

DOWNZONING, FAIRNESS AND FARMLAND PROTECTION

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I. INTRODUCTION

Communities across the country continue to embark on “smart growth” efforts.¹ Smart growth aims to direct growth to already urbanized areas or other areas where growth is desired, while discouraging growth on resource lands.² Farmland protection therefore is a key goal of smart growth efforts.³

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1. James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL’Y 421, 445 (2001) (citing PLANNING COMMUNITIES FOR THE 21ST CENTURY 15-24, 87, 97 (Am. Plan. Ass’n ed., 1999)) (discussing legislation enacted by four states, executive orders issued by governors of four states and active smart growth proposals in five states during 1998-1999).

2. Maryland’s smart growth program is centered on these principles. See MD. CODE ANN. NATURAL RESOURCES §§ 5-9A (2001), et seq. (establishing the procedure to designate rural legacy areas to protect farmland and open space); MD. CODE ANN. STATE FIN. & PROC. §§ 5-7B (2001), et seq. (establishing the procedure to designate priority funding areas, areas already containing infrastructure for future growth, and to target these areas for future state appropriations encouraging growth).

3. See, e.g., MD. CODE ANN. NATURAL RESOURCES §§ 5-9A (2001), et seq.; MD. CODE ANN. STATE FIN. & PROC. §§ 5-7B (2001), et seq.; Jesse J. Richardson, Jr., *Does Smart Growth Protect Farmland and/or Open Space*, Proceedings of the 2000 Continuing Legal Education

Many communities seek to implement their smart growth vision by, in part, “downzoning” rural land to prevent dense development and, presumably, encourage agricultural activities.⁴ “Downzoning” changes the zoning classification of land to a less intensive use.⁵ Downzoning changes the “density or standards previously allowed on property . . . to further restrict the use of property.”⁶ For example, a change in classification from industrial or commercial to residential, or from residential to agricultural or conservation district amounts to a downzoning.⁷ Likewise, a reduction in allowed residential density from four (4) units per acre to one (1) unit per acre constitutes a downzoning.⁸

Property affected by downzoning usually experiences a decrease in value due to the loss of potential development. Downzoning appeals to local governments, in part, because it involves no direct expenditure of funds to compensate landowners for this loss in land value. This uncompensated decrease in property values increasingly results in controversy over the “fairness” of downzoning.⁹

Impacted landowners often feel that the use of downzoning to protect farmland is not “fair” since a relatively small number of landowners bear the financial burden of providing a public good: open space and/or farmland.¹⁰ Government officials, planners, and environmentalists contend that the downzoning is “fair.”¹¹ They assert that governmental “givings,” reciprocal benefits, and reasonable landowner expectations, all support downzoning without compensation.¹²

Political and legal considerations prompt many local and state governments to temper downzoning efforts by including compensation plans, such as transfer of development rights or purchase of development rights programs.¹³ Also, some downzoning proposals result in minimum lot sizes and/or development rights

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4. See DANIEL R. MANDELKER, *LAND USE LAW* 246 (Lexis Law Publishing, 4th ed. 1997 & Supp. 2001)(discussing standard tests for downzoning).

5. *Id.*

6. Walter F. Witt, Jr., *Downzoning-Balancing Public and Private Interests*, *PROBATE AND PROPERTY*, Nov.-Dec. 1989, at 37.

7. *Id.*

8. *Id.*

9. Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 *OHIO ST. L.J.* 1033, 1069-70 (1999).

10. *Id.*

11. See *id.* at 1072-81.

12. *Id.*

13. *Id.* at 1049-50, 1071.

allocations that seek to both protect farmland AND allow “fair treatment” to the landowner.¹⁴

Downzoning efforts that, at least in the eyes of some affected landowners, fail to provide adequate compensation for loss of development potential, are increasingly subject to legal attack. This paper first summarizes the six major potential legal challenges against downzoning to protect farmland: direct challenge of the act, “spot zoning,” “takings,” substantive due process, equal protection, and 42 U.S.C. § 1983. This paper concludes that each of these legal causes of action attempts, often awkwardly, to address the fundamental issue of “fairness.”

In addition, this paper describes and refutes the major arguments posited by those supporting the fairness of downzoning without compensation to affected landowners. Courts consistently rule in ways that contradict these arguments and therefore the arguments have no basis in law.

Finally, this paper concludes that the awkward nature of the courts’ intervention in these matters results from the inherent unfairness of downzoning without compensation along with the lack of an ideal legal cause of action to address the “fairness” issues. In their quest to address these issues, the courts have been unable, at this point, to formulate any clear rules.

II. LEGAL CHALLENGES TO DOWNZONINGS

A. *Direct Challenge of the Act*

In most states, courts treat rezonings “as legislative acts and accord them a presumption of validity.”¹⁵ The challenger holds the burden of presenting *prima facie* evidence that the challenged rezoning is arbitrary and capricious.¹⁶ Once this burden is met, the burden of proof shifts to the municipality to show that the validity of the rezoning is “fairly debatable.”¹⁷ “If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”¹⁸ In states that apply this rule, challenges to downzonings will rarely be successful.¹⁹ Almost any ordinance is fairly debatable.

14. See, e.g., *id.* at 1048-50.

15. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 188 (1998).

16. *Id.*

17. *Id.* (citing *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 388 (1926)).

18. *Id.* (quoting *Village of Euclid*, 272 U.S. at 388).

19. *Id.* at 189.

Some state courts, however, appear to feel uncomfortable granting local governments such unrestrained power.²⁰ These courts have devised several methods to examine rezoning ordinances more closely.²¹ A number of courts go so far as to classify some “rezonings as quasi-judicial in nature [and] not entitled to a presumption of validity.”²²

Some states, invoking the so-called “Maryland rule,” require either fraud, a change of physical circumstances, or a mistake in the original zoning ordinance, for a rezoning.²³ Virginia, Maryland, New Mexico, and Mississippi appear to apply this rule, at least in some circumstances.²⁴ Some courts require much more proof than normally called for in meeting the requirement that the zoning be in accordance with the comprehensive plan.²⁵ Under these approaches, a direct challenge to the rezoning is much more likely to succeed than under the majority rule. However, each case must be analyzed on its own facts.

The Virginia Supreme Court struck down an ordinance that downzoned approximately 3,500 acres for the stated purpose of protecting agricultural land.²⁶ Virginia applies the Maryland Rule to piecemeal downzonings.²⁷ “The entire amount of the property downzoned represented no more than two percent of the City’s land area.”²⁸ The Court deemed the action a piecemeal downzoning and found that no fraud, mistake, or change in circumstances existed to justify the action.²⁹

B. Spot Zoning

“Spot zoning” encapsulates another cause of action that may be utilized by landowners aggrieved by a downzoning. Much confusion exists, even in the courts, as to what constitutes a spotzoning. The Texas Court of Appeals defined spot zoning as “descriptive of the process of singling out a small parcel of land for a use classification different and inconsistent with that of the surrounding area, for the

20. *Id.*

21. *Id.*

22. *Id.* See, e.g., *Fasano v. Bd. of County Comm’rs*, 507 P.2d 23, 26 (Or. 1973).

23. JUERGENSMEYER & ROBERTS, *supra* note 15, at 187-89 (noting the “change or mistake” rule); MANDELKER, *supra* note 4, at 241.

24. See, e.g., *City of Va. Beach v. Va. Land Inv. Ass’n*, 389 S.E.2d 312, 314 (Va. 1990); *Finney v. Halle*, 216 A.2d 530, 536 (Md. 1966); *Davis v. City of Albuquerque*, 648 P.2d 777, 778-79 (N.M. 1982); *City of New Albany v. Ray*, 417 So. 2d 550, 552 (Miss. 1982). See also *Info. Please, Inc. v. Bd. of County Comm’rs*, 600 P.2d 86, 90-91 (Colo. Ct. App. 1979).

25. JUERGENSMEYER & ROBERTS, *supra* note 15, at 189.

26. *City of Va. Beach*, 389 S.E.2d at 314.

27. *Id.*

28. *Id.*

29. *Id.*

benefit of the owner of such property and to the detriment of the rights of other property owners.”³⁰ Factors used by courts to determine whether an unlawful spot zoning exists include the character of surrounding area, “whether conditions in the area have changed, the present use of the property, and the property’s suitability for other uses.”³¹ Courts also examine the degree to which the rezoning accords with the master plan.³² The basic inquiry examines whether the rezoning promotes the public good or advances private gain.³³ Although the spot zoning label usually applies to upzonings, it may also be used to challenge a downzoning.³⁴

The inquiry into whether a spot zoning exists involves fact specific analysis. In the downzoning to protect farmland analysis, however, the rezoning presumably advances the public good. However, downzoning of particular parcels also increases the value of the adjacent parcels, so it could be seen as an advancement of the private gain of the neighbors.³⁵

In addition, spot zoning addresses many of the same concerns that surround equal protection.³⁶ In essence, a plaintiff that advances a spot zoning cause of action claims that the rezoning arbitrarily favors a single or small number of landowners.³⁷

A charge of spot zoning against a downzoning to protect agricultural land, therefore, holds intuitive appeal. However, depending on the circumstances, such a challenge is not likely to succeed.

C. Takings

1. Takings Generally

When a downzoning of property results in a significant decrease in the value of the affected property, often the first response of landowners is to claim that a taking of private property for public purposes without just compensation has occurred.

30. *Burkett v. City of Texarkana*, 500 S.W.2d 242, 244 (Tex. Civ. App. 1973) [citations omitted].

31. JUERGENSMEYER & ROBERTS, *supra* note 15, at 194 (citing *Little v. Winborn*, 518 N.W.2d 384 (Iowa 1994)).

32. *Id.* at 193-94.

33. *See id.* at 194; *see also* MANDELKER, *supra* note 4, at 240 (discussing the public need and public purpose tests).

34. JUERGENSMEYER & ROBERTS, *supra* note 15, at 192-93.

35. *See, e.g., Neuzil v. City of Iowa City*, where the downzoning of plaintiff’s property came at the insistence of, and derived to the private benefit of, the neighboring landowners. The Iowa Supreme Court rejected the plaintiff’s argument that the downzoning constituted spot zoning. 451 N.W.2d 159, 167-68 (Iowa 1990) (Schultz, J., dissenting).

36. *See* MANDELKER, *supra* note 4, at 237-38.

37. *Id.*

The Fifth Amendment of the U.S. Constitution provides that “private property [shall not] be taken for public use, without just compensation.”³⁸ The United States Supreme Court has fashioned a test to determine whether a government regulation exacts a taking of private property without just compensation.³⁹ An interpretation of the test delineated in *Lucas* follows:

A. Is the purpose of the regulatory action a legitimate state interest?

1. if yes, go to B.;
2. if no, a compensable taking has occurred.

B. Does the means used to achieve the objective substantially advance the intended state purpose?

1. if yes, go to C.;
2. if no, a compensable taking has occurred.

C. Does the alleged taking compel the property owner to suffer a physical invasion of his property (or the equivalent)?

1. if yes, a compensable taking has occurred;
2. if no, go to D.

D. “No economically viable use” test:

1. Does the alleged taking deny the property owner of all economically beneficial or productive use of the land?

- i. if yes, go to 2.;
- ii. if no, go to E.

2. Does the regulation simply make explicit what already inheres in the title itself, in the restrictions that the background principles of the state’s laws of nuisance already imposed on the landowner?

- i. if yes, go to E.;
- ii. if no, a compensable taking has occurred.

E. Apply the *Penn Central* balancing test, balancing:

1. the economic impact of the regulation on the landowner;
2. the landowner's investment backed expectations; and,
3. the character of the government activity.⁴⁰

38. U.S. CONST. amend. V, § 1.

39. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992).

40. Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121, 131-32 (2000) [citations omitted].

Several law review articles have addressed the issue of whether a downzoning is likely to rise to the level of a regulatory taking of private property without just compensation.⁴¹ None of these commentators used the same framework for analyzing a regulatory takings claim as is presented here.⁴² However, their conclusion, that downzonings will rarely constitute a taking of private property for public purposes without just compensation, generally comports with the analysis presented here.⁴³

2. Application of the Takings Test to Downzonings

Application of the regulatory takings test set out herein generally yields the conventional wisdom that a downzoning rarely constitutes a taking of private property for public purposes without just compensation. However, recent state and federal court cases raise doubt as to continued validity of the conventional wisdom. The following discussion analyzes the likelihood of a landowner prevailing on a takings claim by considering, in turn, each of the “five factors of the *Lucas* test”:

(a) Is the purpose of the regulatory action a legitimate state interest?

Courts accept protection of agricultural land as a legitimate state interest.⁴⁴ However, courts increasingly tend to subject local governments’ claims of “public purpose” to heightened scrutiny.⁴⁵ While courts previously deferred to the stated intent of the local governments, they seem to find the stated intent to be merely pretextual in recent cases.⁴⁶

(b) Does the means used to achieve the objective substantially advance the intended state purpose?

Downzoning to protect agricultural land generally takes the form of large-lot zoning. Large-lot zoning often fails to protect

41. See, e.g., Cordes, *supra* note 9, at 1033; John A. Humbach, *Law and A New Land Ethic*, 74 MINN. L. REV. 339 (1989).

42. Cordes, *supra* note 9, at 1051-69; Humbach, *supra* note 41, at 351-60.

43. Cordes, *supra* note 9, at 1069; Humbach, *supra* note 41, at 369-70.

44. See, e.g., *Agins v. Tiburon*, 447 U.S. 255, 261-62 (1980) (extolling the legitimate governmental goals advanced by the protection of open space).

45. See, e.g., Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

46. See, e.g., *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 572-73 (N.D. Tex. 2000) (rejecting as pretextual town’s stated purposes for one-acre minimum lot sizes of water and sewer and “rural character” concerns and holding that the zoning was exclusionary).

agricultural land but instead, promotes sprawl and hobby farming. The opinion in *Scot Venture, Inc. v. Hayes Township*⁴⁷ provides the leading case to recognize this principle. The Michigan Court of Appeals struck down an ordinance requiring ten-acre minimum lot sizes.⁴⁸ The court found that the township's stated purpose, to protect farmland, was better characterized as an intent to exclude new residents from the area.⁴⁹

(c) Does the alleged taking compel the property owner to suffer a physical invasion of his property (or the equivalent)?

In a traditional sense, a downzoning of property does not constitute a physical invasion. However, based on the rationale of *Bormann v. Board of Supervisors of Kossuth County, Iowa*,⁵⁰ one could advance a convincing argument that downzoning indeed constitutes a physical invasion. In *Bormann*, the Iowa Supreme Court held that one Iowa Right to Farm law constituted a taking of private property from the neighbor of the farmer for public purposes without just compensation.⁵¹

Iowa law provided that a farm or farm operation located in an agricultural area did not constitute a nuisance.⁵² This classification applied regardless of the established date of operation or date of expansion of the agricultural activities of the farm or farm operation.⁵³ This immunity from nuisance suits applied with few exceptions.⁵⁴

With this background, the Court in *Bormann* addressed whether the right to farm law at issue in that case constituted an unlawful "taking."⁵⁵ In applying the *Lucas* test, the Iowa Supreme Court declared that the right to maintain a nuisance suit is an easement.⁵⁶ "An easement is an interest in land which entitles the owner of the easement to *use* or enjoy land in the possession of another."⁵⁷ A right of way for ingress or egress is a common type of easement.⁵⁸

47. 537 N.W.2d 610 (Mich. Ct. App. 1995).

48. *Id.* at 611-12.

49. *Id.* at 611.

50. 584 N.W.2d 309, 315 (Iowa 1998), *cert. denied*, Gires v. Bormann, 525 U.S. 1172 (1999).

51. *Id.* at 321.

52. *Id.* at 314 (citing IOWA CODE § 352.11(1)(a)).

53. *Id.*

54. *Id.* (citing IOWA CODE § 35.11(1)(b)).

55. *Bormann*, 584 N.W.2d at 315-22.

56. *Id.* at 315-16 (citing *Churchill v. Burlington Water Co.*, 62 N.W. 646, 647 (1895)).

57. *Id.* at 316 (citing RESTATEMENT OF PROP.: SERVITUDES § 451 cmt. a at 2911-12 (1944)).

58. ROBERT R. WRIGHT & MORTON GITELMAN, *LAND USE: CASES AND MATERIALS*, 159-60 (5th ed. 1997).

The Court found that the Board's approval of the application for an agricultural area triggered the provisions of the state statute affording the applicants immunity from nuisance suits.⁵⁹

This immunity resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants This amounts to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution. This also amounts to a taking of private property for public use in violation of article 1, section 18 of the Iowa Constitution.⁶⁰

By taking this easement from the neighboring landowners, the actions of the Board essentially "physically invaded" the neighbors' property.⁶¹ The state now allowed the farmer to conduct activities that constitute a nuisance, where the farmer was not allowed to conduct these activities in the past. In other words, the Iowa Supreme Court reasoned that this law took one of the sticks (the right not to be subject to unreasonable interference with the reasonable use of your land) from the bundle of sticks representing the property rights of the farmer's neighbor.⁶²

Thus, the court reasoned, step C. of the takings test set out herein had been met.⁶³ This step constitutes a "categorical" taking, meaning that no further inquiry is necessary to determine whether the action amounts to a taking of private property for public purposes without just compensation.⁶⁴

One could analogize a downzoning to a forced conservation easement. In this case, the easement is the use of the affected landowner's property by neighbors for views. If the reasoning of the *Bormann* case holds, a downzoning could amount to a taking of private property for public purposes without just compensation.

59. *Bormann*, 584 N.W. 2d at 315.

60. *Id.* at 321. Note that the language of the Iowa Supreme Court's holding also implies that a taking could be found under the first prong of the *Lucas* test. Namely, if the easement was for the "benefit of the applicant," the governmental action appears to lack a proper purpose. The Iowa Supreme Court goes on to state that the action was for "public use," however, with no explanation. *Cf.* *Boomer v. Atlantic Cement Co. Inc.*, 257 N.E.2d 870 (N.Y. 1970) (Jasen, J., dissenting) and *Nat'l Land & Inv. Co. v. Bd. of Adjustment of Easttown*, 215 A.2d 597 (Pa. 1965). See discussion under substantive due process *infra* pp. 14-18. A downzoning could similarly be found to be a taking of private property for *private* purposes.

61. *See Bormann*, 584 N.W.2d at 321.

62. *See id.*

63. *See id.*

64. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

(d) “No economically viable use” test:

i. Does the alleged taking deny the property owner of all economically beneficial or productive use of the land?

Downzoning rarely, if ever, deprives a landowner of *all* economically viable uses of the property. In *Agins v. Tiburon*, Tiburon downzoned a large portion of the locality, including the Agins property, to limit residential development.⁶⁵ However, Agins retained a limited right to develop the property.⁶⁶ So long as some right of development exists, a court likely will not find a taking.⁶⁷ However, if development is prohibited, as was the case in *Lucas*, the property likely retains no economically viable use, particularly if the property cannot be economically farmed.

ii. Does the regulation simply make explicit what already inheres in the title itself, the restrictions that the background principles of the state's law of nuisance already impose on the landowner?

If the property has been stripped of any economically viable uses, the nuisance exception likely would not apply. As Justice Scalia not so subtly hinted in the majority opinion in *Lucas*, “[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the ‘essential use’ of land.”⁶⁸

(e) Apply the *Penn Central* balancing test,⁶⁹ balancing:

- the economic impact of the regulation on the landowner;
- the landowner's investment backed expectations; and,
- the character of the government activity.

The *Penn Central* balancing test is extremely objective. The result of such a balancing depends upon the facts of the particular case. However, a downzoning would rarely amount to a taking of

65. 447 U.S. 255, 257 (1980).

66. *Id.* at 262.

67. *Id.*

68. *Lucas*, 505 U.S. at 1031.

69. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

private property for public purposes under the *Penn Central* balancing test.⁷⁰

D. Substantive Due Process

Amendment V of the U.S. Constitution provides, in part, that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”⁷¹ Amendment XIV, Section 1 of the U.S. Constitution imposes this obligation of due process upon each state (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).⁷² Most, if not all, state constitutions provide similar protections. Although these due process clauses include procedural and substantive requirements, this article focuses only upon substantive due process.

Courts interpret substantive due process to mean that land use controls must advance legitimate governmental interests that serve the public health, safety, morals, and general welfare.⁷³ Stated differently, “[s]ubstantive due process requires that:

1. [t]here be a valid public purpose for the regulation;
2. [t]he means adopted to achieve that purpose be substantially related to it; [and,]
3. [t]he impact of the regulation upon the individual not be unduly harsh.”⁷⁴

Whether land use regulation serves the general welfare forms the major substantive due process question. Substantive due process overlaps other constitutional limitations on land use regulations. In takings cases, a valid public purpose must also exist for the regulation.⁷⁵ Similarly, equal protection doctrine requires an appropriate public purpose.⁷⁶

In the past, substantive due process claims rarely succeeded. Recently, this cause of action appears to have experienced

70. See also Cordes, *supra* note 9; *Agins*, 447 U.S. 255 (1980).

71. U.S. CONST. amend. V.

72. U.S. CONST. amend. XIV, § 1.

73. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926).

74. C. Timothy Lindstrom, *Planning Law Basics in Virginia*, LAND USE LAW IN VIRGINIA I-7 (Va. Law Found. 1999) (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962)).

75. See discussion on takings, *supra* notes 38-70.

76. See discussion on equal protection, *infra* pp. 72-75.

somewhat of a resurgence. However, courts usually construe “public purpose” very broadly to include open space regulation and even aesthetic zoning in many instances.⁷⁷

“[W]hen courts characterize a local regulation as ‘arbitrary and capricious’ they may be saying that the ordinance violates substantive due process.⁷⁸ According to Lindstrom, this applies since the court reasons that “the arbitrary application of a regulation cannot be substantially related to accomplishing the stated objective of the regulation, no matter how valid that objective may be.”⁷⁹

Scots Ventures, Inc. v. Hayes Township involved a landowner challenge to a ten-acre minimum lot size.⁸⁰ Hayes Township, Michigan maintained that the large lot zoning protected agricultural land and the rural character of the area.⁸¹ The court set forth the test for substantive due process claims against zoning ordinances in Michigan: “[f]irst, that there is no reasonable governmental interest being advanced by the present zoning classification itself . . . or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question.”⁸² The Michigan Court of Appeals held that refusal to rezone the property to allow five-acre minimum lot sizes, instead of ten acres as required under the ordinance, violated the plaintiff’s substantive due process rights:⁸³

Even assuming that [the] plaintiff’s property is aptly considered farmland, the evidence suggests that the ten-acre minimum was arbitrary and capricious. While there was [also] testimony that a five-acre minimum lot size requirement would not be sufficient to preserve farmland, there was also testimony that the ten-acre minimum lot size requirement would likewise be insufficient. Given the deficiencies of

77. See, e.g., *Berman v. Parker*, 348 U.S. 26, 33 (1954) (declaring that “[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.”).

78. Lindstrom, *supra* note 74, at I-7.

79. *Id.*

80. 537 N.W.2d 610 (Mich. Ct. App. 1995).

81. *Id.* at 611.

82. *Id.* (quoting *Kropf v. Sterling Heights*, 215 N.W.2d 179 (Mich. 1974)).

83. *Id.* at 611-12.

both options, the imposition of the more burdensome ten-acre requirement is unreasonable.⁸⁴

The Court continued by questioning the motives of the township.⁸⁵ In the past, courts generally accepted the municipality's stated purpose at face value. The following passage from *Scots Ventures* represents a trend whereby courts subject the stated purpose of the ordinance to more stringent scrutiny:⁸⁶

This case presents a situation in which the township's interest in preserving 'farmland' can be more accurately characterized as an interest in preventing further development of an area that is already used for recreational and residential, rather than agricultural, purposes. The real motivations behind the facade of 'public health and welfare' appear to be aesthetics, retention of 'rural character,' and a desire to exclude new homeowners from the township. We believe that [the] plaintiff has met its burden of overcoming the presumption that the restriction on its property is valid and has established that the application of the ten-acre minimum lot size requirement to its property is unreasonable. Accordingly, we reverse.⁸⁷

A line of Pennsylvania cases also strike down several local agricultural zoning schemes as violations of substantive due process.⁸⁸ *National Land and Investment Company* shows early judicial skepticism regarding the motives of local governments in enacting zoning to protect farmland.⁸⁹ In the early 1960's, Easttown was subject to development pressure from Philadelphia and King of Prussia-Valley Forge.⁹⁰ In response to this pressure, and to insure proper sewage disposal, maintain adequate roads and fire protection, and to preserve the "character" of the area, Easttown

84. *Id.* at 611.

85. *Id.* at 612.

86. *See also* *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526 (N.D. Tex. 2000).

87. *Scots Ventures, Inc. v. Hayes Township*, 537 N.W.2d 610, 612 (Mich. Ct. App. 1995).

88. *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1966); *Kit-Mar Builders, Inc. v. Township of Concord*, 268 A.2d 765 (Pa. 1970); *Hopewell Township Bd. of Supervisors v. Golla*, 452 A.2d 1337 (Pa. 1982). *But see* *Boundary Drive Assocs. v. Shrewsbury Township Bd. of Supervisors*, 491 A.2d 86 (Pa. 1985) (upholding a sliding-scale zoning plan that limited farms of any size consisting of prime farmland to two dwellings).

89. *See Nat'l Land & Inv. Co.*, 215 A.2d 597.

90. *Id.* at 605.

adopted a four-acre minimum lot size over much of the jurisdiction.⁹¹ The court rejected the infrastructure arguments as pretextual and opined that the desire to keep the town the same, “is purely a matter of private desire which zoning regulations may not be employed to effectuate.”⁹² In a statement that has been echoed in subsequent cases, and is likely to be repeated by future courts, the court held that “[a] zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid.”⁹³ Employing a similar rationale, the Supreme Court of Pennsylvania, in *Kit-Mar Builders, Inc. v. Township of Concord*, held that an ordinance requiring lots no less than two acres along existing roads, and no less than three acres in the interior, violated the substantive due process rights of the landowner appellant.⁹⁴

The last case, in this line of cases invalidating zoning provisions under the due process clause, is *Hopewell Township Board of Supervisors v. Golla*, which involved an ordinance designed to protect farmland.⁹⁵ In summary, the ordinance allowed the landowner to either use a parcel in the agricultural zone as an undivided tract with no more than one single-family dwelling or subdivide up to five contiguous lots with a maximum lot size of one and one-half acres.⁹⁶ The court held that the ordinance failed to use a less restrictive means to further the legitimate goal of protecting agricultural land, and thus violated the substantive due process rights of the affected landowners.⁹⁷

E. Equal Protection

Amendment XIV of the U.S. Constitution provides, in part, that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁹⁸ Equal protection means that the law should treat similarly situated persons similarly.⁹⁹ Most states have statutes that extend equal protection requirements specifically to

91. *Id.* at 608-11.

92. *Id.* at 611.

93. *Id.* at 612.

94. 268 A.2d 765, 765-66 (Pa. 1970).

95. 452 A.2d 1337, 1338 (Pa. 1982).

96. *Id.* at 1338-39 (The author refers to this zoning scheme as “sliding-scale zoning with no slide.”).

97. *Id.* at 1343-44.

98. U.S. CONST. amend. XIV, § 1.

99. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

zoning regulations, requiring that such regulations be uniform for each class or kind of use throughout each zoning district.¹⁰⁰

Several recent landowner court victories have relied on the equal protection clause of the Fourteenth Amendment. The United States Supreme Court upheld a “class of one” claim in a landowner challenge to a zoning action that was alleged to have vindictive motives.¹⁰¹ Likewise, the Pennsylvania Supreme Court, in *Hopewell Township Board of Supervisors v. Golla*, held that, in addition to the violation of substantive due process, the ordinance at issue violated the equal protection clause.¹⁰² This violated equal protection by treating owners of large lots less favorably than owners of smaller lots.¹⁰³

F. 42 U.S.C. Section 1983

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be

100. See, e.g., VA. CODE ANN. § 15.2-2282 that states “[a]ll zoning regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts.” The provisions in most or all states are similar to Virginia’s provisions. See also *Chrinko v. South Brunswick Tp. Planning Bd.*, 187 A.2d 221, 225 (N.J. 1963) (finding that cluster or density zoning comports with New Jersey’s uniformity requirement since the practice is not compulsory and is open to all landowners with that zoning district).

101. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

102. *Hopewell Township Bd. of Supervisors*, 452 A.2d at 1343-44.

103. *Id.* Note, however, that the Pennsylvania Supreme Court upheld an ordinance with a sliding-scale plan for some farms, but that limited farms of any size consisting of prime farmland to two dwellings in *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 491 A.2d 86, 92 (Pa. 1985).

considered to be a statute of the District of Columbia.¹⁰⁴

This statute was enacted to protect civil rights but has been applied in a broad range of circumstances. Section 1983 authorizes a lawsuit based upon violation of any constitutional right, including substantive due process and the takings clause. The United States Supreme Court has ruled that § 1983 protects as a “right,” property rights.¹⁰⁵ A successful plaintiff under § 1983 can recover damages and attorney’s fees.¹⁰⁶

Thomas v. City of West Haven illustrates a potential use of § 1983 in a land use context.¹⁰⁷ In that case, the Supreme Court of Connecticut held that landowners could file suit under § 1983 where a zoning change was denied because of the animosity of two zoning board members.¹⁰⁸ The two board members recused themselves from the actual vote.¹⁰⁹ The court found that they were motivated by personal dislike, not by animus based on race, sex, religion, etc.¹¹⁰ However, mistreating a property owner because of personal dislike violates the Fourteenth Amendment’s Equal Protection Clause.¹¹¹

Note also that the United States Supreme Court has interpreted § 1983’s “custom and usage” requirement to mean that local governments are liable only for actions that are “official policy” or “visited pursuant to governmental custom.”¹¹² The Court did not explain these terms. However, *Thomas*, relying on cases subsequent to *Monell*, found that “[a]lthough the defendants are correct in their assertion that a single act does not necessarily become municipal policy . . . when an ‘authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right [this] necessarily establishes that the municipality acted culpably.’”¹¹³

A recent pronouncement in takings jurisprudence by the United States Supreme Court occurred in the context of a § 1983 case. In *City of Monterey v. Del Monte Dunes at Monterey*, a property owner brought a § 1983 action against the City of Monterey alleging that the City’s repeated rejections of the owner’s proposals for development of property had violated the owner’s equal protection

104. 42 U.S.C. § 1983.

105. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

106. 42 U.S.C. § 1988(b).

107. 734 A.2d 535, 548-49 (Conn. 1999).

108. *Id.* at 549.

109. *See id.*

110. *Id.* at 545-46.

111. *Id.* at 548.

112. *Id.* at 549 (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978)).

113. *Thomas*, 734 A.2d at 551.

and due process rights, and had effected a regulatory taking.¹¹⁴ The jury returned a verdict for the landowner.¹¹⁵ On appeal, the Court held that the Seventh Amendment gives the right to a jury trial on a § 1983 claim.¹¹⁶ The Court further held that issues of whether the city's repeated rejections of development proposals deprived owner of all economically viable use of the land, and whether the city's decision to reject the development plan bore a reasonable relationship to its proffered justifications, were properly submitted to a jury.¹¹⁷

Given § 1983's provision for attorneys' fees and the availability of a jury trial, its use in land use actions will increase. This cause of action may be used to present many of the "fairness" claims discussed in this article.

III. IS DOWNZONING TO PROTECT FARMLAND "FAIR"?

A. Introduction

Although a particular ordinance that downzones property to protect farmland may (or may not) survive legally, political and other considerations dictate that the fairness issue be addressed. Many commentators maintain that downzoning to protect farmland is "fair." This section discusses the major arguments in favor of the fairness of downzoning and refutes each in turn.

B. Givings

1. Generally

"Before laws were made, there was no property; take away laws, and property ceases."¹¹⁸

One of the most often-cited arguments put forth in support of downzoning to protect farmland is that the landowners did not create the increases in their property values, and hence have no right to be compensated for downzonings or regulations that reduced the value of their property.¹¹⁹ In other words, much of the development value of farmland is attributable not to the work or ingenuity of the landowner, but to the infrastructure (i.e. roads,

114. 526 U.S. 687, 694 (1999).

115. *Id.*

116. *Id.* at 709.

117. *Id.* at 694.

118. JEREMY BENTHAM, THE THEORY OF LEGISLATION 69 (Richard Hidreth trans., A.S. Pandya 5th Ed. 1979) (1877).

119. See, e.g., Cordes, *supra* note 9, at 1074; ARTHUR C. NELSON & JAMES B. DUNCAN, GROWTH MANAGEMENT PRINCIPLES AND PRACTICES (1995).

sewer, water, etc.) paid for by the general public through tax revenues. By restricting development potential through downzoning, the value of the land is simply being reduced to levels that it would otherwise be worth if government had not gratuitously provided this infrastructure. Critics of farmland protection efforts that provide compensation for development rights (like transfer of development rights or purchase of development rights programs) assert that if farmers are paid for the loss of their development rights, the public is in effect paying twice (also known as “double dipping”): once when they pay for the infrastructure that enhances farmland values, and a second time by buying the development rights.¹²⁰

The givings argument holds some intuitive appeal until the underlying premises are more critically examined. The development value of farmland undoubtedly results in part from infrastructure and other governmental expenditures financed by taxpayers (including the farmland owner). However, the givings argument fails for at least three reasons. First, all landowners receive givings, not just owners of undeveloped rural land. Second, the givings argument proves to be a slippery slope and results in no government action rising to the level of a taking. Finally, the law simply fails to recognize givings.

The first major flaw of the givings argument stems from its failure to account for the fact that all property owes part (or all) of its value to governmental expenditures for public services. Without roads, public water and sewer, police and fire protection, and other public services, land holds little or no value. Infrastructure improvements and services that increase the value of unimproved rural or suburban land also increase the value of residential housing and businesses located in the area. Both undeveloped farmland and single-family dwellings in residential subdivisions derive much, or all, of their value from publicly provided infrastructure and services. Moreover, the fair market value of residential dwellings includes the gracious gift of a mortgage interest deduction for federal income tax purposes. All landowners, therefore, receive givings.

This insight raises two equity issues. First, if government officials choose to “recapture” these givings from some landowners and allow other landowners to retain their givings, an obvious inequity results. Second, the very action of the government in recouping its givings from certain rural landowners results in another giving to landowners located in proximate areas of the community.

120. See, e.g., Cordes, *supra* note 9, at 1074; NELSON & DUNCAN, *supra* note 119.

Development restrictions on farmland provide givings to nearby landowners in two ways. First, nearby property increases in value due to the dedicated scenic views provided by “protected” land. In addition, the supply of developable land is reduced. This shift in supply further raises the value of nearby building sites and houses.¹²¹

Thus, the labeling of the recovery of the loss of value in a downzoning through a takings claim or otherwise as “double-dipping”¹²² simply fails to recognize the underlying economic reality. All property owners are the beneficiaries of “givings” (“one dip”). If the government, via a downzoning or otherwise, “takes” this value back, the landowner now holds some fraction of his original full dip. If the government compensates the landowner for the loss in value, the affected landowner is merely placed back on the same level as other landowners in the community with one “dip” or “giving.” In fact, since the downzoning amounts to a “giving” to nearby landowners, it is those landowners that are true double dippers. The following example illustrates this concept:

EXAMPLE 1:

Frances Farmer owns a 300-acre parcel in Paradise County. The farm is valued at \$1.5 million for development purposes. Assume for the purposes of this example that the government “givings” included in the fair market value amount to \$700,000. Frances’ neighbor, Hilda Homeowner, owns a single-family dwelling and one-half acre lot valued at \$200,000. Assume that government “givings” included in this value amount to \$90,000. Paradise County, in order to “preserve farmland” downzones Frances’ farm, along with other farmland in the county. Frances’ farm is now valued at \$1,000,000, including \$200,000 in government “givings” value. Hilda’s home and lot are now valued at \$225,000, include \$115,000 in government givings.

If the local government compensates Frances for her loss in value, Frances now has a farm worth \$1,000,000 (including \$200,000 in government

121. See WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 86 (Donald G. Hagman & Dean J. Misczynski, eds., 1978).

122. Cordes, *supra* note 9, at 1074 (citing Edward Thompson, Jr., *The Government Giveth*, ENVTL. F., Mar.-Apr. 1994, at 22).

“givings”) and \$500,000 cash (less attorneys’ fees and other costs of the dispute). She is merely put back to her prior position. Hilda, however, gains an additional \$25,000 in government “givings,” while losing none of her prior-held “givings.” She may pay slightly more in taxes, but has effectively “double-dipped.”

This example shows that compensating farmers for losses in value attributable to downzoning may be efficient from a societal standpoint. If the sum of the additional government givings incorporated in the value of nearby properties, plus the general environmental benefits and other externalities, exceed the compensation to the farmer, the taxpayers receive more in benefits than the additional taxes paid. Alternatively, one could argue that the neighboring landowners should compensate the farmer for providing the additional giving, and that the community should compensate the farmer in the amount of the full value of the benefit. This alternative proposal, while providing a windfall to the farmer, is more “fair” when viewed from the perspective of the neighboring landowners who presently receive a gratuitous giving from the downzoning.

Extending this analysis further, the second major flaw of the givings argument is that it proves too much. For a perfect market in real estate (or any other good) to exist, property rights must be well defined, exclusive, transferable, enforceable, and completely enforced.¹²³ Although perfect markets exist only in economic models, a market must exist for land to have value. In the United States, the government, through legislative or judicial action, defines and enforces property rights. In addition, governmental action provides for exclusivity and transferability.¹²⁴ Land therefore has no value without government regulations to specify and enforce property rights.¹²⁵ This fact is clearly evident in Eastern European countries attempting to transition to the free market system. In these countries, the property rights are not well defined, enforceable, or enforced. Land markets are difficult, if not impossible, to establish in these legal environments.

123. See ALAN RANDALL, *RESOURCE ECONOMICS: AN ECONOMIC APPROACH TO NATURAL RESOURCE AND ENVIRONMENTAL POLICY* 158 (2d ed. 1987).

124. *Id.* Both the police and the judicial system enforce rights. The judicial system upholds proper transfers and rejects transfers that do not comply with the governmental laws and regulations.

125. The author acknowledges that this argument is inconsistent with the foregoing example. However, the numbers used in the example were for illustrative purposes only. The author asserts that land is valueless without government regulation.

If the logic of the givings argument holds, the government may therefore confiscate all property without compensation. The givings argument asserts that what the government giveth, it may take away. Such a rule results in nonexistent property rights and valueless property. No government action constitutes a taking under this regime.

Finally, the law simply fails to condone the givings argument. Amendment V of the U.S. Constitution provides, in part, that “private property [shall not] be taken for public use, without just compensation.”¹²⁶ By virtue of Amendment XIV, this admonition applies to state as well as federal action.¹²⁷ All state constitutions contain a similar provision. Nowhere does the U.S. Constitution, nor any state constitution, prohibit givings. Federal and state court takings jurisprudence conspicuously lack any reference to givings. The reasoning behind the givings doctrine ignores the takings clause of the U.S. Constitution and over eighty years of legal case law.

Givings proponents recognize that federal case law fails to recognize “givings,”¹²⁸ but point hopefully to Justice Stevens’ dissent in *Dolan v. City of Tigard* that explicitly discusses givings.¹²⁹ In *Dolan*, the City of Tigard imposed certain conditions upon the granting of a requested permit that would allow Dolan to expand her hardware store.¹³⁰ In his dissent, Justice Stevens argued that the Court should consider givings in its analysis:

[T]he Court ignores the state courts’ willingness to consider what the property owner gains from the exchange in question. [Justice Stevens discusses several state cases] In this case, moreover, Dolan’s acceptance of the permit, with its attached conditions, would provide her with benefits that may well go beyond any advantage she gets from expanding her business. As the United States pointed out at oral argument, the improvement that the city’s drainage plan contemplates would widen the channel and reinforce the slopes to increase the carrying capacity during serious floods, “conferring considerable benefits on the property owners

126. U.S. CONST. amend. V.

127. U.S. CONST. amend. XIV, § 1.

128. ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, *THE TAKINGS ISSUE* 159-60 (1999).

129. 512 U.S. 374, 396-400 (1994).

130. *Id.* at 377.

immediately adjacent to the creek.” (citation omitted).¹³¹

However, givings proponents should not place much weight on Stevens’ language. First, the endorsement of a givings concept comes in a dissenting opinion, which did not coincide with that of the majority of the court. In addition, the *Dolan* case involves exactions, whereby a governmental authority imposes conditions as a prerequisite to grant some permission or right.¹³² Downzoning implicates regulatory takings, which are distinguishable from exactions. Regulatory takings do not involve the landowner asking for permission to engage in some sort of activity. Therefore, *Dolan* proves to be immaterial to the downzoning question.

2. *The Special Case of Farm Subsidies*

Supporters of downzoning as a vehicle to achieve agricultural zoning often point to farm subsidies as an example of extraordinary “givings” that provide an additional reason to deny compensation when downzoning rural land.¹³³ Farm subsidies fail to validate unequal treatment of farmers for at least four reasons.

First, farm subsidies are part of a “cheap food” policy that the federal government has pursued for decades. Farm subsidies keep consumer prices for food low.¹³⁴ Thus, the consumer benefits from these subsidies. Therefore, if a giving at all, farm subsidies give uncompensated benefits to consumers.

Secondly, farm subsidies, by providing profitably to the farm operation, help keep land in farming, at least in the short term, as opposed to being sold for development. Farmland neighbors, therefore, continue to enjoy the views, the environmental benefits, and other positive externalities from undeveloped farmland. The visual amenities derived from farmland increase the value of adjacent property. Subsidies give unrecompensed value to the general public and farmland neighbors by providing these public services (scenic views, environmental benefits and other benefits) without the public paying the farmer for the services.

131. *Id.* at 399-400 (Stevens, J., dissenting).

132. *Id.* at 395.

133. See, e.g., C. Ford Runge, et. al, *Public Sector Contributions to Private Land Value: Looking at the Ledger*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP (Charles Geisler & Gail Daneker, eds., 2000).

134. Lawrence W. Libby, *Farmland Protection Policy: An Economic Perspective*, American Farmland Trust Center for Agriculture in the Environment (1997), at <http://www.aftersearch.org/researchresource/wp/wp07-1.html> (Working Paper CAE/WP 97-1).

Thirdly, farm subsidies increase the value of the subject land FOR FARMING ONLY; farm subsidies do NOT affect the value of the land for development.¹³⁵ Farmers receive subsidies only so long as they produce the subsidized crop. The subsidy allows the farmer more profit, thereby increasing the value of the property if planted in that crop. Therefore, so long as the value of the land for development exceeds the value of the land for subsidized farming, which will almost always be the case in areas that are experiencing development pressures, farm subsidies do not “give” farmers any additional land value. In the few cases where the value of the land in agricultural pursuits (including any value added by farm subsidies) exceeds the value of the land for development, the land is more likely to stay in farming, and society in general benefits. Farm subsidies, then, may serve as a farmland protection tool.

EXAMPLE 2:

Farmer Jones owns 300 acres on which she grows soybeans. The fair market value of the property (the highest and best use is single family dwellings) is \$1.5 million. Without subsidies, the value of the land as a soybean farm is \$600,000. With subsidies, the value of the land as a soybean farm increases to \$1.0 million. The fair market of the land, with or without the subsidies, is \$1.5 million.

Finally, distribution of farm subsidies is uneven, with some farmers receiving large amounts of money for farm subsidies and others receiving no subsidies.¹³⁶ This uneven distribution of farm subsidies, along with the benefits that flow to consumers, would exacerbate the administrative difficulty of accounting for givings.

135. Since farm subsidies are received for growing a particular crop or leaving the land fallow, the subsidies do not impact the value of land for development. Farmers either receive a particular amount per bushel of crop produced or per acre of land left fallow. Value for development remains the same whether subsidies are paid or not, since that value is determined by the market for housing. If the value of land for housing is greater than the value of land for agriculture (whether subsidized or not) then a rational landowner sells the land for development or develops the land himself.

136. Subsidies are generally available for grain crops like corn and soybeans, raised mainly in the midwest. On the other hand, no subsidies are available for peaches and apples, grown on the east and west coasts. A small percentage of farmers in Virginia, for example, receive subsidies since they grow apples, peaches, beef cattle, etc. . . . Peanut farmers in Virginia can receive subsidies. On the other hand, grain farms dominate Iowa. The vast majority of these farmers do receive subsidies.

3. *Givings and Conservation Easements*

Incorporating an analysis of givings into the downzoning debate also implicates other existing policies. For example, if increases in farmland value are truly created by government action, another land protection policy, the conservation easement, requires revision. Donors of conservation easements may receive federal and state income tax, federal estate and gift tax, and local real estate tax benefits as a result of the donation.¹³⁷ Tax law bases the amount of the benefit on the difference in the value of the property with and without the easement in place.¹³⁸

Some donors have received large tax benefits from donations of conservation easements through this federal program. But the logic of the givings argument negates any reason to give a tax break for a difference in land valuation that the government, not the individual, was responsible for creating in the first place. If the law begins to recognize givings, then tax benefits for donation of conservation easements must be reexamined and likely eliminated.

C. *Reciprocity*

Supporters of downzoning to protect agricultural land also cite the “reciprocal benefits” argument. The reciprocal benefits argument states that positive and negative impacts of government regulation tend to balance out in the long run, and that any regulation could be deemed unfair if critiqued in isolation.¹³⁹ Cordes asserts that two types of reciprocal benefits exist, specific and general.¹⁴⁰ Specific reciprocal benefits are those benefits that are received from the same regulation that also causes the hardship.¹⁴¹ As an example of specific reciprocal benefits, consider the typical zoning ordinance. The fact that a landowner may, for example, only construct a single-family dwelling on his or her property instead of a steel plant or apartment building, benefits his neighbors by maintaining and possibly increasing the value of the neighbors’ property. However, since the neighbors similarly can only construct single-family dwellings on their property, the landowner benefits from the same regulation that restricts his or her rights.

General reciprocal benefits involve much more abstract reasoning, but the theory suggests that individual government

137. See, e.g., Jesse J. Richardson, Jr., *Tax Benefits to Farmers and Ranchers Implementing Conservation and Environmental Plans*, 48 OKLA. L. REV. 449, 450-60 (1995).

138. Treas. Reg. § 1.170A-14(h) (2003).

139. See Cordes, *supra* note 9, at 1075-77.

140. *Id.* at 1075.

141. *Id.*

regulations should not be viewed in isolation, because any regulation appears unfair in this context.¹⁴² The theory posits that a specific regulation will have a negative effect on certain members of society, but that other governmental regulations will benefit this same group.¹⁴³ When viewed in isolation, a particular regulation may seem unfair to certain landowners, but when viewed in conjunction with the entire regulatory universe, the benefits and burdens equal out.¹⁴⁴

Cordes admits downzoning to protect agricultural land lacks specific reciprocity.¹⁴⁵ “[M]ost of the benefits from preservation go to the broader public and not to the immediate parties involved.”¹⁴⁶ Instead, Cordes relies on the “general” reciprocal benefits argument to sustain his assertion that downzoning to protect agricultural land is fair.¹⁴⁷ However, the evidence used to support this argument from both a legal and equitable standpoint is on shaky ground, at best. No court case has specifically addressed specific versus general reciprocity. In fact, as a general matter, the less specific reciprocity the regulation contains, the more likely the court will strike the regulation down.

The United States Supreme Court has stated that “[t]he determination that governmental action constitutes a taking [and that compensation is due] is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.”¹⁴⁸ In *Agins v. Tiburon*, the city of Tiburon downzoned a large portion of the locality, including the Agins property, to limit residential development.¹⁴⁹ The Court found it significant that:

[t]here is no indication that the appellants’ 5-acre tract is the only property affected by the ordinances [in question]. Appellants therefore will share with other owners the benefits and burdens of the city’s exercise of its police power. In assessing the fairness of the zoning ordinances [at issue], these benefits must be considered along with any diminution in market value that the appellants might suffer.¹⁵⁰

142. *Id.* at 1076.

143. *Id.* at 1075.

144. *See id.* at 1076.

145. *Id.* at 1075.

146. *Id.* at 1044.

147. *Id.* at 1044-45.

148. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

149. *Id.* at 257.

150. *Id.* at 262.

This language clearly contemplates a “specific” reciprocal benefits analysis. The downzoning at issue was not a taking because specific reciprocity existed.

Undoubtedly, “specific” reciprocal benefits should be taken into account. In fact, many court cases have done so in the context of takings claims. The United States Supreme Court recognized the significance of “specific” reciprocal advantage in *Pennsylvania Coal Co. v. Mahon*.¹⁵¹ In that case the court recognized that an earlier mine regulation case did not contravene the takings clause since it “secured an average reciprocity of advantage that has been recognized as a justification of various laws.”¹⁵² Some regulations do not result in “specific” reciprocal benefits.¹⁵³ The majority opinion in *Pennsylvania Coal* summarized the rationale for requiring specific reciprocity by stating that:

[i]n general it is not plain that a man’s misfortunes or necessities will justify his shifting the damages to his neighbor’s shoulders. 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.¹⁵⁴

The United States Supreme Court has recognized that the:

Fifth Amendment does not prevent actions that secure a “reciprocity of advantage,” it is designed to prevent “the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.” A broad exception to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every

151. 260 U.S. 393 (1922).

152. *Id.* at 415.

153. *See, e.g., id.* (holding the regulation in question rose to the level of a regulatory taking in part by imposing an inordinate burden on certain landowners).

154. *Id.* at 416.

action the government takes is intended to secure for the public an extra measure of “health, safety, and welfare.”¹⁵⁵

As implied by the last statement, courts have not embraced the concept of “general” reciprocal benefits for one simple reason: if the concept of “general” reciprocal benefits applied, no governmental action would ever rise to the level of a taking. Additionally, in *Florida Rock Industries v. United States*, the Federal Court of Claims referenced specific reciprocal benefits.¹⁵⁶ “[T]here can be no question that Florida Rock has been singled out to bear a much heavier burden than its neighbors, without reciprocal advantages.”¹⁵⁷

Indeed, the concept of “general” reciprocal benefits, even if validated by the courts, proves unworkable. Innumerable government policies influence land markets. Calculation of general reciprocal benefits requires quantifying the costs of benefits of each regulation or policy, and aggregating these costs and benefits to analyze each particular situation. Without these calculations, the government could justify any regulation, regardless of how inequitable or harsh its provisions, and the takings clause would be rendered impotent. “Seemingly most daunting are the questions of precisely how [the] government ‘givings’ would be quantified, and how monetary transfers from regulatory ‘winners’ to regulatory ‘losers’ could feasibly be effectuated.”¹⁵⁸

No government policy or regulation need perfectly match the costs and benefits. Such a standard obviously means that the government could not go on. However, this circumstance fails to justify government actions that are not as fair and equitable as possible, given the constraints and complexities of the situation. In other words, total and specific reciprocity exists only in an ideal world. There could never be a perfect mix of costs and benefits to all the affected parties for a particular regulation. But it is the responsibility of government to bring these costs and benefits as close to the ideal as they possibly can. At the same time, to justify any government regulation, regardless of how inequitable it might be to a particular group, by simply stating that it will be “balanced

155. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512-13 (1987) (Rehnquist, J., dissenting) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1983)).

156. 45 Fed. Cl. 21, 37 (1999).

157. *Id.*

158. MELTZ ET. AL., *supra* note 128, at 160.

out” by other government regulations grossly oversimplifies the issue.

D. Reasonable Expectations

The final reason used to justify uncompensated farmland preservation programs, the reasonable expectations argument, maintains that government regulation of land (i.e. downzoning or regulatory risk) is a part of economic life and should be anticipated.¹⁵⁹ Thus, the “rational” owner or purchaser of agricultural land takes the possibility/probability of downzoning or other regulatory risk into account when making business decisions.¹⁶⁰ More specifically, when contemplating buying property in areas that could possibly be downzoned, the farmer should discount this into his or her purchase price, thus capitalizing this uncertainty into a lower price for the land.¹⁶¹ But, how “reasonable” is it for a farmer to “expect” that his land may be downzoned?

Cordes claims that the validity of a regulatory risk argument hinges on how foreseeable a regulation might be.¹⁶² He points out that in some cases such as the endangered species act, regulatory risk is difficult to predict, and thus there is a more compelling reason for compensation.¹⁶³ Cordes distinguishes downzoning, however. “In contrast, restrictions on land use [such as zoning] are more readily anticipated in our society, including agricultural restrictions on existing farmland on the urban fringe.”¹⁶⁴

Certainly landowners (and potential purchasers) should consider the possibility of increasingly restrictive land use regulation. However, the inquiry must focus on the likelihood of such changes. The only “data” at the disposal of current landowners and potential purchasers is past history. When you look around on the urban-rural fringe, past history manifests itself in the proliferation of suburban subdivisions interspersed with hobby farms. In this context, farmers understandably hold reasonable expectations that they, too, will be able to develop their property.

The United States Supreme Court, in *Lucas v. South Carolina Coastal Council*, recognized this reality.¹⁶⁵ The *Lucas* case failed to reach the *Penn Central* balancing test portion of the regulatory takings test, and instead was disposed of as a categorical taking

159. Cordes, *supra* note 9, at 1080.

160. *Id.* at 1080-81.

161. *Id.* at 1081.

162. *Id.* at 1080.

163. *Id.*

164. *Id.*

165. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

since Lucas was deprived of all economically viable uses of his property.¹⁶⁶ However, Justice Scalia, in his opinion written for the majority, emphasized the fact that Lucas' "intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences."¹⁶⁷ Therefore, the United States Supreme Court seems to endorse the notion of "temporal equity." In simple terms, temporal equity means that if your neighbors were allowed to develop their property in the past, it is unfair that you be denied that opportunity. Temporal equity comports with reasonable expectations.

In addition, the concept of reasonable expectations appears somewhat amorphous. "Reasonableness" implies the use of an objective standard. Indeed, use of a subjective standard would be unworkable. Given that an objective standard should be used, fair market value appears to be the best measuring stick. The fair market value of the land should reflect reasonable expectations. The proponents of downzoning as a fair means to achieve farmland protection fail to recognize fair market value as an objective measure of reasonable expectations.

Finally, to impose upon farmers the expectation of more restrictive land use regulations provides perverse incentives to those farmers. If a landowner assumes that regulations will become more restrictive, then the landowner holds an incentive to develop his property immediately before the rules change. Given this incentive, land will be prematurely developed and the aim of farmland protection frustrated.

In *Board of Supervisors of Fairfax County v. Snell Construction Co.*, the Virginia Supreme Court addressed the reasonable expectations issue with respect to downzonings and decided to subject "piecemeal" downzonings to the stricter scrutiny of the Maryland Rule, while reviewing upzonings and comprehensive downzonings under the general rule for legislative determinations.¹⁶⁸ The court explained the formulation by stating:

[w]hile the landowner is always faced with the possibility of comprehensive rezoning, the rule we have stated assures him that, barring mistake or fraud in the prior zoning ordinance, his legitimate profit prospects will not be reduced by a piecemeal zoning ordinance reducing permissible use of his land until circumstances substantially affecting the public

166. *Id.* at 1018.

167. *Id.* at 1008.

168. 202 S.E.2d 889 (1974). See section II. A. for a discussion of these tests.

interest have changed. Such stability and predictability in the law serve the interest of both the landowner and the public.¹⁶⁹

In connection with the reasonable expectations aspect of the fairness argument, Cordes expends much effort on elucidating the fact that private property ownership includes both private property rights and obligations to the public.¹⁷⁰ Cordes asserts that the perception that agricultural zoning is unfair “is in part predicated on the idea that private property ownership includes the right to use the property as the owner chooses.”¹⁷¹ To the contrary, the notion that private property rights are unqualified is neither the predicate for the notion of the unfairness of agricultural zoning nor accepted in any legal quarter. The point of reference for a fairness determination is a comparison to others similar situated.

Cordes’ argument seems to be based upon the so-called “nuisance” exception to the categorical taking rule invoked when a regulation denies a landowner all economically viable uses of his land. The foundation for this argument is therefore tenuous at best. As Justice Scalia explained while discussing the nuisance exception in *Lucas*, “[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.”¹⁷² Justice Scalia added that “[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the ‘essential use’ of land.”¹⁷³ This language informs the farmland protection debate since, as in *Lucas*, most consequent land use restrictions to protect agricultural land attempt to prohibit “erection of any habitable or productive improvements on . . . land.”¹⁷⁴ Such activity appears to be “the ‘essential use’ of land.”¹⁷⁵

The argument advanced by Cordes and others, that landowner profit motives must always yield to any restriction advancing the public good, again proves too much. Under this regime, governmental authorities could enact any legislation to advance the public good without fearing a takings claim. However, “[t]he

169. *Bd. of Supervisors of Fairfax County*, 202 S.E.2d at 893.

170. Cordes, *supra* note 9, at 1077-80.

171. *Id.* at 1077.

172. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992).

173. *Id.* (citation omitted).

174. *Id.*

175. *Id.*

nuisance exception to the taking guarantee is not coterminous with the police power itself.”¹⁷⁶ Also, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, then Justice Rehnquist opined in his dissenting opinion that: “the existence of . . . a public purpose is merely a necessary prerequisite to the government's exercise of its taking power.”¹⁷⁷ “The nuisance exception to the taking guarantee,” however, “is not coterminous with the police power itself,” but is a narrow exception allowing the government to prevent “a misuse or illegal use.”¹⁷⁸ It is not intended to allow “the prevention of a legal and essential use, an attribute of its ownership.”¹⁷⁹

In other words, a valid public purpose provides a necessary, but not sufficient, predicate for a valid regulation. In the *Lucas* case, Mr. Lucas conceded that the Beachfront Management Act was properly and validly designed to protect South Carolina's beaches. The South Carolina Supreme Court found this concession dispositive.¹⁸⁰ However, the United States Supreme Court disagreed, setting out the takings test earlier detailed in this paper.

IV. CONCLUSION

Each day, the farmer makes a decision: continue to farm or sell for development. If governments need not compensate the owners of land that is downzoned for public benefit, then many farmers who might otherwise be undecided about developing their land might sell in an attempt to preempt regulation that would prohibit such development. Such a regime encourages premature development.

As Justice Holmes so eloquently stated with respect to takings, “the question at bottom is upon whom the loss of the changes desired should fall.”¹⁸¹ “The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.”¹⁸² The same question forms the appropriate focus of the equity inquiry with respect to downzoning to protect farmland. Farmland protection policy yields many benefits, which are well documented in the literature. However, farmland protection also entails costs.

176. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting).

177. 480 U.S. 470, 511 (1987) (Rehnquist, J., dissenting).

178. *Id.* at 512 (Rehnquist, J., dissenting) (quoting *Penn Central*, 438 U.S. at 145 and *Curtin v. Benson*, 222 U.S. 78, 86 (1911)).

179. *Id.*

180. *Lucas*, 505 U.S. at 1009-10.

181. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

182. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

Downzoning property to maintain its use in farming places the cost of farmland protection on the restricted landowner.¹⁸³ The diminution in land value reflects this cost.¹⁸⁴

The takings inquiry, as well as the examination of the equity of various methods of farmland protection, primarily questions whether the losses should fall upon affected landowners only (no compensation is paid) or the public at large (compensation is paid). Fairness dictates that landowners be compensated when their property is downzoned to provide benefits of open space and/or farmland protection for the public at large. Courts are increasingly recognizing this concept.

183. Cordes, *supra* note 9, at 1048.

184. *Id.*