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Development Rights

'Pine Barrens' Reinforces Their Transferability, Despite Scalia's View

By John M. Armentano

It has been more than 20 years since the New York Court of Appeals issued two decisions effectively approving the power of local municipalities to prohibit development on particular property and transfer the development potential to another parcel through a process known as "transfer of development rights" (TDRs). This procedure is an effective planning tool in providing for open space and historic preservation. In addition, it comes to grips with the elusive regulatory taking issue under the Fifth Amendment.

The first case[1] arose after New York City rezoned two private parks in the Tudor City complex exclusively as parks open to the public. The City granted the park owner transferable development air rights usable elsewhere, by severing the above-surface development rights from the surface development rights.

The Court noted that the development rights were not attached to any particular parcel which was designated to receive the rights and thereby increase development but were "floating development rights." The Court pointed out that these rights were "utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase or devise, and subject to the contingent approvals of administrative agencies." That problem led the Court to reject the City's amended zoning law.

Although the Court rejected the approach in that case, it emphasized that a system under which TDRs were transferred to a development bank, which is known as the "Chicago Plan," would be constitutional. The Court recognized the changing needs of society, and pointed out that "no property is an economic island, free from contributing to the welfare of the whole of which it is but a dependent part." Such language manifests an acknowledgment that land is interdependent, not absolutely unique. Further, it provides for flexible regulation.

Zoning Change Upheld

The next year, the Court of Appeals upheld a New York City zoning change that prohibited the Penn Central Transportation Company, which owned Grand Central Station, from constructing an office building above the terminal when the law allowed the development rights to be transferred to other specified property, some already owned by Penn Central or its affiliates. The Court found that because the transferable above-the-surface development rights attached to specific property, they could be considered as part of the property owner's return on the property.[2] In other words, the existence of the TDRs gave the property value, even though additional development was prohibited.

Moreover, the United States Supreme Court affirmed the decision of the Court of Appeals in that case, noting that the law at issue did not amount to a compensable taking in large measure because of the TDRs. "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [Penn Central] and, for that reason, are to be taken into account in considering the impact of regulation."[3]

Following these decisions, and following amendments to New York State law specifically establishing the require-

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***John M. Armentano**, a partner with the Long Island law firm of Farrell Fritz, P.C., represents local governments and developers in zoning, land use and environmental matters, including litigation.*

ments for TDRs,[4] it is clear that local governments in New York may separate the right to develop property from other property rights and encourage or require that the development rights be transferred or sold to a development "bank" or other purchaser for use on different property.

Justice Scalia's Opinion

Given this well-established history, there probably would have been little new to say about TDRs by now if it were not for a three-Justice concurring opinion written by U.S. Supreme Court Justice Antonin Scalia last year in a little-noticed case.[5]

In *Suitum v. Tahoe Regional Planning Agency*, Justice Scalia criticized the use of TDRs by governments as a way of avoiding taking claims by property owners. Because there is no regulatory taking if a property retains substantial value, to consider TDRs as value negates a taking, Justice Scalia recognized. He believed, though, that courts should first determine whether a particular regulation amounts to a taking, and then consider the availability of TDRs only when analyzing the compensation payable to the affected property owners.

To put TDRs on the taking side of the just compensation equation — that is, to find that the scheme, because of the existence of TDRs, creates such value that a taking does not occur — "is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our takings jurisprudence: Whereas once there is a taking, the Constitution requires just (i.e., full) compensation ... a regulatory taking generally does not *occur* so long as the land retains substantial (albeit not its full) value."[6] To place the TDR value on the compensation side of the equation concedes that a taking has occurred but reduces the "just compensation" by the value of the TDRs.

Will Justice Scalia's view take hold in New York? A recent decision by Suffolk County Supreme Court Justice William Underwood, Jr., suggests that it will not.[7]

Pine Barrens Program

The Suffolk case arose in connection with a challenge to the constitutionality of the Long Island Pine Barrens Protection Act that was brought by property owners against Suffolk County, the State of New York, the New York State Department of Environmental Conservation, and the Central Pine Barrens Joint Planning and Policy Commission. The Act divides the Pine Barrens into a "core preservation area," where development is prohibited, and a "compatible growth area," where limited development is permitted.

Moreover, the Act permits property owners to transfer or sell development rights to the Central Pine Barrens Joint Planning and Policy Commission or to other property owners, for use in "receiving zones." As recognized by Suffolk Supreme Court Justice Underwood, once value is given property owners for their development rights, their property has not been denuded of value and thus taking claims can not succeed.[8]

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Justice Underwood noted that there are two ways to view the Pine Barrens' TDRs: either as compensation for a taking or as a factor in determining whether a taking has occurred at all. He noted that despite Justice Scalia's conclusion that consideration of TDRs must be limited to the compensation side of the takings analysis, "all of the salient language in *Suitum* actually supports the defendants' position."

The court said that in *Suitum*, the plaintiff had applied for an application to the statutorily authorized agency for a building permit, but that the application was denied. The plaintiff then pursued an administrative appeal and received a specific amount of TDRs.

It stated that the facts in *Suitum* were distinguishable from the situation under the Pine Barrens law because the law required either condemnation or compensation, or the granting of a building permit.

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The court pointed out that the zoning regulation rejected in *French* severed development rights from the affected parcels without any assurance that they could ever be given tangible form. In the Pine Barrens case, however, the TDR provisions "do assure preservation of the very real economic value of the development rights as they existed when still attached to the underlying property."

The court concluded that the Pine Barrens law satisfied due process requirements and the need for tangible compensation subject to judicial review. Accordingly, it found the law to be constitutional and granted judgment in favor of the defendants and against the plaintiffs.

Conclusion

If Justice Scalia is correct, and the right to develop one's own property is a right that cannot be taken without just compensation, a local government that attempts to do so will always be required to pay compensation. By contrast, a well-defined TDR program gives government the regulation it wants and provides property owners with value, which should mean that a "taking" has not occurred and that no "taking" compensation will have to be paid. By enacting a sound TDR program, governments will be better able to address open space and preservation issues.

Certainly, the right of property owners to develop their property is one of the most important attributes of property ownership. New York law long has indicated that local governments can enact legislation transferring that right to other property. As the real property law of the state, that law should govern in the area of TDRs, particularly when specifically approved by the legislature.

Justice Scalia, recognizing the importance of the state law of real property in the taking area, gave controlling influence to state law in a major taking case.[9] Because TDRs are intimately involved with taking, federalism and developed jurisprudence should continue to govern. Nevertheless, because Justice Scalia painted in very broad strokes in his *Suitum* opinion, all jurisdictions employing TDRs should take notice and review their TDR scheme to make certain it does not suffer the infirmities of the plan at issue in *Suitum*.

NOTES:

1. Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d 587 (1976).
2. Penn Central Transportation Co. v. City of New York, 42 N.Y.2d 324 (1977), aff'd, 438 U.S. 104 (1978).
3. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).
4. See, e.g., Village Law §§7-701 et seq.
5. Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997) (Scalia, J., concurring).
6. 117 S. Ct. at 1671.
7. W.J.F. Realty Corp. v. The State of New York, No. 94-22784 (Sup.Ct. Suffolk Co., Apr. 22, 1998).
8. For a more complete discussion of the law, see John M. Armentano, "Pine Barrens Protection Act," NYLJ, Sept. 1, 1993, at 5.
9. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).