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Urban Agriculture and Other Green Uses: Remaking the Shrinking City

Catherine J. LaCroix*

FOR MANY DECADES, the primary challenge of land use law has been how to promote and channel growth.¹ Cities encourage new construction and high-value economic activity,² at the same time that they try to manage land use patterns through a city plan.³ Disputes over the proper use of eminent domain arise when cities use this power to encourage private development;⁴ disputes over the proper scope of regulatory power arise when regulators attempt to shape density by restricting development.⁵ There is an entire body of law on the topic of how to con-

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1. *E.g.*, STUART MECK, GROWING SMART LEGISLATIVE GUIDEBOOK xxvii-xxviii (American Planning Association 2002) (explaining the development of land use law as necessary to “manage growth and change”); JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 18-22 (2d ed. 2007) (history of land use law focused on addressing the challenges of urban growth); DANIEL R. MANDELKER, LAND USE LAW 3.01 (5th ed. 2002) (comprehensive plans are “future oriented” and “project the development of a community to a future point . . . in the community’s growth.”); Karina Pallagst, *Shrinking Cities: Planning Challenges from an International Perspective*, in CITIES GROWING SMALLER 10 (2008), available at <http://www.cudc.kent.edu/shrink/CGS/cgsdownload.html>.

2. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 474 (2005) (upholding New London’s use of eminent domain to take plaintiff’s small home, to revitalize a blighted area by comprehensively redeveloping it to include a “waterfront conference hotel,” restaurants, shopping, a museum, and “research and development office space”).

3. *See, e.g.*, MANDELKER, *supra* note 1, at 3.01 (comprehensive plans “plan for the physical development of the community”).

4. *E.g.*, *Kelo*, 545 U.S. 469. The *Kelo* decision set off an upsurge in “anti-*Kelo*” state legislative initiatives, designed to limit the use of regulatory takings to foster redevelopment by private industry. *See* Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657 (2007).

5. *See infra* Part III; *e.g.*, *Constr. Indus. Ass’n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975); 1000 Friends of Oregon v. Wasco County Court, 703 P.2d 207 (Or. 1985). Oregon’s comprehensive land use planning, with restrictions on development, led to a popular revolt in Ballot Measure 37, adopted in 2004 (and a counter-measure three years later, as the effects of Measure 37 began to be felt). *See MacPherson v. Dep’t of Admin. Servs.*, 130 P.3d 308 (Or. 2006) (en banc) (upholding the constitutionality of Measure 37).

strain rapid growth.⁶ The modern “smart growth” movement focuses on areas where growth is pronounced; it seeks to make it better.⁷ Thus the underlying assumption of land use law is that economic and population growth is both our expectation and, when properly shaped, our goal.⁸ Historically, declining cities have focused on fostering growth and development.⁹ Urban redevelopment efforts seek to attract businesses to lift depressed areas from their slump.¹⁰ Nobody wants stagnation; the cure is growth. We often assume that if a city is not growing there is something wrong.¹¹

In the last several years, however, some cities have begun to openly address a previously unacknowledged truth: some cities will and do shrink.¹² They lose population and have no foreseeable prospect of regaining it. Certainly we all know this happens: the ghost town is a standard feature of the lore of the American West. But in modern times, shrinkage has not been an outcome that cities plan for, or embrace.

The land use planning community has begun to grapple with the issue of the shrinking city. Efforts at institutions such as the Kent State University Cleveland Urban Design Collaborative¹³ and the Shrinking Cities Group at the Institute of Urban and Regional Development at

6. See *infra* text accompanying note 89. The topic of growth management and smart growth consumes an entire chapter in two standard treatises. JUERGENSMEYER & ROBERTS, *supra* note 1; MANDELKER, *supra* note 1, at 3.01.

7. MECK, *supra* note 1, at xxxi (offering comprehensive recommendations to revise and improve land use controls, stating “we must grow in a *smarter* way”).

8. See *id.*

9. See, e.g., Laura M. Bassett, *Tax Increment Financing as a Tool for Redevelopment: Attracting Private Investment to Serve a Public Purpose—The Example of Michigan*, 41 URB. LAW. 755 (2009) (use of tax increment financing to attract high-value new investment); Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U.L. REV. 895, 909 (2006) (explaining that inner ring suburbs are constrained by the lack of developable land and need to find ways to foster tax revenue growth through economic development).

10. See *Kelo v. City of New London*, 545 U.S. 469, 474 (2005); Bassett, *supra* note 9, at 756.

11. If a city is not growing, we refer—not to stability—but stagnation or “blight” (sometimes loosely defined to mean—in essence—unchanged over many years). See, e.g., Pritchett, *supra* note 9, at 911 (explaining that “blight” designation in Lakewood, Ohio is used for any residence without three bedrooms, an attached two-car garage, and central air conditioning); *id.* at 912-13, 915 (finding that cities and developers tend to desire growth).

12. See, e.g., *infra* note 24 and accompanying text.

13. Cleveland Urban Design Collaborative, *Who We Are*, www.cudc.kent.edu/a-whowere/whowere.html (last visited Mar. 30, 2010). As the site explains, the Urban Design Collaborative

is a community service organization with a professional staff of architects, planners, urban designers, and landscape designers committed to improving the quality of urban places through technical design assistance, research and advocacy. Supported

Berkeley¹⁴ focus on the shrinking city with this question in mind: how can we achieve managed, “smart” shrinkage? How can a shrinking city be made a viable, pleasant place for its remaining residents?

Shrinking cities pose new legal questions. What constraints might land use law impose on a city’s goals of diminishing its infrastructure responsibilities, downzoning its land to less intensive uses, or taking other steps consistent with a goal of managed shrinkage? This article explores some key issues, using current developments in Cleveland, Ohio—including an active movement to re-green the city through urban agriculture and other green uses—as an example. Part I describes the shrinking cities concept. Part II shows that, although managed shrinkage is a new idea that runs contrary to the land use tradition, existing land use regulatory tools can be used to implement it. Part III considers possible legal challenges, particularly takings claims, that the shrinking city effort might face, particularly when downzoning urban property for urban agriculture and other green uses. It concludes that takings issues, though potentially difficult, can for the most part be overcome. Part III also briefly considers the fairness issues associated with downzoning and the limitations of the current legal structure for revitalizing brownfields in a setting where traditional redevelopment is unlikely. This article concludes that thoughtful, careful city planning can help a city remake itself, even if that process involves encouraging green uses, such as urban agriculture, that do not fit our traditional understanding of an urban environment.

I. The Shrinking Cities Challenge

What is a shrinking city? There is no single definition,¹⁵ but several cities of the American Northeast can tell you they know it when they see it. Detroit, Cleveland, Buffalo, and Youngstown, to name a few, share similar characteristics: long-term trends of significant population decline, associated with the loss or diminution of the industries that caused the cities to grow in the first place.¹⁶ Buffalo’s population, for example,

by the College of Architecture and Environmental Design at Kent State University, the CUDC offers urban design expertise and applied research in the service of urban communities, design professionals, and public policy efforts.

Id.

14. Shrinking Cities Group, www-iurd.ced.berkeley.edu/scg/ (last visited Mar. 30, 2010).

15. Pallagst, *supra* note 1, at 7.

16. LORLENE HOYT & ANDRÉ LEROUX, VOICES FROM THE FORGOTTEN CITIES (2007), available at www.youngstown2010.com (follow “forgotten cities” hyperlink);

has dropped from 580,000 in 1950 to 279,000 in 2005;¹⁷ Cleveland's has dropped from a high of 914,808 in 1950 to approximately 438,042 in 2007.¹⁸ While the suburbs of both of these cities are relatively robust (though with some signs of decay at the inner ring)¹⁹ the cities themselves are hollowed out by dramatic population loss. Jobs in industries such as steel and auto-making are gone and are not expected to return;²⁰ the cities are victims of a "convergence of factors—poverty, property speculation, fiscal instability of local government, poorly performing schools and crime."²¹ While each city endeavors to foster development and redevelopment to combat decay,²² each city also has come to the conclusion that it cannot expect significant population increases in the foreseeable future.²³

From a land use perspective, the term "shrinking city" is a misnomer; perhaps "hollowing city" would be more appropriate. Although the typical shrinking city has experienced significant population decline, the physical footprint of the city itself remains the same size. Cleveland, for example, is a relatively lightly populated core in a sprawling metropolitan area. Thus the fundamental land use question for such cities is what to do with their unused or under-used land in the core.

Joseph Schilling, *Buffalo as the Nation's First Living Laboratory for Reclaiming Vacant Properties in CITIES GROWING SMALLER* 33 (2008).

17. Schilling, *supra* note 16, at 33.

18. CLEVELAND LAND LAB, RE-IMAGINING A MORE SUSTAINABLE CLEVELAND: CITYWIDE STRATEGIES FOR REUSE OF VACANT LAND 2 (2008), www.cudc.kent.edu/shrink/images/reimagining_final_screen-res.pdf [hereinafter RE-IMAGINING].

19. The Ohio First Suburbs Consortium was established to address problems of urban decay in inner ring suburbs in cities across Ohio. As its mission statement explains: "Although the OFSC member-communities are diverse in character, most are built-out or approaching that condition and virtually all are facing severe economic and fiscal stress." Ohio First Suburbs Consortium, www.firstsuburbs.org (last visited Mar. 30, 2010). This is a condition found in other inner ring suburbs nationwide. See Pritchett, *supra* note 9, at 909 (suggesting inner ring suburbs are constrained by the lack of developable land and need to find ways to foster tax revenue growth through economic development).

20. E.g., Pallagst, *supra* note 1. (attributing urban core population losses to both suburbanization and the "downward spiral" of the manufacturing industry). Youngstown's City Plan poignantly notes that, "When steel's reign came to a screeching halt and the smoke literally cleared, Youngstown was left with no vision and no plan to deal with the aftermath. . . ." THOMAS A. FINNERTY JR. ET AL., YOUNGSTOWN 2010 CITYWIDE PLAN 14 (2010), available at www.youngstown2010.com (follow "About Youngstown" to "Youngstown 2010 Citywide Plan").

21. Schilling, *supra* note 16, at 33.

22. See, e.g., City of Cleveland, Development Projects, <http://planning.city.cleveland.oh.us/projects/index.php> (last visited Mar. 30, 2010); Youngstown Office of Economic Development, <http://www.ytowndevelopment.com> (last visited Mar. 30, 2010).

23. E.g., RE-IMAGINING, *supra* note 18 ("Re-Imagining . . . starts from the premise that the loss of population over the last 60 years is not likely to be reversed in the near term . . .").

Several of the shrinking cities have considered how best to address the problem of underpopulation and varying approaches have been adopted. Youngstown has decided to abandon streets, close down infrastructure, and consolidate its remaining population in selected areas.²⁴ In Detroit, there is a grassroots pattern of re-suburbanization, as remaining homeowners acquire adjacent lots for home and garden expansion.²⁵ Cleveland is taking a range of steps of which three are significant here: the State of Ohio has approved legislation establishing a county-wide land bank with the power to acquire and demolish buildings on vacant properties,²⁶ a coalition of government and non-governmental interests has developed a multi-faceted vision for the future in a recent report, *Re-Imagining a More Sustainable Cleveland*,²⁷ and Cleveland has adopted a specific zoning category for urban gardens, including market gardens.

Both the land bank and the Re-Imagining report respond to the same problem: the large number of vacant lots and abandoned buildings found throughout the most blighted areas of cities like Cleveland. While the city's population has been declining for years, the blight accelerated with the mortgage lending abuses that began to attract attention in Cleveland as early as 2000.²⁸ As of March 2009, estimates of vacant houses in the city of Cleveland were as high as 15,000, or more than one in thirteen.²⁹ Most of Cleveland's vacant houses are owned by lenders

24. As Youngstown's Plan notes, the city has lost half its population since 1960. FINNERTY ET AL., *supra* note 20, at 30. Large numbers of abandoned properties dot the city. *Id.* at 36. As a result, the city concluded that "Not all infrastructure can be maintained and not all neighborhoods can be returned to their past sustainability." *Id.* at 37. The current plan reallocates uses: some abandoned areas of housing and unnecessary commercial zones are redesignated "industrial green"—a new category of "non-polluting environmentally friendly" industrial use. *Id.* at 49-51. Overall, the land use plan calls for a thirty percent decrease in land intended for residential use. *Id.*; see also David Streitfeld, *An Effort to Save a City by Shrinking It*, N.Y. TIMES, Apr. 22, 2009, at A12 (discussing comparable efforts in Flint, Michigan).

25. Tobias Amborst et al., *Improve Your Lot! in CITIES GROWING SMALLER* 33 (2008). This trend developed in the 1990s despite the absence of any municipal mechanism facilitating such purchases. See *id.* at 58-59; see also Thomas Gunton, *Coping with the Spector of Urban Malaise in a Post Modern Landscape: The Need for a Detroit Land Bank Authority*, 84 U. DET. MERCY L. REV. 521 (2007) (discussing a land bank for the Detroit area that ultimately was approved in November 2006).

26. S.B. 353, 127th Gen. Assem., Reg. Sess. (Ohio 2007).

27. RE-IMAGINING, *supra* note 18.

28. For an excellent history of the impact of questionable mortgage lending practices and their resulting waves of foreclosures, see Kermit J. Lind, *The Perfect Storm: An Eyewitness Report from Ground Zero in Cleveland's Neighborhoods*, 17 J. AFFORDABLE HOUSING & COMMUNITY. DEV. L. 237 (2008).

29. Alex Kotlowitz, *All Boarded Up*, N.Y. TIMES, March 8, 2009, § MM, at 28. ("The city estimates that 10,000 houses, or 1 in 13, are vacant. The county treasurer says it's

who foreclosed on the properties, by speculators who purchase foreclosed properties in bulk, or (increasingly) by defaulting owners when the lender declines to take the property, deeming it a liability more than an asset.³⁰ Vacant and abandoned buildings attract crime, pose a fire hazard, and reduce the value of surrounding properties.³¹ They signal that a neighborhood is on the decline.³² The land bank offers a mechanism to take public control of distressed properties and direct them to an appropriate use; the Re-Imagining report envisions new, non-residential uses for excess properties.

A. *The Cuyahoga County Land Bank*

In general, a land bank is a governmental entity that takes title to tax-delinquent property, secures the property and perhaps demolishes structures on it, and transfers the property back to private ownership with a clear title, to ensure that the property can be put to productive (and tax-paying) use.³³ Land banking is not new to Cleveland. The city's

more likely 15,000.") Cleveland is not alone in its plight; the foreclosure crisis and economic decline in some central cities has prompted national concern, as evidenced by the work of the National Vacant Properties Campaign, which asserts that "according to the Brookings Institution, Vacant and abandoned properties occupy about 15 percent of the area of the typical large city, more than 12,000 acres on average." National Vacant Properties Campaign, Smart Growth, <http://www.vacantproperties.org/issues/smartgrowth.html> (last visited Mar. 10, 2010); see also John Landis, *The Shape of the New American City: Part Three: The Metropolitan Footprint: Sprawl and Reurbanization: the Changing Shape of Metropolitan America*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 154, 166 (2009) (tracking Census Bureau data to show that, overall, metropolitan areas in the United States are growing, but that ten of the fifty largest core cities lost population between 1990 and 2007; "[t]he biggest percentage losers (Detroit, St. Louis, Cleveland, and Baltimore) were also the biggest absolute losers.").

30. Kotlowitz, *supra* note 29; see also Lind, *supra* note 28, at 238-40 (describing the history of Cleveland).

31. See, e.g., THOMAS FITZPATRICK, UNDERSTANDING OHIO'S LAND BANK LEGISLATION 1 (2009), <http://www.clevelandfed.org/Research/PolicyDis/pdp25.pdf>; Creola Johnson, *Symposium Subprime Meltdown: The Law and Finance of the American Home Mortgage Foreclosure Crisis: Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1181-84 (2008) (documenting the impact of vacant housing with examples from Cleveland, St. Louis, Detroit, and Philadelphia, as well as data gathered by the National League of Cities and National Fire Protection Agency); David T. Kraut, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139 (1999).

32. Fitzpatrick, *supra* note 31.

33. Matthew J. Samsa, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 213-14 (2008). Other cities that have established land banks include St. Louis, Louisville, Atlanta, and the City of Flint and Genesee County in Michigan. Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 140, 146 (2005); see, e.g., Genesee County Land Bank, <http://thelandbank.org> (last visited Mar. 10, 2010).

own land bank was created in the 1970s during the city's first round of serious deterioration.³⁴ At that time, the city had more than 11,000 tax delinquent parcels and the city responded by persuading Ohio to adopt laws authorizing a land bank for such properties.³⁵ "Thousands of abandoned parcels flowed into the land bank to be administered by the city's Community Development Department. [C]heap properties with cleared, marketable titles"³⁶ were made available through the land bank to foster redevelopment.³⁷

In recent years, some influential public figures in Cuyahoga County, in which Cleveland is located, concluded that the city's own land bank had some serious shortcomings in addressing the foreclosure crisis that began in 2000.³⁸ The original Cleveland land bank was adopted under legislation that authorized a passive land bank program.³⁹ When the city foreclosed on a tax-delinquent property, the property would be advertised and offered for sale;⁴⁰ if not purchased after two auctions, the land bank could receive the property for management and resale.⁴¹ This mechanism allowed speculators to purchase property at auction, preventing it from reaching the land bank. As the city continued to deteriorate from 2000-2009, hundreds of properties went into the hands of absentee owners who failed to maintain the properties and allowed them to continue to deteriorate.⁴² Moreover, the land bank tended to acquire only unimproved land, in order to avoid the costs associated with demolishing vacant buildings.⁴³

34. Alexander, *supra* note 33.

35. *Id.* at 147.

36. Norman Krumholz, *Land Banking and Neighborhood Revitalization in Cleveland*, PLANNERS' CASEBOOK, AMERICAN INSTITUTE OF CERTIFIED PLANNERS (2002), reprinted in DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 641 (5th ed. 2008).

37. *Id.* at 641-42.

38. This group included the Cuyahoga County Treasurer, James Rokakis, and several state legislators. Cuyahoga Land Bank, About the Land Bank, <http://www.cuyahogalandbank.org/about.php> (last visited Mar. 10, 2010).

39. OHIO REV. CODE ANN. § 5722.06 (LexisNexis 2010); see CLEVELAND, OHIO, CODIFIED ORDINANCES tit. XV, ch. 183.021 (2009).

40. OHIO REV. CODE ANN. §§ 5721.18-19, 5722.03-06 (LexisNexis 2010); see KERI BLACKWELL, MODEL PRACTICES IN TAX FORECLOSURE & PROPERTY DISPOSITION: CLEVELAND CASE STUDY (2003), <http://www.lisc.org/content/publications/detail/797>.

41. See OHIO REV. CODE ANN. § 5722.03 (LexisNexis 2010); Fitzpatrick, *supra* note 31.

42. See Kotlowitz, *supra* note 29; FITZPATRICK, *supra* note 31, at 3-4.

43. See OHIO REV. CODE ANN. § 5722.01(F) (LexisNexis 2010); see also § 5722.03 (no statutory authority for acquisition from lenders); FITZPATRICK, *supra* note 31, at 3-4 (discussing how banks only take unimproved land); BLACKWELL, *supra* note 40 (describing Cleveland's tax foreclosure acquisition system).

In January 2009, the Ohio legislature adopted a measure to authorize a new form of active, county-wide land bank in Cuyahoga County.⁴⁴ By virtue of its county-wide scope, this land bank would include not only the city of Cleveland but also the relatively prosperous adjacent suburbs within the county.⁴⁵ The county land bank would operate as a distinct legal entity⁴⁶ with its own sources of funding,⁴⁷ empowered to acquire tax-delinquent properties directly without the intervening step of the public auction.⁴⁸ In addition, the county land bank would be able to negotiate with lenders to acquire bank-owned foreclosed properties, acquire property as a gift, or purchase properties from individuals.⁴⁹ Because some of the properties would be in the suburbs outside Cleveland, they would be more likely to have value and offer a source of income upon sale. The county land bank could decide whether a building on the property was best rehabilitated or demolished. It would be able to bundle clusters of properties as needed to make them more attractive for development.⁵⁰

The county's land bank is in its infancy,⁵¹ and is working out its relationship with the cities within the county,⁵² so at this point it cannot be known whether it will live up to its promise.⁵³ The county land bank works with the pre-existing Cleveland City land bank to determine the

44. § 1724.04.

45. § 1724.10 (land bank as agent of the county). Cuyahoga County encompasses not only the City of Cleveland, but a wide range of adjacent suburbs including Shaker Heights, Cleveland Heights, Lakewood, and others. *See* Map of Communities—Cuyahoga County Board of County Commissioners, <http://bocc.cuyahogacounty.us/en-US/map-communities.aspx> (last visited Mar. 10, 2010).

46. §§ 1724.04, 5722.02(B).

47. §§ 1724.02(A), (C), (H), 321.341, .261(A), 307.698, 5705.19(EE), (UU).

48. OHIO REV. CODE ANN. §§ 323.78, 1724.02 (LexisNexis 2010).

49. § 1724.02.

50. § 1724.01(B), .02; *see also* Strategic Land Assembly: Cuyahoga County Ohio Land Bank, http://www.cuyahogalandbank.org/land_assembly.php (discussing strategic land assembly by the land bank); FITZPATRICK, *supra* note 31, at 5-6.

51. The bank was incorporated on April 9, 2009, and named the Cuyahoga County Land Bank. Cuyahoga County Resolution (Apr. 16, 2009), *available at* http://www.cuyahogalandbank.org/documents/organizational/Res_091413_Certified_Incorp_of_CLRC.pdf

52. By law, any city within the county may reach an agreement concerning property that flows into the bank, setting general policies and practices for how properties shall be handled. *See* § 5722.02(D). For certain properties, any city within the county has a thirty day "priority right of acquisition" over property that is placed in the county bank. *Id.* The Land Bank's web site notes: "The CCLRC has many options for what to do with property it acquires, but each Cuyahoga County city is a major partner in the decision regarding what will be done with properties that lie within its own jurisdiction," Cuyahoga Land Bank, *supra* note 38.

53. Already it has been applauded as a "national model," and the Ohio legislature is considering authorizing land banks like it in other areas of the state. Cuyahoga Land Bank, Cuyahoga County Land Reutilization Legislation Called "National Model" (Dec. 4, 2009), http://www.cuyahogalandbank.org/articles/20091204_clrc_national_model.php.

fate of properties within that city.⁵⁴ If, however, the two land banks control a significant quantity of vacant land in Cleveland, they can be a source of publicly owned land to be kept in public hands or turned over to private entities, for use as envisioned in the *Re-Imagining* report, described below.⁵⁵

B. *Re-Imagining a More Sustainable Cleveland*

Over the past decade, it has become apparent that Cleveland and cities like it are unlikely to return to their industrial past; they must find new ways to move forward, and take advantage of opportunities for innovation. *Re-Imagining a More Sustainable Cleveland* is the city's first major step in that new direction, outlining new strategies for using vacant or under-utilized land.⁵⁶ While *Re-Imagining* emphasizes green infrastructure (such as ecosystem restoration, remediation, and green space) and productive landscapes (agriculture and alternative energy such as geothermal and wind turbine power), it is important to acknowledge that the Cleveland City Plan addresses both growth and shrinkage: the city seeks to attract new development and to foster local engines of economic growth where possible, focusing on areas of the city where growth is most promising. At the same time the city recognizes that its

54. § 5722(D). As noted on the Land Bank's web site, "the City of Cleveland operates its own land bank and will take title to all vacant land produced by CCLRC demolitions within its city limits." Cuyahoga Land Bank, *supra* note 38. Cleveland's land bank is located within the Community Development department. City of Cleveland Ohio, Division of Real Estate, <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/CommunityDevelopment/LandBank> (last visited Mar. 30, 2010).

55. The Land Bank specifically supports urban agriculture:

The CCLRC will seek to partner with public and private sector organizations to use the CCLRC's inventory to support urban agriculture. The CCLRC will assist community groups wishing to develop and maintain gardens in targeted areas. The gardens can be a part of a broader water retention or beautification initiative, or a food distribution network. Parameters will be provided to guide development.

Cuyahoga Land Bank, Demolition and Vacant Lot Re-Use, http://www.cuyahogalandbank.org/demo_vacant_reuse.php (last visited Mar. 30, 2010). *See generally* Samsa, *supra* note 33 (discussing the characteristics and value of land banking in community revitalization).

56. *Re-Imagining* was the result of a one year planning process, in which the co-operating institutions "explored strategies for reuse of vacant land with the goal of making Cleveland a cleaner, healthier, more beautiful, and economically sound city." RE-IMAGINING, *supra* note 18, at 1. The thirty member working group focused on identifying goals and strategies, policy changes that might be necessary, and opportunities for pilot projects to test its principles. *Id.* The coalition that prepared the report consisted of the Cleveland City Planning Commission, the Cleveland Land Lab at the Cleveland Urban Design Collaborative of Kent State University, and a nonprofit organization, Neighborhood Progress, Inc, with financial support from the Surdna Foundation. *Id.* During the summer of 2009, Neighborhood Progress, Inc., funded pilot projects to investigate some of the strategies identified in *Re-Imagining*. Neighborhood Progress, Key Initiatives, <http://neighborhoodprogress.org> (last visited Mar. 30, 2010).

long-term health is threatened by vacant and abandoned properties that are not located in pathways of development, and that new uses for these properties must be found.⁵⁷

Consistent with this two-pronged growing and shrinking strategy, *Re-Imagining* presents a decision tree for individual vacant sites in the city. This decision tree, endorsed by the Cleveland City Planning Commission and designed to guide disposition of property in the city's own land bank,⁵⁸ shows how the city envisions allocating property between green and traditional developmental uses. The city might select ecologically valuable or sensitive properties for preservation through a variety of uses: alternative energy generation, storm water management (such as through bio-retention or as a constructed wetland), green space, remediation through bioremediation, phytoremediation, or mycoremediation, or urban agriculture.⁵⁹ Other properties are assessed to determine their long-term development potential. Areas with strong development potential might be designated for a holding strategy: landscaping or bioremediation. For areas with weak development potential, *Re-Imagining* identifies the following menu of possible treatments:

- Community garden
- Bioremediation, phytoremediation, mycoremediation
- Constructed wetland
- Deep tillage/pavement removal
- Basic greening techniques
- Solar field
- Urban agriculture/commodity farming
- Storm water management: riparian setbacks, stream daylighting.⁶⁰

Although this decision tree formally relates only to sites already in the city's possession (properties that have found their way into the city's land bank of vacant sites),⁶¹ it shows how the *Re-Imagining* proposal considers a broad array of uses for excess property in Cleveland.

57. See Cleveland City Plan, <http://planning.city.cleveland.oh.us> (last visited Mar. 10, 2010).

58. RE-IMAGINING, *supra* note 18, at 9 fig.7. The city land bank is located in the Community Development Department but land will not be released from the land bank without approval from the Cleveland City Council. City of Cleveland, *supra* note 56.

59. RE-IMAGINING, *supra* note 18, at 9 fig.7. Each of the remediation techniques is a way to use natural processes to clean up mildly contaminated sites. Bio-remediation uses microbes in soil and groundwater; phytoremediation and mycoremediation work in the same way, using plants and fungi. *Id.* at 24.

60. *Id.* at 9 fig.7.

61. *Id.* The *Re-Imagining* report was completed before the county land bank became operational. The county land bank specifically endorses urban agriculture as a desirable

Re-Imagining makes clear that its goal is to put all land in Cleveland to some form of beneficial use; the innovation in the document is its broad definition of what constitutes beneficial. As the report explains:

Given the large and growing inventory of vacant properties in the City of Cleveland, it is unlikely that all of the city's surplus land will be reused for conventional real estate development in the foreseeable future. The alternative land use strategies described in this document are intended to put vacant properties to productive use in ways that complement the city's long-term development objectives.⁶²

Thus the report includes urban agriculture, green space, green energy, and ecosystem restoration as beneficial land uses. It lists the following goals:

- *Productive use/public benefit.* Whether vacant properties are developed with buildings and infrastructure, preserved as open space, or put into productive use as agriculture or energy generation sites, they should provide an economic return, a community benefit, and/or an enhancement to natural ecosystems.
- *Ecosystem function.* Stormwater management, soil restoration, air quality, carbon sequestration, urban heat island effects, biodiversity and wildlife habitat should be incorporated into future plans for vacant sites in the city.
- *Remediation.* Remove the risk to human health and the environment from environmental pollutants at vacant sites, either with targeted remediation projects or with long-term incremental strategies.⁶³

Re-Imagining is a vision document; it does not include specific proposals for particular properties.⁶⁴ At the end of the document are lists of recommendations and proposals for further action. At the top of the list: "Establish a task force to assess and address barriers to new vacant land reutilization strategies, including zoning, building, and health codes, access to city land and water, etc."⁶⁵

C. *The Urban Garden or Urban Agriculture District*

In *Re-Imagining*, Cleveland joins a small but growing number of shrinking cities focusing on green uses as a new way forward. Youngstown, Ohio has adopted a plan to use its vacant properties for green uses,

use for land that it acquires. Cuyahoga Land Bank, Demolition and Vacant Lot Re-Use, *supra* note 55.

62. RE-IMAGINING, *supra* note 18, at 5.

63. *Id.*

64. While no specific plans or ordinances have followed, grants for pilot projects were awarded in Summer 2009 and most of those projects will begin in Summer 2010.

65. RE-IMAGINING, *supra* note 18, at 31.

including a new use category of urban agriculture.⁶⁶ Urban agriculture also is making headway in Detroit, where local entrepreneurs working with Michigan State University have announced plans to establish “the world’s largest urban farm.”⁶⁷ Cleveland has taken the unusual step of adopting a specific zoning category for urban gardens.⁶⁸

One green use already included in Cleveland’s zoning code is a specific use category, the Urban Garden District. The Cleveland Zoning Code explains the rationale for the district:

[T]o ensure that urban garden areas are appropriately located and protected to meet needs for local food production, community health, community education, garden-related job training, environmental enhancement, preservation of green space, and community enjoyment on sites for which urban gardens represent the highest and best use for the community.⁶⁹

Thus the city’s goals in fostering urban gardens are two-fold: gardening is by itself a productive use of land, and in addition the city is concerned about inner city “food deserts”⁷⁰ that contribute to poor nutrition in many areas of the city.⁷¹ The city seeks to ensure that urban gardens are established as a goal in themselves, not as a holding strategy until it is time for residential or commercial building construction.⁷²

Cleveland’s urban garden district encompasses both community gardens and market gardens. A community garden is not a commercial enterprise: it is “an area of land managed and maintained by a group of individuals . . . for personal or group use, consumption or donation.”⁷³ A market garden

66. FINNERTY, *supra* note 20, at 47.

67. Hantz Farms Detroit, Introducing Hantz Farms, <http://www.hantzfarmsdetroit.com/introduction.html> (last visited Mar. 30, 2010).

68. For a description of urban agriculture zones in the small group of cities that have taken this step, see Mukherji & Morales, “Zoning for Urban Agriculture,” *Zoning Practice* (March 2010) (American Planning Ass’n).

69. CLEVELAND, OHIO, CODIFIED ORDINANCES tit. VII, ch. 336.01 (2009).

70. “[P]laces where fast food restaurants are prevalent and grocery stores are few,” RE-IMAGINING, *supra* note 18, at 26.

71. *Id.* at 27 fig.25 (map of food deserts and community gardens).

72. *Id.* at 26-29. The City’s Planning Director informally offers the following explanation:

The principal purpose of the Urban Garden zoning district is to legislatively reserve certain land for urban gardening, with the necessity for legislation and public notice mailed to nearby property owners—which is required in zoning legislation—if an urban garden property were to be made available for another use. . . . A second reason for the Urban Garden zoning is that it is a little more permissive than is our Residential zoning in permitting fencing that may be needed for an urban garden and in allowing the on-site sale of plantings that are grown on the site (i.e., a “market garden”).

E-mail from Robert N. Brown, Director, Cleveland Planning Commission (Oct. 3, 2009) (on file with author).

73. CLEVELAND, OHIO, CODIFIED ORDINANCES tit. VII, ch. 336.02(a) (2009).

is “an area of land managed and maintained by an individual or group of individuals to grow and harvest . . . crops . . . to be sold for profit.”⁷⁴ These two garden uses are the only uses allowed in the Cleveland urban garden district, but the zoning category allows for either type of garden. Cleveland currently does not have distinct language for urban commercial agriculture, but this designation does not appear necessary because it appears that urban agriculture, which tends to be small-scale cultivation of high value crops, fits within the definition of a market garden.

The uses allowed in the urban garden district are restricted to gardening (with accessory uses such as open space and appropriate signs), with or without on-site sale of crops.⁷⁵ No structures are allowed in the urban garden district, except for small structures associated with the permitted uses, such as greenhouses, tool-sheds, shade pavilions, or “rest-room facilities with composting toilets.”⁷⁶

At this point, a threshold issue must be addressed: why would a city bother to rezone land for an urban garden? As a practical matter, gardening is permissible in any zoning district; a homeowner does not need zoning permission, for example, in order to raise vegetables.

As its statement of purpose demonstrates,⁷⁷ the city sees a distinctive role for the urban garden district. *Re-Imagining* envisions urban garden uses as a desirable end in themselves, not just as an interim use while the city waits for further development;⁷⁸ the district helps to protect the use and foster the urban garden network. A formal zoning designation reserves particular land for urban gardening; the zoning cannot be changed without re-zoning the property through the standard zoning legislative process, including notice to neighbors and a public hearing. Thus the urban garden district is a public and transparent embodiment of a city policy in favor of such uses. In addition, the urban garden district specifically allows uses of particular importance to urban gardening, including “seasonal farm stands” selling produce—not a use that would be allowed in a residential district—as well as other amenities such as restroom facilities and fences up to six feet high.⁷⁹ Possible private owners of land in the urban garden district include local nonprofit organizations that foster community gardening for civic or educational purposes, or a for-profit urban farmer.

74. *Id.* ch. 336.02(b)

75. *Id.* chs. 336.03, .04(b)—(c).

76. *Id.* ch. 336.04(e).

77. *Id.* ch. 336.01.

78. RE-IMAGINING, *supra* note 18, at 9.

79. *Id.* chs. 336.04, .05.

II. Can the Land Use Regulatory System be Used for Managed Shrinkage?

The history of land use law in this country shows that its predominant focus has been on development and the management of development.⁸⁰ Most of our modern land use structure is designed around this concern.⁸¹ The use of this same regulatory structure to manage shrinkage and deurbanization, rather than growth and urbanization, runs contrary to this practice, yet the history of the development and adaptation of our land use regulatory tools shows that they are available for the task.⁸² One example in this history stands out: the local innovations that led to growth management programs in some communities in the 1960s and 1970s.⁸³ The growth management story shows how communities can use existing land use regulatory tools in creative ways to address new challenges.

A. A (*Very*) Brief History of Land Use Law

Land use regulation has been with us for centuries, as governments seek to ensure that the public interest is protected against consequences of disorder and congestion. Early edicts in Elizabethan England focused on overcrowding: rapid growth in London prompted Parliament to adopt measures to mitigate the adverse effects on the public welfare of a “great multitude of people brought to inhabit in small rooms . . . smothered with many families of children and servants in one house or small tenement,” raising concerns about adequate food supplies and transmission of plague.⁸⁴ This heritage of land use control came to the colonies with the English settlers and included measures designed to require the development of property and discourage leaving it in the natural state.⁸⁵ In urban areas, colonial governments were concerned about undue density.⁸⁶

Today, land use regulation—and particularly zoning⁸⁷—is a core function of local government, in accordance with the authority granted

80. *E.g.*, JUERGENSMEYER & ROBERTS, *supra* note 1, at 18-22 (history of land use law focused on addressing the challenges of urban growth).

81. *See infra* notes 87-88 and accompanying text.

82. *See infra* notes 110-11 and accompanying text.

83. *See infra* notes 110-11 and accompanying text.

84. DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 2-3 n.** (5th ed. 2008) (quoting 31 Eliz. I C. 7 (6 Stat. 409 et seq.)).

85. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259-72, 1276-80 (1996).

86. *Id.* at 1273-74.

87. The standard land use regulatory tools include zoning, planning, subdivision review, and financing infrastructure; these are the core elements found in any treatise on the subject. *See, e.g.*, MANDELKER, *supra* note 1, at 3.01.

to it by the relevant state.⁸⁸ The concept of zoning began to take hold early in the twentieth century, culminating in the drafting of the Standard Zoning Enabling Act (SZE) by the United States Department of Commerce in 1924.⁸⁹ Section 1 of the SZE identified the regulation of both population density and building intensity as key elements of the zoning power.⁹⁰ Section 3 of the SZE makes clear that the purposes of zoning include reducing traffic congestion, and preventing the “overcrowding of land” and “undue concentration of population.”⁹¹

To some extent these provisions reflect the origin of the SZE, which was based on the zoning law developed for New York City (hence the concern with congestion and “adequate light and air”),⁹² but they go far beyond a concern with overcrowding to express a concern more generally with “health and the general welfare.”⁹³

These two sections together comprise the key elements of the SZE, offering local governments a specific regulatory tool—the power to zone—with relatively broad permission to exercise their discretion in the public interest. Thus the zoning power is delegated to local governments as a specific tool by which to exercise the police power: the traditional power of governments to protect their citizens’ health, safety and general welfare. This police power is an inherent power of the state legislature that it delegates to local government, and the scope of the zoning power thus depends upon the scope of the police power under state law.⁹⁴

88. In the United States, all local government powers derive from the state. Thus any local government activity must be authorized by the state constitution or state legislature, or must be reasonably necessary to achieve that authorized activity. *See* *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *e.g.*, BARLOW BURKE, *UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS* 6-7 (2d ed. 2009).

89. *See* ADVISORY COMMITTEE ON ZONING, *A STANDARD STATE ZONING ENABLING ACT* (rev. ed. 1928), available at <http://myapa.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>. This legislation was adopted in some form by virtually all states in the United States, so that although zoning is a matter of state and local law its form is very similar nationwide. MANDELKER, *supra* note 1, at 4.15.

90. Specifically, section 1 identified the following grants of power:

To regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

Standard State Zoning Enabling Act § 1, *reprinted in* MANDELKER, *supra* note 1, at 4.16.

91. Standard State Zoning Enabling Act § 3, *reprinted in* MANDELKER, *supra* note 1, at 4.16.

92. *Id.*

93. *Id.*

94. *See* BURKE, *supra* note 88, at 3-5 (explaining the origin and scope of the police power and its role in local land use authority).

The constitutionality of zoning was upheld by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*⁹⁵ in 1926. The Village of Euclid was, at the time, an existing village near rapidly-growing Cleveland, Ohio. In the absence of municipal borders or zoning, it was likely that most, if not all of the land owned by Ambler Realty in Euclid would be developed for industry.⁹⁶ “The Village of Euclid decided, however, that it wanted to determine the land uses within its boundaries. It adopted zoning for the entire village and in so doing zoned a portion of Ambler’s land for residential use.⁹⁷ Ambler raised a facial challenge to the very concept of zoning, asserting that the village could not justify its disruption of the natural forces of the market. The Supreme Court rejected Ambler’s challenge and in so doing established several points of essential importance to the development of land use law, the following of which are pertinent here.

First, the *Euclid* decision endorsed the concept of zoning. That is, the Supreme Court agreed that a local government constitutionally could decide what land uses would be permitted within its borders by means of defining those uses and identifying their permissible locations on a map. In that effort, the village could exercise its own judgment on behalf of the health, safety and welfare of its residents; it did not need to consider the uses in neighboring Cleveland.⁹⁸

Second, the *Euclid* decision endorsed a principle of deferential review of local land use legislative decisions. The process of adopting a zoning ordinance and map is a legislative decision by the legislative body of a municipal government. Key words in the decision are now familiar in judicial review of land use legislative decisions: “If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”⁹⁹

Third, *Euclid* tells us that a zoning restriction can be valid even if it reduces the value of an individual parcel of land. Ambler asserted that his land had lost seventy-five percent of its value through the restrictive zoning;¹⁰⁰ the Court did not find this to be a legal flaw. The opinion offers no suggestion that Ambler deserves to be compensated for the reduction in value of his property (in part because the Court

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

96. *See id.* at 384.

97. *Id.* at 379-80, 382.

98. *Id.* at 389-90.

99. *Id.* at 388.

100. *See Euclid*, 272 U.S. at 384.

handled this case as a facial attack to the zoning ordinance itself,¹⁰¹ not as a challenge to the effect of the zoning as applied to Ambler's land).¹⁰²

After *Euclid*, the concept of zoning was protected from federal constitutional attack and the practice of zoning spread nationwide. Also over the years, the scope and detail of land use regulation expanded to include mandates for planning (based to some extent on the Standard City Planning Enabling Act drafted in 1928),¹⁰³ detailed controls over the construction of subdivisions (also based in part on the Standard City Planning Enabling Act of 1928),¹⁰⁴ and an array of other land use regulatory tools. Use of each of these tools was predominantly focused on ensuring that development of land takes place in a manner that protects the public interest. Cities channel growth, limit density, and dictate aesthetic features of what is developed; in general, communities expect that growth will happen and that it is their goal to manage it.

B. *Growth Management Innovations*

Although much of the land use regulatory system is about eighty-years-old, it has proven to be both durable and adaptable, as municipalities use the regulatory tools at their disposal to address emerging issues of the day. The history of growth management regulation provides a pertinent example. From its inception, zoning was used to shape the land use structure of a municipality, but it was not designed to affect or constrain the pace of development. In the late 1960s and early 1970s, municipalities in rapidly-growing areas of the nation became concerned that their populations were growing too quickly for their tastes, threatening their ability to provide adequate public services and maintain an acceptable quality of life for their residents. Two of these municipalities in particular undertook to devise regulatory mechanisms to control growth, prompting litigation that resulted in two important decisions: *Golden v.*

101. *Id.* at 386.

102. The Court specifically noted that, in a particular instance, a zoning designation might be unconstitutional as applied to a particular parcel of land, 272 U.S. at 395, and a few years later it found such an instance of unconstitutionality in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

103. See BURKE, *supra* note 88, at 76.

104. Mandelker observes: "States first enacted subdivision control legislation towards the close of the nineteenth century to remedy land conveyancing problems. . . . The Standard City Planning Enabling Act used these early subdivision platting statutes as a model for subdivision control enabling legislation which was included in the Act." MANDELKER, *supra* note 1, at 9.02.

*Planning Board of Ramapo*¹⁰⁵ and *Construction Industry Ass'n v. City of Petaluma*.¹⁰⁶

The most significant of these for present purposes was the *Ramapo* decision.¹⁰⁷ In 1969, the Ramapo town board—concerned about rapid growth—amended its zoning ordinance to make ingenious use of the town's existing powers of planning, zoning and subdivision regulation. The town prepared a comprehensive plan to determine what infrastructure it would need to accommodate future growth, how much the infrastructure would cost, and how it could all be built.¹⁰⁸ Then, on the basis of this information, Ramapo prepared a mechanism for phased development.

The town decided that construction of a residential subdivision on undeveloped land would be considered a "residential development use" for which a special use permit would be required.¹⁰⁹ The town adopted requirements for the special use permit, based on the availability of necessary infrastructure. The use permit would not be granted until critical infrastructure was available: sewers, drainage, parks and schools, roads, and fire stations.¹¹⁰ Under the town's capital improvement schedule, this could mean a wait of up to eighteen years.¹¹¹

105. *Golden v. Planning Bd.*, 285 N.E.2d 291 (N.Y. 1972).

106. *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir.), *cert. denied*, 424 U.S. 934 (1975).

107. Ramapo is a town near New York City. Between 1950 and 1968, Ramapo's population grew by nearly 300%, and it looked like the trend would continue, involving substantial amounts of residential construction. *Golden*, 285 N.E.2d at 294 n.1; John R. Nolon, *Golden and Its Emanations: The Surprising Origins of Smart Growth*, 35 URB. LAW 15, 18 (2003).

108. *Golden*, 285 N.E.2d at 294-95 n.1, 366-67.

109. *Id.* at 295.

110.

The standards for the issuance of special permits are framed in terms of the availability to the proposed subdivision plat of five essential facilities or services: specifically (1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) State, county or town roads—major, secondary or collector; and, (5) firehouses. No special permit shall issue unless the proposed residential development has accumulated 15 development points, to be computed on a sliding scale of values assigned to the specified improvements under the statute. Subdivision is thus a function of immediate availability to the proposed plat of certain municipal improvements; the avowed purpose of the amendments being to phase residential development to the Town's ability to provide the above facilities or services.

Id. at 295.

111. A developer could advance the date of development by providing the infrastructure itself, in order to achieve the necessary number of "development points." A landowner also could build a residence on residential land that was not subdivided. *Id.* The town included some other flexibility measures as well.

Certain savings and remedial provisions are designed to relieve of potentially unreasonable restrictions. Thus, the board may issue special permits vesting a present right to proceed with residential development in such year as the development meets

Although the town's growth management program used only its traditional tools of planning, zoning, and subdivision review, the purpose to which these tools were put and the precise details of the program were path-breaking. "The planning literature of the time was full of excitement about growth management, but there was little evidence, on the ground, of its legal adoption."¹¹²

The plaintiffs charged that Ramapo's program was not authorized by the state enabling legislation. And that was a reasonable challenge: zoning authority, of which the special use permit is a part, is designed to shape development, not to slow it down. This issue had not previously been litigated.¹¹³ The New York Court of Appeals agreed that there was no specific authority for this type of timing control in the zoning law.¹¹⁴ Zoning had not traditionally concerned itself with timing.

But the court looked beyond the zoning power to "the perimeters of the devices authorized and purposes sanctioned under current enabling legislation."¹¹⁵ The state conferred the zoning power in order to protect the public interest; this power "includes . . . by way of necessary implication, the authority to direct the growth of population for the purposes indicated, within the confines of the township."¹¹⁶ This is "a necessary concomitant to the municipalities' recognized authority to determine the lines along which local development shall proceed, though it may divert it from its natural course."¹¹⁷ This decision reflects a very flexible view of state authorization. The court did not parse particular language in the state legislation delegating the zoning and subdivision powers. It

the required point minimum, but in no event later than the final year of the 18-year capital plan. The approved special use permit is fully assignable, and improvements scheduled for completion within one year from the date of an application are to be credited as though existing on the date of the application. A prospective developer may advance the date of subdivision approval by agreeing to provide those improvements which will bring the proposed plat within the number of development points required by the amendments. And applications are authorized to the "Development Easement Acquisition Commission" for a reduction of the assessed valuation. Finally, upon application to the Town Board, the development point requirements may be varied should the board determine that such a variance or modification is consistent with the on-going development plan.

Id. at 296-99.

112. Nolan, *supra* note 107, at 19.

113. *Id.* at 18.

114. *Golden*, 285 N.E.2d at 296 ("A reading of the relevant statutory provisions reveals that there is no specific authorization for the 'sequential' and 'timing' controls adopted here.").

115. *Id.* at 296.

116. *Id.*

117. *Id.*

looked more broadly at the purpose of land use regulation. This, plus the court's highly deferential approach to the town's planning efforts and reliance on the town's good faith in carrying out its plan,¹¹⁸ paved the way for a decision in the town's favor.¹¹⁹

The *Ramapo* decision has been hailed as one of the foundations of the smart growth movement and other inventive uses of the land use system. Professor Nolon notes, for example, that the court's "broad interpretation of local land use authority has become a clear trend among courts nationally and has fueled a great expansion of local invention to deal with the problems of sprawl, the provision of infrastructure, the costs of development, and, recently, the protection of natural resources and the environment."¹²⁰ As a matter of doctrine, "the New York Court of Appeals held that the state legislature had delegated vast implied powers to municipalities to time growth, to achieve the most appropriate use of the land, and to invent the mechanisms for doing so."¹²¹ Professor Nolon praises both the town and the case as follows: "The Town of Ramapo blazed a bright trail of invention in the late 1960s. The *Ramapo* court sustained the town's power to do so and, for thirty years, local governments have been ever bolder in developing smart growth solutions to their unique land use problems."¹²²

118. "[I]n passing of the validity of the ordinance on its face, we must assume not only the Town's good faith, but its assiduous adherence to the program's scheduled implementation." *Id.* at 373 n.7.

119. The opinion also addressed other important issues the plaintiffs raised. The court concluded that the town's plan left landowners with sufficient promise of future development that the law did not constitute a regulatory taking. *Id.* at 380-81. The court expressed concern about the exclusionary nature of the scheme: by definition, some people who wanted to live in Ramapo could not. But the court concluded that this was a necessary component of a timed growth structure based on a comprehensive plan. It had a valid police power justification. Although regional measures might be better, the issue in this case was simply whether the town had the authority to take the steps it did, and the court concluded that the authority was there. *Id.* at 376.

120. Nolon, *supra* note 107, at 24.

121. *Id.* at 25.

122. *Id.* at 62. In the last decade, the planning community headlines have been dominated by the concepts of "smart growth" and "new urbanism." While earlier growth control efforts focused on controlling the rate of growth and ensuring adequate infrastructure to serve it, the Smart Growth movement advocated rethinking the forms of growth, focusing on adopting a metropolitan-area-wide vision and reducing residential sprawl. Smart growth involves integrating considerations of land use, housing, employment, transportation, and the environment, with a focus on long-term sustainable development. New urbanism, in particular, focuses on encouraging denser, pedestrian-friendly neighborhoods with a greater emphasis on mass transportation. In 2002, the American Planning Association released its mammoth Growing Smart Legislative Guidebook, a comprehensive guide with model statutes for states to use to revamp their land use enabling legislation. MECK, *supra* note 1. But the key to this movement, as always, is that it assumes that growth will happen; it is intended to foster the type of growth that seems desirable.

Like *Ramapo*, the *Petaluma* case, *Construction Industry Ass'n of Sonoma County v. City of Petaluma*, is significant for its endorsement of the breadth of a municipality's discretion to control growth under the police power. Like *Ramapo*, *Petaluma* was and is a suburb of a growing city, in its case, San Francisco. Between 1964 and 1971, the community's population began to grow so rapidly that the city became concerned.¹²³ The response to the problem was the "Petaluma Plan," based on extensive research about housing patterns and trends.¹²⁴ The plan focused on controlling the tempo of growth and limiting the outward expansion of the city.¹²⁵

The *Petaluma* plaintiffs took their complaint to federal court, rather than state court, so they necessarily raised federal issues, all of them constitutional in nature. In particular, they argued that the plan was "exclusionary," in violation of the Due Process Clause of the Fourteenth Amendment.¹²⁶

The Ninth Circuit agreed that any restriction on construction of new houses would exclude somebody, but that the restriction need only survive rational basis scrutiny: it would survive constitutional challenge if it was rationally related to a legitimate public interest.¹²⁷ And the court cited a series of Supreme Court decisions endorsing a broad interpretation of the powers of local government in land use regulation.¹²⁸ For example, in *Berman v. Parker*¹²⁹ the Supreme Court rejected a challenge to a sweeping urban renewal program in the District of Columbia, stating:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.¹³⁰

In light of this Supreme Court precedent and under the facts before it, the Ninth Circuit concluded that *Petaluma* had adequately demonstrated that its regulation was a rational response to legitimate concerns about the effects of growth. "We conclude therefore that . . . the concept of the public welfare is sufficiently broad to uphold *Petaluma's* desire

123. *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

124. *Id.* at 901.

125. The Plan capped residential development at 500 dwelling units per year, when constructed in units of five residences or more. The Plan included a greenbelt around the city as a boundary for urban expansion and outlined procedures and criteria for award of the annual 500 development-unit permits. *See id.*

126. *See id.* at 906-07.

127. *See id.*

128. *See Constr. Indus. Ass'n*, 522 F.2d. at 906-07.

129. *Berman v. Parker*, 348 U.S. 26 (1954).

130. *Id.* at 33.

to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.”¹³¹

The *Petaluma* decision is based on federal law and gives us no direct insights into the permissible parameters of the zoning power under state law, but it does parallel *Ramapo* with its broad and generous view of the scope of the police power, showing that this view pervades the law at both the federal and the state level. The *Ramapo* and *Petaluma* decisions together demonstrate a flexible interpretation of the range of interests local governments may seek to protect, and they have been influential in legitimizing growth management programs.¹³²

C. *The Message for Shrinking Cities*

This brief history of the court treatment of growth control plans illustrates two points: first, the land use regulatory system historically has been focused on fostering and guiding growth and development; and second, that the existing land use regulatory system provides flexible tools for regulators. *Ramapo* in particular offers a model: the town of Ramapo identified a problem, researched its parameters, and used the regulatory tools at its disposal in a creative manner to fashion a response. The town’s decision to slow the rate of growth, the court tells us, was valid under state law; it was not a “taking” nor was it unduly exclusionary under the circumstances.

Deference as established in *Euclid* and endorsed by state and federal decisions thereafter means that cities can choose their own view of how to regulate in the public interest, and they can use the regulatory tools they have to implement that view. Thus while the shrinking cities movement represents a sharp change in direction, the land use regulatory system is flexible enough to allow the shift.

Of particular importance here, perhaps, is the Supreme Court’s language in *Berman v. Parker*: the “concept of the public welfare is broad and inclusive.”¹³³ *Berman* upheld an ambitious urban renewal program that required razing an entire blighted neighborhood, even though the plaintiff’s property was itself not blighted. The general power to regulate in the public interest justified this sweeping approach. The Court also noted the threat to the public interest of a decaying urban environment: “Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate

131. *Constr. Indus. Ass’n*, 522 F.2d at 908-09.

132. See DANIEL P. SELMI, ET AL., *LAND USE REGULATION: CASES AND MATERIALS* 550 (3d ed. 2008).

133. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

the spirit . . . [and also] may despoil a community as an open sewer may ruin a river.”¹³⁴ The Supreme Court’s views have carried over to state courts, which have upheld a municipality’s ability to determine what the public interest requires in a particular instance.¹³⁵ Thus if a city decides that its interest lies in shrinking, not growing, and in “greening,” not building, there is ample precedent to suggest that its decision is well within its authority under the police power.

III. Challenges for the Shrinking City

Underlying the shrinking cities movement is a central insight: there is more land within some cities’ boundaries than current populations can use. Excess houses fall vacant and deteriorate; a surplus of vacant houses on the market sends a message of decay and drives down prices. For the foreseeable future, *Re-Imagining* offers the view that the best way to handle both problems is to take land out of the development market and put it into alternative, productive “green” uses. As a practical matter, this might require rezoning land from its current category (residential, commercial, or industrial) into another development-restricted use. As noted earlier, Cleveland already has a zoning category for urban gardens.¹³⁶ Such downzoning raises the perennial issue of the regulatory taking, which is the major focus of this section. This section also briefly addresses some affiliated land use law objections to downzoning urban property and, on a different note, the mismatch between federal and state brownfields programs and the needs of a shrinking city.¹³⁷

A. *The Regulatory Takings Challenge*

In spite of its stated enthusiasm for low-intensity green uses, the Cleveland City Planning Commission is wary of taking any action that might

134. *Id.*

135. *See, e.g., Jaylin Inv., Inc. v. Vill. of Moreland Hills*, 839 N.E.2d 903 (Ohio 2005) (holding that exercise of zoning powers is presumed to be within a municipality’s police power unless it is arbitrary). This trend was visible even at the time of *Euclid*, which cited a “constantly increasing tendency in the direction of the broader view” of the power to zone in the public interest. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390-91 (1926).

136. Urban gardens are discussed below. Cleveland recently adopted regulations for keeping bees, chickens, rabbits and other farm animals within city limits, CLEVELAND, OHIO, CODIFIED ORDINANCES tit. VII, ch. 347.02 (2009), as well as zoning requirements for wind turbines. ch. 354A.

137. An interesting policy issue also arises, though at this point it does not have a distinctive legal parameter, and that is the relationship between the shrinking city concept—as implemented in the City of Cleveland itself—and another modern trend: an interest in regional governmental cooperation.

give rise to a takings claim. The city's planning director has posed the issue squarely:

With respect to zoning private land in the Urban Garden District, we would typically avoid private land unless the owner agrees to the zoning. . . . [If] a private owner objects to the urban garden zoning, I believe that it would be difficult for the City to justify using the Urban Garden zoning, because this action could be considered a regulatory taking of the property by removing most of the opportunity for an economic return on the use of the property.¹³⁸

The *Re-Imagining* proposal includes a significant emphasis on urban gardens and ecologically-valuable green space; consequently the takings question deserves careful attention. In that regard, urban gardens and urban agriculture pose issues distinct from preservation of green space for ecological functions.

While property law always has allowed some restrictions on land use¹³⁹—mere ownership of a piece of land does not entitle a person to do with it whatever he wants—at the same time the courts have recognized federal constitutional limits (and in many states additional state constitutional limits)¹⁴⁰ on the extent to which the government can constrain private land use without providing compensation.¹⁴¹ In theory, the issue is not whether regulation is unlawful; it is whether the government must pay for the interference it causes. In practical effect, however, cash-strapped public entities will seek to avoid imposing restrictions that carry with them the hefty price tags of litigation and possible compensation. Thus it is essential to determine whether downzoning private urban property to an urban garden or urban agricultural designation might constitute a taking.¹⁴²

138. E-mail from Robert N. Brown, *supra* note 72.

139. *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (“It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (“As long recognized some values are enjoyed under an implied limitation and must yield to the police power.”); *Reinman v. City of Little Rock*, 237 U.S. 171, 176 (1915)

Granting that it is not a nuisance *per se*, it is clearly within the police power of the state to regulate the business, and . . . to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination.

Id.

140. This article focuses on federal issues alone.

141. For an interesting discussion of the meaning of private land ownership and how it affects takings law, see Eric T. Freyfogle, *Private Property: Correcting the Half Truths*, 59 *PLAN. & ENVTL L.* 3 (2007), available at <http://papers.ssrn.com/abstract=1075702>.

142. The takings case law is founded on the Fifth Amendment of the Constitution, applied to the states through the Fourteenth Amendment, which tells us that private

As early as 1922, the Supreme Court held 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,”¹⁴³ but “if regulation goes too far it will be recognized as a taking.”¹⁴⁴ We must not forget that “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”¹⁴⁵

The Court has made clear that applying these simple platitudes in a particular instance is a highly fact-specific inquiry, but the leading cases share an essential scenario: in each instance, governmental regulation has narrowed the range of permissible uses of a landowner’s parcel and the owner has challenged the restriction as a “taking.” Most recently, in *Lingle v. Chevron*,¹⁴⁶ the Court sought to rationalize its somewhat confusing case law and map the proper Fifth Amendment analysis. In two instances, the Court noted, regulatory action is a *per se* taking for Fifth Amendment purposes. First, “where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.”¹⁴⁷ Second, a taking occurs in the case of “regulations that completely deprive an owner of ‘all economically beneficial use’ of her property.”¹⁴⁸ If we assume that urban gardens are a desirable goal that the city seeks to promote through zoning, the question for consideration is whether a city like Cleveland lawfully may rezone untenanted privately-held land as an urban garden district. We consider private land, because the city may do what it wishes with land owned by the land bank or otherwise by the city. We assume that the land currently has no tenant to avoid the complication of the nonconforming use doctrine, which would protect the owner of an improved parcel in active use from immediate application of the urban garden designation.¹⁴⁹ Thus, for example, if the city rezones a parcel that contains an occupied and viable private home, the nonconforming use doctrine would protect continued use of that property as a residence.¹⁵⁰

property shall not be taken for public use without just compensation being paid. U.S. CONST. amend. V.

143. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

144. *Id.* at 415.

145. *Id.* at 416.

146. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

147. *Id.* at 538.

148. *Id.*

149. JUERGENSMEYER & ROBERTS, *supra* note 1, at 118 (“zoning ordinances almost universally permit nonconforming uses to continue”).

150. CLEVELAND, OHIO, CODIFIED ORDINANCES tit. VII, ch. 359 (2009).

The question is whether the city could successfully defend such a rezoning, or downzoning, to urban agriculture against a takings challenge.¹⁵¹ The viability of such rezoning is likely to be tested soon, as the implementation of the *Re-Imagining* report includes a study—just beginning—to map specific locations in Cleveland that are suitable for green uses, and a study of economic opportunities associated with building a more robust local food economy.¹⁵²

1. PER SE TAKINGS

Does an urban garden designation amount to a *Lucas*-style total taking? In *Lucas*, the Supreme Court held that a taking occurs when a regulation “denies all economically beneficial or productive use of land.”¹⁵³ In particular, the Court noted that South Carolina’s restriction on Lucas’s property required the land “to be left substantially in its natural state. . . .”¹⁵⁴

There is an argument that an urban garden designation is a *per se* taking. The restriction imposed on Lucas prevented him from building a habitable structure; it did not prevent all use of the land. For example, he could build small or non-permanent structures. Consistent with the state’s restrictions, it appears that if Lucas wanted to start a market garden and sell vegetables to his neighbors on the Isle of Palms he could have done so. Indeed, at the trial on Lucas’s claim, the Coastal Council’s permit administrator testified that the state would allow construction of temporary structures and recreational or other uses of the property.¹⁵⁵ Nonetheless, Lucas was deemed to have suffered a total taking. Consistent with this view of *Lucas*, zoning for urban garden uses is a *per se* taking.

A more compelling reading of the case, however, is that *Lucas* does not apply to the urban garden. The Court’s decision turns on the trial

151. The city’s policy would avoid litigation with an existing private land owner but it does not prevent any litigation at any point in the future. A subsequent purchaser of land zoned for urban gardens still could raise a takings challenge. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). For an interesting discussion of whether the ripeness of the claim affects its transferability see, Gregory M. Stein, *Takings in the Twenty-First Century: Reasonable Investment-Backed Expectations After Palazzolo and Tahoe-Sierra*, 69 TENN. L. REV. 891 (2002).

152. See Marc Lefkowitz, Rally for Rail and Big Boost to Regenerating Vacant Land in Cleveland, Green City Blue Lake (Sept. 30, 2009), <http://www.gcbl.org/blog/marclenkowitz/rally-rail-and-big-boost-reimagining-land-use-20> (announcing a grant from the Cleveland Foundation for these purposes).

153. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

154. *Id.* at 1018.

155. Petitioner’s Brief on the Merits at 12-13, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (No. 91-453), 1991 WL 626699 (citing trial transcript).

court's finding that the land was "valueless."¹⁵⁶ The Court interpreted this to mean that Lucas had suffered a deprivation of "all economically beneficial uses."¹⁵⁷ At the original trial on his case, Lucas argued that because he could not build a single-family home the lots had no value.¹⁵⁸ The trial court agreed that the state's law "worked a permanent and total loss in the value of Lucas's property."¹⁵⁹ This factual finding was not reviewed at any stage in the appellate process,¹⁶⁰ and it was an uncontested premise of the petition for certiorari.¹⁶¹ The majority opinion seems to assume that the state's restriction required Lucas's land to be "left substantially in its natural state,"¹⁶² by which the majority presumably meant his inability to build a permanent structure. Although Justice Blackmun in dissent asserted that the trial court's finding was "implausible"¹⁶³ and "almost certainly erroneous,"¹⁶⁴ the majority declined to enter into this debate. The Court made clear that "we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina."¹⁶⁵ In subsequent decisions, the Court has made clear that the distinctive feature of *Lucas* was that the state's restriction deprived Lucas of all economically beneficial use of his property, rendering the property without value.¹⁶⁶

The *Lucas* opinion therefore does not tell us what type of restriction qualifies as a total taking. The Supreme Court did not evaluate or endorse the trial court's finding; it simply accepted the finding on its face and proceeded from the assumption that the property had no economic value.

156. *Lucas*, 505 U.S. at 1007.

157. *Id.* at 1019.

158. Petitioner's Brief on the Merits, *supra* note 155, at 12-13 (citing trial transcript).

159. *Id.* at 8 (citing trial court decision).

160. Respondent's Brief on the Merits at 85, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (No. 91-453), 1992 WL 672613. The issue before the South Carolina Court of Appeals was whether the character of the government's action (the prevention of harm due to beach erosion) should be a factor in the taking analysis. See *Lucas*, 404 S.E.2d at 896, 901.

161. *Lucas*, 505 U.S. at 1022 n.9.

162. *Id.* at 1018.

163. *Id.* at 1037 (Blackmun, J., dissenting).

164. *Id.* at 1044.

165. *Id.* at 1022 n.9 (majority opinion).

166. *E.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, Inc.*, 535 U.S. 302, 330 (2002) (*Lucas* is reserved for an "extraordinary circumstance"). There is some room for question concerning whether the pertinent factor is a loss of all beneficial use or a loss of all economic value; language in the *Tahoe-Sierra* opinion uses both phrases. See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330 ("valueless" and deprivation of all "beneficial use"). This is not important to resolve in the present context, where the city will argue that a viable use remains—urban gardening—and thus the property has not lost all value.

If a party can argue, as a factual matter, that property zoned for urban gardens retains some residual economic value, *Lucas* does not apply.¹⁶⁷

Although there appears to be no case law on urban garden zoning, there are state and lower federal court cases concerning the preservation of agricultural uses through agricultural zoning,¹⁶⁸ a restriction that is arguably comparable. Agricultural zoning can take a variety of forms but in general it restricts permissible uses of the property to agriculture. Some agricultural zones allow only agriculture, including only compatible buildings such as barns; others take the form of large lot zoning, allowing agricultural uses and a maximum of one house on a large lot (possibly anywhere from 10 to 160 acres).¹⁶⁹ Other agricultural zones are more generous, allowing some other uses such as stables or day nurseries.¹⁷⁰ Agricultural zoning is used in some states where the pressures of urbanization are viewed as a threat to local farming.¹⁷¹

Agricultural zoning challenges can concern either refusal to rezone agricultural land or downzoning land from another use. A person might buy land zoned for agricultural use and ask that it be rezoned for a more intensive use, perhaps residences or industry. If the local zoning authorities refuse to rezone, the owner might file suit alleging a range of legal flaws with this decision. An alternative scenario would involve land that was zoned for residential or other use that is downzoned to a more restrictive category of agricultural use only, giving rise to a challenge by the landowner.

In either setting, the plaintiff-land owner has an uphill fight. As a legislative enactment, the zoning ordinance is entitled to a presumption of validity; the plaintiff must show that it is unlawful.¹⁷² In the vast majority of such cases, plaintiffs who allege that agricultural zoning

167. Some lower court decisions under very similar facts have declined to find a *Lucas* taking. *E.g.*, *Gove v. Zoning Bd.*, 831 N.E.2d 865 (Mass. 2005); *see also Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (holding state restriction on filling coastal wetlands is not a *Lucas* taking where a portion of the property may be developed).

168. *See infra* notes 174, 177, 185, 191, 194, and accompanying text.

169. *See* Mark W. Cordes, *Takings, Fairness and Farmland Preservation*, 60 OHIO ST. L.J. 1033, 1048 (1999); *e.g.*, *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988) (one residence allowed on sixty acres).

170. *See, e.g.*, *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) (“agriculture, agricultural buildings, garages, parking areas, stables, roadside stands, day nurseries, and day care centers”).

171. Cordes, *supra* note 169, at 1033-34; *see, e.g.*, *Harvard State Bank v. County of McHenry*, 620 N.E.2d 1360, 1363 (Ill. App. Ct. 1993) (agricultural zoning defended as a buffer against suburban encroachment).

172. In most states zoning decisions are considered legislative, though in a few states the rezoning of individual parcels is considered a quasi-judicial action. *E.g.*, *Fasano v. Bd. of County Comm’rs*, 507 P.2d 23 (Or. 1973).

is a taking have been unsuccessful, even when the property is downzoned from another category allowing greater development.¹⁷³ In *Pace Resources, Inc. v. Shrewsbury Township*,¹⁷⁴ for example, the township downzoned the plaintiff's property from industrial to agricultural use, largely because of concerns that the water supply was inadequate for industry. Neither the Pennsylvania courts nor the federal court in which the plaintiff sought relief held that the rezoning was a taking; both noted the existence of residual value. As will be discussed below, the few contrary instances generally concern cases in which the land is unsuitable for agriculture, so that it has no value as zoned.¹⁷⁵

Our discussion at this point must broaden from *Lucas* to acknowledge the influence of another element in the agricultural zoning cases. In many of these cases, two issues blend together: the owner challenges the decision as invalid as a matter of zoning law because it is arbitrary and not rationally related to a legitimate state interest; the owner might also allege that the refusal to rezone (or the downzoning) is a taking. The first of these may be couched either as a matter of state law (the zoning does not comply with the zoning statute because it is arbitrary) or as a constitutional substantive due process challenge.¹⁷⁶ Before the

173. See Cordes, *supra* note 169, at 1069.

In sum, lower courts have generally affirmed the constitutional validity of agricultural zoning, and in particular that it should not pose a takings problem if done pursuant to sound planning. . . . [T]he decisions largely affirm and are consistent with Supreme Court takings jurisprudence. In particular, lower courts have consistently rejected takings challenges as long as the property was economically viable as farmland, even when there was a substantial diminution in property value.

Id.; see also Mark W. Cordes, *Fairness and Farmland Preservation: A Response to Professor Richardson*, 20 J. LAND USE & ENVTL. L. 371, 376 (2005) (making the same points but with reference to more recently decided Supreme Court cases); Jesse J. Richardson, *Downzoning, Fairness and Farmland Protection*, 19 J. LAND USE & ENVTL. L. 59 (2003) (concluding that downzoning is not likely to be unconstitutional but it is unfair).

174. *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023 (3d Cir. 1987). The federal court specifically noted that the downzoning reduced the land from an alleged value of \$495,000 to \$52,000, but concluded that "although Pace may have been denied the *best* use . . . of its 37 acres, it has not been deprived of *all* economically viable uses of the property." *Id.* at 1031.

175. Cordes, *supra* note 169, at 1060. Other cases have upheld agricultural zoning. *E.g.*, *Forner v. Allendale Charter Twp.*, No. 212531, 2000 Mich. App. LEXIS 2202, at *23-*24 (Ct. App. May 26, 2000); *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991); *May v. Bd. of Trs.*, No. 18997, 2002 WL 1396008 (Ohio Ct. App. June 28, 2002).

176. For example, in *Gisler v. County of Madera*, 112 Cal. Rptr. 919 (Ct. App. 1974) the court seemed to address the state law issue of whether zoning was non-arbitrary and thus a valid exercise of the police power, but it used language reminiscent of *Euclid*:

The County, in the exercise of its sound discretion, impliedly determined that the minimum 18-acre parcel size is necessary in aid of the preservation of the agricultural

Supreme Court's *Lingle* decision in 2005, the takings analysis was confused by a suggestion that the substantive due process and regulatory takings analyses overlapped. In the 1980 decision *Agins v. City of Tiburon*¹⁷⁷ the Court had observed that a taking occurs "if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of the land."¹⁷⁸ The *Lingle* Court noted that for many years courts had found a taking if either of these conditions appeared, even though the first (the "substantially advances" portion) was more properly designated a due process concern.¹⁷⁹ As the *Lingle* Court noted:

Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.¹⁸⁰

Lingle separated due process from takings concerns for purposes of the federal takings analysis. The second part of the *Agins* test, of course, was adopted in *Lucas*: a regulation is a *per se* taking if it "denies an owner viable use of the land."¹⁸¹ Prior to *Lingle*, however, states such as Ohio might consider both prongs of the *Agins* test in evaluating a taking.¹⁸²

Many state court decisions on agricultural zoning reflect both the substantive due process and the takings concerns, and sometimes blend the

character of the area, and since that is a question upon which reasonable minds might differ, there should be no judicial interference with the legislative determination.

Id. at 921-22. In *Wilson v. Trs., Union Twp.*, No. CA98-06-036, 1998 Ohio App. LEXIS 5025 (Ct. App. 1998) the court made the dual nature of the argument clear: "The police power of the government simply 'does not extend to arbitrary, capricious and unreasonable' actions. An ordinance which is enacted outside this permissible scope is unconstitutional because any ordinance that bears no relation to valid police power violates the requirements of the due process of law." *Id.* at *8 (citations omitted).

177. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

178. *Id.* at 260 (citations omitted).

179. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005).

180. *Id.* at 543.

181. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

182. Prior to *Lingle*, the Ohio Supreme Court allowed a taking to be found if a regulation did not substantially advance a legitimate state purpose, without regard to whether the property had lost value. *E.g.*, *State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002); *Goldberg Cos., Inc. v. Richmond Heights. City Council*, 690 N.E.2d 510 (Ohio 1998). After the *Lingle* decision, it appears that the Ohio courts will follow the *Lingle* Court's lead. *See, e.g.*, *State ex rel. Shelly Materials, Inc. v. Clark County Bd. of Comm'rs*, 875 N.E.2d 59 (Ohio 2007) (following *Lingle*). For cases relying on *Agins*, see *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) and *Habersham at Northridge v. Fulton County*, 632 F. Supp. 815, 821 (N.D. Ga. 1985). Both of these are federal cases so their use of a federal standard is not surprising.

two.¹⁸³ With regard to the substantive due process challenge, the government's action usually is upheld; after all, the legislative action will survive a challenge if its validity is "fairly debatable,"¹⁸⁴ which means that the plaintiff must clearly and convincingly demonstrate that it is arbitrary. In *Gisler v. County of Madera*,¹⁸⁵ for example, the California court upheld "exclusive agricultural zoning with a minimum 18-acre parcel size" on the ground that open space preservation is a valid public purpose and the zoning of the subject parcel was not unreasonable.¹⁸⁶ Municipal governments defend agricultural zoning by documenting their plans or policies in favor of protecting agricultural uses, preventing the spread of uses incompatible with agriculture, and avoiding authorizing development in isolated locations.¹⁸⁷

With regard to the takings question, with very few exceptions the state cases use an *Agins*-type analysis for takings (sometimes citing *Agins* itself): they assert that agricultural zoning is a taking when it "denies an owner economically viable use of the land."¹⁸⁸ Thus they appear to assume that the challenged zoning will survive if the record can support a conclusion that some value remains. Courts uphold the zoning when there is evidence that the land is suitable for farming or is actually being farmed,¹⁸⁹ or when the plaintiff simply has not proven that he

183. *E.g.*, *Grand Land Co. v. Twp. Of Bethlehem*, 483 A.2d 818, 820 (N.J. Super. Ct. App. Div. 1984) (not a taking because zoned for a "reasonable use"). The combination of the concepts is in full view in *Gisler v. County of Madera*, 112 Cal. Rptr. 919 (Ct. App. 1974), where the court observed that

[i]n certain factual situations it is difficult to draw a precise line between a non-compensable injury resulting from the enactment of a valid regulation under the police power and regulations which are beyond the limits of the police power and can only be justified as a 'taking' under the power of eminent domain which requires just compensation.

Id. at 921 (citations omitted).

184. This standard, derived from the *Euclid* case, traditionally is used by courts reviewing legislative actions of local authorities. JUERGENSMEYER & ROBERTS, *supra* note 1, at 330.

185. *Gisler*, 112 Cal. Rptr. 919.

186. *See id.* at 921-22.

187. *E.g.*, *Harvard State Bank v. County of McHenry*, 620 N.E.2d 1360 (Ill. App. Ct. 1993) (applying a multifactor test under state law); *Racich v. County of Boone*, 625 N.E.2d 1095 (Ill. App. Ct. 1993); *Wilson v. County of McHenry*, 416 N.E.2d 426 (Ill. App. Ct. 1981); *Forner v. Allendale Charter Twp.*, No. 212531, 2000 Mich. App. LEXIS 2202 (Ct. App. May 26, 2000); *Van Arsdell v. Twp. of Addison*, 195 N.W.2d 21 (Mich. Ct. App. 1972); *Codorus Twp. v. Rodgers*, 492 A.2d 73 (Pa. Commw. Ct. 1985).

188. *E.g.*, *County of Ada v. Henry*, 668 P.2d 994 (Idaho 1983) (applying *Agins* test to find no taking because not all value taken by eighty acre minimum lot zoning); *Eck v. City of Bismarck*, 283 N.W.2d 193, 197 (N.D. 1979), *Wilson v. Trs., Union Twp.*, No. CA98-06-036, 1998 Ohio App. Lexis 5025 (Ct. App. Oct. 26, 1998).

189. *Grand Land Co. v. Bethlehem*, 483 A.2d 818, 820 (N.J. Super. Ct. App. Div. 1984) (zoning restriction invalid because beyond the powers granted by state law, but

cannot use the property as zoned.¹⁹⁰ The owner might assert that farming is not profitable or does not produce enough revenue to cover taxes. This argument was advanced in *Wilson v. County of McHenry*,¹⁹¹ but the court observed that the county had presented testimony that better farming practices could make the land productive.¹⁹² The case upheld agricultural zoning with a 160-acre minimum lot size.¹⁹³

Cases that find agricultural zoning to be a taking generally focus on the unsuitability of the land for farming. Thus, two cases found that the agricultural zoning category was not valid because it is being used simply as a holding zone, not as an actual source of agricultural productivity. In *Petersen v. City of Decorah*,¹⁹⁴ the plaintiff's land was zoned for agriculture even though it had not been farmed for over thirty years; the city admitted that it was using the agricultural classification as a holding zone, waiting for the right type of industrial use to come along. The Iowa court held that this was "unreasonable and confiscatory."¹⁹⁵ In *Kmiec v. Town of Spider Lake*¹⁹⁶ the Wisconsin court found that the plaintiff's land had "a substantial negative value" as farmland; use of agricultural zoning as a "holding district" to control future development was "unreasonable" and unconstitutional on due process grounds.¹⁹⁷

Two other cases, both in Illinois, applied that state's multifactor test to conclude that agricultural zoning of particular property was arbitrary as a matter of state law. *Smeja v. County of Boone* concerned 50 acres

not a taking because agriculture is a "reasonable use" and "not economically infeasible"); *Vanderburgh County Bd. of Comm'rs v. Rittenhouse*, 575 N.E.2d 663 (Ind. Ct. App. 1991) (plaintiffs failed to show the property "cannot be reasonably be used under the present zoning classification," testimony showed the land was farmable, taking argument rejected); *Bell River Assocs. v. China Charter Twp.*, 565 N.W.2d 695, 699-700 (Mich. Ct. App. 1997); *Mays v. Bd. of Trs.*, No. 18997, 2002 Ohio App. LEXIS 3347 at *24-*25 (Ct. App. June 28, 2002); *Joyce v. City of Portland*, 546 P.2d 1100 (Or. Ct. App. 1976).

190. *Forner v. Allendale Charter Twp.*, No. 212531, 2000 Mich. App. LEXIS 2202 (Ct. App. May 26, 2000); *Wilson v. Trs., Union Twp.*, No. CA98-06-036, 1998 Ohio App. LEXIS 5025 (Ct. App. Oct. 26, 1998); *Smythe v. Butler Twp.*, 620 N.E. 2d 901 (Ohio Ct. App. 1993); *Murray v. Columbia River Gorge Comm'n*, 865 P.2d 1319 (Or. Ct. App. 1993); *Chokecherry Hills Estate v. Deuel County*, 294 N.W.2d 654 (S.D. 1980).

191. *Wilson v. County of McHenry*, 416 N.E.2d 426 (Ill. App. Ct. 1981).

192. *Id.* at 429.

193. In *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988), the plaintiffs alleged that the ranch cost as much or more in taxes as it produced in revenue, but the court did not find a taking.

194. *Petersen v. City of Decorah*, 259 N.W.2d 553 (Iowa Ct. App. 1977).

195. *Id.* at 555.

196. *Kmiec v. Town of Spider Lake*, 211 N.W.2d 471, 477 (Wis. 1973).

197. *Id.* at 475-77.

zoned for agriculture; the owner wanted it to be rezoned for residences.¹⁹⁸ The trial court concluded that the agricultural zoning was “unconstitutional and invalid,” and the appellate court affirmed.¹⁹⁹ Illinois courts evaluate the validity of a zoning ordinance by taking into account factors such as the uses and zoning of nearby properties, the extent to which the existing zoning diminishes the property’s value, the suitability of the property for the zoned purpose, and the relative gain to the public and burden on the owner of the existing and the proposed zoning uses.²⁰⁰ The testimony in *Smeja* was that 15 acres of the tract were “submarginal land not particularly desirable for the raising of crops” and that the remaining 35 acres were wooded.²⁰¹ The appellate court’s decision displays general skepticism about the value of agricultural zoning; in particular the court saw little public benefit in maintaining such a tract as agricultural.²⁰² Similarly, in *Pettee v. County of De Kalb*,²⁰³ the plaintiff sought to rezone agricultural land to allow residences and a small aircraft landing field. The trial court found that the agricultural zoning was “arbitrary and unreasonable,” and the Illinois appellate court affirmed.²⁰⁴ One key finding was that the land was “largely unsuitable for farming.”²⁰⁵ The appellate court also offered the view that although “farmland might well be characterized as an essential natural resource,” in the court’s view “the evidence fails to disclose why plaintiff’s land specifically should be so preserved for the general benefit.”²⁰⁶

Finally, some cases conclude that the municipality’s action was irrational because of other failings. In *Harris Bank of Hinsdale v. County of Kendall*,²⁰⁷ the Illinois appellate court agreed with a trial court’s finding that refusal to rezone agricultural land was arbitrary and unreasonable. There was no suggestion that the land was unsuitable for farming; instead a significant factor was that the county’s own plan designated the area for urbanization.²⁰⁸ In *Twigg v. County of Will*,²⁰⁹ the plaintiffs wanted to subdivide their rural land to build residences for family mem-

198. See *Smeja v. County of Boone*, 339 N.E.2d 452 (Ill. App. Ct. 1975).

199. *Id.* at 456.

200. *Id.* at 454.

201. *Id.*

202. *Id.* at 455.

203. *Pettee v. County of De Kalb*, 376 N.E.2d 720 (Ill. App. Ct. 1978).

204. *Id.*

205. *Id.* at 725.

206. *Id.*

207. *Harris Bank v. County of Kendall*, 625 N.E.2d 845 (Ill. App. Ct. 1993).

208. *Id.* at 851.

209. *Twigg v. County of Will*, 627 N.E.2d 742 (Ill. App. Ct. 1994).

bers and others. Again there was no showing that the land could not be used to grow crops; instead, a key finding was that “the evidence tended to show that the current zoning of the area, including plaintiffs’ tract, was assigned in an arbitrary manner without considering the several non-conforming uses existing when the land-use plan was adopted and the zoning ordinance was enacted.”²¹⁰

In light of these cases, the City of Cleveland is likely to be able to defend its agricultural zoning against a suggestion of a *Lucas* taking, as well as a charge of arbitrariness. Cleveland has a lively and active urban gardening and farming community, including a variety of farms for profit, all of which are relatively small scale and focus on niche or high-value produce.²¹¹ The viability of urban farming for profit was specifically evaluated in a study in Philadelphia, which—although it concerned a limited range of agriculture—concluded that profitable urban farming is possible.²¹² Like any other business, it requires skilled planning, production, and marketing, but it can be done.

Cleveland can build a record to support its contention that an Urban Garden Designation was rationally selected for a particular piece of land and has value for the owner of a particular parcel. The analogy to agricultural zoning is clear in the case of a market garden, which is agriculture on a small scale: the gardener sells crops for income. Thus the use of a parcel of land for profitable urban farming, as part of an overall plan of promoting urban gardens, is both rational and—under these cases, which reach only the *Lucas* form of taking—not a taking. First, the use of the Urban Garden Designation is a considered, planned aspect of Cleveland’s zoning structure. *Re-Imagining*—which has been adopted by the Cleveland Planning Commission—envisions a proliferation of urban gardens, raising them from isolated curiosities to a productive and commonplace element of city life.²¹³ Second, Cleveland has

210. *Id.* at 746.

211. For further evidence of the vitality of the urban farming and garden community in Cleveland, see Mark Lefkowitz, Green City Blue Lake, Tour Nine Urban Farms in Cleveland This Saturday (July 2, 2009) <http://www.gcbl.org/blog/marc-lefkowitz/tour-nine-urban-farms-cleveland-saturday>, as well as Local Food Cleveland, <http://www.localfoodcleveland.org> (last visited Mar. 10, 2010), Urban Growth, <http://www.urbangrowthfarms.com> (last visited Mar. 10, 2010), and Cleveland-Cuyahoga County Food Policy Coalition, <http://www.cccfoodpolicy.org> (last visited Mar. 10, 2010).

212. See URBAN PARTNERS, FARMING IN PHILADELPHIA: FEASIBILITY ANALYSIS AND NEXT STEPS 1-3 (2007), available at http://www.spinifarming.com/common/pdfs/STF_inst_for_innovations_exec_summary_dec07.pdf.

213. See RE-IMAGINING, *supra* note 18, at 28.

identified a rational method by which to identify sites that are suitable for community gardens, as illustrated in *Re-Imagining*.²¹⁴ Assuming that the city has an adequate factual basis for each rezoning decision,²¹⁵ and recognizing that—on appropriate land—urban gardening can be economically viable, a claim of a *Lucas*-style taking seems unlikely to be successful. As the Supreme Court has made clear, the presence of any residual economic value precludes the application of *Lucas*.²¹⁶

The above argument relies heavily upon agricultural zoning cases, so it is fair to ask whether rural agricultural zoning really is comparable to an urban garden. Arguably there must be a difference between preserving agriculture at the edge of a city and promoting agriculture at the heart of one. In the shrinking city context, however, we must recognize the ambiguity of the terms “agriculture” and “city.” The term “agriculture” encompasses any form of cultivating the soil, producing crops, or raising livestock; it is not restricted to industrial farming on hundreds of acres. And a “city” in the case of places like Detroit and Cleveland is urban without overall high density; the central problem of a shrinking city is an excess of vacant or under-used land.

Of course there are differences in purpose. One common purpose of agricultural zoning is to preserve farmland from urban encroachment; the Urban Garden District, by contrast, seeks to return nominally urban land to agricultural status. One key defense of agricultural zoning often is the agricultural nature of the surrounding land. The Urban Garden District is likely to be an isolated garden used in a city. In the words of *Euclid*, we are putting the pig in the parlor, where some might think it does not belong.²¹⁷

These are distinctions between the two types of zones, without a doubt, but they do not eliminate the essential value of the comparison. In terms of rationality or substantive due process, the city’s rationale for an urban garden, although different from the rationale for agri-

214. *Id.* at 9 fig.7.

215. If instead the designation is arbitrary, without adequate factual basis, it is vulnerable to challenge on that ground without the need to show a taking. *E.g.*, *Jaylin Invs., Inc. v. Vill. of Moreland Hills*, 839 N.E.2d 903 (Ohio 2006).

216. *E.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, Inc.*, 535 U.S. 302, 330 (2002). For example, in *Palazzolo v. Rhode Island*, the state’s restrictions on filling coastal wetlands precluded the plaintiff from building a proposed 74-lot subdivision. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The Court found no *Lucas* taking, because he still could build a single house on an upland portion of the parcel. *Id.* As the Court pointed out, “A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property ‘economically idle.’” *Id.* at 632 (quoting *Lucas*).

217. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391, 394-95 (1926).

cultural zoning, can withstand scrutiny under the relaxed standard of *Euclid*. The regulatory taking argument is the same in both instances: that the restriction of the land to agricultural purposes is confiscatory; and the response is the same: that agriculture is an economically beneficial use.

It should be noted that the Cleveland urban garden district also allows community gardens, which do not directly produce income, and none of the cases consider whether farming for one's own consumption or donation is a sufficient economically beneficial use to avoid the charge of a taking. However, the takings analysis asks whether property can be used as zoned, and the urban garden category allows both market and community gardens. Consequently, as long as the site is zoned for both market and community gardens and is suitable for gardening, the agricultural zoning cases can assist Cleveland in defending its zoning category against a charge of a *Lucas* taking. The takings issue would be much more difficult if the zoning allowed nonprofit community gardens alone, and would raise interesting questions about the type of economically beneficial use that the Supreme Court would accept to defeat a takings claim.²¹⁸

2. TAKING UNDER *PENN CENTRAL*

If an urban garden district designation is not a *per se* taking under *Lucas*, there remains the possibility that a court could hold that it is a taking under the multi-factor analysis of *Penn Central*.²¹⁹ In *Penn Central*, the Supreme Court rejected a challenge to the application of New York City's Landmarks Law to Grand Central Station, where New York had denied Penn Central permission to build a modern office tower on top of the existing, classically elegant terminal building.²²⁰

The *Penn Central* decision instructed us to consider the economic impact of the regulation on the landowner, and in particular the extent to which the regulation has interfered with distinct investment-backed expectations, and the "character of the government action."²²¹ In applying these factors, the Court recently explained in *Lingle*, we evaluate "the

218. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court famously recognized that cultivation of wheat on one's own property for one's own consumption nonetheless was sufficiently related to interstate commerce to implicate the Commerce Clause. This holding recently was upheld in *Gonzales v. Raich*, 545 U.S. 1 (2005) (cultivation and use of marijuana for medical purposes). Perhaps these cases provide a starting point for an argument that even a community garden is an economic use.

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

220. *Id.*

221. The *Penn Central* list of factors is discussed in *Lingle*, 544 U.S. at 538-39.

severity of the burden that government imposes upon private property rights.”²²² Our goal is to “identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”²²³ In the *Penn Central* context, we consider “the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”²²⁴

The *Penn Central/Lingle* test is more easily stated than applied. What does it mean to conclude that a regulatory restriction is “functionally equivalent” to a classic taking? When the government seizes property by eminent domain it ousts the landowner from the property and acquires title itself. Thus the landowner loses all of the attributes of ownership: he loses title to the property and thus cannot possess it, exclude others from it, use the property, or sell it to somebody else.

It is unclear how any restriction that does not essentially eradicate one or more of the attributes of ownership would be functionally equivalent to eminent domain. By definition any regulation evaluated under *Penn Central* has less effect on the owner than either a physical invasion (held to be a *per se* taking in *Loretto v. Teleprompter*)²²⁵ or the *Lucas* setting. Indeed, the *Penn Central* analysis relatively seldom leads a court to conclude that a taking has occurred.²²⁶

In addition, although the *Penn Central* Court identified three factors, it offered no guidance concerning how they are to be weighed. Arguably it even eschewed offering guidance, by stating that takings analysis involves “essentially ad hoc, factual inquiries.”²²⁷ Some have questioned whether the *Penn Central* Court applied its own test in the *Penn Central* decision,²²⁸ so it is small wonder that many judicial decisions describe

222. *Id.* at 539.

223. *Id.*

224. *Id.* at 540.

225. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

226. See *Walcek v. United States*, 49 Fed. Cl. 248, 271-72 (2001); Cordes, *supra* note 169, at 378.

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

228. After it outlined the principles governing its decision in the first few parts of the opinion, the Court then states:

We now must consider whether the interference with appellant’s property is of such a magnitude that ‘there must be an exercise of eminent domain. . . .’ That inquiry may be narrowed to the question of the severity of the impact of the law on appellant’s parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the Terminal site.

Id. at 136.

the factors, briefly explain how each is featured in the case before it, and (usually) conclude that no taking has occurred.²²⁹ Nonetheless, we are required to follow the instructions in *Lingle* and apply the *Penn Central* analysis to the problem of the urban garden.

a. Economic Impact

The *Penn Central* decision introduced the issue of economic impact by phrasing it as follows:

In engaging in these essentially ad hoc, factual inquiries, the Court's decision have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations are of course relevant considerations. . . . So, too, is the character of the governmental action.²³⁰

In the *Lingle* decision, the Court repeated this language.²³¹ The *Penn Central* Court's use of the words "several factors" and "relevant considerations" suggests that, with regard to economic effect, the Court had two elements in mind: the "economic impact" as a whole, and the impact on "investment-backed expectations" as part of that effect.²³²

Thus it has become customary to consider the extent to which the restriction at issue reduces the value of the property: is it worth significantly less with the restriction than it would be if the restriction were removed? For example, the economic impact of prohibiting filling a wetland might be less than the economic impact of prohibiting construction on comparably located dry land, because the cost of construction in a wetland is much higher and thus the site is less desirable for building.²³³ At the same time, however, the *Penn Central* Court cautioned against giving a significant loss in value too much weight:

Appellants concede that the decisions sustaining other land use regulations, which, like the New York City [landmarks] law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking" and that the "taking" issue in these contexts is resolved by focusing on the uses the regulations permit.²³⁴

229. *E.g.*, *District Intown Props. Ltd. P'ship. v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999); *Zanghi v. Bd. of Appeals*, 807 N.E.2d 221 (Mass. App. Ct. 2004). For an example of a case concluding that a *Penn Central* taking has occurred, see *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21 (1999).

230. *Penn Cent.*, 438 U.S. at 124.

231. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005).

232. *See id.*

233. *E.g.*, *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974 (R.I. Super. Ct. Jul. 5, 2005) (disposition of case on remand from the Supreme Court, taking the cost of construction in a marsh into account in evaluating economic impact).

234. *Penn Cent.*, 438 U.S. at 131.

This language suggests that the more significant part of the inquiry concerns the interference with investment-backed expectations concerning permissible or reasonable uses of the land.

Nonetheless, we must consider the extent to which an Urban Garden designation is likely to diminish the value of the owner's land. Here, the question is whether rezoning vacant land from a residential, industrial, or commercial category to an urban garden zone would have a significant effect on the land's value. In the absence of a specific case, we cannot know the precise answer to this question. The *Re-Imagining* report suggests, however, that the city would not designate as urban garden any land that has significant development potential.²³⁵ Moreover, the assumption of the *Re-Imagining* model is that Cleveland has large quantities of excess land that need to be brought into productive use, and that an urban garden—as opposed to a vacant lot—is a productive use. Indeed, the Cleveland zoning code envisions urban gardens as a way of enhancing the city, by providing green space, a food resource, and a community gathering place.²³⁶ This assumption perhaps challenges traditional understanding of an economically beneficial urban use but, in the context of the shrinking city, has some appeal. Thus we can conclude that the rezoning is unlikely to result in a significant diminution of value, bearing in mind that the assumption would be tested in a particular case.²³⁷

b. Investment-Backed Expectations

The second element of the *Penn Central* analysis is “the extent to which the regulation has interfered with distinct investment-backed expectations.”²³⁸ The Court did not offer much explanation of what it meant by this term, other than the following: “[T]his Court has dismissed “taking” challenges on the ground that, while the challenged Government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute “property” for Fifth Amendment purposes.”²³⁹ Taken at face value, this suggests that only an actual property interest

235. RE-IMAGINING, *supra* note 18, at 9.

236. See CLEVELAND, OHIO, CODIFIED ORDINANCES, tit. VII, ch. 336.01 (2009).

237. If significant development pressures emerge at some point in the future, nothing prevents the City—after an appropriate public hearing and consideration—from rezoning the land for a more intensive use. If it declines to rezone, the scenario becomes one with which we are familiar: an owner of land zoned for a less intensive use seeks rezoning to a higher use; when permission is refused, the owner files suit, alleging a taking.

238. *Penn Cent.*, 438 U.S. at 124.

239. *Id.* at 124-25.

qualifies as an investment-backed expectation. One example of such an interest would be a vested right in development, which can arise under common law when a property owner has committed sufficient resources to construction in compliance with a valid permit,²⁴⁰ or by statute in states that have adopted statutory criteria for vesting.²⁴¹ A person with a vested right to finish a project is protected from any change in zoning that might prohibit completion (as when a developer already is building houses when land is rezoned for commercial use). Lower courts have concluded that a vested right can be a property interest and thus an investment-backed expectation for purposes of *Penn Central*.²⁴²

What else might qualify as an investment-backed expectation? The role of expectations arose in *Palazzolo v. Rhode Island*,²⁴³ in which a land owner challenged a Rhode Island law prohibiting filling coastal wetlands. Prior to that decision, many state courts took the position that a person who acquired land with knowledge of a regulatory restriction could not claim a taking when the restriction was applied. Acquisition with notice, the courts reasoned, precluded any reasonable expectation of development.²⁴⁴ The Supreme Court rejected that view in *Palazzolo*. If the restriction was a taking for the previous owner, it remained a taking when applied to the new owner: “[some] enactments are unreasonable and do not become less so through the passage of time or title A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule.”²⁴⁵ This was enough to decide a key issue in the case: the pre-existing restriction on filling coastal wetlands did not defeat Palazzolo’s takings claim and the case was remanded for consideration under *Penn Central*.²⁴⁶

In a concurring opinion, Justice O’Connor offered her views concerning the relevance of a pre-existing restriction to a *Penn Central* analysis:

Today’s holding does not mean that the timing of the regulation’s enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis Under [*Penn Central*] interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time

240. *E.g.*, *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980).

241. *E.g.*, VA. CODE ANN. § 15.2-2307 (2009).

242. *See, e.g.*, *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1033 (3d Cir. 1987) (suggesting that a vested right is a property interest and thus a “distinct investment backed expectation” for purposes of *Penn Central*).

243. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

244. *See id.* at 613.

245. *Id.*

246. *Id.* at 632.

the claimant acquires the property at issue helps to shape the reasonableness of those expectations.²⁴⁷

She concluded: “[c]ourts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred.”²⁴⁸ Justice O’Connor linked investment-backed expectations to the fairness concerns that she thought underlie the regulatory takings analysis.²⁴⁹ Under this view, the concept of a “reasonable” investment-backed expectation refers to something that can be less than a property interest but must be more than a unilateral desire; it is an objectively reasonable expectation of how a person might use his property.²⁵⁰ Justice O’Connor specifically noted that this reasonable expectation could arise “without vesting any kind of development right in the property owner.”²⁵¹

Justice O’Connor’s views on investment-backed expectations were endorsed in the majority opinion in *Tahoe-Sierra*.²⁵² In *Tahoe-Sierra*, the landowners argued that the planning agency’s lengthy moratorium on all development in affected areas around Lake Tahoe amounted to a *per se* taking for the period of the moratorium. The Court rejected this view, thereby declining to expand the settings in which a *per se* takings rule would apply. Instead, the Court signaled its support for the fact-specific case by case approach of *Penn Central*.²⁵³ It singled out for approval Justice O’Connor’s *Palazzolo* language concerning fairness and the role of the regulatory environment in shaping investment-backed expectations.²⁵⁴ The *Tahoe-Sierra* Court noted that the precise question

247. *Id.* at 633 (O’Connor, J., concurring).

248. *Palazzolo*, 533 U.S. at 635-36.

249. *Id.* at 633.

250. *See id.* at 634-35. Justice Scalia’s concurring opinion took the opposite view: a pre-existing restriction “should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.” A person is not expected to take into account “the assumed validity of a restriction that . . . deprives property of so much of its value as to be unconstitutional.” *Id.* at 637 (Scalia, J. concurring). Of the two, Justice O’Connor’s view seems more representative of how a reasonable developer might think: given the cost and unpredictability of litigation, it seems safer to assume that a restriction is valid than to assume the opposite. Justice Scalia’s view has the appeal of greater logical purity. The courts tend to follow Justice O’Connor. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348-49 (Fed. Cir. 2004); *Cane Tenn., Inc. v. United States*, No. 96-237 L, 2004 U.S. Claims Lexis 359 (Fed. Cl. 2004); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984) (stating reasonable investment-backed expectations “must be more than a ‘unilateral expectation or an abstract need’”).

251. *Palazzolo*, 533 U.S. at 635.

252. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

253. *Id.* at 320-21.

254. *Id.* at 335.

in *Palazzolo* (the temporal relationship between regulatory enactments and the acquisition of title) was not before it but it endorsed the concept of an analysis focusing on fairness and justice in each case.²⁵⁵

A few years later in *Lingle*, though, the Court (through Justice O'Connor again) suggested that perhaps the definition of investment-backed expectations should be narrowed to quasi-property rights: "[t]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."²⁵⁶

With this limited and somewhat unclear guidance, the lower courts seem to give weight to investment-backed expectations if the landowner committed resources to development, when that action was reasonable in light of the facts (such as the property and its surroundings, and their suitability for development) and the regulatory climate existing at the time of investment.²⁵⁷ The *Palazzolo* case on remand provides an unusually well-considered example. The Rhode Island court considered whether a residential development on Palazzolo's land would be likely to be successful, noting Palazzolo's lack of experience in real estate development and the lack of other residential subdivisions in the area.²⁵⁸ The court emphasized the great expense associated with building houses in a marsh.²⁵⁹ The court noted that Rhode Island had never consented to filling the marshland on Palazzolo's parcel and that Palazzolo's title to the property "is clearly subject to the public trust doctrine," so that Palazzolo's "reasonable investment-backed expectations must be measured against the premise that the one-half of Plaintiff's property which lies below mean high water can never be filled absent state approval."²⁶⁰ Finally, the court referred to the "growing nationwide movement toward the preservation of ecologically valuable sites during the last half of the twentieth century," including various Rhode Island enactments prohibiting filling wetlands of which Palazzolo was aware.²⁶¹ Thus the court on remand looked for overall indicia of reasonable expectations,

255. *Id.* at 335-36.

256. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

257. For an interesting survey of how state courts have handled this concept, see J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?*, 38 URB. LAW. 81 (2006).

258. *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974 at *12 (R.I. Super. Ct. Jul. 5, 2005).

259. *Id.* at *13.

260. *Id.*

261. *Id.* at *14 n.78.

without seeming to consider whether those expectations needed to be strong enough to amount to a property interest.

What, then, can one say about an urban garden zone? What is the expectation with which it might interfere? We know that, as a general rule, Cleveland may change the zoning of a parcel without compensating the owner for any change in value. In the absence of a vested right, no person has a property interest in unchanged zoning.²⁶² If we assume that the city rezones untenanted private land previously designated for residential, commercial, or industrial use as an urban garden, we have to consider whether this interferes with an owner's reasonable expectation of development. *Lucas* suggests that, in general, a person has a right to expect to be able to build *something*—that the deprivation of the right to build any permanent structure looks like a taking. But the agricultural zoning cases remind us that the courts are willing to accept zoning that allows productive use without requiring that the use allow actual construction of buildings.

Thus we must consider the likely specific circumstances of an urban garden site in a shrinking city. We must assume that the city plans to rezone land for urban gardens only where it concludes that the specific parcel does not have a reasonable prospect of more intensive development in the foreseeable future. This is the policy expressed in *Re-Imagining*. Moreover, the city's judgment is likely to be supported by the overall climate of a shrinking city, in which there is more land available than is needed to supply current or foreseeable future development. True, even today speculators are purchasing lots in Cleveland by the dozens on the theory that they might prove valuable in the future, but it is notable that many of these are out-of-state individuals unfamiliar with Cleveland.²⁶³ Under these circumstances, it is likely that the city could present a strong case that reasonable expectations of future development of a particular parcel must be modest or non-existent.

Could a city sustain an urban garden zone if the market for land undergoes a dramatic change in the future? At this point we would be even farther into the realm of speculation, and it is possible that the city would change its mind and, after appropriate public hearings, rezone the parcel. If it does not, the agricultural zoning cases suggest that an urban garden district could resist an expectations-based takings

262. *E.g.*, *Zanghi v. Bd. of Appeals*, 807 N.E.2d 221, 226 (Mass. App. Ct. 2004); *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (property owners must expect that land use regulations will change over time).

263. *Kotlowitz, supra* note 29.

challenge even if development pressures increase. Indeed, many agricultural zoning cases are decided in the face of pressure for more intense development—a pressure that agricultural zoning is specifically intended to resist.²⁶⁴

c. Character of Regulation

The final factor in the *Penn Central* analysis is the “character of the government action.” The meaning of this is not clear in *Penn Central*, nor has the Court clarified it on any subsequent occasion. Commentators acknowledge that it is something of a mystery.²⁶⁵ In *Penn Central* itself, the Court characterized this factor as follows: “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by Government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”²⁶⁶

This language suggests that the only issue is whether the government has engaged in some form of a physical invasion. It is possible that this is all the Court meant, because apparently it derived its reference to “character” from the *Causby* case, where the term was used to refer to a physical invasion of an owner’s property.²⁶⁷ Only a few years after *Penn Central*, the *Loretto* case held that such an invasion would be a *per se* taking.²⁶⁸ If the *Penn Central* character factor has any meaning today, it must be elsewhere.

Later in *Penn Central*, the Court states that “Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute ‘takings,’” citing the *Causby* case again.²⁶⁹ In *Causby*, the United States landed

264. Cordes, *supra* note 169, at 1033-34; *see, e.g.*, *Harvard State Bank v. County of McHenry*, 620 N.E. 2d 1360, 1363 (Ill. App. Ct. 1993) (agricultural zoning defended as a buffer against suburban encroachment).

265. *E.g.*, Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENVTL. L.J. 63, 101 (2008); *see also* R. S. Radford, *Just a Flesh Wound? The Impact of Lingle v. Chevron on Regulatory Takings Law*, 38 URB. LAW. 437, 448 (2006) (“What considerations might reasonably be included in the ‘character’ calculus remains as great a mystery today as the day *Penn Central* was drafted.”).

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

267. *United States v. Causby*, 328 U.S. 256, 266 (1946) (“As stated in *United States v. Cress*, 243 U.S. 316, 328, [itself a case involving physical invasion by floodwater,] it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.”).

268. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

269. *Penn Cent.*, 438 U.S. at 128.

military aircraft at a nearby airport by flying low over the claimant's land, frightening the chickens and disrupting the lives of the owners. The Supreme Court agreed with the court of claims that the government had in effect taken an easement over the property.²⁷⁰

Still later in the *Penn Central* opinion, the Court notes that the *Penn Central* plaintiffs describe *Causby* as an instance in which "Government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose."²⁷¹ The Court rejected this suggestion:

Apart from the fact that *Causby* was a case of invasion of airspace that destroyed the use of the farm beneath and this New York City law has in nowise impaired the present use of the Terminal, the Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city.²⁷²

The Court thus disagreed with the notion that the application of the New York landmark law to Grand Central Station was an action in an enterprise capacity; the Court did not disagree with the suggestion that an action in an enterprise capacity might have a particularly dubious character.²⁷³

These two descriptions of the character factor—the acquisition of resources for "uniquely public functions" and the appropriation of property to help a government in an "enterprise capacity"—have slightly different implications. The first might apply to a green space designa-

270. *Causby*, 328 U.S. at 267. The Court described the facts as follows:

[The airplanes] come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has become nervous and frightened.

Id. at 259.

271. *Penn Cent.*, 438 U.S. at 135.

272. *Id.*

273. The *Causby* Court rested its finding of a taking on the concept of a physical intrusion:

The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

Causby, 328 U.S. at 265. *Causby* itself does not include any language using an "enterprise capacity" theory, and indeed it did not need to, as the finding of a physical intrusion was sufficient.

tion for property, when the purpose is flood control to benefit the public. Although the government always regulates in the public interest, this restriction is particularly severe and in effect dedicates the land to a public purpose, with no room for private use (other than recreational strolls when the premises are not flooded). Perhaps this is an action of questionable “character,” though this does not add much to our understanding: in this instance we need not reach the issue of character because, as discussed below, this looks like a *Lucas* per se taking.

The second (enterprise capacity) might apply when a government undertakes a function that might have been handled privately, such as when a government builds a convention center. As an example, assume a city builds a convention center and then realizes that it has not built enough parking spaces to serve the center. In order to solve this problem, the city zones vacant land adjacent to the center “parking lot only.” Although the rezoning might survive substantive due process scrutiny because it is rationally related to a legitimate public purpose (promoting urban development by facilitating the use of a convention center), and the land may well retain significant economic value as a parking lot, something about the character of the action seems like a taking. The city has used its governmental power to obtain parking capacity for its new convention center without paying for it.

In this latter “enterprise capacity” setting, some have argued that the government’s action always looks like a taking. Indeed, it is possible that the *Penn Central* litigants were thinking of an influential article by Prof. Joseph Sax in which he presented this argument.²⁷⁴ However, this enterprise capacity theory does not seem to have been adopted or endorsed in any reported decisions.²⁷⁵

The most recent mention of character is in the *Lingle* decision. As noted earlier, *Lingle* pared away from the taking analysis an element that had confused it for some time: the suggestion in some of the cases that a regulation can be a taking if it fails to substantially advance a legitimate state purpose.²⁷⁶ The *Lingle* Court stated that this is a factor related to due process concerns, not a taking:

274. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62-63 (1964); see also Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U.L. REV. 819, 844 (2006) (“when the government competes for resources, it is more likely to overreach than when it arbitrates the use of resources by others . . . because there is an incentive in the former circumstance to acquire resources without having to pay for them”).

275. The concept is mentioned in *Coast Range Conifers, LLC v. State*, 117 P.3d 990, 995 n.10 (Or. 2005), but without success for its advocates.

276. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005).

In stark contrast to the three regulatory takings tests discussed above [*Loretto*, *Lucas*, and *Penn Central*], the “substantially advances” inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.²⁷⁷

By removing the “substantially advances” component from the takings analysis, the Court suggests that we are not concerned with the strength of the public interest the regulation serves; we are only concerned with the magnitude and distribution of the burden the regulation imposes.²⁷⁸

Perhaps this is what *Lingle* tells us “character” means: an action with a greater or more unfair burden on use looks more like a taking, even apart from its actual economic impact.²⁷⁹ This interpretation might support a challenge to an Urban Garden District designation. The argument would be that by zoning land for an urban garden, the government is in effect taking it for the public purpose of fostering community gardens. If government wants local residents to join together to garden, let the government offer this option on public land. The burden of an Urban Garden zone is significant because it is highly restrictive and much more restrictive than the zoning of adjacent properties, which could be zoned for residential or other development uses. Even if the property had virtually no value at the outset, the “character” of this burden is perhaps distinctively onerous.

This is an argument that could find a sympathetic audience. After all, why should one urban land owner be limited to garden uses, while his neighbors may build houses? At first glance, the agricultural zoning cases seem to provide a response: the courts overwhelmingly uphold zoning land for agricultural uses, when a reasonable governmental purpose is at least fairly debatable. The mere restriction of a property to agricultural use is not fatal. Upon closer examination, the strength of this argument dims somewhat because most types of agricultural zoning also allow construction of single family residences, although at very

277. *Id.* at 543.

278. For an argument that *Lingle* has made the character element irrelevant, see Dale A. Whitman, *Deconstructing Lingle: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573 (2007).

279. The concept of unfairness has the flavor of an equal protection argument. It would be unfortunate if *Lingle*, after striving to remove substantive due process from the takings analysis, were to bring in a confusing equal protection element.

low densities, or the possibility of other uses by special exception.²⁸⁰ Nonetheless, this additional opportunity for development makes a difference in very few cases, so it does not completely undercut the value of the agricultural zoning example. In addition, courts have upheld agricultural zones that allow only agriculture and no other uses.²⁸¹

A more significant drawback is that virtually none of the agricultural zoning cases go beyond a simple *Lucas*-type inquiry to a *Penn Central* analysis, so they do not tell us how the character concept might be handled.²⁸² As noted earlier, most of them simply say that the property retains value for agriculture. One exception in this regard is *Gardner v. New Jersey Pinelands Commission*,²⁸³ which considers the application of *Penn Central* to New Jersey's protection of an area called the Pinelands. The complexities of the state's comprehensive Pinelands protection plan are not important here; the pertinent point is that the plaintiff wanted to subdivide farmland for residences and alleged that the state's refusal to allow such development was a taking. The New Jersey court's *Penn Central* analysis was relatively sparse; here it is in its entirety:

Plaintiff's claim fails under the *Penn Central* analysis. The CMP does not change or prohibit an existing use of the land when applied to plaintiff's farm. Like *Penn Central*, plaintiff may continue the existing, admittedly beneficial use of the property. Further, although whether *Penn Central* could again make use of all of its property, particularly the airspace over its terminal, was unclear, plaintiff may gainfully use all of his property, including the right to build five homes clustered together on the restricted land. There also is no showing that the economic impact of the regulations interferes with distinct investment-backed expectations. In addition, *Penn Central* could offset its loss by transferring valuable property rights to other properties, even if such transfers did not fully compensate it. Plaintiff possesses the similar right to offsetting benefits; it may receive Pinelands Development Credits in return for recording the deed restrictions. Finally, there is no invidious or arbitrary unfairness in the application of the regulatory scheme. Gardner's neighbors in Uplands Agricultural Areas are burdened by exactly the same restrictions, and other landowners in the

280. See, e.g., *Bell River Assocs. v. China Charter Twp*, 565 N.W.2d 695 (Mich. Ct. App. 1997) (agricultural uses include single family homes as well as other special uses allowed by permission).

281. In many cases, the court does not specify whether uses in addition to agriculture are allowed. Some cases expressly approve exclusively agricultural zones. See *Gisler v. County of Madera*, 112 Cal. Rptr. 919 (Ct. App. 1974); *Wilson v. County of McHenry*, 416 N.E.2d 426 (Ill. App. Ct. 1981) (160 acre lot minimum); *Chokecherry Hills Estates, Inc. v. Deuel County*, 294 N.W.2d 654 (S.D. 1980); see also *Joyce v. City of Portland*, 546 P.2d 1100 (Or. Ct. App. 1976) (holding no taking occurred when agricultural use was still permitted).

282. This might be explained by the relative antiquity of many of the cases, some of which were decided before *Penn Central*, and most of which were decided before *Lingle*.

283. *Gardner v. N.J. Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991).

Pinelands must abide by comparable regulations as part of an integrated comprehensive plan designed to benefit both the region and the public.²⁸⁴

This analysis does focus on the unfairness concern in the portion that arguably concerns “character” and notes that the plaintiff suffers from the scheme no more than his neighbors. An urban garden plot owner might argue that he is different; he alone (or relatively alone, because the city plans a network of urban gardens) bears the urban garden district restriction.

When a court evaluates a taking it does not look at the uses or value that have been prohibited; it considers the uses or value that remain, and asks whether the owner retains sufficient use or value that there has been no regulatory taking.²⁸⁵ If the city can show that the use of the land for urban gardens offers a viable economic use to the owner, the city can argue that the zoning is not unduly restrictive. Although neighboring properties might be zoned for business or housing, it is a fact of life in zoning that different districts allow different uses; a community garden inevitably will be located adjacent to other, more intensive uses.²⁸⁶

This response is somewhat unsatisfactory from an intellectual perspective because it says, in essence, that the character of the restriction does not matter because not all value has been taken. Yet it seems consistent with the broader concept of a regulatory taking as functionally equivalent to government confiscation: as long as some economically viable private use remains, the owner has suffered regulation, not a taking.

3. GREEN SPACE ZONING

All of the takings arguments become much stronger, of course, for land that is zoned for green space. The *Re-Imagining* report discusses a range of possible “green infrastructure” uses, including parks and public green space, stormwater management areas, and wildlife habitat.²⁸⁷

To some extent, green space and development might be compatible. If a portion of a parcel can be developed in some manner, while leaving sufficient unpaved area for stormwater management or habitat, arguably we are in a *Penn Central* setting. As the *Penn Central* Court

284. *Id.* at 261 (citations omitted).

285. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978).

286. *See, e.g., Puritan-Greenfield Improvement Ass’n v. Leo*, 153 N.W.2d 162, 170-71 (Mich. Ct. App. 1967) (noting that adjacency to more intensive uses is “characteristic” of the end of one zoning district and the beginning of another). For another analysis of the “character” concept, see Christopher T. Goodin, *The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis*, 29 U. HAW. L. REV. 437 (2007).

287. RE-IMAGINING *supra* note 18, at 8.

explained, when evaluating a taking we look at the parcel as a whole; if not all of a parcel is restricted, there is not a total taking.²⁸⁸ In that instance the takings analysis would be similar to that above, though with the added chore of identifying the relevant parcel for the “parcel as a whole.”²⁸⁹

If any of the green space options preclude any form of economic activity, they look much more like a taking under *Lucas*. If none of a parcel of property can be developed because it is designated as a retention basin for stormwater management or a wildlife habitat, the property has no value to the owner. All of the property’s value has been taken for a public purpose and the *Lucas* argument is particularly strong. The *Lucas* majority noted that regulations requiring land “to be left substantially in its natural state” carry “a heightened risk that private property is being pressed into some form of public service. . . .”²⁹⁰

For this reason it is highly unlikely that the city would attempt to zone any land that is privately held for exclusive use as “green infrastructure.” Any such rezoning on private land would be vulnerable to attack as a taking.

B. *Spot Zoning and Equal Protection Objections to an Urban Garden Zone*

The above discussion focuses on takings law because it is an obvious issue when a city downzones land to a use such as an urban garden. The discussion necessarily includes references to another potential legal challenge to an urban garden zone: the argument that the zoning power has not been exercised rationally and does not satisfy the “fairly debatable” standard. Other legal arguments that might arise stem from the concept of unfairness. These are the state law argument that an urban garden zone might be unlawful “spot zoning,” and a state or federal constitutional argument that singling out one parcel for rezoning might be an equal protection violation.

288. *Penn Cent.*, 438 U.S. at 130-31. The Court explained:

“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. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in parcel as a whole—here, the city tax block designated as the “landmark site.”

Id.

289. *See, e.g., Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000) (evaluating the appropriate parcel for purposes of a takings analysis).

290. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

Litigants raise the challenge of “spot zoning” when they think that one parcel has been singled out for different zoning treatment than the areas around it.²⁹¹ Usually the parcel has been rezoned to a more intensive use than that of its neighbors, such as a large apartment building allowed in a single family home district. Rezoning to a less intensive use (as in the urban garden setting) can be called “reverse spot zoning.” The concept has a visual element: a small tract rezoning will show up on a zoning map as a visible “spot,” surrounded by other, different uses. Spot zoning is not always unlawful; rather, the existence of small tract rezoning is the starting point for a court’s analysis of whether the rezoning complies with zoning laws, including the SZEA’s concept that a municipality’s overall zoning scheme must be in accord with a “comprehensive plan.”²⁹² In addition, of course, the spot zoning must survive the “fairly debatable” standard.²⁹³

A tract of land with the urban garden zoning designation runs the risk of looking like a spot on the Cleveland zoning map. (Of course, if the city carries out its plan of fostering a large number of urban gardens, the zoning map might appear to be dotted with such spots.) The city would have to defend the zone by demonstrating that, rather than an aberration, the urban garden zones have been mapped on the basis of a comprehensive plan; that the rezoning does not adversely affect the neighbors; and that each zone has been selected on the basis of a rational factual finding that the land and location are suitable for the zoning.²⁹⁴

An equal protection challenge takes the spot zoning concept (“this tract has been treated differently from others around it”) and clothes it in constitutional garb. Here the argument would be that selection of a particular tract as an urban garden zone is a form of discrimination.

291. See JUERGENSMEYER & ROBERTS, *supra* note 1, at 242.

292. Standard State Zoning Enabling Act § 3, *reprinted in* MANDELKER, *supra* note 1, at 4.16. Courts generally consider factors such as the impact of the use as rezoned on the surrounding area, the size of the area or number of owners benefited, and whether the rezoning is consistent with a comprehensive plan. *Compare* Greater Yellowstone Coal., Inc. v. Bd. of County Comm’rs., 25 P.3d 168, 172 (Mont. 2001) (small tract rezoning unlawful) *with* Smith v. City of Papillion, 705 N.W.2d 584, 599 (Neb. 2005) (small tract rezoning upheld).

293. See JUERGENSMEYER & ROBERTS, *supra* note 1, at 242.

294. Spot zoning cases do not appear to be frequently litigated in Ohio. The Ohio Supreme Court has defined spot zoning as “the singling out of a lot or a small area for discriminatory or different treatment from that accorded surrounding land which is similar in character.” *Willott v. Vill. of Beachwood*, 197 N.E.2d 201, 203 (Ohio 1964). Following the lead of this case (which held that an 80-acre tract rezoning was not a “spot”), the Ohio courts appear to apply a fairly simple test based on the *Willott* description. See, e.g., *Menges v. Sugarcreek*, No. 89AP070059, 1989 Ohio Ct. App. LEXIS 4825, at *1-3 (Ct. App. Dec. 21, 1989).

Under Supreme Court doctrine, however, economic discrimination in this form need survive only a “rational basis” test: such a statutory classification is valid if there is “any reasonably conceivable state of facts that could provide a rational basis for the classification.”²⁹⁵ For all of the reasons detailed above, the city is likely to be able to survive an equal protection challenge.²⁹⁶

C. *Brownfields in the Shrinking City*

One final issue must be identified, although it is not a land use issue in the narrow sense. The soil in Cleveland displays its urban and industrial heritage, as urban soils commonly are compromised by the presence of petrochemicals, lead or other contaminants. Some of these so-called “brownfield” sites are old industrial areas with significant contamination that merit a structured and comprehensive cleanup; many are relatively mildly contaminated, as a side effect of being located in an aging urban area. It is virtually impossible to place a price tag on such remediation, as it depends on the nature and extent of the contamination, so the practical impact of the issue is uncertain. The *Re-Imagining* report includes concern about remediation, noting that “environmental contaminants abound in places where development demand is very limited or in some cases, non-existent.”²⁹⁷ This is a significant observation because, as *Re-Imagining* points out, “[r]esources for cleaning up brownfields sites are typically tied to new development projects.”²⁹⁸ Indeed, our legal structure for cleaning up contaminated sites rests in large part on the use of private funding or—more recently—public funding available where there is a likelihood that a cleaned-up site can offer economic development benefits. Thus the shrinking city faces another hurdle: a prospective “green” use probably requires cleanup of contaminants to the maximum extent appropriate to protect human health and the environment, but the resources available to the shrinking city are limited.

A comprehensive review of this issue is beyond the scope of this paper, but in general the federal contaminated site cleanup program depends on

295. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993); see *Blust v. City of Blue Ash*, 894 N.E.2d 89, 94 (Ohio Ct. App. 2008) (offering that a comparable rational basis test applies under state law in Ohio); see also *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding a restriction on boarding houses as having a rational basis).

296. The Equal Protection argument gains greater weight if the plaintiff can allege and show a racial motivation in selecting a particular parcel of land, thereby triggering strict scrutiny of the classification. JUERGENSMEYER & ROBERTS, *supra* note 1, at 10.14.A (2007).

297. *RE-IMAGINING*, *supra* note 18, at 24.

298. *Id.*

private funding: it imposes cleanup liability on an array of individuals who can be linked to the hazardous substances contaminating a particular site.²⁹⁹ This liability structure was imposed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980.³⁰⁰ Decades of CERCLA litigation ensued as each of these “potentially responsible parties” (PRPs) sought to find as many other PRPs as possible, to fund the cleanup of these severely contaminated sites. In addition, fear of liability under CERCLA added to disincentives to invest in older industrial sites in cities such as Cleveland: rather than run the risk of acquiring an environmental catastrophe, developers and industry would seek out untouched “greenfield” sites at the edge of town.³⁰¹

This effect of CERCLA (whether real or only perceived)³⁰² prompted concern about the fate of “brownfields”—industrial sites that were not clean, but that also were not so severely contaminated as to merit an EPA-mandated CERCLA cleanup.³⁰³ After initial resistance, during the

299. Federal cleanups occur under the auspices of the Comprehensive Environmental Response, Compensation, and Liability Act, or “CERCLA” the so-called Superfund law. 42 U.S.C. §§ 9601-9628 (2010). The statute imposes liability on the entities that generated the hazardous substances or arranged for disposal of substances they owned or possessed; those who transported hazardous substances to a disposal site they selected; and the current or past owners or operators of the site at which the hazardous substances were found. § 9607(a). Current owners and operators of the site are liable unless they can qualify for an exemption; past owners and operators are liable only if they owned or operated “at the time of disposal.” *Id.* All categories of potentially responsible parties benefit from only very limited defenses: they must be able to show that the contamination is caused solely by an act of God, an act of war, or the act or omission of a third party under very limited circumstances. § 9607(b).

300. §§ 9601-9628.

301. *See, e.g.,* Joel B. Eisen, *Brownfields at Twenty: A Critical Reevaluation*, 34 *FORDHAM URB. L.J.* 721, 730-35 (2007) (describing this as the “brownfields story” and questioning its accuracy). Although there is an “innocent purchaser” defense for the purchaser who conducts a Phase I and finds nothing, the defense is so surrounded by conditions that the prudent investor would seek to avoid the risk of liability; in addition, the “innocent purchaser” defense in its original form offered no protection to the purchaser whose Phase I detected the presence of contamination. Faith R. Dylewski, Comment, *Ohio’s Brownfield Problem and Possible Solutions: What is Required for A Successful Brownfield Initiative?*, 35 *AKRON L. REV.* 81 (2001).

302. *See* Eisen, *supra* note 301, at 730-35.

303. CERCLA, as amended, defines a brownfields site as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” § 9601(39)(A). Sites that are the subject to mandatory CERCLA removal actions or listed on the CERCLA National Priorities List of severely contaminated sites are not eligible for “brownfield” status under federal law. § 9601(39)(B). Some commentators object that state brownfields programs have come to include sites that should have been subject to a more formal mandatory cleanup. *E.g.,* David A. Dana, *State Brownfields Programs as Laboratories of Democracy?*, 14 *N.Y.U. ENVTL. L.J.* 86, 92-93 (2005). In addition to CERCLA, many states passed their own environmental cleanup laws that followed the CERCLA pattern. *See* Dylewski, *supra* note 301, at 91.

1990s the federal EPA began to consider making accommodations to purchasers of brownfield sites,³⁰⁴ and in 2002 Congress enacted amendments to the statute, the Small Business Liability Relief and Brownfields Revitalization Act.³⁰⁵ The goal was to foster redevelopment: as EPA's brownfields program description asserts, "Cleaning up and reinvesting in these properties protects the environment, reduces blight, and takes development pressures off greenspaces and working lands."³⁰⁶ The legislation included new liability protections for purchasers of property with known contamination who agree to cooperate with a cleanup action.³⁰⁷ The law also provided a defense to liability for a government entity that acquired a brownfield property involuntarily through bankruptcy, tax delinquency, or abandonment, or by exercising its power of eminent domain, as long as the local government was not responsible for the contamination at the site and the site was not subject to an EPA-mandated CERCLA cleanup.³⁰⁸ Both of these changes helped to diminish the fear that acquiring a brownfield would be a source of financial disaster for the new landowner; liability of other PRPs associated with the site remained unchanged.

1. STATE BROWNFIELD PROGRAMS

In the meantime, states were taking the lead with their own programs to encourage reuse of brownfields.³⁰⁹ A key feature of these programs was an effort to encourage voluntary private action to clean up mildly contaminated sites: unlike CERCLA with its threat of sweeping liability, these laws rely on carrots, not sticks.³¹⁰ States wanted to encourage productive reuse of old industrial sites, and they designed their

304. See Jonathan D. Weiss, *The Clinton Administration's Brownfields Initiative*, in *BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY* 41 (Todd S. Davis & Kevin D. Margolis eds., 1997). The EPA program is also described in Dylewski, *supra* note 301, at 99-103 (article written before the 2002 amendments to CERCLA).

305. §§ 9604-9605, 9607, 9622, 9628.

306. EPA.gov, Brownfields and Land Revitalization, <http://www.epa.gov/brownfields/> (last visited Mar. 31, 2010).

307. § 9601(40).

308. § 9601(20)(D), (35)(A)(ii).

309. See Heidi Gorovitz Robertson, *Legislative Innovation in State Brownfields Development Programs*, 16 J. ENVTL. L. & LITIG. 1, 61 (2001) (includes list of state brownfields statutes).

310. *E.g.*, Dana, *supra* note 303, at 86, 107 n.2 ("In popular and academic commentary, the term brownfields is sometimes used to cover all voluntary cleanups under state statute that does not follow the CERCLA model . . ."). "Because developers engage voluntarily . . . they presumably lack culpability, and therefore, control the timing, sequencing, and even the comprehensiveness of remediation and reuse." Eisen, *supra* note 301, at 721, 730

brownfields programs to be developer-friendly: the voluntary cleanup system is intended to provide technical assistance to the developer, to encourage cleanup and productive (meaning tax-revenue-generating and job-generating) reuse.³¹¹ Indeed, the programs have been criticized for being too kind to developers, thereby exposing the public to environmental contaminants at redeveloped brownfields.³¹² They also have been criticized for harboring overly-optimistic views of the development that might ensue.³¹³

The voluntary brownfields process can be attractive to a private developer who wants to avoid surprises and undue expense. Usually it includes the possibility of a lesser cleanup standard than the feared CERCLA “edible and drinkable” level, by restricting the future use of the land.³¹⁴ Thus, for example, a state could restrict property to industrial or commercial use, and prohibit residential development.³¹⁵ Instead of fully cleaning the soil or groundwater, the state could allow the developer to use physical barriers designed to reduce human exposure to the site, such as fencing, pavement, or an impervious cap covering the contaminated soil.³¹⁶ State brownfields programs also allow for the use of innovative cleanup techniques (including research into bioremediation) because they are not subject to the restrictive standards of CERCLA.³¹⁷

State voluntary cleanup programs are not particularly hospitable to the urban gardener. They rely on attracting industrial or commercial developers who can pay for the cleanup, with the hope of subsequent profitable redevelopment of the property. At their inception, these laws

311. See Eisen, *supra* note 301, at 721 (a basic principle of a redevelopment program which provides incentives for remediation and redevelopment).

312. *Id.* at 732, n.60 (criticizing the programs of many states, and especially New Jersey, for being overly “developer-centered”); Dana, *supra* note 303, at 87-88, 93-94 (criticizing state programs for including severely contaminated sites in their brownfields voluntary cleanups, noting that inadequate cleanup can lead to reuse of sites that increase human exposures).

313. Eisen, *supra* note 301, at 733-34.

314. *E.g. id.* at 736-37; see also Robertson, *supra* note 309, at 4-5 (noting that many states have allowed cleanup to vary depending on the future use of the land).

315. See Robertson, *supra* note 309, at 8-9.

316. The plan also could include an institutional control such as a deed restriction on reuse prohibiting future residential development, a local zoning restriction, or some other administrative or legal tool to prevent public exposure to contaminants. A Citizen’s Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups, U.S. EPA (Office of Solid Wastes and Emergency Response Feb. 2005). Robertson, *supra* note 309, at 15-16 (criticizing reliance on institutional controls or lesser cleanup standards).

317. See Dana, *supra* note 303, at 96 n.32.

were concerned with redevelopment and were not focused on a goal of producing a clean environment for its own sake.

An additional issue for the shrinking city is that many green uses are unlikely to be eligible for relaxed cleanup standards. Ohio's Voluntary Action Program, for example, would require land used for urban farming to be cleaned up to residential standards—the strictest standard of cleanup.³¹⁸ Few of us would feel comfortable purchasing vegetables from an urban garden that was on soil not cleaned up to the most stringent environmental standards. Some urban gardeners seek to avoid the soil issue by building raised beds on impervious surfaces such as parking lots: the vegetables grow in a combination of mulch and topsoil with the parking lot beneath.³¹⁹ There is also considerable interest in urban greenhouses, which similarly should not require full cleanup of underlying soils.³²⁰ But for any urban gardener who wishes to use the native soil, the contamination problem can be significant.

2. HOW DO WE PAY FOR CLEANUP IN A SHRINKING CITY?

Traditionally, both CERCLA and state voluntary cleanup laws relied heavily on private funding. CERCLA imposes liability on private persons who can be held responsible for contamination; state voluntary cleanup programs enlist the help of private entities who want to clean up properties with the expectation of profitable redevelopment. Over time, however, it became apparent that private funding would not always be available and that the public needed to play some role. Thus both the federal government, through the 2002 CERCLA amendments, and various state programs began to offer sources of public funding. Much of this funding is linked to the profitable redevelopment of the contaminated property, but there are exceptions: both the federal gov-

318. See OHIO ADMIN. CODE 3745:300-08(A), (C); :300-11(A), (D) (2010).

319. See Gather 'Round Farm; Urban Gardens, <http://gatherroundfarm.webs.com> (last visited Mar. 31, 2010).

320. For example, one project in Cleveland would establish a significant urban greenhouse, using an employee-owned cooperative model:

Another cooperative in development (\$10 million in federal loans and grants already in hand) is Green City Growers, which will build and operate a year-round hydroponic food production greenhouse in the midst of urban Cleveland. The 230,000-square-foot greenhouse—larger than the average Wal-Mart superstore—will be producing more than 3 million heads of fresh lettuce and nearly a million pounds of (highly profitable) basil and other herbs a year, and will almost certainly become the largest urban food-producing greenhouse in the country.

Gar Alperovitz et al., *The Cleveland Model*, NATION (Mar. 1, 2010), available at http://www.thenation.com/doc/20100301/alperowitz_et_al/single.

ernment and Ohio offer the possibility of public funds for land intended for green uses.

In the shrinking city setting, we can assume that many mildly contaminated properties are owned by the city or by persons who are not capable of bearing the cost of cleanup. It is doubtful that a resident who has defaulted on a mortgage, for example, can help pay for remediation. A lender who forecloses on a contaminated property is not liable as an “owner” under CERCLA.³²¹ An urban farmer does not have deep pockets. Cleveland has a rich heritage of an active nonprofit community focused on community development,³²² but the cost of cleanup can be daunting.

Thus the financial resources available to a shrinking city are limited: it must look into its own pockets, or perhaps those of the state or federal governments. There is some chance of funding at the federal level. For example, federal grant funds for site assessments and cleanup are not necessarily tied to the prospect of redevelopment; EPA focuses on benefits to human health and the environment, and benefit to the community.³²³ While many of the federal grant success stories feature traditional redevelopment, one example celebrates the use of federal funds to clean up and preserve a community garden in Sacramento, California,³²⁴ and another describes restoring an estuarine environment.³²⁵

Of course, there is no guarantee that federal funds will be available, and it is apparent that EPA favors projects that will lead to redevelopment. In announcing new grants this year, for example, EPA noted that the grants “will stimulate and accelerate the pace of cleanup and redevelopment of brownfields sites, and will create jobs . . . Communities, states, and tribes need this now more than ever.”³²⁶ Even with the

321. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601(20)(A) (E)(2002).

322. Lind, *supra* note 28, at 240.

323. Env'tl. Prot. Agency, FY09 Guidelines for Brownfields Assessment Grants at 24-25, *available at* <http://www.epa.gov/oswer/docs/grants/epa-oswer-oblr-08-07.pdf>; Env'tl. Prot. Agency, FY09 Guidelines for Brownfields Revolving Loan Fund (RLF) Grants at 16-17, *available at* <http://www.epa.gov/oswer/docs/grants/epa-oswer-oblr-08-09.pdf>; Env'tl. Prot. Agency, FY09 Guidelines for Brownfields Cleanup Grants at 25-26, *available at* <http://www.epa.gov/oswer/docs/grants/epa-oswer-oblr-08-08.pdf>.

324. *See* Env'tl. Prot. Agency, Capital Area Development Authority, CA: Cleanup Grant (Aug. 2006), http://www.epa.gov/brownfields/success/sacramento_ca_BRAG.pdf. Another cleanup effort was for a dog park. Env'tl. Prot. Agency, Culver City, CA: Petroleum Assessment and Cleanup Grants (Nov. 2008), http://www.epa.gov/brownfields/success/culver_city_ca_brag.pdf.

325. *See* Env'tl. Prot. Agency, Jamestown S' Klallam Tribe, Sequim Bay, WA: Cleanup Grant (Sept. 2008), <http://www.epa.gov/brownfields/success/sequimbaywabrag.pdf>

326. *EPA to Award Nearly \$112 Million in Grants For Cleanup, Land-Revitalization Projects*, 40 ENV'T REP. 1121 (May 15, 2009).

infusion of additional funds from the 2009 stimulus package (for which the twenty percent participation requirement for cleanup grants was waived), however, EPA awarded grants to 252 applicants out of about 700 grant applications.³²⁷

State-funded cleanup programs might offer funding opportunities, although they tend to link funding to redevelopment.³²⁸ In Ohio, this link is an element of the state's major initiative, the Clean Ohio fund program. The fund is created by public bonds issued by the state; it is administered by the Clean Ohio Council, which is housed in the Ohio Department of Development.³²⁹ Clean Ohio offers local governments and nonprofit organizations³³⁰ grants and loans for brownfields investigation and cleanup.³³¹ The statute specifies that the applicant must describe the economic benefit that will result from cleaning up the brownfield,³³² and it authorizes the director of development to set priorities among the applicants.³³³

327. *Id.*; *Analysis Says Economic Stimulus Package Offers Projects Broad Funding Opportunities*, 40 ENV'T REP. 428 (February 27, 2009); *see also* Bartsch, *Increased Funding, Flexibility, Simplicity Suggested for Brownfields Program*, 37 ENV'T REP. 1975 (Sept. 22, 2006) ("Over the past two years, EPA has denied nearly 800 grant applications, including 460 cleanup grant proposals, because it did not have enough funding to meet qualifying demand.").

328. This restriction applies in Massachusetts. Mass Development, *Brownfields Redevelopment Fund*, <http://www.massdevelopment.com/financing/specialty-loan-programs/brownfields-redevelopment-fund/> (last visited Mar. 31, 2010); *see* Julianne Kurdila & Elise Rindfleisch, *Funding Opportunities for Brownfield Redevelopment*, 34 B.C. ENVTL. AFF. L. REV. 479, 489-91 (2007); *see also* Mass. Dept. of Env'tl. Prot., *Brownfields Introduction*, <http://www.mass.gov/dep/cleanup/brint.htm> (last visited Mar. 31, 2010).

State brownfields program incentives are available to buyers, and sometimes sellers, of contaminated property provided there is a commitment to cleanup and redevelopment. . . . State incentives can help parties identify risk, limit liability, and fund the cleanup of brownfields sites enabling their reuse for industry, housing, and other purposes.

Id.

329. OHIO REV. CODE ANN. § 122.651(F) (LexisNexis 2010) (the Fund is housed in the Department of Development; it also coordinates with Ohio EPA). The Clean Ohio Fund has four major components: brownfield revitalization, farmland preservation, green space conservation, and recreational trails. The discussion in this paper focuses on the brownfield revitalization program, which is divided into two sections: the revitalization fund and the assistance fund. *See* Clean Ohio Fund, <http://clean.ohio.gov> (last visited Mar. 31, 2010).

330. *Id.* § 122.65(B) (listing "applicants" as including local government entities, nonprofit organizations, and for-profit organizations that have entered into an agreement with a local government).

331. *Id.* § 122.656 (applications for grants for brownfields investigation); § 122.657 (describing criteria for applying for grants for investigation or cleanup).

332. *Id.* § 122.657(A)(8).

333. *Id.* § 122.657(D).

As implemented, the Clean Ohio Fund selection mechanism favors “economic benefit” as a key factor, and interprets “economic benefit” to mean one thing: jobs.³³⁴ Unfortunately, it might be difficult for a small-scale urban farm or garden to demonstrate a high level of job creation. Urban farm enthusiasts are optimistic that they can generate useful employment, if their plans bear fruit; this remains to be seen.³³⁵

Although economic benefit is only one of several elements for which points are awarded in an application for Clean Ohio funds, as a practical matter it can be quite significant: a score of zero for economic benefit puts the applicant at a disadvantage.³³⁶ The Clean Ohio Fund is an \$800

334. See Clean Ohio Fund, Clean Ohio Revitalization Fund Application for Funding: Guidance for Part B Known End User Track (May 2009), http://clean.ohio.gov/BrownfieldRevitalization/Documents/CORF_ApplicationPage/CORF_PartB_ScoringGuidanceKEU_052009.pdf; Clean Ohio Fund, Clean Ohio Revitalization Fund Application for Funding: Guidance for Part B Redevelopment Ready Track (May 2009), http://clean.ohio.gov/BrownfieldRevitalization/Documents/CORF_ApplicationPage/CORF_PartB_ScoringGuidanceRRTrack_052009.pdf; Clean Ohio Fund, Clean Ohio Assistance Fund Cleanup Application Section B (Mar. 2009), <http://clean.ohio.gov/BrownfieldRevitalization/Documents/FinalCOAF%20Cleanup%20Application%20Section%20B-Project%20Characteristics%20&%20Economic%20Benefit%20030609.doc>.

335. Many urban farms are relatively small operations, operated by their owners. One project underway in Cleveland—the Green City Growers urban greenhouse—could provide a slightly higher number of jobs. It is part of a group of employee-owned cooperative enterprises planned for the Cleveland inner city. Alperovitz, *supra* note 320. In addition, the Cuyahoga County Land Bank seeks to encourage urban agriculture as a workforce-training tool: “As compared to rural agriculture, urban agriculture attempts to integrate [agricultural] activities into the urban economic and ecological system. These linkages include the involvement of urban residents to meet labor needs (workforce development) and the use of typical urban resources.” Cuyahoga Land Bank, Demolition and Vacant Lot Re-Use, *supra* note 55. The proponents of an urban farm in Detroit, Hantz City Growers, assert that urban farms could provide “hundreds” of green jobs. See Hantz Farms Detroit, *supra* note 67 (discussing green jobs for local residents).

336. The statutory language allows an argument that the Clean Ohio funds should be available for redevelopment in the form of urban agriculture or urban gardening. The statute itself does not define “economic benefit,” see OHIO REV. CODE ANN. § 122.65 (LexisNexis 2010), and certainly does not restrict it to job creation. Both commercial and community gardens confer an “economic benefit,” broadly defined, by providing a source of food and, in the case of urban agriculture or market gardens, actual income for the gardener. At this point, in the state’s view a community garden is not an economic benefit; it is a community benefit. But a shrinking city has a good argument that development for urban gardening is a better alternative than simply letting the land sit, contaminated and unused. This is particularly compelling in a city like Cleveland where there are private entities (urban farmers and community development corporations) who are willing to undertake or organize urban gardening, if the soil is clean.

The statutory argument is weaker for cleanup of contaminated property that is destined for ecological infrastructure such as flood plains. Here, it is more difficult to argue that there is an economic benefit of the type the Clean Ohio statute might envision. Fortunately for Cleveland, Ohio has a separate program that offers funding for improvements that protect waterways from nonpoint source pollution, such as polluted

million bond fund, and all expenditures go through a competitive application process.³³⁷ The state has strong incentives to favor projects with a clear and significant economic payback in the form of jobs. Ohio and other states suffer from a chronic shortage of funds to deal with environmental cleanup.³³⁸

In summary, shrinking cities confront a legacy of environmental contamination that they may have few ready resources to combat. Although they may argue that their projects are eligible to compete for state or federal funding for brownfield remediation, their appeals for funds may be at a disadvantage when compared to projects that promise more lucrative reinvestment after cleanup.

IV. Conclusion

The problem of the shrinking city offers a fascinating variation on many of the themes of land use law. For the past two hundred years our expectation has been growth, not shrinkage, and our land use system has been focused on how to manage expansion, rather than decline. The regulatory system we have developed is sufficiently flexible to handle the

runoff. See Ohio.gov: Environmental Protection Agency, <http://www.epa.state.oh.us/defa/comguide.html> (last visited Mar. 31, 2010) (providing links to Ohio cleanup programs). Cleaning contaminated land could reduce contaminants in urban runoff. Other land uses envisioned in *Re-Imagining* could be helpful in this regard also. Cities such as Cleveland are spending hundreds of millions of dollars to combat problems with combined sewer overflows (CSO), in which stormwaters combine with sanitary sewer lines, leading to overflows of untreated sewage into streams and lakes during wet weather. See Northeast Ohio Regional Sewer District, What is a CSO?, <http://www.neorsd.org/cso.php> (last visited Mar. 31, 2010). The CSO problem is caused in part by the high percentage of impervious surfaces in urban areas. See RE-IMAGINING, *supra* note 18.

Prior to urban settlement, the land in Cleveland was able to absorb much of the rain as it fell. . . . As the city grew, the percentage of impervious surfaces such as streets, sidewalks, and roofs . . . increased dramatically. . . . This prevents the natural absorption of stormwater and results in increased runoff and compromised water quality.

Id. at 20. *Re-Imagining* points out that planting trees on vacant lots would reduce stormwater runoff: "If done properly, this would reduce infrastructure costs and improve water quality." *Id.* at 11. Thus the re-greening of Cleveland could reduce the burden on the region's sewer systems and provide an alternative to the current practice of building additional water storage capacity and taking other mechanical measures to prevent CSOs.

337. See Clean Ohio Fund, Welcome to the Clean Ohio Fund, <http://clean.ohio.gov/> (last visited Mar. 31, 2010). For a detailed discussion of the Clean Ohio funds and other funding mechanisms available in Ohio and other states, see Kurdila & Rindfleisch, *supra* note 328.

338. As noted even before the current economic crisis began, "the dire budgetary situation in many states appears to have stymied environmental enforcement, including enforcement under CERCLA and mirror state CERCLA statutes." Dana, *supra* note 303, at 88.

challenge, but the shrinking city must pick its way carefully, offering a documented and persuasive case for each decision to restrict future development. A well-advised and careful city can reap the benefit of judicial deference to local decision making and fend off challenges that its restrictions amount to a taking of private property or are otherwise unlawful as a matter of land use law. As a practical matter, however, the shrinking city is likely to face difficulty in financing its efforts to revitalize contaminated areas.

