STUDENT ARTICLE

THAT'S WHERE WE PRINT THE MONEY: TRADING INCREASED DENSITY FOR PUBLIC AMENITIES

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TABLE OF CONTENTS

Introduction 494
I. Density Bonuses Defined 497
  A. Amount of Discretion 499
  B. Form of Developer Participation 500
  C. Type of Amenity Secured 500
II. Rationales 501
  A. The Windfall Rationale 502
  B. The Value Creation Rationale 505
  C. The Externality Rationale 506
III. Policy Concerns 509
  A. Planning Concerns 509
    1. Inconsistency 509
    2. Calculation Difficulties 511
  B. Increased Density 514
  C. Strategic Behavior 515
IV. Legal Claims 517
  A. Substantive Due Process or Takings? 518
  B. Treatment of Density Bonus Programs Under Exactions Jurisprudence 522
  C. Takings 526
    1. Regulatory Takings 527
    2. The Denominator Problem 529
    3. Just Compensation 532
  D. Substantive Due Process 535
    1. Challenges by Property Owners 536
    2. Challenges by Neighbors 537
Conclusion 538

INTRODUCTION

In the next year, a twenty-nine-story luxury residential building will open on the waterfront in Brooklyn, New York.[1] The floor area of this building will exceed the floor area otherwise permitted by the zoning ordinance. The developer can build at this higher density because the developer agreed to construct affordable housing nearby.[2] The city of Chicago offers a similar deal to building owners who agree to construct an environmentally-friendly "green" roof.[3] Seattle developers who agree to provide public restrooms or job training facilities can also build at higher density than zoning would otherwise allow.[4] These programs are part of a larger class of regulations, sometimes referred to as "incentive zoning," in which municipalities relax zoning rules for private developers who agree to construct, or pay for, public amenities.[5] As the Brooklyn, Chicago, and Seattle programs illustrate, a common relaxation is to allow a higher density than as-of-right[6] zoning would otherwise allow. Because these programs provide a "bonus" of additional density, these

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[1] *See* Northside Piers, http://www.northsidepiers.com (last visited June 18, 2007).

[2] *See Williamsburg Takes Off*, N.Y. CONSTRUCTION, Sept. 2006, at 14.

[3] *See* Peter Slevin & Kari Lydersen, *Greening of Chicago Starts at the Top Floor*, WASH. POST, Aug. 10, 2006, at A3.

[4] *See* SEATTLE, WASH., MUNICIPAL CODE §§ 23.49.011 to .013 (2006), *available at* http://clerk.ci.seattle.wa.us/~public/code1.htm.

[5] *See* Jerold S. Kayden, *Zoning For Dollars: New Rules for an Old Game? Comments on the* Municipal Art Society *and* Nollan *Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991) ("[C]ities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features such as plazas, atriums, and parks, and social facilities and services such as affordable housing, day care centers, and job training.").

[6] As-of-right density is the density that is permitted by the zoning ordinance for the principal use in the district. *See* Neville v. Koch, 593 N.E.2d 256, 260 (N.Y. 1992); *see also* NYC Zoning Glossary, http://www.nyc.gov/html/dcp/html/zone/glossary.shtml (last visited June 18, 2007).

techniques are often called "density bonus programs." I refer to this additional density as "bonus density." The types of amenities secured vary. Municipalities have offered increased density in return for affordable housing,[7] open space and pedestrian walkways,[8] transit improvements,[9] construction of human services and daycare facilities,[10] and provision of public art.[11]

Because density bonus programs depend on developer participation, they generate more amenities as the value of the bonus density increases,[12] and one would expect them to be increasingly attractive as real estate values increase.[13] Proponents argue that density bonus programs allow a municipality to secure public amenities without direct cost.[14] However, this argument may ignore the indirect costs of density bonus programs. Although density bonus programs may allow the municipality to avoid direct expenditures, they might encourage increased density which will impose indirect costs that may ultimately require increased infrastructure expenditures. Moreover, density bonus programs might allow the municipality to shift the costs of public amenities to a small group of private property owners. This opportunity arises from the municipality's dual role; it not only offers the bonus density for a particular amenity but also sets the base level of density.

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[7] *See, e.g.*, NEW YORK., N.Y., ZONING RESOLUTION § 23-90 (2007), *available at* http://www.nyc.gov/html/dcp/pdf/zone/allarticles.pdf; SEATTLE, WASH., MUNICIPAL CODE § 23.49.012 (2006), *available at* http://clerk.ci.seattle.wa.us/~public/toc/table.htm.

[8] *See, e.g.*, NEW YORK, N.Y., ZONING RESOLUTION § 33-14 (1998), *available at* http://www.nyc.gov/html/dcp/pdf/zone/allarticles.pdf.

[9] *See, e.g.*, *id.* § 81-292 (1982).

[10] *See* JUDITH GETZELS & MARTIN JAFFE ET AL., ZONING BONUSES IN CENTRAL CITIES 8 (1988) (detailing bonus programs for daycare facilities in Hartford, New York, Boston, Miami, Cincinnati, and Bellevue, Washington).

[11] *See id.* at 10.

[12] Participation should increase as the value of the density bonus increases, allowing the municipality to secure relatively more amenities.

[13] *See* Bill Marsh, *A History of Home Values*, N.Y. TIMES, Aug. 27, 2006, § 4, at 3. *See generally* Alyssa Katz, *Inclusionary Zoning's Big Moment*, CITY LIMITS, Jan.–Feb. 2005, at 21 (noting several cities that adopted voluntary density bonus programs for affordable housing in conjunction with rezonings that increased real estate values).

[14] *See* Robert W. Burchell & Catherine C. Galley, *Inclusionary Zoning: Pros and Cons*, NEW CENTURY HOUSING, Oct. 2000, at 3, 5–6; *see also* Henry A. Hill, *Government Manipulation of Land Values to Build Affordable Housing: The Issue of Compensating Benefits*, 13 REAL EST. L.J. 3, 3–5 (1984).

Opponents argue that, because of this dual role, density bonus programs create a perverse incentive for municipalities to decrease as-of-right density in order to leverage more amenities in return for bonus density.[15] Moreover, even where a municipality does not act strategically, efficiency and implementation remain problematic. Critics argue that density bonus programs encourage development at a density that is inconsistent with physical planning[16] and that municipalities are likely to both overvalue the benefit of potential amenities and undervalue the harm of the bonus density.[17]

In this Note, I argue that, despite the concerns outlined above, density bonus programs are justified in most circumstances. In Part II, I define density bonus programs. In Part III, I examine the three rationales for density bonus programs: the "windfall" rationale—that the increase in density confers a windfall on the developer that the municipality can properly recapture;[18] the "value-creation" rationale—that the programs increase social utility by agglomerating complementary uses;[19] and the "externality" rationale—that the benefit of the amenity will offset the cost of the bonus density.[20] In Part IV, I outline the policy concerns that density bonus programs can pose. Finally, in Part V, I examine the legal challenges that might be brought to density bonus programs.

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[15] *See* Kayden, *supra* note 5, at 46.

[16] Physical planning sets density at a level appropriate for the available infrastructure. *See id.* at 26–27.

[17] GETZELS & JAFFE ET AL., *supra* note 10, at 12.

[18] *See* Madelyn Glickfeld, *Sale of Development Permission*, *in* WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 376, 376 (Donald G. Hagman & Dean J. Misczynzki eds., 1978).

[19] *See, e.g.*, Anthony Downs, *Creating More Affordable Housing*, 49 J. HOUSING 174, 178–80 (1992) (noting that employers benefit from the presence of low and moderate-income work force); Norman Marcus, *Zoning from 1961 to 1991: Turning Back the Clock*, *in* PLANNING AND ZONING NEW YORK CITY 61,73–78 (Todd W. Bressi ed., 1993) (discussing New York City special districts that offered bonuses for many amenities that were not designed to directly offset the cost of increased density).

[20] *See, e.g.*, Seattle, Wash., Ordinance 120443 (July 27, 2001) (codified as amended at SEATTLE, WASH., MUNICIPAL CODE § 23.49.012(A) (2006)), *available at* http://clerk.ci.seattle.wa.us/~public/CBOR1.htm (enter "120443" into the "Ordinance No." box) (explaining that density bonuses are intended to fund "public benefit features or capital projects that mitigate a portion of the impacts of higher-density development.").

I. DENSITY BONUSES DEFINED

An initial hurdle to analyzing density bonus programs is defining the term. The difficulty is caused, in part, by the fact that different programs with varying elements can reasonably be referred to as density bonus programs. Some programs allow negotiation between government and property owner;[21] others allow developers to participate in the density bonus program as-of-right.[22] Some seek amenities that seem related to the costs of the bonus density, like plazas and widened sidewalks;[23] others seek more general public amenities like job-training programs or daycare facilities.[24] Finally, some programs require that the developer provide amenities in-kind,[25] sometimes even requiring a dedication of property; others offer bonus density to developers in return for cash payments.[26]

Another difficulty in defining density bonus programs is that significant political or legal consequences may follow once a label attaches.[27] This gives parties incentive to select language that is more likely to influence the outcome of a legislative or administrative dispute than to accurately describe the programs. City officials who favor the programs may refer to them as

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[21] *See, e.g.*, SACRAMENTO, CAL., MUNICIPAL CODE § 17.186.060 (2001), *available at* http://www.qcode.us/codes/sacramento/.

[22] *See, e.g.*, NEW YORK, N.Y., ZONING RESOLUTION, § 23-95 (2006), *available at* http://www.nyc.gov/html/dcp/pdf/zone/allarticles.pdf.

[23] *See, e.g.*, SEATTLE, WASH., MUNICIPAL CODE § 23.49.013 (2006), *available at* http://clerk.ci.seattle.wa.us/~public/toc/table.htm (offering density bonus for open space amenities).

[24] *See, e.g.*, HARTFORD, CONN., MUNICIPAL CODE §§ 35-295 to -296 (2006), *available at* http://www.municode.com/resources/gateway.asp?sid=7&pid=10895.

[25] *See, e.g.*, NEW YORK, N.Y., ZONING RESOLUTION, §§ 23-951 to 23-953 (2006), *available at* http://www.nyc.gov/html/dcp/pdf/zone/allarticles.pdf (offering density bonus for new construction or preservation of on-site or nearby affordable housing for lower income households).

[26] *See, e.g.*, SEATTLE, WASH., MUNICIPAL CODE § 23.49.012(A)(2) (2006), *available at* http://clerk.ci.seattle.wa.us/~public/toc/table.htm (providing participating developers with a "cash option").

[27] *See* Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 14 (noting that the term "exaction" is a synonym of "extortion"); *see also* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring that exactions be "roughly proportional" to a proposed development's impact); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (requiring a nexus between an exaction and the purpose of the original property restriction).

"incentive zoning," while developers would prefer the word "tax."[28] Moreover, municipalities, presumably to avoid the legal challenges a mandatory program invites, have adopted mandatory programs that offer a "density bonus."[29] In contrast to a density bonus program, this "bonus" does not provide an incentive for developer participation.

In an attempt to address these issues, Rachelle Alterman and Jerold S. Kayden developed a taxonomy for what they termed "developer provisions."[30] Density bonus programs all have two primary elements in common. First, they always offer developers additional floor area. Second, they are always voluntary.[31] Density bonus programs may vary as to the amount of discretion they provide; the form of developer participation; and the types of amenities sought—they may seek related or unrelated amenities. In the next Part, I describe these three elements more fully.

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[28] *See* Rachelle Alterman & Jerold S. Kayden, *Developer Provisions of Public Benefits: Toward a Consensus Vocabulary*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES 22, 24 (Rachelle Alterman ed., 1988).

[29] *See, e.g.*, SANTA MONICA, CAL., MUNICIPAL CODE § 9.56.050(i) (2006), *available at* http://www.qcode.us/codes/santamonica/ (offering a "density bonus" in a mandatory program).

[30] The term "developer provisions" encompasses all land use regulations that seek public amenities from private developers, including, among others, exactions, linkage fees, and inclusionary zoning. Alterman and Kayden classify incentive zoning programs according to five elements: (1) the amount of discretion given to planning officials; (2) the form of developer participation; (3) the form of the incentive; (4) the mechanism of participation; and (5) the type of amenity secured. *See* Alterman & Kayden, *supra* note 28, at 24–30.

[31] To put this in the terms of Alterman and Kayden, the programs I examine are "incentive-based" and not "exaction-based." According to Alterman and Kayden, developer provisions fall into two categories based on whether the mechanism of participation is voluntary: "exaction-based" and "incentive-based." Exaction-based programs include subdivision exactions, impact fees, and linkage. *See* Alterman & Kayden, *supra* note 28, at 28–30. Impact fees "assess developers for the costs that the development will impose upon the government's capital budget for public services. . . . Linkage programs condition approval of certain central city developments (usually commercial or office space) upon the developer's provision of facilities or services for which the development will create a need, or that the development will displace." Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 480 (1991); *see also* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999). Exaction-based programs are not "density bonus programs" for my purposes even if they claim to offer a "density bonus."

A. *Amount of Discretion*

Developer provisions can be either "preset" or "discretionary."[32] Preset developer provisions set out in advance the "public benefits developers must provide . . . to take advantage of the incentive."[33] In contrast, discretionary developer provisions state no specific incentive in advance, leaving "the public sector and developer [to] negotiate over the type and amount of public benefit to be provided."[34] Preset density bonus programs will often set a ratio of bonus floor area per square foot of each amenity and cap the amount any one amenity can generate.[35] For example, Seattle allowed an additional five square feet of floor area for every square foot of museum but limited bonus density for museums to an aggregate of 30,000 square feet.[36] City officials may have limited discretion to adjust these schedules, but the bonus was basically self-administered.[37] Developers can rely on this type of density bonus program much as they would rely on as-of-right density.

Discretionary density bonus programs provide relatively more discretion to the municipality to make a deal with the developer. The Sacramento, California program, for example, contemplates significant give-and-take between the developer and the city.[38] Developers are encouraged to schedule a pre-application conference with the city's planning department[39] and file a preliminary application detailing the project and any incentives the developer deems necessary for the city to provide.[40] Although the

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[32] Alterman & Kayden, *supra* note 28, at 26.

[33] *Id.*

[34] *Id.*

[35] *See, e.g.*, Seattle City Clerk's Office, Public Benefit Feature Bonus Table for Section 23.49.126 (repealed April 12, 2006), http://clerk.ci.seattle.wa.us/~tables/2349126.htm.

[36] *Id.*

[37] *See* SEATTLE, WASH., MUNICIPAL CODE §§ 23.49.011 to .012 (2006), *available at* http://clerk.ci.seattle.wa.us/~public/toc/table.htm. Although parts of the Seattle density bonus program were repealed, Seattle still has a preset discretionary bonus program. *See id.*

[38] *See* SACRAMENTO, CAL., MUNICIPAL CODE § 17.186.060 (2006), *available at* http://www.qcode.us/codes/sacramento/.

[39] *See id.* § 17.186.060(A)(1).

[40] *Id.* § 17.186.060(A)(2). Discretion to approve or disapprove the application is vested in the planning director to approve the application if it meets the criteria for approval of a special use permit. *Id.* § 17.186.060(C). Only the "financial incentives" require city council approval. *Id.*

program does have a preset element,[41] the city may "grant multiple additional incentives" to achieve more units or improve affordability.[42] These "additional incentives" include additional density bonuses.[43]

B. *Form of Developer Participation*

Developer provisions employ two types of developer participation. Some programs require developers to provide amenities in-kind (that is, developers construct the amenity themselves); others will allow developers to pay the municipality instead. Density bonus programs will often employ both of these mechanisms in tandem. Seattle, Washington gives developers who seek a bonus for housing or child-care facilities a "cash option."[44] Under the cash option, developers receive bonus density in return for payments to the city.[45] In many cases, funds received by the municipality under the cash option may be spent only on the amenity for which the bonus was originally offered. In Seattle, payments are deposited in "accounts established solely to fund capital expenditures for the public benefit features for which the payments are made."[46]

C. *Type of Amenity Secured*

The amenities that developer provisions secure can be characterized as related and unrelated. With regard to density bonus programs, related amenities include those that mitigate the effects of increased density. For example, open space, pedestrian walkways, or street-level plazas may decrease the costs that accompany increased density, such as larger buildings and increased pedestrian traffic. Amenities might also be characterized as related when they support and thereby enhance the social utility

§ 17.186.060(C)(4).

[41] Developers receive a 25% density bonus by making 10% of units affordable to very low income households or by making 20% of units affordable to low income households. *Id.* § 17.186.030.

[42] *Id.* § 17.186.030(E).

[43] *Id.* § 17.186.020.

[44] *See* SEATTLE, WASH., MUNICIPAL CODE § 23.49.012 (2006), *available at* http://clerk.ci.seattle.wa.us/~public/toc/table.htm.

[45] *See id.*

[46] *Id.* § 23.49.012(C).

of increased density by economies of agglomeration.[47] For example, a subway improvement may increase the value of office development by decreasing the costs of transportation for tenants. Unrelated amenities have a more attenuated relationship with the costs of increased density. However, the line between related and unrelated amenities will not always be so clear. For example, public art may seem unlikely to mitigate the effects of increased density but if the public art attracts more pedestrians and thereby decreases security costs to nearby office buildings, it could be characterized as related.

The preceding discussion identified the common features of all density bonus programs: they are facially voluntary and offer increased density as an incentive for developer participation. I have also identified the features that may vary: the amount and type of discretion they afford municipal officials; whether they require in-kind provision or offer a cash option; and whether the amenities sought are related or unrelated. I turn, in the next Part, to the rationales for density bonus programs.

II. RATIONALES

Density bonus programs can be defended on three rationales: the windfall rationale, the value-creation rationale, and the externality rationale. In this Part, I evaluate the underlying concerns that animate each of these rationales. While much of the analysis in the following Part may be important to evaluating the potential constitutional claims of property owners and neighbors, I reserve this discussion to Part IV and focus instead on the equity and efficiency of the rationales. I argue that the windfall rationale provides an incomplete justification because it runs counter to the American conception of property rights[48] and, moreover, suffers from difficult baseline questions that threaten to undermine both

[47] Agglomeration economies are the benefits that parties gain from clustering together, such as the collective use of infrastructure. For a good overview of agglomeration economies, see ARTHUR O'SULLIVAN, URBAN ECONOMICS (4th ed. 2000).

[48] Admittedly, in at least some areas, the government recaptures increases in the value of property due to government action. *See, e.g.*, 42 U.S.C. § 9607(r) (Supp. II 2005) (imposing liability on a "bona fide prospective purchaser" for any increase in the fair market value of property due to a government funded cleanup). However, these examples are rare, particularly where the government increases value by reducing regulation or, put another way, granting property rights.

the equity and efficiency of the programs. However, I will argue, the value creation and externality rationales do provide justification for density bonus programs.

A. *The Windfall Rationale*

A "windfall" is "any increase in the value of real estate—other than that caused by the owner—or by general inflation."[49] According to windfall recapture theory, when a change to land use regulation increases the value of property, the property owner receives a windfall because she has done nothing[50] to bring about the increase in value. Applied to density bonus programs, a municipality can recapture this value by requiring an amenity in return for the density bonus. To put it another way, because a density bonus increases the value of property, the windfall rationale holds that it is appropriate for the government to recover this windfall.

The windfall rationale seems logical. If the government grants a property owner a benefit for which the property owner has done nothing, the government should be able to recapture that benefit. However, application of the windfall rationale to density bonus programs encounters two problems. First, the windfall rationale suffers from a difficult baseline question: How much of the increase in value is benefit granted by the municipality, and properly subject to recapture, and how much is due to investment by the property owner and therefore should remain with the property owner? This calculation cannot be accomplished via traditional appraisal techniques because of the complex interaction of factors that affect real estate values. Ultimately, drawing the line to determine what amount of value increase is or is not a windfall depends on a conception of natural property rights. Under the American tradition property rights lie with the property owner, save for regulations necessary to protect health, safety, and

[49] Donald G. Hagman, *Windfalls and Their Recapture*, *in* WINDFALLS FOR WIPEOUTS, *supra* note 18, at 15 (citation omitted).

[50] This theory is complicated by the issue of what actions by property owners we should accord value. Arguably, lobbying for a zoning change that the property owner will benefit from should not be an action by the owner that "caused" the increase in value and therefore, gains in value due to lobbying should be subject to windfall recapture. However, if the property owner paid a premium for the property that reflected the potential for the zoning change, even if the property owner lobbied for the change, the benefits of the rezoning should not be recaptured because the property owner has paid for the possible change.

welfare under the police power.[51] Therefore, to the extent regulation of density is not necessary to the police power, under the American regime the bonus density belongs to the property owner. The windfall rationale represents a fundamental departure from the American conception. Under the windfall rationale, property rights lie with the government.[52] When the government increases the allowed density, the increase in value from the bonus density belongs to the government and can be recaptured, regardless of whether the government could properly limit density under the police power. For example, suppose the infrastructure available to a particular parcel could indisputably sustain a density of 4 floor area ratio (FAR)[53] without implicating police power concerns but the zoning resolution allows only 2 FAR. Under the American view, the municipality could not properly keep the density at 2 FAR. If the municipality increases permissible density to 4 FAR there would be no windfall to the property owner because the property owner had a right to the full 4 FAR. Put another way, the property owner has a right to all the property rights, save those property rights that could be denied by legitimate police power regulation. Under the windfall rationale, however, if the municipality increases permissible density, the property owner has received a windfall of 2 FAR, the value of which the municipality can recapture.

Moreover, other legal structures may recapture some of the windfall gains that density bonus programs aim to recapture. If an increase in permissible density increases the value of a property and the owner subsequently sells it, the gain will be subject to capital gains tax. In most jurisdictions, real estate taxes are based on the value of the property and, therefore, an increase in the value of the property will result in increased property taxes. If increased density allows the property owner to earn increased income from the property, that income will be subject to income tax. To some extent, windfall recapture duplicates these taxes. State

[51] *See, e.g.*, Glickfeld, *supra* note 18, at 376.

[52] *See id.* (noting that under a sale-of-development-permission system, the "right to develop is owned and controlled by some level of government").

[53] FAR—the ratio of total building floor area to the area of its zoning lot—is the principle method by which municipalities regulate density. *See* NYC Zoning Glossary, http://www.nyc.gov/html/dcp/html/zone/glossary.shtml (last visited Mar. 19, 2007).

constitutions often require that taxes apply uniformly.[54] Municipalities might sidestep uniformity limits by enacting density bonus programs that apply to a subset of property owners. With this possibility, we might be more suspicious of assertions that windfall recapture is simply an exercise of the police power.[55]

Second, it is not always clear that the property owner will be the only one to benefit from increased density. Societal benefits may flow from increased density. For example, a municipality might increase density because doing so might lead to more housing, larger population, and an increased tax base. If these benefits are large enough, society will get a fair return even if it does not get an amenity in return. For an example, consider New York City's recent rezoning of the Greenpoint-Williamsburg area of Brooklyn. The area in question, which lies south of Brooklyn's border with Queens and along the East River waterfront, had traditionally been a center of manufacturing activity and was zoned accordingly to exclude residential uses.[56] This regulation effectively constrained the supply of residential land by permitting only industrial use. As neighboring areas grew in residential popularity, demand for residential property in the manufacturing area increased. In 2004, the city announced a rezoning that would permit residential use on certain parcels that formerly allowed only manufacturing uses. Upon announcement, the value of these parcels increased dramatically.[57] In response to the announced rezoning plan, the community clamored for a density bonus program that would offer the additional density in return for affordable housing.[58] At least in part, this reflected the

[54] *See, e.g.*, N.J. CONST. art. VIII, § 1; PA. CONST. art. VIII, § 1. *See generally* Jack Stark, *The Uniformity Clause of the Wisconsin Constitution,* 76 MARQ. L. REV. 577, 578–79 (1993) (noting that all but two states have adopted uniformity clauses).

[55] *See, e.g.*, Glickfeld, *supra* note 18, at 376.

[56] New York City Department of City Planning, Greenpoint-Williamsburg Land Use and Waterfront Plan: Planning Framework, http://www.nyc.gov/html/dcp/html/greenpointwill/greenplan3.shtml (last visited Mar. 19, 2007).

[57] Julie Satow, *Waterfront Deals Boom in Landgrab: Despite Fire, Prices Soar as Construction Picks Up; Skeptics Doubt Demand*, CRAIN'S N.Y. BUS., May 8–14, 2006, at 1.

[58] *See, e.g.*, Diane Cardwell, *Council Threatens to Block Plan to Rezone in Brooklyn*, N.Y. TIMES, Apr. 5, 2005, at B3; Katz, *supra* note 13, at 21; Janny Scott, *Mayor Wins Wide Praise for Initiatives on Housing*, N.Y. TIMES, Nov. 4, 2005, at B1.

community's desire to recapture a portion of the increase in the value of the formerly industrial land.[59] Admittedly, the rezoning also reflected part of the city's economic development strategy. The city sought the rezoning, in part, to offset a waning manufacturing tax base and address a growing housing shortage.[60] However, the city could have accomplished these goals without the density bonus program by simply rezoning the area for residential use, suggesting even further that other motives were afoot.

B. *The Value Creation Rationale*

Under the value creation rationale, municipalities use density bonus programs to encourage agglomeration economies. Agglomeration economies are the benefits that parties gain from clustering together.[61] These benefits may arise from the collective use of infrastructure.[62] The benefits also arise from proximity to complementary activities.[63] For example, a manufacturer may benefit from proximity to a residential district, which supplies a source of workers. Agglomeration economies also arise when one use reduces the costs of another use.[64] For example, increased foot traffic from nightlife may decrease the after-hours security costs of an office building.

Agglomeration economies are public benefits and are therefore not easily retained by the party who provides them. Individual parties may not adopt uses that would result in agglomeration economies even when it would be socially optimal. Under the value creation rationale, density bonus programs overcome this problem by ensuring that developers share in the cost of providing agglomeration economies. For example, a program might provide a bonus in return for contribution to subway improvements. These subway improvements will not only benefit the participating property owner but also the neighboring property owners. If a property owner had to bear the costs of the subway improvements alone, they might not elect to make them,

[59] Of course, the proponents of the inclusionary zoning plan did not always use the terms of windfall recapture.

[60] *See* Scott, *supra* note 58.

[61] *See* O'SULLIVAN, *supra* note 47, at 26–28.

[62] *See id.* at 28 ("If firms in an industry require specialized transport networks . . . public service costs are lower if the firms cluster.").

[63] *See id.* at 30.

[64] *See id.* at 27.

even if it would be socially optimal to do so. The density bonus adjusts the property owner's incentives. Developers of neighboring buildings will provide similar contributions in proportion to their density.

Most programs do not expressly rely upon the value creation rationale. However, Norman Marcus has suggested that when an amenity, rather than mitigating the harm of increased density, actually requires more density, it is more likely that value creation is the true motivation.[65] The New York City theater bonus is likely animated by the value creation rationale.[66] A significant cost faced by office buildings is after-hours security. This cost is higher in areas that are sparsely populated at night. Theaters may decrease security costs by bringing in nighttime crowds. However, if the marginal cost of a theater outweighs the marginal benefit of decreased security, a rational property owner would not operate a theater. The Theater Bonus addresses this problem in two ways. First, the bonus offsets a portion of the cost of theater construction and operation by increasing the permissible floor area of participating office buildings.[67] Second, the program minimizes the free rider problem because other property owners cannot increase their density without contributing an operating theater as well.[68]

C. *The Externality Rationale*

Under the externality rationale, amenities secured in return for density bonuses are designed to offset the harm caused by increased density. Because increased understanding of externalities has heralded the new age of environmental and land use regulation, density bonus programs that rely on the externality rationale are closest to widely accepted land use regulation under the police power.[69] As critics have noted, granting increased density in return for amenities meant to offset increased density is

[65] *See* Marcus, *supra* note 19, at 87.

[66] NEW YORK, N.Y., ZONING RESOLUTION § 81-70 (2006) (providing incentives for preservation of theaters in order to "help insure a secure basis for the useful cluster of shops, restaurants and related amusement activities").

[67] *See* Marcus, *supra* note 21, at 73–74, 87.

[68] *See also id.* at 73.

[69] *See generally* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 31–45, 73–86 (3d ed. 2005) (discussing permissible land use regulation rationales).

"paradoxical."[70] In theory, the municipality can overcome this problem by ensuring that the required amenity will fully offset the costs of the bonus density. As discussed below,[71] these calculations can be difficult for even sophisticated municipalities. But even if one accepts that there is a risk of calculation errors, density bonus programs will be at least as justifiable as other land use regulations like zoning ordinances and maps that require similar estimations of externalities and therefore face similar risks of calculation errors.

The externality rationale finds support from two important concerns: fairness and efficiency. It ensures fairness in that the property owner offsets the negative external costs of the increased density of her building by providing public amenities. The externality rationale also addresses efficiency. Unless the property owner fully absorbs the cost of increased density, she will construct more density than is socially optimal. Similarly, without the offsetting benefit of the amenity, the community might enact more severe land use regulations than are socially optimal. This might happen if the potential utility gains to a property owner are greater than the cost the use would impose on the municipality.[72] If the municipality cannot mitigate the costs it might choose to prohibit the use altogether, despite the potential social gains.[73]

The Seattle, Washington Downtown Zoning Plan exemplifies the externality approach. The Seattle Land Use Code is designed to "achieve an *efficient* use of the land without major disruption of the natural environment and to direct development to sites with adequate services and amenities."[74] The Seattle code does not define "efficiency."[75] Seattle appears to be aiming for an "efficiency" in which costs largely fall on the parties who created them. Density bonuses were intended to fund "public benefit

[70] GETZELS & JAFFE ET AL., *supra* note 10, at 1.

[71] *See infra* Part III.A.2.

[72] *See* Fennell, *supra* note 27, at 20–25.

[73] *See id.* at 23.

[74] SEATTLE, WASH., MUNICIPAL CODE § 23.02.020 (1995), *available at* http://clerk.ci.seattle.wa.us/~public/toc/table.htm (emphasis added); *see also id.* § 23.49.

[75] Scholars employ varying definitions of efficiency. These definitions include the "allocation of resources in which value is maximized," or transactions involving "unanimity of all affected persons." RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 13–14 (5th ed. Aspen Publishers 1998) (1972).

features or capital projects that mitigate a portion of the impacts of higher-density development."[76] In enacting an affordable housing bonus, Seattle determined "that a major impact of [commercial] development is the increased need for low-income and low-moderate income housing downtown to serve workers in lower-paid jobs and their families attracted by the development."[77] Seattle intended to offset the demand for affordable housing that increased commercial density would create, not just to subsidize affordable housing.[78] Therefore, the Seattle program places the costs imposed by increased demand for low-income housing on the source of the increased demand, commercial developers.

It is worthwhile to note that localities will often rely on the externality rationale with questionable reasoning, suggesting that there is more afoot than simple externality mitigation. The Santa Monica, California, inclusionary zoning ordinance exemplifies this problem.[79] The ordinance was enacted to satisfy the "demand for affordable housing created by market rate development."[80] While the ordinance does point to the "depletion of potential affordable housing sites by market-rate development,"[81] the formula used to calculate the requisite affordable housing is inconsistent with this justification. A developer of multi-family housing must make a certain percentage of units affordable to low-income households.[82] However, the required percentage increases as the number of units in the project increases.[83] Assuming that an increase in the supply

[76] Seattle, Wash., Ordinance 120443 (July 27, 2001) (codified as amended at SEATTLE, WASH., MUN. CODE § 23.49.012(A) (2006)), *available at* http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CBOR&s1=120443.ordn.&Sect6=HITOFF&l=20&p=1&u=/~public/cbor2.htm&r=1&f=G.

[77] *Id.*

[78] The Seattle plan expressly rejected the use of outside subsidization because "housing provided through the bonus system is intended to mitigate a portion of the additional housing needs resulting from increased density, beyond those needs that would otherwise exist." *Id.* § 23.49.012(D)(1).

[79] Note that the Santa Monica program is mandatory and, therefore not a "density bonus program." However, its mandatory nature should not affect its logic under the externality rationale. *See* SANTA MONICA, CAL., MUNICIPAL. CODE § 9.56.010 (2006), *available at* http://www.qcode.us/codes/santamonica/.

[80] *Id.*

[81] *Id.*

[82] I have simplified this example for the purpose of illustration. The Santa Monica program allows the developer several options, including on-site or off-site construction of the affordable units, *see id.* §§ 09.56.050, .060, as well as an in-lieu fee, *see id.* § 09.56.070.

[83] Projects with less than four units must set aside 10% of units as affordable,

of housing would decrease the price of housing and thereby improve affordability,[84] it makes little sense to impose proportionally greater requirements on larger developments.

III. POLICY CONCERNS

Policy concerns about density bonus programs fall into three categories: first, that density bonus programs will result in bad planning outcomes; second, that density bonus programs will result in inefficiently high density; and third, that density bonus programs encourage municipalities to act strategically by lowering as-of-right zoning in order to "sell" density back to property owners.[85] In this Part, I examine each of these complaints in turn. I conclude that although density bonus programs often present difficult planning issues and require advanced calculations, these problems need not result in bad planning as these issues can be addressed by fine-tuning. While the two latter concerns present significant equity and efficiency problems, only under certain circumstances will these problems justify judicial intervention.

A. *Planning Concerns*

1. *Inconsistency*

Density bonus programs are often adopted as an amendment to an existing zoning ordinance. Absent an accompanying decrease in as-of-right density, a density bonus program will necessarily allow a higher density of development than the zoning ordinance. The density that is set in the zoning ordinance expresses conclusions about the acceptable density given existing infrastructure.[86] Critics have argued, therefore, that density bonus

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those with more than four units, 20%, and those with more than sixteen units, 25%. *See id.* § 09.56.050.

[84] This, admittedly, is a tenuous assumption. Increased development may lead to increased in-migration, and supply, relative to demand, may remain unchanged.

[85] *See* Kayden, *supra* note 5, at 46 (describing the possibility that "government will manipulate the base matter of right zoning FAR to a lower level than otherwise necessary in order to obtain amenities at no marginal physical planning cost" (citing Nollan v. Cal. Costal Comm'n, 483 U.S. 825, 837 n.5 (1987) (describing the risk that the government will impose stringent regulations which it will then waive for unrelated purposes))).

[86] *See id.* at 7 ("Zoning expresses conclusions about theoretically objective physical planning criteria such as street, sidewalk, sewer, and water pipe

programs endorse density that is inconsistent with planning objectives.[87]

The problem with the inconsistency critique is that it assumes a baseline of the density before the density bonus program is enacted. However, because the density bonus program may secure amenities that offset increased density, there is no reason to believe that the appropriate density with the density bonus program is the same as the appropriate density absent a density bonus program. If municipalities can rely on density bonuses, they might simply rezone at a higher density because they can count on the benefits of the amenities secured by the density bonus program offsetting the cost of the increased density. As long as the benefits of the density bonus program offset the cost of the bonus density, there is no apparent inconsistency.

Therefore, the inconsistency critique does not apply to density bonus programs that are designed under the externality rationale because they will set as-of-right and base density based on the costs and benefits of density. Density bonus programs enacted on the windfall rationale may be relatively more vulnerable to the critique, but they need not be. For example, a density bonus program might be enacted on the windfall rationale when a city has decided to rezone because of a recent improvement in infrastructure. The municipality may want to increase the permissible density but also recapture the increase in value that is due to the municipality's investments in infrastructure. In both cases, the key is that the municipality incorporates the costs of increased density into its planning, either by offsetting these costs with amenities or by recouping municipal investment in infrastructure.

There is always the possibility that a municipality that claims to be acting on the externality rationale may actually be motivated by other purposes. The inconsistency criticism then may reflect general skepticism about the fairness of local decision-making, rather than a specific objection to inconsistency. The critique is similar to the criticisms of scholars who argue that "local governments cannot be trusted to deal fairly or carefully even in

capacity; light and air availability at ground level; and compatibility of new buildings with the existing neighborhood.").

[87] *See generally* Marcus, *supra* note 19 (discussing New York City's experience with density bonus programs and their effects on the rationality of the comprehensive plan).

land decisions with only local consequences."[88] Because they argue piecemeal changes are difficult to control under reasonableness review,[89] these critics propose a solution—what Carol Rose dubs "plan jurisprudence."[90] Plan jurisprudence would require strict enforcement of the comprehensive plan and searching judicial review of any piecemeal changes.[91] Even if we accept the inconsistency argument on these grounds, another characteristic of density bonus programs would likely satisfy these critics. Unlike the piecemeal changes feared by many, density bonus programs will often set out their terms in advance, provide limited discretion to officials, and generate data sufficient to test their fairness.

2. *Calculation Difficulties*

Density bonus programs aim to offset the harm caused by increased density with amenities that mitigate the harm of increased density. Some critics have argued that "[t]his defense is paradoxical; in effect, density is increased in return for a feature that ameliorates the adverse effects of the increased density."[92] This argument ignores the possibility that a municipality could create a density bonus program where the amenity secured fully offsets the cost of the increased density.[93] However, it does suggest a problem. The quantity and type of amenity necessary to offset increased density will determine the success of a density bonus program. The municipality could calculate the amenity needed that would more than offset increased density. Practically speaking, however, difficulties creep into the calculation.

Setting the ratio of the bonus to the required amenity is a delicate calculation even for a sophisticated municipality. As Getzels and Jaffe note, "[d]etermining the appropriate size of the bonus requires economic calculations, implementation of social

[88] Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 841 (1983).

[89] *See id.* at 842.

[90] *See id.* at 844–46 (discussing the critique of piecemeal changes and plan jurisprudence).

[91] *See id.* at 848–67.

[92] GETZELS & JAFFE ET AL., *supra* note 10, at 1.

[93] For example, a municipality might attempt to reduce as-of-right density to zero and provide density solely in return for amenities that would offset the cost of density, in order to achieve the benefits commiserate with the costs of density. However, if we do not assume that the municipality can accurately calculate the costs of externalities, zero as-of-right density becomes problematic.

and environmental policy, and, finally, *intuition*."[94] If the municipality undervalues the bonus, the city will receive less of the amenity than it should. If the municipality overvalues the bonus, developers may not participate at all. To address this problem, municipalities have relied on several different methods of calculation.[95] These techniques go by a range of names, including equivalent land cost,[96] equivalent development rights,[97] rate of return,[98] marginal cost to profit,[99] and cost plus.[100] But each tries

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[94] GETZELS & JAFFE ET AL., *supra* note 10, at 8 (emphasis added).

[95] *See id.* at 16–21.

[96] Under the equivalent land cost approach, the locality compares the cost of providing the public amenity to the cost of purchasing additional land to achieve the same overall density. *See id.* at 16–17. The bonus is calibrated by setting the bonus floor area equal to the ratio of the cost of the amenity to the cost of land. The benefit of the equivalent land cost approach is that it changes with land and amenity costs. However, it can be difficult to calculate accurate land costs across neighborhoods both because certain neighborhoods are inherently more valuable and because the density allowed by zoning often varies. *See id.*

[97] Under the equivalent development rights approach, the locality compares the cost of providing the amenity with the cost of acquiring additional density on the open market. The bonus is calibrated by setting the bonus equal to the product of a plus factor and the ratio between the cost of the amenity and the cost of development rights. *See id.* at 16. As with the equivalent land cost approach, the equivalent development rights approach is only accurate to the extent a locality can accurately calculate the value of development rights. *See id.* at 17–18. However, the development rights approach, because it relies on the price of development rights and avoids the land pricing issues of the equivalent land cost approach, may provide a more accurate measure of the value of the bonus to the developer. Because development rights are less attached to any individual parcel they should provide a less idiosyncratic index of the value of additional density. However, the value of density to any individual developer remains dependent on the circumstances of that developer's specific parcel.

[98] Under the rate of return approach, the locality estimates the net revenue of the bonus and then compares it "to the prevailing rate for similar types of projects in the same development market." *Id.* at 18–19. The rate of return approach enjoys the advantage of broad application because it is not as dependent on place-based land costs and the equivalent land and development rights approaches. It also has the benefit of more accurately reflecting the developer's decision-making because the rational developer should look to rate of return independent of location. Assuming developers are rational, they should demand the same rate of return no matter where the parcel is located. However, the rate of return approach requires a complex set of calculations that the other approaches avoid. A locality employing this approach must calculate the net operating income at the base FAR, the net operating income of the bonus FAR, the net operating income of the amenity, the operating cost of the base FAR, the operating cost of the bonus FAR, and the cost of the amenity. Moreover, to the extent costs of construction and potential operating income are capitalized into land costs, the equivalent value approaches might be more accurate.

[99] The marginal cost to profit model assumes that the developer will build at

to do essentially the same thing: set the value of the bonus density as closely as possible to the cost of providing the amenity.

A quick glance over the footnotes on the calculation methods exposes the complexity of designing an effective density bonus program. Each method must make calculations that are subject to complex factors that are often mutually dependent.[101] Moreover, even if localities were able to make these calculations accurately, the resultant programs would remain vulnerable to economic fluctuations. For example, if the cost of constructing an amenity decreases, developers will be more likely to participate. Similarly, if the real estate market slows, developers may not participate at all. Even if the cost of the amenity is properly calibrated to the value of the bonus, the marginal value of the amenity to the community may be reduced as the volume of participation increases.[102]

One might respond that the solution to this problem is simply better information. However, we might question whether municipalities can get accurate data on the rate of return from development because developers have an incentive to over- or

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the point that maximizes the profit per square foot. The locality sets the gross bonus floor area equal to the product of the ratio of the cost of the amenity to the net incremental rental value and a plus factor that incorporates the efficiency factor and the vacancy rate. *Id.* at 19–21. As with the rate of return approach, the marginal cost to profit model requires accurate calculation of several complex variables.

[100] Under the "cost-plus" method, the bonus is set equal to the product of the cost of the amenity per square foot, the inverse of the net capitalization value per square foot, the efficiency rate and a plus factor. The plus factor determines the rate of the incentive. *Id.* at 21. The "cost-plus" approach is relatively easy to calculate because it only requires estimating the net capitalization value and the efficiency factor. This approach also allows the locality to easily vary the incentive across amenities.

[101] For example, the equivalent land cost and equivalent development rights methods both base their bonus calculation on the price of a commodity that the introduction of a density bonus is likely to affect, the supply of density. Comparing the equivalent development cost approach to the equivalent land cost approach illustrates the difficulty. Enactment of a density bonus program should increase the value of land. However, it is plausible that a density bonus program would have the opposite effect on the market for tradable development rights because the density bonus program increases the supply of development rights. The other methods do not provide an easier solution as they rely on much more complicated metrics like the vacancy rate, cost of construction, and rate of return. *See id.* at 16–21.

[102] *See, e.g.*, *id.* at 1 (discussing the lack of utility to the public gained by the creation of many ground-level plazas through the New York City Plaza Bonus).

understate potential return on investment.[103] In addition, more formal attempts to require financial disclosures from developers might scuttle an otherwise favorable deal.

Although density bonus programs face vexing calculation problems, these problems are equally present under a traditional zoning regulation. A density or height restriction might prove too stringent or too lax in the face of an economic upswing. Traditional zoning expresses conclusions about permissible density based on available infrastructure, current development patterns, and preferred growth. For the most part, municipalities can deal with these problems in density bonus programs, as they do with traditional zoning, by fine-tuning the mix and availability of the bonus for each amenity

B. *Increased Density*

Density bonus programs will allow municipalities to secure more amenities where density is more valuable. Critics argue that this will lead to an excessive number of high rises in central cities.[104] This criticism has been leveled at the New York City Plaza Bonus. Critics claimed the New York City Plaza Bonus encouraged construction "of tall buildings surrounded by sometimes unusable plazas."[105] This argument appears to have two components: first, that the density bonus program was oversubscribed and therefore resulted in more density than intended; and second, that the secured amenities offset less of the costs of that density than anticipated.[106] In retrospect, the most salient complaint against the Plaza Bonus appears to be the latter—that the city sold too cheaply.[107] However, the first prong continues to have appeal.

Density bonus programs, by definition, allow increases in density for particular parcels above the as-of-right density.[108] It would be difficult to argue, however, that this increase in density

[103] Much of the public argument in advance of adoption of the Greenpoint/Williamsburg Inclusionary Zoning Program centered around whether the program would provide a sufficient rate of return to developers. *See, e.g.*, Satow, *supra* note 57.

[104] GETZELS & JAFFE ET AL., *supra* note 10, at 1.

[105] *Id.*

[106] *See id.*

[107] *See id.* at 1–2; *see also* Kayden, *supra* note 5, at 7.

[108] *See supra* notes 5–11 and accompanying text.

was problematic if the benefit of the amenity secured either exceeded or perfectly offset the cost of the increased density. Therefore, it seems likely that the real concern underlying this critique is that municipalities will systematically undervalue the costs of increased density. If this concern is realized, we might conclude that municipalities should not bargain away regulation at all because they either cannot or will not accurately value the costs of forgone regulation. But this conclusion goes too far. A municipality could systematically undervalue the cost of not regulating particular uses even without offering to relax regulation in return for an amenity. For example, a municipality might allow commercial uses in order to increase its tax base without evaluating the cost of industrial uses. Yet critics who fear increased density because of calculation problems presumably would not argue that all land use regulation should be struck down for the same reason. Most density bonus programs are enacted in advance and set out explicit bargains and therefore should be at least as susceptible to evaluation. Whether this evaluation will allow the political process to remedy problems is an empirical question. The Plaza Bonus experience provides mixed evidence: it was adjusted several times, but it took several decades.[109]

C. *Strategic Behavior*

As Getzels and Jaffe delicately state, in order for density bonus programs to be attractive to developers, "the underlying density . . . must be sufficiently stringent."[110] The municipality must set the as-of-right density at a low enough level to make the density bonus attractive. However, the municipality plays two roles in the density bonus transaction: first, as a regulator, by setting the base density; and second, as a fundraiser for the community, by trading the bonus for amenities. This dual role causes a significant concern for strategic behavior by the municipality.[111] A municipality could lower permissible density

[109] The plaza bonus was initially created by the 1961 Zoning Resolution and has been repealed gradually in a piecemeal fashion through 1996 at the urging of community groups. *See* David W. Dunlap, *43 Stories Tall, and Just Under the Wire*, N.Y. TIMES, Mar. 12, 1995, § 9, at 1; *see also* Alan S. Oser, *Space Bonus for New Building Helps Save Tenement*, N.Y. TIMES, Apr. 30, 2000, § 11, at 9.

[110] GETZELS & JAFFE ET AL., *supra* note 10, at 2.

[111] *See generally* Kayden, *supra* note 5, at 21–24 (discussing three potential conflicts of interest that arise when a city assumes the role of both regulator and seller of property).

and then "sell" the prior as-of-right density back to the developer.[112] In a world with costless regulation,[113] the direct sale of zoning rights for cash would result in "pure profit" for the municipality.[114] Under these conditions, the rational municipality would maximize revenue by regulating as much as possible. This revenue maximization would not be problematic so long as the amenities required were based on the cost of the developer's density. There is no reason, however, to assume that the program would be so carefully calibrated absent some oversight. The municipality's incentive to decrease as-of-right density in order generate revenue is not dependent on the connection between the costs of density and benefits of the amenity.

A second strategic concern arises where density imposes a cost on a subset of the community, but the amenity benefits the entire community. The locality will have an incentive to impose disproportionate burdens on less politically powerful groups.[115] This concern parallels similar criticism of transferable development rights (TDRs). TDRs allow a municipality to protect resources, like open space and historic districts that are threatened by development pressures, by restricting development on parcels in threatened areas but providing property owners with development rights that can be used on other parcels.[116] Critics of these programs allege that these programs are often unfair to transfer area residents because those residents bear the burden of increased density without the benefit of the open space or historic preservation.[117]

[112] *See id.* at 46.

[113] Of course, density often provides benefits to the municipality like property taxes and economic development.

[114] *See* Fennell, *supra* note 27, at 15–16 (citing Kayden, *supra* note 5, at 3).

[115] *See id.* at 40–41 (explaining how "majority interests within the community, who are not negatively affected by the development, might prefer to strike a bargain which would grant them valuable unrelated benefits . . . rather than a bargain that would simply remediate the [direct harms] caused by the development").

[116] *See* Matthew P. Garvey, Student Article, *When Political Muscle Is Enough: The Case for Limited Judicial Review of Long Distance Transfers of Development Rights*, 11 N.Y.U. ENVTL. L.J. 798, 798–99 (2003).

[117] *See id.* at 799.

IV. LEGAL CLAIMS

Density bonus programs rarely draw court challenges. The programs lack the coercive element that motivates challenges to mandatory land use restrictions. However, the critiques outlined above have identified several problems that may affect the rights of two distinct classes of potential plaintiffs—owners of property subject to a program and neighbors affected by the bonus density. Property owners can challenge density bonus programs as beyond the authority of the municipality, as a taking without just compensation, as a denial of due process or equal protection, or as an unconstitutional condition under the exaction cases.[118] Third party neighbors can bring claims that the programs are beyond the authority of the municipality, as well as equal protection and due process claims.

In order to assess these claims, I examine each of them in turn. I conclude that courts should deem density bonus programs takings requiring compensation only in narrow circumstances. Moreover, I will argue that takings analysis is inapposite to density bonus programs because even where there is a taking requiring compensation, the courts lack a principled approach to determining just compensation. Most density bonus programs, therefore, should be reviewed under substantive due process. However, because of the property rights involved, courts should apply a slightly more searching review than they have applied in developer challenges under substantive due process. For similar reasons, I conclude that the existing standard is sufficient to protect rights of third party neighbors.

As an initial matter, both property owners and neighbors can challenge density bonus programs by claiming they are beyond the authority of an enacting municipality.[119] The strength of these claims depends on the language of the particular authorizing statute. To that extent, I do not focus on them here. However, the meaning of the authorizing statute may turn on the police power,

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[118] It is important to note that property owners often bring all of these claims when challenging land use regulations. This has led to significant confusion as to the interaction between takings and substantive due process. *See* discussion *infra* Part IV.A.

[119] *See, e.g.*, Mun. Art Soc'y of N.Y. v. City of New York, 522 N.Y.S.2d 800, 800–01 (Sup. Ct. 1987) (holding that conditioning sale price on granting of density bonus was not authorized by the Zoning Code).

and therefore authority cases may inform due process analysis. Insofar as the municipality's authority informs due process analysis, I consider the scope of municipal authority in the appropriate context.

A. *Substantive Due Process or Takings?*

When property owners challenge density bonus programs under the Constitution, they will likely rely on the Takings Clause[120] and the Due Process Clause.[121] However, when a property owner claims a land use regulation is unconstitutional, it is not always clear which clause should control. As several commentators have observed, the Supreme Court's regulatory takings jurisprudence appears to have incorporated tests that are logically more consistent with substantive due process analysis.[122] The confusion arose primarily from language in *Agins v. City of Tiburon* that blurred the line between takings and due process.[123] In *Agins*, Justice Powell wrote that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."[124] *Agins* involved substantive due process; still, takings cases after *Agins* sometimes relied on this language. For example, Justice Scalia quoted *Agins* in *Lucas v. South Carolina Coastal Council*.[125]

In *Lingle v. Chevron U.S.A., Inc.*, the Court effectively ended the confusion by making clear that the *Agins* "substantially

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[120] "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[121] "[N]or 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." U.S. CONST. amend. XIV, § 1. As Professor Ellickson and Professor Been note, attorneys representing these landowners may overlook narrower attacks under state constitutions and federal statutes. ELLICKSON & BEEN, *supra* note 69, at 94.

[122] For a brief overview of this literature see ELLICKSON & BEEN, *supra* note 69, at 179 n.8; *see also, e.g.*, John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 696 (1993); Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 887–88 (2001).

[123] *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[124] *Id.* at 260 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)). To further complicate the problem, *Nectow* was clearly a substantive due process case. *Nectow*, 277 U.S. at 185.

[125] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992).

advance" test was not a takings test.[126] *Lingle* leaves the Due Process Clause out of takings analysis but leaves open the question of the types of challenges that are best addressed under each clause.[127] In *Eastern Enterprises v. Apfel*, the Court split on this issue.[128] Congress, in response to financial difficulties in coal miner benefit funds, had imposed retroactive liability on operators who had employed coal miners.[129] Eastern, a former coal operator, was liable for $5 million of premiums in the first year. Eastern challenged the statute under both the Due Process and Takings Clauses.[130] Four justices held that the retroactive liability constituted an uncompensated taking.[131] Justice Kennedy's concurrence, while agreeing that the statute was unconstitutional, disagreed that the regulation was a taking,[132] arguing that the Takings Clause should not apply where a "specific property right or interest" is not at stake.[133]

It seems highly unlikely, therefore, that density bonus programs could escape takings review under *Eastern Enterprises.* Facially, density bonus programs regulate property. Justice Kennedy points specifically to the "air rights" in *Penn Central Transportation Co. v. New York City* as just the kind of property interest that would justify takings analysis.[134] The regulation in *Penn Central* governed the use of so-called "air rights"—density which was allowed by zoning but had not yet been developed—over Grand Central Station.[135] In essence, density bonus programs, by regulating density that has not yet been developed, also regulate air rights. The similarity is salient.

Moreover, before *Lingle*, landowner challenges to zoning ordinances alleging substantive due process violations did not find

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[126] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005). The Court concluded that the substantially advances "formula prescribes an inquiry in the nature of a due process, not a takings test, and that it has no proper place in our takings jurisprudence." *Id.* at 540.

[127] ELLICKSON & BEEN, *supra* note 69, at 196.

[128] *See* E. Enters. v. Apfel, 524 U.S. 498 (1998).

[129] *See id.* at 514–15.

[130] *See id.* at 516–17.

[131] *Id.* at 504, 538.

[132] *See id.* at 539 (Kennedy, J., concurring).

[133] *See id.* at 541.

[134] *See id.* (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)).

[135] *See Penn Cent.*, 438 U.S. at 116–18.

friendly courts.[136] In upholding a zoning ordinance in a facial challenge in *Village of Euclid v. Ambler Realty Co.*, the Court validated the principle of zoning.[137] *Euclid* left landowners free to challenge individual applications of zoning ordinances. Two years after *Euclid*, the Court considered such a challenge in *Nectow v. City of Cambridge* and struck down the zoning ordinance, relying on a clear determination that the ordinance would not serve the police power in the absence of any other justification.[138] The Court, however, did not hear another zoning case on substantive due process grounds for approximately fifty years,[139] and federal courts have remained skeptical of substantive due process claims.[140]

Judge Posner's opinion in *Coniston Corp. v. Village of Hoffman Estates*, an as-applied substantive due process challenge to a zoning determination, exemplifies judicial skepticism.[141] Judge Posner's opinion rests on three grounds. First, the Takings Clause protects property owners from uncompensated takings, and therefore there is no need to bring a substantive due process claim.[142] Second, these claims ask the court to accept the "substantive" component of the Due Process Clause, the idea that a law can violate the Due Process clause even where there are no procedural irregularities, without clear textual support.[143] Finally, judicial scrutiny under the Due Process Clause would vest courts with the authority to strike down legislative enactments without any evidence that process was lacking.[144]

There are several reasons to take issue with Judge Posner's justifications in *Coniston*. First, the *Coniston* understanding of the Takings Clause would read the word "property" out of the Due Process Clauses of the Fifth and Fourteenth Amendments. If the

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[136] *See* ELLICKSON & BEEN, *supra* note 69, at 98.
[137] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388–89 (1926).
[138] *See* Nectow v. City of Cambridge, 277 U.S. 183, 188–89 (1928).
[139] ELLICKSON & BEEN, *supra* note 69, at 98.
[140] *See id.* at 102 (noting that substantive due process challenges to decisions of land use regulators have been called the "most unlikely to succeed").
[141] *See* Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988).
[142] *See id.* at 464. The petitioners in this case had waived their takings claim. *See id.* at 463.
[143] *See id.* at 465–66. Posner also finds that there was not a deprivation under the due process clause in this case. *See id.*
[144] *See id.* at 465.

Takings Clause is the only clause in the Constitution that governs "property," the Fourteenth Amendment prohibition of deprivations of property without due process of law would be rendered superfluous. Second, the Takings Clause does not actually address all governmental denials of "property." The Takings Clause protects property owners by requiring compensation when government actually takes properties or where regulation is "*functionally equivalent* to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[145] The Takings Clause says nothing about deprivations of property interests that are not functionally equivalent to a direct appropriation but are unfair—for example, if the city "flipped a coin" to decide whether or not to grant a permit—which the Due Process Clause should proscribe.[146] Ironically, the expansion of the regulatory takings doctrine may have resulted from the lack of protection under the Due Process Clause. This suggests a third reason for skepticism of the *Coniston* rationales. A broad definition of regulatory takings might raise similar concerns that judges will effectively strike down properly enacted regulations as substantive due process review.[147] Judges may overstep their institutional role under the Due Process Clause, but can also do so under the Takings Clause. Admittedly, the Takings Clause does not allow judges to award injunctive relief.[148] Therefore, in

[145] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005) (emphasis added).

[146] *Cf.* Lemke v. Cass County, Neb., 846 F.2d 469, 472 (8th Cir. 1987) (Arnold, C.J., concurring) (saying that a zoning decision might rise to the level of a substantive due process violation if it was made by a truly irrational method such as flipping a coin).

[147] This end around is illustrated by the reasoning in *Coniston*. Judge Posner interprets the Due Process Clause to prohibit only deprivations of "property" that go beyond the loss of a "right" to develop an office building. *See Coniston*, 844 F.2d at 466. That is, to succeed on a substantive due process challenge a plaintiff must in essence have a successful regulatory takings claim. *See id. Penn Central*, by looking to the benefits and burdens on the property owner in determining if a regulatory taking has occurred, incorporates a means-ends test that is similar to the inquiry under substantive due process. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978). Therefore, as the scope of regulatory takings expands, judicial power to strike down regulations follows.

[148] *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314–15 (1987) (noting that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power").

takings challenges, judges are limited to awarding compensation rather than injunctive relief. However, to the extent that compensation is overestimated, judges can similarly, albeit less severely, overstep institutional boundaries.

Skepticism of *Coniston* aside, it seems clear that under *Eastern Enterprises* where a regulation affects a "property interest" it can be challenged as a taking. In the following Part, I analyze the likely treatment of a density bonus program under the exactions jurisprudence.

B. *Treatment of Density Bonus Programs Under Exactions Jurisprudence*

In *Nollan v. California Coastal Commission* the Supreme Court struck down a California agency condition on a building permit that required a public easement because the public easement was not substantially related to the purpose of the permit.[149] After *Nollan*, Jerold Kayden observed that *Nollan's* reasoning bore significant similarity to the reasoning in *Municipal Art Society of New York v. City of New York*, where a New York state court struck down the sale of property owned by New York City that involved a density bonus program as an illegitimate sale of zoning rights.[150] Kayden asked whether *Nollan* condemned incentive zoning.[151] If the trade of bonus density for an amenity were the same as trading a permit for an easement, density bonus programs would be unconstitutional under *Nollan* unless the amenity they secured was related.[152] Kayden ultimately argued that this conclusion was premature.[153] Three years after Kayden's article, in *Dolan v. City of Tigard*, the Court added to the *Nollan* substantial relationship requirement, holding that exactions must also have "rough proportionality" to the harm they are intended to prevent.[154] Similar to *Nollan*, *Dolan*, if it applies to density bonus programs, poses a substantial obstacle for density bonus programs. Even those programs that rely on the externality rationale and therefore aim to offset the cost of increased density do not

[149] *See* Nollan v. Cal. Costal Comm'n, 483 U.S. 825, 837 (1987).

[150] *See* Mun. Art Soc'y of N.Y. v. City of New York, 522 N.Y.S.2d 800, 802–03 (Sup. Ct. 1987); Kayden, *supra* note 5, at 4.

[151] Kayden, *supra* note 5, at 4.

[152] *See id.* at 44.

[153] *See id.* at 44–49.

[154] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

determine the amount of amenity required based on the cost of the increased density. Rather, they often calculate the size of the bonus in reverse by determining how much is necessary to make providing the amenity financially enticing.

Even if Kayden was wrong and the *Nollan-Dolan* limitations do apply to density bonus programs, the Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, which confined *Dolan* to the area of exactions[155] should shield municipalities that enact density bonus programs. To illustrate, I examine the exaction cases, Kayden's original argument, and *Del Monte Dunes*.

In *Nollan*, the Nollans purchased a small parcel of land on the coast of the Pacific Ocean, intending to construct a bungalow. The California Coastal Commission conditioned their building permit on the grant of a public easement across their beachfront.[156] The Court struck down the condition because there was no "essential nexus" between the permit and the easement.[157] Justice Scalia cast the case in the terms of the doctrine of unconstitutional conditions. The Commission could not condition the waiver of a constitutional right—in this case, the right to just compensation under the Takings Clause—on an unrelated exaction.[158]

Justice Scalia's opinion in *Nollan* was animated by two objections with particular relevance to density bonus programs: first, that government will "over-leverage" by increasing regulation in order to secure more exactions;[159] and second, that the fact that government is willing to trade away regulation suggests the regulation itself is illegitimate.[160]

Kayden noted the similarity of this reasoning to the reasoning in *Municipal Arts Society*.[161] In *Municipal Arts Society*, a New York court struck down a sale of city-owned land that included an incentive zoning component, a bonus for providing improvements

[155] *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999). Exactions are "land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at 702.

[156] *See* Nollan v. Cal. Costal Comm'n, 483 U.S. 825, 828 (1987).

[157] *See id.* at 837.

[158] *See id.* at 836–37.

[159] *See id.* at 837.

[160] *See* Kayden, *supra* note 5, at 47.

[161] *See* Kayden, *supra* note 5, at 4; *see also* Mun. Art Soc'y of N.Y. v. City of New York, 522 N.Y.S.2d 800, 802–03 (Sup. Ct. 1987).

to adjacent subway stations.[162] The Transit Bonus provided up to a twenty-percent floor area bonus to developers who agreed to provide improvements to an adjacent subway station.[163] The City Planning Commission had discretion to set how much of the bonus any individual project would receive.[164] The Board of Estimate, consisting of the mayor, two members elected citywide and the borough presidents,[165] could then approve or disapprove any individual award.[166] Intending to maximize the sale value of the property,[167] the City Planning Commission made bids contingent on Board of Estimate approval.[168] The sale price was reduced to the extent the Board of Estimate denied the bonus.[169] Judge Lehner's reasoning, by focusing on the relationship between the incentive and the amenity, bore similarity to *Nollan*. Because the proceeds of the sale were not earmarked for local improvements but rather would fund the City's general operations, the transaction amounted to a sale of zoning rights.[170] Because the Zoning Resolution did not authorize the City to sell zoning rights, the scheme was beyond the authority of the City Planning Commission.[171]

Kayden observed that *Nollan* and *Municipal Arts Society* might prohibit the use of incentive zoning techniques for unrelated amenities.[172] However, he stopped short of concluding that *Nollan* declared incentive zoning unconstitutional for three reasons. First, although the *Nollan* facts bore superficial similarity to incentive

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[162] *See Mun. Art Soc'y*, 522 N.Y.S.2d at 801, 803–04; *see also* NEW YORK, N.Y., ZONING RESOLUTION, § 81-53 (1982) (repealed 1998) (current version at NEW YORK, N.Y., ZONING RESOLUTION, § 74-634 (2006)).

[163] Kayden, *supra* note 5, at 9 (citing *Mun. Art Soc'y*, 522 N.Y.S.2d at 801).

[164] *See Mun. Art Soc'y*, 522 N.Y.S.2d at 803; *see also* Kayden, *supra* note 5, at 9.

[165] *See* Bd. of Estimate v. Morris, 489 U.S. 688, 690 & n.2 (1989). The Board of Estimate was struck down two years later as inconsistent with the Equal Protection Clause. *See id.* at 703.

[166] NEW YORK, N.Y., ZONING RESOLUTION, § 81-53 (1982) (repealed 1998) (current version at NEW YORK, N.Y., ZONING RESOLUTION § 74-634 (2006)).

[167] *See* Kayden, *supra* note 5 at 17. Kayden also observed that the scheme "would not necessarily yield additional revenue to the city" because the bidding parties would adjust their sales price based on the probability of Board of Estimate approval. *See id.* at 18–21.

[168] *See Mun. Art Soc'y*, 522 N.Y.S.2d at 801.

[169] *See* Kayden, *supra* note 5 at 11.

[170] *See Mun. Art Soc'y*, 522 N.Y.S.2d at 803–04.

[171] *See id.* at 803.

[172] *See* Kayden, *supra* note 5, at 34.

zoning, the Court did not directly consider an incentive zoning transaction.[173] Second, even if a court did confront an incentive zoning transaction, the Constitution would not demand invalidation of all incentive zoning transactions, just those that did not feature true incentives.[174] City governments would not necessarily over-leverage and, therefore, courts should not strike programs down based solely on this threat; rather, courts should carefully review each program to ensure that it features "real incentives."[175] Finally, Kayden argued that *Nollan* does not offer a constitutional basis for ascribing the rights in the bonus density to the property owner.[176]

As noted above, three years after Kayden's article, *Dolan* added proportionality to *Nollan's* nexus requirement.[177] Applied in tandem, *Nollan-Dolan* would spell doom for density bonus programs by placing the burden on municipalities to show not only that the amenity sought was related to the bonus density, but also that the amenity was proportionate to the costs the density imposed.[178] Kayden concluded that *Nollan* should not apply, but could not consider *Dolan* because it had not yet been decided.[179]

However, even if Kayden was wrong, *Del Monte Dunes* limited *Dolan* to the "special context of exactions."[180] In *Del*

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[173] *See id.* at 44–45.

[174] *See id.* at 47.

[175] *See id.* at 47.

[176] *See id.* at 48.

[177] In *Dolan*, the plaintiff, owner of a plumbing and electrical supply store, submitted an application to the Tigard City Planning Commission to expand her store and pave her parking lot. The City Planning Commission conditioned the permit on Dolan's dedication of a portion of her land for a public "greenway" and a bicycle path. The Court struck down both conditions as unconstitutional because the City had not demonstrated that the condition was proportionate to the harm that would be caused if the permit were granted. *See* Dolan v. City of Tigard, 512 U.S. 374, 379, 391, 393 (1994).

[178] The *Nollan* and *Dolan* decisions might not condemn all density bonus programs. Programs that secured "related" amenities would survive *Nollan*. *See* Nollan v. Cal. Costal Comm'n, 483 U.S. 825, 831–32, 837 (1987). Programs that sought amenities that were "roughly proportional" to the bonus density would survive *Dolan*. *See Dolan*, 512 U.S. at 391. However, this will be a high bar for even well-considered programs to meet. First, many programs seek amenities that are unrelated under *Nollan*. Second, most programs do not set the ratio of amenity require to bonus density by determining the cost imposed by that density but rather by determining the amount of bonus density necessary to make the program attractive to developers.

[179] *See* Kayden, *supra* note 5, at 48–49.

[180] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687,

Monte Dunes, the City of Monterey had repeatedly denied the plaintiff's requests for a development permit and increased its demands.[181] The Court held that the regulatory takings claim had been properly submitted to the jury, and that *Dolan* did not apply because denial of development was not an exaction.[182] Therefore, as long as density bonus programs are not exactions, *Del Monte Dunes* should shield them from *Dolan*. But the meaning of *Del Monte Dunes* is not so clear.[183] Lower courts have disagreed as to whether *Del Monte Dunes* extends *Nollan-Dolan* to monetary exactions or only to dedications of land[184] and whether only to adjudicative exactions or to legislative as well.[185] A full survey of this issue is beyond the scope of this Note; I note only that the consensus appears to be that the determinative characteristics will be whether a density bonus program is a legislative enactment and whether it requires a dedication of the property. Only those density bonus programs that provide significant discretion to city officials would appear vulnerable under this standard.

C. *Takings*

The Takings Clause requires the government to provide just compensation when it takes property.[186] Therefore, determining if a regulation is an unconstitutional taking is a two-step inquiry that

702 (1999).

[181] *See id.* at 694–98.

[182] *See id.* at 702–03.

[183] *See* Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & POL. 451, 466 (2005).

[184] *Id.* at 466 & n.70 (citing San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 106 (Cal. 2002) (refusing to extend *Nollan-Dolan* to all government fees affecting property values)); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 697 (Colo. 2001) (holding that *Del Monte Dunes* confines *Nollan-Dolan* to exactions that require dedication of land). *But see id.* (citing Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 636–40 (Tex. 2004) (drawing no distinction between an exaction and a fee); City of Olympia v. Drebick, 83 P.3d 443, 451–52 (Wash. Ct. App. 2004) (applying *Nollan-Dolan* to exactions of money)).

[185] *See id.* at 467 & nn.71–72 (citing Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996); Home Builders Ass'n of Central Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997); Rogers Machinery, Inc. v. Wash. County, 45 P.3d 966, 981–82 (Or. Ct. App. 2002) (holding that *Nollan-Dolan* only apply to adjudicative decisions)). *But see id.* (citing Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 390 (Ill. Ct. App. 1996) (applying *Nollan-Dolan* to a legislative decision)).

[186] U.S. CONST. amend. V.

asks first, whether a government action constituted a taking, and second, whether the property owner was justly compensated. Although the approaches to the first question are far from unified,[187] the Court looks to the "severity of the burden that government imposes upon private property rights."[188]

1. *Regulatory Takings*

The "[p]aradigmatic taking is a . . . direct government appropriation or physical invasion of property."[189] Before Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*,[190] takings were only the seizure of property[191] or a "practical ouster of [the owner's] possession."[192] In *Mahon*, Justice Holmes noted that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[193] These "regulatory takings" fall into three basic categories: first, regulation that results in a permanent physical occupation of private property;[194] second, regulation that results in complete deprivation of "*all* economically beneficial us[e];"[195] and third, regulations that amount to takings under the multi-factor test of *Penn Central*.[196]

A density bonus program, like any other land use regulation, could be a taking under any of these takings tests. For example, a density bonus program that allowed no as-of-right density would be a taking because it would deny all economically beneficial use. Similarly, where the amenity required by a density bonus program

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[187] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005).
[188] *Id.*
[189] *Id.* at 537.
[190] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).
[191] *See, e.g.*, United States v. Pewee Coal Co., 341 U.S. 114, 115–17 (1951) (appropriation of a coal plant).
[192] *See Lingle*, 544 U.S. at 537 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992)) (alteration in original); *see also, e.g.*, United States v. Gen. Motors, 323 U.S. 373, 378 (1945) (occupation of warehouse).
[193] *Mahon*, 260 U.S. at 415.
[194] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).
[195] *Lucas*, 505 U.S. at 1019.
[196] Justice Brennan identifies these factors as "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and "the character of the governmental action." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

itself requires a dedication of property—for example, where the program seeks on-site affordable housing—a program would work a taking as a permanent physical occupation. However, because typical density bonus programs will not implicate these rules, *Penn Central* will control most developer challenges.

With one important exception, which I discuss below, density bonus programs should not require compensation under the *Penn Central* standard. First, if the scheme in *Penn Central* did not constitute a taking, it is difficult to argue that a density bonus program does. The regulatory program challenged in *Penn Central* was New York City's Landmark Preservation Law.[197] Pursuant to the law, the New York City Landmark Commission designated Grand Central Station as a landmark, thereby subjecting all subsequent modifications of the property to government approval.[198] The specific issue in *Penn Central* was the rejection of a Penn Central Transportation Co. proposal to construct an office building above Grand Central Station.[199] Penn Central Transportation Co. argued, among other claims,[200] that the law deprived them of "any gainful use of their 'air rights' above the Terminal and that, irrespective of the value of the remainder of their parcel, the city had 'taken' their right to this super-adjacent airspace, thus entitling them to 'just compensation.'"[201] The Court squarely rejected this approach.[202]

Moreover, most density bonus programs will be less severe than the regulation in *Penn Central*. If the *Penn Central* scheme had not provided TDRs as an offset to the burden of the landmark designation, it might have constituted a taking because the economic impact of the regulation would have been more severe. In contrast, the economic impact of a density bonus program will often be quite favorable to the property owner. Indeed, this is the aim of a density bonus program—if it does not present a favorable bargain to the property owner, she will not participate.

Second, while the *Penn Central* approach reflects the

[197] *Id.* at 107.
[198] *Id.* at 115–16.
[199] *See id.* at 116–17.
[200] *Id.* at 123–37.
[201] *Id.* at 130.
[202] "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.*

acknowledgement in *Mahon* that a taking need not include actual government appropriation of property, this inquiry is relatively narrow.[203] The *Penn Central* court contrasts a regulatory taking with a regulation that "adjust[s] the benefits and burdens of economic life to promote the common good."[204] Before *Lingle*, when the confusion over the line between substantive due process and takings persisted, this passage fueled takings inquiries that examined whether the burden of the governmental action was justified by the public benefit.[205] However, *Lingle* makes clear that what the *Penn Central* court is looking for are regulatory actions that are "*functionally equivalent* to the classic taking in which the government directly appropriates private property or ousts the owner from his domain."[206] Density bonus programs will rarely be functionally equivalent to a direct appropriation or ouster.

This brings me to the one exception I noted above. Where the density bonus program is enacted with a simultaneous down-zoning, a density bonus program begins to resemble a taking. This is different from the generic density bonus program because the investment-backed expectations of the property owner are quite different. In the generic situation, the property owner purchases a property zoned to allow a certain density and she has no expectation that she has a right to build at any higher density. When facing a simultaneous down-zoning, however, the property owner has purchased with the expectation that she can build to the as-of-right density. After enactment, she must provide an amenity in order build according to her previous expectations. This seems like exactly the kind of scheme regulatory takings jurisprudence is trying to prevent: one where the government is, via regulation, effectively taking a property right in order to secure a public amenity.

2. *The Denominator Problem*

Property owners could also claim that a density bonus program constitutes a taking because it denies them the bonus density if they do not participate in the program. The developer asserts that if the maximum density under the density bonus

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[203] *See id.* at 124; *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).

[204] *Penn Cent.*, 438 U.S. at 124.

[205] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005).

[206] *Id.* at 539 (emphasis added).

program is consistent with the police power, to deny this bonus density constitutes a taking. This argument is in essence a regulatory takings claim. The initial difficulty in analyzing this claim is the so-called "denominator problem."[207] Regulatory takings jurisprudence focuses on the severity of the taking. This requires two calculations. First, a court must determine what rights the government has taken—the numerator. Second, a court must compare this numerator to the rights the developer had before the government action—the denominator.[208] The more narrowly the denominator is defined, the more likely a taking will be severe.[209] The critical question then becomes what the denominator is.[210] In challenging a density bonus program, a property owner might challenge a density bonus program by arguing: first, that the denominator is the bonus density; next, that the program denies her that bonus density entirely; and finally, that she is, therefore, entitled to compensation under *Lucas*.

While the Court has intimated that the government cannot avoid compensation by leaving the property owner with a "token interest,"[211] it has also refused to allow property owners to divide their property into discrete parcels in order to satisfy the *Lucas* total wipeout test.[212] This reflects Justice Holmes' concern that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[213]

The Court will clearly allow some amount of conceptual severance. However, on balance, precedent weighs against a property owner who claims a density bonus program is a taking under *Lucas* based on a denial of the entire bonus density. First, *Penn Central* did not allow a property owner to treat regulation of air rights as a total wipeout in a similar situation. In *Penn Central*, the regulation prohibited any use of the property owner's air rights,

[207] *See generally* Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (1996) (providing an overview of the denominator problem).

[208] *See id.* at 666.

[209] *See id.* at 666–68.

[210] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

[211] Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001).

[212] *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).

[213] Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

so the parcel the property owner sought to sever constituted a larger portion of the entire property than density bonus programs will typically affect.[214] Most density bonus programs do not condition all air rights; rather, they expressly set up two tiers of density, leaving property owners free to develop property up to the first tier density.[215] Admittedly, the *Penn Central* conclusion relied on the availability to the plaintiff of transferable development rights[216] and density bonus programs do not typically provide similar compensation for the inability to use the bonus density. However, the ability to transfer the development rights merely mitigates "whatever financial burdens the law has imposed . . . and, for that reason, are to be taken into account in considering the impact of regulation."[217] In other words, the TDRs simply lessen the severity of the regulation, they are not necessary to the validity of a regulation under *Penn Central*.

Second, allowing unlimited conceptual severance would open almost every zoning regulation to a takings challenge. This would be inconsistent with the treatment of other land use regulations under the Takings Clause. In *Keystone*, the Court had this to say:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes.[218]

This language would seem to cut against the property owner's claim that the denial of the density bonus is a taking. However, the denominator issue is far from clear. Therefore, it is important to assess whether, accepting that a density bonus program could be a taking requiring just compensation, a density bonus program

[214] *See Penn Cent.*, 438 U.S. at 130.
[215] Kayden, *supra* note 5, at 37–38.
[216] *Penn Cent.*, 438 U.S. at 137.
[217] *Id.*
[218] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987).

might survive because it provides compensation in the form of increased density.

3. *Just Compensation*

My discussion thus far has focused on the first half of the takings inquiry: whether the government has in fact taken the property. However, density bonus programs implicate both prongs of the takings inquiry. Even if the program constitutes a taking, the municipality might still argue that the bonus provided to the property owner in return for the regulation constitutes "just compensation." The denominator problem, discussed above, continues to complicate this issue. If a landowner was successful in showing that a density bonus program constituted a total taking, it would make little sense if the municipality could avoid compensation because it granted the bonus. As Justice Scalia has posited, including the bonus rights in the determination of whether a taking has occurred would simply allow the municipality to pay less than full compensation.[219] If one accepts the theory that additional rights must merely offset full compensation, the question of whether the density bonus is just compensation would depend merely on appraisal value. However, in a *Penn Central* action whether there has been a taking depends in part on reciprocity of benefits and burdens. It makes more sense to ask if density bonuses serve the purpose of the compensation requirement, rather than bifurcating the inquiry into whether a taking has occurred and, if so, whether the bonus is just compensation. In order to assess this issue, I examine density bonus programs in light of the two primary rationales for compensation: fairness and efficiency.

Under the fairness rationale, compensation "is required to correct for failures in the democratic process or to force government to treat similar property owners equally."[220] On the efficiency rationale, compensation "is necessary because governments will not pay sufficient attention to the costs their regulations impose unless they are forced to compensate those whose property values are diminished by the regulation."[221] I

[219] Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 747 (1997) (Scalia, J., concurring).

[220] ELLICKSON & BEEN, *supra* note 69, at 146.

[221] *Id.* at 145–46.

address each of these in turn.

At least where they are truly voluntary, density bonus programs would appear to satisfy the fairness principle. The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[222] The fairness principle might be satisfied if a program is voluntary. Indeed, "[i]t is not fair to require public benefits serving the entire community from one particular development or class of development, but it is reasonable to seek *voluntary* provision from one or several developments."[223] However, the distinction between a voluntary incentive and a mandatory exaction may be illusory.[224] If as-of-right zoning denies all use unless the property owner participates in the density bonus program, it would be difficult to characterize developer participation as "voluntary."[225] Even where the municipality allows some use, participation may not be effectively voluntary. If as-of-right density is so low that development is infeasible, a "voluntary" program may be effectively mandatory because a developer will have no choice but to participate.[226] Therefore, whether compensation in the form of bonus density satisfies the fairness principle will depend on whether the density bonus program is truly voluntary.

Density bonus programs are more problematic under the efficiency principle of the Takings Clause. If government does not incur meaningful costs when taking property it might take more property than it needs.[227] Several commentators suggest courts

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[222] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[223] Alterman & Kayden, *supra* note 28, at 26 (emphasis added).

[224] *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 570 n.110 (The "difference between exaction and incentive zoning terminology might be seen as a question of where the baseline building right is seen to lie. If the building rights are viewed in some sense as already inhering in the property, the demanded public amenity should be called an 'exaction.' However, if the building rights are viewed as a gift by the zoning authority given as a reward to those who provide public amenities, the additional building rights should be referred to as incentive zoning rights.").

[225] For a transaction to be voluntary there must be some benefit to the bargaining parties, and a basic level of use cannot serve as that benefit. *See* Nollan v. Cal. Costal Comm'n, 483 U.S. 825, 834 n.2 ("[T]he right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'").

[226] *See* Been, *supra* note 31, at 478 n.29.

[227] *See* POSNER, *supra* note 75, at 64 ("Without [the requirement of just

should therefore enforce a robust compensation requirement.[228] Unfortunately, "[a]ny constitutional assessment of incentive zoning under the just compensation clause ultimately falls prey to the circularity of private property rights definitions."[229] If one takes an expansive view, property rights are absolute and subject only to the limitation that property be used in such a manner as not to injure others' interests.[230] Density bonuses, therefore, could not serve as compensation because the additional density already belongs to the property owner. On the opposite view, property rights are a "creature of government largesse."[231] If we accept this view, a density bonus program could deny any level of development unless a developer provided an amenity. Resolving this argument is beyond the scope of this Note. However, it is important to note that whether density bonus programs are questionable from an efficiency perspective will depend on the conception of property rights employed.

Beyond this question, the strategic problem reappears. The reason that the just compensation requirement ensures efficiency is that the government must pay cash for the property it takes. Therefore, the government will incur the full cost of its actions. The bonus density does not clearly capture the cost of the government action for two reasons. First, granting the density does not impose the same cost on the municipality as a cash payment does. Cash payments are drawn from the entire community via tax revenue. Government and citizenry incur the full cost of the cash payment because it actually decreases the amount of cash available for other expenditures. Where the government compensates with density, unlike cash, government does not bear the full cost of density. The costs will be disproportionately concentrated on neighboring property owners. This suggests the second reason that bonus density does not satisfy the efficiency principle. The density does have costs, just as cash compensation would, but the costs of density are not spread

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compensation], government would have an incentive to substitute land for other inputs that were cheaper to society as a whole but more expensive to the government.").

[228] *See* ELLICKSON & BEEN, *supra* note 69, at 149–51 (providing a summary of the debate).

[229] Kayden, *supra* note 5, at 48.

[230] Bell & Parchomovsky, *supra* note 224, at 612–13.

[231] *See id.*; *see also* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 881–82 (1987).

equally across the municipality. The neighbors of the property that receives the density bonus will bear a disproportionate share of the costs. Of course, if the neighbors are politically powerful and well connected, elected officials may feel the burden of this density in future elections. However, the cost incurred by the government will vary with the political influence of the affected area. Those areas that have less power will be less able to protect themselves.

D. *Substantive Due Process*

As discussed above, Judge Posner's opinion in *Coniston* exemplifies the federal courts' skepticism of landowner due process challenges to zoning ordinances.[232] This skepticism has translated into a very high level of deference to zoning ordinances.[233] Of course, legislative enactments receive deference; as long as they do not infringe upon a fundamental right, they are reviewed under rational basis, and they are presumptively valid unless the challenging party can show that they are not rationally related to a legitimate state interest.[234] But this burden has been especially heavy with regard to land use regulations. Only the "most egregious" action will violate substantive due process.[235] Federal courts have required that a land use regulation "shock the conscience",[236] be "truly irrational,"[237] or constitute "grave unfairness"[238] before they strike it down.

[232] *See supra* notes 141–48 and accompanying text.

[233] *See* cases cited *supra* note 185.

[234] *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 537–38 (1998); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486–88 (1955).

[235] *See* City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 198 (2003).

[236] *See, e.g.*, United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 394 (3d Cir. 2003); *see also* Bowers v. City of Flint, 325 F.3d 758, 763 (6th Cir. 2003); Baker v. Coxe, 230 F.3d 470, 474 (1st Cir. 2000). *See generally* ELLICKSON & BEEN, *supra* note 69, at 102 (providing an overview of these cases).

[237] Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992) (quoting Lemke v. Cass County, Neb., 846 F.2d 469, 472 (8th Cir. 1987) (Arnold, C.J., concurring)).

[238] George Washington Univ. v. District of Columbia, 318 F.3d 203, 209 (D.C. Cir. 2003).

1. *Challenges by Property Owners*

There are several reasons to disagree with the *Coniston* rationales. But even if we accept them, there are other reasons that the standard of review should be slightly higher for property owner challenges to density bonus programs. First, density bonus programs share characteristics of the constitutionally suspect government actions, like exactions, that would trigger heightened review. Moreover, because the government has greater incentive to overreach in a density bonus program than it does in the enactment of a general zoning ordinance, density bonus programs are more likely to threaten the property interests the Due Process Clause is meant to protect. Additionally, the burden of a density bonus program may fall on a small number of property owners who may be less able to protect themselves in the political process. Courts, therefore, should review density bonus programs more closely than they would a zoning ordinance. The "most egregious" standard is insufficient.

However, it would be inappropriate for courts to apply strict scrutiny. Density bonus programs are also similar to government actions that receive judicial deference. The programs expressly allocate benefits and burdens just as the zoning ordinance does. Moreover, the *Coniston* rationales still do not countenance such a high level of review. *Coniston's* separation of powers concerns remain, and the Takings Clause protects property owners from effective ousters of ownership.[239]

Density bonus programs may require delicate, complex calculations that exceed the sophistication of many localities. If the municipality overvalues the amenities or undervalues the cost increased density imposes on the community, developers will construct more of the amenity than is socially optimal. However, localities routinely make implicit cost benefit allocations. Simply because a density bonus program makes the valuation explicit should not condemn it to suspicion. Rather, the explicitness of the process should find favor precisely because it is transparent. The potential for inaccuracy is not confined to density bonus programs, yet other legislative schemes have been sustained in the face of

[239] *See* Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464–66 (7th Cir. 1988).

innocent miscalculation or even transparent rent-seeking.[240] As Kayden observes, if a locality "may balance police against libraries, then it is difficult to contend that they may not pit additional congestion against social amenities."[241]

2. *Challenges by Neighbors*

Challenges by neighbors, however, should not have the benefit of heightened review. While density bonus programs may give governments incentive to place the burden of density on less powerful members of the community, it is not clear that this problem is any worse for density bonus programs than it is for the zoning ordinance.

Claims by neighbors that they bear a disproportionate burden of increased density have substantial similarity to environmental justice claims. Environmental justice claims have struggled with the intent requirement of the Equal Protection Clause.[242] A municipality may have the most difficulty in calculating the proper bonus level for a particular amenity where it cannot easily associate the amenity with the increased density. For example, where the municipality receives an art museum in return for allowing increased density, the locality may have difficulty setting the bonus at a level that accurately reflects community preferences. Determining the marginal increase in subway ridership resulting from an increase in density is relatively easy compared to setting the value of a museum. So the nexus and proportionality requirements of *Nollan*[243] and *Dolan*[244] might have something to recommend them in this context. This is not because of the risk of government extorting property owners[245] but because the nexus

[240] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) ("[L]itigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.").

[241] Kayden, *supra* note 5, at 30.

[242] "Early environmental justice cases floundered under the . . . intent requirement." ELLICKSON & BEEN, *supra* note 69, at 755. *See generally* Kyle W. La Londe, *Who Wants to be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of* Alexander v. Sandoval, 31 B.C. ENVTL. AFF. L. REV. 27 (2004) (discussing potential federal environmental justice claims).

[243] *See* Nollan v. Cal. Costal Comm'n, 483 U.S. 825, 837 (1987) (requiring a nexus between an exaction and the purpose of the original property restriction).

[244] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring that exactions be "roughly proportional" to a proposed development's impact).

[245] Several commentators have recognized that a primary fear of the court in

requirement might protect third parties from innocent miscalculations that are likely to result in inefficient outcomes.[246]

However, allowing neighbors to challenge density bonus programs under nexus and proportionality tests would be inappropriate. The *Coniston* rationales do not countenance anything more than heightened review for challenges by neighbors because they do not present as significant a threat to neighbors' rights as to property owners' rights.[247] With regard to neighbors' rights, these programs do not seem much different than a traditional zoning ordinance. The density bonus program, much like a zoning ordinance, sets out a permissible density. Moreover, if neighbors are given a relatively easy standard to meet, those with the resources for litigation may have a disproportionate influence in determining the balance of benefits and burdens. The best way to protect neighbors from the ills of increased density, as it is for protecting minorities from environmental harm, may be legislative.[248]

CONCLUSION

The strategic problem is real. A municipality could enact a density bonus program to "print money," effectively shifting the cost of providing public amenities to property owners and circumventing constitutional limits that are designed to ensure fairness and efficiency. Where it is clear that the municipality is acting strategically a court would be right to strike the program down. However, it is important to remember that the strategic municipality is merely a potential. Density bonus programs are most defensible under the externality and value creation rationales, because programs that rely on these rationales are more likely to approach outcomes that are equitable, by imposing an obligation

Nollan and *Dolan* was that powerless property owners were being extorted by overzealous local land use regulatory bodies. *See, e.g.*, Fennell, *supra* note 27, at 9; Kayden, *supra* note 5, at 46–47.

[246] For an assessment of nexus requirements to protect third parties, see Fennell, *supra* note 27, at 40–41; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); *see also* Been, *supra* note 31, at 497–98.

[247] *See* Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464–66 (7th Cir. 1988).

[248] Admittedly, these legislative solutions have been criticized.

that is based directly on the costs that the property owner creates and that are efficient, by forcing developers to fully internalize these costs. Density bonus programs may also allow municipalities to address nettlesome urban problems, like development of affordable housing, without significant administrative cost. These potential benefits are substantial enough that the mere potential for strategic behavior should not condemn density bonus programs. However, density bonus programs should not be per se valid. Where they do not feature real incentives it is less likely that the programs are defensible.

Courts, therefore, should focus on whether the incentives are real. If the incentive is real, a program will not burden the property owner's rights but rather offer the property owner a benefit. In most circumstances, takings analysis will be ill-suited to determining if a program offers real incentives because of difficult baseline questions. Substantive due process, which allows courts to examine the allocation of the costs and benefits, is more appropriate. Most programs will properly survive this inquiry. Even if municipalities are likely to make errors in calculating bonuses, most of these problems can be dealt with by fine-tuning the mix of amenities and bonuses and by adjustments through the political process. Because the success of a density bonus program is dependent upon the accuracy of these calculations, special attention should be paid to the method of calculation. Moreover, for certain amenities, it may be easier to determine the relationship between the amenity and the cost of density as well as the amenity's value to the municipality. Important areas for further research, therefore, might include an empirical survey of the successes and failures of the calculation methods outlined above, as well as an examination of the relative success of different classes of amenities.

Density bonus programs are an innovative planning approach that may allow municipalities to address difficult urban problems. Because they impose the costs of density on developers and allow the municipality to secure amenities they may have intuitive appeal. They are not, however, a panacea. Municipalities must be careful to ensure that they are property considered and calculated. Courts have a less prominent but important role to ensure that the municipality does not push too far.