

Washington Law Review

Volume 74
Number 3 *Symposium on Salmon Recovery*

7-1-1999

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Recommended Citation

Jennifer Frankel, Notes and Comments, *Past, Present and Future Constitutional Challenges to Transferable Development Rights*, 74 Wash. L. Rev. 825 (1999).

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PAST, PRESENT, AND FUTURE CONSTITUTIONAL CHALLENGES TO TRANSFERABLE DEVELOPMENT RIGHTS

Jennifer Frankel

Abstract: Seattle's transfer of development rights (TDR) system, an innovative land use device, has so far avoided many of the problems that have plagued other TDR systems. Although the system's voluntary participation avoids a takings challenge, it is still vulnerable to attack on due process grounds. In addition, two U.S. Supreme Court cases held that conditions in land use regulations must closely mirror the harms sought to be prevented, suggesting new constitutional problems for Seattle's TDR system. This Comment describes Seattle's current TDR system and examines its vulnerability to constitutional challenges. This paper concludes that while Seattle's TDR system will probably avoid the pitfalls of past TDR systems, proposed changes would increase its vulnerability to due process challenges.

The past thirty years have witnessed a trend in land use planning toward local systems that compensate owners of low-income housing and historic landmarks in exchange for a promise to forgo further development of their land.¹ Transferable Development Rights (TDR) systems allow landowners to transfer a parcel's unused development potential to other sites either by moving the rights to the landowner's other properties or by selling the rights to other developers. The landowner of the site receiving the development rights can then build to a greater height and density than otherwise allowed by local zoning regulations.² By providing monetary incentive to landowners to retain low-income housing and historic landmark theaters, an innovative TDR system in Seattle, Washington, has already been successful in saving several of these structures.³

Past legal challenges to TDR systems focused on whether the regulation that provides TDR in exchange for a restriction creates either a taking under the Fifth Amendment of the U.S. Constitution or a violation of due process.⁴ Seattle's TDR system sidesteps the takings challenge by making landowner participation in the program voluntary.⁵ Landowners who prefer to tear down their low-income housing are free

1. See *infra* note 27 and accompanying text.

2. See *infra* note 19 and accompanying text.

3. See *infra* Part I.B.2.

4. See *infra* notes 106–16 and accompanying text.

5. See *infra* note 160 and accompanying text.

to do so.⁶ Many landowners, however, choose to sell their rights because of their high value. High demand and a strong market for development rights are essential to ensure the success of a voluntary TDR system.⁷ Past experience indicates that owners of low-density, low-income-producing buildings will not choose to limit their ability to develop their land without significant compensation.⁸

Although Seattle's program will probably avoid a successful takings challenge, it is vulnerable to a due process challenge under two separate theories. First, the system may violate due process by jeopardizing citizens' health and safety. Municipalities establish zoning limits to protect the health, safety, and welfare of their citizens. Theoretically, transferring development rights that allow developers to build beyond the zoning limit compromises citizens' health, safety, and welfare; therefore a program authorizing such transfers may be vulnerable to a due process challenge.⁹ The second due process theory rests on the assumption that the zoning limits have been set too low and buildings in excess of the zoning limitations will not jeopardize citizens' health, safety, or welfare. Developers could make a due process argument that they should not be required to purchase development rights to build higher and at greater density.¹⁰

Two U.S. Supreme Court decisions, *Nollan v. California Coastal Commission*¹¹ and *Dolan v. City of Tigard*,¹² pose another constitutional challenge to Seattle's TDR system. In both decisions, the Court held that a regulatory restriction on development must have a close connection to the harm it proposes to prevent.¹³ TDR systems allow developers to pay to save low-income housing (the condition) in exchange for the right to build larger buildings (the harm). Developers who buy rights to build at greater densities might argue that the harm of larger buildings is not connected to the condition of low-income housing. To pass this

6. See City of Seattle Dep't of Community Dev. & Downtown Hous. Advisory Task Force, *Transfer Development Rights: TDR Bank Report C6* (1988) [hereinafter *TDR Bank Report*] (discussing survey indicating that landowners are not necessarily interested in participating in TDR program).

7. See *id.*

8. See John J. Costonis, *Space Adrift: Landmark Preservation and the Marketplace* 6, 9 (1974).

9. See *infra* notes 169, 171, and accompanying text.

10. See *infra* note 170 and accompanying text.

11. 483 U.S. 825 (1987).

12. 512 U.S. 374 (1994).

13. See *infra* notes 206–210, 218–224, and accompanying text.

constitutional test, Seattle would have to show that the preservation of low-income housing and historic landmark theaters alleviates the harm of larger, denser downtown buildings.

Part I of this Comment examines the property law basis for TDR systems. It also explores past TDR systems in New York, a proposed system for Chicago, and the sophisticated TDR system used by Seattle. Part II reviews past constitutional challenges to TDR systems including takings, due process attacks, and possible future challenges based on *Nollan* and *Dolan*. Finally, it discusses Seattle's vulnerability to these past and future constitutional challenges and concludes that although Seattle's current TDR system may avoid the pitfalls of past TDR systems, proposed changes will make it vulnerable to a due process challenge.

I. TDR SYSTEMS

A. *Structure of TDR Systems*

TDR systems originated as a mechanism to save historic landmarks while sidestepping Fifth Amendment takings challenges by providing value to the restricted landowner.¹⁴ In addition to landmarks, current systems allow owners of redeveloped land,¹⁵ low-income housing developments,¹⁶ or rural land forming part of a preservation program to transfer development rights.¹⁷ TDR systems provide compensation for landowners whose land is restricted.¹⁸ A basic TDR system works by allowing landowners to sell excess development rights attached to their land (the sending site) to landowners who want to develop their land (the receiving site) beyond the current zoning limits.¹⁹ The amount of development rights is generally calculated in square footage of floor

14. See Roger A. Cunningham et al., *The Law of Property* 644 (2d ed. 1993).

15. See Sarah J. Stevenson, Note, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. Rev. 1329, 1345-47 (1998).

16. See *TDR Bank Report*, *supra* note 6, at 2.

17. See Kery Murakami, *Next Step for Growth, Denny Triangle?*, Seattle Times, Dec. 23, 1998, at A1.

18. See Cunningham, *supra* note 14, at 644-45 (quoting D. Mandelker, *Land Use Law* § 11.26 (1982)).

19. See Terry Jill Lassar, *Carrots & Sticks: New Zoning Downtown* 185 (1989).

area.²⁰ The option to sell excess development rights can offer landowners a strong monetary incentive to restrict development on their land.²¹

TDR systems are based on the notion that an excess of development potential exists because the present use of the sending site does not fully exploit the usable area available under the current zoning limits.²² TDR systems are valuable land use tools because they allow the transfer of a plot's development potential to land where greater density will not be objectionable.²³ Contrary to the traditional view that development rights are inextricably tied to a specific plot of land, TDR systems suggest that development rights in land are separable from other ownership rights.²⁴ The property metaphor most often used to describe the TDR concept is that of a bundle of sticks where each individual property right is separable from the others.²⁵ TDR systems separate the right to possess land from the right to develop land and assert that those development rights are transferable to other plots of land.²⁶ Once the development rights are severed from the sending site and sold, the owner of the site must commit to restricting more intense development on the site.²⁷

Architects of early TDR systems that allowed only direct transfers from the sending site to the receiving site found this process ineffective when one landowner had development rights to sell, but could find no

20. *See id.*

21. The price of development rights rises as the demand rises. In 1997, rights sold for \$11 per square foot while in 1999 the going price is \$13. *See* Clair Enlow, *Developers Starting to Put a Price on Development Rights*, Seattle Daily J. Com., July 1, 1998, at 1.

22. *See* John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harv. L. Rev. 574, 576 (1972). One commentator suggests that "[t]he rationale behind TDR plans embodies the notion that the property upon which development is restricted (the transferor property) does not completely fill its allotted zoning envelope, and therefore has unused development rights which should be transferable to other parcels of land (the transferee property)." Michael D. Strugar, *Transferable Development Rights: Robbing Peter to Pay Paul?*, 62 U. Det. L. Rev. 633, 633 (1985).

23. *See* John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L.J. 75, 85-86 (1973).

24. *See* John J. Delaney et al., *TDR Redux: A Second Generation of Practical Legal Concerns*, 15 Urb. Law. 593, 595 (1983).

25. *See* Edward H. Ziegler, *The Transfer of Development Rights (Part I)*, 18 Zoning & Plan. L. Rep. 61 (1995).

26. *See* Franklin J. James & Dennis E. Gale, *Zoning for Sale: A Critical Analysis of Transferable Development Rights Programs 2-3* (1977).

27. *See* Norman Marcus, *Transferable Development Rights: A Current Appraisal*, Prob. & Prop., Mar.-Apr. 1987, at 40, 41. These commitments run with the land as real covenants. *See id.*

developer interested in purchasing them.²⁸ One early proponent of TDR systems suggested the creation of a TDR bank that would be administered by the city, with the city having the authority to purchase and hold development rights when there was no ready buyer.²⁹ TDR banks have proven very effective in bridging the time gap between when landowners wish to sell their development rights and when developers want to buy them. The TDR bank provides a ready market for development rights when the local real estate market cannot.³⁰

B. *Evolution of TDR Systems*

TDR systems preserved or made possible New York's Grand Central Station³¹ and South Street Seaport,³² the New Jersey Pinelands,³³ Seattle's downtown low-income housing,³⁴ and Seattle's Benaroya Symphony Hall.³⁵ TDR systems were a favorite topic of legal writers in the 1970s and early 1980s.³⁶ Articles about TDR systems focused primarily on the theoretical models because few actual systems existed at that time.³⁷ Although initially hesitant,³⁸ land use planners have embraced

28. See *TDR Bank Report*, *supra* note 6, at 1.

29. See *infra* notes 63–67 and accompanying text.

30. During an economic downturn, Seattle's TDR bank managed to save over 300 units of low-income housing by purchasing the development rights and banking them. See Enlow, *supra* note 21.

31. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

32. See Stevenson, *supra* note 15, at 1345–47.

33. See *id.* at 1347–50.

34. See *TDR Bank Report*, *supra* note 6, at Introduction.

35. See Enlow, *supra* note 21.

36. See Costonis, *supra* note 8; David Berry & Gene Steiker, *An Economic Analysis of Transfer of Development Rights*, 17 *Nat. Resources J.* 55 (1977) (discussing economic aspects of TDR); Costonis, *supra* note 22 (describing his TDR plan to preserve landmarks in Chicago); Costonis, *supra* note 23 (establishing legal arguments for TDR); Delaney, *supra* note 24 (examining second generation of TDR programs); James H. Foster, *The Transferability of Development Rights*, 53 *U. Colo. L. Rev.* 165 (1981) (discussing nontransferability of development rights); Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 *Brook. L. Rev.* 867 (1984) (covering history of TDR in New York City); Dwight H. Merriam, *Making TDR Work*, 56 *N.C. L. Rev.* 77 (1978) (suggesting models for successful TDR programs); Strugar, *supra* note 22 (discussing zoning problems TDR create); Comment, *Development Rights Transfer in New York City*, 82 *Yale L.J.* 338 (1972) (discussing history of New York City's TDR plan); Note, *The Unconstitutionality of Transferable Development Rights*, 84 *Yale L.J.* 1101 (1975) (discussing unconstitutionality of TDR).

37. See *infra* Part I.B.1.

38. See Marcus, *supra* note 27, at 42.

TDR systems throughout the United States over the last decade.³⁹ Current TDR systems have evolved from simple plans to move density between adjacent lots to complex systems containing TDR banks that buy and sell development rights and transfer them throughout an entire city.⁴⁰ New York City's early TDR system and a plan to save Chicago's historic landmarks provided the framework for Seattle's complex TDR bank.⁴¹

I. The New York City and Chicago Plans

Standing in the forefront of land use law, New York City passed the United States' first zoning ordinance in 1916.⁴² Later, in keeping with its tradition of innovative land use law, New York responded to the problem of historic landmark preservation with the creation of a TDR program.⁴³ In 1961, New York enacted the Zoning Resolution that was a precursor to its TDR system.⁴⁴ By redefining "zoning lot" to allow density transfers between contiguous lots that had the same landowner, the 1961 Resolution relaxed the tight zoning controls of the 1916 Resolution.⁴⁵

Although ultimately ineffective in saving landmarks, the architects of a 1968 amendment to New York's zoning law⁴⁶ attempted to make development rights more valuable by allowing landmark owners to sell their development rights to different owners of adjacent lots.⁴⁷ The 1968 amendment defined an "adjacent lot" as land either contiguous or across the street from the landmark site or one of a series of lots of a common owner that connected to the landmark site.⁴⁸ The main reason for the 1968 amendment's ineffectiveness in saving historic landmarks was the

39. There were over 30 municipalities identified a decade ago with TDR programs. See Madelyn Glickfield, *Update on Transfer of Development Rights*, 1375, 1378 (A.L.I.-A.B.A. Conference Material, Aug. 14-18, 1989) (suggesting that survey does not fully reflect actual number of programs).

40. See *infra* notes 58-61 and accompanying text.

41. See *infra* Part I.B.2.

42. See *Historical Setting*, in *Zoning and the American Dream* 1 (Charles M. Haar & Jerold S. Kayden eds., 1989).

43. See Jerome G. Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, in *Transfer of Development Rights* 84 (Jerome G. Rose ed., 1975).

44. See Merriam, *supra* note 36, at 90.

45. See *id.*

46. See *id.*

47. See Costonis, *supra* note 22, at 585.

48. See *id.*

lack of incentive for landmark owners to sell their development rights.⁴⁹ Because the plan allowed only transfers to adjacent lots, landmark owners would participate in the program only if their landmarks happened to be adjacent to lots that needed development rights.⁵⁰ In addition, because the New York plan was voluntary,⁵¹ the city could not save the landmark if the landowner chose not to participate in the development rights transfer.⁵²

A proposed, but never implemented, TDR system for Chicago sought to solve the problems inherent in the New York plan. In 1972, John C. Costonis, a professor of urban planning law at the University of Illinois, Urbana, waged an unsuccessful battle to save Chicago's Old Stock Exchange building from destruction to make way for a forty-five story office building.⁵³ Out of its rubble, Costonis developed what is now known as the Chicago plan.⁵⁴ Costonis acknowledged that landmarks in historic areas outside of downtown and other high-land-value areas could often be saved by traditional landmark preservation designation.⁵⁵ However, he realized that landmarks located within the high-land-value downtown core would remain extremely vulnerable to destruction; speculators would put resources into litigation against the city for the purpose of developing unproductive historic sites and maximizing the return on their investment.⁵⁶

Costonis identified and corrected a number of weaknesses in the New York plan.⁵⁷ To create incentives for landowners to transfer their rights, Costonis envisioned the creation of a "development rights transfer district" within which landowners could transfer unused development rights regardless of adjacency.⁵⁸ Costonis believed that a TDR system that facilitated transfer between districts would be the next step in the definition of the zoning unit.⁵⁹ Even though the Chicago plan sought to

49. *See id.* at 586.

50. *See id.* at 586–87.

51. *See id.* at 588.

52. *See id.*

53. *See Costonis, supra* note 8, at xv.

54. *See id.* at xvi.

55. *See Costonis, supra* note 22, at 582.

56. *See id.* at 582.

57. *See id.* at 586–89.

58. *See Costonis, supra* note 23, at 86.

59. *See Costonis, supra* note 22, at 622.

eliminate the adjacency requirement, it only redistributed already-authorized bulk within the district, as opposed to creating more density.⁶⁰ Costonis claimed that shifting development rights from one lot to another would not affect the overall density of the downtown area.⁶¹

Costonis saw the voluntary aspect of the New York plan as another impediment to its success.⁶² Costonis suggested solving this problem through the use of a development rights bank.⁶³ Start-up money for the bank would come from the sale of development rights of publicly owned landmarks.⁶⁴ If a landowner refused to participate in the program, Costonis suggested that the municipality step in and use its power of eminent domain to take the property.⁶⁵ The landowner's compensation would come from funds in the development rights bank,⁶⁶ and the development rights severed from his or her land would be placed in the bank.⁶⁷ Costonis envisioned the Chicago plan saving historic landmarks as well as allowing municipalities to establish their own urban planning goals separate from the whims of the private marketplace.⁶⁸

2. *Seattle's TDR Bank*

Costonis was never able to persuade Chicago to adopt his plan,⁶⁹ but other cities have implemented some of his ideas.⁷⁰ Although different both in purpose and effect⁷¹ from Costonis's plan, the TDR bank in Seattle still uses much of his structure.⁷² Seattle already had a TDR system before it developed its TDR bank, but the slowdown in

60. See Costonis, *supra* note 23, at 88.

61. The assumption is that because density is only shifted and produces no net gain in a city's density, it is somehow less worrisome than if more density has been added. See Costonis, *supra* note 8, at 33-34. Individuals who work in the downtown areas with the highest densities might not agree.

62. See Costonis, *supra* note 8, at 56.

63. See Costonis, *supra* note 23, at 87.

64. See *id.*

65. See Costonis, *supra* note 22, at 590.

66. See *id.*

67. See Costonis, *supra* note 23, at 87.

68. See Costonis, *supra* note 8, at xvi.

69. See Merriam, *supra* note 36, at 98.

70. See, e.g., Lassar, *supra* note 19, at 83 (describing San Francisco's use of TDR).

71. Seattle was more interested in using the bank to bridge the timing gap as opposed to using it to purchase development rights from reluctant landowners. See *TDR Bank Report*, *supra* note 6, at 1.

72. See *id.*

downtown development, curtailing demand for development rights, hampered its success.⁷³

Seattle initially established its TDR system to preserve low-income housing.⁷⁴ Throughout the 1980s, Seattle implemented several innovative programs to save low-income housing, but the courts invalidated most of them as violating substantive due process.⁷⁵ In 1988, Seattle's Department of Community Development, in connection with a Downtown Housing Advisory Task Force, suggested expanding the existing TDR system by implementing a TDR bank that would purchase development rights when the private market could not absorb them.⁷⁶ By purchasing the rights, the TDR bank proved an effective means of preserving low-income housing, historic landmarks, and performing arts centers during the late 1980s and early 1990s when developers were not interested in purchasing development rights.⁷⁷ Since its inception in 1988,⁷⁸ the city's TDR bank has helped to save 337 low-income housing units and 2 landmark theaters, and helped finance Benaroya Hall, the city's new symphony hall.⁷⁹

The Seattle system allows landowners to receive immediate monetary compensation by selling rights either directly to an individual or to the TDR bank.⁸⁰ The TDR bank was created to improve the TDR market and increase the incentive for landowners to participate.⁸¹ Seattle uses the TDR bank to persuade private landowners to sell their rights, thereby protecting low-income housing.⁸² The TDR bank also provides a funding

73. *See id.* The city identified the problem with the program as being the "timing gap" between when low-income housing owners want to sell their rights and when commercial developers want to buy them. *See id.*

74. *See id.*

75. *See* *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993) (holding law requiring mobile park owners to help with relocation costs of tenants as violation of substantive due process); *R/L Assocs., Inc. v. City of Seattle*, 113 Wash. 2d 402, 780 P.2d 838 (1989) (invalidating Seattle ordinance that made owners of low-income housing provide tenants with relocation expenses prior to converting property to nonresidential use); *San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987) (invalidating Seattle ordinance that restricted owners of low-income housing from converting property to nonresidential use).

76. *See TDR Bank Report, supra* note 6, at 1.

77. *See* *Enlow, supra* note 21.

78. *See TDR Bank Report, supra* note 6, at Introduction.

79. *See* *Enlow, supra* note 21.

80. *See id.*

81. *See TDR Bank Report, supra* note 6, at C2.

82. *See id.* at C8–C9.

mechanism for the city itself to buy housing and then sell the development rights.⁸³

Because Seattle's program is voluntary, a high demand for development rights must exist for the program to succeed. Since the late 1990s, the strong market for development rights has ensured that the demand for development rights exceeds the supply.⁸⁴ In 1988, the architects of the plan envisioned developers demanding 50,000 square feet per year of development rights to increase the size of their buildings.⁸⁵ In 1998, Seattle estimated that developers sought 636,000 square feet of development rights for projects.⁸⁶

The large demand for development rights in Seattle can be attributed to the passage of an initiative to curb growth in downtown Seattle.⁸⁷ In May 1989, Seattle voters passed the Citizen's Alternative Plan (CAP) in response to several years of intensive building of both private and public projects.⁸⁸ Heavy construction from this intensive development turned downtown into what some Seattle residents called "Little Beirut."⁸⁹ In response, the CAP limited the available new office space in the downtown area to 500,000 square feet a year for the years 1989–1994, and then 1,000,000 square feet a year for the following five years.⁹⁰ The CAP changed existing downtown zoning by lowering the Floor-to-Area Ratio (FAR)⁹¹ density limit and capping the height of new buildings at 450 feet (about forty stories).⁹² Because the FAR is extremely low under the CAP,⁹³ developers of most new office buildings need to purchase development rights or incorporate some other type of zoning bonus to

83. Interview with Jane Voget, Seattle Dep't of Housing Servs., in Seattle, Wash. (Nov. 5, 1998).

84. See Enlow, *supra* note 21.

85. See *TDR Bank Report*, *supra* note 6, at 15.

86. See Enlow, *supra* note 21.

87. Interview with Jane Voget, *supra* note 83 (discussing effect of Citizen's Alternative Plan (CAP) on development rights).

88. See Lassar, *supra* note 19, at 24.

89. Together the construction of the Westlake Center, the convention center, and the bus tunnel snarled downtown traffic for years. See *id.* at 23.

90. See *id.* at 24.

91. City planners use FAR to limit the density of buildings. FAR represents the ratio between the total amount of floor area and the size of the building lot. See *id.* at 9.

92. See *id.* at 24.

93. The CAP initiative lowered the FAR from 10 to 5 in the densest part of downtown Seattle, and to build above a FAR of 7 (an amount that can be reached through other zoning bonuses), developers must purchase development rights. See *id.* at 24–25.

build at desired densities.⁹⁴ Although the limit on the total amount of square footage ends in 1999, the low FAR does not.⁹⁵ This squeeze between the density limit of the CAP and the rising downtown real estate market heightens the demand for development rights.⁹⁶ Although not part of its original goal, the CAP ensures that developers will purchase development rights to build.

As of 1998, Seattle's TDR program allows owners of eligible low-income housing and Landmark Performing Arts Theaters (LPAT) to sell between five and eight FAR of unused development rights to private landowners or to the city's TDR bank.⁹⁷ To be eligible to sell their excess rights, owners of low-income housing must agree to maintain the building in its present state for twenty years.⁹⁸ For an LPAT site to be eligible, the city must designate it as a landmark and provide a Certificate of Approval for its rehabilitation.⁹⁹

The success of Seattle's TDR program has generated suggestions for new types of eligible sending sites. In early 1999, a community group consisting of residents and developers of downtown Seattle submitted suggestions for new ways of generating development rights.¹⁰⁰ The suggestions included a "Landmark Building Inefficiency TDR" which would compensate owners of such buildings for the heightened expense of operating them,¹⁰¹ and an Open Space TDR that would grant landowners the ability to sell development rights generated from open spaces.¹⁰² The interest in new types of eligible sending sites stems from the success of the program and the high price the rights bring in the Seattle market.¹⁰³

94. See *id.* at 25. The low FAR that the CAP established guarantees a demand for development rights. Even buildings far below the height of 40 stories need to purchase development rights because of the artificially low FAR. For example, both the 38-story Madison Financial Center and a 19-story office building at the corner of Second and Columbia requested the purchase of development rights from the city's bank. See Enlow, *supra* note 21.

95. See Lassar, *supra* note 19, at 24.

96. Interview with Jane Voget, *supra* note 83.

97. See City of Seattle, Dep't of Constr. & Land Use, *Director's Rule 20-93*, at 92, 100.

98. See *id.* at 91.

99. See *id.* at 99.

100. See Downtown Urban Ctr. Planning Group, *DRAFT Approval and Adoption Matrix* (1999).

101. See *id.* at 9.

102. See *id.* at 8-9.

103. Interview with Jane Voget, *supra* note 83.

II. CONSTITUTIONAL CHALLENGES TO TDR SYSTEMS

A. *Traditional Challenges*

1. *Takings and Due Process*

TDR systems developed out of a tension between land use regulation and landowner rights.¹⁰⁴ The power of eminent domain gives federal, state, and local governments the ability to take private property for public use without the owner's consent.¹⁰⁵ The Fifth Amendment protects against abuses of this power by providing that the land not be taken "without just compensation."¹⁰⁶ The Supreme Court has held that a land use regulation can be a taking.¹⁰⁷ The two-prong test for a regulatory taking includes an inquiry into whether the ordinance substantially advances a legitimate state interest, and whether the ordinance denies all economically viable use of the land.¹⁰⁸ A city exposes itself to a regulatory taking claim if the method chosen to preserve historic landmarks results in no economic or beneficial use remaining in the land—in essence a condemnation.¹⁰⁹ Because limiting a building's use would rarely render it completely valueless, landowners who have challenged historic preservation programs as takings have been unsuccessful.¹¹⁰

In addition to bringing takings challenges, developers can challenge land use regulations on substantive due process grounds.¹¹¹ The government's ability to enact land use regulations lies in the Tenth Amendment, which allows local governments to use police powers to promote "public health, safety, or the general welfare."¹¹² Although the standard is broad and vague, the U.S. Supreme Court has recognized a limitation on governmental Tenth Amendment powers. As Justice

104. See James & Gale, *supra* note 26, at 2.

105. See Cunningham, *supra* note 14, at 506.

106. U.S. Const. Amend. V.

107. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

108. See Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 Harv. Envtl. L. Rev. 231, 238–39 (1988).

109. See Costonis, *supra* note 8, at 12–14.

110. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 105 (1978) (holding historic designation of New York City's Grand Central Station not taking).

111. See Cunningham, *supra* note 14, at 513.

112. *Id.* at 512–13.

Brennan asserted in a footnote in *San Diego Gas & Electric Co. v. City of San Diego*,¹¹³ a regulation that “is not enacted in furtherance of the public health, safety, morals, or general welfare” might constitute a due process violation.¹¹⁴ Although due process challenges and takings challenges are theoretically unconnected, Justice Brennan’s assertion sounds suspiciously similar to the first prong in the regulatory takings analysis.¹¹⁵ The reality is that courts often do not distinguish between takings and due process arguments, and confusion exists between the two constitutional challenges.¹¹⁶ TDR systems, like other land use regulatory schemes, have been challenged under both theories.¹¹⁷

2. *Decisions Question the Constitutionality of TDR Systems*

Judicial opinions and commentary on TDR systems have focused on the restrictions placed on the sending site and how the system can be used to avoid a regulatory taking or a violation of due process.¹¹⁸ However, what role development rights will play in a takings/just compensation analysis remains an unanswered question.¹¹⁹ Despite extensive commentary on TDR systems,¹²⁰ only three main cases speak to their constitutionality: *Fred F. French Investment Co. v. City of New York*,¹²¹ *Penn Central Transportation Co. v. New York City*,¹²² and *Suitum v. Tahoe Regional Planning Agency*.¹²³ Although the courts in these cases did not reach the issue of whether development rights provide just compensation, these opinions do provide a helpful framework for assessing whether TDR systems might avoid a constitutional challenge.¹²⁴

113. 450 U.S. 621 (1981).

114. *Id.* at 657 n.23 (Brennan, J., dissenting).

115. *See supra* note 108 and accompanying text.

116. *See* Cunningham, *supra* note 14, at 513.

117. *See infra* Part II.A.2.

118. *See* *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Fred F. French Inv. Co. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976); *supra* note 36 for commentary.

119. *See* Strugar, *supra* note 22, at 638.

120. *See supra* note 36.

121. 350 N.E.2d 381.

122. 438 U.S. 104.

123. 520 U.S. 725.

124. *See, e.g., Fred F. French*, 350 N.E.2d at 388–89 (discussing use of Chicago Plan to ensure just compensation).

In *Fred F. French*, the Planning Commission of New York City rezoned two parcels zoned for apartments as a Special Park District in response to the owner's intent to erect buildings on them.¹²⁵ The rezoning allowed the owner to transfer some of the parcel's development rights to unspecified receiving lots elsewhere in the city.¹²⁶ The landowner sued, claiming that the rezoning was a compensable taking within the meaning of constitutional limitations.¹²⁷ The New York Court of Appeals recognized the potential of development rights,¹²⁸ but did not believe that they provided value until they "could be attached to some accommodating real property."¹²⁹ The court held that the development rights had no value because of the lack of a market for them in New York.¹³⁰ Although the court found the change in zoning a violation of due process, in dicta it proposed a TDR structure similar to the Chicago plan that would pass constitutional scrutiny.¹³¹ The zoning scheme in *Fred F. French* could not pass constitutional muster because the landowner was forced to shoulder the economic burden of a public amenity—a clear violation of due process.¹³²

In 1978, the Supreme Court faced the TDR issue in *Penn Central Transportation Co. v. New York*.¹³³ Penn Central, the owner of the Grand Central Terminal, proposed to erect an office building above the terminal.¹³⁴ Because the terminal had a landmark designation,¹³⁵ the developers had to submit their plans to the Landmarks Preservation Commission, which rejected the proposed development.¹³⁶ The landmark designation brought with it the right to transfer the terminal's development rights to other land owned by Penn Central located near the

125. *See id.* at 383–84.

126. *See id.* at 384.

127. *See id.*

128. *See id.* at 387.

129. *Id.* at 388.

130. *See id.* at 389.

131. *See id.* at 388. The court specifically suggested a TDR bank system that would immediately compensate landowners with money, as opposed to "development rights [that are] disembodied abstractions of man's ingenuity," and only achieve value when "attached to some accommodating real property." *Id.*

132. *See Merriam, supra* note 36, at 94.

133. 438 U.S. 104 (1978).

134. *See id.* at 116.

135. *See id.* at 115–16.

136. *See id.* at 117.

terminal.¹³⁷ Penn Central sued, claiming that its land had been taken without just compensation.¹³⁸ The Supreme Court identified two issues in the case: (1) does the regulation constitute a taking, and if so, (2) do the development rights provide just compensation.¹³⁹ Because the Court held that there was no taking,¹⁴⁰ it never answered the question of whether development rights constitute just compensation when there are specific receiving sites for the development rights.¹⁴¹ The Court stated that although the owner could not use the air rights of the terminal to build above it, those rights could be transferred to other parcels and therefore had value.¹⁴² If there had been a taking, it was unclear whether the development rights would have provided “just compensation.”¹⁴³ The Court implied that the development rights can be considered at the ad hoc, factual balancing stage to determine if a taking has occurred under the Fifth Amendment, but once there has been a taking, the development rights might not be valuable enough to provide just compensation.¹⁴⁴

In 1997, the Supreme Court had an opportunity to better define the role of development rights in the takings/just compensation equation in *Suitum v. Tahoe Regional Planning Agency*,¹⁴⁵ but because the issue was not squarely before the Court, the majority opinion declined to do so.¹⁴⁶ The plaintiff, Bernadine Suitum, bought property near Lake Tahoe in 1972.¹⁴⁷ In 1987, the Tahoe Regional Planning Agency (TRPA) rezoned areas around Lake Tahoe to create Stream Environment Zones (SEZs)

137. *See id.* at 114. The lots that were allowed to take the development rights had been expanded immediately before the landmark commission designated the Terminal specifically to not “unduly restrict the development options of the owners of Grand Central Terminal.” *Id.*

138. *See id.* at 119.

139. *See id.* at 122.

140. *See id.* at 138.

141. *See id.* at 122. The court noted that the landowners owned at least eight buildings that could receive the development rights. *See id.*

142. *See id.* at 137.

143. *Id.*

144. *See id.* at 137.

145. 520 U.S. 725 (1997).

146. The majority noted:

While the pleadings raise issues about the significance of the TDR’s [sic] both to the claim that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide, and we do not decide, whether or not these TDR’s [sic] may be considered in deciding the issue of whether there has been a taking in this case

Id. at 728.

147. *See id.* at 730.

within which no development could occur.¹⁴⁸ To mitigate the harshness of the new zoning, the TRPA granted property owners a variety of development rights (the value of which was unclear) that could be sold to other landowners whose land did not fall within a SEZ.¹⁴⁹ Suitum's property fell within a SEZ, and she sued both on a violation of due process theory and a takings claim.¹⁵⁰ The TRPA claimed that Suitum's action was not ripe for review because she had not yet attempted to sell her development rights.¹⁵¹ The Court focused only on the ripeness issue and held that such a case would be ripe for review only when the regulation had affected a plot of land and the landowner had received a final decision.¹⁵² At that point, the facts would present a justiciable question of whether the regulation had gone "too far," and thus constituted a taking.¹⁵³

Although the majority opinion ruled only on the narrow issue of whether Suitum's claim was ripe for review,¹⁵⁴ Justice Scalia, in a concurring opinion, chose to address how development rights fit in the takings/just compensation equation.¹⁵⁵ Scalia suggested that development rights should be considered only for determining just compensation.¹⁵⁶ This was a departure from the Court's view in *Penn Central* in which it suggested that development rights could be used to avoid a taking.¹⁵⁷ If the value of development rights ensures that a regulation avoids going "too far" because the land retains "substantial value," the landowner receives substantially less than if the landowner had received just compensation for the loss of the entire parcel of land.¹⁵⁸ By going beyond the narrow issue presented to the Court, and persuading two other justices to join his concurrence, Scalia indicated one possible direction of the Court if the Court again faces the issue of development rights.¹⁵⁹

148. *See id.* at 729.

149. *See id.* at 730.

150. *See id.* at 731.

151. *See id.* at 732.

152. *See id.* at 737.

153. *Id.* at 744.

154. *See id.*

155. *See id.* at 745 (Scalia, J., concurring).

156. *See id.* at 747 (Scalia, J., concurring).

157. *See supra* note 144 and accompanying text.

158. *Suitum*, 520 U.S. at 748 (Scalia, J., concurring).

159. *See* R.S. Radford, *TDRs and Takings: The Unanswered Question in Suitum v. Tahoe Regional Planning Agency*, 441, 448-49 (A.L.I.-A.B.A. Course Study Material SC43, 1998).

Following the logic of Scalia's opinion, the Court would likely scrutinize the next TDR scheme to ensure that the development rights provide the necessary level of compensation required by the Fifth Amendment to avoid an unconstitutional taking.

3. *Seattle's Vulnerability Under Traditional Challenges*

Because Seattle did not establish its current TDR system until 1988, it was aware of the pitfalls of past programs and took steps to avoid them. Unlike the programs challenged in *Fred F. French, Penn Central*, and *Suitum*, Seattle's TDR system does not force landowners to restrict development on their land, but rather uses monetary incentive to persuade them to do so. By making participation in the program voluntary, Seattle's TDR system has avoided the takings and due process challenges that plagued earlier systems. If landowners do not want to limit the development of their land, they are not forced to do so.¹⁶⁰ A landowner who chooses to sell his or her development rights could not claim a taking because an unconstitutional taking is predicated on the government taking land without the owner's consent.¹⁶¹ Because transactions through Seattle's TDR system cannot be challenged as takings, the issue raised by Justice Scalia's concurring opinion in *Suitum* of whether development rights are just compensation will never arise.¹⁶² Considering the difficulties faced by past TDR systems, Seattle has successfully fashioned a TDR system that is constitutionally sound in terms of restricting development.

B. *Subversion of Zoning Limits*

1. *Substantive Due Process*

By allowing developers to purchase rights to build larger buildings, TDR systems thwart the well-ordered plan of zoning and are vulnerable to due process challenges. Many see zoning as "the conflict between the police power on the one side and the integrity of the right of private

160. See *TDR Bank Report*, *supra* note 6. Costonis envisioned a mandatory program for landmark preservation and if the landowner did not want the rights, the city would acquire the property through condemnation, using the funds from the bank to purchase the property. See Costonis, *supra* note 8, at 52.

161. See Cunningham, *supra* note 14, at 506.

162. See *supra* note 156 and accompanying text.

property on the other.”¹⁶³ The U.S. Supreme Court established the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.*,¹⁶⁴ and in doing so, saw fit to defer to local planning commissions’ views and opinions in establishing zoning ordinances.¹⁶⁵ Absent zoning laws that are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,” zoning plans would stand as constitutional.¹⁶⁶ However, *Euclid* did not grant unchecked zoning power to municipalities.¹⁶⁷ Rather, the Court held that in terms of due process, the Constitution limits the government’s police power to a standard of reasonableness.¹⁶⁸

Once a government establishes a zoning plan, it must adhere to it or expose itself to a due process challenge.¹⁶⁹ Developers purchase development rights to exceed the FAR set by zoning. If the original zoning is overly restrictive, the zoning should be adjusted upward without forcing landowners to purchase development rights.¹⁷⁰ If the original zoning is the correct standard to ensure the health and safety of the community, then the increased development harms citizens and surrounding landowners.¹⁷¹

Proponents of TDR systems such as Costonis suggest that transferring development rights does not intensify development but simply redistributes it.¹⁷² Critics of TDR systems, however, suggest that the limit on the total density is ineffective without a geographical connection, or nexus, between the sending site and the receiving site.¹⁷³ Otherwise, if the majority of the receiving sites are in a concentrated area away from the sending sites, that area will become more dense than others. If

163. V.N. Brooks, *The Office File Box—Emanations from the Battlefield*, in *Zoning and the American Dream*, *supra* note 42, at 3, 5–6 (quoting July 1926 letter from Newton M. Baker to Frank Hunter).

164. 272 U.S. 365 (1926). For a colorful history and description of the people involved in *Euclid*, see Brooks, *supra* note 163, and William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in Euclid v. Ambler*, in *Zoning and the American Dream*, *supra* note 42, at 31.

165. See *Euclid*, 272 U.S. at 394.

166. *Id.* at 395.

167. See Brooks, *supra* note 163, at 22.

168. See *id.*

169. See Strugar, *supra* note 22, at 642–44.

170. See *id.* at 646.

171. See *id.* at 650.

172. See *supra* notes 58–61 and accompanying text.

173. See Marcus, *supra* note 27, at 42.

landowners can transfer development rights only to adjacent lots, as with the New York plan, then air and light will reach the street over the lower building even if the shadow of the higher building blocks much of the street. But if the sending and receiving sites are not near each other, the goal of ensuring that air and light reach the street may be compromised in the area of the receiving sites.¹⁷⁴ When bulk moves between sites that have no geographical nexus, it subverts the goals of a zoning system.¹⁷⁵

2. *Seattle's Vulnerability to a Substantive Due Process Challenge*

Seattle's TDR system is vulnerable under two different types of due process challenges.¹⁷⁶ First, developers may accuse Seattle of a misuse of police power because the zoning limits are set artificially low.¹⁷⁷ Second, a diverse pool of potential litigants could argue that if the zoning limits are currently correct, then the denser buildings allowed through the purchase of development rights would by definition affect the health and safety of the citizens.¹⁷⁸

The CAP sets zoning limits in downtown Seattle.¹⁷⁹ City officials did not set the CAP limit to create a market for development rights; citizens concerned about light and air and the tenor of downtown Seattle passed the initiative. If they incorrectly assessed the proper zoning limits and Seattle could actually sustain a denser downtown, then developers should not have to pay extra to develop to that density.¹⁸⁰ An indication that the

174. One commentator suggests:

[T]he tension between TDR and uniform district zoning reaches a breaking point when the nexus of benefit and burden formed by the radius of transferability of development rights cannot be stretched to connect the benefited parcels (surrounding the open space) to the burdened parcels (stuck with unwanted extra bulk in their vicinity). Thus, the zoning principle of uniformly treating similarly situated interests is violated by long-distance development rights transfers. The appeal of predictability and collective security which zoning makes to a community as a system of land use regulation is sacrificed to the exigency of preservation in this case.

Id.

175. See Marcus, *supra* note 36, at 898.

176. See *supra* notes 169–171 and accompanying text.

177. See Marcus, *supra* note 27, at 41.

178. See *supra* note 171 and accompanying text.

179. See *supra* notes 87–96 and accompanying text.

180. The key argument against populist zoning initiatives is that they “destroy[] the comprehensive scheme” that zoning by land use professionals implies. David G. Andersen, Comment, *Urban Blight Meets Municipal Manifest Destiny: Zoning at the Ballot Box, the Regional Welfare, and Transferable Development Rights*, 85 Nw. U. L. Rev. 519, 520–21 (1991).

CAP sets zoning too low is that almost any new developments, even those well below forty stories, require a purchase of development rights to build.¹⁸¹ Properly set zoning protects the health, safety, and welfare of citizens; it would be unreasonable to prevent construction altogether.

Developers who do not want to pay for extra density to preserve low-income housing or historic landmark theaters would have standing to bring suit. The TDR system rests upon the idea that funding for public amenities will no longer come from the general tax base, but instead will come from developers who need to purchase development rights for their projects.¹⁸² In his *Penn Central* dissent, Justice Rehnquist expressed his displeasure with New York's landmark preservation scheme by arguing along due process lines that the government should not force individuals "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁸³

Even though developers have standing to bring suit, they apparently do not have the motivation to do so. So far, developers have preferred to pay for the development rights rather than enter into a protracted legal battle. The result of a successful suit would be the invalidation of the TDR system altogether, which might deprive the developers of the chance to buy development rights, and would compel them to build below the CAP. Most developers would not risk the uncertainties of litigation in such a fluid legal terrain with the possibility of afterwards being confined to the CAP limitations.

Assuming *arguendo* that the CAP creates the correct levels of height and density to protect the health, safety, and welfare of citizens, then the larger, denser buildings made possible by development rights will harm citizens' health and safety.¹⁸⁴ Seattle's TDR system is vulnerable to the same criticisms leveled at Costonis's Chicago plan because it allows development rights to be shifted between geographically unconnected sites.¹⁸⁵ The Seattle plan limits transfers of development rights to within

181. See *supra* note 94 and accompanying text.

182. See Delaney, *supra* note 24, at 607.

183. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting).

184. Commentators have suggested that the rigid numbers of zoning codes incorrectly implies there is only one zoning answer as opposed to a possible range. See Costonis, *supra* note 8, at 30-31.

185. See *supra* notes 173-175 and accompanying text.

the downtown core so some general geographical nexus exists,¹⁸⁶ but there is no assurance that a series of dense buildings will not be built close to each other, limiting air and light and creating a highly congested area.¹⁸⁷ This lack of a geographical connection between the sending site and the receiving site undermines the argument that density transfer will not affect the overall tenor of the downtown area and calls into question the city's entire zoning plan.¹⁸⁸

Citizens' groups and land use professionals, some of whom proposed and voted for the CAP out of concern for the density of downtown Seattle, do not want its limits manipulated.¹⁸⁹ If citizens' groups feel that a certain development project exceeding the CAP will jeopardize their health, safety, and welfare, then they would have standing to sue. Citizens' groups in other municipalities have stopped development they perceived to be harmful to their health, safety, and welfare. For example, in New York City, a nonprofit organization concerned with urban design brought a successful suit to invalidate a proposed local development made larger through the use of zoning bonuses.¹⁹⁰ Concerned citizens in Seattle have already expressed nervousness about the transfer of development rights into Seattle's downtown core.¹⁹¹ Innovative zoning and regulatory plans that modify baseline zoning rules by allowing developers to build larger buildings than would otherwise be permitted sometimes become "lightning rod[s] for general discontent with local

186. Seattle has also decided to stretch the geographic nexus. An agreement to trade development rights between Seattle and King County does not even make a pretense at a geographical nexus. The City and County have entered into an agreement that allows developers in a particular part of downtown Seattle to pay \$150,000 for every additional floor of apartments above the CAP. About half the money so generated would go to rural landowners who would receive \$20,000 for giving up the right to develop each parcel. For example, a landowner who owns 285 acres and could build one unit per five acres at current zoning would receive over \$1,100,000 to keep his or her land pristine. See Murakami, *supra* note 17.

187. See Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. Envtl. Aff. L. Rev. 565, 572-73 (1992).

188. In addition, people who work in a particularly congested area of downtown Seattle will be disproportionately affected by the transfer of development rights and will have to bear a higher burden than people who work in the rest of the city. See *id.*

189. See Murakami, *supra* note 17.

190. See Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 Wash. U.J. Urb. & Contemp. L. 3, 12 (1991) (discussing *Municipal Art Soc'y v. City of New York*, 522 N.Y.S.2d 800 (Sup. Ct. 1987)).

191. Peter Steinbrueck, a Seattle City Councilman and a co-chairperson of the CAP initiative, expressed concern that ignoring the CAP would begin the movement towards unchecked development that caused the CAP to be passed in the first place. See Murakami, *supra* note 17.

land use policies.”¹⁹² Not all land use professionals believe that TDR systems are a good idea. Some suggest that development rights transfer is the wrong way to preserve landmarks because the system can lead only to higher residential and commercial densities.¹⁹³ In addition, regardless of the justification in planning terms, increases in concentration can be harmful to individuals who work in the denser area.¹⁹⁴

Seattle’s manipulation of downtown zoning limits does not necessarily implicate a violation of due process. Proponents of TDR systems suggest that zoning is not an exact science and that politics plays as large a role as planning in zoning formulation. In short, there exists no single correct level of zoning that when violated would be unconstitutional.¹⁹⁵ In addition, courts have largely deferred to municipalities to zone as they see fit.¹⁹⁶ However, two Supreme Court decisions¹⁹⁷ suggest that the Court will no longer automatically defer to local land use departments when assessing the constitutionality of regulations.¹⁹⁸

C. *Essential Nexus*

1. *The Nollan and Dolan Decisions*

The U.S. Supreme Court has not seen fit to clarify the confusion over when a regulation is a taking,¹⁹⁹ but it has provided guidance in determining when a regulation is a reasonable use of police power.²⁰⁰ Although couched in takings-analysis terms, two U.S. Supreme Court cases, *Nollan v. California Coastal Commission*,²⁰¹ and *Dolan v. City of Tigard*,²⁰² use substantive due process language to explain their results.²⁰³

192. Kayden, *supra* note 190, at 6.

193. See Richards, *supra* note 36, at 371.

194. See *id.* at 372.

195. See Costonis, *supra* note 22, at 628–29.

196. See *supra* note 165 and accompanying text.

197. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

198. See Jerold S. Kayden, *Judges as Planners: Limited or General Partners?*, in *Zoning and the American Dream* *supra* note 42, at 223, 243.

199. See Damon C. Watson, Recent Developments, *Dolan and the ‘Rough Proportionality’ Standard: Taking Its Toll on Loretto’s Bright Line: Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), 18 Harv. J.L. & Pub. Pol’y 591, 592 n.10 (1995).

200. See Kayden, *supra* note 198, at 243.

201. 483 U.S. 825.

202. 512 U.S. 374.

The decisions evidence a shift by the U.S. Supreme Court from the traditional deference to zoning plans suggested in *Euclid*,²⁰⁴ to an inquiry that instead “requires judges to scrutinize more carefully the justifications offered by planners in support of land use regulations abridging private property rights.”²⁰⁵

In *Nollan*, the Court held that for a land use regulation to impose a condition on a property owner to alleviate a harm created by that owner, there must be an essential nexus between the condition and the harm.²⁰⁶ If no nexus exists, the restriction is not a legitimate land use regulation, but rather “an out-and-out plan of extortion.”²⁰⁷ To reach this conclusion, the Court used the first prong of the regulatory takings analysis that establishes a regulation as a taking if it does not “substantially advance legitimate state interests.”²⁰⁸ The Court separated this prong into two inquiries: what is a legitimate state interest and “what type of connection between the regulation and the state interest satisfies the requirement that the former ‘substantially advance’ the latter.”²⁰⁹ By requiring a connection between the regulation and the harm, the Court retreated from the deference previously afforded land use planners, suggesting a new level of judicial scrutiny of land use regulations.²¹⁰

Although *Nollan* was a regulatory takings case, the language and logic of the Court can be applied to due process cases.²¹¹ Because the condition involved in the *Nollan* decision was a permanent, public easement, the Court could have reasoned that regardless of the legitimate state interest, if a government requires a permanent physical occupation, it is a

203. See Kayden, *supra* note 198, at 230.

204. See *supra* note 165 and accompanying text.

205. Kayden, *supra* note 198, at 223.

206. See *Nollan*, 483 U.S. at 837.

207. *Id.* (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14–15 (1981)). Justice Scalia elucidates this point by suggesting that

[t]he evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury.

Id.

208. *Id.* at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)); see also *supra* note 108 and accompanying text.

209. *Nollan*, 483 U.S. at 834.

210. See Kayden, *supra* note 198, at 240.

211. See *id.* at 233.

taking.²¹² Instead the Court used the regulatory takings analysis.²¹³ By choosing to use the regulatory takings analysis and examining the regulatory scheme using language in accord with a due process analysis,²¹⁴ the Court implied a new level of scrutiny for regulations vulnerable to due process challenges.²¹⁵ Prior to *Nollan*, the “substantially advancing legitimate state interests” prong had not been used by the Supreme Court in their takings analysis.²¹⁶ It is no coincidence that the “substantially advancing legitimate state interests” takings test sounds suspiciously like the “substantial relation to health, safety, morals or general welfare” due process test found in *Euclid*.²¹⁷ The language of the Court indicates an end to the previous deference given to land use planners regardless of whether their programs are challenged under the Fifth Amendment or substantive due process.

By not reaching a conclusion on the “essential nexus,” the *Nollan* decision left open the question of what degree of essential nexus between the condition and the harm is necessary to avoid a regulatory taking.²¹⁸ In 1994 the Supreme Court granted certiorari in *Dolan v. City of Tigard*²¹⁹ to better define the standard for judging the proper nexus.²²⁰ The Court held that the correct degree of essential nexus between condition and harm is a “rough proportionality.”²²¹ The Court explained that “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”²²² The standard of rough proportionality threatens to end the deference traditionally shown to planning commissions and the

212. *See id.* at 230.

213. *See supra* notes 107–108 and accompanying text.

214. *See supra* note 115 and accompanying text.

215. *See Kayden, supra* note 198, at 237.

216. *See Lawrence, supra* note 108, at 239. In fact, if one traces the origin of this prong of the regulatory takings analysis, it ultimately leads back to a due process case. The Court cites *Agins v. City of Tiburon*, 447 U.S. 255 (1980), a takings case, for the two-prong test. But *Agins* cites *Nectow v. Cambridge*, 227 U.S. 183, 188 (1928), a due process case, as the source of the “substantially advancing state interests” prong. *See Kayden, supra* note 198, at 233.

217. *See Kayden, supra* note 198, at 233; *see also supra* note 166 and accompanying text.

218. *See Kristen P. Sosnosky, Dolan v. City of Tigard: A Sequel to Nollan’s Essential Nexus Test for Regulatory Takings*, 73 N.C. L. Rev. 1677, 1692 (1995).

219. 512 U.S. 374 (1994).

220. *See id.* at 389.

221. *Id.* at 391.

222. *Id.*

presumption of constitutionality that accompanied it.²²³ It forces the municipality to prove quantitatively that a regulation is a proper use of police power by showing that it is in proportion to the harm.²²⁴

2. *Implication of Nollan/Dolan for Seattle's TDR System*

Developers who buy development rights possess one of the strongest challenges to Seattle's TDR system. The *Nollan* decision held that a government must show an essential nexus between the condition and the harm prevented.²²⁵ By allowing developers to build at a higher FAR if they buy development rights, Seattle's TDR system creates a connection between denser buildings and the loss of low-income housing and historic landmark theaters. Seattle might be able to show the connection between increased development and the loss of low-income housing and landmark theaters, but the *Dolan* standard of rough proportionality will require the courts to closely scrutinize the city's justification.²²⁶

Seattle developers purchase development rights voluntarily and therefore would not have a takings claim under the Fifth Amendment.²²⁷ However, the *Nollan* logic suggests that courts will now examine any land use condition for the requisite essential nexus to the harm, regardless of whether it is being challenged under a takings claim or a due process claim.²²⁸ TDR systems are thus vulnerable to due process challenges because they impose a condition on developers that has a tenuous connection to the harm of increased development.

Every TDR transaction in Seattle involves two potential landowners: the owner whose land generates the development rights and the owner who purchases the rights to use in his or her development.²²⁹ The TDR bank obscures the connection between these transactions by allowing a time lag between when the development rights are sold to the bank and when they are bought.²³⁰ Developers who want to build larger buildings must pay for development rights. The money for the development rights

223. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 843 n.1 (Brennan, J., dissenting).

224. See *Dolan*, 512 U.S. at 405 (Stevens, J., dissenting).

225. See *supra* note 207 and accompanying text.

226. See *Dolan*, 512 U.S. at 403 (Stevens, J., dissenting).

227. See *Cunningham*, *supra* note 14, at 506. The power of eminent domain is the power to take property without the owner's consent. See *id.*

228. See *Kayden*, *supra* note 198, at 233.

229. See *TDR Bank Report*, *supra* note 6, at 1.

230. See *id.* at 1.

go to landowners who choose to restrict their land to a particular use, such as low-income housing or rural preservation.²³¹ Thus, by explicitly connecting the two related transactions (the sale and purchase of development rights), the TDR system, in essence, requires developers to fund low-income housing as a condition of building larger buildings. However, the harm created by developers with their larger, denser buildings is actually a more congested downtown with its attendant lack of air and light.²³² Thus, the *Nollan* essential nexus is lacking because no nexus exists between the condition (funding low-income housing) and the harm (congested downtown). The TDR system's lack of nexus indicates a misuse of police power, and the program could be struck down as a violation of due process.²³³

Even if Seattle could show a connection between the condition and the harm, it would be hard pressed to meet the rough proportionality standard of *Dolan*. The *Dolan* standard suggests that courts will not permit the city to rely generally on the premise that increased office space will create a need for more low-income housing. To reach the essential nexus requirement, the city will have to show "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."²³⁴ The city will have difficulty showing that a specific larger building will somehow cause a need for the precise amount of low-income housing saved through the developer's purchase of development rights. Therefore, the city will fall short of the high standard of essential nexus and expose itself to a constitutional challenge.

In the end, the success of Seattle's TDR system might prove to be its downfall. Because of its success, development rights go for a premium.²³⁵ In 1999, low-income housing and landmark performing arts centers have development rights available for transfer. However, due to the high price for development rights, private landowners have proposed

231. See Murakami, *supra* note 17.

232. See, e.g., Lassar, *supra* note 19, at 87–105.

233. See *supra* notes 211–217 and accompanying text.

234. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). It is unclear whether the city would have to show whether only the extra space achieved through the TDR is directly proportional or that the entire building creates this need for more housing. The city would have a difficult time if it were forced to show that 40 floors make no difference in terms of the housing situation, but that the 41st floor does.

235. See Enlow, *supra* note 21.

different types of buildings that should be included as sending sites.²³⁶ As the types of sites that generate transferable development rights become further removed from the harms of increased development, the city will have increasing difficulty demonstrating the essential nexus between the payment of development rights and the benefit.

III. CONCLUSION

Seattle's innovative TDR system sidestepped many of the problems that plagued earlier systems. Because landowners sell their development rights voluntarily and the TDR bank guarantees a value for the rights, the Seattle system will continue to avoid a takings challenge. However, as with any TDR system, Seattle's program is vulnerable to a due process challenge because it manipulates the existing zoning limits. By allowing building beyond the existing zoning, the TDR system provides developers with ammunition to challenge the current zoning as too restrictive. If, on the other hand, the city can show that the current zoning is at the appropriate level, then citizens who want to keep downtown Seattle livable will argue that transferring development rights creates density harmful to their health, safety, and welfare.

Since its inception, Seattle's TDR system has been successful in saving low-income housing and landmark theaters without using public funds. Its success has led developers to propose other types of sites that can transfer development rights. The Supreme Court cases of *Nollan* and *Dolan* give courts the constitutional means to scrutinize closely Seattle's TDR scheme to ensure that an essential nexus exists between the public amenities paid for by development rights and the harms created by increased density. The popularity of Seattle's TDR system with groups that have standing to sue has so far prevented any challenges. However, as the connection between the increased density and the public amenity paid for by developers becomes more tenuous, the constitutional vulnerability of Seattle's TDR scheme will simply become more pronounced.

236. See *supra* notes 100–103 and accompanying text.

