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# Regulatory Takings: The Supreme Court Runs Out of Gas in *San Diego* †

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Deciding whether an overzealous exercise of the police power requires the payment of just compensation under the fifth amendment—the so-called "taking issue"—has never been one of the Supreme Court's driving ambitions. The issue is of particular significance to landowners, however, because the proliferation of land use and environmental regulations and the specialized entities which spawn them has increased the probability of a regulatory wipeout.

Although the United States Supreme Court's recent decision in *San Diego Gas & Electric Co. v. City of San Diego*[1] failed to resolve the taking issue, Justice Brennan's dissent,[2] in which Justices Stewart, Marshall, and Powell joined and with which Justice Rehnquist substantially agreed,[3] clarifies the Court's position with regard to whether the exercise of the police power can ever be a taking, and if so, what remedy is constitutionally required.

In an analysis focusing on the decision in *San Diego* and Justice Brennan's dissenting opinion, this article briefly reviews the Supreme Court's handling of the taking issue. The article then examines three issues not addressed by Justice Brennan. First, it explores governmental immunity and explains why immunity principles developed under analogous section 1983 cases may apply. Second, the issue of whether legislative and administrative remedies must be exhausted as a prerequisite to a judicial determination of a taking is considered. Third, the damage question is examined in detail. The discussion reveals that the question may be far more un-

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[1] 101 S. Ct. 1287 (1981).

[2] *Id.* at 1296 (Brennan, J., dissenting).

[3] Justice Rehnquist concurred in the majority opinion which found the absence of a final judgment below to preclude the Court's jurisdiction. However, Justice Rehnquist stated that had there been a final judgment, he "would have little difficulty agreeing with much of what is said in the dissenting opinion of Justice Brennan." *Id.* at 1294 (Rehnquist, J., concurring). Moreover, the majority opinion written by Justice Blackmun admitted that the "federal constitutional aspects of [the taking] issue are not to be cast aside lightly . . . ." *Id.* at 1294 (majority opinion).

settled than Justice Brennan indicated. After exploring whether damages should serve a compensatory or redistributive function, the discussion proceeds to treat separately the calculation of interim and permanent damages and the difficulties likely to be encountered. The analysis concludes by proposing a set of principles to be applied to the calculation of damages in the regulatory taking context.

## THE SUPREME COURT AND THE TAKING ISSUE

The seemingly absolute protection of the fifth amendment, which provides that "private property [shall not] be taken for public use, without just compensation,"[4] often has proven harshly illusory for landowners who have invested significant sums in reliance upon zoning and subdivision regulations.[5] For almost thirty-five years, land use matters were on the road not taken by the Court.[6] Even when the Court ventured onto the path of land development issues, its protection of valuable property rights was limited and generally unsatisfactory.

The Court's excursion into land use matters began more than half a century ago in *Village of Euclid v. Ambler Realty Co.*,[7] in which it sustained the validity of the Village of Euclid's zoning ordinance notwithstanding a resulting diminution of seventy-five percent in the value of Ambler's

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

[5] A recent comment noted:

> The regulation of property is nonactionable so long as the property owner is left with some minimum, residual value in his land. Owners may not be compensated for mere reduction in value. Once the scale tips so that instead of an 80 or even 90 percent devaluation the amount of loss is 100 percent, an owner may sue for *and recover* the entire lost value of his land. Although there seems to be a kind of bottom-line justice in salving the largest wound, the property owner of land devalued by 90 percent, but not by the magical higher increment, must perceive legal reasoning to be totally awry.

Meyer & Dolle, *Changing Compensation Rules for Property Takings*, REAL EST. REV., Spring 1981, at 28, 30 (emphasis in original).

The Supreme Court has held that diminution in value is relevant, but not a determinative issue. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). One of the reasons it is not determinative may be that calculating a landowner's investment is often difficult. For example, Professor Berger asks:

> Do we look at what [a landowner] paid for the parcel or at its current market value? If current market value, do we consider the impact of the control itself upon that value? [If the landowner] had actually sold off more than two-thirds of his frontage before the lawsuit began, how should the sales transaction alter the investment base? If [the landowner] has already recouped his original outlay, does he have any investment base in the remainder? Easy answers do not leap to mind.

Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 819 (1976). *See generally* R. ELLICKSON & A.D. TARLOCK, LAND-USE CONTROLS 134-36 (1981).

[6] Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, LAW & CONTEMP. PROB., Spring 1979, at 5, 81.

[7] 272 U.S. 365 (1926).

property. Subsequent decisions of the Court largely followed *Euclid* except when either the landowner could accomplish the Herculean task of proving that the particular land use measure failed to promote the general welfare[8]—for which invalidation was the remedy[9]—or the regulation was accompanied by some physical invasion[10]—for which compensation was grudgingly awarded for a limited property interest such as an easement. When a government with a facially valid public purpose so regulated land that its value was virtually—but not totally—destroyed, however, the landowner generally was left remediless.[11]

The Court apparently never has felt entirely comfortable with this position, because of both the express terms of the fifth amendment and Justice Holmes' cryptic assertion that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[12] Nevertheless, since Justice Holmes' statement the Court has yet to find that a land use regulation[13] went "too far," notwithstanding the vigorous arguments of landowners to the contrary. In *Penn Central Transportation Co. v. New York City*,[14] the Court upheld a regulation requiring that the owners of the Grand Central Terminal maintain it as a landmark, even though the regulation greatly limited their ability to exploit their property interests.[15] The Court affirmed Justice Holmes' statement, but confined it to cases in which the landowner could demonstrate that the regulation left the property economically nonviable[16]—a concept which remains largely undefined.

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[8] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[9] In his dissenting opinion in *San Diego*, Justice Brennan suggested that the government also may be liable to the landowner for damages "under 42 U.S.C. § 1983 for a Fourteenth Amendment due process violation." 101 S. Ct. at 1306 n.23 (Brennan, J., dissenting). The cited provision is the current version of the part of the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (amended 1979), which provides a possible remedy whenever anyone acting under color of state law deprives a person of federal rights, privileges, or immunities.

Under Justice Brennan's analysis, damages are not available directly under the fifth amendment, because regulation which does not promote the general welfare implicitly does not fulfill the "public use" requirement of that amendment. *But cf.* Berman v. Parker, 348 U.S. 26 (1954) (giving little, if any, weight to the public use requirement).

[10] United States v. Causby, 328 U.S. 256 (1946).

[11] *See, e.g.*, Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (upholding a shoreland zoning ordinance which prohibited all but natural uses, such as harvesting wild crops); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976) (upholding a rezoning from commercial to single family residential notwithstanding an 80% reduction in value).

[12] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[13] *Cf.* Kaiser Aetna v. United States, 444 U.S. 164 (1979) (assertion of federal navigational servitude which interferes with landowner's investment-backed expectations requires compensation).

[14] 438 U.S. 104 (1978).

[15] *Id.* at 135-36.

[16] *Id.* at 138 n.36.

Even though proving economic nonviability may be difficult,[17] the way seemed clear after *Penn Central* for landowners to obtain compensation for overzealous police power[18] regulation. This at least was the situation when the California Supreme Court decided *Agins v. City of Tiburon*,[19] which held either that the remedy for regulatory takings was limited to invalidation and never included monetary relief, or that as a matter of federal constitutional law, an exercise of the police power, no matter how arbitrary or excessive, could never constitute a taking.[20] The United States Supreme Court, in its opinion in *Agins*, sidestepped the issue raised by this seemingly new impediment to resolving the taking issue. The Court held that the mere enactment of a zoning ordinance which permitted construction of up to five dwellings on a five-acre tract like that of appellants did not rise to a constitutional deprivation.[21]

## THE *SAN DIEGO* DECISION

With this background, the road to *San Diego* was unobstructed. San Diego Gas & Electric Co. (the utility) owned property in northwest San Diego on which it intended to put a nuclear generating station and which was zoned partly industrial and partly agricultural.[22] Before the utility

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[17] After the Supreme Court's decision in *Penn Central*, Professor Blumstein speculated that the decision may reflect "an even further erosion of constitutional protections for property interests." Blumstein, *supra* note 6, at 89 n.606. It appeared to remove the diminution in value or economic viability issue from the Court's primary area of concern. In this regard, Professor Blumstein remarked:

> If the nature and degree of private harm are no longer mainstays of the threshold categorization decision, then it will be a lot easier to characterize a governmental action as falling under the police power rather than the eminent domain power. That done, it will be difficult to rule in favor of a landowner in an economic substantive due process context, despite the reasonable beneficial use language of *Penn Central*, because of the Court's overwhelming reluctance to reenter the arena of active economic substantive due process review. The skeptical view, therefore, is that *Penn Central* withdraws consideration of private harm at the only point at which, pragmatically, it could really matter, and places it instead within an analytical context wherein it is doomed to desuetude.

*Id.* at 89 n.606.

[18] The police power must be distinguished from that of eminent domain. In general, "it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . . From this results the difference . . . that the former recognizes a right to compensation, while the latter on principles does not." E. FREUND, THE POLICE POWER 546-47 (1904). *Cf.* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 180 (1971) (other formulations of the distinction).

[19] 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

[20] For the reason for this equivocation on the statement of the holding, see note 36 *infra*.

[21] Agins v. City of Tiburon, 447 U.S. 255 (1980). The Court did not consider whether a taking would have resulted when the ordinance was applied specifically to the Agins property because the landowner had yet to submit a specific development plan. *Id.* at 262.

[22] 101 S. Ct. at 1289-90.

could undertake any industrial use, the city adopted an open-space plan and proposed a bond issue to acquire open-space lands, including the property in issue.[23] When the bond issue failed, the utility sued for mandamus, declaratory relief, and damages.[24]

After a bench trial on the issue of liability, a jury awarded damages in excess of three million dollars, pursuant to the finding that the open-space designation deprived the utility of "all practical, beneficial or economic use of the property."[25] The trial court reached this conclusion by glossing over two factors which indicated that the property still might have been economically viable. First, as a chartered city, San Diego was not statutorily required to follow its open-space plan[26] and hence might have permitted industrial or other development.[27] The record established, however, that the city followed a "policy of enacting and enforcing zoning ordinances that were consistent with its open-space plan."[28] Second, the taking asserted by the utility could have been characterized as partial because the regulation affected 214 acres even though the utility owned 412 contiguous acres.[29] Nevertheless, the trial court summarily concluded that both " 'the property designated as open space and the remainder of the larger parcel is unmarketable.' "[30]

Notwithstanding these uncertainties, the California Court of Appeal affirmed,[31] but the California Supreme Court remanded for reconsideration in light of its intervening opinion in *Agins*.[32] In an unpublished opin-

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[23] *Id.* at 1290.

[24] *Id.* at 1290-91.

[25] *Id.* at 1291.

[26] *Id.* at 1290-91. *See* CAL. GOV'T CODE §§ 65700, 65803 (West 1966 & Supp. 1979).

[27] The open-space plan acknowledged the utility's ownership of the property and the utility's intent to use part of the property as a nuclear power plant. 101 S. Ct. at 1290. The plan stated that " 'such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem; however, a number of approvals and clearances must be obtained prior to the plant's construction becoming a reality.' " *Id.* n.5. The utility abandoned its plan to construct a nuclear power plant after discovery of an off-shore fault that rendered the project unfeasible. *Id.* n.6.

[28] *Id.* at 1291.

[29] *See id.* at 1289 n.2.

[30] *Id.* at 1291. It is not clear whether the "remainder" referred to by the trial court was the 15 acres that the trial court had found to be damaged by severance from the larger parcel or was the balance of the property owned by the utility. In any case, the court's conclusion appears to be erroneous because the utility had already received a substantial return on its original $3.5 million investment by selling some 40 acres for $1.7 million and including the original purchase price in its rate base which guaranteed the utility an annual rate of return of more than eight percent on the property. *See* Duerksen & Mantell, *Interim Damages: A Remedy in Land Use Cases?*, LAND USE L. & ZONING DIG., Apr. 1981, at 6, 11 & n.21; *Erratum*, LAND USE L. & ZONING DIG., May 1981, at 11.

[31] ___ Cal. App. 3d ___, 146 Cal. Rptr. 103 (1978). This decision was vacated and deprived of all effect by the California Supreme Court's grant of the city's petition for hearing. 101 S. Ct. at 1291 (citing Knouse v. Nimocks, 8 Cal. 2d 482, 483-84, 66 P.2d 438, 438-39 (1937); CAL. R. CT. 976(d), 977).

[32] 101 S. Ct. at 1291.

ion, the Court of Appeal reversed itself and found that *Agins* precluded the damage award.[33] The Court of Appeal was even unwilling to invalidate the offending regulation under *Agins*.[34]

When the California Supreme Court denied further review[35] and the United States Supreme Court granted certiorari, the Court seemed to have reached the last roadblock to compensable regulatory takings. It had not. Because the Supreme Court could not agree on the holding of the California Supreme Court in *Agins*,[36] the majority seized upon this disagreement, and the California Court of Appeal's failure to invalidate the regulation, as indications that disputed fact issues remained.[37] Hence, the Supreme Court dismissed for want of jurisdiction due to the absence of a final judgment.[38]

## JUSTICE BRENNAN'S DISSENT

Justice Brennan, with whom three other members of the Court joined,[39] thought that the majority seriously mischaracterized the opinion below.[40]

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[33] *Id.* at 1292.

[34] The reason for this unwillingness is disputed. *Compare id.* at 1293-94 (Court of Appeal remanded for determination of whether taking occurred) *with id.* at 1297 (Brennan, J., dissenting) ("the Court of Appeal held that the city's exercise of its police power . . . could not . . . constitute a 'taking' . . ." as a matter of law).

[35] *Id.* at 1293 (majority opinion).

[36] Justice Blackmun for the majority stated:

> Contrary to the dissent's argument, the California Supreme Court's *Agins* decision did not hold that a zoning ordinance never could be a "taking" and thus never could violate the Just Compensation Clause. It simply *limited the remedy* available for any such violation to nonmonetary relief. . . .
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> We believe, therefore, that it is the dissent that "fundamentally mischaracterizes" . . . the California ruling.

*Id.* at 1292 n.8 (emphasis in original). In contrast, Justice Brennan in dissent argued, "With all due respect, [the majority's] conclusion misreads the holding of the Court of Appeal [which decided] [i]n faithful compliance with the instructions of the California Supreme Court's opinion in *Agins v. City of Tiburon* . . . ." *Id.* at 1297 (Brennan, J., dissenting).

In a footnote, Justice Brennan pointed out that

> [i]t is not merely linguistic coincidence that the California Supreme Court in *Agins* never analyzed the Tiburon zoning ordinance to determine whether a Fifth Amendment "*taking*" without just compensation had occurred. Instead, the court noted that "a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to *deprive* the landowner of substantially all reasonable use of his property," and that "[t]he ordinance before us had no such effect."

*Id.* at 1298 n.4 (Brennan, J., dissenting) (emphasis supplied by Justice Brennan).

[37] *Id.* at 1292-94 (majority opinion).

[38] *Id.* at 1294. Under 28 U.S.C. § 1257 (1976) the Supreme Court is granted jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."

[39] Justice Rehnquist, concurring, literally interpreted the concept of final judgment, contrary to the Court's opinion in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). 101 S. Ct. at 1295 (Rehnquist, J., concurring).

[40] 101 S. Ct. at 1296 (Brennan, J., dissenting).

Justice Rehnquist concurred in the majority's dismissal while otherwise embracing "much of" Justice Brennan's position.[41]

It is difficult to understand why the majority semantically obscured the federal constitutional issue squarely raised by the California Supreme Court. After all, is there any real difference between characterizing *Agins* as holding that the remedy for regulatory takings is limited to invalidation[42] or as holding that regulations can never be takings, but only deprivations subject to invalidation?[43] Justice Brennan demonstrated in passing that there is no real difference[44] and also illustrated the tremendous importance of dealing with the just compensation issue, even assuming arguendo the presence of disputed fact issues in the record below.[45] The California Court of Appeal, in compliance with *Agins*, "held that the city's exercise of its police power, however arbitrary or excessive, could not *as a matter of federal constitutional law* constitute a 'taking' "[46] and that an invalid police power exercise "does not require compensation; rather the party's remedy is administrative mandamus."[47] The consequent dismissal denied relief as a matter of law, not of fact.[48] No trial court resolution of factual questions would have had any effect on the constitutional position—denying compensatory awards for such exercises of police power—required by the California Supreme Court in *Agins*.

The dissenting opinion also recognized the importance of monetary relief.[49] A monetary remedy is important largely because the alternative, invalidation, is so inadequate. As the *San Diego* case history demonstrates, invalidation results only after protracted litigation in which a landowner, against incredible odds, proves that his property has been rendered worthless by regulation.[50] However, invalidation does not mean that the landowner can proceed to develop his land. In fact, it often means just the opposite, since the landowner then faces a hostile local government, which not only has an arsenal of other controls with which to stymie the landowner, but also may have enough malevolent creativity to enact a regulation only slightly less restrictive than the one invalidated to start the litigation game all over again.[51]

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[41] *Id.* at 1294 (Rehnquist, J., concurring).
[42] *Id.* at 1293.
[43] *Id.* at 1297 (Brennan, J., dissenting).
[44] *Id.* at 1298-1300.
[45] *Id.* at 1301.
[46] *Id.* at 1297 (emphasis in original).
[47] *Id.*
[48] *Id.* at 1300.
[49] *Id.* at 1304-08.
[50] *See id.* at 1289-93 (majority opinion).
[51] With regard to the *San Diego* litigation, Justice Brennan noted:

> The instant litigation is a good case in point. The trial court, on April 9, 1976, found that the city's actions effected a "taking" of appellant's property on June 19, 1973. If true, then appellant has been deprived of all beneficial

Thus, as the Court was then constituted,[52] four Justices were on record as having endorsed monetary compensation for unduly harsh land regulation. Apparently, Justice Rehnquist agreed.[53] This endorsement brushed aside a wide array of local government policy arguments against compensation.[54] Specifically, Justice Brennan dismissed the argument that land use planning would be inhibited or "chilled" if monetary compensation became a possible remedy. Justice Brennan conceded that some government action may be forestalled, but suggested that uninhibited land use planning which considers benefits, but not costs, may be irrational.[55]

Justice Brennan correctly perceived that the "chilling" argument is a perverse twist on constitutional theory, since the concern should be whether the constitutional right to private property, not the intervention of government, is chilled or diminished.[56] In addition, the dissent was equally unimpressed by the belief, long held by governmental officials and some commentators,[57] that a government can only be held liable when it "intends" to take property. Justice Brennan noted that "police power regulations such as zoning ordinances and other land use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."[58] Concluding, Justice Brennan aptly observed that "the appli-

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> use of its property in violation of the Just Compensation Clause for the past seven years.
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> Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow city attorneys the following advice: "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN."

*Id.* at 1305 n.22 (Brennan, J., dissenting) (citing Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations*, 38B NIMLO MUN. L. REV. 192-93 (1975)).

[52] Justice Stewart has since resigned from the Court.

[53] While the Supreme Court has never decided whether an action for damages is possible against a municipality under the just compensation clause, the lower federal courts have consistently heard actions for regulatory taking damages. *See, e.g.*, Foster v. City of Detroit, 405 F.2d 138, 144 (6th Cir. 1968), *aff'g* 254 F. Supp. 655 (E.D. Mich. 1966); Miller v. County of Los Angeles, 341 F.2d 964, 966 (9th Cir. 1965); Foster v. Herley, 330 F.2d 87, 90 (6th Cir. 1964); Lowe v. Manhatten Beach City School Dist., 222 F.2d 258, 259-60 (9th Cir. 1955); Amen v. City of Dearborn, 363 F. Supp. 1267, 1270 (E.D. Mich. 1973); Sayre v. United States, 282 F. Supp. 175, 181-85 (N.D. Ohio 1967).

[54] *See, e.g.*, Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1968 URB. L. ANN. 1. For a catalog of the arguments for and against compensation, see Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1071-72 (1975).

[55] 101 S. Ct. at 1308 n.26 (Brennan, J., dissenting).

[56] This argument was made forcefully in Brief for Appellant at 19-20, Agins v. City of Tiburon, 447 U.S. 255 (1980).

[57] *E.g.*, Duerksen & Mantell, *supra* note 30, at 9.

[58] 101 S. Ct. at 1304 (Brennan, J., dissenting).

cability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments . . . ."[59]

## ISSUES LEFT UNADDRESSED AND UNRESOLVED

Even if the Court should soon hear another regulatory taking case and officially adopt Justice Brennan's approach, several issues remain unresolved. For example, because the approach contemplates damages outside the formal condemnation process, it implicitly indicates that a governmental entity which does not possess eminent domain authority could nonetheless be held liable for a regulatory taking. The slight existing precedent, however, is to the contrary.[60] Besides this rather technical point, the three most important issues which remain open concern governmental immunity, exhaustion of remedies, and the purpose and calculation of damages.

### *Governmental Immunity*

Justice Brennan did not address what, if any, governmental immunities are to apply. Obviously, because federal rights are involved, no immunity originating under *state* law will defeat liability.[61] It is less obvious, but no less clear, that a government ought not to be immune from liability for land use decisions merely because its decisions are discretionary. While one commentator has suggested that the Court has yet to definitively address this issue,[62] the Court's statement in *Owen v. City of Independence*[63] that a municipality has "no discretion to violate the Federal Constitution"[64] seems sufficiently unambiguous. If the government could draw a discretionary shield around its land use regulations, then much, if not all, of Justice Brennan's position on the compensability of regulatory takings would make little sense.[65]

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[59] *Id.* at 1308.

[60] *See* Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1358 (9th Cir. 1977), *aff'd in part & rev'd in part sub nom.*, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Gregory v. City of New York, 346 F. Supp. 140, 143 (S.D.N.Y. 1972). *Cf.* Jacobson v. Tahoe Regional Planning Agency, 474 F. Supp. 901 (D. Nev. 1979) (absence of power to condemn prevented liability under § 1983).

[61] In Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975), the Second Circuit stated that "[a] state rule of immunity or privilege which allows a state officer to escape liability for a deprivation of 'rights, privileges, or immunities secured by the Constitution of the United States' is simply not controlling under 42 U.S.C. § 1983." *Id.* at 137. *See also* T & M Homes, Inc. v. Township of Mansfield, 162 N.J. Super. 497, 393 A.2d 613 (1978).

[62] Carlisle, *The Evolution of Section 1983—Verdict In on Liability but Jury Out on Remedy*, 12 URB. LAW. 727, 732 & n.20 (1980).

[63] 445 U.S. 622 (1980).

[64] *Id.* at 649. *See generally* Note, *The Municipal Zoning Power and Section 1983 Liability After* Owen v. City of Independence, 12 LOY. CHI. L.J. 209 (1981).

[65] Hernandez v. City of Lafayette, 643 F.2d 1188, 1198 & n.20 (6th Cir. 1981).

However, certain federal immunities may apply, particularly those defenses and immunities available under analogous cases brought under section 1983.[66] Absent a clear holding that damages were available directly under the fifth amendment for a regulatory taking, landowners have turned to section 1983 for relief.[67] While the statute itself suggests absolute liability, the Court has incorporated into section 1983 immunities well-established in common law at the time of its enactment.[68]

Most immunity principles developed under section 1983 probably will carry over to actions premised directly upon the fifth amendment. Outside the land use area, the Court has held that it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against *federal* officials."[69] It seems unlikely that a different rule will apply in the land use context or that it is tenable to distinguish suits brought against *state* officials under section 1983 from those brought directly under the Constitution. Neverthless, these issues are unresolved. Because the immunity-law policy of balancing the need for governmental discretion against the protection of constitutional interests is the same in both contexts, there appears to be little reason to complicate further an already confused area.[70]

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[66] 42 U.S.C. § 1983 (Supp. III 1979). This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[67] A growing number of cases hold that damages may be recovered for the overregulation of land under § 1983. *See, e.g.*, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 1737 (1981); Rogers v. Tolson, 582 F.2d 315 (4th Cir. 1978); Cordeco Dev. Corp. v. Santiago Vasquez, 539 F.2d 256 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976).

[68] In Tenney v. Brandhove, 341 U.S. 367 (1951), for example, the Court explored the question of absolute immunity for state legislators. The Court held that such an immunity existed at common law when § 1983 was enacted. Moreover, the Court stressed that such an immunity was necessary for the proper functioning of the democratic process because legislators otherwise would hesitate to exercise their independent judgment because of the threat of liability. *Cf.* Peirson v. Ray, 386 U.S. 547 (1967) (absolute immunity extended to judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute immunity extended to prosecutors).

[69] Butz v. Economou, 438 U.S. 478, 504 (1978) (emphasis added).

[70] One area of confusion under the § 1983 cases which directly affects land use litigation concerns the type of immunity local officials should be accorded. The lower federal courts are split on the issue. *Compare* Fralin and Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979) (finding county supervisors and planning commissioners entitled to absolute immunity), *with* Thomas v. Younglove, 545 F.2d 1171 (9th Cir. 1976) (finding county supervisors entitled to qualified immunity) *and* M.J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975) (finding planning commissioners entitled to qualified immunity).

Assuming that immunities under section 1983 case law do apply, land use decisionmakers may be able to rely upon absolute legislative and judicial immunity. Of course, what is legislative or judicial in the land use context is unclear,[71] and hence, some land use officials—especially administrators who implement, rather than devise, land use plans—may be afforded only qualified immunity. Qualified immunity protects only officials who act in both objective and subjective good faith.[72] Moreover, deciding which immunity applies outside the land use context has divided the federal courts, although the Supreme Court has indicated that the officials' challenged functions, rather than the legislative denomination of the entity to which they belong, is determinative.[73]

With respect to entity immunity, the eleventh amendment immunizes states from damage liability.[74] Because most land use regulations originate with local or county government, however, this immunity is not particularly significant.[75] What is significant is that the Supreme Court has held that local government lacks even qualified immunity from liability under section 1983.[76] Thus, a local government cannot use the good faith of its officers as a defense.[77]

### *Exhaustion of Remedies*

If municipalities, and perhaps even local land use officials, are not immune from damage liability under the foregoing principles, there still is

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The Supreme Court has yet to decide whether individuals performing legislative functions at the purely local level, as opposed to the regional level, should be afforded absolute immunity from federal damage claims. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 404 & n.26 (1979).

[71] *Compare* Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) (holding that rezoning decisions on specific pieces of property are judicial), *with* State v. City of Rochester, 268 N.W.2d 885 (Minn. 1978) (expressly rejecting the *Fasano* holding and maintaining the more customary view that rezonings are legislative and thus presumed valid). *See also* Harris, *Rezoning—Should It Be a Legislative or Judicial Function?*, 31 BAYLOR L. REV. 409 (1979); Sullivan, Araby *Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA LAW. 50 (1974).

[72] *See* Wood v. Strickland, 420 U.S. 308, 321-22 (1975).

[73] *See generally* Lake Country Estates, Inc. v. Tahoe Regional Planning Auth., 440 U.S. 391 (1979); Wood v. Strickland, 420 U.S. 308 (1975). In *Wood* the Court noted that "school board members function at different times in the nature of legislators and adjudicators in the school disciplinary process." 420 U.S. at 319.

[74] *E.g.*, Bennett v. Gravelle, 323 F. Supp. 203 (D. Md. 1971), *aff'd*, 451 F.2d 1101 (4th Cir. 1971).

[75] *See, e.g.*, Atkins v. City of Charlotte, 296 F. Supp. 1068, 1072-73 (D.N.C. 1969) (holding that eleventh amendment does not extend immunity to governmental units smaller than state).

[76] Owen v. City of Independence, 445 U.S. 622 (1980).

[77] *Id.* at 638. Of course, the local government may claim that its officer acted without official sanction, and thus may avoid liability because "a municipality cannot be held liable under section 1983 on a *respondeat superior* theory." Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978).

the question of when damage liability arises. The issue includes whether an aggrieved landowner must exhaust legislative and administrative remedies before filing an action for damages, and whether damages accrue while such remedies are being exhausted.

An exhaustion requirement may be justified in the land use context because without exhaustion municipalities would be subject to unexpected liability.[78] Because this argument is a variation of the government's argument that any damage awards would "chill" effective land use regulation,[79] one might have expected it to be rejected outright on the basis of Justice Brennan's refusal in *San Diego* to subject constitutional guarantees to policy judgments.[80] However, that Justice Brennan's opinion did not settle the issue is illustrated by the decision of the Sixth Circuit in *Hernandez v. City of Lafayette*.[81]

Decided two months after *San Diego*, the *Hernandez* opinion was concerned primarily with a landowner's claim for damages under section 1983 and with the propriety of the district court's grant of summary judgment for the city and mayor who together failed for more than two years to act definitively on the landowner's rezoning requests, largely because the city wanted to acquire part of the land for a right-of-way and was fearful that the rezoning would increase the ultimate purchase price.[82] The Sixth Circuit affirmed the lower court's finding of absolute immunity for the mayor, but not for the city.[83] In so doing, the court took note of Justice Brennan's opinion in *San Diego* and in dicta commented upon the exhaustion issue.[84]

The *Hernandez* court hypothesized that a zoning classification could result in a taking either because circumstances changed after its initial passage or because the classification denied a landowner an economically viable use from its inception.[85] In either event, the court determined that no taking would occur until "the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity."[86] In a footnote, the *Hernandez* opinion suggested that a land-

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[78] *See* Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569 (1977). The author states: "This threat of an unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional and physically safe." *Id.* at 1597, *cited with approval in* Agins v. City of Tiburon, 24 Cal. 3d 366, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980).

[79] *See* text accompanying note 56 *supra*.

[80] 101 S. Ct. at 1308.

[81] 643 F.2d 1188 (6th Cir. 1981).

[82] *Id.* at 1191.

[83] *Id.* at 1194, 1200.

[84] *Id.* at 1199-1201.

[85] *Id.* at 1200.

[86] *Id.*

owner must exhaust his legislative remedies by petitioning the city council for a rezoning.[87] Moreover, the court indicated that no damages accrue to the landowner until the available remedies have been exhausted.[88] Thus, under the *Hernandez* opinion, no taking occurs until all proceedings to review and correct a zoning classification are completed.

One commentator approved of the *Hernandez* interpretation of the Brennan opinion because the "government does not always recognize that it has taken property [and] [i]t sometimes needs to have its attention focused."[89] Others have recommended an exhaustion requirement in order to provide the landowner with an incentive to mitigate damages.[90] However, these recommendations are contrary to traditional land use practice, and arguably the spirit, if not the letter, of Justice Brennan's opinion.

### Legislative Remedies

Generally, in order to attack the constitutionality of legislation, a landowner need not ask the legislature to repeal it.[91] This principle was adequately articulated by Justice Sutherland in *Village of Euclid v. Ambler Realty* when he noted that the landowner's suit was proper even though the landowner had made no effort to obtain a building permit or to apply to the zoning board of appeals for relief.[92] This is not to suggest that it is inadvisable to exhaust every credible remedy before litigating, especially in view of the cost of litigation. The advisability of exhaustion is further increased by the Supreme Court's consistent refusal to consider more than the facial constitutionality of a land use regulation absent its actual application to the landowner.[93] Until a landowner submits

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[87] *Id.* & n.27. The court suggested that the landowner also may contest the initial general zoning regulation prior to its passage. *Id.*

[88] *Id.* at 1201.

[89] Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, 4 ZONING & PLAN. L. REP. 129, 134 (1981).

[90] *E.g.*, Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 URB. LAW. 25, 53 (1973).

[91] R. ELLICKSON & A.D. TARLOCK, *supra* note 5, at 77; *accord*, 4 R. ANDERSON, AMERICAN LAW OF ZONING § 27.14, at 341 (2d ed. 1977) (discussing injunctive relief). *But see* 1 J. METZENBAUM, THE LAW OF ZONING 744 (2d ed. 1955). For a good discussion of each position, see Comment, *Exhausting Administrative and Legislative Remedies in Zoning Cases*, 48 TULANE L. REV. 665, 674-77 (1974).

[92] *Id.* at 386.

[93] In each of the last three major land use cases considered, the Court indicated that the landowner had failed to apply for specific permission for development. San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287, 1290 n.5 (1981); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978). It is not clear whether the Court was advocating the pursuit of legislative or administrative remedies in each of these cases. In *Penn Central* and *Agins*, the initial authority for applying the regulation appears to have been administrative—the Landmarks Preservation Commission, 438 U.S. at 110, and the local planning agency, *see* CAL. GOV'T CODE

a development plan, has the plan rejected, and proves that any remaining permitted use is economically nonviable, the Court will presume that land use officials will not construe their own regulation contrary to the Constitution.[94] Thus, although the practical importance of exhausting available remedies cannot be overstated, particularly because it contributed to the absence of a final judgment in *San Diego*,[95] it would be misleading to characterize legislative exhaustion as a traditional requirement.

### Administrative Remedies

Although the exhaustion of administrative remedies is more commonly required,[96] the requirement is subject to numerous exceptions. For example, administrative remedies need not be exhausted if the administrative body lacks authority to grant relief, if the relief granted would be inadequate, if the administrative body is demonstrably hostile and any petition would be futile, or if irreparable harm would be suffered during the delay which exhaustion would entail.[97] These exceptions often apply to land use cases because administrative zoning bodies typically are limited to granting variance only from the physical, rather than the use, requirements of regulation and then only in cases of unnecessary hardship or practical difficulty.[98] Thus, some of the commonly accepted reasons for

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§§ 65553, 65567 (West Supp. 1981), respectively—while in *San Diego* it is likely that both administrative and legislative approvals would have been required to develop property within the open space planning area.

[94] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 & n.36 (1978); R. ELLICKSON & A.D. TARLOCK, *supra* note 5, at 77. *See also* note 110 *infra*.

[95] 101 S. Ct. at 1293 & n.12, 1294.

[96] *See* R. ELLICKSON & A.D. TARLOCK, *supra* note 5, at 77.

[97] *See generally* Comment, *supra* note 91, at 667-73.

[98] For a brief discussion of the reasons use variances are disfavored, see R. ELLICKSON & A.D. TARLOCK, *supra* note 5, at 221. Generally, use variances are opposed because they undermine the attempt to segregate uses and they appear to delegate legislative responsibility to an administrative body.

Indiana was once (but may no longer be) an exception to allowing administrative bodies to grant use variances. Prior to a 1979 statutory modification, boards of zoning appeals in Indiana in first class cities were expressly authorized to grant use variances, IND. CODE § 18-7-2-70 (1976) (repealed 1981), and other political subdivisions as defined in IND. CODE § 18-7-2-61 (1976) (repealed 1981) were broadly authorized to grant "such variance from the terms of the ordinance as will not be contrary to the public interest . . . ," IND. CODE § 18-7-5-82 (1976) (repealed 1979). Under the prior statutes Indiana courts required landowners to pursue administrative relief from allegedly unconstitutional land use regulation before turning to judicial remedies. *See, e.g.*, English v. City of Carmel, ____ Ind. App. ____, 381 N.E.2d 540 (1978). While boards of zoning appeals occasionally have been reluctant to grant a use variance when such relief would have been inconsistent with the existing zone classification, *see, e.g.*, Board of Zoning Appeals v. Koehler, 244 Ind. 504, 194 N.E.2d 49 (1963) (board attorney advised that administrative relief for shopping center in residential district was beyond board's jurisdiction; Indiana Supreme Court disagreed and granted relief), the courts have been less reluctant to grant relief, *see, e.g.*, Town of Homecraft v. Macbeth, 238 Ind.

requiring exhaustion, such as preserving a sphere of administrative action in deference to superior administrative expertise,[99] simply do not fit the land use system. Either the administrative remedy is too narrow to

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57, 148 N.E.2d 563 (1958) (use variance ordered judicially after denial by board). Under the statutory amendment of 1979, most boards of zoning appeals are expressly prohibited from granting use variances; only a "metropolitan" board—that is, one associated with a county having a consolidated city—or the municipal board for an "excluded city" in such a county is authorized to grant such relief. Act of Apr. 6, 1979, Pub. L. No. 178, § 125, 1979 Ind. Acts 790, 846-47 (formerly codified at IND. CODE § 18-7-4-918(d) (Supp. 1979)) (repealed 1981) (current version at IND. CODE § 36-7-4-918(d) (Supp. 1981)).

At this point, it is an open question whether the Indiana courts will give substantive effect to this subtle, but important, wording change in the enabling statute. One recent case suggests that if a nonmetropolitan board of zoning appeals grants a use variance, a court might still choose to uphold it either on the basis of statutory construction or the constitution. Initially, in Strange v. Board of Zoning Appeals, ___ Ind. App. ___, 425 N.E.2d 720 (1981), the Indiana Court of Appeals found that Act of Apr. 6, 1979, Pub. L. No. 178, § 125, 1979 Ind. Acts 790, 846-47 (repealed 1981) prohibited the grant of a use variance to a landowner who wished to establish a radio and television sales service shop in a residential district. On rehearing, the appellate court narrowly construed the 1979 prohibition against use variances in § 18-7-4-918(d) to apply to boards of zoning appeals functioning under area, but *not* advisory, planning law. Strange v. Board of Zoning Appeals, ___ Ind. App. ___, 428 N.E.2d 1328 (1981). Under advisory planning law, a city or county could create a board of zoning appeal for itself, IND. CODE § 18-7-5-69 (1976) (repealed 1979); whereas, under area planning law, cities and counties were encouraged to cooperatively establish unified zoning bodies, IND. CODE §§ 18-7-4-1, -65 (1976) (repealed 1979). Given that statutory construction, the appellate court invalidated the portion of the Shelby County Zoning Ordinance which prohibited the grant of use variances as being inconsistent with the general enabling legislation.

Curiously, the appellate court's decision on rehearing ignored a subsequent recodification of the use variance prohibition in IND. CODE § 36-7-4-918(d)(4) (Supp. 1981). In general, the advisory-area distinction is incorporated into the 1981 recodification of the Indiana planning and zoning laws by means of section "headings." *See, e.g.*, IND. CODE §§ 36-7-4-201, -202 (Supp. 1981). In particular, § 918(d) carries an "area" heading, denoting applicability to area planning law. However, subsection 4 of § 918(d), which contains the use variance prohibition, is not given a separate "heading." A new provision in IND. CODE § 36-7-4-102 (Supp. 1981) provides that "subsections . . . without headings apply to area planning as well as advisory planning. . . ." On this basis alone the *Strange* court's limitation of the use variance prohibition to area boards of zoning appeals seems erroneous. Moreover, the appellate court's reference to the legislature's intent in the 1979 reenactment to restate (without substantive change) corresponding provisions of earlier law may now be overridden by IND. CODE § 36-1-1-1 (Supp. 1981) which states:

> This title is intended to codify, *revise*, or rearrange applicable or corresponding provisions in prior statutes. A citation to a prior statute may be construed as a citation to the appropriate provision of this title *if the prior statute is reenacted in the same or restated form in this title.*

*Id.* (emphasis added). Because the appellate court on rehearing overlooked the 1981 recodification in title 36 and the substantive changes made therein, it may be unwise to rely upon the appellate court's statutory construction as a basis for the continued availability of the use variance in Indiana.

However, in deciding the *Strange* case on statutory grounds, the appellate court alluded to possible constitutional arguments if the use variance mechanism was not available as an "escape hatch," ___ Ind. App. at ___, 428 N.E.2d at 1331. The appellate court did not decide on that basis because apparently "the issue ha[d] not been raised. . . ." *Id.* at ___, 428 N.E.2d at 1332.

[99] *See generally* K. DAVIS, ADMINISTRATIVE LAW §§ 20.01-.10 (1972); Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327 (1963); Comment, *supra* note 91.

be useful, as is the case of the variance, or the administrative remedy is so ill-defined that the landowner is left to plumb the depths of discretion through submission of detailed site plans, as is the case with much subdivision regulation.[100] Poorly defined discretion also may lessen the viability of administrative relief in the zoning area to the extent that a community's zoning ordinance is not truly self-administering. It is not uncommon to place undeveloped land in a low density zone on the zoning map but to make it eligible for optional—but discretionary—higher density under the zoning text.[101] Knowing how many options to pursue in order to have exhausted available administrative remedies can be problematic.[102]

An administrative exhaustion requirement is also out of step with the position the Court has taken in section 1983 cases. While some members of the Court may be predisposed toward some exhaustion requirement,[103] the Court has held more than once that exhaustion of state judicial or administrative remedies is not a prerequisite for recovery under section 1983.[104] Lower federal courts have applied this principle in land use cases,[105]

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[100] With regard to subdivision controls, Professor Krasnowiecki commented:

> Thus, in the case of subdivision and site planning control, exhaustion is not a matter of seeking available local relief, but rather of exploring the scope of discretion left to the approving agency under the governing rules or standards . . . .
>
> . . . Courts have refused to entertain an attack on a self-administering rule until it has been applied in the context of a particular plan of development and have even refused to entertain an attack when the rule has been applied to a preliminary plan when it was clear that the same rule would be applied to a final plan.

Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1044-45 (1972).

[101] With respect to zoning, see Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 51-52 (1981).

[102] Professor Krasnowiecki commented:

> Faced both with underlying zoning restrictions which prevent his development, and with an optional departure which is either too restrictive or leaves too much to the unbridled discretion of local officials, [the landowner] may find that a combined attack on the underlying zoning and the optional departure is too complicated for the courts to understand or entertain. The courts are likely to require that he apply for the optional departure before he will be allowed to challenge the underlying zoning restrictions. The expense and delay involved will generally force [the landowner] to accept whatever decision is rendered by the local officials in his case.

Krasnowiecki, *supra* note 100, at 1047.

[103] The Court noted the possibility that an individual may not be deprived of anything until after administrative proceedings have been completed. Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973). The question of whether administrative remedies must be exhausted as a matter of course was nevertheless avoided in *Gibson* because the particular administrative remedy was deemed inadequate because of the bias and indirect pecuniary interest of the administrative body. *Id.* at 578.

[104] *See, e.g.*, Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309, 312 & n.4 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Educ., 373 U.S. 668 (1963).

[105] For example, exhaustion of administrative remedies was not required in Dahl v. Palo

although, as *Hernandez* illustrates, they have not all followed the Supreme Court's lead.[106]

Moreover, the exhaustion requirement suggested by *Hernandez* should not be accepted unthinkingly because it appears to undercut the general thrust of Justice Brennan's dissent in *San Diego*. If, as Justice Brennan reasoned, the just compensation requirement is not "precatory,"[107] and compensation must be paid from the "date the regulation first effected the 'taking,' "[108] delaying compensation for an undetermined time while the property owner pursues administrative remedies which do not include compensation[109] seems irreconcilable with the constitutional mandate. Admittedly, one might argue that no taking is effected until the administrative process is completed, but such semantics would contradict Justice Brennan's opinion, which would require the government to tell the court whether it will revoke or amend the regulation in order to enable the court to assess damages.[110] Justice Brennan envisioned that even revoking the regulation would not avoid the payment of compensation for a temporary taking.

On balance, the *Hernandez* modification of *San Diego* is unsatisfactory not because it is unreasonable to provide government with advance notice of its potential liability, but because that notice would have to be given

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Alto, 372 F. Supp. 647 (N.D. Cal. 1974), where the plaintiff alleged that her property had been taken by downzoning and sought damages under the fourteenth amendment. The court, relying upon two § 1983 decisions by the Supreme Court, held that there was no need to seek an administrative variance. *Id.* at 649 & n.2.

[106] *See, e.g.*, Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970). The Ninth Circuit requires exhaustion of state administrative remedies which are designed to forestall a deprivation of a constitutional right. *See* Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973); Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969).

[107] 101 S. Ct. at 1305 (Brennan, J., dissenting).

[108] *Id.* at 1307.

[109] Prior to *San Diego*, the landowner faced a similar problem when he raised the question of invalidation while pursuing other administrative relief—such as a variance or conditional use. Generally, the land use administrative process does not permit the introduction of evidence on the validity question. *See* Krasnowiecki, *supra* note 100, at 1050-52 & n.79. Moreover, the validity question may be improper when the denial of administrative relief is contested pursuant to a writ of certiorari, because certiorari is generally limited to judicial review of the administrative record, R. ANDERSON, *supra* note 91, § 25.29, which often contains little about the substantive invalidity of the regulation because the allegation of invalidity would be beyond the jurisdiction of the conventional administrative zoning proceeding, *id.* § 25.30; *but see* note 98 *supra* (Indiana law prior to 1981 allowed invalidity question to be raised before administrative body).

[110] Justice Brennan stated:

> The government must inform the *court* of its intentions vis-a-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award. Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a "taking."

*Id.* at 1307 (Brennan, J., dissenting) (emphasis added) (footnote omitted).

in the context of an existing land use system which is inadequately designed to provide a legislative or administrative remedy. In this regard, one commentator's suggestion that the notice might take the form of a simple letter has merit because it allows the existing system to be circumvented.[111] However, the suggestion conflicts somewhat with traditional notions of administrative exhaustion which require that any matter which is to be the subject of judicial review be fully argued and presented in the administrative proceeding.[112]

### Constructing an Acceptable Exhaustion Requirement

What needs to be done if exhaustion is to become part of the regulatory taking analysis is to construct a legislative or administrative remedy which deals directly with the landowner's substantive constitutional claim—that is, a remedy which will preserve the economic viability of the property.[113] The existing land use administrative process does not provide such a remedy. Although a legislative rezoning could provide a constitutionally adequate remedy, as the *Hernandez* opinion implies,[114] requiring a landowner to re-enter the legislative process perpetuates the "wait and see" character of much land use regulation,[115] and seemingly provides little incentive for government to regulate constitutionally in the first place. In fairness the landowner should not be made to endure another legislative proceeding unless such a proceeding realistically might remove the constitutional defect of the regulation and unless the landowner is compensated for the delay associated with the proceeding.

The only nonjudicial remedy capable of addressing the substance of the landowner's grievance under the existing land use system is legislative rezoning. A legislative exhaustion remedy consistent with the dissenting opinion in *San Diego* may be built upon the letter notice suggestion if such notice places the burden upon the legislative body to convene new proceedings on the matter within a reasonable time. If no proceedings are convened, it can be assumed that the local government has no serious interest in modifying its regulation and the landowner is free to pursue

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[111] Hagman, *supra* note 89, at 134.

[112] *See, e.g.*, Bohn v. Watson, 130 Cal. App. 2d 24, 278 P.2d 454 (1954). In *Bohn* the court held that a party to an administrative proceeding must present all arguments, issues, and evidence before the administrative tribunal as a condition precedent to judicial review.

[113] This discussion assumes that damages for a regulatory taking are unavailable through the administrative and legislative processes. *See* note 117 *infra*.

[114] 643 F.2d at 1200 n.27.

[115] "Wait and see" zoning is the name given to the practice of placing undeveloped land in unrealistic holding zones in order to increase the discretion of decisionmakers. *See* text accompanying note 101 *supra*. *See also* NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 206 (1968); MODEL LAND DEV. CODE 150-58 (1976).

his judicial remedies. However, whether or not the local legislative body reconvenes on the issue, if the landowner's damage claim is later found to be justified, damages should be calculated from the date of the letter notice, and not, as some authorities would require,[116] from the completion of the exhaustion requirement. To do otherwise would substantially diminish the deterrence of the compensation clause upon overzealous land use regulation.

### *The Question of Damages*

Perhaps the most perplexing issues left unanswered by *San Diego* are what and how much the damages are for a regulatory taking. Justice Brennan's opinion barely touched on the calculation of compensation, but validly suggested leaving the states free to experiment.[117] Presumably, however, the experimentation will be guided by the dissent's general remedial outline.

Justice Brennan contemplated two sources of liability for a regulatory taking. First, the government will be liable for damages accruing during the interim period from the enactment of the regulation effecting a taking, to its rescission or amendment.[118] Second, if the government chooses to continue the offending regulation, it will be liable for, in Justice Brennan's words, "proper measures of just compensation."[119]

#### Interim Damages: Compensation or Redistribution?

An initial stumbling block in the calculation of interim damages actual-

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[116] Hagman, *supra* note 89, at 135. The *Hernandez* court stated:

> During the pendency of such proceedings to review and correct a zoning classification that denies an owner an economically viable use of his property, "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' "

643 F.2d at 1201 (quoting Agins v. City of Tiburon, 447 U.S. at 263 n.9 (quoting Danforth v. United States, 308 U.S. 271, 285 (1939))). The Supreme Court's comments in *Agins* referred to the loss in value associated with precondemnation activities and not the loss in value associated with a legislative proceeding designed to correct a regulatory taking.

[117] 101 S. Ct. at 1308 (Brennan, J., dissenting).

[118] *Id.* at 1307. Although Justice Brennan described the interim period as running until "the government entity chooses to rescind or otherwise amend the regulation," *id.* (footnote omitted), it is important to note that there always will be an interim period even if the government chooses not to rescind or amend following the court's determination that the regulation effected a taking. In the latter case, the interim period will end after the government has had a reasonable opportunity to rescind or amend. Justice Brennan recognized that the government might decide to continue the offending regulation. *See* text accompanying note 119 *infra*.

[119] 101 S. Ct. at 1308 (Brennan, J., dissenting).

ly pervades the entire issue of damages in the regulatory taking context: Is the purpose of such damages the redistribution of burdens or compensation for loss? The policy underlying the fifth amendment arguably supports awarding the fair rental value of the property during the interim period, regardless of actual damages. It is also evident that Justice Brennan believes that the amendment's purpose is fair redistribution of public burdens, and not merely reimbursement for loss as in tort liability. He observed that

> [b]ecause police power regulations must be substantially related to the advancement of the . . . general welfare, it is axiomatic that the public receives a benefit while the offending regulation is in effect. If the regulation . . . is found to effect a "taking," it is only fair that the public bear the cost of the benefits received . . . .[120]

While the federal condemnation precedents cited by Justice Brennan favor the payment of fair rental value for a temporary taking,[121] federal[122] and state[123] court decisions outside of the formal condemnation context have not treated the issue uniformly. Some courts clearly hold that compensation is to be measured not by the hypothetical rental value or benefit received, but by the out-of-pocket loss suffered by the landowner.[124] Perhaps most disturbing of all from the standpoint of the redistribution

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[120] *Id.* at 1306 (citations omitted).

[121] The cited cases are Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945). 101 S. Ct. at 1307 (Brennan, J., dissenting).

[122] *Compare* Cordeco Dev. Corp. v. Santiago Vasquez, 539 F.2d 256, 261 n.8 (1st Cir. 1976) (refusing to base interim damages on "a simple rate of return . . . during the period in which plaintiff was deprived of its commercial use"), *with* Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709, 728-29 (D.N.J. 1976) (finding normal compensation for temporary taking to be fair rental value).

[123] *Compare* Keystone Assocs. v. State, 82 Misc. 2d 620, 371 N.Y.S.2d 814 (Ct. Cl. 1975) (remedy for temporary taking is rental value of property), *rev'd*, 55 A.D.2d 85, 389 N.Y.S.2d 895 (App. Div. 1976), *rev'd & remanded*, 45 N.Y.2d 894, 383 N.E.2d 560, 411 N.Y.S.2d 8 (1978), *and* Usdin v. State, 173 N.J. Super. 311, 414 A.2d 280 (1980) (standard of recovery is rental value calculated in relation to land's most appropriate use (industrial) minus residual value of regulated use (floodway)), *with* City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) (landowner's out-of-pocket loss is standard of recovery). Other states appear to waffle between rental value and actual loss. *See, e.g.*, Brazil v. City of Auburn, ___ Wash. App. ___, 598 P.2d 1 (1979). Of course, some states are still waffling between invalidation and compensation, regardless of how measured. *See, e.g.*, Moviematic Indus. Corp. v. Dade County, 349 So. 2d 667, 672 (Fla. Dist. Ct. App. 1977); Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. Dist. Ct. App. 1973). Some of the waffling has been eliminated by Justice Brennan's opinion, which thus far has been received as if it were the opinion of the Court. *See* Burrows v. City of Keene, ___ N.H. ___, 432 A.2d 15 (1981) (creation of conservation district and placement of plaintiff's land therein constituted taking requiring payment of compensation, reasonable counsel fees, and twice the costs incurred upon appeal). The New Hampshire court extensively discussed Justice Brennan's *San Diego* dissent with approval, but expressly rested its decision solely upon the New Hampshire Constitution, perhaps to avoid the nominal dissenting status of the Brennan opinion.

[124] *E.g.*, City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978).

of public burdens is the manner in which the general compensation or redistribution issue has been treated under section 1983. The Supreme Court's decision in *Carey v. Piphus*[125] indicates that " '[t]he cardinal principle [in the award] of damages [under section 1983] is that of *compensation* for the injury . . . .' "[126]

In *Carey* the section 1983 plaintiff sought damages for the improper suspension of a student from school without adequate procedural due process. The Court envisioned two sources of damage: first, injuries caused by the suspension if it was improper, and second, damages inherent in the wrong. With either type of damage, the plaintiff bears the burden of proof, as injury cannot be presumed to occur. In short, some actual injury, however intangible, must be proven. Nominal damages may be paid for the denial of due process, however, because the right thereto is " 'absolute' in the sense that it does not depend upon . . . a claimant's substantive assertions."[127]

Strictly applying *Carey*'s tort liability focus to direct actions for regulatory takings in the land use context may leave the landowner without remedy. *Carey* suggests that a landowner must prove that the offending regulation resulted in an actual loss. This may be difficult when many of the landowner's losses, such as loss of financing commitments or other contractual rights, are consequential.[128] Similarly, if the regulated land is undeveloped, the landowner's loss may be his inability to develop the property toward some hypothetical use between the regulation's enactment and its rescission or amendment. This concern is especially serious since the subject of the harshest land use regulation is often undeveloped rural or suburban land where no-growth fever or the public's appetite for open space is usually greatest.

*Carey* suggests that a landowner also may claim damages from the intangible injury resulting from the taking itself[129]—for example, his emotional distress from years of wrangling with land use officials both in and out of court. While that possibility is theoretically comforting, few landowners would undertake expensive litigation when the likely compensation depends solely upon a speculative award for the owner's mental anguish over the constitutional abuse. Of course, the prospect of nominal damages suggested by *Carey* provides even less solace. Moreover, it is not even certain that nominal damages would be available for a regulatory taking because unlike the right in a procedural due process viola-

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[125] 435 U.S. 247 (1978).

[126] *Id.* at 254-55 (quoting 2 F. HARPER & F. JAMES, LAW OF TORTS § 25.1, at 1299 (1956) (emphasis in original).

[127] 435 U.S. at 266.

[128] *See* notes 138-44 & accompanying text *infra*.

[129] *See* 435 U.S. at 262-64.

tion, the right to relief in a regulatory taking case is not absolute, but rather depends upon the landowner's substantive assertion of nonviability.[130]

Applying *Carey* to regulatory takings would undermine the policy of redistributing public burdens and would render hollow any judicial recognition of government's liability for regulatory takings. A landowner would be told in effect that a regulation can result in a taking if the rigorous substantive standard of economic nonviability is met and that compensation is available for regulatory takings if actual losses are proven. That the landowner's good faith compliance with the invalid regulation led him to forfeit valuable contract rights and prevented any development of the property upon which to calculate its lost rental value would be merely part of the game.[131]

Thus, the damage issue left unaddressed by Justice Brennan may limit the protection afforded property interests by the regulatory taking concept. Indeed, one commentator already has suggested that states and municipalities take "steps to limit their liability" through the "adoption of damage tests . . . that would require a property owner to show that it had been injured in fact by any temporary taking."[132] While implicitly allowed under *Carey*, such a damage test raises the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[133]

Finally, it should be noted that the holding in *Carey* is not free of doubt. For example, one writer doubts that the Court intended to limit section 1983 liability to tort remedies.[134] Even if it did, *Carey* may allow a dif-

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[130] Meyer & Dolle, *supra* note 5, at 30; text accompanying notes 14-17 *supra*.

[131] *See* note 144 *infra*. In Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976), the court was highly skeptical about the landowner's right to damages for financing charges during the construction period delay, the increased cost of permanent financing, and various other consequential items.

Professor Hagman would compensate when economic resources, such as actual construction or developer-financed infrastructure, are wasted. Hagman, *Temporary or Interim Damage Awards In Land Use Control Cases (Part II)*, 4 ZONING & PLAN. L. REP. 137, 142 (1981) [hereinafter cited as Hagman, *Awards (Part II)*]. However, drawing a distinction between "soft" damage items—such as financing fees—and the "hard" damages associated with manifest construction is unwarranted insofar as it interjects into the damage calculation a distinction which has caused considerable difficulty and waste in other areas of land use control, such as the determination of when the right to a building permit vests. *See generally* Hagman, *The Vesting Issue: The Rights of Fetal Development Vis a Vis the Abortions of Public Whimsy*, 7 ENVTL L. 519 (1977).

[132] Bonderman, *Comment*, LAND USE L. & ZONING DIG., May 1981, at 11.

[133] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[134] Carlisle, *supra* note 62, at 727. Carlisle concluded:

> Section 1983, by the breadth of its language, has the capacity to accommodate change by providing a variety of remedies; however, if viewed in simple terms as creating [only tort liability] for innocent deprivations of newly

ferent damage rule for regulatory takings since the Court indicated that damage principles may differ depending on the constitutional right in question.[135] For example, several federal appellate court decisions support a presumption of damage in cases of racial discrimination, denial of voting rights, and denial of fourth amendment rights.[136]

### Calculation of Interim Damages

Thus far, this article's concern has been whether rental value (redistribution of public burdens) or actual loss (compensation) forms the basis of interim damages. Assuming that rental value is to be paid, the difficult secondary question of measurement is presented. For example, rental value may be based on the landowner's actual use of the property, the property's least economically viable use—below which it cannot be constitutionally restricted[137]—or on all uses economically available to the property including its "highest and best use." The selection of a value standard is especially important because regulatory takings, unlike formal condemnation, frequently affect undeveloped land.

The pre-*San Diego* case law on this issue is sparse and inconsistent. Most courts recite the general rule that rental value is the payment for a temporary taking without revealing by what standard the rental value is to be determined.[138] One California decision acknowledged the general rule, then eviscerated it by denying compensation because the landowner merely held the property for investment.[139] Similarly, a decision by the

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> recognized constitutional rights, either the statute itself must undergo change, or strained limitations will evolve which will leave injured parties truly "remediless" simply because the tort remedy is too harsh.

*Id.* at 735 (footnote omitted).

[135] The Court stated:

> In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.

Carey v. Piphus, 435 U.S. at 258-59.

[136] *See id.* at 264 & n.21. It is unclear after *Carey* whether these recoveries will be treated by the Court as dependent upon the implied presence of actual damages, since the Court expressly refused to intimate an opinion on the merits of these opinions by the courts of appeals. *Id.* at 265.

[137] Penn Cent. Transp. Co. v. New York City, 438 U.S. at 138 n.36.

[138] *See, e.g.*, Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709, 728-29 (D.N.J. 1976).

[139] City of Los Angeles v. Ricards, 10 Cal. 3d 385, 515 P.2d 585, 110 Cal. Rptr. 489 (1973). In *Ricards* the city destroyed a bridge, plaintiff's only access to her property, by diverting water. *Id.* at 387, 515 P.2d at 586, 110 Cal. Rptr. at 490. Plaintiff claimed that she was unable to sell the inaccessible property. *Id.* at 388, 515 P.2d at 587, 110 Cal. Rptr. at 491. The court took the plaintiff quite literally and pointed out that the loss of access was not a restraint on alienation. *Id.* One suspects that the plaintiff was not really arguing that

Texas Supreme Court made the rental value calculation entirely subjective by criticizing the failure to prove that the property would have produced any return to the landowner during the interim period.[140] In contrast, a New York Supreme Court decision overturned a decision awarding a landowner lost profits and increased construction costs offset by any increase in rents, and instead determined that the damages should be the carrying charges during the interim period.[141] On this point a separate opinion disagreed, noting that "projected return on the basis of a development plan suitable to the property could be taken into account by experts, . . . in determining fair rental value [but it would be error to measure] damages by the actual rent reserved in claimaint's lease . . . ."[142] The New York Court of Appeals, agreeing with the separate opinion, reversed the reversal by the New York Supreme Court.[143] With so little agreement on the applicable standard for calculating rental value, it is not surprising that courts have received coolly landowner claims for such consequential losses as increased construction and financing costs, no matter how economically significant they might be.[144]

Under formal condemnation practice, land is valued at its "highest and best use" or under "all available uses."[145] These two formulations are intended to be identical, although juries and economists may treat them differently.[146] Under either formulation, condemnation value is not limited

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the loss of access was a formal restraint on alienation, but merely that the loss of access made it virtually impossible to market the property. *See id.* This confusion aside, the California Supreme Court seemingly felt that any landowner who merely held property for speculation or investment appreciation could not possibly be entitled to damages for a temporary taking. Thus, the court reversed the trial court's damage award. *Id.* at 391, 515 P.2d at 589, 110 Cal. Rptr. at 493.

[140] City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978). For a commentary in agreement with *Teague*, see Clark & Kidman, *The Relationship of Just Compensation to the Land Use Regulatory Power: An Analysis and Proposal*, 2 PEPPERDINE L. REV. S79 (1974), in which the authors state that for damages a landowner must "establish that his development was imminent and delayed by regulations," *id.* at S100.

[141] Keystone Assocs. v. State, 55 A.D.2d 85, 389 N.Y.S.2d 895, *rev'd* 45 N.Y.2d 894, 383 N.E.2d 560, 411 N.Y.S.2d 8 (1978).

[142] 55 A.D.2d at 90, 389 N.Y.S.2d at 899 (Greenblott, J., concurring in part & dissenting in part).

[143] Keystone Assocs. v. State, 45 N.Y.2d 894, 383 N.E.2d 560, 411 N.Y.S.2d 8 (1978).

[144] *See, e.g.*, Prince George's County v. Blumberg, 44 Md. App. 79, 407 A.2d 1151 (1979) (refusing to compensate developer for increases in interest rates during interim period when building permits had been wrongly revoked), *rev'd in part & remanded in part & aff'd in part*, 288 Md. 275, 418 A.2d 1155 (1980), *cert. denied*, 449 U.S. 1083 (1981). *Prince George's* may not be dispositive of the issue, however, because the Maryland Court of Appeals refused to rule on the remedial issues because the landowner failed to exhaust administrative remedies. Prince George's County v. Blumberg, 288 Md. at 296, 418 A.2d at 1167.

[145] L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 30 (2d ed. 1953).

[146] Orgel suggested that the "all available uses" formula is to be preferred. Under this formula, an "expert appraiser would refuse to limit his attention to value for any *one* use, because he recognizes that such a limitation would tend to result in an *under*valuation of the property." *Id.* at 149 (emphasis in original). Orgel noted that courts and counsel

to the property's existing use, because the market does not so limit value. Except in rare cases,[147] property is "certainly adapted for some uses, probably adapted for other, more valuable uses, and possibly adapted for still other, and still more valuable uses."[148] The only restriction on determining potential-use value under present condemnation practice is that the uses not be so speculative as to command no market price.[149]

Consideration of potential land uses in regulatory takings has been criticized by scholars as bestowing a windfall on landowners because of public action.[150] Such criticism may be somewhat erroneous, since it is based on both a partial misstatement of the usual eminent domain valuation formulation and an overemphasis of the importance of public actions, such as land use controls, on value. For example, one commentator has stated that a condemned parcel's value is measured by its "highest and best use under existing or *reasonably probable land use controls*."[151] This formulation suggests that economists appraising land value in condemnation must exclude from consideration any land use not reasonably probable under the community's land use policy. As even this commentator acknowledged, however, economists do not limit their considerations to *existing* land use policy.[152] In view of the frequency with which zoning amendments and variances are granted—often without adherence to the announced standards[153]—it is hardly surprising that existing land use con-

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for landowners may prefer the "best use" formulation in order to remind the condemnation jury that the landowner's property value is not restricted to the actual use of the property. *Id.*

[147] Very few properties are peculiarly adapted for one particular use. Orgel observed:

> We assume, for example, that property in the Wall Street district of New York, should be valued for office-building purposes, since the possibility of the lands becoming available for "lower uses" such as for farms and residences, or for "higher uses" such as for gold mines is too remote to influence materially the prices at which such land is actually bought and sold on the market place.

*Id.* at 147-48.

[148] *Id.* at 148.

[149] *Id.* § 31, at 154.

[150] Costonis, *supra* note 54, at 1044.

[151] *Id.* at 1043 (emphasis in original).

[152] Professor Costonis indicated that land use controls are not the only determinant of land value when he observed: "If . . . the condemnee succeeds in demonstrating that liberalization of land use controls affecting his parcel is 'reasonably probable,' the further increment of development potential will fall somewhere between the Allowable Use and the Highest and Best Use Unrestricted by Public Regulation categories." *Id.* at 1051. The analysis in the text is based on the assumption that "liberalization" includes not only reasonably probable changes under an existing land use policy, but also reasonably probable changes in the land use policy itself. In addition, even though he was "startled" by the fact, Professor Costonis further observed that "in the index of Orgel's two-volume eminent domain treatise, . . . only four references to zoning, two of which refer to footnotes in the main work and two to textual passages of less than a paragraph's duration," can be found. *Id.* at 1043 n.100.

[153] *See, e.g.*, Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); Shapiro, *Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969); Note, *The Effect of Statutory Prerequisites on Decisions of Courts of Zoning Appeals*, 1 IND. LEGAL F. 398 (1968).

trols have been accorded little weight in land valuations. Courts themselves regularly consider the possibility of a rezoning in determining value.[154] Because such is the practice in formal condemnation proceedings, it seems strained to criticize similarly calculated damage awards as "windfalls" in the regulatory taking context.

This is not to suggest that land use controls have no effect on value, but merely to point out that such controls are but one factor to be considered, along with present and future uses of land adjacent to the parcel being valued, availability of transportation, such municipal services as water and sewer, the parcel's topography and soil, and numerous other physical and market factors which may be relevant in a given case.

Misstating the valuation formulations naturally leads to overemphasis on the importance of public activity in the land market. Such emphasis was evident in Chief Judge Breitel's opinion in the New York Court of Appeals in *Penn Central Transportation Co. v. City of New York*.[155] Referring to the public's "heavy investment" in railroads and connecting transportation, Judge Breitel concluded that a taking claim premised on an obligation to maintain as a landmark a publicly enhanced railroad terminal must exclude public or societal values and be based solely on a showing "that there was no possibility of earning a reasonable return on the privately contributed ingredient of the property's value."[156] Such analysis inadequately distinguishes the creation of value through direct

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[154] The drafters of the Model Land Development Code noted:

> Because so many communities use their zoning regulations as temporary holding devices—placing property in a low density classification with the implicit understanding that a rezoning will be granted if they like the developer's proposal—an artificially low value would result if only the temporary holding classification were considered in determining value. Consequently, the courts will consider the possibility of a rezoning in determining valuation.

MODEL LAND DEV. CODE § 5-303 note, at 203 (1976) (citing cases from several jurisdictions and citing Zipser, *Zoning Classification and Eminent Domain*, 1 URB. LAW. 89 (1969)).

[155] 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104, *rehearing denied*, 439 U.S. 883 (1978).

[156] *Id.* at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 333. In fairness to Judge Breitel, his comments seem to concentrate on direct public investment rather than public regulation. He stated:

> Even in the best of times, railroads were dependent on government-granted monopolies for their rights of way, government grants for their land, and government assistance for such projects as grade crossing eliminations. Railroads were given franchises to use city streets without charge, often to the detriment of neighboring residents and often without leaving the city power to terminate the franchise. Through the years, Penn Central and its predecessors have benefited mightily from this assistance.

*Id.* at 332, 366 N.E.2d at 1275-76, 397 N.Y.S.2d at 919 (citation omitted). In contrast, Professor Costonis bemoaned the failure of condemnation practice to subtract from damage awards the effect of public regulation. Specifically he stated that "[current practice] requires that the award include both the land's value under existing land use restrictions *and* the premium that the market places on it in anticipation of future zoning changes that will increase its value." Costonis, *supra* note 54, at 1043 (emphasis in original).

public subsidy and unharnessed private enterprise from the inability of public regulation or "upzoning" to *create* value. For example, an upzoning cannot increase the value of land unsuited to higher use in the marketplace. Moreover, analyzing value in terms of public control depreciates that part of a parcel's value which is linked to the private activity surrounding it.[157]

The misconception of land value as heavily dependent upon public regulation has led to the proposal that the police and eminent domain powers be integrated into the "accommodation power."[158] This power would compensate regulatory takings in relation not to the property's highest and best use, but rather to its least economically viable use, or the property's "Reasonable Beneficial Use."[159] The expressed motivation for so limiting the landowner's remedy is to create "a sounder balance between private property rights and public governance interests."[160] However, the balance in the accommodation power analysis clearly favors public governance—a favoritism which seems unwarranted in view of the proliferation of harsh regulatory takings. The frequency with which local governments use the police power rather than that of eminent domain indicates that the existing balance of public and private rights hardly has discouraged public regulation, and that the proposal does not move far enough toward protection of private rights.

There remains another possible justification for the accommodation power. Specifically, a strong argument can be made that the landowner has no moral or legal entitlement to any land value whatever, because he did nothing to create it. This position is rooted in the theories of the nineteenth-century philosopher Henry George, and is premised on land's inelasticity as a commodity. Thus, no tax on land will reduce its supply in a competitive market.[161] Because everything a landowner earns from the land itself, as distinguished from any improvements to the land, constitutes economic rent,[162] the question arises whether George's land value recapture theory supports something less than full compensation for regulatory takings. As is evident from the discussion which follows, the

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[157] *See* private windfall examples in WINDFALLS FOR WIPEOUTS 15 (D. Hagman & D. Misczynski eds. 1978) [hereinafter cited as WINDFALLS].

[158] Costonis, *supra* note 54, at 1023. Although Professor Costonis declined to define this proposed power, *id.*, he described it as one "intermediate between the police and eminent domain powers . . . which, in providing fair compensation to meritorious claimants, affords government a feasible alternative to the prohibitively expensive 'just compensation.' " *Id.* at 1034. It is designed to address a "class of regulatory measures that fits neither into the traditional police nor eminent domain power niches and that escapes the confiscation objection only by affording burdened landowners fair compensation in the form of appropriate economic trade-offs." *Id.* at 1058.

[159] *Id.* at 1063.

[160] *Id.* at 1049 n.125.

[161] *See* H. GEORGE, PROGRESS AND POVERTY 358-67 (50th anniversary ed. 1929).

[162] Kmiec, *supra* note 101, at 122.

answer to this question is a matter of policy, not of law. Moreover, the policy answers for interim and permanent damages may differ.

Compensation for *interim* damages should not be limited to the property's least economically viable use as suggested by the accommodation power analysis. This position is legally justified in part because invalid regulation, being void, leaves the property legally unzoned, and hence theoretically subject to any land use.[163]

Beyond that somewhat legalistic notion, however, fairness requires that a landowner be fully compensated for interim damages. While recapturing windfall land values may be a justifiable source of public revenue, it should be recaptured overtly, pursuant to a comprehensive recapture program.[164] There is, after all, little justification for allowing some landowners to retain all land value while imposing a double penalty on the landowner who happens to be the subject of a regulatory taking. This unfortunate landowner would suffer both the expense of proving a regulatory taking under the elusive economic viability standard and the indignity of being only partially compensated for doing so.

Full compensation for interim damages also promotes fairness in view of the uncertainty costs imposed upon a landowner by a regulatory taking. Precedent in formal eminent domain cases has attempted to rectify the uncertainty, foisted on a landowner by a temporary taking by increasing the available compensation beyond that available for permanent takings.[165] For example, the Supreme Court has held that long-term rental value is not the sole measure of fair rental value for a temporary taking. Rather, as the Court noted in *United States v. General Motors Corp.*,[166] it is appropriate to consider incidental losses not as independent items of damage, but as evidence of actual market rental value for temporary occupancy.[167] While it may be possible to limit the holdings of *General*

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[163] *See, e.g.*, Morris County Land Improvement Co. v. Township of Parsippany—Troy Hills, 40 N.J. 539, 559, 193 A.2d 232, 243-44 (1963). *See generally* 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 36.02 (4th ed. 1980).

[164] *See* WINDFALLS, *supra* note 157; Kmiec, *supra* note 101, at 126-27.

[165] Some of the differences between temporary and permanent takings have been mitigated by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 (1976). Unlike the judicial rule referred to in the text, the Act does not increase the compensation for property taken, but rather reimburses persons for personal losses whenever a federally assisted acquisition of real property results in the displacement of any person. *Id.* §§ 4622, 4630. Pursuant to the Act, cash grants are available for the relocation expenses of moving a business, *id.* § 4622, and for both owners, *id.* § 4623, and tenants, *id.* § 4624, displaced from their homes.

[166] 323 U.S. 373 (1945).

[167] *Id.* at 383. Writing for the Court in *General Motors*, Justice Roberts stated:

> The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy . . . ? . . .
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> . . . .
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> . . . When [the government] takes the property, that is, the fee, . . . it must

*Motors* and similar cases[168] to incidental damages associated with moving materials from the property,[169] inability to transfer the value of a going concern,[170] or repossession of the property after temporary displacement,[171] there appears to be no compelling reason to do so. It seems particularly inappropriate to confine these holdings to their facts in view of Justice Brennan's citation in *San Diego* of *General Motors* and similar cases as examples in which the Court determined the appropriate measure of just compensation for temporary use.[172]

The uncertainty imposed by temporary regulatory takings is hardly less significant than that associated with formal temporary takings. In fact, the uncertainty may be even greater since the landowner may have no advance indication whether the regulatory taking will be temporary or permanent. Under Justice Brennan's suggested approach in *San Diego*, it is the government that decides whether to revoke or amend the offending regulation.[173] Thus, the landowner will not know until the end of the taking litigation whether or not he even will own a property interest that is capable of development. He certainly will be in no position to obtain loan commitments or to engage in realistic site planning.

Based on these legal and policy considerations, this analysis rejects the limited compensation of the accommodation power and other interim damage rules,[174] and proposes instead that landowners be awarded interim

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> pay [the landowner] for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases....
>
> It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. . . .
>
> [In determining market rental value for temporary occupancy it is proper to consider] the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy . . . .

*Id.* at 380-83. *See also* L. ORGEL, *supra* note 145, § 80, at 340.

[168] *See, e.g.*, United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261 (1950); United States v. Petty Motor Co., 327 U.S. 372 (1946).

[169] 323 U.S. at 383.

[170] Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

[171] *See* 323 U.S. at 383 (suggesting that fair rental value for temporary taking may include cost of returning goods to premises).

[172] 101 S. Ct. at 1307.

[173] *Id.*

[174] Professor Hagman has argued for a lesser level of interim damages on the theory that a regulatory taking leaves the landowner in possession of the property with some

damages equal to the property's fair rental value, determined in relation to all economically available uses of the property and the peculiar uncertainty costs confronted by a landowner subject to a temporary regulatory taking,[175] including increased construction and financing costs.

Permanent Damages Without Acquisition of a Property Interest

Calculating damages for permanent takings is no less difficult than for temporary takings. The heart of the difficulty is whether the government is compensating the landowner or rather acquiring a fee or some lesser property interest. If the permanent award is viewed as damages, rather than purchase price, all the uncertainties surrounding the interim damage calculation return. For example, courts must decide whether the damage payment is compensation for actual loss or a redistribution of public burdens.[176] Similarly, the value basis for the damage award must be agreed upon.

Accepting the arguments made previously for the redistribution of public burdens, the sole question to be resolved is the applicable value standard. As was suggested earlier,[177] the interim and permanent damage calculations diverge on the value standard. Unlike the interim damage situation, when permanent damages are at issue, the regulating body has devised a land use restriction with knowledge that it will effect a taking. Uncertainty is no longer a major factor because the landowner is to receive full compensation in the interim up to the time when the government decides to rescind or continue the offending regulation. If the government decides to continue the regulation, the permanent calculation itself signifies the government's decision to maintain stringent control over the

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residual use rights. Hagman, *Awards (Part II), supra* note 131, at 139. He would pay only "negotiated" fair rental value—that is, an amount private parties would "have negotiated if it [the length and extent of the government's damaging conduct] was known in advance including the fact that the take was only going to be temporary[.]" *Id.* at 141. Hagman suggests that his proposed interim damage rule is based on Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), and *General Motors*, the formal temporary condemnation precedents cited by Justice Brennan. However, as discussed earlier, these cases represent an enlargement—not a constriction—of compensation for formal temporary takings. *See, e.g.*, General Motors Corp. v. United States, 323 U.S. at 380-83, *quoted in* note 167 *supra*.

In addition, Professor Hagman's position seems questionable on the policy grounds suggested in the text. Specifically, something less than full rental value is an isolated windfall recapture, ignores the uncertainty foisted by the temporary taking upon the landowner, and slights the admonitory purpose full compensation serves against overzealous land use regulations. In this regard, it is important to remember that a regulatory taking is not a voluntarily negotiated agreement among private parties, but the involuntary imposition of an errant government.

[175] Although the government faces uncertainty, the courts' concern should be the landowner's uncertainty. Text accompanying note 56 *supra*.

[176] *See* text accompanying notes 120-36 *supra*.

[177] Text accompanying note 163 *supra*.

property's development, and thus to pay accordingly. Moreover, as discussed below,[178] permanent damage awards risk overpayment, but interim damage awards do not. Therefore, this article advocates applying the least economically viable use value standard in the *permanent* calculation. This standard satisfies the constitutional minimum by supplying the value increment necessary to cure the regulatory taking.[179]

Advocates of land use deregulation[180] may decry application of the minimal acceptable constitutional standard with a variation of the argument previously directed toward the remedial inadequacy of invalidation. For example, it can be argued that governmental excesses in land use regulation are facilitated by its limited liability. While the argument has considerable validity, especially in states like California where private property scarcely exists but in name,[181] it is unsatisfactory insofar as it seeks to redress all existing land use inequities through an adjustment in compensation practice.

Although government's failure to compensate landowners for regulatory abuses may be the most glaring fault of the existing system, it is by no means its only one. Commentators,[182] including this writer, have examined the unfairness, inefficiency, uncertainty, and inflexibility of the existing land use system. These examinations reveal that if deregulation is in fact merited, it is best handled through comprehensive legislative reform that properly demarcates the appropriate spheres of public and private decisionmaking. Increasing the permanent compensation available to landowners cannot sensitively and properly divide public and private responsibility.[183] Thus, using the highest possible value standard will ultimately satisfy neither the deregulation advocates nor those[184] who

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[178] Text accompanying notes 185-86 *infra*.

[179] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131, 138 n.36 (1978).

[180] *See, e.g.*, B. SIEGAN, LAND USE WITHOUT ZONING (1972); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Kmiec, *supra* note 101; Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980); Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447 (1981).

[181] California has become noted for the wipeout of land developers. *See* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976). Professor Hagman described the situation in California as follows:

> [T]he state [is] without any comprehensive scheme of control. Local, regional and state agencies, many of them new and many of them charged to protect a specialized aspect of the public weal, however, may exercise substantial control. Each agency has a kind of veto power. Often hostile to developers, these agencies do not conceive of themselves as in a kind of partnership relationship with developers in the production of the built environment.

Hagman, *Development Agreements*, 3 ZONING & PLAN. L. REP. 65, 66 (1980).

[182] *See* sources cited note 180 *supra*.

[183] *Cf.* Costonis, *supra* note 54, at 1048-49 (advocating legislative action to resolve compensation issues).

[184] *E.g.*, Costonis, *supra* note 54.

desire merely incremental readjustment in the balance between public governance and private rights. So long as government is authorized by enabling legislation to regulate land use under the vacuous general welfare standard, permanent damage awards should not be calculated to subvert the legislative will covertly by substituting eminent domain measurements for those under the police power. The imperfections of the existing land use system are so monumental that it deserves to be overtly subverted, repealed, and reconstituted.

Finally, limiting permanent damage awards to the amounts necessary to cure the constitutional deprivations lessens the concern of damage overpayment. Such concern stems from the possibility of conferring a windfall on the landowner in the event the regulation is subsequently repealed.[185] The interim calculation, by its very nature, does not involve the overpayment problem. While it might be possible to avoid the problem by paying permanent damages periodically, the administrative costs likely would be prohibitive. Presumably, an economist could factor into a lump-sum payment the likelihood of future decontrol, although the number of variables, including the turnover of officeholders,[186] may severely undermine the accuracy of such predictions. Thus, the simplest solution is to limit the permanent compensation paid by the value standard applied.

### Permanent Damages with Acquisition of a Property Interest

Permanent damages also could take the form of the purchase price for the property interest taken. This alternative would avoid a separate interim damage calculation since interest would be added to the purchase price award from the date of the offending regulation's enactment.[187] Of course, this would slight the policies outlined in this article which favor a separate interim damage calculation.[188]

Under this view, the property interest taken would largely determine

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[185] WINDFALLS, *supra* note 157, at 296-97. *See generally* Bosselman, *Property Rights in Land: New Statutory Approaches*, 15 NAT. RESOURCES J. 681 (1975).

[186] Professors Ellickson and Tarlock have noted that the turnover in officeholders may lessen the incentive for rational decisionmaking allegedly inherent in the payment of compensation. In this regard, they observed:

> Even if municipal liability for interim damages were to be imposed, would the city officials who adopt an unconstitutional program $T_1$ fully weigh city liabilities that do not accrue until after $T_5$? (Compare how today's city council may grant generous unfunded pension rights to city workers, and leave to tomorrow's city council the problem of funding them.) Are the efficiency gains that will accrue from holding cities liable for interim damages likely to exceed the administrative costs of applying that remedy?

R. ELLICKSON & A.D. TARLOCK, *supra* note 5, at 172.

[187] *Id.* at 171.

[188] *See* text accompanying notes 163-73 *supra*.

the compensation paid. As Justice Brennan intimated, the government which invalidly takes by regulation may decide to condemn formally the fee interest in the property.[189] Through fee ownership the government could preserve land in its present state or resell it to a landowner who would undertake some publicly desired use. Alternatively, if the government's interest in the property was directed more to the timing than to the type of development, it could purchase a short-term leasehold or a less-than-fee interest, such as an easement, covenant, or servitude, for a defined period. Of course, if the government wished to prevent a specific type of development, it could acquire the relevant development rights with a permanent less-than-fee interest.

The purchase of less-than-fee interests or development rights has a number of benefits, the primary ones being to lower acquisition costs and long-term holding costs since the property continues to produce tax revenue. In addition, to the extent that the development rights remaining in private ownership are economically viable, the land may generate some private income.

However, the purchase of development rights is not trouble-free. First, it diminishes the property's alienability by fragmenting ownership. Second, the historical success of development right purchases in this country is, at best, checkered.[190] Third, valuing these interests may be more difficult than valuing fee interests,[191] although one commentator succinctly stated that a development right's value equals the difference between the land's value in its present use and that as developed.[192]

One land use scholar has raised two objections to the permanent damage-acquisition approach. The first is that the acquisition alternative allows the government to avoid its taking problem too cheaply.[193] Specifically, it allows the government to purchase those development rights necessary to cure an invalid taking at a cost roughly equal to the difference between the value of the property as invalidly regulated and its value under valid regulation. This it is argued is "rather an enormous advantage for government,"[194] since the government must pay less than it would if it were required to purchase the fee.

Surely the purchase of the limited interest necessary to validate the

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[189] 101 S. Ct. at 1307-08.

[190] For example, scenic easements acquired by the National Park Service have been difficult to police and to enforce judicially. D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 923-26 (1979).

[191] *Id.* at 926-27. *See generally* Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DEN. L.J. 168 (1968).

[192] Eckert, *Acquisition of Development Rights: A Modern Land Use Tool*, 23 U. MIAMI L. REV. 347, 349 (1969).

[193] WINDFALLS, *supra* note 157, at 293-94.

[194] *Id.* at 294.

regulation does greatly advantage the regulator. It is hard to understand, however, why this comes as a shock. The advantage to the government is coextensive with its power to regulate under the police power. Perhaps, the criticism directed at the regulatory purchase of property interests is traceable to a belief that a rational land use system should both fully recapture windfalls and fully compensate wipeouts.[195] Because the purchase of a limited property interest barely mitigates the wipeout and leaves the windfall question unaddressed, the existing system is highly deficient in this particular regard. Nevertheless, as suggested earlier,[196] to the extent that the existing system prevails, the compensation question should be addressed in that context.

The second objection, however, is addressed directly to the existing system: that is, the arguable constitutional infirmity in allowing government to use its regulatory power to purchase a property interest after devaluing the property by regulation.[197] Ample precedent prohibits such regulatory abuse in the context of formal eminent domain acquisitions.[198]

Overall, the stated objections mirror a difficulty encountered earlier in the calculation of permanent damages: whether the market value of the acquired fee or less-than-fee interest should be determined in reference to all economically available, but undeveloped, uses, or only the least economically viable use. Without repeating the previous arguments, there would appear no reason to distinguish permanent damages and permanent acquisitions. Within the context of the existing land use system, the two types of permanent calculations should be treated consistently. Hence, the acquisition price for either fee or less-than-fee interests would be determined from the property's least economically viable use.[199] However, the mere statement of the rule reveals that consistent treatment of the permanent calculation creates the impermissible inconsistency between the damage payment for regulatory takings and formal eminent domain acquisitions referred to above.[200] To avoid such inconsistency, it is probably

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[195] *Id.* at 20, 24.

[196] Text accompanying notes 182-85 *supra.*

[197] WINDFALLS, *supra* note 157, at 239-94.

[198] *See, e.g.*, City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (1961). In *Plainfield* the landowner and the municipality could not reach a voluntary agreement with respect to the sale of the landowner's property. The city then rezoned the tract for parks, playgrounds, and schools, and one month later sought to condemn the property. The New Jersey court held that the municipality had improperly used the zoning authority to lower the price of the property. *See also* Hagman, *Planning and Regulatory Acquisition,* in WINDFALLS, *supra* note 157, at 222-55.

[199] Thus, with respect to permanent damages or permanent acquisitions, the position supported here generally coincides with that proposed by Professor Costonis. *See* Costonis, *supra* note 54. In addition, the proposal is in line with that suggested by the American Law Institute. *See* MODEL LAND DEV. CODE § 5-303(5) & note (1976).

[200] *See* text accompanying notes 193-95 *supra. See also* Burrows v. City of Keene, ____ N.H. ____, 432 A.2d 15 (1981). The *Burrows* court implicitly disdained any difference be-

best to adopt the suggestion that any permanent award be viewed as damages rather than the acquisition of a property interest.

## CONCLUSION

While the supposed absence of a final judgment in *San Diego* left the Court short of its destination, the importance of the opinion cannot be understated. Justice Brennan's well-written dissent diminishes any doubt[201] about the direction of the Court as then constituted on the regulatory taking issue after *Penn Central*: police power regulation can be a taking within the meaning of the just compensation clause of the fifth amendment. Moreover, for the first time an apparent majority of the Court has indicated that the compensation requirement in the fifth amendment is mandatory and not merely precatory. Invalidation will not suffice, whether the government formally condemns property or implicitly condemns by regulation.

While Justice Brennan's statement that "once there is a 'taking' compensation *must* be awarded"[202] may appear to establish absolute government liability, there is little reason not to apply the immunities established in analogous cases under section 1983. The policy of balancing public discretion and private rights is so similar in both contexts that little would be gained from separate treatment.

A requirement that a landowner who has suffered a regulatory taking exhaust legislative and administrative remedies is unjustified if such remedies are not designed to deal with the landowner's substantive claim and if the landowner is not compensated for the damages which accrue while remedial actions are pursued. Because none of the legislative and administrative remedies of the existing land use system fulfill both these requirements, none is satisfactory and coincident with Justice Brennan's opinion. Nevertheless, it may be possible to construct an adequate nonjudicial remedy by using the rezoning mechanism and minimizing the burden on the landowner through the provision of compensation during the rezoning process and placing the responsibility for the pursuit of a

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tween the payment available for permanent regulatory acquisitions and permanent eminent domain acquisitions. The court stated:

> From the outset, it was plain that the city wished that the plaintiff's land be devoted to open space. . . . The city, however, would not pay a reasonable price for the property, electing instead to offer to purchase the property for a sum representing the land's value based on the city's intended use of the land rather than the price to which the plaintiffs were entitled, which was one reflecting the land's highest and best use.

*Id.* at ____, 432 A.2d at 21.

[201] *See, e.g.*, note 17 *supra*.

[202] 101 S. Ct. at 1305 (Brennan, J., dissenting) (emphasis in original).

rezoning upon the municipality after notice of a taking claim is received from the landowner.

On the damage issue, the identity of interests in the immunity area between the section 1983 cases and those brought directly under the fifth amendment does not prevail. Supreme Court precedent indicates that compensation for actual loss is the purpose of section 1983. In contrast, both Justice Brennan and sound land use policy suggest that redistribution of public burdens lies at the heart of the constitutional prohibition against takings without just compensation. These positions and the case precedents themselves are not irreconcilable, however, and in the regulatory taking context, they should be reconciled in favor of redistribution.

Damage calculation for regulatory takings is also not self-evident. Existing case law has evaded the value standard to be applied. Thus, time and again, opposing sides assume their natural positions without any consistent guiding standard. Landowners argue for valuation at highest and best use while regulators urge valuation at existing use, which more often than not is undeveloped—a status probably traceable to the offending regulation. On the sidelines, unduly emphasizing the effect of public and regulatory activity on land value, certain scholars argue for the least amount of compensation acceptable under the Constitution.

Thus, the compensation issue has become a stalking horse for those of vastly different views on individual freedom and the relative importance of property rights to protection of that freedom. By their narrow focus on the inequities of current compensation practice, both sides have left uncorrected the overall failings of the existing land use system. Consequently, landowners continue to be inadequately compensated and legislatures fail to re-examine comprehensively the land use control system.

If compensation within the existing system is treated discretely from overall land use reform, it is not difficult to outline some general principles that should apply. First, interim damages should equal the fair rental value of the property under all economically available uses. In making the calculation, the court should consider significant items of consequential loss such as the forfeiture of valuable contract rights and loan commitments. Interim damages so calculated take full cognizance of both the legal nullity of invalid regulations and the inherent unfairness and uncertainty such regulations impose upon the landowner.

Second, permanent damages should be provided only for the use value that is in fact constitutionally infringed. Paying damages for the least economically viable use maintains an acceptable balance between the police and eminent domain powers and lessens the chance of overpayment in the event of subsequent decontrol. While permanent damages may also be treated as an acquisition of a fee or less-than-fee property interest,

such characterization raises both the specter of an unconstitutional regulatory acquisition and such other problems as fragmentation of ownership and the difficult enforcement and valuation of development right interests.

These damage principles are not immutable. However, they should serve as a basis for further discussion as the states take up Justice Brennan's invitation to experiment with compensation. Experimentation will be healthy so long as no one overlooks Justice Brennan's qualification that any procedure or remedy chosen comport with the Constitution and "meaningfully allow a landowner to challenge a regulation that allegedly effects a 'taking,' and recover just compensation if it does so."[203]

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[203] *Id.* at 1308.