PROCEDURAL AND SUBSTANTIVE LAND MANAGEMENT TECHNIQUES OF POTENTIAL RELEVANCE FOR THE NEW JERSEY PINELANDS

A REPORT TO THE PINELANDS COMMISSION

Ву

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VOLUME 5

THE TAKING ISSUE AND VESTED RIGHTS

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INTRODUCTION

This is the fifth of a five-volume study prepared for the New Jersey Pinelands Commission by Ross, Hardies, O'Keefe, Babcock & Parsons. The purpose of the report is to describe and provide a preliminary analysis of land planning and management techniques which have been used, or proposed, in this and other countries. This report serves as a basis for later elements of the Ross, Hardies work program in which, following an additional data-gathering stage, Ross, Hardies will work with the Commission and its staff to narrow the range of planning and management techniques which merit the Commission's consideration and will, as its final work product, draft specific legislation and regulations designed to achieve the goals and purposes of the New Jersey Pinelands Protection Act of 1979.

The first volume of this report is devoted to a summary and analysis of the entire report. In Volume 2, we present detailed descriptions of a number of state and regional land use programs for the purpose of illustrating the variety of organizational and procedural approaches that can be taken to regional land planning and management. In Volume 3, we discuss a variety of substantive approaches to land use regulation which may be useful in the Pinelands either as regional regulations or as models for local adoption in response to regional guidelines. Volume 4 analyzes a

number of land management programs which are currently used in several foreign countries and draws several lessons for the Pinelands program from this foreign experience. Finally, in this volume, we present a preliminary legal analysis of the fundamental constitutional principles which must be accommodated in any land use regulatory program.

The use of police power regulations to protect and preserve natural resource values is now generally well-accepted in the United States, although the legitimacy of using the police power to protect environmentally sensitive lands is of fairly recent vintage. As recently as 1970, the Massachusetts Supreme Judicial Court said:

The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act. MacGibbon v. Board of Appeals of Duxbury, 255 N.E.2d 347, 351 (Mass. 1970).

Although that case turned on the specific authority available under the enabling act, the Court's disaffection for the environmental purpose of the regulations is unmistakable. Compare, MacGibbon v. Board of Appeals of Duxbury, 340 N.E.2d 487 (Mass. 1976). See also, Morris County Land Improvement Company v. Parisippany-Troy Hills Township, 40 N.J. 539 193 A.2d 232 (1963) (discussed at length, infra.).

Nevertheless, the importance of environmental values and their relationship to the general public health, safety and welfare are now for the most part beyond serious dispute.

Note for example, the words of a Florida appellate court:

We find the inclusion of ecological considerations as a legitimate objective of zoning ordinances and resolutions is long overdue and hold that preservation of ecological balance of a particular area is a valid exercise of the police power as it relates to the general welfare. Moviematic Industries v. Brd. of County Com'rs of Metropolitan Dade County, 349 So.2d 667, 669 (Fla. 3rd DCA 1977).

The use of the police power, however, is not unlimited. Statutory, constitutional and judicial constraints restrain the unfettered exercise of this authority. For example, the police power is reserved to the states under the United States Constitution and unless specifically delegated or authorized by state statute, the power cannot be exercised by political subdivisions of the states. The constitutional constraints are found principally in the Fifth and Fourteenth Amendments of the United States Constitution and their state constitutional counterparts.

Judicial limitations involve construction of statutory or constitutional language and judicial application of common law principles of equity.

CHAPTER I

STATUTORY LIMITATIONS

In the case of the Pinelands Act, statutory limitations do not represent a significant obstacle to strict land use and environmental regulations. The Act authorizes the Pinelands Commission to exercise whatever power and authority is necessary to achieve the objectives of the Act. In effect, the Commission is authorized to exercise any governmental authority which is permitted under the Constitutions of the State of New Jersey and the United States.

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CHAPTER 2

CONSTITUTIONAL LIMITATIONS

I. DUE PROCESS AND TAKING

The constitutional limitations on the exercise of the police power are well-known and generally considered under the rubric of "The Taking Issue."

Few subjects are more fraught with emotion and less understood than the rights of private property and the Constitutional limits to public control of those rights. If this is a highly charged emotional issue, it is no less serious a matter of national concern, as evidenced by the current debate over land use legislation in the Congress and in State legislatures throughout the country. The Taking Issue, Bosselman, Callies and Banta (CEQ 1972) at the forward.

And, few subjects have engendered more commentary than has the "taking issue." See for example, Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L.Rev. 1165 (1967).

Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971). Note, Development in the Law-Zoning, 91 Harv. L.Rev. 1427 (1978). This discussion is not intended as a recapitulation of all that has been said about the taking issue, nor is it intended as an encyclopaedic treatment of the thousands of taking issue cases decided in this country; rather, it is intended as a summary view of this issue in the context of the Pinelands Act and its legislative

mandate to protect and preserve the overall ecological value and essential character of the Pinelands.

Exercise of the police power over the use of land is generally governed by two clauses of the Fifth Amendment to the Constitution of the United States:

. . . nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

V Amend, U.S. Const. [Emphasis added]

The first clause is generally referred to as the "due process" clause and the second the "taking" clause. Although the Fifth Amendment is a limitation on federal powers, the clauses are applicable to the state's police power because the clauses are generally regarded as being incorporated by the Fourteenth Amendment and similar provisions are found in all state constitutions. In theory, the clauses represent separate and distinct constitutional constraints on government; however, the courts have frequently, and unfortunately, complicated their analysis of the taking issue by intermingling the clauses in their analysis of the constitutionality of public actions.

Notwithstanding this confusion, it can be said with some confidence that the "due process" clause contemplates that exercises of the police power will be accomplished through procedures that are fair to persons who will be affected, principally by ensuring that they are notified

of pending governmental actions and given an opportunity to be heard.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possession. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment, to minimize substantively unfair or mistaken deprivations of property.

The due process clause has also been interpreted to require that regulations be understandable to those governed by them.

[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Connally v. General Construction Co., 269 U.S. 385, 391 (1925).

In addition to these procedural constraints, the due process clause is also a substantive limitation on the exercise of the police power, but delineation of that constraint is difficult because of the courts' above-mentioned penchant for intermingling constitutional analysis of the due process clause with the taking clause.

The due process and taking clauses both find their origin in the Magna Carta. Taken literally, the former is a limitation on the police power while the latter is a limit

on actual public acquisition of interests in private property through an exercise of the power of "eminent domain." Early constitutional jurisprudence supported the view that an exercise of the police power, as distinguished from the power of eminent domain, was not governed by the taking clause. For example, in Mugler v. Kansas, 123 U.S. 623 (1887), the U.S. Supreme Court sustained a state prohibition against the manufacture and sale of alcoholic beverages which a brewery owner had challenged on the ground that the regulation rendered his property valueless and, therefore, constituted a "taking." Justice Harlan rebuffed the suggestion:

According to Harlan, as long as title to the property was undisturbed and the government did not physically invade the property for its own use, there could be no "taking." The test was whether a police power regulation was reasonably related to the public health, safety and welfare and if it was, a compensable taking under the taking clause could not occur. Harlan was of the view that the state's police power could not be burdened with a compensation requirement:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious

to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. 123 U.S. at 667-668.

However, in Pennsylvania Coal v. Mahon, 260 U.S.

393 (1922), the Supreme Court apparently changed course and eliminated the distinction between the regulatory power and the power of eminent domain and characterized them as merely matters of degree on the same spectrum. (In The Taking Issue, the authors entitled the chapter on Pennsylvania Coal: "HOLMES REWRITES THE CONSTITUTION," Bosselman at p. 124.) Justice Holmes, the author of the Pennsylvania Coal opinion, wrote:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. 260 U.S. at 415.

Pennsylvania Coal was the owner of subsurface mineral rights in land which was improved at the surface with streets and residential structures. The State of Pennsylvania adopted an act which prohibited subsurface mining that would cause subsidence of structures developed on the surface. The coal company challenged the law as an unconstitutional taking and the Supreme Court sustained the attack:

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved . . . "For practical purposes, the right to coal consists in the right to mine it." [citation omitted] . . . To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. Id. at 414.

The Court went on to say:

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. Id. at 416.

Significant implications flow from the Holmesian theorem. The Constitution unequivocally provides that just compensation must be paid for all private property that is "taken." Under the Holmes analysis, if a regulation goes too far and becomes a "taking" then, by definition, compensation is required, or at least that is what the taking clause seems to say. Such a result could have a far-reaching impact on the functional integrity of government:

The possibility of incurring significant, unanticipated liability in money damages as a result of invalidation of a zoning ordinance in an inverse condemnation action (an action for compensation for overly restrictive regulations) would have a chilling effect on governmental experimentation in landuse controls. This inhibition would

most severly affect rapidly growing communities—those that most need innovative land-use controls, yet are least able to risk incurring such liability. The lack of definite judicial standards limiting the police power would accentuate the problem.

If injunctive relief were the sole remedy available, governmental requlation would not be so inhibited: at worst, the continued enforcement of the zoning ordinance would be enjoined. In short, cautious legislators would hesitate to enact innovative regulations that could possibly result in liability in inverse condemnation actions; they would choose the measures that have proved "safe," rather than those that test the limits of the police power.

To permit inverse condemnation actions as a means of attacking zoning ordinances would reduce legislative control over the allocation of financial resources; the court, in declaring an ordinance invalid, and the plaintiff in choosing either the injunctive or compensatory form of relief, would exercise control over expenditure of public funds.

The weighing of costs and benefits is essentially a legislative process. In enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of that ordinance. Determining that a particular land-use control requires compensation is an appropriate function of the judiciary, whose function includes protection of individuals against excesses of government. But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather

than forced compensation, would seem to be the more expedient means of remedying legislative excesses.

If a zoning ordinance is enjoined, the legislative body, rather than the court, can then decide whether the social benefits flowing from the plan warrant the exercise of eminent domain and the expenditure of public resources. When the legislature decides that the costs outweigh the benefits, it can either abandon the objective entirely, enact less stringent regulation, or combine regulation with compensation. Note, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan. L.Rev. 1439 (1974). See also, e.g. Jacobson v. Tahoe Regional Planning Agency, 474 F.Supp. 901 (U.S.D.C. Nev. 1979).

In Fred T. French Investing Co., Inc. v. City
of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.5.2d 5
(1976), Judge Breitel, a noted jurist, observed:

[W] hen there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported "regulation" may impose so onerous a burden on the property requlated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic . . . such a regulation, does not constitute a "taking," and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid. 385 N.Y.S.2d at 8. [Emphasis added]

In a recent speech to participants in an ALI-ABA Course of Study entitled Land Use Litigation, now-retired Judge Breitel

opined that Justice Holmes' use of the taking clause language was intended as a mere "metaphor" and that it should not be taken as an abstract rule of law. Passing over the vagaries of past applications of the taking clause to the police power, Judge Breitel observed that in this day and age of municipal economics, the concept of an invalid regulation constituting a taking and thereby forcing compensation, makes little practical sense. The more logical approach would seem to be that, while a regulation may be invalid because it is overly restrictive, it will not constitute a "taking."

The Pennsylvania Coal decision has been much criticized and its precedental value is no easier to understand than is Justice Holmes' opinion. For example, just four years later, the Supreme Court validated use restrictions in the landmark case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) and setback regulations in Gorieb v. Fox, 274 U.S. 603 (1926). In Euclid, a substantial diminution of value (approximately 75%) was held constitutional. In Gorieb a regulation prohibiting all use of a portion of a parcel of land through a setback regulation was validated because the property as a whole could be beneficially used.

More recently, in <u>Penn Central Transportation</u>

Co. v. City of New York 438 U.S. 104 (1978), the court

sustained a severe regulation on the use of a designated historic landmark (Grand Central Station). Under the New York City's Landmarks Preservation Law, a Commission was empowered to designate structures or areas as landmarks or historic districts to regulate demolition and alteration of designated sites. Penn Central wanted to construct an office building in the air space above its terminal, but was denied the necessary approvals. Penn Central challenged the law on a number of grounds including that the regulations constituted a taking of the "air space" above the terminal without just compensation. The Supreme Court, after an extended review of Pennsylvania Coal and its progeny, upheld the law. In essence, the court said that the mere fact that a regulation imposes a severe economic burden on a property owner by denying his right to make certain beneficial uses of his property is not enough to render the regulation either a "taking" or an invalid exercise of the police so long as the regulation is designed to promote some recognized public interest and so long as the owner is left with the ability to make some reasonable economic use of the property.

Goldblatt v. Town of Hempstead 369 U.S. 590 (1962) was heavily relied upon by the Supreme Court in its Penn

Central opinion and is worth discussing here. In that case, the Town of Hempstead enacted an ordinance regulating dredging and pit excavation. Appellants challenged the ordinance

as a taking of property without due process of law, because it prevented continuance of their excavating business. The Court set out the issue as follows:

Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. [citation omitted] 369 U.S. at 592.

The court passed lightly over <u>Pennsylvania Coal</u> as to the limit beyond which regulation becomes confiscatory, and set out the following rule for judging the reasonableness of the town's ordinance:

To justify the state in . . . interposing its authority in behalf of the public, it must appear--First, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon the individuals. [citations omitted] [Emphasis added] 369 U.S. at 594-595.

Under this test, the ordinance was upheld despite the resulting loss by appellants of the most beneficial use of their property. Thus, while Pennsylvania Coal seemed to say that such a degree of deprivation would constitute a taking, Penn Central and Goldblatt say that anything short of a total

deprivation was permissable.

What constitutes a minimum beneficial use under the Constitution is not yet settled. In <u>Just v. Marinette</u> <u>County</u>, 56 Wisc.2d, 201 N.W.2d 761 (1962), the Wisconsin Supreme Court upheld the constitutionality of an ordinance designed to protect water quality through a program of shoreland regulation. The ordinance was enacted pursuant to an act which required local governments to regulate use of swampy, marshy shoreland to protect the quality of water in lakes and waterways. Marinette County's ordinance prohibited residential, commercial, or industrial development on protected lands. Use of the land was limited to those activities which did not alter the natural state of the shoreland (e.g., harvesting wild crops and wildlife preservation). Particular special exception uses (e.g., farming, dams, piers) were permitted under specified conditions.

Plaintiff filled an area of his land without obtaining a permit. When the county sought an injunction, the plaintiff challenged the ordinance as an unconstitutional taking. The court held that a landowner has no constitutional right to change the essential character of his land in order to use it for a purpose for which it was unsuited in its natural state. The use of the police power to protect the environment was viewed as beyond question or doubt. The regulations were characterized by the court as necessary to

prevent public harm, that is, damage to the environment, an exercise of the police power rather than the power of eminent domain. The court recognized the dangers of unchecked despoilation of the environment and the state's response thereto as a justification for protecting the public interest by restricting use of private land in its "natural" uses.

Perhaps the most important and far-reaching aspect of the court's opinion in Marinette was its rejection of the argument that the wetland restrictions depreciated the value of the land. According to the court, that argument had no validity because it was based on the value of the land if filled or otherwise altered rather than on an estimate of its value in the natural state:

We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural status quo of the environment . . . An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injurs the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses. 201 N.W.2d at 768.

A similar approach was taken by the New Hampshire Supreme Court in Sibson v. State, 336 A.2d 239, in which the court sustained the denial of a permit to fill a saltmarsh:

The plaintiffs do not seriously contest that the denial of the permit to fill was a proper exercise of the police power, but argue that this denial rendered their saltmarsh economically useless and therefore constitutes a taking. They rely upon a theory first promulgated by Justice Holmes in Pennsylvania Coal Co. v. Mahon . . . The importance of wetlands to the public health and welfare would clearly sustain the denial of the permit to fill plaintiffs' marshland even were their rights the substantial property rights inherent in a current use of an activity on their land.

Moreover, the rights of the plaintiffs in this case do not have the substantial character of a current use. The denial of the permit by the board did not depreciate the value of the marshland or cause it to become "of practically no pecuniary value." Its value was the same after the denial of the permit as before and it remained as it had been for milleniums. The referee correctly found that the action of the board denied plaintiffs none of the normal traditional uses of the marshland including wildlife observation, hunting, haying of marshgrass, clam and shellfish harvesting, and aesthetic purposes. The board has not denied plaintiffs' current uses of their marsh but prevented a major change in the marsh that plaintiffs seek to make for speculative profit." Id. at 241, 242-43.

In a totally different context, the New York

Court of Appeals has said this concerning the subject of the minimum beneficial use which must be preserved to an owner by a system of land use regulations:

> . . it is the interaction of economic influences in the greatest megalopolis of the western hemisphere . . . that has made the property [Grand Central Terminal] so valuable Of primary significance, however, is that society as an organized entity, especially through its government, rather than as a mere conglomerate of individuals, has created much of the value of the terminal property Plaintiffs may not now frustrate legitimate and important social objectives by complaining, in essence, that government regulation deprives them of a return on so much of the investment made not by private interests but by the people of the city and state through their government. Penn Central Trans. Co. v. City of New York, 366 N.E.2d 1271, 1275 (1977).

We find in the Marinette-Sibson-Penn Central trilogy a remarkably common thread that may well evidence a significant new judicial attitude toward the issue of what "return" will be considered a "fair return" for purposes of judging the constitutionality of a regulatory program. In all three cases, the courts approach the issue of "fair return" or "economic use" not simply by asking "how much" return is possible under the regulation but also by asking "return on what." And, in these cases, the courts suggest that the "private property" on which a "fair return" must be allowed will no longer be assumed to include the

the right to exploit either nature or society in the name of individual development gain.

II. DAMAGE ACTIONS

The significance of the taking issue is underscored by a recent trend in civil rights law. Traditionally, political subdivisions of the states have been regarded as not being "persons" under the Civil Rights Acts of 1871, and therefore not amenable to suit for damages for deprivation of property rights allegedly caused by unconstitutional police power regulations. However, in 1978 the Supreme Court of the United States held that local governments were persons under the Civil Rights Act and not absolutely immune. Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, (1978). The Court's opinion is not a model of clarity and there have been a variety of constructions. One of those constructions is that a municipality is liable for damages under the Civil Rights Act for deprivations of private rights resulting from unconstitutional regulations. Another construction is that local governments have a good faith immunity for such claims. See e.g., T & M Homes, Inc. v. Town of Mansfield, 393 A.2d 613 (N.J. Superior 1978). A third interpretation is that local governments are amenable to suit under the Civil Rights Act but damages are not available for relief.

Jacobson v. Tahoe Regional Planning Agency, 474 F.Supp. 901 (U.S.D.C. Nev. 1979).

Which of these constructions will ultimately secure the approval of the Supreme Court is shere speculation. The extent to which this trend represents a constraint on the Pinelands Commission is not easy to evaluate. The Supreme Court has considered a case involving a regional land use management program and concluded that the regional agency was akin to local government and therefore a person under the Civil Rights Act. Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 367 (1979). The Tahoe Agency ("TRPA") had contended that it was exercising state power and therefore immune from suit under the eleventh amendment to the U.S. Constitution. The Court rejected the argument pointing out that six out of ten TRPA members were appointed by local government, TRPA was funded by local government, TRPA obligations were not binding on the states, and the activities of TRPA were traditionally functions performed by local governments. The Pinelands Commission will perform similar functions. It has members appointed by local government and can sue and be sued in its own name. It would seem that it is likely that the Commission would be considered as a person.

That result is significant only if the Supreme

Court should adopt the unlikely position that an unconstitutional exercise of the police power can give rise to a cause of action for damages.

It is clear that the individual commissioners are absolutely immune from liability for acts taken in their legislative capacity.

"Legislators are immune from deterrents to the uninhibited discharge of their legislative duty not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of the judgment against them based upon a jury's speculation as to motives. The holdings of this court in Fletcher v. Peck, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S. 367 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019.

This reasoning is equally applicable to federal, state, and regional legislators. Whatever potential damage liability regional legislators may face as a matter of state law, we hold that petitioners' federal claims do not encompass the recovery of damages from the members of TRPA acting in a legislative capacity. 440 U.S. at 405.

III. NEW JERSEY

Taking jurisprudence in New Jersey is generally in accord with that recited above. The pole-star of modern

taking cases in New Jersey is the now-infamous and much maligned Morris County Land Improvement Company v. Parisippany—Troy-Hills Township, 40 N.J. 539, 193 A.2d 232 (1963).

Although the case has been clearly eroded, the Supreme Court of New Jersey has not yet openly receded from the opinion.

However, regardless of its modern precedental value, an analysis of the case is an important stepping-off point for a discussion of New Jersey taking jurisprudence. The municipal zoning ordinance involved in Parsippany-Troy Hills limited the use of the plaintiff's swampland and tideland to:

". . . Agricultural uses; raising of woody or herbaceous plants; commercial greenhouses; raising of acquatic plants, fish and fish food (with a one-family dwelling as an adjunct to any of these uses, provided its lowest floor was a specified distance above flood level); outdoor recreational uses operated by a governmental division or agency; conservation uses . . . hunting and fishing preserves; public utility transmission lines and substations; radio or television transmitting substations and antenna towers; and township sewage treatment plants and water supply facilities." 193 A.2d at 236.

The court considered these uses and the mechanism whereby a permit to engage in these and other uses would be granted, and concluded that the ordinance presented an array of geological and legal barriers which rendered use of the land "practically impossible":

hibit not only the removal of the unusable top two layers of earth from the zone... but also forbid the importation from outside the zone of suitable fill material or soil... the only available method seems to be to dredge fill material from the bottom stratum of sand and gravel in some other portion of the premises (which, however, does not have the qualities of fertile top soil) and to fill the excavation as far as possible with the unusable upper layers from the area being excavated and filled. 193 A.2d at 239.

The court went on to point out that even reclamation of the wetlands would almost certainly result in the formation of ponds or lakes, and activities for which the landowner would have to get special permission. Further, even the earth removal and filling activities would be completely barred under the ordinance if it would "impair present or potential use" of adjacent properties. A large adjacent parcel was owned by a private conservation group which had repeatedly objected to any type of filling activities in the area so there was little likelihood, in the court's eyes, that the landowner would ever be allowed to use his land for anything except growing fish and acquatic plants or converting it to a hunting or fishing preserve or wildlife sanctuary.

The New Jersey court relied directly on <u>Pennsylvania</u>

<u>Coal Company v. Mahon</u>, 260 U.S. 393, 415, 43 S.Ct. 158, 160,

67 L.Ed. 322, 326 (1922) for the proposition that "the

general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." Noting that the issue of regulation versus a taking is a matter of degree, the court said that "There can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basis or open space." 193 A.2d at 241. Finding that the plaintiff was deprived of all beneficial use of the land, the court struck down the zoning regulations as confiscatory and unreasonable. It should be observed that although the court declared the regulation a taking, no compensation was ordered, suggesting that the New Jersey Court also intended a "taking" as a metaphor.

The extent to which the Morris County Land case presents a modern obstacle to the use of the police power to strictly regulate the use of privately owned land for the purpose of environmental protection is not clear. In AMG Associates v. Township of Springfield, 65 N.J. 101, 319 A.2d 705 (1974), the New Jersey Supreme Court hinted that Morris County Land might have to be reconsidered as precedent in land use cases involving protection of the environment.

Justice Hall (who also wrote the opinion in Morris County Land) qualified his prior opinion:

It is to be emphasized that we deal in this case only with the split-lot situation where there is a deprivation of all practical use of the smaller portion thereof. The approach to the taking problem, and the result, may be different where vital ecological and environmental considerations of recent cognizance have brought about rather drastic land use restriction in furtherance of a policy designed to protect important public interests wide in scope and territory, as for example, the Coastal Wetlands Act, N.J. S.A. 13:9A-1 et seq., and various kinds of flood plain use regulation. Cases arising in such a context may properly call for a reexamination of some of the statements 10 years ago in the largely locally limited Morris County Land case (citations omitted). The Taking Issue (Council on Environmental Quality, 1973). 319 A.2d at 711, fn.4.

This apparent narrowing of the Morris County Land case is not an isolated occurrence. Although the New Jersey Supreme Court has not had another occasion to consider the extent to which land use regulations for environmental protection might be considered a valid exercise of the state's police power, the Superior Court has handed down at least three decisions which suggest that little attention is being paid to Morris County Land.

The first of these cases is <u>Sands Point Harbor</u>,

<u>Inc. v. Sullivan</u>, 136 N.J. Super.436, 346 A.2d 612 (App.

Div. 1975). Pursuant to the Coastal Wetlands Act of 1970,

N.J.S.A. 13:9A-1 et seq., the Department of Environmental

Protection of the State of New Jersey adopted an order designating approximately 140 acres of the plaintiff's land as "coastal wetlands." As a result of this designation, all "regulated activities" (e.g., dredging, draining, excavating, or erecting structures) were prohibited unless the landowner obtained a special permit. The plaintiff challenged the constitutionality of the land use regulation and of the Coastal Wetlands Act itself under both the United States Constitution and the New Jersey Constitution. He claimed denial of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and Article 1, paragraph 1 of the New Jersey Constitution of 1947. He also contended that the Act, as applied, was a taking without just compensation in violation of Article 1, paragraph 20 of the New Jersey Constitution. addition, the plaintiff claimed that his land had been effectively rendered unusable. The court found no merit in any of plaintiff's contentions. The equal protection argument was based solely on the exclusion of certain coastal wetlands (those under the jurisdiction of Hackensack Meadowlands Development Commission) from the geographic scope of the The court found the differences in treatment reasonably based on differing conditions.

As noted, the taking issue was argued in Sands

Point only under the New Jersey Constitution, probably because the New Jersey Supreme Court has held repeatedly that under the New Jersey Constitution where an important personal right is affected by governmental action, there must be a greater showing of "public need" than is traditionally required under the United States Constitution. See, e.g., Taxpayers Association of Weymouth Township v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016, (N.J. 1976), cert. denied sub nom. 430 U.S. 977, S.Ct. 1072, 52 L.Ed.2d 373 (1977) . The court distinguished Morris County Land because the only "absolutely prohibited" activities were the dumping of solid wastes, the discharging of sewage and the storage or application of pesticides. The court stated that none of these were activities which plaintiff sought to conduct. Whether the prohibition of these activities would render use of the property economically unfeasible or otherwise impossible was completely ignored by the court.

It is difficult to appreciate the difference between the Sand Point Harbor development opportunity and that of the plaintiff in Morris County Land. If there are differences, they seem to be:

- (1) The regulations were more carefully drawn to appear less restrictive,
- (2) The court was less willing to look below the surface and consider the practical impact,
- (3) In that twelve-year interim, environmental

concerns had achieved recognition as genuine threats to the public welfare, thus deserving more weight in the balance of public need versus private ownership rights, and

Apparently, the court was impressed because there were few activities that were absolutely prohibited, and those that were obviously dangerous to the environment. In addition, the regulations were the result of a state legislative determination of important public interests.

N.J.S.A. 13:9A-4(d).

Morris County Land is American Dredging Company v. State

Dept. of E. P., 161 N.J. Super. 504, 391 A.2d 1265 (Ch. Div. 1978), a case involving the Coastal Wetlands Act. There the court virtually nullified the theory of Morris County Land at least for the regulation of land to prevent environmental harm:

The thrust of the Wetlands Act is the prevention of harm to the public, not the enhancement or improvement of a governmental activity or purpose. I have concluded that the distinction is basic and distinguishes [Morris County Land] from this case. I respectfully find that the law of that case is not controlling in the case at bar. 391 A.2d at 1268.

The court then went on to say:

Where the effect of the governmental prohibition against use is not in the furtherance of a governmental activity,

such as flood control or preservation of land for a park or recreational area, but rather to preserve the land for ecological reasons in its natural environment without change, the consideration of reasonableness of the exercise of the police power must be redetermined. The issue then presented is a determination of which interest shall prevail, the public interest in stopping the despoilation of natural resources or the right of an individual to use his property as he wishes. The focus of the reason for that specific governmental action changes the concept of legislation for the public good to legislation to prevent public harm, which prevention must then be weighed against the owner's undiminished right to use his property. 391 A.2d at 1268.

Reviewing the land use regulations in this context, the court concluded that an order prohibiting the deposit of dredge soil on 80 acres of wetlands, out of the 2,5000 acres owned by the plaintiff was reasonable and did not constitute a taking. A total of 159 acres of American Dredging's land had been designated as wetlands. Of the 159 acres, the plaintiff had already obtained permits for disposal of fill on all but 80 acres. ADC claimed that the 80 acre tract had no possible use except for the disposal of dredge materials, and provided expert testimony to the effect that the regulations reduced the value of the 80 acres by \$120,000.

In its analysis leading to the conclusion that the diminutation in value did not constitute a taking, the court followed the United States Supreme Court in Penn Central,

supra:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interferred with distinct investment backed expectations are of course relevant considerations. * * * So too is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by Government * * * than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. Penn Central Transportation Company v. City of New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d, 631, 648 (1978). [citations omitted]

The Appellate Court concluded that, while economic impact on a landowner is a factor to be considered, mere diminution in economic value does not mandate a finding that a taking has occurred. In support of this proposition, the Court embraced the logic of Just v. Marinette County, supra.

"While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling." 391 A.2d at 1270. citing Just v. Marinette County, 56 Wisc. 2d 7, 17, 201 N.W.2d 761, 771 (1962).

Other factors to be considered, the court noted, include consideration of other possible uses of the land and a

determination of the necessity of the regulation to effectuate a substantial public purpose.

The court in American Dredging was extremely strong in its characterization of environmental regulation as a prevention of harm rather than an uncompensated taking for public benefit. First, the court quoted an excerpt from another opinion of Justice Hall, the author of Morris County Land:

Modern man has finally come to realize - I hope not too late - that the resources of nature are not inexhaustible. Water, land and air cannot be misused or abused without dire consequences to all mankind. Undue disturbance of the ecological chain has its devastating effect at far distant places and times. Increased density of population and continuing residential, commercial and industrial development are impressing these truths upon us. We trust solution of our problems in this vital area can be aided by modern technology and the expenditure of money, but it seems evident that we must also thoroughly respect the balance of nature. N.J. Sports and Exposition Auth. v. McCrane, 61 N.J. 292 A.2d 545, 577 (1972).

Applying this respect to the fact situation in American Dredging, the court concluded that:

The uncontrolled use of land, if unchecked, is harmful to the public interest, and government may within the scope of the police power regulate that use. If ADC is permitted to fill in the approximately 80 acre tract, it is clear that no protected vegetation, fish, or other marine life will again exist in that

area. The destruction will be permanent and irreversible. The natural environment as it existed in its original state will give way to a pile of dredge spoil. To the extent that is accomplished the public is damaged. That result cannot be deemed to be reasonable use of land exempt from the regulation promulgated under the police power of this State. 391 A.2d at 1270.

The court made two final points in rejecting the attack on the wetlands designation. First, it pointed out that the landowner had not been deprived of all use of its land because nothing prevented them from using the 80 acres for "natural and indigenous uses." 391 A.2d at 1270. Finally, the court rejected American Dredging's claim of diminished value, on essentially the same ground as the courts in Marinette, Sibson and Penn Central. According to the opinion, American Dredging Company regarded the unregulated value of the land on the basis of its value as its worth if filled and available for urban types of development. The court characterized that notion as speculative, based on a future right.

The most recent Appellate Division case which erodes Morris County Land is N.J. Builders v. Dept. of Environmental Protection, 169 N.J. Super. 76, 404 A.2d 320 (App. Div. 1979). The Department of Environmental Protection designated the central Pine Barrens as a critical area

for waste water treatment purposes because of soil conditions and water-table levels which make the waters in the area highly susceptible to contamination from septic tanks. The "critical area" designation as well as the standards for septic tank installation were challenged by a coalition of builders, farmers and the Town of Hammonton. The court upheld the designation, citing actual and prospective population increases in the Pine Barrens and ample, credible evidence to support the regulations.

One contention proffered by the plaintiffs in New Jersey Builders was that the DEP designation and regulations constituted a taking. In rejecting this contention, the Appellate Division reviewed taking jurisprudence in New Jersey, including Morris County Land and Pennsylvania Coal, and then pointed out the modern trend of supporting "legislation to protect certain areas even though it diminishes the value of private persons' land." (citations omitted) 404 A.2d at 330. The court characterized the challenged regulations as having been enacted to prevent a harm resulting from potential changes in the natural character of the property, rather than as creating a public "benefit." Having considered the regulations as such, the court had little trouble in finding them "a proper exercise of the police power for which there is no right to compensation " 404 A.2d at 331 [citations omitted]. The court went

on to generally endorse environmental legislation and harkened back to the historical view of the distinction between an exercise of the police power and an exercise of the power of eminent domain with a quotation from Rathkopf, "The Law of Zoning and Planning" (4th ed. 1978) §703:

Many years ago, Professor Freund stated in his work on the Police Power, sec. 511, at 546-547, 'It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful * * *. From this results the difference between the power of eminent domain and the police power, that the former recognises [sic] a right to compensation while the latter on principle does not. Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed onproperty in order to create a public benefit rather than to prevent a public 404 A.2d at 331. [citation omitted]

Under this analysis, the regulations sought to prevent harm to water quality and the environment, and were therefore a valid exercise of police power and not a taking.

It is noteworthy that in each of these cases the court cited Just v. Marinette County, supra.

It must be recalled, however, that while Morris

County Land, supra, has been largely ignored by the Appellate

Division, it has not been overruled by the New Jersey Supreme

Court. The court, prior to Justice Hall's retirement, did

suggest that the decision should be reconsidered; however,

an opportunity has not offered itself or the suggestion was

not well-taken.

Each of the cases discussed above deals with the "taking issue" in the context of environmental regulation. They reveal a strong judicial perspective for protection of environmental values and indicate that the taking issue does not represent a substantial limitation on the comprehensive management plan. Nevertheless, a brief sampler of non-environmental police power cases is important to a full and complete understanding of the constitutional backdrop of the Pinelands comprehensive management plan.

In Bow and Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 307 A.2d 563 (1973), the Supreme Court upheld a municipal ordinance which zoned property residential while nearby property was zoned commercial. The landowner complained of the resulting diminution of value. The court held that the municipal zoning decisions were at least of debatable wisdom and therefore valid. The court said that landowners are not entitled to have their property zoned for its highest possible use, and that there could be no determination that a zoning ordinance is "confiscatory" without a clear demonstration of the economic infeasibility of utilizing the property as zoned.

In <u>East Rutherford Industrial Park, Inc. v. State</u>, 119 N.J. Super. 352, 291 A.2d 588 (Law Div. 1972), land-owners challenged the denial by the Hackensack Meadowlands

Development Commission of a subdivision application and an order that construction be halted on a building for which a permit had been previously issued. The basis for the denial was a pending improvement plan for the Sports and Exposition Authority. Plaintiffs claimed that the regulations (plus publicity regarding the projected improvement) had blocked development or sale of their property resulting in a "taking." The court reviewed federal and state case law on the taking issue and held that no taking had occurred; however, the court expressly reserved plaintiff's right to present the same issues to the court after the final decision as to acquisition or use of the property by the Sports Authority and during eminent domain proceedings.

In Schere v. Township of Freehold, 119 N.J. Super. 433, 292 A.2d 35 (App. Div. 1972), cert. denied, 410 U.S. 931 (1973), the Superior Court cited Morris County Land, supra, as support for its holding that fiscal considerations alone cannot justify the imposition of "functional non-utilization" of private land. The court found that the challenged ordinance prevented residential use of land well suited for such use, in order to reserve the land for future utilization by more affluent users. This was, according to the court, confiscatory as well as conflicting with present day judicial thought as to appropriate relationships between zoning policy and social housing needs.

In Meadowland Reg. Dev. Ag. v. Hackensack M. Dev.

Com'n, 119 N.J. Super. 572, 293 A.2d 192 (App. Div. 1972),
landowners challenged a twenty-six month freeze on the
development of 10,000 acres of land in the Hackensack
Meadowlands as an unconstitutional taking. The Superior
Court held that the regulations were reasonable and did not
constitute a "taking." The court specifically rejected
arguments that if the regulations were held legal, the state
should pay compensation for the period of the interim regulations. The importance of comprehensive planning and study
of environmental impact was seen as justifying the exercise
of the police power and the action could not, therefore,
constitute a "taking." However, the court did seem to
reserve judgment on the effect of future extensions on the
freeze on development.

The court also discussed the substantiality of deprivation necessary before a taking can occur in Freeman v. Paterson Redevelopment Agency, 128 N.J. Super. 448, 320 A.2d 228 (Law Div. 1974):

This case does not involve regulatory action
. . . which "has deprived the landowner of
all beneficial use of his lands for indeterminate lengths of time." The damage to
Plaintiff's property does not constitute
"total or substantial destruction of its beneficial use" and is not "different in kind
from the damage suffered by other property
owners in the area." Although one prospective
tenant was discouraged from renting and

other willing tenants have been difficult to find, nevertheless, the premises can be used for rental purposes; the Agency's action and activities did not in themselves deny to [Plaintiff] a market for their property." In large measure, Plaintiff's difficulties are shared with others in similar circumstances and stem from the redevelopment process itself. [citations omitted] 320 A.2d at 232-233.

that the deprivation, while admittedly severe, was not total. Renters might be difficult to find, but in theory at least, the landowner was still free to rent his property, and secondly, the plaintiff was not singled out by the zoning action. His hardship was substantially the same as that of all surrounding landowners, and their loss of the use of their property was a function of the redevelopment of the blighted area. This case was later remanded to determine whether the redevelopment project had been abandoned, and, if so, the extent of compensible injury. 138 N.J. Super. 39, 351 A.2d 765 (App. Div. 1976).

In <u>Dock Watch Hollow Quarry Pit</u>, Inc. v. Township of Warren, 142 N.J. Super. 103, 361 A.2d 12 (App. Div. 1976), aff'd, 74 N.J. 312, 377 A.2d 1201 (1977), the owner of a quarry (which existed as a prior nonconforming use) challenged municipal zoning regulations restricting his quarry operations. The court held that nonconforming uses were subject to police power regulations designed for en-

values. "Rights inherent in private ownership must, under certain circumstances and to some degree, give way to the greater interest and good of the public." 361 A.2d at 24. Although the owner suffered substantial loss of the use of his property, the court viewed the environmental concerns as paramount. Certain non-necessary and overly restrictive regulations were invalidated, but most were allowed to stand (including some enacted for purely aesthetic purposes). The court found it beyond possible question that environmental protection alone is enough to warrant exercise of the police powers.

Also, in Lom-Ran Corp. v. Dept. of Environmental Pro., 163 N.J. Super. 376, 394 A.2d 1233 (App. Div. 1978), a denial of exemption from a sewer connection ban was upheld and held not to be a taking, with the importance of protecting public health cited in explanation:

* * * All property is held in subordination to the police power; and the correlative restrictions upon individual rights--either of person or of property--are incidents of the social order, deemed a negligible loss compared with the resultant advantages of the community as a whole, if not, indeed fully recompensed by the common benefits.

[Emphasis added] 394 A.2d at 1238.

Another interesting case is Mindel v. Tp. Council of Tp. of Franklin, 167 N.J. Super 461, 400 A.2d 1244 (Law Div. 1979), where a landowner's challenge to the denial of a

variance to allow farming in a residentially zoned area was held unreasonable. The case was not based on a taking question, but did state a standard by which to judge restrictive zoning regulations. Such regulations, the court noted, must be reasonably calculated to meet the evil, and must neither exceed public need nor substantially affect uses which do not have the offensive character of those which cause the problem sought to be ameliorated. Referring to New Jersey's Farmland Assessment Act ("FAA"), the Court said it expresses a clear legislative preference for open spaces over commercial or residential. The court felt that an expansive reading of the FAA may suggest a state policy to discourage residential development in any except urban areas.

IV. CONCLUSION

Based on these cases it is possible to identify several common threads that are likely to be involved when a New Jersey court is called upon to test the constitutional integrity of the Pinelands comprehensive management plan.

First, the purpose of the Pinelands Act will probably find favor with the courts. Judicial sensitivity to the relationship of environmental values to the general public health, safety and welfare is on the rise, and the uniqueness of the Pinelands, together with the Legislative mandate will go a long ways toward sustaining the plan.

Second, absent a major shift in course by the United States Supreme Court, the relief which will/be available to a successful landowner aggrieved of the comprehensive management plan will be invalidity, not forced compensation. Third, there is a substantial chance that the constitutional efficience of the private uses permitted by the management plan will be evaluated in terms of the natural character of the land rather than its potential as urbanized or disturbed land. Finally, the private beneficial use of land governed by the comprehensive management plan, and therefore its constitutionality, will probably be judged on the basis of the Pinelands as a whole, and on the basis of individual parcels when considered as a whole.

It is difficult to coalesce the various perspectives of the police power reflected in the cases into a practical rule, and no single case can be referred to as the "better rule." However, a useful summary may be that a police power regulation will be tested on a case-by-case basis and will be held valid unless: (1) it-bears no substantial relationship to the public health, safety or welfare, (2) is not rationally or reasonably likely to serve the avowed public purpose or (3) deprives the landowner of all beneficial use of his property.

CHAPTER 3

VESTED RIGHTS

Any time new or modified land use regulations are adopted, it is inevitable that some on-going or planned development activity will be restricted or prohibited by the new provisions. Landowners who are pursuing or have planned a particular development concept suddenly find their projects no longer permitted; and while the new regulations may be sustainable as a valid exercise of the police power under the analysis set out in Chapter 2, courts are generally careful to be fair to landowners by balancing the threat to the public health, safety and welfare to which the new regulations are directed against the landowner's injury if he is not permitted to continue. The identification of those landowners who should be insulated from the application of new regulations is often referred to as a determination of "vested rights" or "zoning estoppel." See Heeter, "Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes," 1971 Urban Law Annual 63-66.

The invocation of estoppel against police power regulations is no more than an attempt by courts to provide fairness to landowners who have previously committed themselves to a particular course of action in reliance upon some act of government. In Florida where dramatic growth has resulted in substantial changes in land use regulations,

the issue of vested rights has received frequent judicial consideration, and the Florida courts have evolved a useful definition of those situations where a developer should be insulated from changes in police power regulations:

[T]he doctrine of equitable estoppel will preclude a municipality from exercising its zoning power where

". . . [A] property owner (1) in good faith reliance (2) upon some act or omission of government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired. Salkoksky v. City of Coral Gables, 151 So.2d 433 (Fla. 1963). Hollywood Beach Hotel Company v. City of Hollywood, 329 So.2d 10, 15-6 (Fla. 1976). (Emphasis added.)

A similar standard is employed in New Jersey. See e.g.

Burcam Corporation v. Planning Board of Township of Medford,

168 N.J. Super. 508, 403 A.2d 921 (1979); Sautto v. Endenboro

Apartments, Inc., 84 N.J. Super. 461, 202 A.2d 466 (1964).

As the Supreme Court of New Jersey stated in Tremarco Corporation v. Garzio, 32 N.J. 448, 161 A.2d 241, 245 (1960):

In general terms, the rule is that where the permit is regularly issued in accordance with the zoning ordinance, it may not be revoked after reliance. It must be determined at what point it can be said that an individual has performed acts which form the wellspring from which certain protectable interests may flow and create a countervailing force which will prevail over the normally paramount authority of the municipality to preserve the desireable characteristics of the community through zoning.

I. AFFIRMATIVE ACT OF GOVERNMENTAL AGENCY

development, he must be able to point to an affirmative act of the government in relation to his development proposal. He could point, for example, to the issuance of a building permit, Donadio v. Cunningham, 58 N.J. 309, 277 A.2d 375 (1971); City of Lansing v. Dawey, 247 Mich. 394, 225 N.W. 500 (1929); Russian Hill Improvement Assoc. v. Board of Permit Appeals, 56 Cal. Rptr. 672, 423 P.2d 824 (1967); Town of Hillsboro v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969) or the probability of the issuance of a building permit, Nott v. Wolff, 17 Ill.2d 262, 163 N.E.2d 809 (1960); Fifteen Fifty North State Building Corporation v. City of Chicago, 15 Ill.2d 408, 155 N.E.2d 97 (1958).

Many jurisdictions require the actual possession of a permit for a claim of vested rights. See Smith, "The Role of Reliance in Restrictive Rezoning," Land Use & Environmental Estate Law & Practice, Course Handbook Series No. 122 (Practicing Law Institute 1975). In many of these jurisdictions a building permit is not per se sufficient. Suatto v. Endenboro Apartments, Inc., supra. There are jurisdictions, however, which have allowed developers to rely on governmental acts of considerable less formality. In Cos Corporation v. City of Evanston, 27 Ill.2d 570, 190 N.E.2d 364 (1963), for example, the developer pointed to conferences with city

officials where he has been assured that his plans conformed to city ordinance. See also, Geuber v. Mayor and Township Com. of Raritan Township, 39 N.J. 1, 186 A.2d 489 (1962). Another court pointed to "an extensive, legally instituted and continued course of action [which] carries with it an increasing degree of immunization from governmental erraticism." Cypres Estates, Inc. v. Moore, 51 Misc. 2d 463, 273 N.Y.S.2d 509, 513 (1966). See also, Abbeville Arms v. City of Abbeville, 257 S.E.2d 716 (S.C. 1979) where the developer relied on an inaccurate zoning map and the city was estopped from denying a building permit. However, most jurisdictions insist on some sort of formal expression of a "governmental" act: plat approval, Telimar Homes, infra; approval of a site plan, Board of Supervisors v. Fairfax County v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972); a conditional use permit, City of North Miami v. Margulies, 289 So. 2d 424 (Fla. 3d DCA 1974); or a rezoning, Town of Largo v. Imperial Homes, Inc., 309 So. 2d 571 (Fla. 2d DCA 1975). C.f. Hill Homeowners Association v. City of Passaic, 156 N.J. Super. 505, 384 A.2d 172 (1978), reliance on site plan approval and demolition and foundation permit insufficient.

In addition, the act must be lawful in order for a developer to be warranted in relying on the act. Anno., "Rights Under Illegal Building Permit," 6 A.L.R. 2d 960.

The law has long been that an applicant for a permit is presumed to know the law and will not be heard to assert his reliance upon the misinterpretations or unauthorized representations of municipal employees to preserve alleged rights under an illegal permit. Miami Shores Village v. Wm. N.

Brockway Post, 24 So. 33, 35 (Fla. 1945). It is important to remember the policies that underlie this principal. Were it otherwise, an individual official or employee could supplant the legislative purposes. Laws would have no meaning, because their terms could be altered at will by administrative officials. The public interest would be at the mercy of corruption and dishonesty, and the structure of our laws could encourage such connivance.

There can be no "vested rights" under a void permit. To hold otherwise would be to put a premium on dishonesty of city officials charged with the duty of issuing such permits and would open the way for connivance and fraud. The will of the official would then be substituted for the mandate or restriction of legislative enactment, and thus the limitations of zoning acts and ordinances held for naught. Ostrowsky v. Newark, 139 A.911, 912 (N.J. Ch. 1928).

See also, Reichenback v. Windward at Southampton, 364 N.Y.S.2d
283 (Sup. Ct. 1975), affd. 372 N.Y.S.2d 985 (1975).

II. GOOD FAITH RELIANCE

The mere existence of a governmental act is not sufficient by itself to vest a right to develop. A developer

must have relied on the governmental act in good faith in order to estop a municipality from enforcing a newly enacted ordinance. "Good faith" is an elusive concept and courts are reluctant to discuss what are essentially the inner motives of a developer. Often a court will merely state without elaboration that a landowner has relied in "good faith." See e.g., San Diego Coastal Regional Commission v. See the Sea, Ltd., 109 Cal. Rptr. 377 (1975).

A few courts have held that knowledge of a pending restrictive ordinance which will affect the developer's property, clouds the validity of his vested rights or estoppel claims. With such knowledge, a developer may not "deliberately increase his equities." See Anderson, 1 American Law of Zoning § 6.31 (2d ed. 1976); Heeter at 77-82); see also, Sharrow v. Dania, 83 So. 2d 274 (Fla. 1955). As stated by the Supreme Court of Arizona, a developer may not begin construction with knowledge of a pending restrictive ordinance and then

which arose from its action after it had knowledge that the ordinance was being considered . . . [F]inancial loss no matter how severe, does not of itself give parties a vested right . . . Tuscon v. Arizona Mortuary, 34 Ariz. 495, 272 P. 923 (1928).

However, a Pennsylvania court has held that the fact that the governmental body had begun a long-range and comprehensive planning effort, which eventually resulted in a new

ordinance, did not preclude good faith reliance on a building permit. Public notice of the new ordinance occurred subsequent to the permit and the developer's reliance thereon. Gulf Oil Corporation v. Township Board of Supervisors, 438 Pa. 457, 266 A.2d 84 (1970). See also, Miller v. Dassier, 155 N.Y.S.2d. 975, 979 (Sup. Ct. 1956).

III. DETRIMENTAL RELIANCE

Not only must a developer rely in good faith on a governmental act, but his reliance must be to his detriment if the new law is applied to his activities. Generally, detrimental reliance is interpreted as the expenditure of funds or incurrence of obligations of such a substantial nature that the developer would suffer real injury if he were denied the right to proceed with his development. Expenditures considered by the courts include costs or obligations incurred during preliminary stages of development or costs of actual construction. Often, these expenditures and obligations are considered in relation to the total original investment. See e.g., Molino v. Mayor and Council of Borough of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (1971); Reichenbach v. Windward at Southampton, 80 Misc. 2d 1031, 364 N.Y.S.2d 283, aff'd. 372 N.Y.S.2d 985 (1975). However, such a "proportionate test" is not universally employed. See e.g., Clachamas County v. Holmes, 508 P.2d 190 (Ore. 1973) and American National Bank & Trust

Company of Chicago v. City of Chicago, 19 Ill. App. 3d 30, 3ll N.E.2d 325 (1974).

Traditionally, expenses in connection with preparation for development, for example, preliminary mining tests or the purchase price of land coupled with negotiation of a loan or a lease, are insufficient to establish vested rights even when in reliance on an affirmative governmental act. See Anderson, 1 American Law of Zoning § 6.22 and Sautto v. Edenboro Apartments, Inc., supra, where the Court excluded consideration of taxes and cash and notes which represented the cost of the real estate but considered those preliminary planning expenses which are not ordinarily expended until a permit is issued. In Avco Community Developers, Inc. v. Smith Coastal Regional Commission, 130 Cal. Rptr. 386, 553 P.2d 546 (1976), the developer had expended large sums of money in reliance on grading and improvement permits; however, the developer had not yet acquired a building permit. After a subsequent change in the law, the court held that the developer did not have a vested right to building permits no matter how extensive his expenditures. They were considered merely preparatory expenses which only entitled him to complete the grading and improvements allowed by the permits. See Hagman, "AVCO: Nothing Vested, Nothing Gained," 29 Zoning Digest No.1, 12 (1977).

However, given the case by case nature of determinations of vested rights, there are many exceptions to the Medical Structures, Inc., supra, the landowner argued that he had purchased the property for \$250,000 in reliance on the prior issuance of a special use permit, and that he had expended substantial additional sums for preparation of his site plans, bond deposits, engineering and architectural plans in reliance on approval of his site plan. Although actual construction had not begun, the court held that the developer had demonstrated sufficient reliance on the governmental act to have acquired a vested right to proceed with his development in spite of an amendment to the zoning ordinance which prohibited the proposed use.

Corporation, 309 So. 2d 571 (Fla. App. 1975), the expenditures of the developer were in preparation for development. The developer had not begun construction or obtained a building permit. By the time he was aware of the contemplated zoning change, he had spent \$310,000 for the property and over \$69,000 in architectural fees, interest, taxes, sewer permits and other costs. The court held that the town was estopped to deny the developer the right to continue.

See also, Tantimonaco v. Zoning Board of Review, 102 R.I.
594, 232 A.2d 385 (1967).

Most courts do not consider monies expended to acquire the property See e.g., Gosselin v. Nashua, 114 N.H.

447, 321 A.2d 593 (1974) or refundable municipal fees in determining whether the total expended is "substantial."

Unexecuted or rescindable contracts with contractors, architects or suppliers are generally not included. See generally, Rathkopf, The Law of Zoning & Planning Ch. 75.

Many courts require actual construction in order to find substantial reliance. The developer in County Council, Montgomery County v. District Land Corporation, 274 Md. 691, 337 A.2d 712 (1975), had expended over one million dollars in studies and plans in preparation for development, but the court denied his claim to vested rights because actual construction had not commenced. Many courts consider the beginning of the building itself the crucial point of "substantial" reliance, others the beginning of excavation Cooper v. City of Greensburg, 363 A.2d 813 (Pa. Cmwlth. 1976), and still others, the pouring of the foundation. See, City of Dallas v. Messerole, 164 S.W.2d 564 (Tex. Civ. App. 1942); Gala Homes, Inc. v. Board of Adjustment of the City of Killen, 405 S.W.2d 165 (Tex. Civ. App. 1966).

Even though a developer can establish that he has expended substantial sums or incurred substantial binding obligations installing improvements, these expenditures may not necessarily establish vested rights for the entire development that the developer contemplates. This situation arises with a staged development. There must be at least a

"nexus" between the early developed stages and the later undeveloped stages. See e.g. Prince George's County v. Equitable Trust Co., 408 A.2d 737 (Md. Ct. App. 1979).

In State ex rel. Bugden Development Company v. Keifaber, 179 N.E.2d 360 (Ohio 1960), the planning commission had given preliminary approval to the whole plan and final approval to an individual tract when the zoning ordinance was changed. The court upheld the disapproval of a plat which was not in accordance with the new ordinance, stating that the improvements already installed in the remaining tract would still be useful and valuable under the new ordinance. See, however, Telimar Homes, Inc. v. Miller, 14 A.D.2d 586, 218 N.Y.S.2d 175 (1961), where the court held that the plaintiff had acquired a vested right to develop his entire subdivision as planned. See also, Malnat Associates v. Board of County Commissioners, 260 Md. 292, 272 A.2d 6 (1971), where the second stage of a phased development was allowed to proceed, but the third stage was required to comply with the new ordinance.

Even where a right has vested to proceed with a proposed project, it may be forfeited by reason of subsequent facts. About 15 years after the New York court's decision in Telimar Homes, supra, a subsequent developer acquired sections three and four, the undeveloped portions of the project. The Planning Board refused to approve the

plans submitted by the new developer on the basis of the prior minimum lot size. Since the earlier court decision, no further development had occurred, water wells had failed, and a new water district was formed by the town which acquired the assets of the private water company which did not include sections three and four. Difficulties had been encountered with septic tank sewage disposal systems and the water drainage system. The developer challenged the disapproval of the plats on the basis of the earlier decision about the required minimum lot size, and the court stated that while it is not open to question, that once vested rights are established, they "continue for the benefit of a successor in title," a landowner can be divested of his vested rights. The court remanded the case for a hearing as to whether the original developer had abandoned or recouped his substantial economic interest in the construction or whether there had been sufficient abandonment or recoupment to allow public health, safety and welfare considerations to override his remaining interest in development of the tract with the prior lot sizes. Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 382 N.Y.S.2d 538 (1976). Other cases involving the issue of forfeiture or abandonment of vested rights are: McGowan v. Cohalan, 41 N.Y.2d 434, 393 N.Y.S.2d 376 (1977), no vested rights when four years had elapsed since rezoning, and developer had failed to proceed

with development; Hollywood Beach Hotel Company v. City of Hollywood, 329 So. 2d 10 (Fla. 1976), no forfeiture when developer elected not to proceed, and surrendered building permit when these actions were prompted by the delay of the City; Town of Paradise Valley v. Gulf Leisure Corp., 27 Ariz. App. 600, 557 P.2d 532 (1976), no forfeiture when unforeseen difficulties of a financial nature caused a temporary delay of two years; Beattie v. Babcock, 180 A.2d 741 (Del. Super. Ct. 1962), forfeiture when only minor work is done over a six-year period.

In the final analysis, no matter what kind of costs or obligations are considered as good faith reliance, in order to be a basis for vested rights, those expenditures must constitute an injury to the developer if he is not permitted to proceed with his proposed development. If the developer's investment is reasonably recoverable through development permitted under the new regulations, the expenditures do not constitute an injury. For example, a subdivider's investment in water mains, sewer lines, streets and other improvements would not be an injury, in the event larger lot sizes were required by new regulations, because the improvements would be necessary and useful elements of any subdivision. The mere expenditure of funds is not detrimental reliance. The expenditures must be of a nature such that they are unrecoverable by the developer if he were

to develop in accordance with the new regulations.

IV. BALANCING

The final issue in determining whether vested rights exist or estoppel should be invoked is whether it would be highly inequitable to deny a developer the right to complete his project. Many courts balance the various interests involved in addressing this issue. As the Supreme Court of New Jersey has stated:

The ultimate objective is fairness to both the public and the individual property owner. We think there is no profit in attempting to fix some precise concept of the nature and quantum of reliance which will suffice. Rather a balance must be struck between the interests of the permittee and the right and duty of the municipality through planning and the implementation of that scheme through zoning . . . Tremarco Corp. v. Garzco, 161 A.2d 241 (N.J. 1960).

See also, City of Evanston.v. Robbins, 254 N.E.2d 536 (Ill. App. 1970); State ex rel. Russel Center v. City of Missoula, 533 P.2d 1087 (Mont. 1975).

The question is properly whether the governmental action sought to be estopped is clearly and convincingly directed to achieve a demonstrable and compelling public interest. The alleged "detrimental reliance" is frequently weighed by the courts against that public interest and estoppel is not invoked unless the private hardship exceeds that which the public will suffer. Sautto v. Edenboro Apartments, Inc., supra; Tremarco Corp. v. Garzo, supra.

[N]either the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. Lynn v. Duchel, 299 P.2d 236, 240 (Cal. 1956).

CONCLUSION

In 1975, the first National Model Land Development Code since the Model Acts on zoning, subdivision and planning were drafted by the Department of Commerce fifty years ago was published by the American Law Institute. Already this Code has been cited in a number of court opinions. Subsection (2) of Section 2-309 of this Code reads as follows:

(2) The expectation that a development permit could be obtained does not create any rights that prevent change of a development ordinance. If the ordinance so provides, a change in the development ordinance or applicable rule that becomes effective after a development permit has been granted shall apply to the developer's right to begin or complete development in accordance with the permit unless the developer has in . good faith made substantial and unrecoverable expenditures subsequent to and on the basis of the issuance of the permit or unless it is determined that the former ordinance or rule should be made applicable in a particular case in the interests of justice.

The Reporters for the Code made the following comment on that subsection:

In subsection (2), the Code adopts what is considered to be the majority view in regard to rights attaching to the issuance of a

development permit: a change in the development regulation or rule that becomes effective after a development permit has been granted will affect a developer's right to begin or complete development, unless the applicant has made substantial expenditures subsequent to and on the basis of the issuance of the permit. This rule was summarized by the Supreme Court of Pennsylvania in Penn Twp. v. Yecko Bros., 420 Pa. 386, 217 A.2d 171 (1966):

demonstrate (1) that he has obtained a valid building permit under the old zoning ordinance, (2) that he got it in good faith-that is to say without "racing" to get it before a proposed change was made in the zoning ordinance and (3) that in good faith he spent money or incurred liabilities in reliance on his building permit has acquired a vested right and need not conform with the zoning ordinance as changed. 217 A.2d at 173.

A few municipalities have enacted ordinances which provide an administrative format for determining vested rights. (See e.g., San Antonio, Texas, Ordinance No. 48484) Some statutes have such provisions (See e.g., California Coastal Zone Conservation Act.) Careful attention must be given to existing development expectations during the planning process. If not, support for the plan may be seriously eroded. Many comprehensive planning efforts which have failed to adequately catalogue and provide for legitimate development expectations have resulted in debate, not about the substantive merits of the plan's objectives but rancorous disputes over existing rights. There are undoubtedly

developments in the Pinelands that a court will insulate from at least portions of the plan, and the overall integrity of the effort must be protected by realistic appraisal and recognition of on-going developments under the judicial standards set out above. However, it should be noted that vested rights problems in the Pinelands should not be significant inasmuch as the regulations which will be adopted by the end of this summer will be the logical outgrowth of an extended period of public discussion and planning. This circumstance will seriously undermine any claim of "unfair surprise" or "good faith reliance" on the status quo.