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Compensation and Valuation for Regulatory Takings

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COMPENSATION AND VALUATION FOR REGULATORY TAKINGS

INTRODUCTION

The constitutional status of restrictive governmental land use regulations is one of the most controversial issues in contemporary American land use law.[1] Courts and commentators disagree on the propriety of allowing monetary compensation when land use regulation[2] unconstitutionally restricts the use of private property.[3] Two opposing constitutional interpretations are involved in this debate. One view holds that overly restrictive land use regulations constitute a *de facto* taking of private property for which the fifth amendment requires just compensation.[4] The opposing view holds that overly restrictive land use regulations are an invalid exercise of the police power that violate the due process clause of the fourteenth amendment. Therefore, according to this view, the proper remedy is not compensation, but invalidation of the offending regulation.[5]

The leading statement on the issue of whether monetary compensation is an appropriate remedy for unconstitutionally restrictive land use regulations is contained in Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*.[6] According to Justice Brennan, once a court identifies a regulatory taking, the fifth amendment demands that compensation be paid to the landowner, even in cases of a "temporary taking" where the offending ordinance is ultimately rescinded.[7] Justice Brennan's dissent was joined by Justices Stewart, Marshall and Powell.[8] Significantly, Justice Rehnquist also expressed his agreement with the above portion of Justice Brennan's dissenting opinion in a concurring opinion in which he agreed with the plurality that the absence of a final state court judgment

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1. For a sampling of various viewpoints on the controversy over the proper remedy in cases of unconstitutional land use regulations, see *Constitutional Issues in Land Use Regulation*, 8 HASTINGS CONST. L.Q. 517 (1981). For an overview of the American land use system, see A. DAWSON, LAND USE PLANNING AND THE LAW (1982); R. ELLICKSON & A. TARLOCK, LAND USE CONTROLS (1981).

2. The term "land use regulation" as used in this Comment refers to any land use control law or zoning ordinance.

3. As opposed to the broader question of when a land use regulation will be held to constitute a *de facto* regulatory taking, this Comment is concerned with the issue of whether compensation should be awarded once a regulatory taking has occurred.

4. *See infra* note 23 and accompanying text.

5. *See infra* note 73 and accompanying text.

6. 450 U.S. 621 (1981).

7. *Id.* at 655 (Brennan, J., dissenting).

8. *Id.*

required dismissal of the appeal.[9] Consequently, the compensation remedy proposed by the dissent in *San Diego* was sanctioned by an indirect majority of five justices of the Supreme Court.[10] Nevertheless, the compensation remedy proposed by Justice Brennan is not a conclusive holding of the Court. Because the majority in *San Diego* dismissed the appeal, the compensation remedy proposed by the dissent may be cited as merely persuasive authority by lower courts.[11]

The United States Supreme Court is apparently undaunted by its inability to conclusively resolve the compensation issue. Since 1980, the Court has reviewed four regulatory inverse condemnation cases.[12] In each of these four cases, the Court side-stepped the compensation issue by dismissing the case on procedural grounds.[13] Simultaneous with announcing its decision in the two most recent regulatory inverse condemnation cases, the Court agreed to hear in its next term a case attempting to present the same questions.[14] The failure of the Supreme Court to conclusively resolve the compensation issue has resulted in confusion among state and federal courts.[15] While some courts are receptive to a landowner's claim for just compensation, other courts refuse to award compensation and limit the landowner's remedy to invalidation of the offending regulation.[16] The unfairness in the current state of the law to municipal regulatory entities, developers, and other landowners necessitates a conclusive resolution by the Supreme Court of the controversy surrounding the proper remedy in cases of overly restrictive land use regulations.

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9. *Id.* at 633 (Rehnquist, J., concurring).

10. *Id.*

11. *Id.* In *San Diego*, a majority of the Court concluded that the California courts had not decided whether any taking had occurred and that the absence of a final state court judgment required dismissal of the appeal. *See infra* note 93 and accompanying text.

12. MacDonald, Sommen & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985); San Diego Gas & Elect. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

13. *See infra* notes 56-65 and accompanying text.

14. On July 28, 1985, the same day that the Supreme Court's decision in Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985), was announced, an appeal to the Supreme Court was filed in the case of MacDonald, Sommen & Frater v. Yolo County, 106 S. Ct. 2561 (1986). Similarly, on June 25, 1986, the same day that the Court's decision in *Yolo County* was announced, the Court agreed to review First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 52 (1986), a case that attempts to present the same issue of whether compensation is a proper remedy for regulatory inverse condemnation. The Court also granted *certiorari* on October 13, 1986, in Nollaw v. California Coastal Comm'n, 102 S. Ct. 312 (1986). The *Nollaw* case involves the question of when excessive regulation under the police power constitutes a taking. Accordingly, the stage is once again set for the Court to resolve this important issue.

15. *See infra* note 51.

16. *Id.*

Resolution of this question must ultimately involve a careful balancing of competing public policy concerns regarding the availability of a compensation remedy. Persuasive policy arguments support both the invalidation and compensation positions.[17] Therefore, both academia and the bar must continue to evaluate Justice Brennan's proposed compensation rule and further develop the parameters of a compensation remedy in anticipation of a conclusive Supreme Court decision. Because awarding monetary relief in land use cases is a relatively recent development in the law, courts have not yet developed adequate guidelines to use in measuring a compensation remedy.[18] Indeed, valuation problems become increasingly important as a compensation remedy gains acceptance in the courts.

This Comment addresses the basic considerations and the relevant underlying legal doctrines necessary to provide an understanding of the compensation controversy. Also, the propriety of a compensation remedy as opposed to an invalidation remedy is considered. The parameters of the compensation remedy proposed by Justice Brennan in his *San Diego* dissent are then explored. Finally, a number of valuation methods for determining the proper measure of a just compensation remedy are discussed.

I. BACKGROUND

A. Doctrinal Considerations

Underlying the controversy of which remedies should be available to property owners subject to unconstitutionally restrictive land use regulations is the tension between the government's police power authority to regulate land use for the public welfare and the protection accorded private property by the fifth amendment's just compensation clause.[19] Governments possess police power authority to regulate land use for the public health, safety and general welfare.[20] Generally, when a government restricts the use of private property pursuant to its police power by enacting zoning ordinances or other land use control laws, it need not compensate the landowner monetarily.[21] Possessing the sovereign power of eminent domain, the government may appropriate private property for public use.[22]

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17. *See infra* notes 103-21 and accompanying text.

18. *See infra* note 156 and accompanying text.

19. *See* Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations,* 29 UCLA L. REV. 711 (1982) (discussing tension between eminent domain or taking power, which requires compensation, and police power, which involves regulation of land use without compensation).

20. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1973); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926).

21. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922). *See generally* E. FREUND, THE POLICE POWER § 511 (1904).

22. 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.11 [2] (J. Sackman rev. 3d ed. 1983). *See also* Comment, *Regulation of Land Use: From Magna Carta to Just Formulation,* 23

However, the fifth amendment requires that the government compensate owners of property condemned through the government's exercise of its eminent domain power.[23] Regulation of land under the police power is therefore distinguishable from the exercise of the power of eminent domain in that the Constitution requires compensation to the owner of the property affected by eminent domain, yet there is no such requirement with respect to the police power.[24] Although the police power regulation of land is distinguishable from formal condemnation under the power of eminent domain, a land use regulation may so infringe upon the landowner's use and enjoyment of a property right that the practical effect is the same.[25] In other words, the regulation may invade the individual's private property rights to the extent that it constitutes a *de facto* taking of private property for public use without payment of just compensation.[26] When such a taking occurs, the question arises whether the landowner may bring an inverse comdemnation[27] claim for monetary compensation.

UCLA L. REV. 904, 904 n.4 (1976) (discussing historical application of just compensation clause and its modern application in context of land use regulation). For current scholarship on the fifth amendment's takings clause, see R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (doctrinal analysis of takings clause concerned with reconciliation of functions of state and limitations upon its power, with respect to individuals, imposed by fifth amendment). *Cf.* Note, *Richard Epstein on the Foundations of Takings Jurisprudence,* 99 HARV. L. REV. 791 (1986) (critical of Epstein's analysis).

23. The fifth amendment provides "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. Although provisions similar to the fifth amendment exist in virtually every state constitution, twenty-five states have broader provisions that require compensation where property is taken or damaged. 1 P. NICHOLS, *supra* note 22, § 6.1 [3]. *See* Kratovil, *Eminent Domain Revisited and Some Land Use Problems,* 34 DEPAUL L. REV. 587 (1985) (discussing development of Constitutional provisions in context of inverse condemnation). *See also* Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus,* 8 SANTA CLARA L. REV. 1, 15 (1967) ("or damaged" clauses included in state constitutions to enlarge compensation beyond court-imposed physical invasion requirements for takings).

Both the fifth and the fourteenth amendments to the United States Constitution are involved in the compensation issue. The fifth amendment binds the federal government directly. U.S. CONST. amend. V. The fourteenth amendment, binding on the states, provides that no person shall be deprived of "property without due process of law." U.S. CONST. amend. XIV. The Supreme Court has held that the due process clause of the fourteenth amendment incorporates the fifth amendment's compensation requirement for the taking of private property for public use. Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897). Thus, the fifth amendment's compensation requirement binds both federal and state governments. For the sake of brevity, this Comment will simply refer to the fifth amendment when discussing the compensation requirement, without the additional reference to the fourteenth amendment, with the understanding that the states are bound by the substance of the fifth amendment's just compensation clause.

24. *See supra* notes 20-23.

25. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

26. *Id.*

27. *See infra* note 30.

B. *The "Taking" Issue and Inverse Condemnation*

Governments may effectuate a "taking" of private property in the following two ways: (1) directly taking the property by exercising the power of eminent domain; or (2) enacting land use regulations under the police power that are held to be unconstitutionally restrictive.[28] The traditional means by which private property is taken for public use is by a formal condemnation proceeding brought by a governmental entity pursuant to its power of eminent domain.[29] When the governmental entity fails to initiate formal condemnation proceedings prior to the taking, the landowner may bring an action for "reverse" or "inverse" condemnation.[30] Inverse condemnation actions are based on the self-executing character of the fifth amendment's just compensation clause.[31] The condemnation process is called "inverse" because it is initiated by the landowner rather than by the government.[32] Instead of the government initiating a formal eminent domain proceeding, an inverse condemnation action is brought by a landowner to compel compensation for an alleged *de facto* taking of their land.[33] Traditionally, inverse condemnation suits were limited to situations where a government entity caused a physical invasion of a landowner's property.[34] Thus, the question whether an inverse condemnation action should be allowed where the governmental action is a

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28. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 398 (1922).

29. Precisely what constitutes a public use or a public purpose is an independent topic of debate in the law of eminent domain. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954) (construing public use clause of fifth amendment and holding that fifth amendment does not permit taking of private property for subsequent private redevelopment).

30. The Supreme Court has defined inverse condemnation as "a short hand description of the manner in which a landowner recovers just compensation for a taking when condemnation proceedings have not been instituted." United States v. Clarke, 445 U.S. 253, 257 (1980). *See* Kratovil, *supra* note 23, at 589 (tracing origins of inverse condemnation and noting that actions for inverse condemnation were recognized as early as 1882).

31. The United States Constitution's proscription on uncompensated takings is "self-executing." No further statutory authorization is required to permit inverse condemnation suits. United States v. Clarke, 445 U.S. 253, 257 (1980); Jacobs v. United States, 290 U.S. 13, 54 (1933).

32. *See* San Diego Gas & Elect. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting) (action termed "inverse" because landowner, rather than government, initiates the proceeding).

33. *Id.*

34. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (cable television attachment constitutes taking); Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (requirement that access to private pond remain open to public without compensation constitutes taking); United States v. Causby, 328 U.S. 256, 266 (1946) (compensable taking due to destruction of chicken farm because chickens flew into walls when frightened by aircraft noise); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1872) (inverse condemnation award for physical invasion through flooding attributed to government). *See generally* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 46-48 (1964) (discussing traditional physical invasions test for taking).

regulatory invasion, as opposed to a physical invasion of property rights, lies at the core of the current debate.[35]

In addition to a direct taking of private property via exercise of the eminent domain power, a government may indirectly effectuate a taking by regulatory action pursuant to its police power.[36] Regulatory takings do not involve physical invasions of land; rather, they are imposed through governmentally legislated restrictions that limit a property's use.[37] The concept of regulatory takings may be traced back to the landmark 1922 Supreme Court decision in *Pennsylvania Coal Co. v. Mahon*.[38] The *Pennsylvania Coal* Court recognized that land use regulations enacted pursuant to the police power may constitute a taking if the effect of the regulation infringes upon the beneficial use and enjoyment of private property to an unconstitutional degree.[39] Justice Holmes's majority opinion stated that "the general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[40] Justice Holmes's statement resulted in what one commentator has described as the "continuum theory," in which police power and eminent domain are differentiated by degree rather than kind.[41]

Courts and scholars have long struggled with the problem of determining the precise point where an exercise of police power "goes too far" and becomes an uncompensated and unconstitutional taking of the regulated property.[42] While the Supreme Court has yet to agree upon any ascertainable

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35. San Diego Gas & Elect. Co. v. City of San Diego, 450 U.S. 621, 637-62 (1981) (Brennan, J., dissenting).

36. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 396 (1922).

37. *Id.* at 395.

38. 260 U.S. 393. In *Pennsylvania Coal,* the Court considered the validity of a statute that prevented the holder of subsurface mining rights from mining in a manner that caused surface dwellings to subside. The Court found this regulation to be so restrictive of the coal company's use of its property that it amounted to an unconstitutional *de facto* taking. Declaring the regulation to be void, the Court did not discuss the issue of damages since the state, which had enacted the regulation, was not a party to the instant suit between the coal company and the owner of a residence. *Id.*

39. *Id.* at 415. In an earlier decision, Mugler v. Kansas, 123 U.S. 393 (1922), the Court held that a land use regulation under the police power is distinct from a physical taking under the power of eminent domain. The Court denied the landowner relief on the grounds that the regulation, a prohibition on the manufacture and sale of alcoholic beverages, was within the police power and did not prevent the landowner from using his brewery for lawful purposes. While *Mugler* distinguished the police power and the power of eminent domain, *Pennsylvania Coal* placed these two powers on a continuum and indicated that a police power regulation can constitute a taking. For an analysis of the two decisions, see Sax, *supra* note 34, at 38-46.

40. 260 U.S. at 415.

41. Bayerd, *Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations into Gold,* 21 SANTA CLARA L. REV. 171, 173 (1981).

42. The Supreme Court has repeatedly stated that no set formula exists for establishing a regulatory taking. *See, e.g.,* Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

formula, it considers the following factors when determining whether a regulation has effectively become an unconstitutional taking: (1) whether any beneficial use remains; (2) whether any economic value remains; (3) whether any investment-backed expectations are thwarted; (4) whether the government is in effect attempting to acquire a property's use without payment; and (5) whether any direct legal constraints are placed upon the property.[43] It must be kept in mind, however, that the relative ease or difficulty of establishing a *de facto* taking determines the relevancy of the compensation question, because it is only when a *de facto* regulatory taking is established that a court is properly confronted with the question of a proper remedy.[44]

C. *The Question of the Proper Remedy*

As opposed to the more expansive issue of when land use regulations constitute *de facto* takings of private property, this Comment is primarily concerned with the narrower question of what remedy may be allowed once a court determines that such a taking has occurred.[45] Traditionally, the

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43. *See* Note, *Inverse Condemnation: Valuation of Compensation in Land Use Regulatory Cases*, 17 SUFFOLK U.L. REV. 621, 630 (1983) [hereinafter cited as *Inverse Condemnation*] (listing factors which courts examine to determine whether regulatory taking has occurred).

44. As one commentator has observed, it is well and good to fashion the proper remedy for a taking, but if the doctrine or test for a taking is unworkable or weak, the court has built a boat without a sail. *See* Stoebuck, San Diego Gas: *Problems, Pitfalls and a Better Way*, 25 WASH. U.J. URB. & CONTEMP. L. 3, 24 (1983).

45. Although the focus of this Comment is upon whether monetary compensation in the form of an inverse condemnation remedy is required by the fifth amendment, it must be noted that an alternative statutory action under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (Supp. 1985), is available for landowners seeking monetary relief for a government's invasion of their constitutional rights. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, 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.

Id.

A complete analysis of the § 1983 action is not within the scope of this Comment. Nonetheless, a number of issues regarding this alternative means of relief must be noted. First, because "damages" are being recovered in a § 1983 action, broader financial relief is possible. Specifically, consequential damages should be recoverable under § 1983, but are generally not available where constitutionally required just compensation is awarded for a taking. The exception, of course, is that consequential damages may be allowed in states with constitutions providing for compensation when property is taken or damaged.

Second, while attorneys' fees and costs have been held unrecoverable in a direct action brought under the fifth and fourteenth amendments, Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977), successful § 1983 litigants may, at the court's discretion, recover reasonable attorneys' fees pursuant to the provisions of 42 U.S.C. § 1988

remedies available to landowners have been limited to equitable relief.[46] Such relief has taken the form of injunctions against the enforcement of the offending ordinance, writs of mandamus, or declaratory judgments.[47] However, landowners are more frequently arguing that this type of relief is inadequate.[48] These landowners seek to have the courts extend a compensation remedy by allowing inverse condemnation claims where a regulatory taking is alleged.[49]

II. INVALIDATION OR COMPENSATION: WHICH IS THE PROPER REMEDY?

Should financial compensation be available to landowners subject to unconstitutionally restrictive land use regulations, or is invalidation of the

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(1976).

Additionally, unsettled issues in § 1983 liability exist with respect to immunities. In Monell v. Dept. of Social Services of New York, 436 U.S. 658, 701 (1978), the Supreme Court held that municipalities are "persons" and are thus subject to liability under the Civil Rights Act. Further, in Owen v. City of Independence, 445 U.S. 622, 650 (1980), the Court held that municipalities are not immune from § 1983 damages actions merely because their officials may have acted in good faith. Thus, municipal liability under § 1983 is firmly established. However, states continue to enjoy eleventh amendment immunity from such suits. Quern v. Jordan, 440 U.S. 332 (1979). Consequently, the current law governing immunities in § 1983 actions is disadvantageous to local governments. Unlike the states, local governments have no eleventh amendment protection from civil rights actions for damages for land use regulations. Issues regarding the resolution of these inequities are unsettled. *See infra* note 121. Finally, issues of federal court abstention from deciding local land use questions and of exhaustion of state remedies may confront the landowner bringing a § 1983 action in federal court. For a discussion of the exhaustion and abstention issues in the § 1983 land use context, see Wright, *Damages or Compensation for Unconstitutional Land Use Regulations,* 37 ARK. L. REV. 612, 629 (1983).

For discussions on the increasing use of § 1983 in land use battles, see Bley, *Use of the Civil Rights Acts to Recover Money Damages for the Overregulation of Land,* 14 URB. LAW. 223 (1982); Pearlman, *Section 1983 and the Liability of Local Officials for Land Use Decisions,* 23 URB. L. ANN. 57 (1982); Rockwell, *Constitutional Violations in Zoning: The Emerging Section 1983 Damage Remedy,* 33 U. FLA. L. REV. 168 (1981); Note, *The Availability of 42 U.S.C. § 1983 in Challenges of Land Use Planning Regulations: A Developer's Dream Come True?* 1982 UTAH L. REV. 571.

46. *See, e.g.,* Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 593-94, 350 N.E.2d 381, 385, 385 N.Y.S.2d 5, 8, *cert. denied and appeal dismissed,* 429 U.S. 990 (1976) (holding that burdensome zoning does not constitute compensable taking, but amounts to deprivation of property rights and therefore invalidation is only proper remedy).

47. *Id.*

48. *See infra* note 51.

49. The monetary relief awarded in an inverse condemnation action for overly restrictive land use controls is often described by courts and commentators both as "compensation" and as "damages." This semantic duality can be conceptually misleading. Courts and commentators using both "damages" and "compensation" interchangeably in the inverse condemnation context clearly are referring to constitutionally required just compensation and not merely reimbursement for loss as in tort liability. Hence, it is suggested that such use of the term "damages" is inappropriate unless reference is being made to a § 1983 recovery and that conceptual clarity demands that the landowner's monetary award in inverse condemnation actions be referred to as "compensation" and not "damages."

offending ordinance the proper remedy? Opposing constitutional interpretations, as well as competing policy considerations, are at the core of this debate.[50] While both state and federal courts have confronted the question, their responses vary from almost completely prohibiting an award of monetary compensation to openly endorsing such relief.[51]

Since the 1922 Supreme Court decision in *Pennsylvania Coal Co. v. Mahon*,[52] six regulatory inverse condemnation cases have reached the United States Supreme Court.[53] In each of these cases, the Court has avoided resolving the issue of whether the fifth amendment requires that landowners subject to regulatory takings are entitled to just compensation or whether injunctive relief against the future application of the regulation is a constitutionally sufficient remedy.[54] In two cases, *Pennsylvania Central Transport Co. v. New York*[55] and *Agins v. City of Tiburon*,[56] the Court decided that

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50. In considering inverse condemnation-type claims arising from interference with private property rights by the federal government, the Supreme Court has sanctioned compensatory relief to avoid invalidating government regulations and frustrating public policy. *See, e.g.*, Regional Rail Reorg. Act Cases, 419 U.S. 102 (1974); Hurley v. Kincaid, 285 U.S. 95 (1932). Note, however, that the Tucker Act, 28 U.S.C. § 1491 (1976), provides congressional authorization for the payment of compensation for federal government activity that impinges on private property rights.

51. Some jurisdictions flatly refuse to award compensation and hold that invalidation of the offending ordinance is the sole remedy when the government unduly restricts land use. *See* Davis v. Prima County, 121 Ariz. 343, 590 P.2d 459 (Ct. App.), *cert. denied*, 442 U.S. 942 (1978); Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1980); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

Other states are receptive to compensation claims. *See, e.g.*, Clifton v. Berry, 244 Ga. 78, 259 S.E.2d 35 (1979); Pratt v. State Dept., 309 N.W.2d 767 (Minn. 1981); Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981); Village of Willoughby Hills v. Carrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658, *cert. denied*, 409 U.S. 919 (1972); City of Austin v. Teague, 570 S.W.2d 398 (Tex. 1978); Zinn v. State, 334 N.W.2d 67 (Wis. 1983). At the same time, a growing number of federal courts are recognizing a monetary compensation remedy under the fifth and fourteenth amendments. *See* Yuba v. Goldfields, 723 F.2d 884 (D.C. Cir. 1983); Scott v. Grenville Co., 716 F.2d 1409 (4th Cir. 1982); Devines v. Maier, 665 F.2d 138 (7th Cir. 1981). *See infra* note 53.

52. 260 U.S. 393 (1922). *See supra* note 38 and accompanying text.

53. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985); San Diego Gas & Elect. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Pennsylvania Central Transp. Co. v. New York, 438 U.S. 104 (1978); Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1971).

54. *See infra* notes 55-65.

55. 438 U.S. 104 (1978). In *Pennsylvania Central*, the landowner was denied permission to build a skyscraper above Grand Central Station, which had been designated a landmark under New York City's landmark preservation law, and sought compensation for a temporary taking as well as injunctive and declaratory relief. Under the New York law, the owners of designated historic properties could transfer development rights to neighboring parcels of land under the same ownership as the transferring historic site. Affirming the New York Court of Appeals decision upholding the law, the United States Supreme Court held that there was no compensable

no taking could be established on the facts presented. Thus, the Court never reached the compensation issue.[57] In a third case, *Lake County Estates v. Tahoe Regional Planning Agency,*[58] the Court remanded for reconsideration of the regulatory officials' statutory immunities.[59]

In the three most recent cases, the Supreme Court has avoided reaching the merits of the compensation issue by dismissing the cases on finality and ripeness grounds. In *San Diego Gas & Electric v. City of San Diego,*[60] the

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taking. The Court reasoned that even though permission to construct an office building above the station was denied, the restrictions imposed were substantially related to the promotion of the general welfare, and not only permitted reasonable beneficial use of the station itself, but also afforded opportunities to enhance other properties near the station. *Id.* at 138. Applying the "continuum" analysis in determining whether the regulation had effected a taking, the *Pennsylvania Central* Court emphasized the "economic impact of the regulation on the claimant" and the "character of the governmental action." *Id.* Significantly, the Court noted that if future circumstances changed "so that the terminal ceases to be economically viable, the Appellants may obtain relief." *Id.* at 138 n.36.

56. 447 U.S. 255 (1980). In *Agins,* the landowners had purchased an undeveloped five-acre parcel in one of California's most exclusive coastal suburbs for residential development purposes. Subsequently, the city enacted an open space zoning ordinance that restricted development of the parcel to only one to five single family homes. Without first submitting a development plan to the city, the owners brought a regulatory inverse condemnation action contending that the rezoning of such valuable land to excessively low density destroyed the value of the property. The California Supreme Court ruled that no compensation could be recovered in inverse condemnation for overly restrictive police power regulations and limited the remedy available to landowners in such cases to declaratory relief or mandamus to invalidate the offending ordinance. *Id.* at 262-63. The Supreme Court affirmed, finding that no taking had occurred since appellants were free to pursue their reasonable investment expectations by submitting a development plan to the city. *Id.* Because the case was decided on the basis that appellant's failure to seek alternative relief precluded a finding of the requisite regulatory taking, the compensation issue was left unresolved by the Court. However, the majority opinion offered one morsel on the taking issue by stating that mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership and cannot be considered a taking in the constitutional sense. *Id.* at 263 n.9.

57. Between *Pennsylvania Central* and *Agins,* the Court decided three taking cases, yet avoided clarifying the compensation issue in each of the three decisions. In Andrus v. Allard, 444 U.S. 51 (1979), the Court held that federal statutes prohibiting transactions in bald eagle feathers or parts were not a taking of the defendants' property. Next, in Kaiser Aetna v. United States, 444 U.S. 164 (1979), the Court held that the United States government cannot require the owner of a private marina who dug a channel to navigable waters to open the channel to public navigation without compensation. Although the case did not actually involve an eminent domain problem, the Court noted that requiring public access to the channel would have been a taking. *Id.* at 173. Finally, in Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), the Court held that a Florida statute that gave local courts interest earned on certain funds deposited in their registries amounted to a taking of the depositors' property.

58. 440 U.S. 391 (1971).

59. In *Lake County Estates,* the Court considered only the question of immunities available to the Planning Agency and its governing body members under 42 U.S.C. § 1983. *Id.* at 405. On remand, the district court held that if there is no power of eminent domain, there can be no liability under § 1983. Jacobson v. Tahoe Reg. Plan. Agency, 474 F. Supp. 901 (D. Nev. 1979).

60. 450 U.S. 621 (1981).

majority concluded that the California Court of Appeals had not decided whether a taking had in fact occurred, and hence the absence of a final state court judgment deprived the Court of jurisdiction and required dismissal of the appeal.[61] Similarly, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,*[62] the Court ruled that the regulatory taking claim was premature since the developers had not exhausted their administrative remedies by applying for a variance and pursuing state compensation procedures.[63] Most recently, in *MacDonald, Sommer, & Frates v. Yolo County,*[64] the Court avoided the compensation issue by ruling that absent a final determination by the County Planning Commission as to how it would apply the challenged regulations to the property in question, the Court could not determine whether a taking had occurred and whether just compensation was due.[65]

A. The Constitutional Debate

The manner in which the compensation issue is defined ultimately shapes the controversy over what remedy is legally proper. Two opposing constitutional interpretations are involved in the debate over the proper remedy in regulatory takings cases. First, the compensation view holds that the fifth amendment's just compensation clause requires payment of just compensation to landowners subject to regulatory takings.[66] Second, the invalidation view holds that government regulation of land pursuant to the police power

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61. *Id.* at 663.

62. 105 S. Ct. 3108 (1985).

63. In *San Diego,* a majority of the Court concluded that the California courts had not decided whether any taking had in fact occurred, and that the absence of a final state court judgment required dismissal of the appeal. *See infra* note 93 and accompanying text.

64. 106 S. Ct. 2561 (1986). In *Yolo County,* a land development group brought an inverse condemnation claim alleging that by (1) downzoning their forty-four acre parcel of land located in Yolo County, California, to permit only agricultural use; (2) denying the developers access to existing streets; and (3) refusing to provide water, sewage, and police and fire protection services to the site, defendants effected an unconstitutional taking of their property for which compensation was due under the fifth amendment. The developers argued that the land was unsuitable for farming due to insect infestation and the removal of the topsoil from the site by state highway crews for construction of an overpass, and hence the regulation appropriated the entire economic use of the property. The California district court ruled that monetary compensation for inverse condemnation was foreclosed by Agins v. City of Tiburon, 24 Cal. 3d 226, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd,* 447 U.S. 255 (1980). The California Court of Appeals affirmed, and the California Supreme Court denied appellant's petition for hearing. On appeal, the United States Supreme Court failed to reach the merits of the compensation issue. The Court held that because the County Planning Commission had not made a final determination as to how it would apply the challenged regulation to the property, the Court could not determine whether a taking had occurred and whether compensation was due. 106 S.Ct. at 2568-69.

65. *Id.*

66. *See, e.g.,* San Diego Gas & Elect. Co. v. City of San Diego, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting). *See infra* note 90.

cannot give rise to financial liability, and, therefore, injunctive relief or invalidation of the offending ordinance is the proper remedy.[67]

The compensation view is based upon the express language of the fifth amendment's just compensation clause. The language of the fifth amendment prohibits the taking of private property for public use without payment of just compensation.[68] As soon as private property has been taken, either by formal condemnation proceedings or by physical invasion or regulation, the landowner suffers a constitutional violation, and the self-executing character of the just compensation clause is triggered.[69] Essentially, the compensation view argues that the just compensation requirement of the fifth amendment is not precatory; once a regulatory taking is found, compensation must be paid to the landowner.[70] To support the application of the express language of the fifth amendment to the context of land use regulation, advocates of the compensation view rely upon Justice Holmes's declaration in *Pennsylvania Coal*[71] that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[72] Literally construed, this statement suggests that the excessive police power regulation becomes a *de facto* exercise of the eminent domain power with a concomitant right to compensation under the fifth amendment.

The opposing position, the invalidation view, argues that the term "taking" is a misnomer.[73] This position contends that the taking clause of the fifth amendment is not applicable to governmental regulatory action as opposed to other governmental actions, such as physical invasions of private property.[74] Under the invalidation view the appropriate constitutional test to

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67. *See generally* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973) (advocating due process or invalidation view that government regulation of land under police power cannot constitute taking for which compensation is due; as invalid exercises of police power, only proper remedy is invalidation of offending regulation). *Cf.* Costonis, *Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies,* 75 COLUM. L. REV. 102 (1975) (proposing that regulation be viewed as neither exercise of police power nor as taking, but as exercise of "accommodation power" that would require government to offer "fair compensation" for regulation that "goes too far").

68. U.S. CONST. amend. V. *See supra* note 23.

69. *See supra* note 31.

70. *See, e.g.,* 450 U.S. at 655 (Brennan, J., dissenting).

71. 260 U.S. 393 (1922).

72. *Id.* at 415.

73. *See* Fred F. French Inv. Co. v. New York, 39 N.Y.2d at 594, 350 N.E.2d at 385, 385 N.Y.S.2d at 9 (1976) (word "taking" used metaphorically in *Pennsylvania Central;* "gravaman of the constitutional challenge" in such cases is that regulation is invalid exercise of police power under due process clause).

74. *See, e.g.,* Davis v. Prima County, 121 Ariz. 343, 590 P.2d 459 (Ct. App. 1979); Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979); Kasser v. Dade Dounty, 344 So. 2d 928 (Fla. 1977); Ventures Property v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979); McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980).

be applied to excessive land use regulations is substantive due process.[75] If a land regulation under the police power is a reasonable means of attaining a proper public goal, it should be upheld regardless of the economic losses that the regulation imposes upon some landowners.[76] Accordingly, it is argued that the term "taking" can only be used in a metaphorical sense to refer to the outer limit of valid exercises of the police power.[77] Regulations exceeding this boundary are characterized as constituting deprivations of property without due process of law and not as takings in violation of the just compensation clause.[78] Advocates of this view argue that compensation is not required for regulations that deprive landowners of a property interest without due process of law. In this view, the property owner's remedy is limited to invalidation of the unconstitutional regulation.[79]

Two state court decisions illustrate the view that invalidation is the proper remedy. In *Fred F. French Investing Co. v. City of New York,*[80] a New York court found that by rezoning private parks in a residential complex as open exclusively to the public, New York City deprived the owners of the reasonable economic use of their property.[81] Rejecting the plaintiff's inverse condemnation claim, the *French* court held that in all but exceptional cases, such as where governments intend to actually acquire land, excessive zoning regulation does not constitute a constitutionally compensable "taking."[82] The court ruled that zoning under the police power was "only metaphorically" a taking, amounting simply to a deprivation of property rights without due process of law.[83]

The California Supreme Court further endorsed the invalidation view in *Agins v. City of Tiburon.*[84] The court ruled that compensation is not available, under any circumstances, in cases of government regulation of private property.[85] The *Agins* court held that a landowner alleging a zoning ordinance had deprived him of substantially all use of his land may "not

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75. *See* Stoebuck, *supra* note 44, at 41 (arguing that by interpreting "too far" language used in *Pennsylvania Coal* as metaphor for lack of substantive due process, courts will avoid many problems associated with just compensation).

76. *See* F. BOSSELMAN, *supra* note 67, at 238-55 (arguing that regulation of use of land, if reasonably related to valid public purpose, can never constitute taking).

77. *See, e.g.,* Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, (1976), *cert. denied and appeal dismissed,* 429 U.S. 990 (1976); Agins v. City of Tiburon, 24 Cal. 3d 226, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd,* 447 U.S. 255 (1980).

78. 24 Cal. 3d at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

79. *Id.*

80. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

81. Id. at 594, 350 N.E.2d at 385, 385 N.Y.S.2d at 9.

82. *Id.*

83. *Id.*

84. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980).

85. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid.''[86] Thus, the *Agins* court limited the remedies available to landowners subject to unconstitutionally restrictive land use regulations to declaratory relief or mandamus to invalidate the offending regulation.[87]

Reviewing the California Supreme Court's decision in *Agins,* the United States Supreme Court failed to reach the merits of the inverse condemnation claim.[88] The Court found that the city's open-space zoning ordinance, which restricted development of the plaintiff's previously purchased five-acre tract to only one to five single family homes, did not constitute a taking.[89] Hence, the Court did not consider whether a state may limit the remedies available to landowners subject to a regulatory taking.

The compensation position has gained increasing acceptance among the courts in recent years. Basically, the compensation view advocates that excessive government regulation of private property constitutes a *de facto* taking of the property with a concomitant right to payment under the fifth amendment.[90] In *San Diego Gas & Electric Co. v. City of San Diego,*[91] five Supreme Court justices sanctioned the award of monetary compensation to landowners subject to unconstitutionally restrictive land use regulations.[92] Although a majority of the Court felt that the absence of a final state court judgment required dismissal of the appeal,[93] Justice Brennan, joined by Justices Stewart, Marshall and Powell, disagreed and reached the merits in an extensive and now celebrated dissenting opinion.[94] Additionally, in a

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86. *Id.*

87. *Id.*

88. 447 U.S. 255, 263 (1980).

89. *Id.* The ordinance applied to one of California's most expensive suburban areas. *See supra* note 56.

90. Since the *San Diego* decision, a number of state supreme courts have recognized Justice Brennan's interim compensation approach. *See* Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Pratt v. State, 309 N.W.2d 767 (Minn. 1981); Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983). In addition, a number of federal courts of appeals have recognized the Brennan dissent as expressing the view of the Supreme Court on the compensation issue. *See* Yuba v. Goldfields, 723 F.2d 884 (D.C. Cir. 1983); Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir. 1983); Barbian v. Panagis, 694 F.2d 476, 482 n.5 (7th Cir. 1982); *In re* Aircrash in Bali, 684 F.2d 1301, 1311 n.7 (9th Cir. 1982); Fountain v. Metro Atlanta R.T.A., 678 F.2d 1038, 1043 (11th Cir. 1982); Scott v. Greenville Co., 716 F.2d 1409 (4th Cir. 1983); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1982), *cert. denied,* 455 U.S. 907 (1982); Devines v. Maier, 665 F.2d 138, 152 (7th Cir. 1981); Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981), *cert. denied,* 456 U.S. 973 (1983). *But see* Citadel Corp. v. Puerto Rico Hwy. Auth., 495 F.2d 31 (1st Cir. 1982) (denying compensation for unconstitutional freeze on development).

91. 450 U.S. 621 (1981).

92. *Id.* at 622. Blackmun, J., delivered the opinion of the Court. Justices Burger, White, Rehnquist and Stevens joined in the majority.

93. *Id.* at 633.

94. *Id.* at 654 (Brennan, J., dissenting).

concurring opinion, Justice Rehnquist manifested agreement with "much of what is said in the dissenting opinion of Justice Brennan."[95]

The *San Diego* dissent considered the mandatory, self-executing nature of the fifth amendment's just compensation clause and concluded that once a court establishes that a regulatory taking has occurred, the Constitution demands that the regulatory entity pay just compensation to the owner of the affected land.[96] The *Fred F. French* and *Agins* position that excessive land use regulations are "metaphorical" takings and are to be challenged as invalid exercises of the police power under the due process clause was sharply rejected by Justice Brennan as "tampering with the express language" of the Constitution.[97] If Justice Rehnquist's concurrence is interpreted as evidence that he favors awarding compensation for regulatory takings, at least four justices on the current Court are in agreement with the position outlined in Justice Brennan's dissenting opinion.[98]

While solidly grounded in the Constitution, Justice Brennan's philosophically principled civil libertarian approach to protecting individual rights from excessive encroachment by the state is evident. Justice Brennan concluded that mere invalidation falls far short of fulfilling the fundamental purpose of the just compensation clause since individual property owners are forced to bear burdens that should be borne by the public as a whole.[99] Emphasizing fairness, Justice Brennan reasoned that payment of compensation by the government to the landowner for any economic loss suffered during the time the property was taken operates to redistribute the economic costs from the individual to the public.[100] Viewed broadly, Justice Brennan's dissent in *San Diego,* combined with the growing number of state and federal circuit courts awarding compensation,[101] evidences a movement towards holding governments more accountable for land use restrictions that unconstitutionally infringe upon private property rights. Perhaps this posture is best summed up by Justice Brennan's aphorism: "After all, if a policeman must know the Constitution, then why not a planner?"[102]

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95. *Id.* at 633 (Rehnquist, J., concurring).

96. *Id.* at 655 (Brennan, J., dissenting).

97. *Id.* at 650 n.14 (Brennan, J., dissenting).

98. Since the *San Diego* decision, Justice O'Connor has replaced Justice Stewart. Consequently, of the original four dissenters in *San Diego Gas,* only three remain on the Court. Considering Justice Rehnquist's concurrence in *San Diego,* it is probable that at least four Justices on the current Court favor a compensation remedy. Justice O'Connor's position on this issue remains unknown. During the time she was on the Arizona Court of Appeals, she did not write or sign an opinion revealing her views on the compensation issue.

99. 450 U.S. at 657 (Brennan, J., dissenting).

100. *Id.*

101. *See supra* note 90.

102. 450 U.S. at 661 n.26 (Brennan, J., dissenting).

B. Competing Policy Concerns

Persuasive policy arguments support both the invalidation and the compensation positions.[103] Certainly, the ultimate resolution of the controversy over the proper remedy for regulatory takings must involve a careful balancing of the public and private interests. The essence of the policy concerns on both sides can be stated briefly. Advocates of the invalidation position express three basic concerns regarding a damages remedy. First, courts as well as commentators contend that the possibility of financial liability will inhibit land use planning and unduly "chill" government exercise of regulatory powers.[104] Second, large and unexpected judgments against local governments may deprive essential governmental programs of needed funds and plunge local governments into bankruptcy.[105] Third, the invalidation remedy is adequate when accompanied by affirmative relief, such as an order to rezone in a prescribed manner or an order to issue a permit.[106]

In addition, some courts adopting the invalidation position advance a judicial deference rationale.[107] In these decisions, the courts argue that the legislature imposes police power regulations with the expectation that the private property interests affected will not be compensated.[108] It is contended that any judicial imposition of financial liability would usurp the legislature's prerogative to determine whether the policy behind the regulation justifies the cost of compensation.[109] Further, it is pointed out that invalidation gives a regulatory entity the option of discontinuing the restrictive regulation or amending it to conform to constitutional limits if it is determined that the public objective to be achieved is not worth the price of a formal eminent domain proceeding.[110]

In contrast, those endorsing a compensation remedy advance the following arguments. First, they argue that the possibility of liability will only en-

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103. For a summary of the policy arguments on both sides of the compensation debate, see Johnson, *Compensation for Invalid Land Use Regulations,* 15 GA. L. REV. 559 (1981).

104. *See, e.g.,* Agins v. City of Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979) (threat of compensation "would have a chilling effect upon the exercise of police regulating powers at a local level" and also impose excessive financial burdens on local governments).

105. *Id. See* Baumgardeman, *Takings Under the Police Power,* 30 SW. L.J. 723, 738 (1976).

106. *Cf.* Mandelker, *Land Use Takings: The Compensation Issue,* 8 HASTINGS CONST. L.Q. 491, 515 (1981) (arguing that difficulty with compensation remedy is that it attaches single remedy to constitutional violation that can be overcome equally effectively with injunctive relief).

107. Davis v. Prima County, 121 Ariz. 343, 345, 590 P.2d 459, 461, *cert. denied,* 442 U.S. 942 (1978); Ventures Property v. Wichita, 225 Kan. 698, 703, 594 P.2d 671, 677 (1979); Gary D. Reihart, Inc. v. Township of Carroll, 487 Pa. 461, 466, 409 A.2d 1167, 1170 (1979).

108. *See, e.g., Agins,* 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377 ("it seems [a] usurpation of legislative power for a court to force [payment of] compensation").

109. *Id.*

110. *See* Kasser v. Dade County, 344 So. 2d 928, 929 (Fla. 1977); McShane v. City of Faribault, 292 N.W.2d. 253, 259 (Minn. 1980).

courage responsibility in the enactment of regulations.[111] Indeed, given the stringent requirements necessary to establish a taking, a damages remedy would impose only a minimal fiscal threat on good faith planning.[112] Second, the fiscal disaster predictions are overstated and should not deter a court from giving appropriate relief for constitutional violations.[113] Third, the invalidation remedy is inadequate because the landowner continues to be exposed, even after judgment, to harassment in the form of new enactments only slightly different from the invalidated regulation.[114] Thus, it is said that invalidation without compensation is a "toothless tiger," capable of great roars about deprivation of constitutional property rights but ineffective in guarding against multiple regulatory excesses.[115]

Furthermore, proponents of the compensation view argue that there is no difference between regulatory and non-regulatory takings that should affect entitlement to a compensation remedy.[116] Hence, invalidation is unfair since the landowner is forced to pay for the public benefit served by the restriction.[117] Nullifying the offending restriction does not compensate the landowner for the deprivation of his property rights during the interim period between the regulation's enactment and its ultimate invalidation. Essentially, advocates of the compensation remedy argue that invalidation falls far short of satisfying the constitutional requirements of just compensation.[118]

Invalidation is clearly an insufficient remedy from the landowner's perspective. As Justice Holmes wrote, it is important to guard against "the danger of forgetting that a strong public desire to improve the public

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111. *See* Owen v. City of Independence, 445 U.S. 622, 650-51, 656 (1979); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Kraft v. Malone, 313 N.W.2d 758 (N.D. 1981); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978).

112. *See* Comment, *supra* note 19, at 732 (arguing that compensation would impose minimal fiscal threat on good faith planning and that effect might be healthy incentive to responsible regulating).

113. *Id.*

114. *See San Diego,* 450 U.S. at 655 n.22 (Brennan, J., dissenting) (noting that invalidation does not prevent enactment of subsequent unconstitutional regulations and attacking attitudes of some regulatory government officials that "[i]f all else fails, merely amend the regulation and start over again"). *See also* Burrows v. City of Keene, 432 A.2d 15, 20 (1981) (compensation remedy is only way to prevent harassment by repeated amendments amounting to ongoing restrictions).

115. *See* Comment, *supra* note 19, at 734.

116. *See San Diego,* 450 U.S. at 654 (Brennan, J., dissenting) (stating that once regulatory taking is found, fifth amendment demands that compensation be paid to landowner). *But see* Mandelker, *supra* note 106, at 498 (rejecting "compensation syllogism" that compensation is automatically required whenever constitutional taking occurs).

117. *See San Diego,* 450 U.S. at 656-57 (Brennan, J., dissenting) (compensation remedy properly redistributes cost of public benefit served by regulation, which in fairness should be borne by public).

118. *See* Comment, *supra* note 19, at 736 (author observes that invalidation approach is akin to saying that only remedy available to victim of assault is judicial declaration that assailant ought to cease his unlawful ways . . . or indeed only start throwing different punches).

condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[119] As a number of commentators have pointed out, allowing a landowner to sue for both invalidation and compensation for the period during which the regulation was enforced would considerably reconcile the opposing policy arguments.[120] In this manner, government regulatory entities would be forced to consider seriously the economic impact of proposed land use regulations on landowners.[121] At the same time, governments would retain adequate freedom to exercise police power authority to control land use.

III. PARAMETERS OF A COMPENSATION REMEDY

The parameters of a regulatory inverse condemnation compensation remedy are unclear. Specifically, the application of the compensation formula proposed by Justice Brennan in his *San Diego* dissent involves the notion of a temporary taking as opposed to the permanent, full market value takings traditionally associated with inverse condemnation claims. Moreover, although the constitutional rule proposed by Justice Brennan provides a doctrinal framework for a compensation remedy, modifications on the Brennan formula, such as the development of procedural prerequisites to compensation actions, must be anticipated and evaluated.

A. The "Temporary Taking": Interim as Opposed to Permanent Compensation

Implicit in a traditional inverse condemnation claim is the notion that the governmental action has affected a permanent taking of private property for public purposes. Consequently, the government would be obligated to pay the full fair market value as if it had formally condemned the regulated property. In contrast, a modified inverse condemnation remedy, based on a "temporary taking" of the property and requiring "interim compensation"

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119. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

120. *See* Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings"*, 8 HASTINGS CONST. L.Q. 517, 543 (1981). *See also,* Comment, *supra* note 19, at 746.

121. The issue of a state regulatory entity's immunity under the eleventh amendment is beyond the scope of this Comment. According to one commentator, the eleventh amendment has not been a bar to regulatory inverse condemnation suits because either there has been a legislative waiver of immunity or the constitutional taking clause itself is deemed to be a self-executing waiver. Manelli, *Constitutional Provision Requiring Just Compensation for Taking or Damaging Private Property is Not Self-Executing,* 36 NOTRE DAME LAW. 213-14 (1961). *See* Bosselman & Bonder, *Potential Immunity of Land Use Control Systems from Civil Rights and Anti-Trust Liability,* 8 HASTINGS CONST. L.Q. 453 (1981) (examining delegation to local governments of state immunity and noting that Court will generally find such delegation only where there is clearly articulated state policy and where state has retained power to administer and enforce that policy). For a discussion of federal jurisdiction and the eleventh amendment, see Note, *The Eleventh Amendment's Lengthening Shadow over Federal Subject Matter Jurisdiction:* Pennhurst State School and Hospital v. Halderman, 34 DEPAUL L. REV. 515 (1985).

for the period the unconstitutional regulation is in effect, has developed as a middle ground between the often inadequate invalidation remedy.[122]

In *San Diego Gas & Electric Co. v. City of San Diego*,[123] the utility company sought the full market value of the property as compensation for the complete and permanent taking of a 412-acre parcel designated as open space under San Diego's regulatory plan. In his dissent, Justice Brennan rejected the utility company's claim for full market value. Brennan stated that:

> Nothing in the Just Compensation Clause empowers a court to order a government entity to condemn the property and pay its full fair market value, where the "taking" already effected is temporary and reversible and the government wants to halt the "taking." Just as government may cancel condemnation proceedings before passage of title, . . . it must have the same power to rescind a regulatory "taking."[124]

Hence, according to the *San Diego* dissenters, compensating the landowner for the full market value of their property is not required when a regulatory taking is found. Instead, unconstitutionally restrictive land use regulations may constitute a "temporary" taking for which the government must pay compensation for the interim period between the date the regulation first effected a taking and the date the regulation is rescinded or amended.[125]

While Justice Brennan's interpretation of the fifth amendment as applied to regulatory takings does not represent binding precedent, the reasoning is entirely persuasive. The fact that a regulatory taking may be temporary by virtue of the government's power to rescind or amend the regulation does not make it less than a constitutional taking.[126] As Justice Brennan observed, nothing in the just compensation clause suggests that the taking must be permanent and irrevocable.[127] Nor does the temporary character of a regulatory taking render compensation for the time of the taking any less obligatory.[128] Moreover, from a policy perspective, a compensation award for a temporary taking involves less of a "chilling" financial exposure to regulatory governments than would requiring these regulatory governments

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122. *See San Diego*, 450 U.S. at 637-61. *See also* D. HAGMAN & J. MISCZYNSKI, WINDFALLS FOR WIPEOUTS (1978) (arguing that invalidation is insufficient remedy and that fifth amendment requires payment of compensation for period during which offending regulation is in force).

123. 450 U.S 621 (1981).

124. *Id.* at 658 (Brennan, J., dissenting).

125. *Id.* Justice Brennan's repeated reference to legislative repeal or amendment is "mystifying" to one commentator, since a court will presumably invalidate any land use regulation it finds to be a temporary *de facto* taking and leave it to the local governing body to decide whether to formally condemn or adopt a less restrictive regulatory alternative. *See* Cunningham, *supra* note 120, at 537.

126. *San Diego*, 450 U.S. at 658 (Brennan, J., dissenting).

127. *Id.*

128. *Id.*

to condemn the affected property, take title, and pay the full market value of the land.[129]

B. *Modifications on the Brennan Compensation Formula*

It is important to note that the dissenters in *San Diego* observed that the Constitution does not embody any specific procedure or form of remedy and that the courts should be free to experiment within the proposed remedial framework.[130] The development of procedural prerequisites for regulatory inverse condemnation suits is clearly the most significant area of modification of the compensation remedy proposed by Justice Brennan in the *San Diego* dissent. What remedies must be exhausted prior to bringing a compensation suit? What state or local procedures must be utilized? Landowner diligence issues concerning the procedural posture that courts will require of property owners before they will hear compensation claims will undoubtedly affect the feasibility of bringing regulatory inverse condemnation actions.

Perhaps the most significant modification of the Brennan Compensation Formula was introduced by the Fifth Circuit Court of Appeals two months after the *San Diego* decision in *Hernandez v. City of LaFayette.*[131] In *Hernandez,* a city failed for over two years to act on the landowners' rezoning requests because it feared that rezoning would increase the purchase price of land it wanted to acquire for a right of way.[132] Consistent with the Brennan Compensation Formula, the *Hernandez* court ruled that where a temporary regulatory taking is found, the landowner is entitled to "an amount equal to the value of the property during the period of the taking."[133] The *Hernandez* court qualified this general rule by concluding that where (1) the application of a zoning ordinance to a particular property fails to initially deny the owner an economically viable use of their land, but later does result in such a denial due to changing circumstances; or (2) where a zoning classification initially denies a property owner an economically viable use, but the owner delays or fails to seek timely relief, a taking does not occur until "the municipality 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."[134] The court reasoned that the city would lack an intention to deny the landowner an economically viable use of their property until the city was put on notice that its zoning regulations were effecting such a denial.[135]

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129. Of course, the method that is used to measure such interim compensation will determine the full extent to which the "chilling effect" of a compensation award will have upon a regulating government.

130. 450 U.S. at 660 (Brennan, J., dissenting).

131. 643 F.2d 1188 (5th Cir. 1981).

132. *Id.* at 1191.

133. *Id.* at 1200.

134. *Id.*

135. *Id.* at 1200-01.

Another qualification on the Brennan Compensation Formula introduced by the *Hernandez* court is the suggestion that the landowner must exhaust his legislative remedies by petitioning the city for a rezoning.[136] In fashioning the notice and opportunity to cure exhaustion prerequisites, the *Hernandez* court was concerned that landowner delays or the failure to seek timely relief and possibly increase awards would subject municipalities to unexpected financial liability.[137]

Under the *Hernandez* modification, compensation does not accrue until the available legislative remedies have been exhausted. Compensation is measured from the point that the government is given notice and thereby made aware of the regulatory taking. Included is a reasonable period of time to allow the regulatory entity a realistic opportunity to correct the inequity.[138] This approach seems fair because providing the regulating government with advance notice of its potential liability imposes little burden upon the landowner. At the same time, the landowner's right to compensation is not compromised in any way, assuming that they give timely notice. Moreover, allowing the regulating government a reasonable time to correct the offending regulation is fair as long as the time period allowed is not so unduly long as to compromise the landowner's right to compensation.

Commentators are divided on the propriety of the *Hernandez* modification of the Brennan Compensation Formula. Arguing that government needs to have its attention focused because it does not always recognize when it has taken property, one prominent commentator has observed that the *Hernandez* modification should eliminate the fear of the "invalidation is the only remedy" school of thought that government will be paralyzed into inaction if every imposing regulation results in a compensation award for the landowner.[139] Although the commentator agrees that requiring the property owner to bring the harsh regulation to the attention of the decision-making body makes sense, he notes that the regulating government's attention can be focused in a number of ways. It is suggested that a simple letter describing the harsh effects of the regulation upon the landowner's property would provide sufficient notice.[140] If proceedings to modify the offending regulation are not convened within a reasonable time from letter notice, the landowner should be free to pursue his judicial remedies. Compensation would be calculated from the date of the letter notice and not the date of the completion of the exhaustion requirement.[141] On the other hand, some scholars contend that the *Hernandez* exhaustion requirements are contrary to the

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136. *Id.*

137. *Id.* at 1201.

138. *Id.* at 1200.

139. Hagman, *Temporary or Interim Damage Awards in Land Use Control Cases (Part I)*, 4 ZONING & PLANNING L. REP. 129, 134 (1981).

140. *Id.* at 134.

141. *Id.*

spirit of Justice Brennan's dissent.[142] It is argued that delaying compensation for an undetermined time while the property owner pursues administrative remedies is irreconcilable with Justice Brennan's view that compensation must be paid from the date the regulation first effected a taking.[143]

Exhaustion requirements such as the *Hernandez* court imposed upon Justice Brennan's compensation formula seem to be in accordance with recent Supreme Court decisions. For instance, in *Agins v. City of Tiburon,*[144] the Court held that where a property owner had not sought approval for development of their land under the ordinances in question, there was no taking.[145] Hence, in *Agins,* the Court sent the message that local administrative procedures must be utilized before a regulatory taking claim will be heard.

The *Agins* decision seems to have foreshadowed the Court's recent decision in *Williamson Regional Planning Commission v. Hamilton Bank of Johnson City.*[146] In the *Hamilton Bank* decision, the Court introduced two procedural prerequisites to bringing compensation claims under the fifth amendment that may be viewed as further modifications on Justice Brennan's compensation formula. First, the Court ruled that if a state provides an adequate procedure for seeking just compensation, landowners cannot claim a violation of the just compensation clause until the state compensation procedures have been utilized and just compensation has been denied by the government.[147] Thus, unless a landowner exhausts state compensation remedies, a compensation claim will be "premature."[148]

The second procedural prerequisite to bringing regulatory inverse condemnation claims introduced by the *Hamilton Bank* Court concerns the ripeness of regulatory inverse condemnation claims. Specifically, the Court ruled that regulatory inverse condemnation claims are not ripe until the government entity charged with implementing the regulation reaches a final decision regarding the application of the regulation to the particular property involved.[149] The *Hamilton Bank* Court reasoned that until the regulatory

142. Kimec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego,* 57 IND. L.J. 45, 61 (1982) (while author admits that one could argue that no taking effected until administrative process completed, he dismisses "such semantics" as contrary to spirit of Justice Brennan's opinion).

143. *Id.*

144. 447 U.S. 255 (1980).

145. *Id.* at 261. In *Agins,* the city's open space zoning ordinance permitted a development of between one and five single family residences on the appellant's property. The Court found that such restrictions advanced the legitimate governmental goals of assuring careful and orderly development. Thus, the Court held that although the ordinances limited development, they neither prevented the best use of appellant's land nor extinguished a fundamental attribute of ownership. *Id. See supra* note 56.

146. 105 S. Ct. 3108 (1985).

147. *Id.* at 3121.

148. *Id.*

149. *Id.* at 3117.

commission determines that no variances will be granted, it is impossible for a jury to determine whether a landowner will be unable to derive economic benefit from the land.[150] Significantly, the Court applied this reasoning in its most recent regulatory inverse condemnation case. In *MacDonald, Sommer & Frates v. Yolo County,*[151] the Court affirmed dismissal of a regulatory inverse condemnation claim on grounds that the County Planning Commission had not made a final determination as to how it would apply the regulation to the complainants property.[152] Restating its *Hamilton Bank* reasoning, the *Yolo County* Court concluded that it could not adjudicate the constitutionality of the regulations without knowing the exact nature and extent of the development permitted under the regulations.[153] Hence, the Supreme Court has made it clear that a landowner must obtain the regulatory entity's final position regarding how it will apply the regulation to the particular land before the Court will rule on a claim for regulatory inverse condemnation.

On the whole, procedural prerequisites or exhaustion requirements such as the *Hernadez* court suggested are justified. Under the *Hernandez* modification of Justice Brennan's proposed compensation remedy, the regulating government is provided with advance notice of potential liability.[154] At the same time, the landowner's right to compensation is not compromised, assuming that they give timely notice of the regulation's harsh impact. Thus, the *Hernandez* modification is fair to both parties. Nonetheless, substantial administrative or legislative exhaustion requirements risk diminishing the deterrence of the just compensation clause upon overzealous land use regulation. Allowing the regulating government a reasonable time period to correct the offending regulation is also fair as long as the time period is realistic enough to prevent the landowner's right to compensation from being unduly compromised. Courts must guard against the existing danger that such exhaustion requirements may violate the constitutional requirement that a landowner be able to challenge a regulation without being forced to resort to "unfair procedures in order to recover his due compensation."[155]

IV. VALUATION OF THE INTERIM COMPENSATION REMEDY

Given the recent development of a compensation remedy, it is understandable that adequate guidelines for calculating compensation awards have not yet developed.[156] The touchstone *San Diego* case provides only general hints

150. *Id.*
151. 106 S. Ct. 2561 (1986).
152. *Id.* at 2566.
153. *Id.* at 2566-67.
154. 105 S. Ct. at 3121.
155. *San Diego,* 450 U.S. at 660 (Brennan, J., dissenting).
156. *See* Note, *Inverse Condemnation, supra* note 43, at 621 (noting lack of valuation standards and proposing modifications to various eminent domain rules for use in regulatory takings cases).

regarding the valuation of the proposed interim compensation remedy. Justice Brennan left the states free to experiment with the details. He simply noted that the principles for determining the proper measure of just compensation that are applied in the context of formal condemnation proceedings, occupations and physical invasions should provide guidance to courts awarding compensation for a regulatory taking.[157]

The purpose of a just compensation award is to place landowners in the same position monetarily as they would have occupied had their property not been taken.[158] Therefore, an interim compensation award should reimburse the landowner for any losses suffered during the time the offending regulation was in effect. The dissent in *San Diego* noted that valuation principles applied in formal condemnation cases should guide courts in measuring an interim compensation remedy for regulatory takings.[159] In most eminent domain cases, however, the taking is permanent. Landowners transfer all or part of their property interest to the government, which then pays fair market value as compensation.[160] In contrast, the interim compensation award proposed in *San Diego* contemplates only a "temporary taking."[161] The regulating government is not required to purchase a permanent interest. Rather, the government is simply required to pay compensation beginning on the "date the regulation first effected the taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[162] Accordingly, those eminent domain cases involving only a temporary taking of property interests can provide the foundation for establishing methods of measuring interim compensation in regulatory inverse condemnation cases. Thus focused, at least three separate "temporary taking" valuation methods must be considered: (1) the rental return method; (2) the option price method; and (3) the lost profits method.[163]

A. Rental Return Method

The rental return method values the compensation for a temporary regulatory taking at the rental figure that hypothetically would have been ne-

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157. 450 U.S. at 659-60 (Brennan, J., dissenting).

158. *Id.* at 657-59 (Brennan, J., dissenting).

159. *Id.* at 659 (Brennan, J., dissenting).

160. 1 P. NICHOLS, *supra* note 22, § 1.11.

161. 450 U.S. at 658 (Brennan, J., dissenting).

162. *Id.* According to the rule proposed in the *San Diego* dissent, if the regulating government chooses to continue the offending regulation in force, it must pay "proper measures of just compensation." *Id.* at 660 (Brennan, J., dissenting). It is important to note, however, that according to Justice Brennan's compensation rule, the regulating government must still pay interim compensation for the period during which the regulation was in force, regardless of whether or not the government rescinds the regulation or elects to continue the regulation in force and condemn the affected property. *Id.*

163. *See generally* Hagman, *supra* note 139.

gotiated among private parties as the property's rental value.[164] This concept is best illustrated by two classic temporary taking cases. In *Kimball Laundry Co. v. United States,*[165] the United States Army took wartime possession of a laundry business. The United States Supreme Court held that since the taking was temporary, the proper measure of compensation was the rental value of the laundry for the three years and seven months the government had possession.[166] Similarly, in *United States v. General Motors Corp.,*[167] the government condemned and temporarily occupied a building leased to the General Motors Corporation. The Court awarded the company the market rental value at which a long-term tenant would have leased the property to a temporary tenant for the period of the government's occupation of the premises.[168] Although these cases illustrate the concept of the rental return measure, it must be noted that regulatory takings do not involve physical possession of the property. Further, in a regulatory taking the condemnee normally has some use rights, however limited. As a result, the rental return compensation award in regulatory takings cases arguably may be something less than that awarded in *Kimball* and *General Motors,* and less than the term "rent" typically implies.[169]

The rental value measure of compensation has been adopted in several temporary taking cases involving land use regulations.[170] For instance, in *Sixth Camden Corp. v. Evensham,*[171] the plaintiff developer, after denial of a variance and an attempted downzoning by the township, sought compensation for a zoning ordinance that precluded construction of a shopping center on his land. Finding a temporary taking, the court held that "the fair rental value of the property" was the proper compensation.[172] A Texas case that also adopted rental value as the appropriate compensation measure added a rather drastic twist. In *City of Austin v. Teague,*[173] the city repeatedly rejected the plaintiff's application for a waterway development permit. The landowners were denied all use of their land, and the city acquired a "scenic

164. Kimec, *supra* note 142, at 80 (advocating rental return measure for interim compensation awards).

165. 338 U.S. 1 (1949).

166. *Id.* at 6-7.

167. 323 U.S. 373 (1945).

168. *Id.* at 379-84.

169. *See* Hagman, *supra* note 139, at 139.

170. *See, e.g.,* Sixth Camden Corp. v. Township of Evensham, 420 F. Supp. 709, 728-29 (D.N.J. 1976) (finding normal compensation for temporary taking to be fair rental value); 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)). *Cf.* City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) (landowner's out-of-pocket loss standard of recovery applied although court purports generally to adopt rental value standard).

171. 420 F. Supp. 709 (D.N.J. 1976).

172. *Id.* at 729.

173. 570 S.W.2d 389 (Tex. 1978).

easement" without cost. The Texas Supreme Court held that rental value is the appropriate measure of compensation when landowners are temporarily deprived of the use of their land.[174] However, the court ruled that the plaintiff had failed to prove with reasonable certainty that the property would have produced any rental return at all for the period during which development was improperly denied.[175] Thus, the *Teague* court seemed to "waffle" between rental value and actual value or out-of-pocket loss as the standard of recovery.[176]

Assuming that a hypothetically negotiated rental return for the period of the taking is the proper measure of interim compensation, an important secondary question remains regarding the standard by which this rental value should be determined. While this issue is often ignored by courts, several choices for measuring interim rental value exist. Rental value may be based upon the value of the property at its actual level of use; the value of the property's lowest use or the floor below which the use of the property cannot be constitutionally restricted; or the value of the property at all available uses including its highest and best use.[177]

The choice of the proper measurement basis for interim rental value is largely a matter of policy. Nevertheless, the selection of a value standard is especially important because regulatory takings, unlike formal condemnation, frequently affect undeveloped land.[178] Under formal condemnation practice, land is valued at its highest and best use, which includes all available uses.[179] The rationale for not limiting condemnation value to the property's existing or actual use is that the market does not so limit value. This is understandable given the frequency with which zoning amendments and use variances are granted. 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.[180]

Some commentators advocate adopting these eminent domain rules in measuring interim rental value in regulatory inverse condemnation cases.[181] In arguing that fairness requires that the landowner be fully compensated for all interim losses, this position holds that fair rental value should be determined by considering all economically available uses of the property as well as the uncertainty costs imposed by the temporary taking, including

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174. *Id.* at 394.

175. *Id.* at 395.

176. *See* Kimec, *supra* note 142, at 64 n.123.

177. *Id.* at 67.

178. Because undeveloped land is often involved in regulatory inverse condemnation cases, the actual or existing use standard would seldom be a viable option. L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 30 (2d ed. 1953).

179. *Id.* § 31.

180. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 n.36 (1978).

181. *See* Kimec, *supra* note 142, at 72-74.

increased construction and financing costs.[182] Others advocate measuring interim rental value at the lowest, most constitutionally restrictive use.[183] This standard satisfies the constitutional minimum by supplying the value increment necessary to cure the regulatory taking.[184] Furthermore, by not factoring in incidental and consequential losses and limiting the compensation paid to the most restrictive constitutionally permissible use value, the compensation calculation is greatly simplified. It is argued that so limiting the landowner's remedy creates a "sounder balance" between private property rights and public governance interests.[185]

B. Option Price Method

The option price method measures interim compensation as the market value of an option to purchase the land for the period during which the offending regulation is in force.[186] A New Jersey Supreme Court decision best illustrates this valuation measure. In *Lomarch Corp. v. Mayor of Englewood,*[187] the plaintiff challenged the constitutionality of a regulatory provision that reserved land for a period of one year for possible acquisition and use as public parks and playgrounds. The court held that the restriction was valid as long as the city complied with constitutional mandates and paid just compensation for the temporary taking, despite the fact that the law failed to expressly provide for compensation.[188]

With regard to measuring such compensation, the *Lomarch* court suggested that the landowner should receive the value of a one-year "option" to purchase the land.[189] Moreover, the court stated that the option price should reflect taxes and reasonable engineering expenses incurred in obtaining municipal approval of the plat in the event that the municipality should eventually take title.[190] As noted with respect to the rental value rule, the option price value may be adjusted to reflect the fact that landowners in regulatory inverse condemnation cases continue to exercise existing use rights.

C. Lost Profits Method

The lost profits method values the landowner's interim compensation award at the amount of interest that would have accrued upon the profits

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182. *Id.*

183. *See* Costonis, *Fair Compensation and the Accommodation Power: Antidote for the Taking Impasse in Land Use Controversies,* 75 COLUM. L. REV. 1049 n.125 (1975).

184. *Id.*

185. *Id.*

186. *See* Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968).

187. *Id.*

188. *Id.* at 884.

189. *Id.*

190. *Id.*

the landowner would have realized absent the unconstitutional regulation.[191] For instance, in *Prince George's Co. v. Blumberg,*[192] the plaintiff was granted permits to build apartment buildings that were later revoked due to neighborhood opposition and environmental considerations. Finding that the revocation of the plaintiff's building permits was unlawful, the court held that compensation was appropriate.[193]

To calculate this award, the *Blumberg* court first determined the profit that the plaintiff would have realized had the project been developed and sold without the delay caused by the improper permit revocation.[194] The court then awarded the plaintiff interest on the "undelayed profit" that would have been earned from the time the property would have been developed and sold to the date the project could actually be built and sold.[195] While this valuation measure may be criticized as speculative, it is no more speculative than techniques that courts and juries often utilize in measuring damage awards in tort cases.

As is evident, several methods are available to measure regulatory inverse condemnation awards. Courts may base an interim compensation award on the fair rental value of the property, possibly valued at the most restrictive constitutionally permissible use. Alternatively, the option price method or a lost profits approach may be used as a valuation measure. It is unlikely that strict adherence to any one of these formulas will prove adequate in all land use cases. Indeed, the propriety of using a particular valuation method will depend upon the circumstances of a given case. For example, valuing temporary takings involving large scale developments may require a lost profits approach if it is difficult to ascertain a fair rental or option value for such a project.

On the other hand, where a ready market for the property exists, the trier of fact should be able to determine easily fair rental value or the price of an option based on market conditions. Interestingly, one commentator has observed that the rental return, option price, and interest on lost profit rules "may be the same measures masquerading under different labels."[196] In any event, courts should remain flexible in selecting an appropriate interim compensation valuation formula depending upon the particular circumstances of the case at hand.

CONCLUSION

It is safe to say that "the future is now" with respect to a compensation remedy for landowners subject to unconstitutionally restrictive land use

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191. *See* Prince George's County v. Blumburg, 44 Md. App. 79, 407 A.2d 1151 (1979), *cert. denied,* 449 U.S. 1083 (1981).

192. *Id.*

193. *Id.* at 82, 407 A.2d at 1155.

194. *Id.* at 83-84, 407 A.2d at 1156.

195. *Id.*

196. *See* Hagman, *supra* note 139, at 142.

regulations. While the interim compensation remedy proposed by Justice Brennan in his *San Diego* dissent does not represent binding Supreme Court precedent, an indirect majority of five Justices of the Supreme Court indicates that the fifth amendment's just compensation clause may demand that landowners subject to regulatory takings be compensated.[197] If the just compensation clause is to have any meaning, a compensation remedy must be available when a court finds that a land use regulation constitutes a taking. As Justice Brennan wrote in his dissent in *San Diego,* a compensation remedy is "supported by the express words and purpose of the just compensation clause."[198] Equitable remedies such as invalidation simply do not provide an adequate remedy to those landowners who are forced to bear the cost of the public benefits accruing from the regulation during the period of time that the regulation is in force.

The law of regulatory inverse condemnation is currently unsettled. The repeated failure of the United States Supreme Court to conclusively resolve the compensation issue has resulted in considerable confusion among state and federal courts. While some courts allow claims for just compensation for regulatory takings, other courts flatly refuse to award compensation and limit the landowner's remedy to invalidation.[199] The obvious unfairness of the current state of the law to both regulating governments and landowners necessitates a conclusive resolution of the controversy over the proper remedy for regulatory takings by the Supreme Court.

Once a court makes the threshold finding of a regulatory taking, the government should be given an opportunity to mitigate liability by rescinding the offending regulation. If no settlement is negotiated, the court must determine the proper form of the constitutionally required just compensation. According to the compensation remedy proposed by the *San Diego* dissent, the government must pay compensation for the temporary taking effected by the regulation during the interim period between the enactment of the offending regulation and its rescission or amendment.[200] If the government chooses to continue the regulation in force, the landowner must be paid "proper measures of just compensation." In any event, the government may have the option of formally condemning the property by exercise of its eminent domain power and paying the full fair market value of the property.[201]

Compensation for regulatory takings is relatively new to the law. Consequently, there is little precedent to draw upon for guidance in valuing a compensation remedy. Common law eminent domain rules provide a starting point for compensation valuation in land use cases. Several approaches for

197. 450 U.S. at 634-37 (Brennan, J., dissenting).
198. *Id.* at 653-54 (Brennan, J., dissenting).
199. *See supra* note 51.
200. 450 U.S. at 654-59 (Brennan, J., dissenting).
201. *See* 1 P. NICHOLS, *supra* note 22, § 1.11.

measuring interim compensation have been discussed, and this Comment suggests that courts should have the flexibility to employ any one of these methods depending upon the particular circumstances of a given case.

To be sure, courts confronted with the multiplicity of unresolved questions regarding a regulatory inverse condemnation compensation remedy must proceed carefully. As the courts take up Justice Brennan's invitation to experiment with a compensation remedy, however, they must heed his "Constitutional requirement" that the "landowner must be able to meaningfully challenge a regulation that allegedly effects a taking, and recover just compensation if it does so."[202]

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202. 450 U.S. at 661 (Brennan, J., dissenting).