligible to receive TDC's from any one of six undeveloped small lot subdivisions that lie inland in canyon areas and mountainous terrain. Zone II is in the Cold Creek Basin area. Zone II's TDC potential is limited because it contains many small lot subdivision donor areas but few potential receiver sites. Zone III contains many potential donor areas, but few receiver areas, and likewise will not participate in the TDC program to any great extent.
graphical relationship aims to satisfy the statutory requirement that the adverse environmental effects of development be mitigated. Under the TDC program, the maximum allowable population in a particular transfer zone is not increased, it is merely clustered into certain sites that have been deemed most appropriate. The Guidelines reason that by shifting population densities within the same geographic area, there will be no net adverse environmental effects. The increased demands placed on the environment by the new development are theoretically offset by preserving geographically related donor areas as open space. Other factors cited as mitigating the adverse effects of intensified development in the receiver area are: 1) reduced energy consumption resulting from fewer automobile miles traveled by residents who are clustered; and 2) not having to extend urban services into unspoiled areas. With direct and cumulative adverse environmental effects thus mitigated, expansion of existing developed areas can be carried out in a manner that is consistent with the Coastal Act’s goal of efficient resource utilization.

During the permit application process, developers in the receiver zone are given conditional project approval; the condition is simply that they purchase enough development credits to satisfy the Guidelines’ “development credit exchange ratio.” Donor area owners do not apply for credits but are

64. As pointed out in the Guidelines, supra note 46, § D-2, “[1] land divisions establish both the location and intensity of new development and therefore, determine the amount of impact on coastal resources which will occur in the future. For the most part, land divisions are irreversible.” It can therefore be argued that TDC’s mitigation of adverse environmental consequences through geographically related transfer zones is not consistent with the Coastal Act. Since the coastal zone is a sensitive ecosystem and since land divisions are irreversible, it would seem that such an indirect, off-site method of “protecting” the delicately balanced environment would not completely offset the true adverse consequences of a new development. The Commission recognizes this conceptual anomaly, but argues that by requiring a “two-to-one” credit exchange ratio, the Act is satisfied. See note 66 supra.


66. Id. § E-5. One development credit is required for each new parcel created by subdividing an existing parcel. For example, in order to divide one parcel into three parcels, two credits are needed; to divide a combination of three parcels into four parcels, one credit is needed. For multiple-family development, one development credit is required for each new unit to be constructed. The number of required developments is reduced by the number of existing subdivided lots within the project site (i.e., a six-unit project erected on two existing parcels requires four credits). See note 55 supra for the formula used to generate development credits. The formula and ratio result in a two-to-one exchange. The credits from two donor areas are required to be purchased for each added parcel in the receiver zone.
required to advertise their desire to participate in the program through "normal real estate market channels." Receiving zone developers are expected to purchase the requisite number of development credits on the open market. The development potential of the donor parcel is completely transferred when the developer-purchaser records a deed restriction prohibiting residential development on the donor parcel. Once that transfer has occurred, the developer is given final project approval.

Participation in the TDC program is entirely voluntary, but is encouraged by the creation of economic incentives. The Guidelines do not prohibit the owner of a donor parcel from applying for a permit to develop his land, but the limited amount of development allowable under the Guidelines would prevent immediate development from being a profitable investment. Thus, rather than choosing to build immediately, the owner could instead sell his development credits to a receiving zone developer who would presumably be willing to pay a higher price for them in order to complete his project.

The TDC program is an attempt to more equitably allocate the burdens of coastal resource preservation between the owners of receiver zone and donor zone property. The developer who is allowed to intensify the use of his land and thereby derive higher profits is required to mitigate the adverse environmental impacts caused by his development by participating in the TDC program. The donor parcel owner

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67. Id. § E-4. The program contemplates that donor parcel owners wishing to participate in the program offer their credits for sale in newspapers or in listings with local realtors.

68. Id. § E-6.

69. The donor parcels were selected specifically with this fact in mind. The standards used to determine the suitability of donor parcels for immediate development impose such restrictive environmental constraints that the costs of construction are not justified in light of the limited size of the dwelling that could be built on the small lots.

70. The price the developer would be willing to pay would be a function of the increased income he would gain from the intensified use of his parcel, minus the marginal cost of building an extra unit, plus the cost of acquiring the necessary development credit.

71. To require the purchase of development credits to mitigate adverse environmental impacts is in the nature of an exaction. The governing body of a city or county is authorized "to require the dedication of land, the payment of fees in lieu thereof, or a combination of both, for park and recreational purposes as a condition to the approval of a final subdivision map." Cal. Gov't Code § 66477 (West Supp. 1980). In Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 640, 484
is given the opportunity to realize an economic return on the property without actually developing it.

The TDC program reflects the shift in the policies underlying the 1972 Act and the 1976 Act. It recognizes the high demand for housing that exists in the region and seeks to most efficiently utilize the limited carrying capacity of the area without compromising resource protection, or prejudicing the county's ability to prepare an acceptable LCP.

Although the goals of the TDC program appear consistent with the policies of the Coastal Act, questions remain concerning the authority of the Commission to adopt such a unique regulation. Also unresolved are issues concerning the impact TDC's are likely to have on public and private property owners. As will be discussed below, this author feels these issues can be resolved in favor of the Commission and TDC's.

III. CHALLENGING THE GUIDELINES

A. Basis for Challenge

The Coastal Act gives the Commission authority to adopt regulations to carry out the policies and provisions of the Act. Although the Act provides specific criteria for the Commission to consider in promulgating its regulations, the California courts have held that the Commission additionally has broad discretion "to weigh complex factors," and that its discretion is "immune from the remedy of traditional mandamus . . . which may be employed [only] to compel performance of a purely ministerial duty." Since TDC's are not spe-

P.2d 606, 611, 94 Cal. Rptr. 630, 635 (1971), the California Supreme Court upheld the constitutionality of these exactions and held that they may be justified even without a "showing of direct relationships between a particular subdivision and an increase in the community's recreational needs." The court also held that "the owner of more valuable land which will support a greater number of living units may be required to pay a higher fee for each new resident than the owner of less valuable land with a lower density." Id. at 645, 484 P.2d at 616, 94 Cal. Rptr. at 640. In Frisco Land & Mining Co. v. State, 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (1977), cert. denied, 436 U.S. 918 (1978), the court held it was within the authority of the Commission to condition the issuance of permits on the landowner's dedication of public access easements.

75. State v. Superior Court, 12 Cal. 3d 237, 240, 524 P.2d 1281, 1284, 115 Cal.

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cifically mentioned in the Coastal Act as a ministerial function of the Coastal Commission, the TDC program must find its justification as a valid, discretionary, administrative act.

The California Government Code provides that "any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief." Although the Commission maintains that its interpretive guidelines are not "regulations," it is applying them in making permit decisions. The Guidelines therefore satisfy the Government Code's definition of a regulation as a "standard of general application . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it."

The Government Code further provides that a regulation promulgated by a state agency, in order to be valid, must meet the following standards: (1) it must be consistent with the statute granting the administrative agency authority to adopt regulations; and (2) it must be within the scope of authority delegated to the agency. Administrative regulations are presumed to be reasonable by a reviewing court, unless it can be clearly shown that the regulations are "so unreasonable as to be arbitrary or capricious, or in excess of the authority vested in the agency."

B. Are TDC's Consistent with the 1976 Act?

To the extent that the TDC program attempts to balance the competing interests of developers, environmentalists, and property owners, the concept is in accord with statutory policies of local planning for balanced utilization and conservation of coastal resources. The program addresses the need for

77. Letter from Coastal Commission Deputy Director Peter Douglas to Assemblyman Charles Imbrecht (July 1, 1977).
78. See, e.g., Application of Monte Markham (Appeal No. 119-79, August 1, 1979).
80. Id. § 11342.2.
81. Id. § 11373.
83. See text accompanying notes 25-29 supra.
housing in the region in a way that does not prejudice either long term local planning options or the "delicately balanced ecosystem." If successful, the program will result in development patterns that concentrate new growth "within or near existing developed areas." Such an infilling approach should reduce the pressures exerted on coastal resources by new developments. Clustered development will reduce the amount of automobile traffic in the area and facilitate public transportation. With many frequent destinations centrally located, transportation corridors will not be as extended, thereby making public transportation a more attractive alternative to the automobile and promoting the statutory mandate for minimizing energy consumption. By discouraging construction in the canyons that comprise the donor areas, the program will fulfill the 1976 Act's requirement for preserving the geological integrity of the coastal zone. The infilling approach to new development will also help achieve maximum public access to the beach by reducing the amount of beach front subject to private control, thereby making each pathway to the beach more accessible to the public.

In order to protect what it found to be a "distinct, valuable natural resource," the California Legislature has initiated a truly ambitious planning process. It remains to be seen whether or not this process will be successful in managing the coastal zone, but in order to achieve statutory aims, creative planning methods such as TDC's are called for. TDC's are consistent with the statute, and a challenge to the Guidelines founded on statutory inconsistency would appear to be without merit.

84. CAL. PUB. RES. CODE § 30001(a) (West 1977).
85. If the commission or any local government body grants or denies a permit "in a manner which will take or damage private property for public use," it must pay just compensation. CAL. PUB. RES. CODE § 30010 (West 1977). It is problematic whether or not TDC's actually fulfill this policy objective.
87. CAL. PUB. RES. CODE § 30253(4) (West 1977).
88. Id. § 30253(2).
89. See note 33 supra.
90. CAL. PUB. RES. CODE § 30001 (West 1977).
C. Does the Coastal Commission Have Statutory Authority to Adopt TDC's?

Although the Commission has been given broad powers to effectuate the Coastal Act,\textsuperscript{91} it cannot usurp the legislative function of the local zoning body. While the Commission is empowered to condition and restrict coastal development, it may not rezone any areas within its jurisdiction, for to do so would be a legislative function that is beyond the Commission's authority.\textsuperscript{92}

The Guidelines resemble a zoning ordinance in the sense that they establish standards of permissible development on different parcels of land. The Guidelines are not, however, the equivalent of a zoning ordinance. The Coastal Act has been judicially determined not to be a zoning measure.\textsuperscript{93} Unlike a traditional zoning ordinance, the Act does not specify a permitted use within a designated area; rather it establishes a protective overlay to existing zoning classifications. The Guidelines do not reclassify present zoning in either donor or receiver areas, but merely encourage development, within existing zoning limitations, that is consistent with the objectives of the Act. The substance of the regulations established by the Guidelines is thereby within the scope of the powers and duties vested in the Commission.

Environmental legislation such as the Coastal Act derives its authority from the state's power to regulate public nuisances.\textsuperscript{94} The Guidelines resemble restrictive spot-zoning to the extent they single out certain parcels for more restrictive uses; they are justified, however, by the overriding statutory policy in favor of preventing environmental deterioration in the coastal zone. Development that would lead to environmental derogation is similar to a public nuisance, which the administrative agency is required to prevent.

\textsuperscript{91} See notes 36-39 and accompanying text supra.

\textsuperscript{92} Cal. Gov't Code § 65850 (West 1980) provides that the "legislative body of any county or city by ordinance may: (a) Regulate the use of buildings, structures, and land." Cities and counties have plenary power to zone, plan and issue permits. Cal. Const. art. XI, § 5(a). The Coastal Act does not intrude on this plenary power because it applies only in the event of a conflict between local and state regulation, or under the doctrine of state preemption of the local regulation. See CEEED v. California Coastal Zone, 43 Cal. App. 3d 306, 316, 118 Cal. Rptr. 315, 325 (1980).

\textsuperscript{93} 43 Cal. App. 3d at 313, 118 Cal. Rptr. at 322.

\textsuperscript{94} Id. at 319, 118 Cal. Rptr. at 328.
In sum, the Commission has been given broad powers to restrict and condition development. Since promulgation of the TDC Guidelines is an appropriate administrative action, and since the goals of the program are consistent with the Coastal Act, an assertion that the Commission has exceeded its authority in creating the Guidelines is unlikely to succeed. While the Commission is authorized to regulate coastal development, neither it nor any other governmental body may regulate private property in such a way as to take private property without just compensation. Because the TDC concept deals with development rights, it necessarily raises the question of whether the regulation constitutes a taking. This author will next argue that there is merit to a challenge based on the taking issue; however, such a challenge, even if successful, is unlikely to render the program invalid.

D. The Guidelines and the Taking Issue

The issue of whether a land use regulation constitutes a taking of private property without just compensation does not lend itself to simplistic analysis. The fifth amendment to the U.S. Constitution provides that private property shall not be taken for public use without just compensation. The U.S. Supreme Court has found that this provision was designed to prevent the government from forcing individuals to "bear public burdens which, in all fairness, should be borne by the public as a whole." The Court has not been precise, however, in defining what is a compensable "taking" of private property. Admitting that the question of what constitutes a taking has proven to be a problem of "considerable difficulty," the Court has stated it has "been unable to develop any 'set formula' for determining when 'justice and fairness' require compensation." Whether there has been a compensable taking, then, depends largely upon the particular circumstances of each case, resulting in what has been called the "crazy-quilt

95. See Costonis, 'Fair' Compensation and the Accommodation Power, supra note 5; Sax, supra note 61.
96. U.S. Const. amend. V.
98. 438 U.S. at 124.
pattern of Supreme Court doctrine" regarding this issue.100

The cases confirm that the Court has engaged in "essentially ad hoc, factual inquiries" in determining when a taking has occurred.101 However, two factors have emerged as critical in making the determination: 1) the economic impact of the regulation on the property owner and the extent to which the regulation has interfered with distinct investment-backed expectations; and 2) the character of the governmental action in question.102 With regard to the second factor, the Court has pointed out that a taking may more readily be found when the interference with property can be characterized as a physical invasion by the government rather than when the interference arises from some "public program adjusting the benefits and burdens of economic life to promote the common good."103 The Court has generally expressed a tolerant view of land use regulations that promote the public health, safety, and general welfare.104

California courts have also shown a willingness to accept restrictive land use regulations. The most recent California Supreme Court case on the issue, Agins v. City of Tiburon,105 held that a land use regulation will be found unconstitutional and subject to invalidation "only when its effect is to deprive the landowner of substantially all reasonable use of his property."106 In Agins, the court was asked to decide whether the operation of the city's zoning ordinance, which severely restricted a landowner's use of his property,107 allowed the re-

100. Sax, supra note 61.


103. 438 U.S. at 125.


106. Id. at 277, 598 P.2d at 32, 157 Cal. Rptr. at 379.

107. The rezoning ordinance designated plaintiffs' property as "RPD-1", meaning that the maximum authorized use of the property (a 5-acre tract) would be single-
stricted property owner to seek damages in inverse condemnation. The court held that declaratory relief, not damages, is the appropriate relief in such cases. The court stated that while there is a clear constitutional basis for the protection of private property, the term “property” “denotes the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use, and dispose of it . . . The constitutional provision is addressed to every sort of interest the citizen may possess.” The ordinance at issue in Agins restricted the property owner’s right to develop his property but did not deprive him of substantially all reasonable use.

The Agins decision suggests the California Supreme Court’s policy of keeping the processes of land use regulation flexible enough to meet the changing needs of society. The court noted that modern planning techniques, which are uniformly approved today, would probably have been rejected a few years ago as arbitrary and oppressive. Land use planning is a particularly dynamic branch of the law. As cities expand and increasing pressures are placed on the environment, the need for responsible, effective planning becomes more profound. The court in Agins demonstrated a special sensitivity to the planning process by insulating the local planning body from liability for money damages and the concomitant “chilling effect upon the exercise of police regulatory powers” which would result from the imposition of civil liability.

The California Supreme Court has also addressed the taking issue in the context of Coastal Commission rulings. In the watershed case of State v. Superior Court, the court

family residences at a density of not less than two nor more than one dwelling unit per gross acre.” Id. at 271, 598 P.2d at 28, 157 Cal. Rptr. at 375. The plaintiffs bought the property for residential purposes, but the ordinance limited construction to a maximum of five houses for the entire tract.

108. Id. at 273, 598 P.2d at 29, 157 Cal. Rptr. at 376.
109. Id. (quoting United States v. General Motors Corp., 323 U.S. 373, 377 (1945)) (emphasis in original).
110. See note 107 supra.
111. 24 Cal. 3d at 275, 598 P.2d at 30, 157 Cal. Rptr. at 377 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 372 (1926)).
112. Id. at 276, 598 P.2d at 30, 157 Cal. Rptr. at 378.
was asked to decide whether the Commission's denial of a developer's permit application gave rise to a cause of action in inverse condemnation. The Commission denied the permit because the land proposed to be developed might ultimately be designated as open space in the final coastal plan. Ruling that the denial did not constitute a taking, the court examined the purposes of the Coastal Act and the effect of the Commission's action on the property owner's land. The court looked to the language of the Coastal Act to determine its purposes and found that the permanent protection of the coastal zone is of "paramount concern" to the people of California. The requirement of acquiring a building permit from the Commission was found to be an interim measure necessary to assure that development in the coastal zone occurring prior to adoption of the final comprehensive coastal plan was consistent with the statutory objective of resource preservation. The public interest in coastal resource preservation justified the temporary restrictions on the individual's right to develop his property.

Although State v. Superior Court construed the 1972 Act, its reasoning remains sound under the 1976 Act. The permit process can still be considered an interim program until LCP's are certified. The Commission is empowered to restrict development in order to preserve coastal resources pending adoption of the final LCP's, thereby justifying restrictions on development rights imposed by the Guidelines.

Whether TDC's constitute a taking of private property has received limited judicial consideration, although the U.S. Supreme Court dealt with the issue in Penn Central Transportation Co. v. New York City. The Court was asked to decide whether "a city . . . may place restrictions on the development of individual historic landmarks in addition to those imposed by applicable zoning ordinances without effecting a taking requiring the payment of just compensation." Under the facts of the case, New York City's Landmarks

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116. Id. at 108.
Preservation Law designated Grand Central Terminal as a historic landmark, which resulted in the imposition of additional building restrictions beyond those imposed by applicable zoning laws. The owners of the terminal applied for a permit to expand and remodel the building, but the permit was denied. Under New York City's zoning laws, however, a landmark owner who was prevented from developing his property to the maximum density permitted under applicable zoning ordinances could transfer unused development rights to contiguous parcels or to parcels across the street. Penn Central Transportation Company owned at least eight parcels that were eligible to receive Grand Central's unused development potential. Thus, there was a market for the unused development potential, and it was a virtual certainty that Penn Central would be able to take advantage of the development transfer system.

The Supreme Court ruled that the operation of the Landmark Preservation Law did not constitute a taking. The Court weighed the economic impact and nature of the government's action and determined that a diminution in property value caused by a regulation does not constitute a taking unless the regulation renders the property "wholly useless." In upholding the TDC program, the Court recognized an inherent value in the transferable development rights and determined that "while these rights may well not have constituted just compensation if a taking had occurred, the rights . . . mitigate whatever financial burdens the law has imposed, and are to be taken into account in considering the impact of the regulation." In evaluating the economic burden placed on the private landowner, the Court also noted that the regulation did not prohibit current uses of the property. Since the economic impact of the regulation was partially offset by the ability to transfer development rights, and since the regulation did not forbid the owner from continuing to use the prop-

117. Id. at 116-17.
118. Id. at 109. These restrictions include an affirmative duty to keep the exterior of the property in good repair and to the Commission's approval of any proposed alteration of the exterior features of the building.
120. 438 U.S. at 128 (quoting Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908)).
121. Id. at 138.
In its present fashion, the first critical "taking" factor was resolved in favor of the government.

The Court then examined the character of the government's actions. The plaintiffs did not challenge the city's authority to regulate aesthetic features, and stipulated that restricted development of historic landmarks was a legitimate public purpose. Since the private property owner was not unduly burdened by the regulation, the second critical taking factor was also resolved in favor of the government. The Court in *Penn Central* awarded TDC's their first substantial judicial victory.

TDC's were also examined by a New York court in *Fred F. French Investing Co. v. City of New York*.122 There the New York Court of Appeals struck down a TDC program that required a private property owner to dedicate his land as a public park in exchange for the opportunity to transfer the site's development rights. The critical facts underlying the decision were: 1) the regulation deprived the owner of any possibility of using his land to generate a return on his investment; and 2) the development rights were left in legal limbo,123 not readily transferable to other property due to a lack of common ownership of the donor parcel and a suitable receiver site. The program's flaw, according to the court, was that the value of the development rights at the time they were attached to the donor site might not be preserved when the property owner went into the unpredictable real estate market to try to sell them.124 Since the government's action deprived him of the right to use his land (by requiring him to dedicate it as a park), and since the transferable development rights had no definite economic value, the court held that the government had destroyed the economic value of the property.125

These cases demonstrate that a TDC land use regulation may be struck down as an invalid exercise of the state's police power if it precludes the owner's ability to realize any economic return on the restricted property. Judicial scrutiny will focus on the parcel's remaining permissible uses and the marketability of the transferable development credits. Further, the regulation must be sufficiently related to a substantial

123. *Id.* at 598, 350 N.E.2d at 388, 385 N.Y.S.2d at 11.
124. *Id.*
125. *Id.*
public purpose and reasonably necessary to carry out this purpose without imposing an undue burden on the individual property owner.

In applying this test to the TDC Guidelines, the Coastal Commission's action can be characterized as an interim restraint on the present development of certain parcels which, according to the policies of the Coastal Act, should not be developed until after LCP certification. The public interest in planning for the preservation and efficient utilization of coastal resources justifies the Commission's temporary limitations on the development of donor parcels. So long as the public purpose does not unduly burden donor parcel owners, the TDC program should pass constitutional muster.

There is no question the implementation of the Guidelines will result in significant economic impacts on property owners. Although development credits are to be determined by a constant formula, the designation of a parcel as unsuitable for present (profitable) development will severely depress its market value. Nevertheless, the Guidelines do not absolutely deny the owner of the right to develop his parcel, but merely limit the amount of development to a level consistent with the Coastal Act. In light of Agins, it is unlikely the courts will find that the limitations on permissible development totally eliminate the owner's right to a return on his investment.

The valuation of the TDC's presents problems similar to those in Fred French. The credits in Penn Central had inherent value because they could be transferred to other sites owned by Penn Central that had already been determined to be appropriate receiver sites. The credits in Fred French, however, were not readily transferable since the owner of the donor parcel was required to enter an unpredictable market to sell them. The owner was thus placed in legal limbo, to the dissatisfaction of the court. Small lot owners whose parcels have been designated in the Guidelines as donor areas are similarly required to generate their own compensation "through normal real estate channels." The government is severely restricting the owner from any opportunity to profitably use his parcel in a manner consistent with present zoning,

126. See note 55 supra.
127. See text accompanying note 67 supra.
and is compensating him by thrusting him into the fluctuations and uncertainties of the real estate market. Although demand for housing is strong in receiver areas, the price received for development credits is subject to external variables that are not associated with their true value. The government should not rely on a volatile real estate market that is subject to inflation, credit policies, fluctuating demand, speculation, Coastal Commission approval of development projects, and other externalities to guarantee a reasonable economic return to the owner of a restricted parcel.\textsuperscript{128}

A constitutional challenge to the Guidelines is not likely to succeed. Even in its present form, the TDC program does not appear to be a taking because the donor parcels are only restricted until LCP certification and because the restrictions do not completely deprive the donor parcel owner of all economic return on his property. Donor parcels can continue to be used in their present manner and are not systematically precluded from future development. Finally, the TDC program does not compel participation by any landowner, but merely provides economic incentives to encourage owners to leave their parcels undeveloped.

As discussed above, however, there are problems in the design of the transfer process. Most importantly, participating donor parcel owners will be thrust into a position dangerously close to the "legal limbo" decried in \textit{Fred French}. This problem should be resolved before long term applications of TDC's are undertaken.

E. \textit{Possible Solutions}

The major legal problems that might jeopardize the coastal TDC program arise primarily in the marketplace. Because of such externalities as inflation, speculation, rising interest rates, population growth trends, contingent project approval by the Commission, and even the weather, the TDC market is likely to become extremely volatile.\textsuperscript{129}

\textsuperscript{128} See Comment, \textit{supra} note 5, where the author argues that since the market determines the value received for the credits, the landowner will not necessarily receive compensation equivalent to this loss.

\textsuperscript{129} Since the beginning of the program, approximately 20 credits have been traded at an average price of $35,000-$40,000. The credits have come from the donor areas that are most unsuitable for present development. As the supply of donor sites diminishes, credits will have to be generated from parcels that are increasingly attrac-
By taking an active role in the transfer process, the government could eliminate much of the instability in the market. An extreme example would be if the government were to control the market by setting prices, buying credits from donor parcels, and selling them to receiver zone developers. Under this scenario, a “TDC bank” administered by the government would provide an owner with more exact compensation for development credits. By reducing the potential impacts of external economic factors, the price received for TDC’s would be more directly associated with their true worth, as determined by the donor site’s actual potential for development. The risks and uncertainties of the real estate market would be lifted from the restricted property owner, and he would be guaranteed “fair compensation” for relinquishing the right to develop his land.  

A less extreme possibility would be for the government to enter the market as a purchaser and seller of credits without actually setting prices or eliminating private participation in the buying and selling of credits. This approach might be especially practical in the coastal zone with the Coastal Conservancy acting as the government purchasing agent. The Conservancy, which through the State Public Works Board has been granted authority to exercise powers of eminent domain, could purchase enough credits to have a stabilizing effect on the market price. As a public agency, the Conservancy would be less profit motivated, causing the desired smoothing effect on prices. The restricted landowner would still be assured of receiving fair compensation but would not have to bear the risks associated with a more volatile real estate for immediate development. This may tend to increase the price of credits. (Interview with Peter Bass of the California Coastal Conservancy, February 7, 1980).

130. This theory is elaborated in Costonis, Space Adrift: Saving Urban Landmarks Through the Chicago Plan (1974). The author advocates the creation of a municipally administered reserve which will receive, hold, and sell the development rights of public and private landmarks, thereby creating a fund the city may use to acquire a protective interest in threatened landmarks.

131. The Coastal Conservancy is part of California’s Coastal Management Plan (CCMP). See note 2 supra. The Conservancy, which was established based upon recommendations contained in the Commission’s 1975 Coastal Plan, is responsible for implementing a program of agricultural land protection, area restoration, and resource enhancement in the coastal zone. Establishment of the Conservancy adds acquisition and restoration capabilities to the CCMP to complement the Commission’s regulatory and planning authority.

tate market. Developers, in turn, would be guaranteed a supply of credits at prices which would lower total construction costs.

A third alternative would be to have the government guarantee the value of credits by establishing a minimum repurchase price at which it would buy otherwise unmarketable credits. This approach would again guarantee "fair compensation" to the owner of the donor parcel, and the government could permanently preserve the property as open space without having to spend the larger sums of money required to gain full title by eminent domain. The credits purchased by the government could be transferred to other government land, possibly to increase the availability of low income housing. By keeping the government out of the exchange process except as a last resort, the private sector would probably be more responsive to TDC's as well.

The problems with any active governmental role in the TDC market are largely administrative and political. Administering a new land use program and the bureaucracy it would generate, setting and maintaining prices, public scrutiny and participation in the administrative process, and the political distastefulness of economic manipulation by the government pose large problems inherent in any governmental participation. The government must retain some measure of control over the TDC market, however, to make the program a truly effective planning tool. Its role must be flexible enough to meet the contingencies of land use planning and to encourage private participation, yet must be firm enough to assure restricted property owners a reasonable return on their investment.

IV. Conclusion

The existing regulatory processes in the coastal zone can provide the framework for solving the problems associated with the administration of a TDC program. Because its planning and permit authority is temporary, the Commission can adopt land use regulations that might otherwise pose serious constitutional questions. If the TDC pilot program were mandatory and permanent, it might very well constitute an invalid exercise of the police power, but because it is only temporary and voluntary, constitutional issues are bypassed. The functioning pilot program will enable planners to deter-
mine the feasibility of using TDC's as a planning tool of potentially wide ranging application. Questions regarding credit prices, acceptance by the private sector of TDC's, and whether TDC's can be successful in achieving the statutory goals of efficient resource utilization and conservation can be resolved.

The unanswered questions concerning TDC's are worth pursuing. Expanded government initiatives are necessary to combat further environmental degradation caused by poorly planned development. The individual property owner should not, however, be forced to singularly pay for our collective environmental consciousness. Restrictive, non-compensatory zoning results in harsh inequities to landowners who are "zoned-out" of their development opportunities. On the other hand, TDC's mitigate the inequities caused by zoning by providing some degree of compensation to restricted landowners, and at the same time recognize that future development must be carefully planned and located in areas that can support it.

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