WHAT'S ON THE HORIZON? TAKINGS JURISPRUDENCE AND CONSTITUTIONAL CHALLENGES TO RIDGELINE ZONING IN VERMONT

INTRODUCTION

> *"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."*[1]

Ridgeline zoning is a recent and contentious development in land use law in Vermont. As new technology enables the construction of roads, sewers, and telephone communication on relatively steep slopes at high elevations, property owners continue to pursue development that was once impossible.[2] In an effort to reduce rapid, potentially harmful expansion and to protect aesthetics, municipal planning boards have imposed zoning and subdivision bylaws that restrict development at high elevations.[3]

One heavily contested area in Vermont is the western slope of the Northfield Range located in the towns of Waitsfield, Warren, and Moretown.[4] These municipalities, including the town of Fayston, form an area called the Mad River Valley. The Mad River flows north through the Valley surrounded by 2000 to 4000 foot mountains.[5] The Northfield Range, known locally as the Northfield Ridge, lies on the eastern side of the Valley.[6]

Situated on the large, flat plateaus below the Northfield Ridge and once heavily dependent upon forestry and agriculture, the Mad River Valley now depends primarily on tourism.[7] Skiing and related development have replaced the logging, sawmill, dairy farming, and sheep farming industries of past centuries.[8] Today, thousands of tourists visit the Valley to alpine and cross-country ski in the winter and golf, paddle, fish, horseback ride, and cycle in the

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1. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
2. *See, e.g.*, Cory Hatch, *Warren Interim Zoning Tested*, VALLEY REPORTER, Oct. 19, 2000 at 1. *See also* Lisa Loomis, *Northfield Ridge Hearing Draws Few Comments*, VALLEY REPORTER, Nov. 16, 2000 at 1; Robert M. Kessler, *North Carolina's Ridge Law: No View from the Top*, 63 N.C. L. REV. 197 (1984). "[M]ountains have long been a getaway retreat, valued for their breathtaking views, recreational opportunities, and 'away-from-it-all' atmosphere. Recently, however, the mountains have attracted a growing number of tourists and second-home buyers from outside of the region, spawning a construction boom that has threatened these attractions." *Id.*
3. *See, e.g.*, WAITSFIELD VERMONT, WAITSFIELD TOWN PLAN, 76-77 (1998).
4. *Id.*
5. *Id.* at 7.
6. *Id.*
7. *See id.* at 13.
8. *See id.* at 7-14.

summer.[9] Tourists dine at dozens of restaurants and stay at inns, condominiums, and vacation homes scattered across the Valley.[10] The appeal of "rural" living and the abundance of outdoor recreation choices attract many visitors to become permanent residents. The towns have grown accordingly:

> Vermont aesthetics and the expanding demographies of Waitsfield have attracted a population estimated at 1422 in 1990. A wide variety of businesses and activities are located here. Waitsfield is now home to high tech computer and energy companies, specialty food stores, a canoe manufacturer, garden centers, construction companies, craft shops, real estate and financial services, a movie theater and playhouse and award winning maple syrup manufacturers.[11]

> Since 1960, Warren has experienced tremendous population growth, in part due to the development and continued expansion of the ski resorts and tourism industry. An increasing diversification of the Mad River Valley's economy in the past fifteen years, has contributed to the relatively high growth rates. Additionally, the Valley has emerged as a bedroom community for growing employment centers in Burlington, Waterbury, and Barre/Montpelier.[12]

Rapid expansion has changed the landscape, as well as the culture of the once agrarian community. In response, planning commissions, including those of Waitsfield and Warren, have drafted town plans and implemented local zoning bylaws to maintain aesthetics, prevent sprawl, preserve water quality and wildlife habitat, and uphold local culture and historic ideals.[13] Mandatory consistency between town plans and bylaws requires officials to review permit applications, issue and deny variances, and impose conditions on development projects on the Northfield Ridge, as well as in other districts throughout the area.[14]

While many local and state officials argue that these administrative actions are essential to responsible growth, they have the potential to infringe upon the constitutionally protected rights of landowners. One such action

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9. *See* I-100 homepage *at* http:// www.madriver.com (last visited on Feb. 26, 2001).

10. *See id.*

11. WAITSFIELD TOWN PLAN, *supra* note 3, at 14.

12. WARREN VERMONT, WARREN TOWN PLAN, 4-2 (1998) (urban areas to the North and East of the Mad River Valley).

13. *See* WAITSFIELD TOWN PLAN, *supra* note 3, at 76-93; WARREN TOWN PLAN, *supra* note 12, at 10-1 to 10-16.

14. VT. STAT. ANN. tit. 24, § 4301 (1992) (2000 Supp.).

involved an interim bylaw, implemented in Waitsfield in 1998. It placed a moratorium on all development above 1700 feet elevation on the Northfield Ridge without providing compensation to landowners.[15] Property owners challenged the validity of the moratorium in court, asserting that the Town's interim bylaw amounted to an unconstitutional taking without compensation.[16] Despite the severe limitations imposed on feasible land use on the Ridge above 1700 feet, the Vermont Supreme Court upheld the Town's action.[17]

Consistent with its prior rulings, and notwithstanding recent United States Supreme Court decisions on the takings issue,[18] the Vermont Supreme Court used a rational basis standard of review.[19] The court presumed the constitutional validity of the bylaw without heightened scrutiny, which required the landowners to meet the extremely high burden of proving the bylaw invalid.[20] The court also upheld the interim bylaw as a reasonable implementation of the town plan.[21] While the contested zoning is not currently in effect for other reasons,[22] the Waitsfield Planning Commission intends to re-institute a similar bylaw in the future.

After an aesthetically displeasing and potentially harmful clear-cut on private property on the Northfield Ridge in Warren,[23] the Planning Commission adopted similar bylaws limiting development near ridgelines.[24] While Warren's plan is less restrictive than Waitsfield's, it has met opposition on a local level, and property owners have threatened to take their challenge

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15. PROPOSED CHANGES TO WAITSFIELD ZONING ORDINANCE (Aug. 30, 1998).

16. *In re* Interim Bylaw, Waitsfield, Vermont, 170 Vt. 541, 542, 742 A.2d 742, 744 (1999).

17. *Id.*

18. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that the requirement that landowners grant a public easement across property in exchange for a building permit is an improper exercise of police power); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (concluding that State's complete prohibition on development was an unconstitutional taking of landowner's property); Dolan v. City of Tigard, 512 U.S. 374 (1994) (ruling that the city's requirement of a greenway easement had an insufficient nexus with landowner's development project and was therefore an unconstitutional taking of property).

19. *See In re* Interim Bylaw, 170 Vt. 541, 542 , 744 A.2d 742, 744 (1999).

20. *Id.*

21. *Id.*

22. The Town voted by referendum to permanently adopt the interim bylaw. In accordance with title 24, section 4404 of the Vermont Statutes Annotated, a written protest by a five percent petition of the voters required a super-majority (2/3 voter approval) and the amendment failed. Interview with Russ Bennett, Chairman of Waitsfield Planning Commission, in Waitsfield, Vt. (Nov. 11, 2000) (citing VT. STAT. ANN. tit. 24, § 4404 (1992)).

23. Interview with Margo Wade, Warren Deputy Zoning Administrator, in Warren, Vt. (Oct. 18, 2000).

24. *See* WARREN ZONING ORDINANCE (Oct. 1999). Warren's zoning of the Northfield Ridge is less restrictive in that it allows single-family dwellings, as a conditional use, on a minimum lot size of twenty-five acres.

to the Vermont courts.[25] Unlike Waitsfield or Warren, the Moretown Planning Commission has elected to forgo restrictive zoning on the Northfield Ridge within its jurisdiction.[26]

Part I of this Note considers the structure, process, and authority granted to municipalities in Vermont to adopt zoning regulations. Part II describes the evolution of takings jurisprudence in the federal courts. Part III discusses the current status of takings law in Vermont and as applied to ridgeline zoning in Waitsfield and Warren, Vermont. Part IV raises potential constitutional concerns with Vermont takings jurisprudence in light of recent United States Supreme Court decisions and suggests the use of a heightened standard of judicial review as applied to challenges to land use regulations, including claims of inverse condemnation, or denials of due process or equal protection. Part V proposes alternative methods to advance the important and legitimate goals of environmental and viewshed protection, while maintaining the constitutional rights of landowners. Finally, Part VI, an addendum, discusses some implications of the most recent takings issues considered by the United States Supreme Court.

I. BACKGROUND

A. Overview of Local Land Use Regulation in Vermont

The United States Constitution reserves to states a general police power to advance the health, safety, and welfare of the people.[27] One method by which states accomplish these goals is through the regulation of land. Both the United States Supreme Court and the Vermont Supreme Court have held that land use regulation, in the form of zoning, is a valid implementation of police power. "The law is well settled that governments may exercise their regulatory power to institute zoning, without compensation to affected property owners, when the zoning reasonably relates to public health, safety, morals or welfare."[28]

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25. Cory Hatch, *Warren Interim Zoning Tested*, VALLEY REPORTER, Oct. 19, 2000, at 1. "The Valley's struggle over how to balance property rights with the need to protect high elevation ridgelines from residential development has come to Warren." *Id.*

26. Interview with Lisa Loomis, Editor, VALLEY REPORTER, in Waitsfield, Vt. (Sept. 12, 2000).

27. *See* U.S. CONST. amend. X.

28. State v. Sanguinetti, 141 Vt. 349, 351, 449 A.2d 922, 924 (1982) (holding that a municipality acted in contravention of state law when it went beyond the scope of its authority under the enabling grant of power from the state legislature); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (concluding that a court affords rational basis review to municipal zoning ordinances enacted pursuant to the police power delegated by the state legislature).

States delegate police power to municipalities through state zoning enabling acts or through home rule authority established by state constitutions. The legislature has authorized Vermont municipalities to adopt local zoning and subdivision bylaws since the mid-1960s; however, controls over private land use have long existed, originating in the common law of nuisance.[29] For example, in the 1882 case of *Canfield v. Andrew*, the Vermont Supreme Court held a property owner liable for damages to an adjacent landowner for dumping mill waste into a river. [30] The court stated the general application of both law and equity: "One must so use his own property as not to injure that of another."[31]

In 1967, the Vermont Legislature authorized municipalities to regulate local land use through an enabling statute called the Vermont Planning and Development Act (Chapter 117), also known as Act 200.[32] The purpose of Act 200, as stated by the legislature, is broad:

> To encourage the appropriate development of all lands in this state by the action of its constituent municipalities and regions . . . in a manner which will promote the public health, safety against fire, floods, explosions and other dangers; to promote prosperity, comfort, access to adequate light and air, convenience, efficiency, economy and general welfare . . . to facilitate the growth of villages, towns and cities and of their communities and neighborhoods so as to create an optimum environment, with good civic design . . . and to provide means and methods . . . for the prevention, minimization and future elimination of such land development problems as may presently exist or which may be foreseen and to implement those plans when and where appropriate.[33]

B. Administrative Structure

Act 200 provides a structure, an adoption process by which municipalities administrate land use controls, and authorizes the two major types of bylaws to regulate land development: zoning regulations and subdivision regulations.[34] Municipalities have no authority from the legislature to adopt or amend regulations beyond what is allowed by statute, and all bylaws and other

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29. DEBORAH MARKOWITZ, MUNICIPAL GUIDE TO LAND USE REGULATION IN VERMONT 2-3 (1998) (noting common law pertaining to land use regulation originated in the law of nuisance, trespass and restrictive covenants, easements and equitable servitudes). *See id.*

30. Canfield v. Andrew, 54 Vt. 1, 41 Am. Rep. 828 (1882).

31. *Id.* at 2.

32. VT. STAT. ANN. tit. 24, § 4301 (2000).

33. *Id.* § 4302.

34. *See id.* § 4401(b)(1) & (2) (2000).

ordinances must comply with Act 200.[35] The Vermont Supreme Court has required substantial compliance with the statutory procedures outlined in Act 200.[36] Significantly, the enabling statute grants broad authoritative power to municipalities to institute land use controls, yet imposes few explicit limitations on local government.

The structure and character of the legislative and judicial bodies in each municipality are significant in evaluating the design, intent, and efficacy of land use regulations. Generally, town governments strive to create boards comprised of involved citizens with diverse backgrounds and interests. Anecdotal evidence suggests that although the goal is to achieve balance, certain board members often possess long-term authority to mold the town's land use policies. Thus, the power structure and term duration of such positions, among other factors, may directly impact the political successes or failures of land use regulations.[37]

In Vermont, the actors on the local and municipal level include a planning commission, a zoning administrator, a zoning board of adjustment ("ZBA") or a development review board ("DRB"), and a selectboard.[38] Act 200 also provides for regional planning through regional planning commissions, the council of regional planning commissions, and the Environmental Court.[39]

Before adopting zoning and subdivision bylaws, a town must have a planning commission and/or a DRB, and a valid town plan.[40] The planning commission, typically appointed by the selectboard, or in some instances elected by the voters, is comprised of three to nine voting members.[41] The planning commission drafts the town plan, which outlines the general land use scheme and highlights the purposes the board wishes to advance under the municipality's police power.[42]

The planning commission designs the zoning and subdivision bylaws consistent with the town plan pursuant to Vermont statute. Vermont statute

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35. State v. Sanguinette, 141 Vt. 349, 353, 449 A.2d 922, 925 (1982).

36. Town of Charlotte v. Richter, 128 Vt. 270, 271, 262 A.2d 444, 444 (1970) (ruling that the town must substantially comply with provisions of Vermont's zoning enabling act to effect a legal force to the town ordinance).

37. For instance, Russ Bennett, the current Chair of the Waitsfield Planning Commission, is a local developer and Waitsfield resident who has volunteered on the Waitsfield Planning Commission for nearly fifteen years. Robert Rose, another Waitsfield Planning Commission member, has influenced planning commission decisions as a member for almost twenty years. *See* Waitsfield Town Records, Waitsfield Town Hall, Waitsfield, VT. In Warren, records indicate that the longest membership on the current planning commission began in 1997. Personal Communication, Margo Wade, Warren Deputy Zoning Administrator, Warren, VT (Nov. 14, 2001).

38. VT. STAT. ANN. tit. 24, § 4321 (2000).

39. *Id.* § 4342. *See also* VT. STAT. ANN. tit. 4, § 1001 (2001) (environmental court).

40. *Id.* § 4401(a).

41. *Id.*

42. *Id.* § 4325.

mandates that all bylaws must have the express purpose of implementing the town plan.[43] In addition to the planning commission, voters may also propose bylaws; if such bylaws are presented by petition of five percent of the town voters, the planning commission must then refrain from executing any changes to the proposed bylaw.[44] The planning commission prepares a written report[45] if the bylaw will affect the zoning of any land area and must hold at least one public hearing before proposing the addition to the selectboard.[46]

Municipalities, through the work of the planning commission, create zoning districts in accordance with state statute.[47] A municipal zoning ordinance typically lists permitted and conditional uses in each zoning district. Uses not listed are not permitted. Zoning districts typically include: agricultural and rural residential districts, forest districts, recreational districts, planned residential developments and planned unit developments, design control districts and historic districts, among others.[48]

In many Vermont municipalities, such as Waitsfield, the planning commission also acts as a quasi-judicial board.[49] Planning commissions can weigh facts and circumstances to grant or deny subdivisions and other permits, and can alter standards if the commission determines that such standards are incompatible with the health, safety, and general welfare of the community.[50] In its quasi-judicial role, a planning commission reviews permit applications for conditional uses, subdivisions, and transfer of development rights, etc.[51] Additionally, the planning commission undertakes environmental and capacity studies, presents building, development, housing and safety codes to the selectboard, and creates a capital budget.[52]

The ZBA, also appointed by the selectboard, consists of three to nine members. The ZBA hears appeals from decisions of the planning commission and the zoning administrator.[53] In addition, the ZBA may reject an appeal

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43. *Id.* § 4401(a)(1).

44. *Id.* § 4403(b).

45. The Vermont statute does not require the planning commission to prepare a *written report.*

46. VT. STAT. ANN. tit. 24, § 4403 (c)-(d) (2000).

47. VT. STAT. ANN. tit. 24, §§ 4405, 4407 (2000).

48. *Id.* § 4407.

49. *See id.* §§ 4325, 4417, 4407(5).

50. *In re* Appeal of Taft Corners Associates, Inc., 171 Vt. 135, 136, 758 A. 2d 804, 807 (2000) (holding that town holds authority to determine whether a developer has a vested right to develop subdivided lots under the provisions of the zoning ordinance in effect when the subdivision permit was issued); *see also* VT. STAT. ANN. tit 24, § 4413 (2000).

51. Transferable Development Rights ("TDRs") trade density from one parcel to another. The property owner "trading" the right is compensated. The goal of directing density can also be achieved by using impact fees by which developers are charged in certain areas. Towns then use the fee money to purchase development rights in other areas. *See* Vt. STAT. ANN. tit. 24, § 5203 (2000).

52. *See* VT. STAT. ANN. tit. 24, § 4325(4)-(6).

53. VT. STAT. ANN. tit. 24, § 4461 (2000).

without a hearing and render a decision, including findings of fact, if the board finds that the matter has been decided in a previous appeal.[54]

A municipality may choose to institute a DRB instead of a ZBA. The DRB or the ZBA and the planning commission in each town may include the same members.[55] In towns with a DRB, the planning commission acts strictly in a drafting and administrative capacity. The DRB reviews all development applications including appeals, variances, conditional uses, and subdivisions.[56] The Town of Warren uses a DRB rather than a ZBA.[57]

Elected town officials make up the selectboard. In its land use capacity, it reviews and holds public hearings on bylaws, amendments and repeals proposed by the planning commission.[58] When the planning commission suggests the adoption, change or repeal to the town plan or land use bylaws, the selectboard reviews the proposals, and holds at least one public hearing.[59] In some towns, the selectboard votes to adopt or repeal the bylaws, while in others, such as Waitsfield and Warren, bylaw changes occur through a public referendum. The selectboard may remove appointed or elected officials on the planning commission at will and members of the ZBA or DRB for good cause.[60]

The selectboard aids the zoning administrator and the other town boards in enforcing bylaws and by providing legal assistance in court.[61] The selectboard participates in court appeals in which the town is an interested party and adopts interim bylaws, such as that affecting the Northfield Ridge in Waitsfield.[62] Although the board has no direct control over the decisions of the planning commission, ZBA or DRB, the selectboard is involved in nearly every other aspect of local land use regulation.[63] The selectboard appoints members of the respective boards for terms of four years, without term limits or as the selectboard establishes.[64]

The State Legislature authorizes interim zoning to permit a town to temporarily preserve existing land uses or to adopt temporary regulations

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54. *See id.* § 4470(b).

55. *Id.* § 4461(a).

56. *See generally* VT. STAT. ANN. tit. 24, § 4461 (2000).

57. Interview with Margo Wade, Warren Deputy Zoning Administrator, in Warren, Vt. (Oct.18, 2000).

58. *See* WARREN TOWN PLAN, *supra* note 12, at 12.

59. VT. STAT. ANN. tit. 24, §§ 4384-4385 (2000).

60. *Id.* §§ 4461-4462. *See* VSA tit. 24 section 4323 annotation citing Brennan v. Town of Colchester, 169 Vt.175, 730 A.2d 601 (1999).

61. *See* VT. STAT. ANN. tit. 24, §§ 2384-4385 (2000).

62. *See In re* Interim Bylaw, Waitsfield, Vermont, 170 Vt. 541, 542, 742 A.2d 742, 473 (1999); *see also* MARKOWITZ, *supra* note 29, at 11.

63. *See* VT. STAT. ANN. tit. 24, § 4301 (2000).

64. *See id.* § 4461.

while actively working on permanent bylaws.[65] The selectboard may adopt interim bylaws, without voter approval, after a public hearing so long as the town planning commission is undertaking studies or is holding hearings for the purpose of permanently instituting a new bylaw. Interim bylaws, such as that regulating development on the Northfield Ridge, are valid for two years,[66] and after a public hearing the selectboard may extend an interim bylaw for an additional year.[67]

Vermont statute also allows temporary moratoria on issuing permits[68] to assist a town in preventing an influx of applications by developers who wish to circumvent proposed bylaws.[69] Municipalities enforce interim zoning bylaws like any other municipal bylaw. The selectboard "may, upon application, authorize permits for specific development (as a conditional use) not otherwise permitted by the interim bylaw."[70] In so doing, the board must hold a public hearing and may issue a permit only if it determines that the proposed use is consistent with the goals of maintaining the health, safety, and welfare of the municipality.[71]

The selectboard may choose to apply the existing bylaws or the provisions of the bylaws or amendments that are under consideration.[72] Town selectboards cannot appeal a decision of one of their own boards except when the town is an applicant, as the boards are expected to act on the town's behalf.[73] However, the selectboard may participate as an interested party in an appeal to the Environmental Court, or if a town regulation is in question in the litigation.[74]

The Environmental Court, created by the Vermont Legislature in 1989, reviews environmental appeals and enforcement actions, including municipal land use matters.[75] It reviews development permit applications de novo on the permit issues that were appealed and may not defer to the factual findings of the planning commission.[76] Moreover, while the Environmental Court has the same authority as the ZBA, the DRB, or the planning commission with regard

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65. *See id.* § 4410 (a).

66. This is assuming that they are constitutional.

67. *See* VT. STAT. ANN. tit. 24, § 4410 (f).

68. *Id.* § 4443 (d).

69. *But see* MARKOWITZ, *supra* note 29, at 24. It is well settled that "communities should not, ordinarily, adopt complete moratoria on development, as such may result in unconstitutional 'takings.'" *Id.*

70. *Id.* at 25.

71. *Id.*

72. *Id.*; *see also* VT. STAT. ANN. tit. 24, § 4410(b).

73. MARKOWITZ, *supra* note 29, at 26; *see also* VT. STAT. ANN. tit. 24, § 4471, *citing* Sanbourin v. Town of Essex, 146 Vt. 419, 505 A.2d 669 (1985).

74. VT. STAT. ANN. tit. 24, § 4464(b)(2) (1992).

75. VT. STAT. ANN. tit. 4, § 1001.

76. *See In re* Appeal of Sabin, Docket No. E95-120 (Vt. Env. Ct. Apr. 15, 1996).

to applications, it is not bound by ZBA or DRB rulings.[77] The Environmental Court, however, cannot consider issues that applicants failed to raise below.[78] The Vermont Supreme Court hears appeals from the Environmental Court.[79] If an applicant fails to appeal the decision of the zoning administrator or the planning commission to the ZBA, or the DRB, he or she waives the right to appeal to the Environmental Court, with the exception of cases in which the constitutionality of a bylaw is at issue.[80]

II. FEDERAL TAKINGS JURISPRUDENCE AND THE DOCTRINES OF EMINENT DOMAIN AND INVERSE CONDEMNATION

> [T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man . . . The legislature, therefore, [has] no authority to make an act divesting one citizen of his freehold and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government. . . .[81]

Eminent domain is "the inherent power of a governmental entity to take privately owned property . . . and convert it to public use."[82] Generally, eminent domain pertains to the legal proceedings undertaken by the government in order to condemn property for the public good.[83] While Vermont's Act 200 and similar enabling statutes grant broad authority to municipalities to adopt land use regulations or to assert eminent domain to advance the health, safety and welfare of the public, that power has limits. The United States Constitution restricts the federal government, state governments, and local municipalities in land regulation in order to protect individual property rights, as well as rights to substantive and procedural due process and equal protection.[84]

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77. *See In re* Appeals of Robert W. Wimble and Carl R. Wimble, Docket Nos. 105-6-98 (Vt. Env. Ct. Mar. 1, 1999)).

78. *See In re* Eberle, Docket No. E96-078 (Vt. Env. Ct. Jul. 16, 1996).

79. *See* Vt. STAT. ANN. tit. 10, § 8013 (2000).

80. *See* VT. STAT. ANN. tit. 24, § 4472 (discussing exclusivity of remedy and highlighting that the Environmental Court decisions are binding only upon the parties involved; however, a facial challenge of constitutional validity may be brought in Superior Court, rather than Environmental Court).

81. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795).

82. BLACK'S LAW DICTIONARY 541 (7th ed. 1999).

83. *See* United States v. Clarke, 445 U.S. 253, 257-258 (1980).

84. *See* U.S. CONST. amend. V; amend. XIV.

The Fifth Amendment of the United States Constitution, in a section known as the Eminent Domain clause,[85] limits the federal government by declaring that "private property [shall not] be taken for public use, without just compensation."[86] The Fourteenth Amendment to the United States Constitution limits the states' use of eminent domain[87] and prohibits the "taking" of private property without appropriate compensation:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or *property*, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[88]

Throughout its long takings history, the United States Supreme Court has identified two types of governmental regulatory deprivations that are compensable under the Constitution: (1) regulations that cause a physical invasion of private property,[89] and (2) regulations that deny landowners all economically beneficial or productive use of land.[90] Through inverse condemnation proceedings, a landowner receives just compensation for a taking of his or her property when the government either physically or through restrictions on use, takes property without instituting condemnation proceedings.[91]

Federal takings jurisprudence evolved out of state common law. Initially, state courts drew takings doctrine from three sources: state constitutional law, natural law, and common law.[92] Between 1810 and 1840, most state courts first decided cases on regulatory and/or devaluative takings.[93] Zephaniah Platt, a proprietor along the Saranac River in New York State, was the first claimant in a case recognizing a regulatory taking as compensable in 1819.[94] In *People*

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85. BLACK'S LAW DICTIONARY, *supra* note 82, at 542.

86. U.S. CONST. amend. V.

87. Eminent domain is the ability of government to take privately owned land. *See supra*, note 82-83 and accompanying text.

88. U.S. CONST. amend XIV (emphasis added).

89. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that a requirement that landlords allow the placement of antennae on their rooftops constituted a taking).

90. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (holding that when a property owner is required to sacrifice all economically viable use of land for the common good, such a requirement constitutes a taking).

91. *See* United States v. Clarke, 445 U.S. 253, 257 (1980).

92. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1229 (1996).

93. *Id.* at 1260.

94. *Id.* at 1236.

v. Platt,[95] the New York Supreme Court of Judicature held that statutes requiring property owners to alter their dams along the Saranac River to facilitate salmon passage "essentially destroy[ed] immense property"[96] and equated such statutes to an appropriation of private property requiring compensation.

While state decisions, such as *Platt*, occurred in the early part of the 19th century, the federal courts did not begin hearing takings claims until shortly after the Civil War.[97] Initially drawing upon state takings doctrine,[98] the United States Supreme Court has long established the validity of the takings challenge as a cause of action. In the often-cited 1922 case of *Pennsylvania Coal Co. v. Mahon*, the Supreme Court recognized that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[99]

Since its early rulings,[100] the Court's takings jurisprudence has evolved greatly due to the unique nature of each land use dispute.[101] The judicial test to determine whether state action constitutes a taking without compensation generally rests on ad hoc factual inquiries.[102] It is well established since the United States Supreme Court's ruling in *Pennsylvania Coal* that takings claims are decided on the unique circumstances of each case.[103]

Historically, courts relied primarily on the basic substantive due process standard established in the 1926 case of *Village of Euclid v. Ambler Realty Co.*[104] In *Euclid*, the Court concluded that "[a land use regulation] can be

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95. People v. Platt, 17 Johns. 195 (N.Y. Sup. Ct. 1819).

96. *Id.* at 216.

97. *See* Kobach, *supra* note 92, at 1265. The first takings claim in federal court was Avery v. Fox, 2 F. Cas. 245 (C.C.W.D. Mich. 1868) (No. 674). *Id.*

98. Avery v. Fox, 2 F. Cas. 2456 (C.C.W.D. Mich. 1868) (No. 674).

99. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

100. *See* Kobach, *supra* note 92, at 1266.

101. *Id.*

102. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015. "In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to engage in . . . essentially ad hoc, factual inquiries." *Id.* (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1971)).

103. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); *see also Penn Central*, 438 U.S. 104 at 124 (holding that New York City's "Landmarks Law," which prevented Penn Central Railroad from building atop Grand Central Station at 42nd Street and Park Avenue, did not constitute an unconstitutional taking without compensation); Agins v. Tiburon, 447 U.S. 255, 260 (1980):

> 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. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests.

Id.

104. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926) (holding that a municipality's proper use of police power, under rational basis review, does not violate substantive due process).

declared unconstitutional [only if proven] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[105] And "[t]he years that followed *Euclid* . . . were marked by a near abdication of any meaningful judicial review of zoning regulations."[106] Courts afforded great deference to governmental authorities by presuming the constitutional validity of zoning actions with minimal inquiry.[107]

In 1971, however, the Court in *Penn Central Transportation Company v. City of New York* introduced to takings analyses a somewhat innovative balancing test employing several new factors.[108] The Court considered the economic impact of the regulation, the nature and extent to which the regulation interfered with investment backed expectations, and the character of the governmental action.[109] In weighing these elements, however, the Court employed its traditional, rational basis standard of review,[110] assumed the legitimacy of the governmental action,[111] and ultimately concluded that the restrictions on the property at issue were *reasonably* necessary to effectuate a legitimate public purpose.[112] Thus, in accordance with *Euclid* and other prior rulings,[113] the Court's presumption of constitutional validity of the regulation imposes upon the landowner the difficult burden to prove otherwise.[114]

While the Court arrived at early holdings on takings by employing a rational basis level of judicial review, recent decisions have exhibited heightened judicial scrutiny.[115] For example, in *Lucas v. South Carolina*

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105. *Id.* at 395.

106. BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS AND LAND USE REGULATION 2 (1997).

107. *See infra* Part III. A. on presumptions of validity. Many jurisdictions, including Vermont, continue to rely on the *Euclid* presumption today. For the purposes of this discussion, courts that afford governmental action a "presumption of validity" when hearing land use disputes effectually employ "rational basis review."

108. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1971).

109. *Id.*

110. *See id.* at 127.

111. *See id. See also* Robert H. Freilich & Elizabeth Garvin, *Takings After Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, *in* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 54 (David L. Callies, ed. 1993).

112. *See Penn Central*, 438 U.S. at 127, (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962)).

113. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S.470, 488 (holding that a state regulation prohibiting mining was protective of the public welfare and a valid use of police powers to abate a potential public nuisance).

114. *Euclid*, 272 U.S. at 395.

115. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994); First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (holding that claimants must receive damages for temporary takings, even though invalid ordinance was eventually repealed); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) (concluding that although market value of TDRs was yet to be determined, takings claim was ripe for judicial review); City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) (concluding that in a § 1983 action the determination of economic burden was a question of fact appropriate for a jury).

Coastal Council, decided in 1992, the Court implicitly required the state to meet a higher burden by refusing to afford the state's land use restriction a simple presumption of constitutionality.[116] In ruling on the case, the Court gave less credence to cursory legislative findings, [117] more closely examined investment-backed expectations of the landowner, and forced the state to show more completely its reasoning in employing police power to prohibit Lucas from developing his property.[118] Additionally, the *Lucas* Court, through the words of Justice Scalia, questioned whether less than a total taking requires compensation, especially when the value is greatly diminished.[119] The Court criticized *Penn Central* and *Keystone* for suggesting that consideration should extend to other property belonging to the landowner where perhaps all uses are retained.[120] Rather, the *Lucas* Court implied that the takings analysis should segment the property into discrete parts, affording consideration to only those rights allegedly taken. Ultimately, however, the Court left the partial takings question unanswered, and held that Lucas had suffered a total taking without compensation.[121]

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116. *See Lucas*, 505 U.S. at 1024-25 (concluding that artful drafting by legislature should not dictate whether or not a court finds a particular regulation valid).

117. *Id.*; *see also* David L. Callies, *Introduction: Taking the Taking Issue into the Twenty-first Century*, *in* CALLIES, *supra* note 111, at 2-5. In *Lucas*, plaintiff purchased beachfront land with the intent to build two high-priced homes. The State denied Lucas a development permit pursuant to a newly enacted coastal development regulation. Plaintiff claimed that the regulation was an unconstitutional taking of his property, as it deprived him of all reasonable and productive use of the land without compensation. The U.S. Supreme Court held that the statute did constitute a taking of Plaintiff's property and ordered the State to compensate him. (Incidentally, later on the State sold the land to a developer who built two homes there). *Id.*

118. *See Lucas*, 505 U.S. at 1024-25. The *Lucas* Court concluded that a simple governmental assertion that a challenged regulation prevents public harm, fails to provide adequate proof of a legitimate state interest. In arriving at this determination, the Court suggested that legislative findings may or may not be helpful in guiding courts on the purpose of particular legislation, and declined to accept findings as conclusive. *Id.* The absence of deference stood as an overt act by the Court to disregard "rational basis" and to employ heightened scrutiny to review state action in the land use arena. *See also* Michael M. Berger, *Property Owners have Rights, Lower Courts Need to Protect Them*, *in* CALLIES, *supra* note 111, at 41.

119. *See Lucas*, 505 U.S. at 1016. In a *Lucas* footnote, Justice Scalia, for the majority, noted:

> [F]or example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id. at n.7.

120. *See* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 486 (1987).

121. *See Lucas*, 505 U.S. at 1016:

> The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

Id. See also id. at 1027.

Importantly, the *Lucas* concept of ownership is not novel. Civil and common law systems have recognized three, well-established incidents of property ownership: possession, use and disposition.[122] Further, as Professor Epstein explains, it provides no hierarchy or degrees of ownership:

> There is a partial taking of property if possession is removed . . . if use is removed . . . or if disposition is removed. . . . Any deprivation of rights is a taking, regardless of how it is effected or the damages it causes. The question to be asked is, "What has been taken?" not "What has been retained?"[123]

This shift in takings analysis by the Supreme Court, in accordance with Professor Epstein's analysis, continued with other rulings including *Dolan v. Tigard*,[124] *City of Monterey v. Del Monte Dunes*,[125] and *Suitum v. Tahoe Regional Planning Agency*.[126]

The *Lucas* Court's use of elevated scrutiny is not unique. Arguably, the Supreme Court has begun to adopt state courts' analyses of challenges to land use regulations. As early as 1962, state courts, including those in Oregon,[127]

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122. *See* RICHARD EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 59 (1985).

123. *Id.* at 62.

124. *See* Dolan v. City of Tigard, 512 U.S. 374, 394 (1994) (where a regulation required donating private property for public use as a greenway, the Court noted that the taking at issue elminated the landowner's right to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store, such that the landowner's right to exclude would not be regulated, it would be eviscerated).

125. *See* City of Monterey v. Del Monte Dunes, 526 U.S. 687, 717 (1999) (noting that a landowner suffers a compensable taking when the government denies just compensation in fact or otherwise refuses to provide procedures through which compensation may be sought).

126. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 725-28 (1997) (determining that, in a § 1983 action challeging that regional planning agency committed unconstitutional regulatory taking, procedures for compensating affected transferrable development rights may be considered in deciding the issue whether there has been a taking).

127. *See* Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23, 27-28 (Or. 1973) (rejecting the proposition that judicial review of a municipality's determination to change the zoning of a particular property in question is limited to a determination whether the change was arbitrary and capricious; rather, determining whether the action produces a general rule or policy which is applicable to an open class of individuals, interest, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial, and subject to increased scrutiny).

Washington,[128] Illinois,[129] and Florida,[130] explicitly subjected municipal zoning decisions to heightened judicial review. In contrast to the traditional view that zoning and zoning amendments by a local governing body are "legislative acts," these courts have treated land use decisions as "administrative" or "quasi-judicial."[131]

These two distinct methods of analysis have been characterized as judicial activism and judicial restraint, respectively.[132] The traditional reasoning behind judicial restraint is that courts acknowledge that decisions reflecting economic and other policy matters are best left to officials elected through the democratic process and therefore are entitled to a certain degree of deference. Proponents for judicial activism, however, believe that the flaws in democratic procedures lead to the deprivation of individual rights, including rights to private property, necessitating a heightened level of review.[133]

A primary and favorable result of this jurisprudential shift to elevated scrutiny is a reduction in the possibility of arbitrary decisions by zoning authorities.[134] For example, in *Fasano v. Board of County Commissioners of Washington County*, the Oregon Supreme Court concluded:

> By treating the exercise of authority by the commission in this case as . . . judicial rather than [legislative] and thus enlarging the scope of review on appeal, we may lay the court open to criticism by legal scholars who think it desirable that planning authorities be vested with the ability to adjust more freely to changed conditions. However, having weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local

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128. *See* Orion Corp. v. State of Washington, 693 P.2d 1369 (Wash. 1985) (holding that a landowner had standing for inverse condemnation proceedings, and that, contrary to State's contention, the exhaustion of administrative remedies was a futile effort).

129. *See* Ward v. Vill. of Skokie, 186 N.E.2d 529 (Ill. 1962) (holding that a village zoning decision was unreasonable and arbitrary).

130. *See* Board of County Comm'rs of Brevard County v. Snyder, 627 So.2d. 469, 472-473 (Fla. 1993) (using heightened judicial review to conclude that strong political influence affects the local decision-making process).

131. Traditionally, legislative acts are presumed constitutional, thereby requiring a lower standard of review. *See Euclid*, 272 U.S. at 395; *see also* Galanes v. Town of Brattleboro, 136 Vt. 235, 240, 388 A.2d 406, 410 (1978) (stating that the court will defer to the judgment of the municipality to make policy decisions). In contrast to the traditional view that zoning by a local governing body is a "legislative act," these courts have treated land use decisions as "administrative" or "quasi-judicial," therefore requiring a heightened standard of review. *See supra* notes 127-130 and accompanying text.

132. *See* EPSTEIN, *supra* note 122, at 29.

133. *Id.* at 30 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (citations omitted)).

134. *Id.*

> government, we believe that the later dangers are more to be feared.[135]

Similarly the Washington Supreme Court declared in *King v. Seattle*:[136]

> We are mindful . . . of the potential for abuse which legal process may serve in the hands of public officials, bankrolled with public funds, who seek to achieve by delay and the necessity for costly court suits or administrative hearings what they cannot achieve on the merits—the frustration of private citizens' legally protected activity.[137]

While the United States Supreme Court and other state courts currently afford takings cases a heightened level of judicial scrutiny, many jurisdictions, including Vermont, have declined to follow.[138]

III. VERMONT TAKINGS JURISPRUDENCE

The United States Constitution limits governmental land-use restrictions. While these limitations, defined by the Constitution and clarified by the United States Supreme Court, clearly apply to Vermont municipalities, Vermont also has its own eminent domain clause.[139] In fact, Vermont's compensation requirement, although not ratified until 1786, was the first of its kind drafted in 1777.[140] The Vermont Constitution now provides: "That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money."[141]

Vermont has no statutorily prescribed method by which landowners may initiate inverse condemnation;[142] however, pursuant to the Vermont

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135. Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23, 27 (Or. 1973).

136. King v. Seattle, 525 P.2d 228 (Wash. 1974).

137. *Id.* at 236.

138. *See* McLaughry v. Town of Norwich, 140 Vt. 49, 54, 433 A.2d 319, 321 (1981). "Zoning bylaws are presumed to be valid." *Id.*; Beck v. City of St. Paul, 231 N.W.2d 919, 925 (Minn. 1975). "The general welfare of the public is paramount in importance to the pecuniary stake of the individual." *Id.*; *see also* Robert J. Hopperton, *The Presumption of Validity in American Land Use Law: A Substitute for Analysis, A Source of Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301 (1996). "[P]resumption is an inference which a court is permitted or required to draw to supply the place of a fact." *Id.* at 304, (citing CHRISTOPHER J. MILLER & CORA M. THOMPSON, 8 CYCLOPEDIA OF FEDERAL PROCEDURE § 26.268 (3rd ed. 1991 rev. vol.)).

139. *See* Kobach, *supra* note 92, at 1229.

140. *See id.*

141. VT. CONST. ch 1, art. 2.

142. Southview Associates v. Bongartz, 980 F.2d. 84, 100 (2d Cir. 1992).

Constitution's takings clause, landowners may challenge the validity of land use controls imposed by municipalities. Moreover, in *Southview Associates v. Bongartz*, a federal appeals court held that "[a] landowner has not suffered a violation of the Just Compensation Clause [of the United States Constitution] until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State."[143] For this reason, takings claims in Vermont are most often brought in state court.[144]

In Vermont, as well as in other jurisdictions, takings challenges often argue that the adoption of a particular ordinance is either facially invalid or invalid as applied.[145] A claim that the ordinance is invalid as applied challenges the regulation as it affects a particular parcel or a specific permit application. In Vermont, such claims are ripe only after a plaintiff property owner has exhausted all administrative remedies, including any variance procedures.[146] In following with the ripeness doctrine of the United States Supreme Court holding in *Williamson County of Regional Planning Commissions v. Hamilton Bank of Johnson City*,[147] the Vermont Supreme Court in *Killington, LTD. v. State of Vermont and Town of Mendon* reasoned that "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[148]

On the other hand, a claimant may bring a facial challenge to a land use regulation without actually attempting to develop land. "A facial taking means that the mere adoption of land use regulations constitutes a taking of the property."[149] Importantly, a facial challenge primarily benefits society and results in injunctive or declaratory relief,[150] rather than monetary damages.

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143. Id.

144. *Southview Associates*, 980 F.2d at 99 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).

145. *See In re* Interim Bylaw, Waitsfield, Vermont, 170 Vt. 541, 542 742 A.2d. 742, 744 (1999) (citing Keystone Bituminous Coal Ass'n. v. De Benedictis, 480 U.S. 470, 486 (1987)).

146. Killington, LTD. v. State of Vermont and Town of Mendon, 164 Vt. 253, 262, 668 A.2d 1278, 1284 (1995) (holding that a regulatory takings claim resulting from an Act 250 Environmental Board decision is not ripe until claimant has exhausted all administrative remedies and citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 187-88 (1985)); *accord*, Houston v. Town of Waitsfield, 162 Vt. 476, 479, 648 A.2d 846, 865 (1994) (holding that water extraction was not agriculture by definition of town plan and was therefore not a use by right; however, Plaintiff's claim was not ripe because she had not applied for a variance after receiving a permit denial).

147. *See Williamson*, 473 U.S. 172.

148. *See Killington LTD*, 164 Vt. at 262, 668 A.2d at 1284 (citing MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986) (holding that claim was not ripe for review)); *but see* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1013 (1992 (concluding that although Plaintiff had not applied for newly available variance, his claim was ripe nonetheless, because statute prohibited all development).

149. *See Killington, LTD.*, 164 Vt. at 261, 668 A.2d 1284 (citing J. SHONKWILER AND T. MORGAN, LAND USE LITIGATION § 3.01 (1986)).

150. *See id.* (citing Weissman v. Fruchtman, 700 F. Supp. 746, 753 (S.D.N.Y. 1988)).

Such a challenge can be brought upon the adoption of the regulation.[151] The Vermont Supreme Court rarely finds either type of challenge to a municipal land use regulation adequate to invalidate the regulation or to award inverse condemnation.[152] In reliance on the United States Supreme Court rulings in *Euclid*[153] and *Nectow v. City of Cambridge*,[154] the Vermont Supreme Court has generally held that:

> [T]he exercise of the police power to institute zoning is constitutional without compensating the affected properties for loss in value. This is all conditioned on there remaining in the owner some practical use of his [or her] land, the existence of a public good or benefit of sufficient magnitude to justify the burdening of the affected property.[155]

A. Vermont's Presumption of Validity and Rational Basis Review

The Vermont courts begin a takings analysis "[w]ith the proposition that zoning enactments are entitled to the presumption of validity."[156] Moreover, the courts refrain from interfering with zoning unless it is clearly and indisputably unreasonable, irrational, arbitrary or discriminatory.[157] As Professor Daniel Mendelker and Professor A. Dan Tarlock describe:

> The use of the term *presumption* to describe the relationship between a zoning body and a court is misleading because it is being used to describe two different concepts. . . . "Presumption" is a technical term to allocate the burden of producing evidence, but . . . courts generally use the term "presumption" [in land use decisions] to refer to standards of judicial review that will be applied. Legislative bodies are not subject to the same evidentiary

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151. *See id.*

152. Galanes v. Town of Brattleboro, 136 Vt. 235, 240, 388 A.2d 406, 410 (1978) (holding that "zoning enactments are entitled to a presumption of validity," and the town's ordinance had a legitimate purpose which did not constitute spot zoning); *In re* Duncan, 155 Vt. 402, 408, 584 A.2d 1140, 1144 (1990) (recognizing that the local administrative body deserves judicial deference to interpret local zoning ordinances); City of Rutland v. Keiffer, 124 Vt. 357, 367, 205 A.2d 400, 406-07 (1964) (holding that courts will not interfere with zoning unless it is clearly unreasonable, irrational, arbitrary or discriminatory).

153. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

154. *See* Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928) (concluding that as long as a property owner retains some practical use of her property, and the public benefit is advanced, the burden imposed is justified and non-compensable).

155. *Galanes*, 136 Vt. at 240, 388 A.2d at 410 (citing *Euclid*, 272 U.S. at 368).

156. *Id.* at 240 (citing Town of Charlotte v. Richter, 128 Vt. 270, 271, 262 A.2d 444, 4455 (1970)); *see also* McLaughry v. Town of Norwich, 140 Vt. 49, 54 433 A.2d 319, 322 (1981); *Keiffer*, 124 Vt. at 359.

157. *See Keiffer*, 124 Vt. at 367.

> burdens as fact finders. Instead, they must offer only a *plausible rationale* for what they do unless a constitutional norm is violated.[158]

Under a presumption of validity, Vermont courts uphold the constitutionality of zoning and subdivision regulations so long as the stated purpose remains within the limits of the police power, delegated by Act 200. This authority is very broad, and as the Vermont Supreme Court has noted: "[The] purpose of the Vermont Planning and Development Act is to 'provide means and methods for the municipalities and regions of this state to plan for the prevention, minimization, and future elimination of such land development problems as may presently exist.'"[159]

Generally, so long as a municipal ordinance draws an explicit nexus with a legitimate purpose to advance the health, safety, and welfare of the public, the Vermont Supreme Court will defer to the municipality's judgment and uphold the ordinance as reasonable and valid.[160] Put differently, Vermont, like several other jurisdictions, employs the "fairly debatable" rule in deciding takings cases.[161] If the reasonableness of the challenged regulation is "fairly debatable" the Court construes the bylaw in favor of the municipality.[162] This deferential method provides a stark contrast to current federal takings analysis, as well as to methods used by other state jurisdictions, where courts are more suspect of town administrative actions.

B. Burden of Proof

In Vermont, a strong presumption of constitutional validity remains, notwithstanding the United States Supreme Court's recent stance against such presumptions.[163] Accordingly, the burden on a landowner challenging a land

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158. *See* Daniel R. Mandelker and A. Dan Tarlock, *Shifting the Presumtion of Constitutionality in Land Use Law*, 24 URB. LAW. 1, 8 (1992) (emphasis added).

159. *In re* Stowe Highlands, 164 Vt. 272, 278, 668 A.2d 1271, 1276 (1995) (quoting VT. STAT. ANN. tit. 24, § 4302(a) (1994)).

160. *See* Galanes v. Town of Brattleboro, 136 Vt. 235, 240, 388 A.2d 406, 410 (1978).

161. *See* MATTHEW BENDER, ZONING AND LAND USE CONTROLS, Part V., ch. 39, at 39.02 (Alan Weinstein ed., 2000).

> Since zoning . . . [is] a legislative act . . . zoning ordinances are presumed to be valid. This presumption is rebuttable, and the challenger bears the burden of proving an ordinance's unreasonableness as applied to his property. . . . Any uncertainty about the unreasonableness must be resolved in the government's favor. If the issue is fairly debatable . . . a court may not substitute its opinion for that of the zoning authority which enacted the challenged ordinance.

Id. (citing Elam v. City of St. Ann, 784 S.W.2d 330, 334 (Mo. Ct. App. 1990)).

162. *Id. See also Galanes*, 136 Vt. at 240-42, 388 A.2d at 410-11.

163. *See Galanes*, 136 Vt. at 240-42, 388 A.2d at 410-11.

use regulation is very difficult to meet. To prevail on a takings challenge in Vermont courts, plaintiffs must show either that the regulation in question "does not substantially advance a legitimate state interest or that it denies the owner economically viable use of his land."[164] Such proof may be insurmountable due to financial or time constraints, especially as all inferences drawn by the courts favor the legislators or local zoning body.

Under these requirements, a facial challenge claiming that a particular bylaw is unconstitutional, no matter its application, presents an extraordinary burden that typically fails.[165] Realistically, a landowner in Vermont has a better chance at invalidating an ordinance if he or she converts a facial challenge to an as-applied challenge by attempting to develop the property.[166] Generally, the proof required to challenge a bylaw as it is applied to a particular property is less extraordinary, but nevertheless quite burdensome.[167] It supposes that the owner intended to build in the near future, even though in reality, many landowners choose to hold land for investment or to wait until conditions are more appropriate.[168]

In addition, the ripeness doctrine[169] mandates a landowner to submit a development permit that requires "the preparation of numerous documents, such as geologic surveys, archeological surveys and environmental impact reports."[170] Such proof may amount to considerable expense, and "even then, there is no certainty that one application will be sufficient or that the property owner will be able to successfully prosecute a takings challenge based on the denial of the one application."[171] This requirement puts landowners who wish to challenge town actions at a serious disadvantage. The Vermont enabling statute does not require towns to provide findings before implementing restrictions on land use.

An example of this scenario is *Kisiel v. Waitsfield*, decided in December of 2000.[172] In February 1996, the Waitsfield Planning Commission granted a heavily conditioned subdivision permit to the Kisiels to develop a 158-acre

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164. Chioffi v. City of Winooski, 165 Vt. 37, 41, 676 A.2d 786, 789 (1996) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)). *See also* Omya v. Town of Middlebury, 11 Vt. L. Wk. 217, 217, 758 A.2d 777 (2000).

165. *See Chioffi* 165 Vt. 37, 676 A.2d 786.

166. *See* Stephen Abraham, *Windfalls or Windmills: The Right of a Property Owner to Challenge Land Use Regulations (A Call to Critically Reexamine the Meaning of Lucas)*, 13 J. LAND USE & ENVTL. L. 161, 192 (1997).

167. *See* Southview Associates v. Bogartz, 980 F.2d 84 (2d Cir. 1992).

168. Abraham, *supra* note 166, at 192.

169. *See id.*

170. *Id.* at 193.

171. *Id.*

172. *In re* Mark and Pauline Kisiel, Docket No. 695 (Vt. Envt. Board August 7, 1998), *rev'd*, Oct., 1999; *In re* Mark and Pauline Kisiel, 11 Vt. L. Wk. 401, 772 A.2d 136 (2000).

tract of land into five residential lots on the Northfield Ridge in Waitsfield. In January of 1997, the Waitsfield selectboard approved the Kisiels' request to improve the road accessing their land by granting a Permit for Work in the Public Right of Way. In addition to subdivision and highway access permits required by the town, the Kisiels were required to obtain an Act 250 permit[173] from the Vermont District Environmental Commission[174] in order to improve and extend the class four road servicing their property.[175] The District Environmental Commission issued the road extension permit in November 1997.

Notwithstanding its prior approval, the Town appealed the state-approved Act 250 road permit to the Environmental Board, asserting that the development was in contravention of the Town Plan, which aims to prevent development on steep slopes.[176] Even though the Vermont statute provides that town plans are not binding,[177] the Environmental Board sided with the Town and reversed the permit. The owners appealed to the Vermont Supreme Court.[178]

The Vermont Supreme Court reversed the decision of the Environmental Board, holding that the Waitsfield Town Plan is not controlling law.[179] The

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173. Act 250 is beyond the scope of this note. For a thorough discussion *see* RICHARD BROOKS, TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 - VOL. II, THE HISTORY, PLANS AND ADMINISTRATION OF ACT 250 (Vt. Law Sch., Env. Law Ctr. 1997).

174. The Vermont Environmental Board is a quasi-judicial body, appointed by the governor. Through nine District Environmental Commissions established pursuant to VT. STAT. ANN. tit. 10 § 6026 (2000), the Environmental Board reviews Act 250 permit decisions on appeal from District Environmental Commission decision to insure compliance with state standards. VT. STAT. ANN. tit. 10, § 6026.

175. *See* VT. STAT. ANN. tit. 10, § 151 (2000). Act 250 was passed by Legislature in 1970. It requires that certain types of development meet ten statutory criteria in order to proceed. Considerations include, among others, impacts on water quality, aesthetics, and compliance with a duly adopted local plan.

176. *See In re Kisiel*, 11 Vt. L. Wk. at 402, 772 A.2d at 137; *see also* WAITSFIELD TOWN PLAN, *supra* note 3, at 12:

> Objective 2—To protect Waitsfield's fragile resources and sensitive natural areas and reduce environmental hazards and prevent the loss of life and property from flooding.
> a. prevent the creation of parcels which will result in development on steep slopes, critical wetlands and floodplain; and consider amending the Waitsfield Zoning Bylaws to create standards to prevent such development.

Id.

177. Act 200 clearly indicates that a town plan is a general expression of town goals. It is not binding. Bylaws, on the other hand, designed to implement the town plan, carry much weight in the courts, unless they are invalid. *See In re* Appeal of Alfred Duval, Docket No. 129-7-98 (Vt. Env. Ct. Feb. 11, 1998) ("Town plan is merely an overall guide to community development. Although it may recommend many desirable approaches to that development, only those provisions incorporated in the bylaws are legally enforceable. The 'intent' of the town plan does not provide a basis for disapproval of the project if it meets all applicable regulations."). *Id.*

178. *In re* Mark and Pauline Kisiel, 11 Vt. L. Wk. 401,401, 772 A.2d 135, 136 (2000).

179. *Id.* at 403, 772 A.2d at 140 (citing *In re* Molagno, 163 Vt. 25, 31, 653 A.2d 772, 775 (1994): "[the Board may not] give non-regulatory abstractions in the Town Plan the legal force of zoning laws." *Id.*

court noted that neither the Town Plan nor the zoning bylaws specify "steep slopes."[180] The decision was a significant step away from the extreme deference the Vermont courts have shown to municipalities in zoning disputes.[181] In effect, the court precluded Waitsfield from creating policy retroactively, by interpreting its plan according to whether or not it wished to approve a particular permit.[182] Although Waitsfield authorities viewed the decision as radical, the court simply reiterated the well-established fact that only descript bylaws (and not broad town plans) have the force of law.[183]

IV. THE CONSTITUTIONALITY OF LAND USE REGULATIONS OF THE NORTHFIELD RIDGE UNDER *LUCAS*

In a separate case in 1999, the Vermont Supreme Court permitted the Town of Waitsfield to impose severe restrictions on the use of privately owned land on the Northfield Ridge in *In re Interim Bylaw, Waitsfield, Vermont*.[184] Although the bylaw at issue in *In re Interim Bylaw* failed to pass by a super-majority in a town referendum in November 1999,[185] the Waitsfield voters will decide on a slightly modified version of the same ordinance prohibiting all residential development on the Northfield Ridge.[186] Significantly, as the proposed bylaw now stands, it fails to specify or define steep slopes.[187] The absence of specificity may provide maximum regulatory control over all property at high elevations along the Northfield Ridge—whether or not slopes on a particular parcel are steep. Arguably, this is the goal of planning officials

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180. *Id.* at 402, 772 A.2d at 139.

181. The Vermont court conducted a statutory analysis under Act 250, rather than a constitutional examination; however, the court's application and reasoning are analogous to constitutional inquiries regarding claims for denials of substantive due process and inverse condemnation.

182. *In re Kisiel*, 11 Vt. L. Wk. at 404, 772 A.2d at 144. "For whatever reasons, the Town is attempting, through Act 250, to undo its own regulatory decisions, without attempting to reopen them in the Town processes. The only explanation . . . [is] that the Town has now adopted an interim zoning ordinance prohibiting residential development. . . . The [Town] is not entitled to use Act 250 to retroactively apply its new zoning regime to development to which it is not applicable." *Id.*

183. Apparently, the Waitsfield Planning Commission was not cognizant of this rule: "[The decision] gutted the power of the Town Plan, not just for Waitsfield, but for all Vermont towns. . . . 'This ruling has said, there's the Town Plan. We see that it's not consistent with the zoning regulations so we're going to rule with the regulations. That's gutting the power of the Town Plan.'" Lisa Loomis, *Kisiel Wins Battle*, VALLEY REPORTER, Jan. 4, 2001, at 6, *quoting* Russ Bennett, Chairman, Waitsfield Town Planning Commission.

184. *See In re* Interim Bylaw, Waitsfield, Vermont, 10 Vt. L. Wk. 313, 742 A.2d 742 (1999).

185. *See id.* at 313.

186. Lisa Loomis, *Ridge Amendment Likely to Come before Voters*, VALLEY REPORTER, Jan. 25, 2001, at 3.

187. *See In re* Mark and Pauline Kisiel, 11 Vt. L. Wk. 401, 402, 772 A.2d 135, 139 (2000).

who desire to keep the Ridge free of development for reasons not limited to environmental protection.[188]

Property owners on the Northfield Ridge in Warren, Vermont, face a similar amendment to the bylaws, although less severe,[189] and have equal concerns about restrictions on their land. One landowner expressed the following:

> As a long-standing property owner and Valley resident since 1977, I am very opposed to any changes that would involve further restrictions on the property owners in the Valley. My property is over 18 acres on the Roxbury Mountain Road. My home is there, and the stewardship on the land and that of my neighbors, is something that many of us feel is a great and serious responsibility. To further restrict uses, I fear, would cause a backlash effect and promote more use, such as logging and timber removal, which would only work at cross purposes to the intent here.[190]

Notwithstanding the dissent of many landowners on the Northfield Ridge, many town citizens in both Waitsfield and Warren favor zoning restrictions as the most effective method to limit growth. Although Vermont courts generally afford municipal governments in the Mad River Valley with broad discretion, a less deferential standard of review may loom on the horizon. Because of the importance that citizens place on open spaces, towns must immediately consider zoning and bylaws in light of the recent federal trends in takings law. An examination of Vermont Supreme Court land use decisions, and in particular *In re Interim Bylaw,* may assist in effective land use planning to adequately withstand constitutional challenges in the future.

In re Interim Bylaw, Town of Waitsfield, Vermont[191] involved Plaintiffs, Edmund W. E. and Deborah Stein, who owned land along the Northfield Ridge in Waitsfield, Vermont. Of the 195 acres owned by the Steins, 130 acres are located above 1700 feet in elevation in the Forest Reserve District, as designated by the Waitsfield Town Plan.[192] Pursuant to Act 200,[193] the Town adopted an interim bylaw imposing, among other restrictions, a

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188. *See infra* Part IV. B.

189. *See* Cory Hatch, *One Step Closer to New Zoning Vote,* VALLEY REPORTER, Dec. 7, 2000 at 1. "The interim forest reserve district, made to limit development above 1,850 feet east of Route 100 and above 2,000 feet in the vicinity of Sugarbush Resort, will become permanent. . . . [The district] will maintain a minimum lot size of 25 acres for any development." *Id.* at 3.

190. Letter to the Editor, VALLEY REPORTER, Dec. 7, 2000, at 4.

191. *In re* Interim Bylaw, Waitsfield, Vermont, 10 Vt. L. Wk. 313, 742 A.2d 742 (1999).

192. *See* WAITSFIELD TOWN PLAN, *supra* note 3, at 76.

193. VT. STAT. ANN. tit. 24, § 4410 (1992).

permanent moratorium on development above 1700 feet,[194] which affected approximately forty-nine parcels.[195] Of the forty-five affected landowners, only one was an actual Waitsfield resident able to vote in a local referendum.[196]

The Steins planned to subdivide their land into two parcels for single-family dwellings.[197] The interim bylaw required a conditional use permit in order for the Steins to build on their land located below 1700 feet, approximately 65 acres, but prohibited all development on the remainder of their land, another 130 acres located above 1700 feet.[198] The Steins facially challenged the portion of the bylaw prohibiting one and two-family dwelling units above 1700 feet in Superior Court without attempting to apply for a permit under the interim bylaw. An application seemed futile, as the bylaw prohibited all development.[199]

The Town moved for summary judgment, maintaining that the Plaintiffs' complaint failed to show that the bylaw created an unconstitutional taking of their land. The trial court granted summary judgment, and the Vermont Supreme Court affirmed the decision. The Vermont Supreme Court held that the Plaintiffs neither supplied an argument that the bylaw failed to advance a legitimate municipal interest, nor that the productive potential of their land was lost due to the bylaw,[200] despite Plaintiffs' complete preclusion from developing their land in accordance with their investment-backed expectations.[201] In arriving at the holding, the Vermont Supreme Court cited to *Keystone Bituminous Coal Association v. DeBenedictis*,[202] which essentially employed the United States Supreme Court's takings analysis of *Agins v. Tiburon*.[203]

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194. *In re Interim Bylaw*, 10 Vt. L. Wk. 313, 313, 742 A.2d at 743; interview with Russ Bennett, Chairman, Waitsfield Town Planning Commission, in Waitsfield, Vt. (Oct. 2000).

195. Interview with David Dion, Waitsfield realtor and developer, in Waitsfield, VT (Sept. 2000).

196. *Id.* Since the referendum, much of the land in the Forest Reserve District has changed hands. In November of 2001, the Waitsfield zoning administrator could not confirm, nor deny Mr. Dions' data regarding Waitsfield's Forest Reserve District at the time of the referendum. Personal Communication with Bill Bryant, (Nov. 7, 2001).

197. Interview with Bill Bryant, Waitsfield Planning Administrator, in Waitsfield, VT (Oct. 2000).

198. *In re* Interim Bylaw, Waitsfield, Vermont, 10 Vt. L. Wk. at 313, 742 A.2d at 743.

199. *See* Houston v. Town of Waitsfield, 162 Vt. 476, 648 A.2d 864 (1994) (concluding that town bylaw prevented plaintiff from appealing denied permit application when such appeal proved futile).

200. *See In re Interim Bylaw*, 10 Vt. L. Wk. at 314, 742 A.2d at 744 .

201. *Compare*, Agins v. City of Tiburon, 447 U.S. 255 (1980). Appellants were not precluded from all housing construction on their land; here, the Steins were faced with a permanent moratorium on all housing development.

202. *In re Interim Bylaw*, 10 Vt. L. Wk. 313, 742 A.2d at 744 (citing Keystone Bituminous Coal Ass'n. v. De Benedicits, 480 U.S. 470, 486 (1987)).

203. *See Agins*, 447 U.S. at 259: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Id.*

The facts in Waitsfield were quite distinguishable from those in the United States Supreme Court cases of *Keystone* and *Agins*. Appellants in *Agins* were permitted to construct one-family dwellings under the challenged ordinance, and for this reason, the Court concluded that because "appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. . . it cannot be said that the impact of the ordinance has denied them the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments."[204] In Waitsfield, the interim bylaw prevented any and all development for single-family dwellings above 1700 feet elevation. In addition, the *Agins* Court concluded that the challenged ordinance neither prevented the best use of appellant's land, nor "extinguish[ed] a fundamental attribute of ownership."[205] Conversely, the restrictions on the Steins' land in Waitsfield prevented the best use of the property and clearly removed an attribute of ownership by prohibiting development for residential use on almost all of the land in question.[206]

Irrespective of these differences, the Vermont Supreme Court found a sufficient nexus between the interim bylaw and its stated purpose,[207] as well as the "regulatory mechanisms employed to advance the goal."[208] Significantly, the Court gave the purpose a rational basis review by presuming that the stated purpose[209] was constitutionally valid and held that, "Plaintiffs present no argument that the interim bylaw does not substantially advance a legitimate state interest. Nevertheless, we find that the Town has a legitimate interest in resource protection and preservation."[210]

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204. *Id.* at 262.

205. *Id.* at 262, (citing United States v. Causby, 328 U.S. 256, 262 (1946) and Kaiser Aetna v. United States, 444 U.S. 164, 179-180 (1979)).

206. When the Steins purchased their land, one attribute it possessed was its "developability," which was otherwise lost upon the adoption of the ordinance. Arguably, no other use is profitable or feasible. *See infra*, Part IV. A.

207. *See In re* Interim Bylaw, Waitsfield, Vermont, 10 Vt. L. Wk. 313, 742 A.2d 742, 743 (1999); *see also*, WAITSFIELD TOWN PLAN *supra* note 3, at 12:

> The purpose of the Forest Reserve District is to protect significant forest resources, water supply, watersheds, forest ecosystems, and wildlife habitat at higher elevations; to assure continued present and future outdoor recreational opportunities along the Ridge; to keep the visual character of the ridge natural and undisturbed; and to exclude development in areas with steep slopes, shallow soils, unique or fragile resources, wildlife habitat, and poor access to town roads and community facilities and services.

Id.

208. *In re Interim Bylaw*, 10 Vt. L. Wk. 313, 742 A.2d at 744.

209. *Id.*; *see also* WAITSFIELD TOWN PLAN, *supra* note 3, at 12. "[T]o provide the Town time to review the results of recently completed studies and expert analysis of portions of this area, determine whether additional studies are needed to plan for development in this area and prepare specific proposals for implementation of the development recommendations regarding this area." *Id.*

210. *In re Interim Bylaw*, 10 Vt. L. Wk. at 313, 742 A.2d at 743.

The Town's interest in protecting the environment and aesthetics on the Ridge appears legitimate; however, the court's cursory review of the implementation of those objectives—on summary judgment—left factual questions unanswered. For the several important reasons recently articulated by the United States Supreme Court, as well as other state courts, which have proven persuasive in the past,[211] the Vermont court could have employed an elevated standard to review the local land use regulation. If the Vermont Supreme Court had examined the Waitsfield interim bylaw with heightened scrutiny, several important issues bearing upon its validity might have surfaced.

A. Ridgeline Zoning in Waitsfield May Not Substantially Advance a Legitimate State Interest

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.... [O]ur cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest.[212]

The *Lucas* Court rejected the presumption of validity traditionally afforded government-imposed land use restrictions and closely examined whether the challenged regulations substantially furthered the stated goals of the government.[213] Without considering the potential result of the Waitsfield ordinance in relation to its stated purpose, the Vermont Supreme Court deferred all judgment to the municipality by presuming that the bylaw substantially advanced a legitimate state interest.[214]

The Waitsfield planning commission states the purpose of the Waitsfield Forest Reserve District (which includes the Northfield Ridge):

> [T]o protect significant forest resources and water supply watersheds at higher elevations and to limit development in areas with steep slopes, shallow soils, unique or fragile resources,

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211. *See* Fasano v. Board of County Comm'rs of Washington County, 507 P.2d 23 (Or. 1973).

212. Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987) (emphasis in the original).

213. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

214. *See In re* Interim Bylaw, Waitsfield, Vermont, 10 Vt. L. Wk. 313, 314, 742 A.2d 742, 744 (1999).

> headwater streams, wildlife habitat, and poor access to Town roads and community facilities and services.[215]

Pursuant to Act 200,[216] this purpose is legitimate; however, upon heightened scrutiny, it becomes evident that the bylaw's permitted uses fail to substantially advance that purpose. Although agriculture and forestry are uses permitted "by right,"[217] neither is consistent with watershed preservation or low impact on shallow soils.[218] Moreover, pursuant to Vermont statute,[219] activities and structures necessary to adequately perform either use must also be permitted, notwithstanding the fact that access roads and accessory structures disrupt wildlife corridors and affect viewsheds and other resources.[220] On the other hand, single-family dwellings, arguably comparable in impact, are not allowed.

Many environmentalists, economists, and legal scholars contend that agriculture and conservation are far from synonymous.[221] In an article

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215. Proposed Changes to the Waitsfield Zoning Ordinance (approved by the Waitsfield Planning Commission, August 30, 2000 to replace Article III. Section 4. Forest Reserve District).

216. *See* VT. STAT. ANN. tit. 24, § 4403 (1992).

217. Proposed Changes to the Waitsfield Zoning Ordinance, *supra* note 215, include:

> In the Forest Reserve District, the following uses are permitted by right: (1) Agriculture; (2) Forestry. In the Forest Reserve District, the following uses are permitted with the approval of the Board of Adjustment pursuant to Article IV, Section 5: (1) Accessory apartment less than 800 sq. ft. (below elevation of 1,700'msl only); (2) Accessory use; (3) Commercial Water Extraction; (4) Home Occupation; (5) Outdoor Recreation Consistent with Traditional Uses of Forest Land; (6) Public Utilities; (7) Seasonal Camp; (8) Single Family Dwelling (only below 1,700' msl).

218. *See* WAITSFIELD TOWN PLAN, *supra* note 3, at 24: "[P]oor forest management can result in the degradation of biological diversity and can destroy scenic landscapes." Privately owned forest land is not required to be managed in accordance with a forest management plan approved by the county forester and is therefore subject to the potential for poor and/or hazardous management. *Id.* at 25. Waitsfield is attempting to adopt a regulation requiring the management of all forest lands according to best management practices put forth by the county forester. *Id.*

219. *See* John H. Hasen, *Meaning of 24 V.S.A. 4495*, OPINION NO. 91-2 F OFFICE OF THE ATTORNEY GENERAL (1991) (formal opinion letter of Vermont Attorney General explaining affect of municipal zoning on "accepted agricultural and silvicultural practices").

220. *See id.* These permitted activities include:

> [T]he growing or harvesting of crops; raising of livestock; operation of orchards; the sale of farm produce on the premises where raised [requiring adequate access to customers]; processing and storage of products raised on the property; and other accepted agricultural practices . . . [and] [c]ustomary farm structures accessory to agricultural uses and on the same lot or parcel as the [permitted use].

Id.

221. *See* Karen R. Hansen, *Agricultural Nonpoint Source Pollution: The Need for an American Farm Policy Based on an Integrated Systems Approach Recoupled to Ecological Stewardship*, 15 HAMLINE J. PUB. L. & POL'Y 303 (1994); N. William Hines, *The Land Ethic and American Agriculture*, 27 LOY. L.A. L. REV. 841 (1994).

explaining the fallacy of the perceived connection between agriculture and environmental protection, Professor Jim Chen argues:

> Together with mineral extraction, agriculture is one of the most resource-depleting activities. . . . [The] assertion that incumbent farmers provide valuable "open space" and other unspecified "environmental benefits" . . . rhetoric fails to explain why the complete abandonment of farming in a region might not be an environmentally preferable outcome. . . . Agriculture's vintage—its sheer age as a human activity—obscures its long-term effects on the environment. . . . Agriculture's likeliest victims blithely assume that "the ground filters everything out." The "small farm" variant . . . is especially misleading, for small-scale communities are seldom as humane and ecologically sound as . . . rhetoricians portray them to be.[222]

How the distinction between agricultural "open space" and environmental protection became blurred in Vermont is complicated; however, it is clear that town policies designed to foster the traditions of agriculture cannot, in good faith, be characterized as pure efforts to protect the environment. Thus, Waitsfield's Forest Reserve District, which prohibits all residential development above 1700 feet, yet allows agriculture and forestry as a use by right—for the professed purpose of protecting the environment—is arbitrary and unreasonable.[223]

B. Waitsfield Landowners Suffer Potentially Arbitrary and Unequal Treatment

The United States Supreme Court has recognized the strong potential for arbitrary and unequal treatment in local government decision making. Accordingly, the Vermont Supreme Court has recognized that the constitutional principles of due process and equal treatment require that zoning

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222. *See* Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333, 336-37 (1995).

223. This may be more of a systemic problem facing Vermont. The enabling statute aims to support agriculture/forestry and other traditional uses of the land—and Act 250, Vermont's environmental protection law, actually goes further and exempts agriculture from the process. While such is beyond the scope of this Note, consider Chen, *supra* note 222. Discussions with voters in Waitsfield indicate that many desire ridgeline zoning to protect aesthetics. Although the Vermont Legislature recognizes aesthetical zoning as a legitimate governmental interest, "environmental protection" has garnered more support because it may serve as a more legitimate reason to restrict private development rights.

and subdivision regulations must regulate according to land location, topography, and use, rather than according to who is the property owner.[224]

The Vermont Court should employ this reasoning to address any future challenges against Waitsfield zoning. Equal treatment is an important concern here, as many Waitsfield property owners reside outside Vermont. They cannot vote in zoning referendums, and locals look upon them with disdain, believing that the "out-of-staters," otherwise known as "flatlanders," are responsible for the changing character of the Valley.[225] Professor John Hart Ely, in *Democracy and Distrust*, has described this significant problem, which may be more severe on local levels: "[Political] malfunction occurs when . . . representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudicial refusal to recognize commonalities of interest."[226]

The California Supreme Court also recognized this issue in *Associated Home Builders v. City of Livermore*, in which a city adopted an ordinance prohibiting the issuance of building permits.[227] The court found that the ordinance significantly affected the ability of nonresidents, who were not represented in the city's regulating body and unable to vote, to build in the city.[228]

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224. *See, e.g.*,Vill. of Willowbrook, v. Grace Olech, 528 U.S. 562 (2000) (holding that town's treatment of plaintiff in zoning requirements was different than other persons in her position and such individualized treatment was an irrational denial of equal protection); *See also* Mandelker and Tarlock, *supra* note 158, at 10:

> Most state courts do not shift the presumption of constitutionality when a substantive challenge is made to a land use restriction. But there are many exceptions. . . . Presumption shifting has long been the rule in several types of small rezonings . . . because of perceived defects in the decision-making process.

Id. See also Smith v. Town of St. Johnsbury, 150 Vt. 351, 357 554 A.2d 233 (1988) (acknowledging that a court must examine the purpose *behind* a governmental action to determine whether distinctions between similarly situated landowners are arbitrary and capricious, but ultimately concluding that the Town's rezoning did not violate equal protection); *see also* Omya v. Town of Middlebury, et. al, 11 Vt. L. Wk. 217, 758 A.2d 777, 781 (2000) (holding that the Town's action did not constitute a taking or a violation of equal protection, but implying that the outcome might have been different with respect to the equal protection claim, if the owner had shown that it was treated differently from similarly situated class members). For the view that arbitrary and unequal treatment extends beyond zoning, *see* Williams v. Vermont, 472 U.S. 14 (1985) (holding that statute establishing tax on cars purchased by nonresidents later domiciled in Vermont higher than taxes charged to in-state residents purchasing their cars in state a violation of equal protection). "[T]he statute makes distinctions among residents that are not 'supported by a valid state interest independent of the discrimination itself.'" *Id.* at 28 (Brennan, J., concurring).

225. Discussions with residents and Town officials. One Valley resident explained that the ability to subdivide and develop the Northfield Ridge comes from the influx of "flatlanders" with "Wall Street money." A member of the Planning Commission explained that in adopting the interim bylaw, property owners residing locally were solicited by the Town for purchase agreements (importantly, not condemnation proceedings) or rights of first refusal because board members felt more of a responsibility to the locals impacted by the land use restrictions. *Id.*

226. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102-03 (1980).

227. Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976).

228. *Id.* at 487. Considering the effect on non-resident applicants, the court noted:

> [A]n ordinance, superficially reasonable from the limited viewpoint of the

The California Court modified the deferential review afforded local zoning ordinances and insisted that the ordinance "have a real and substantial relation to public welfare."[229]

In likeness to the Supreme Court's method of analysis in the early case of *Adkins v. Children's Hospital*, a semi-heightened judicial review in land use cases prevents using the police power as "a mere pretext—to become another and delusive name for the supreme sovereignty of the state, to be exercised free from constitutional restraint."[230] Regardless of these factors, and the fact that Waitsfield looks favorably upon farming and forestry, arguably just as harmful as housing development, the Vermont Supreme Court has assumed the validity of the Waitsfield assertion with de minimus examination of the serious potential for unequal treatment.

C. The Nuisance Exception May Not Apply

The Vermont Court bolsters its rational basis review with the prevention of harm argument supplied by the Supreme Court in *Keystone Bituminous.*[231] *In re Interim Bylaw* reasoned that the Town of Waitsfield properly exercised its police power to prevent a public nuisance that could (according to town administrators) result in degradation to the environment and to the aesthetics of the Northfield Ridge.[232]

Although the Vermont courts have declined to follow, *Lucas* has eliminated part of the *Keystone* nuisance exception. "Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[233] According to *Lucas,* a regulation, such as the bylaw in Waitsfield, must be grounded in the state

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> municipality, may be disclosed as unreasonable when viewed from a larger perspective. . . . These considerations impel us to the conclusion that the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects.

Id.

229. *Id.* at 485 (quoting Miller v. Board of Public Works, 234 P. 381, 385 (1925)).

230. Adkins v. Children's Hosp., 261 U.S. 525, 549 (1923) (quoting Lochner v. New York, 198 U.S. 45, 56 (1905)). Although the Court in *Adkins* analyzed police power outside of the land use context, the level of judicial review applied to governmental action in *Adkins* is also relevant here.

231. *See* Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470, 485-86 (1987).

232. *See In re* Interim Bylaw, Waitsfield, Vermont, 170 Vt. 541, 742 A.2d 742 (1999).

233. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992) *cited in* Freilich & Garvin, *supra* note 111, at 67. The consideration of investment-backed expectations is also a factor here. The Supreme Court has implied that regardless of the stated intentions of a landowner, investment-backed expectations include any and all uses inherent in the ownership of the property. *Penn Central*, 438 U.S. at 125-27.

common law of nuisance. Thus, in evaluating a regulation, it is important to consider the historical restrictions on similarly situated landowners:

> The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so). So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.[234]

Historically, the town encouraged residential use of the Northfield Ridge. In fact, a number of homes currently stand at high elevations on relatively steep slopes in Waitsfield.[235] Therefore, the *"Euclidean"* argument of "right thing in the wrong place, like a pig in a parlor instead of a barnyard," fails to meet the nuisance exception most recently considered by *Lucas*.[236]

D. The Judicial Inquiry Should Not End Even if a Legitimate Municipal Interest is Identified

The well-established takings analysis in most jurisdictions begins with a substantive due process test and follows with an examination of economic burdens imposed upon the particular landowner.[237] Typically, the articulated goals of any local land use ordinance are legitimate so long as they profess to

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

235. For example, Ralph Walker, a Waitsfield resident, purchased his land in Ski Valley Acres, a subdivision on Northfield Ridge (elevation approximately 1600 feet) in 1962. He had neither the time nor the money to build until 1989; however, for over twenty years, he expected that he would. Currently, several lots in the subdivision are undeveloped, leaving open the possibility of others with similar expectations. Interview with Ralph Walker, Waitsfield property owner, in Warren, Vt. (Jan. 29, 2001).

236. *See Lucas*, 505 U.S. at 1031.

> We emphasize that to win its case, South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim [nuisance]. . . .

Id. The Court further stressed that:

> [A]n affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

Id.

237. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (holding that a city ordinance prohibiting brickyards within the city limits was not in violation of the Fourteenth Amendment substantive due process clause and further concluding that the property at issue was not taken without just compensation); Agins v. Tiburon, 447 U.S. 255 (1980) (considering that validity of a city zoning ordinance and establishing a two-part test by stating, "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of land . . . "). *Id.* at 260.

protect the public. Such was true in *In re Interim Bylaw*, where in essence, the town sought to prevent a public nuisance (residential development) argued to cause environmental harm. In reasoning that the *Keystone* nuisance exception applied[238] the court immediately concluded that the bylaw substantially advanced a legitimate state interest. Under this "*Euclidean*"[239] analysis, the Vermont court effectively ended the takings inquiry.

While consistency with recent United States Supreme Court holdings only requires economic burdens to be considered *after* a regulation passes constitutional muster, heightened legitimacy review has made the initial test more difficult and gives the landowner a better opportunity to show economic burden and other losses.[240] Currently, at least in the federal courts, if a landowner can show that the regulation fails to substantially further a legitimate governmental interest or that all economic value of his or her property has been removed, the court invalidates the regulation and/or deems the action a taking. Importantly, if the initial burdens cannot be met, the judicial inquiry does not end there. Rather, a court reverts to the balancing test of *Penn Central* before deciding the case.[241]

The United States Supreme Court in *City Monterey v. Del Monte Dunes*,[242] noted that the issue of economic burden is a question of fact.[243] In *In re Interim Bylaw*, decided on the basis of a summary judgment motion, the plaintiffs failed to adequately show the economic burdens imposed on their investment-backed expectations; however, it is important to recall that the claim was a facial challenge with an extraordinary burden of proof.[244] Perhaps, if the plaintiffs had the opportunity to present their issues and the facts at trial, the outcome would have been different.[245]

In presenting their case, the plaintiffs might have referred to language explicit in the Waitsfield Town Plan to show the probable deprivation of all

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238. *See Lucas*, 505 U.S. at 1031.

239. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The first part of the U.S. Supreme Court test is purpose; if the purpose is legitimate, then the Court uses the balancing test of *Penn Central*. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1971); *see also* Freilich & Garvin, *supra* note 111, at 59.

240. *See* Freilich & Garvin, *supra* note 111, at 59.

241. *Id.* at 60.

242. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (concluding that the extent of the economic burden suffered by a landowner was a question of fact suitable for a jury).

243. *Id.* The fact that the Court believed that reasonable people could differ implies a rejection of the old standard in which any "reasonably debatable" inference is drawn in favor of the regulating authority.

244. *See id.*

245. Summary judgment precluded a more thorough analysis of the facts. Many argue that the Stein's claim was a bad case to bring, as the claimants were ill-prepared to meet their burden. *See, e.g.*, Interview with Bill Bryant, Waitsfield Planning Administrator, in Waitsfield, Vt. (Oct. 2000).

practical economic and/or productive use of the burdened land.[246] For instance, the following excerpt from the Town Plan suggests that agricultural uses, permitted under the interim bylaw, have poor economic productivity, especially when located away from the river or plateau below the Northfield Ridge:[247]

> The Town's traditional agriculture base is largely due to the location of the broad river valley and the level plateau in the vicinity of Waitsfield Common . . . The location of these soils is directly correlated to the location of much of today's farming in Waitsfield, most of which is along the Mad River, including most of the river floodplain, and throughout the broad plateau running south from Waitsfield Common. . . . Unfortunately, the characteristics which define prime agricultural soils also make them the most desirable soils for most types of development. . . . Although the current economic viability of agriculture is marginal compared to other land uses . . . at some future date Vermont may well be an important farm resource.[248]

Arguably, a planning commission, such as the one in Waitsfield, could be cognizant of the unfeasibility of a permitted use, such as agriculture; however, in reliance on a court's presumption of validity, regulators are encouraged to avoid a takings claim by allowing as subterfuge what is truly impossible.[249]

E. Inconsistency in Zoning among Towns with Virtually Identical Land Calls for Heightened Judicial Review

A dramatic difference exists between the Forest Reserve bylaws of Waitsfield and those of Warren, despite that they regulate virtually the same land with analogous wildlife, geology, soil conditions and hydrology on the Northfield Ridge.[250] Compare the stated purpose of Waitsfield's Forest

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246. Other evidence such as economic data regarding the fair market value of the land or a farmer's/forester's testimony might have also been valuable. The pleadings do not indicate that these were offered to the court.

247. WAITSFIELD TOWN PLAN, *supra* note 3, at 24.

248. *Id.* at 24.

249. *See* Orion Corp. v. State of Washington, 693 P.2d 1369 (1985). The Supreme Court of Washington noted a similar administrative abuse in *Orion Corp.*, where a plaintiff sued the state for inverse condemnation as a result of the state's Shoreline Management Act that precluded all development of plaintiff's property. The plaintiff corporation attempted to sell its land to the state; however, both the state and the federal government refused the offer, reasoning that the expenditure was unnecessary based on the current state of the law. *Id.*

250. Both regulate the Northfield Ridge within their own jurisdictions (Waitsfield to the north and Warren to the south). The entire ridge is similar in character with poor soils, varying slope degrees and watershed headwaters.

Reserve District[251] with Warren's stated purpose for its proposed Forest Reserve District:

> [T]he Forest Reserve District is intended to protect lands characterized by high elevations, steep slopes, soils unsuitable for on-site septic disposal, intact wildlife habitat, productive forest land, headwater streams and associated water supplies and scenic resources, and to limit development in areas of town with poor access and/or proximity to public services and facilities.[252]

Although the towns' bylaws have relatively synonymous purposes (to regulate virtually the same land) the permitted and conditional uses imposed on landowners are quite different.[253] Significantly, single-family dwellings and other uses in addition to forestry and agriculture are permitted on the Northfield Ridge in Warren.[254] While some of these uses are conditional and subject to burdensome restrictions,[255] Warren arguably upholds its duty under the Constitution by leaving all the qualities inherent in ownership intact[256] and all the available "sticks" in the owners' "bundles."[257] Regardless of the actual validity of either town's bylaw, the simple difference between the two towns' impacts on owners of virtually identical land, should signal the Vermont courts to closely examine the actual purpose and effect of municipal land regulations through a heightened judicial review in much the same manner as the United States Supreme Court has examined the legitimacy of governmental actions in cases such as *Nolan*, *Lucas*, and *Dolan*.[258]

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251. *See* Proposed Changes to the Waitsfield Zoning Ordinance, *supra* note 217 and accompanying text.

252. Warren Proposed Land Use and Development Regulations, Table 2.1, Forest Reserve District, hearing draft (interim bylaws) (Oct. 12, 2000).

253. *Id.*

> Permitted Uses: (1) Agriculture; (2) Day Care Facility; (3) Forestry; (4) Home Occupation; (5) Single Family Dwelling (below 1850' msl only); Conditional uses: (1) Accessory Structure; (2) Outdoor Recreation Facility; (3) Ski Facilities/Service; (4) Ski Lifts; (5) Single Family Dwelling (above 1850' msl with minimum lot size of 25 acres—or as permitted under Article 8).

Id. at 6.

254. *See id.*

255. *Id.*

256. *See* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987).

257. *See id.* The "bundle of sticks" analogy is used frequently in property law to describe a collection of rights flowing from ownership; *see also* Andrus v. Allard, 444 U.S. 51, 65 - 66 (1979) (the aggregate of sticks in the bundle is seen in its entirety); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82 n.6 (1979) (with regard to the takings clause on the U.S. Constitution, property includes the entire group of rights inherent in ownership).

258. *See supra* note 18 and accompanying text.

F. Property as a Quasi-Fundamental Right

While currently, property rights are not widely viewed as fundamental, they have traditionally maintained an elevated position in the constitutional hierarchy. In *Lynch v. Household Finance Co.*, Justice Potter Stewart declared: "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."[259]

Similarly, Chief Justice Rehnquist emphasized the constitutional importance of property rights in *Dolan v. Tigard*: "We see no reason why the takings clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[260] These explicit comparisons to those individual rights, widely acknowledged as very important, suggest they should invoke a heightened level of judicial review on par with, for example, freedom of expression and gender equality.[261]

Such a review is important, especially when zoning and subdivision decisions by regulatory boards may involve issues of substantive and procedural due process and equal protection.[262] This is not to suggest, however, that the courts should consider every municipal regulation suspect when a landowner effectively loses property (which might be converted into

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259. *See* Lynch v. Household Finance Co., 405 U.S. 538, 552 (1972); *see also*, Corfield v. Coryell, 6 F.Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (Justice Bushrod Washington stating, "to take, hold and dispose of property, either real or personal . . . may be mentioned as some of the particular privileges deemed to be fundamental). *Id.* at 551-52.

260. Dolan v. City of Tigard, 512 U.S. 374, 382 (1994); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992). "Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that any rule with exceptions presumes the invalidity of a law that violates it—for example, the rule generally prohibiting content-based restrictions on speech." *Id.* (citing Simon & Schuster, Inc. v. Members of New York Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.")). *Id.*

261. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (requiring that a gender-based classification be substantially related to serving an important governmental interest); Spence v. Washington, 418 U.S. 405, 415 (1974) (holding that appellant's display of the United States flag decorated with peace symbols was a form of protected expression and found his conviction invalid because the State had no interest in preserving the physical interest of the flag); *see also*, RICHARD F. BABCOCK AND CHARLES L. SIEMON, THE ZONING GAME REVISITED 61 (1985).

262. *See Vill. of Willowbrook*, 528 U.S. 562 (2000) (holding that a class of one is a valid classification for equal protection analysis of a municipal zoning requirement that treated plaintiff unequally); *see also* Esmail v. Macrane 53 F.3d 176 (7th Cir. 1995) (authorizing a class of one for equal protection claim against public official alleged to have denied landowner a town liquor license out of vindictiveness).

livelihood or savings for the future); rather, courts should recognize the loss as significant and worthy of close analysis. Accordingly, if a landowner brings a frivolous and groundless claim, a court could issue penalties and sanctions, for the waste of both the court's and the municipality's time and expense.[263]

V. FAIR ALTERNATIVES

Municipalities, such as those in the Mad River Valley, Vermont, should take care in crafting regulations that the courts could interpret as eliminating all reasonable and practical use of private property.[264] Such regulations, including those designed to protect the environment from harm, are most often upheld when based in state property or nuisance law substantially advancing a compelling governmental interest. Even more effective, however, are properly-administrated growth management devices that leave landowners with alternatives or provide just compensation.[265]

At least in theory, condemning and paying for fragile, open land is the most effective and equitable method by which to regulate. Another method is the use of moratoria ordinances; the courts generally uphold moratoria that temporarily, rather than permanently, halt development.[266] Such ordinances state as their purpose, to provide "timed growth"[267] and to allow municipalities opportunities to appropriately study development impacts and to prepare to extend services such as sewer and water.[268] The rationale behind such regulations recognizes the allowance of reasonable use over a reasonable period of time.[269] Other frequently utilized methods that limit growth while upholding the Constitution include administrative devices such as conservation easements,[270] transfer development rights,[271] tax deferral for current uses,[272]

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263. Pursuant to the rules of civil procedure, sanctions and penalties may be imposed upon attorneys and their clients for bringing frivolous lawsuits. Such a possibility should dissuade landowners from bringing unwarranted claims. *See, e.g.*, FED. R. CIV. P. 11.

264. *See, e.g.*, Freilich & Garvin, *supra* note 111, at 62.

265. *Id.*; *see also* WARREN TOWN PLAN, *supra* note 12.

266. *See* Freilich & Garvin, *supra* note 111, at 63.

267. Timed growth is the process by which towns slow development through moratoria in order to best serve the needs of the public with adequate sewer and other utilities, school and emergency services, etc. Thus, moratoria ordinances afford a town time to plan.

268. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 321 (1987). "We limit our holding to the facts presented, and of course do not deal with the quite different question that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." *Id.*

269. *See* Freilich & Garvin, *supra* note 111, at 65.

270. Landowners voluntarily use conservation easements to restrict types of uses on their property. Easements run with the title and may be altered only at the express written consent of the easement holder and any other co-signers. The donation of conservation easements to conservation organizations is attractive to landowners because they often result in significant tax advantages. *See* 26 C.F.R. §1.170A-14(a) (1998). Hundreds of thousands of acres of land in the U.S. have been preserved through this method. *See* Land

public and private development programs,[273] and other land acquisition techniques.[274]

VI. ADDENDUM

Since the completion of this paper, the United States Supreme Court raised yet another red flag for municipalities such as Waitsfield and Warren when it decided *Palazzolo v. Rhode Island* on June 28, 2001.[275] In *Palazzolo*, the Court reshaped the significance of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*,[276] which established the rule of ripeness in takings cases. In a 5-4 decision, the Court concluded that if a governmental entity denies an application to develop land and through its denial, establishes a permissible use of the property to a reasonable degree of certainty, then the owner is not required to submit further applications to eliminate the possibility that some other type of development *might* pass approval, before challenging the denial in court.[277]

Perhaps more significant is the Court's holding that a landowner is not barred from claiming a regulatory taking even if he or she acquired property with clear notice of the restrictions on the land.[278] This holding should alarm towns such as Waitsfield where land owners potentially subject to the moratorium on high elevation development[279] sell their land to purchasers, who subsequently could challenge the moratorium in court, even if aware of the

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Trust Alliance, 1994 National Land Trust Study Summary 3 (May 1995). For a thorough discussion on conservation easements, see John Hollingshead, *Conservation Easements: a Flexible Toll for Land Preservation*, 3 ENVTL. LAW. 319 (1997); *see also* Randall G. Arendt, CONSERVATION DESIGN FOR SUBDIVISIONS 119-20 (1996).

271. A local government can award Transferable Development Rights ("TDRs") to allow the transfer of rights to develop from one piece of land to another. TDRs mitigate the harm to a landowner when land restrictions for environmental purposes are imposed. TDRs may also be sold or exchanged and allow government to better control development density without stripping landowners of all rights to property. *See* Linda Bozune, *Transferable Development Rights: Compensation for Owners of Restricted Property* in 1984 ZONING AND PLANNING HANDBOOK 207 (J. Benjamin Gailey, ed. 1984).

272. VT. STAT. ANN. tit. 10, § 6301 (2000).

273. For example, the Vermont Land Trust accepts donations of conservation easements and other grants from landowners throughout Vermont.

274. Freilich & Garvin, *supra* note 111, at 63.

275. Palazzolo v. Rhode Island, 121 S.Ct. 2448 (2001).

276. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

277. *See id.* at 186.

278. *Palazzolo*, 121 S.Ct. at 2463 (noting that "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."). *Id.*; *see also* John D. Echeverria, *A Preliminary Assessment of Palazzolo v. Rhode Island*, 31 ENVTL. L. REP. 11112, 11116-17 (Sept. 2001), *at* http://www.envpoly.org/papers/elr.pdf (last visited Oct. 20, 2001).

279. This is providing that voters adopt restrictions on ridgeline development.

bylaw at the time of purchase. The Court's decision in *Palazzolo* could motivate speculators to acquire restricted property at low cost, only to challenge restrictions and to ultimately develop the land in direct contravention to a town's goals.

In separate concurrences in *Palazzolo*, Justices O'Connor and Scalia provide contrasting opinions on whether courts should consider an owner's notice of a regulation at the time of his or her acquisition under the reasonable expectations prong of *Penn Central Transportation Co. v. New York City*.[280] O'Connor suggests that notice of specific land use restrictions should factor into the analysis of the buyer's "reasonable investment backed expectations" for the use of the land. Conversely, Scalia maintains that a buyer's knowledge of restrictions should have no bearing on whether a court finds a taking of property. Notwithstanding the difference in these opinions, the rule seems clear that prior notice no longer bars a landowner from challenging governmental restrictions in court.

Finally, the *Palazzolo* Court emphasized that the identification of the relevant property in a regulatory taking case is a "difficult, persisting question" and raised the possibility that it might, in the future, conduct takings analysis on a portion, rather than the whole of a given parcel.[281] Such determination could create serious problems for towns employing ridgeline zoning in situations such as *In re Interim Bylaws, Waitsfield, Vermont*, in which landowners could build only on a very small portion of their property.[282] While the Court remains unclear with respect to partial takings, explicit mention of the possibility is significant for takings law and represents the current Court's particular interest in resolving the issue in the near future.

A day after the Court handed down *Palazzolo*, it granted certiorari in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[283] Significantly, the occurrences giving rise to *Tahoe-Sierra Preservation Council* were quite similar to the circumstances in the Mad River Valley.[284] In *Tahoe-Sierra Preservation Council*, a governmental entity

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280. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1971).

281. *Palazzolo*, 121 S.Ct. at 2465; *see also* John D. Echeverria, *A Preliminary Assessment of Palazzolo v. Rhode Island*, *supra* note 278, at 11115.

282. *See In re* Interim Bylaw, Waitsfield, Vermont, 170 Vt. 541, 542, 742 A.2d 742, 743 (stating that 130 acres of plaintiff's 195 acres of land was above the elevation restricting development).

283. Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency 216 F.3d 764, 30 ENVTL. L. REP. 20638 (9th Cir. 2000), *reh'g en banc denied*, 228 F.3d 998 (9th Cir. 2000), *petition for cert. granted*, 121 S.Ct. 2589 (2001).

284. The most recent amendments to bylaws posed to voters in both Waitsfield and Warren have again failed. Residents in the towns voted to require a two-thirds majority vote to pass the new bylaws and both towns were unable to garner enough support. Litigation over whether petitioners and the Town of Warren followed proper procedure continues; however, the most recent discussion suggests re-writing the ordinance and taking it again to the voters at a future town meeting.

determined that development in the resort communities surrounding Lake Tahoe threatened the environment and accordingly instituted a freeze on development in particular locations. Landowners challenged the moratorium as an unconstitutional temporary taking. The district court agreed; however, the appeals court reversed the decision. Thus, in granting certiorari, the Supreme Court will determine "whether the [Ninth Circuit] Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the Constitution."[285]

In deciding the case, the Court will reconsider and refine its decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* in which it determined that a temporary moratorium, deemed a taking, required the government to compensate a landowner.[286] A finding by the Court in further clarification of *First English* that temporary moratoria can constitute unconstitutional takings has far-reaching implications for municipalities who employ moratoria to slow growth and to carefully consider planning goals to best meet citizens' needs. This possibility is evidence that towns must employ more innovative methods in cooperation with landowners to preserve open space. It suggests that Waitsfield and perhaps Warren are now more susceptible to losing future court battles over permanent outright bans on the development of land without providing compensation.

VII. CONCLUSION

> We have now felled forest enough everywhere, in many districts far too much. Let us restore this one element of material life to its normal proportions, and devise means for maintaining the permanence of its relations to the fields, the meadows, and the pastures, to the rain and the dews of heaven, to the springs and rivulets with which it waters the earth.[287]

From a policy perspective, property rights arguments are not popular, especially in Vermont, where much of the tradition and the culture is interconnected to the idea that land and its resources belong to all of humankind. "But the applicability of express constitutional guarantees is not

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285. Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000), *petition for cert. granted*, 121 S.Ct. 2589 (2001).

286. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 319 (1987).

287. George Perkins Marsh, *Man and Nature* (1864) *reprinted in* THE NATURE OF VERMONT (1999).

a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches."[288]

Vermont is not immune from the shifting jurisprudence of the United States Supreme Court. As our recent presidential candidates and their supporters pointed out, the composition and the corresponding jurisprudence of the Court is always subject to change. These changes may affect far more than the high profile issues of abortion and affirmative action. They may impact the responsibility of municipalities to uphold property rights when employing police power to regulate land.

Vermont municipalities and others enjoying the strong presumption of constitutional validity afforded their regulations should take heed and structure land use regulations accordingly. This is not to suggest that towns should forgo attempts to preserve their open spaces. Rather, they should avoid constitutional "short cuts."

As Justice Brennan once said: "After all, if a policeman must know the Constitution then why not a planner?"[289]

Kara Sweeney

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288. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 (1981) (dismissing an appeal arising from action to invalidate a City mandate designating most of a utility company's land as open space without paying compensation, as further proceedings in the trial court were pending).

289. *Id.* at 661 (Brennan, J., dissenting).