COMPENSABLE REGULATIONS REDIVIVUS

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Abstract

In the United States, as in many other countries, public power over use of land is exercised by regulation and by eminent domain.[1] Disputes over whether regulation does or does not constitute a taking of property and whether use of eminent domain falls within the intent of the U.S. and state constitutions have provided the courts, including the United States Supreme Court, with seemingly endless opportunities to settle these questions. However, definitive, clarifying decisions are still lacking.[2]

The context of this paper is land that has incompatible natural resource values and development values. The two cases argued before the Supreme Court in early 2006 seemed to offer the possibility of breakthrough guidelines. However, the first decision is likely to only add to the confusion. As of now, what is missing is a means of assuring fairness to all affected parties, eliminating windfalls and wipeouts. This goal is as germane to other nations' land use management as to that in the United States.

Three means of achieving greater fairness over decisions affecting open land were proposed over 40 years ago. One, conservation easements, acquired by either public or private bodies, has experienced substantial success in keeping land private and open. Another, transfer of development rights from open land to land allocated for development, has had very limited success despite much publicity. The third, compensable regulations, holds land in open space unless local plans change to permit development. It guarantees land owners fair compensation when they sell.

Then University of Pennsylvania Professor of Law Jan Krasnowiecki and I designed compensable regulations to offer a new, alternative approach. Our focus was creation of a tool to protect significant natural resources and to promote efficient and attractive urban growth.[3] Compensable regulations limit use of open land to its current or other open space use. At the time of passage of the regulations the land is appraised and the local government imposing the regulations guarantees that the appraised price, corrected for changes in the value of the dollar, will be the minimum price paid whenever the land is sold. The property remains in private ownership and on the tax rolls. The government retains the right to alter land use regulations in accord with its plans,

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[1]Government tax policies, including deductions and exemptions, also influence land use. However, except for deductions granted for gifts of conservation easements, tax questions fall outside the scope of this paper.

[2] This history offers a modern, real life parallel to the case of Jarndyce v. Jarndyce in Charles Dickens' Bleak House: the central question is not resolved, and so there is ample fodder on which generations of lawyers have fed and are now feeding.

[3] Krasnowieci, Jan and Ann Louise Strong, "Compensable Regulations For Open Space: A Means Of Controlling Urban Growth," Journal of the American Institute Of Planners, Vol. XXIX, #2, May 1963.

including encouragement of urbanization. Fair compensation is assured the open space owner. Lengthy, expensive litigation is avoided.

Our proposal for compensable regulations has yet to be adopted. However, given the evident shortcomings of tools now in use, the time is ripe for its use.

The Unresolved Problem

Today, as yesteryear, there is a gap in the management of urban growth between what land use regulations can lawfully achieve and what lies within the scope of eminent domain. For decades, private landowners challenging regulations that they believe to be unfairly onerous have done battle in court, asserting that the regulations go "too far". In essence, when do limitations on use of land exceed what is fair ("fair economic return" in the words of many courts' decisions)? If use of eminent domain is employed, two questions arise: is the purpose of the eminent domain authorized by law, and how is the fairness of compensation to be determined?

Two types of land use conflicts, one concerned with regulation, the other with eminent domain, have been argued in the U.S. Supreme Court recently. They illuminate these issues.

Regulation

The Supreme Court, in February of 2006, heard arguments in two cases from the state of Michigan that challenge the reach of federal regulatory power under the Clean Water Act. At issue are the meanings of "navigable waters" and "the waters of the United States" as well as the limits of regulatory power of the federal government. Conflicting opinions were issued by the Court on June 19, 2006, leaving the final outcome of the cases yet to be decided.

Both cases involve use of wetlands. In the Rapanos, a developer[4] sought to build a shopping center on a wetland. With that intent he filled the wetland with sand, failing to apply to the state for the permit that the federal regulations require. This former wetland drains into ditches that in turn drain into streams that flow into navigable rivers 20 miles away. In the Carabell case, another developer,[5] wishing to build condominiums on 16 acres of a 20 acre wetland, sought a permit to fill the wetland. The permit was denied. The wetland is separated from a navigable waterway by a manmade earth berm. Litigation in these cases has been ongoing for over a decade. At issue is the extent to which the federal government may employ regulation to manage the nation's waterways.

Two earlier Supreme Court opinions provided precedent to these cases. A unanimous Supreme Court, in 1985, held that wetlands abutting open waterways are subject to federal regulations enacted by the Corps of Engineers under the Clean Water

[4] Rapanos v. United Stares. 547 U.S. ____(2006).
[5] Carabell v. Army Corps of Engineers. 547 U.S. ____(2006).

Act.[6] Next the Court, in 2001, by a vote of 5-4, held that an abandoned gravel pit, filled with water and used by migratory birds, lacked a sufficient nexus to "navigable waters" to be subject to federal regulation. Instead, the Court held that power to regulate use of the quarry rested with the state.[7]

Linda Greenhouse, Supreme Court reporter for the New York Times, summed up the outcome of the two Michigan cases as follows:

> The Supreme Court on Monday came close to rolling back one of the country's fundamental environmental laws, issuing a fractured decision that, while likely to preserve vigorous federal enforcement of the law, the Clean Water Act, is also likely to lead to new regulatory battles, increased litigation by property owners and a push for new legislation.[8]

Four members of the Court, including its two new members, held that the federal government had trampled on the authority of the states by stretching the definition of wetlands "beyond parody." They voted to vacate the decision and remand it to the Circuit Court to apply their test that wetlands must be "relatively permanent bodies of water" and be directly connected to the navigable waterway. Another justice voted to vacate and remand the cases but with the applicable test to be applied by the Circuit Court being whether the wetlands were "…likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." The remaining four justices voted to affirm the Circuit Court opinions and uphold the regulations that have been in use for decades.

Eminent Domain

The case of Kelo v. City of New London[9] pitted the City against owners of small homes in an area that the City wished to condemn for private economic development, as authorized by the law of the state of Connecticut. The Supreme Court, by a 5-4 vote, upheld the City's right to use eminent domain. The majority noted that the condemnation was in the context of a development plan enacted to foster economic development for a site that included petitioners' lands and homes. They went on to hold that the economic development envisioned constituted a public purpose and that this falls within the term "public use" under the 5th Amendment to the Constitution.[10] The majority also emphasized that the states are free to enact greater restraints than those required under the U.S. Constitution. The minority argued that a higher standard of judicial review should apply to statutes authorizing eminent domain for the purpose of economic development rather than, for example, the purpose of highway construction. In June 2006, five of the

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[6] United States v. Riverside Bayview Homes, 474 U.S. 121, 1985.
[7] Solid Waste Agency of Upper Cook County v. United States, 531 U.S. 159, 2001. The Corps of Engineers application of the Migratory Bird Rule was at issue.
[8] "Justices Divided On Protections Over Wetlands, New York Times, June 20, 2006, p. 1.
[9] 545 U.S. ____, 2005.
[10] Bearing out the thesis that this issue has been long litigated without conclusive resolution, the Court cited Berman v. Parker, 348 U.S. 26, decided in 1954, which supported condemnation of slum properties for redevelopment.

seven plaintiffs had agreed to sell their properties to the City. The City also had reached settlement with the other two plaintiffs. The City agreed to move the Kelo house to its location of 100 years ago and to buy the Cristofaro family's home in return for a guarantee of new housing at a specified price.

The Kelo decision provoked an outcry: the little guy once again had lost out to powerful developers. The opposite outcome might result if the Town of North Hills, on Long Island, New York, pursues its plan to condemn the private Deepdale Golf Club, whose members are super-rich, to convert it to a public golf club for its merely rich citizens. In Connecticut, following Kelo, legislators at once introduced a bill to revoke the authorization for local governments to use eminent domain to acquire land for transfer to private entities for the purpose of economic development. Similar bills are now pending before the legislatures of many states and, as of April 2006, 12 had adopted new legislation. Texas now prohibits use of eminent domain to benefit private parties. However, the Texas law includes several exceptions, including one allowing eminent domain to enable the Dallas Cowboys to build a new football stadium.[11]

Altering Regulation Or Acquisition To Achieve Greater Fairness

Land use lawyers, planners, and land owners have long been troubled by the real or perceived inequities imposed by regulation or by use of eminent domain.[12] Two approaches to this problem were developed and widely advocated starting in the 1960s. One, transfer of development rights (TDR), permits a land owner to sever and sell the right to develop land from one parcel (in the sending district) to the buyer's parcel (in the receiving district).[13] Its use has been very limited in the context of protection of open land, although it has been used more often to transfer additional building rights from an historic or architecturally significant structure to another nearby site. The other approach consists of sale or gift of conservation easements by a land owner to either public or private parties for the purpose of limiting further development of land. It enjoys widespread use in the United States, but now faces some challenges.

In discussing both approaches, I will include illustrations from experiences in my suburban county—Chester County, Pennsylvania. The County, with 500,000 acres (200 hectares), is projected to have a population of 500,000 by 2020. Chester County is endowed with some of the nation's best soils and with ample rainfall. Over half of the land was farmed in 1964; by 1992, after development swept in and land values soared, only 175,000 acres of farmland remained. There are valiant public and private efforts to preserve farmland and farming as a viable economic use of the land.

Regulation: Transfer of Development Rights

[11] The New York Times, February 1, 2006.
[12] See Strong, Ann Louise, Daniel R. Mandelker, and Eric Damien Kelly, "Property Rights and Takings", Journal of the American Institute of Planning, Volume 62, #1, Winter 1996.
[13] Initially proposed by Gerald Lloyd in 1961, ably advocated by Professor Jerome G. Rose, Rutgers University, in 1975 and thereafter.

Much has been written about TDRs. Its many enthusiasts have exhorted communities to enact TDR ordinances in order to keep land in open space uses. The concept appears simple until a community starts to calculate which provisions fit local circumstances and are equitable.[14] Among the many issues that arise are how much land to include in the sending zone in relation to how much to include in the receiving zone; what incentive to offer developers in the receiving zone to encourage them to purchase development rights; whether to create a public bank for credits; whether to offer a public guarantee of a floor price; and under what circumstances the provisions of the underlying ordinance may be altered.

A survey in 2000[15] found that 124 TDR ordinances whose objectives include farmland preservation had been adopted nationwide. This was a miniscule number for a program promoted for over 40 years. The survey found that 21 of the 124 communities with TDR ordinances had effected transfers, with a total of 88,000 acres (35,000 hectares) transferred. Most transfers--covering 67,000 acres (27,000 hectares)—were to protect farmland. The two most substantial programs date back, respectively, to 1979 and 1980. One is the program of the Pinelands Commission in New Jersey, a federal-state-municipal entity. The other is the program of Montgomery County, Maryland. Both programs cover large areas, the Pinelands TDR sending area is 160,000 acres (6,400 hectares), and the Montgomery County sending area is 110,000 acres (4,400 hectares). This scale has made it feasible to designate areas suitable for preservation and areas for additional density. Both agencies benefit from superior management by their planning agencies. Both established allocation provisions that are fair as between owners of sending lands and as between these owners and the prospective buyers in receiving areas. Between them, they accounted for 61,000 acres (24,400 hectares) protected, or 69 percent of all land transferred under the 124 TDR ordinances.

Pennsylvania was first among the states in number of TDR programs enacted by its municipalities between 1978 and 1994. There were 14 ordinances, of which two were later revoked.[16] In Chester County, at the time of a year 2000 survey, three township ordinances were in effect and no transfers had occurred. A fourth ordinance was adopted later and, as of 2006, the sole transfer in the County occurred under that ordinance. It was a transfer from one parcel to another in the same ownership. East Nantmeal Township, where we own agricultural land in the sending zone, is one of the four TDR townships. No transfers have occurred there in large part because land in the receiving area must have community water and sewerage and neither exists. Land values in surrounding townships where development is occurring average around $ 30,000 per acre (approximately 70,000 Euros/hectare).[17]

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[14] See Strong, Ann L., "Transfer of Development Rights to Protect Water Resources", Land Use Law and Zoning Digest, Vol. 50, #9, September 1998, for a discussion of the issues that must be resolved.
[15] "Fact Sheet: Transfer of Development Rights", Farmland Information Center, American Farmland Trust, Washington, D.C., 2001.
[16] "Can Transfer of Development Rights Work in Pennsylvania", Brandywine Conservancy Environmental Management Center, Chadds Ford, PA, Summer 1998.
[17] This and other information concerning Chester County was received from William Gladden II, Director, Chester County Open Space Program, March 23, 2006.

Some of the many reasons why TDR has not succeeded are: residents in receiving zones do not want greater density there; owners in sending zones find the money offered for their rights inadequate; developers lack sufficient financial incentive to use rights; few programs include public banks offering guaranteed sums to would-be sellers; and, possibly the most important, the programs are an administrative headache.

Acquisition: Conservation Easements

The late William H. "Holly" Whyte was an articulate, tireless supporter of conservation easements and deserves much of the credit for their early adoption.[18] Laurence Rockefeller, a committed conservationist, had the wisdom to hire Holly Whyte and to entrust him with the promotion of land preservation programs. Whyte participated in the drafting of early state conservation easement laws in California, Connecticut, New York, and Massachusetts, providing templates for other states. Not incidentally, he grew up in Chester County, Pennsylvania, and cared deeply about its landscape of rolling hills and productive farms.

Easements were a long recognized right in land, widely accepted, and often used to provide access to private land, as for power lines or paths to fishing streams. Therefore, there were legal and political precedents that laid the groundwork for conservation easements applicable to entire tracts of land. Unlike TDR, there was no new legal concept in which rights in land were to be lifted and placed on other land elsewhere. What was new was the concept of giving or selling the right to develop land to another party, public or private, whose intent was to maintain the land in open space use. A significant benefit for donors of conservation easements granted in perpetuity has been the availability of a federal income or estate tax deduction for the loss in market value of the land after a gift. A tax deduction also has been available if the easement was sold but for less than its appraised value. In 2005, some members of Congress raised questions about the fairness of some appraisals and proposed either severely lowering the tax benefits of conservation easement gifts or eliminating these benefits altogether. As of now Congress has taken no action.[19]

Conservation easement programs are flourishing at all levels of government and through national and local land trusts. The federal government buys conservation easements through such agencies as the Fish and Wildlife Service and the National Park Service, protecting millions of acres.[20] Local governments usually buy their easements with funds raised by special taxes or bond issues combined with grants from the federal and/or state governments. Much of the public money in local government programs is directed to preservation of high quality farmland. The land trusts rely principally on gifts

[18] Whyte, William H., "Conservation Easements", Urban Land Iinstitute, Washington, D.C., 1959; The Last Landscape, Garden City, L.I., N.Y., Doubleday and Co., 1968.
[19] Parker, Dominic P., "Conservation Easements: A Closer Look at Federal Tax Policy, PERC Policy Series, #PS-34, October 2005, is a thoughtful appraisal of the issues faced by use of conservation easements.
[20] For example, the Fish and Wildlife Service holds easements on 1.2 million acres of wetlands in North and South Dakota and Montana as part of the prairie pothole protection program. "Conservation Easement Examples," Mountain-Prairie Region, U.S. Fish and Wildlife Service, n.d.

of easements--or of fee title, and the conservation purposes that the donated lands serve are varied. A recent study found that there were over 1,500 regional and local land trusts active in the United States as of 2005, and that they hold fee title or easements on an astounding 9.5 million acres of land.[21]

Pennsylvania and its local governments are the national leaders in acquisition of conservation easements. The purpose of these publicly held easements is predominantly to protect farmland. As of early 2006, there were public easements protecting over 3,700 farms and 318,000 acres of farmland in the Commonwealth. The public expenditure for purchase of these easements was $696,000,000 or about $2,200 per acre.[22]

Chester County and Lancaster County, its neighbor to the west, are the conservation easement leaders in Pennsylvania, as well as among the national leaders. As of 2004, almost 20% of Chester County's land, or over 90,000 acres (36,000 hectares), was protected open space. Over 50,000 acres (20,000 hectares) of this total is protected by conservation easements held by 13 land trusts or the public sector, including the Commonwealth, the County, and some of its 73 municipalities. The principal objective of most of these easements is protection of farmland. The County is in a race with developers to protect over 60,000 more acres of prime farmland. Its total funding in 2005 was $6,336,000, and consisted of $665,000 in federal grants, $2,957,000 in state funds, and $2,714,000 in county funds. The County in turn provides its municipalities with grants of 50% of the cost of easements up to a maximum of $12,000 per acre total price. On average, in Chester County easements are selling for $4,000 per acre. There are more eligible applicants than funds available, creating a three year queue.

Despite all of the successes both nationally and locally, today there are serious problems confronting conservation easement programs.

Changing circumstances

Land trusts may hold perpetual easements on land that a municipality later judges to be better suited for deelopment. One consequence may be that the easement tract becomes isolated from other protected land as development surrounds it. Public acquisitions are less likely to face this sort of problems since the criteria for public expenditure for easements are stringent in terms of the value of land for farming use and the goal of protecting large farm areas. Whether the easement is privately or publicly held, perpetuity is required by the federal government as a condition to approval of a tax benefit. Easement perpetuity and flexibility in land use thus are incompatible. It may be possible to extinguish an easement that no longer can serve its intended purpose and invest the proceeds from sale of the easement in another property that can serve that purpose. However, this does add a layer of complexity for the holder of the easement.

[21] "National Land Trust Census," Land Trust Alliance, Washington, D.C., 2005.
[22] "Farmland Preservation: Pennsylvania is the Leader," 2000-2001 Annual Report to the General Assembly, Department of Agriculture, Commonwealth of Pennsylvania. "Summary of Agricultural Easement Purchases by County—2/16/2006," Bureau of Farmland Preservation, Pennsylvania.Department of Agriculture, Harrisburg, PA, 2006.

Shrinking public funds

The federal Farm and Rangeland Protection Program has been a vital contributor to local funding programs. Its funds have contributed to saving 300,000 acres (120,000 hectares) of land. Its backlog in demand is 100 million dollars. The budget allocation for 2006 is 75 million dollars and the authorization for 2007 is 100 million dollars. President Bush has proposed to Congress that it cut the 2007 allocation to 50 million dollars. Many states have serious budget problems as the federal government has imposed more spending obligations on them. Voters in local referenda have been very supportive of open space bond issues and special taxes. Whether this will continue to hold true in light of economic pressures remains to be seen.

Assessments for property taxes

Land under easement is assessed for property tax purposes at its open space value and not at its potential development value. Owners of developed land may perceive rises in their property taxes as a consequence of increased municipal investment in services to be unfair in light of the lower taxes on the lands under easement. The facts belie this. Studies by the American Farmland Trust in cooperation with local governments across the country show that, for $1 in tax revenue received from the local property tax, the median expenditure for residential services is $1.15, while for farm and open space uses it is $0.37.[23]

Questionable appraisals

As already mentioned, some members of Congress are questioning whether land owners who have made gifts of easements are claiming larger tax deductions than are justified. Land owners who have made gifts are interested in maximizing their tax deductions, and the donees of the gifts are anxious to encourage gifts. Appraisal of the value of easements when the easements have been donated is a difficult task, since often there have not been other sales of land subject to easements in the vicinity to provide comparables.

A disconnection between who benefits and who pays

Parker[24], in his article on conservation easements and federal tax policy, uses the term “disconnect” to demonstrate that the benefits of federal tax deductions granted for gifts of easements that provide small scale benefits at the local level are, in effect, transferred via increased federal taxes to taxpayers nationally. The “disconnect” is that the federal taxpayers do not benefit from the easements One can agree that this is so without finding it a cause for rejection of deductions, since our current tax system is

[23] “Fact Sheet: Cost of Community Services Studies,” American Farmland Trust, Washington, DC, November 2002.
[24] Op. cit. supra, fn.19, at p. 16.

replete with similar disconnections. However, it does present one more avenue by which to attack some conservation easements.

These questions provide a framework by which to examine compensable regulations to determine whether their use would avoid problems now arising for conservation easements.

Compensable Regulations

Compensable regulations, as their name implies, are regulatory and not confiscatory. Their intent is to retain exurban land in specified open space uses for an unspecified time, permitting the enacting local government time to plan when and where lands should be developed as well as which lands should remain open. If development is desired, the regulations will be changed as appropriate. If some changes in authorized uses of the open land become appropriate, the regulations will be changed to reflect that as well.

The compensation due the land owner is determined by the market. The guaranteed price is the market value of each affected property immediately prior to passage of the regulations. This amount is determined by appraisal, is subject to appeal, and is recorded. This price is the local government's guaranteed basic return to the land owner, payable whenever he or she chooses to sell on the open market. If the sale price is less than the guarantee, corrected for any change in the value of the dollar between the time of establishment of the guarantee and time of sale, the government is obliged to pay to the seller that difference between the guarantee and the market price. Any remainder of the guarantee price carries over as a guarantee to the purchaser. Two illustrations show how the guarantee works under different circumstances.

Owner Greenfield is a farmer and intends to continue farming until he retires. His guarantee is $10,000/acre. Ten years later, he decides to retire. The regulations limiting the use of the land to open space are still in place. There has been no change in the value of the dollar, but farmers are having a tougher time making a living. Thus, the highest bid for Greenfield's land is from farmer Appletree for $9,000/acre. The local government pays Greenfield $1,000 from the guarantee and Appletree, as the new owner, now holds a guarantee of $9,000.

Owner Sylvan Meadows is a developer who has been renting his land to a farmer while waiting until the time is ripe to build a housing development. His guarantee also is $10,000/acre. He decides to sell at once and invest the proceeds in land elsewhere. Farmer Wheatly, encouraged by the protection offered to farmers by the regulations, sees a chance to add to his current adjacent farm and offers $10,500/acre. Meadows sells and no compensation is required .

Some of the benefits of compensable regulations from the perspective of the land owner are that the land remains in private hands subject to sale whenever the owner chooses. The land continues to be assessed at open space value. The owner is assured of a

guaranteed price for the land. However, should the regulations be altered to encourage development, the owner may profit from an increase in land value attributable to the changed regulations.

The local government also benefits. It can assure that development occurs according to plan, when and where infrastructure is available to serve it. There is no problem of perpetuity as often exists with easements. The public obligation to pay owners for their guarantees will be spaced over time and will be cushioned by open market purchases covering some or all of the guaranteed price. There is no need for expensive, speculative, and potentially litigious appraisals of easement gifts. The market determines the land value as subject to the open space regulations.

The term "compensable regulations" might be confused with the term "compensatory regulations" as employed in a new law in Oregon[25]. Given the similarity in terms, it is important to distinguish one from the other. Compensatory regulations are very different in intent and impact than compensable regulations. The Oregon law authorizes land owners to file for compensation for loss in value of their land whenever any level of government enacts or cancels land use regulations. If the impact of these legislative changes reduces land value, compensation is due. Ownership is defined to extend back to ancestors who initially acquired the land. A few types of regulations are excluded from the law, including those concerning public health and safety, pollution, and public morality. If the government that passed the regulation is unwilling or financially incapable of paying the compensation, the regulation is waived. There is no matching provision in the law for the government to collect fees for regulations that create windfalls. Oregon has been a leader for several decades in careful statewide land use planning, introducing and enforcing urban growth boundaries. Hostility to these boundaries fueled the citizen campaign that led to passage of an initiative titled Measure 37. As the Oregon Supreme Court said, in finding no constitutional violation, "Whether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview." As compensation claims pour in, this new law may lead to the collapse of the land use system now in place

In sum, the various measures now in use in the United States to implement land use plans, both to conserve valuable natural resources and to encourage urban development in a timely and efficient manner, are proving no match to the pressures of money and politics on open land near metropolitan areas. Compensable regulations offer a fair, open system that can protect the lands more valuable for their productive and aesthetic qualities while fostering well planned communities that place less of a financial burden on taxpayers.

[25] Measure 37, a citizen initiative approved by Oregon's voters in November 2004, overturned by the trial court in 2005 in the case of MacPherson v. Department of Administrative Services et al. , and reversed and upheld by the Oregon Supreme Court on February 21, 2006, SC S52875. Measure 37 is now an amendment to ORS ch. 197. Four other states also have compensatory regulation statutes.