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Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations

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The increasing popularity of growth control regulations should result in increased legal challenges to such measures in the future. This Article focuses on the two chief constitutional theories upon which developers and landowners likely will pursue such challenges: violations of the takings clause[1] and violation of substantive due process.[2] It also explains both the overlapping characteristics and important practical distinctions between takings and substantive due process claims.

I. HISTORICAL BACKGROUND

A. The Emergence of Damages as a Remedy for Excessive Land Use Regulation

The increased availability of monetary damages as a judicial remedy has dramatically affected land use litigation in the last two decades. Previously, the doctrine of sovereign immunity[3] imposed a major barrier to recovery in federal courts of damages against local zoning jurisdictions in

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1. U.S. CONST. amend. V. The takings clause provides that "private property [shall not] be taken for public use, without just compensation." *Id.*

2. *See id.* (no person shall be deprived of property without due process of law); *id.* amend. XIV, § 1 (same applied to states).

3. The principle of sovereign immunity dictates that the state cannot be sued without its consent. *Ex parte* State of New York No. 1, 256 U.S. 490, 497 (1921).

many states.[4] Some state courts limited judicial remedies for excessive regulation to invalidation of confiscatory, irrational or other excessive land use regulations, or injunctions against enforcement of such regulations.[5] The availability of a damages remedy is particularly important because damages likely will be the single greatest deterrent to the implementation of growth control regulations by local governments.

The Supreme Court struck a major blow to local government immunity in *Monell v. Department of Social Services of New York*.[6] In *Monell*, the Court held that local government agencies could be liable for damages under title 42, section 1983 of the United States Code.[7] Further, unlike state governments, municipal and county governments are not protected by the eleventh amendment[8] from liability for damages; nor do state governmental immunities protect local governments from liability under section 1983.[9] Since *Monell*, challenges to local zoning and land use decisions based on allegations of constitutional violations have be-

4. *See, e.g.*, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 519, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (city immune by statute from damages liability for reduction in property value from $400,000 to $75,000 caused by rezoning), *cert. denied*, 425 U.S. 904 (1976); CAL. GOV'T CODE §§ 818.2, 818.4 (1980); Carlisle, *The Section 1983 Land Use Case: Justice Stevens and the Hunt for the Taking Quark*, 16 STETSON L. REV. 565, 565 (1987).

5. *See, e.g.*, Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1517-19 (11th Cir. 1987) (damages for inverse condemnation not allowed under Florida law); Agins v. Tiburon, 24 Cal. 3d 266, 269-70, 598 P.2d 25, 26, 157 Cal. Rptr. 372, 373 (1979), *aff'd*, 477 U.S. 255 (1980) (only remedy available to aggrieved landowner is invalidation; damages not recoverable); Presbytery of Seattle v. King County, 114 Wash. 2d 320, 332 n. 20, 787 P.2d 907, 914 n.20 (1980) ("If all excessive regulations require just compensation, rather than, invalidation, land-use decision makers, who adopt regulations in a good faith attempt to prevent a public harm, will nevertheless be held strictly liable for regulations that result in a taking."); Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 730 (Wyo. 1985) (in excessive regulation cases, remedy has generally been limited to injunction and declaration of unconstitutionality).

6. 436 U.S. 658 (1978).

7. *Id.* at 690-91; 42 U.S.C. § 1983 (1988).

8. U.S. CONST. amend. XI.

9. Owen v. City of Independence, 445 U.S. 622, 657 (1980). Individual local officials, however, enjoy considerable personal immunity. Virtually every federal circuit has found local officials absolutely immune from suits for damages for all actions taken in a legislative capacity. *See, e.g.*, Haskell v. Washington Township, 864 F.2d 1266, 1277 (6th Cir. 1988); Aitchison v. Raffiani, 708 F.2d 96, 99 (3d Cir. 1983); Reed v. Village of Shorewood, 704 F.2d 943, 952-53 (7th Cir. 1983); Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982); Hernandez v. City of Lafayette, 643 F.2d 1188, 1193-94 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); Bruce v. Riddle, 631 F.2d 272, 274-80 (4th Cir. 1980); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 613-14 (8th Cir. 1980). Officials acting in an executive capacity enjoy a qualified immunity. *See* Bateson v. Geisse, 857 F.2d 1300, 1304 (9th Cir. 1988); Cinevision Corp. v. City of Burbank, 745 F.2d 560, 577-78 (9th Cir. 1984). This immunity protects municipal officials from liability for actions other than those which violate constitutional rights clearly established at the time of the alleged wrongful act. *See, e.g.*, Bass v. Attardi, 868 F.2d 45, 51 (3d Cir. 1989); *Bateson*, 857 F.2d at 1304.

come commonplace in the federal courts. Although plaintiffs have generally been unsuccessful in such actions,[10] and federal courts have since erected "imposing barriers" in the form of the ripeness doctrine,[11] this wave of litigation continues to this date.

A second major development occurred when the Supreme Court held in *First English Evangelical Lutheran Church v. County of Los Angeles*,[12] that (1) money damages were constitutionally compelled in cases brought under the takings clause of the fifth amendment,[13] and (2) that local governments could be held liable for "temporary" takings,[14] at least where the landowner was deprived of "all use."[15] *First English* effectively overruled state court precedents which had held that invalidation of offending regulations rather than payment of monetary damages was a constitutionally permissible remedy for regulatory takings.[16]

The latter holding of *First English* is uniquely important in the context of growth control regulations. While growth control regulations, virtually by definition, do not preclude development of land permanently, they often effectively delay potential development for at least some landowners. If such delay can be equated to a temporary taking, public agencies implementing community-wide growth control measures may be exposed to potentially crippling financial liability.

B. The Emergence of Growth Control Regulation

Zoning regulations, since their inception, have sought to regulate the amount and type of development within communities.[17] "Growth Control," as used in this Article, denotes regulation of the *rate* of development within a geographical area. Growth control measures may be employed for two principle purposes: (1) to prevent development and associated demands on public services from outstripping available resources; and (2) to slow down, if not stop, adverse changes in community character and "quality of life" which are perceived to result from rapid urban or suburban development. It is beyond the scope of this Article to

10. Carlisle, *supra* note 4, at 568 n.14.

11. *See, e.g.*, Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989) (claims not ripe until final decision regarding use of property has been reached).

12. 482 U.S. 304 (1987).

13. *Id.* at 319.

14. For further discussion of temporary takings, see *infra* notes 75-83 and accompanying text.

15. *First English*, 482 U.S. at 318.

16. *See id.* at 317-21.

17. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (recognizing constitutionality of regulating land use by geographical zones).

discuss all the different types of regulatory schemes which might be described as growth control measures. For purposes of this Article, however, growth control measures may be divided into two broad categories. Permitting systems, or "classic" growth control regulations, limit growth by establishing quotas on the number of building permits or other entitlements which may issue in a given year.[18] Other systems restrict growth by linking development to the availability of public services and infrastructure.[19] The latter type of system may operate in tandem with community plans for phased development of required infrastructure, thus linking the timing of development with the general plan.[20]

Notwithstanding the intense controversy often spawned by growth regulations, few published decisions have addressed growth control as we now know it. *Golden v. Planning Board of Ramapo*,[21] perhaps the seminal case on the use of *timing* as a conscious and systematic mode of land use regulation, was not decided until 1972. In *Ramapo*, New York's highest court upheld a zoning plan which required new subdivisions to be phased in accordance with the city's long-term capital improvement plan.[22] Although cautioning that permanent restrictions against "natural" growth would not be well received, the court found no constitutional or state-law obstacles to linking development to the gradual extension of necessary infrastructure, even though this might delay development of some properties as much as eighteen years.[23] Touching on the takings issue, the court noted that denial of the right to subdivide did not necessarily preclude other reasonable uses of the property.[24] Moreover, the court stated that even if use were denied for the entire eighteen-year duration of the zoning plan, losses inflicted by the ordinances would likely

18. *See, e.g.*, CAMARILLO, CAL., MUN. CODE ch. 1, §§ 20.04-20.23 (1981), *cited in* Pardee Constr. Co. v. City of Camarillo, 37 Cal. 3d 465, 470 n.6, 690 P.2d 701, 704 n.6, 208 Cal. Rptr. 228, 231 n.6 (1984); Pacifica Corp. v. City of Camarillo, 149 Cal. App. 3d 168, 180-82, 196 Cal. Rptr. 670, 678-79 (1983); SIMI VALLEY, CAL., MUN. CODE ch. 1, art. 19, § 9-1.1801 (1988); *see also* SANTA BARBARA CITY CHARTER § 1508 (restricting commercial development to 3,000,000 square feet over 20 years and providing for annual limits based on approved square feet of development).

19. *See, e.g.*, Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 590, 557 P.2d 473, 476, 135 Cal. Rptr. 41, 44 (1976) (initiative measure prohibiting issuance of building permits pending compliance with standards for schools, water and sewage treatment); Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 381-82, 285 N.E.2d 291, 304, 334 N.Y.S.2d 138, 156, *appeal dismissed*, 409 U.S. 1003 (1972).

20. *See, e.g.*, *Ramapo*, 30 N.Y.2d at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 156.

21. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

22. *Id.* at 383, 285 N.E.2d at 309, 334 N.Y.S.2d at 156.

23. *Id.* at 377-78, 382, 285 N.E.2d at 301-02, 308, 334 N.Y.S.2d at 151-52, 155.

24. *Id.* at 373, 380-81, 285 N.E.2d at 298, 307, 334 N.Y.S.2d at 147, 154.

be substantially mitigated by increases in property value over the delay period.[25] Since *Ramapo*, state courts generally have upheld growth moratoria and other growth control regulations, in principle, against constitutional attacks.[26] Many state courts, however, have questioned the legality of such measures under state law, or have remanded cases for factual determinations on constitutional issues.[27] Federal litigation on growth control regulations has been limited and unpromising to the opponents of such measures. In *Construction Industry Association v. City of Petaluma*,[28] the Ninth Circuit flatly rejected a substantive due process challenge to Petaluma's classic growth control ordinance.[29] In *Petaluma*, the ordinance fixed housing development to 500 dwelling units per year.[30] Plaintiff argued that the ordinance violated substantive due process in that it was arbitrary and unreasonable.[31] The Ninth Circuit stated that the federal courts should not be called upon to evaluate whether legitimate local interests are outweighed by legitimate regional interests.[32] Although it remains the leading federal decision on growth control regulations, *Petaluma* does not address the question of whether such regulations may effect a taking. Such a claim was rejected summarily in *Giuliano v. Town of Edgarton*,[33] which involved a challenge to regulations limiting subdivisions of large parcels to ten new lots per year.[34]

Federal courts generally decline to find that temporary local development moratoria or other development interruptions amount to a taking of property, at least where the delay is limited in duration and

25. *Id.* at 380-83, 285 N.E.2d at 306-09, 334 N.Y.S.2d at 153-56.

26. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (city plan which fixed housing development growth rate at 500 dwelling units per year and which required building permits to be divided evenly between west and east sections of city is reasonable exercise of police power); Dawson Enter. v. Blaine County, 98 Idaho 606, 567 P.2d 1257 (1977) (denial of rezoning of 12.8-acre parcel from agricultural and residential to commercial use, even though deprivation of highest and best use, not a taking); Sturges v. Chilmark, 380 Mass. 246, 402 N.E.2d 1346 (1980) (rate of development by-law which limited issuance of building permits to one-tenth of lots in subdivision in year of enactment, and a further one-tenth in subsequent nine years has rational connection with permissible public purpose).

27. *See, e.g., Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (reversed and remanded to determine if initiative ordinance prohibiting issuance of further residential building permits unconstitutionally burdened right to migrate to city).

28. 522 F.2d 897 (9th Cir. 1976).

29. *Id.* at 908.

30. *Id.* at 901.

31. *Id.* at 905.

32. *Id.* at 908.

33. 531 F. Supp. 1076, 1084-85 (D. Mass. 1982).

34. *Id.* at 1081.

justified by legitimate planning concerns.[35] Neither the higher federal courts nor the state courts, however, have squarely addressed the question of whether long-term growth control regulations may effect a taking. Consequently, this Article primarily addresses the application of general legal principles to the specific issue of long-term growth control regulations, with the understanding that the case law has yet to be developed.

II. GROWTH MANAGEMENT LEGISLATION AS A TAKING OF PROPERTY

The takings clause of the fifth amendment provides that private property shall not "be taken for public use, without just compensation."[36] The fifth amendment applies to "regulatory takings"[37] — governmental actions interfering with property rights to such a degree that they are deemed tantamount to a taking. How regulatory takings are to be defined and analyzed, however, remains an evolving area of the law. The Supreme Court has itself admitted on several occasions that it generally was unable to develop a "set formula" for determining when justice and fairness require that an economic injury caused by public action must be deemed a compensable taking.[38] Thus, ascertaining precisely where the boundary between permissible regulation and takings will be found in any given case remains a matter of applying general, and often unclear, principles enunciated in the case law.

To complicate matters, takings challenges are generally classified into two distinct categories. A "facial" challenge is generally aimed at a legislative decision or policy, such as the enactment of a zoning ordinance. The second category, an "as applied" challenge, involves the practical application of an ordinance or other regulation to particular land. An as applied challenge generally presumes that the landowner has made some reasonable effort to put the land to economic use and that effort has been thwarted by the challenged regulatory scheme. These two types of challenges are discussed separately because significant proce-

35. *See, e.g.*, Jackson Court Condominiums v. City of New Orleans, 874 F.2d 1070, 1080-82 (5th Cir. 1989); Schafer v. City of New Orleans, 743 F.2d 1086, 1090 (5th Cir. 1984); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1198 (N.D. Cal. 1988); Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1382 (D. Md. 1975). *But see* Lockary v. Kayfetz, 908 F.2d 543, 548-49 (9th Cir. 1990) (moratorium against new water hook-ups may violate due process or effect a taking if water shortage is purely pretextual).

36. U.S. CONST. amend. V.

37. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122-28 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-94 (1962).

38. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); *Penn Cent.*, 438 U.S. at 124.

dural and substantive differences exist in the way that facial and as applied challenges are resolved, particularly in the growth control setting.

A. Facial Takings Claims

A facial challenge alleges that a governmental statute, ordinance or policy in and of itself effects a taking of property.[39] In a facial challenge, the only issue before the court is "whether the 'mere enactment' of the [regulation] constitutes a taking."[40] The Supreme Court, in *Agins v. City of Tiburon*,[41] stated the test for a facial taking as follows: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[42] Thus, to effect a taking by its mere enactment, an ordinance must either: (1) be an impermissible exercise of the government's police power in that it does not substantially advance legitimate public interests; or (2) effectively preclude all possible reasonable uses of the land.[43] Consequently, where the ordinance leaves open the possibility of reasonable use a takings challenge must generally be pursued on an as applied basis, after the landowner has made reasonable attempts to develop in compliance with the regulation. The Supreme Court describes the battle as "uphill" for a landowner claiming a facial taking.[44]

1. The substantial relationship/legitimate public purpose prong

The first prong of the *Agins* test is, on its face, very similar to that used in evaluating substantive due process claims, and with that used in testing the validity of legislative acts generally.[45] The standards applicable to substantive due process claims[46] also serve as the jumping off point for takings claims brought under the first prong of the *Agins* takings

39. *See* Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 479 (1987).
40. *Id.*
41. 447 U.S. 255 (1980).
42. *Id.* at 260; *accord Keystone*, 480 U.S. at 485.
43. *Agins*, 447 U.S. at 260-61.
44. *Keystone*, 480 U.S. at 495.
45. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 323-32 (1981) (applying rational basis test to commerce clause, due process and equal protection challenge to Surface Mining and Reclamation Act of 1977); Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 243 (1990) (court should not set aside public officers' determination in zoning matters unless their action is irrational exercise of power having no substantial relation to public health, public morals, public safety, or public welfare); Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1577 (11th Cir. 1989) ("zoning regulations will not be declared unconstitutional as violative of substantive due process unless they 'hav[e] no substantial relationship to the public health, safety, morals, or general welfare.' ").
46. *See infra* notes 132-60 and accompanying text.

test.[47] Thus, takings claims brought under the first prong of *Agins* may essentially duplicate claims brought against the same regulations on a substantive due process theory. Nevertheless, significant procedural, and possibly significant substantive, differences between the two constitutional theories exist.[48]

2. Denial of economically viable use prong

Under the second prong of the *Agins* test, a taking may occur if governmental regulations deny the owner "economically viable use of the property."[49] The question of what, precisely, constitutes a denial of "economically viable use" remains a hotly debated subject.[50] In practice, most state and federal courts construe the "economically viable use" test as requiring prohibition of virtually all use of the property.[51]

Prior Supreme Court decisions make clear that for facial takings analysis, economically viable use is measured in terms of the lawful uses remaining to the property owner, not by the degree to which more profitable uses are circumscribed.[52] Thus, even drastic restrictions on use, and resulting severe devaluations of property, have generally withstood takings challenges.[53]

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47. *See* Ceilbert v. California, 218 Cal. App. 3d 234, 253, 266 Cal. Rptr. 891, 902 (1990).

48. *See infra* notes 161-257 and accompanying text.

49. *Agins*, 447 U.S. at 260.

50. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1301, 1330-33 (1989); Comment, *Just Compensation for Temporary Takings: A Discussion of Factors Influencing Damage Awards*, 35 EMORY L. J. 729 (1986).

51. *See, e.g.*, Lakeview Dev. Corp. v. City of South Lake Tahoe, 915 F.2d 1290, 1300 (9th Cir. 1990) ("Moreover, it is clear from Lakeview's submissions that it has not been denied all economically viable use of its land."); Herrington v. County of Sonoma, 857 F.2d 567, 570 (9th Cir. 1988) ("a taking claim requires proof that substantially all economically viable use of the property has been denied"), *cert. denied*, 489 U.S. 1090 (1989); Furey v. City of Sacramento, 780 F.2d 1448, 1454 (9th Cir. 1986) ("the [Constitutional] line is crossed when such restrictions . . . deprive an owner of all economically viable uses of his land"); Terminals Equip. Co. v. City & County of San Francisco, 221 Cal. App. 3d 234, 242-43, 270 Cal. Rptr. 329, 333 (1990) ("However, the courts of this state have consistently held that before a zoning or land use plan crosses the line separating a valid exercise of the police power from unreasonable regulation tantamount to a compensable taking, the landowner must be deprived of '*substantially all reasonable use* of his [or her] property.' " (citations omitted)).

52. *See, e.g., Keystone*, 480 U.S. at 497; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, at 131 (1978).

53. *See, e.g.*, Andrus v. Allard, 444 U.S. 51 (1979) (simple prohibition of sale of lawfully acquired property does not effect taking; nor does fact that regulations prevent most profitable use); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance prohibiting beneficial use to which property had previously been devoted not so onerous as to effect a taking); Hadacheck v. Sebastion, 239 U.S. 394 (1915) (nearly 90 percent reduction of value caused by use restriction insufficient to establish a taking); William C. Haas & Co. v. City & County of

In *First English Evangelical Lutheran Church v. County of Los Angeles*,[54] the Supreme Court appears to have accepted the standard that "all use" must be denied, at least for temporary takings.[55] For purposes of the decision, the Court accepted as true the plaintiff's allegations that the challenged county ordinances denied literally "all use" of the property, and, further, assumed that such regulations would remain in effect for a number of years.[56] The Court did not examine the challenged ordinances or attempt to evaluate whether they indeed permitted some residual use of the property.[57] On remand, the California Court of Appeal undertook such an analysis and concluded that no taking was alleged as a matter of law because the ordinances allowed at least some minimal recreational use of the Church's rural property.[58] Under this standard, zoning regulations which allow virtually any significant use of land are unlikely to be subject to a successful facial challenge.

For a number of reasons, modern growth control regulations probably never will be found to effect a facial taking of land. First, while growth control regulations generally inhibit major development, they do not necessarily preclude alternate or less intensive uses of the property.[59] Where property is already partly developed, the fact that the intervention of growth control regulations postpones completion of development plans cannot be said to deny the owner of all economically viable use.[60] In other cases, some potentially viable alternate uses of the land, such as agricultural, limited commercial or recreational, may be unaffected by growth control regulations.[61] Less intensive forms of development, such as individual single-family dwellings, are commonly exempted from growth control restrictions, thus often permitting at least limited use of

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San Francisco, 605 F.2d 1117 (9th Cir. 1979) (rezoning of land to restrict construction of buildings higher than forty feet, when originally zoned to permit construction of buildings to three hundred feet did not constitute a taking even when property value reduced from two million dollars to one hundred thousand dollars).

54. 482 U.S. 304 (1986).

55. *Id.* at 318.

56. *Id.* at 321-22.

57. *See id.* at 313.

58. First English Evangelical Lutheran Church v. County of Los Angeles, 210 Cal. App. 3d 1353, 1367-71, 258 Cal. Rptr. 893, 901-05 (1989) (no taking because "[during] this period and after the enactment . . . this property could be used for agricultural and recreational uses"), *cert. denied*, 110 S. Ct. 866 (1990).

59. *See, e.g.*, SIMI VALLEY, CAL., MUN. CODE ch. 1, art. 18, § 9-1.1802(b) (1988) (exempting mobilehome parks and certain "infill" projects of less than 15 residential units from permit allocation requirements).

60. *See Lakeview*, 915 F.2d at 1300.

61. *See, e.g.*, Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1451-52 (9th Cir. 1987) (ordinance permitted property uses consistent with open space preservation).

residentially zoned properties.[62] Densities as low as one unit per five acres are clearly within the scope of economically viable use for purposes of facial takings analysis,[63] and one case suggested that densities as low as one residential unit per 320 acres, when coupled with the opportunity for agricultural use, may allow sufficient use to survive a facial taking claim.[64] Some growth control systems also exempt or provide special treatment for favored classes of development, such as affordable housing, senior housing projects, group care homes, or other special uses.[65] In no case will the fact that permitted development is neither the "highest and best" use nor the use desired by the landowner transform the regulations into a taking.

3. Delay as a *per se* taking

A slightly more difficult case arises where the growth regulations permit no interim or alternate uses of the property at all. A temporary interference with development is not normally sufficient to deprive land of all economic value and, thus, will not normally amount to a taking.[66] Nevertheless, it has become stylish in the wake of *First English* to assert that virtually any government-caused delay in development amounts to a temporary taking which must be compensated by the governing authorities.

The County of Los Angeles adopted the ordinance challenged in *First English* in response to a serious flood in the Angeles National Forest.[67] The ordinance prohibited "construction, reconstruction, placement or enlargement of any building or structure, any portion of which was or would be located within the outer boundary lines of the interim flood protection area."[68] At the time of the flood, First English Evangelical Lutheran Church (the Church) owned a twenty-one acre parcel of land in the Angeles National Forest on which it operated a campground as a retreat center and recreational area for handicapped children.[69] The campground buildings, a dining hall, two bunkhouses, a caretakers lodge

62. *See, e.g.*, C-Y Dev. Co. v. City of Redlands, 137 Cal. App. 3d 926, 929, 187 Cal. Rptr. 370, 372 (1982) (growth control initiative measure exempted individual single family homes, multiple unit dwellings of fewer than four units, commercial and industrial construction).

63. *See Agins*, 447 U.S. at 260-63.

64. Gherini v. California Coastal Comm'n, 204 Cal. App. 3d 699, 714, 251 Cal. Rptr. 426, 433-34 (1988).

65. SIMI VALLEY, CAL., MUN. CODE, ch. 1, art. 18, § 9-1.1303.b (1988) (priority to senior and affordable housing project).

66. *See infra* notes 82-87 and accompanying text.

67. *First English*, 482 U.S. at 307.

68. Los Angeles, Cal., Interim Ordinance 11,855 (Jan. 11, 1979).

69. *First English*, 482 U.S. at 307.

and an outdoor chapel were destroyed in the flood.[70] The Church filed a complaint in inverse condemnation[71] alleging that the County's ordinance denied all use of the property.[72]

The Court held that a complete prohibition of *all use*, even for a temporary period, may amount to a taking for which compensation is required.[73] The principle issue in *First English*, however, was whether monetary damages were mandated as a remedy for regulatory takings.[74] For purposes of the decision, the Court assumed that the Los Angeles County ordinance denied appellant all use of its property "for a considerable period of years."[75] The Court did not elaborate on whether relatively short-term restrictions or a less than total prohibition of use would necessarily amount to a temporary taking.[76] The Court stated: "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[77]

Although the Court did not provide an explicit test for determining when delay rises to the level of a taking, the Court recognized that " 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[78] This language strongly suggests that the factors considered in traditional takings analysis also may be considered in evaluating whether a temporary interference with use amounts to a taking. Lower courts have subsequently followed this approach.[79]

There are several reasons to suspect that growth control regulations will continue to withstand facial takings claims in the wake of *First English*. First, growth control ordinances by themselves generally do not

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70. *Id.*

71. Inverse condemnation should be contrasted with eminent domain. Eminent domain refers to a legal proceeding in which a government authority asserts its power to condemn property. United States v. Clarke, 445 U.S. 253, 255-58 (1980). Inverse condemnation is an action brought by a landowner to recover just compensation for a taking of property when condemnation proceedings have not been initiated. *Id.* at 257.

72. *First English*, 482 U.S. at 308.

73. *Id.* at 317-19.

74. *See id.* at 310-12.

75. *Id.* at 322.

76. *Id.* at 318-21.

77. *Id.* at 321.

78. *Id.* at 318.

79. *See, e.g.*, Zilber v. Town of Moraga, 692 F. Supp. 1195, 1205-06 (N.D. Cal. 1988); Guinnane v. City & County of San Francisco, 197 Cal. App. 3d 862, 868, 241 Cal. Rptr. 787, 790-91 (1987), *cert. denied*, 488 U.S. 823 (1988).

foreclose future use, as may a downzoning,[80] but merely tend to *postpone* the time when permitted development may occur. This is significant because the land may retain considerable market value despite the regulations. Retention of resale value has been considered a significant factor in determining whether building moratoria or denial of development permits constitute a denial of all economically viable use.[81]

In *First English*, the Supreme Court expressly distinguished development delays caused by reasonable regulatory activity from outright prohibitions of use, stating: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like which are not before us."[82] Indeed the Court had previously indicated that such "normal delays" would not amount to a taking.[83]

Even where no substantial development is allowed for extended periods, additional factors may militate against finding a taking. Any reciprocal benefits which accrue to the regulated land must be taken into account in assessing whether the regulation amounts to an uncompensated taking.[84] Courts also consider the potential for interim uses, albeit less intensive and less profitable, which may be permitted pending full development of the regulated property. In *Golden v. Planning Board of Ramapo*,[85] these collective factors persuaded the court that planned development delays of up to eighteen years for some properties did not amount to a taking. The ordinance involved in *Ramapo* disallowed subdivision until proposed municipal services were completed according to an eighteen-year plan.[86] The Court stated:

> An ordinance which seeks to permanently restrict the use of property so that it may not be used for any reasonable purpose must be recognized as a taking. . . . An appreciably different situation obtains where the restriction constitutes a *temporary* restriction, promising that the property may be put to a profitable use within a reasonable time. The hardship of holding un-

80. Downzoning is "[a] process by which the allowable intensity of development on a zoned parcel of land is reduced." D. GODSCHALK, D. BROWER, L. MCBENNETT, B. VESTAL & D. HERR, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 419 (1979).

81. *See, e.g.*, MacLeod v. Santa Clara County, 749 F.2d 541, 547 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985); *Guinnane*, 197 Cal. App. 3d at 868-69, 241 Cal. Rptr. at 791.

82. *First English*, 482 U.S. at 321.

83. *See Agins*, 447 U.S. at 263 n.9.

84. *See, e.g., id.* at 255, 262; *Penn Cent.*, 438 U.S. at 133-35.

85. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

86. *Id.* at 366-67, 285 N.E.2d at 294-95, 334 N.Y.S.2d at 142-43.

> productive property for some time might be compensated for by the ultimate benefit inuring to the individual owner in the form of a substantial increase in valuation.[87]

At some point delays caused by government regulations may pass rational bounds. Reported cases, though, indicate periods of delay up to eight years before cases were deemed ripe for adjudication.[88] Delays of several years caused by planning studies or development moratoria have been upheld routinely against taking challenges.[89] Where liability has been found, it has been based on unreasonable delays which violated due process requirements, or the equivalent "substantial relationship" prong of the *Agins* test.[90] As discussed below,[91] it will ordinarily be difficult to estimate at the time of enactment just how much delay any given property owner may experience as a result of growth control measures. It appears, however, that as long as there is a rational basis for the regulations themselves, delays of up to eight to ten years may be acceptable, unless it can be shown that such delays effectively deprive the land of all present value.

4. The ripeness prerequisite

The ripeness requirement may be a very substantial practical problem for successfully litigating a facial takings claim based on anticipated delays.[92] The Supreme Court requires that the precise effect of zoning regulations be known before any takings claim is litigated.[93] Thus, a challenge to zoning or other regulations is not ripe for adjudication where the effect of the regulation is uncertain or depends upon future

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87. *Id.* at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 154.

88. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-94 (1985) (case premature unless following final decision); Norco Constr. v. King County, 801 F.2d 1143, 1145-46 (9th Cir. 1986) (five-year wait did not mature until final state agency review).

89. *See, e.g., Zilber*, 692 F. Supp. at 1206-07 (18-month moratorium on certain development applications not ripe for review); *Guinnane*, 197 Cal. App. 3d at 866-70, 241 Cal. Rptr. at 790-92 (city's more than one-year delay in acting on developer's building permit not a temporary taking).

90. *See, e.g.*, Urbanizadora Versalles, Inc. v. Rios, 701 F.2d 993, 996-97 (1st Cir. 1983) (14-year interference by pre-condemnation activities unreasonable). See *supra* notes 42-48 and *infra* notes 132-60 and accompanying text for a discussion of the first prong of the *Agins* test.

91. *See infra* notes 92-96 and accompanying text.

92. See *infra* notes 181-227 and accompanying text for further discussion of the ripeness requirement.

93. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348-51 (1986) ("Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it."); *see* Pennell v. City of San Jose, 485 U.S. 1 (1988); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

events. The Court has stated: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[94]

As a practical matter, landowners and developers are seldom in a position to show that the mere enactment of growth control regulations will inevitably and necessarily prevent timely development of their particular properties. Unlike a development moratorium, a growth control plan generally permits some ongoing development to occur each year.[95] In systems which rely on annual or semi-annual allocation of building permits, each landowner theoretically has at least some prospect of securing permits in any given cycle. In addition, the ordinances may provide exceptions or exemptions for certain forms of development which the landowner remains free to pursue.[96] As long as either of these prospects exists, the landowner cannot demonstrate with the required degree of certainty that mere enactment of the growth control regulations will inevitably inflict a constitutionally impermissible amount of delay on potential building plans. Challenges to the system must instead be pursued on an as applied basis, after making reasonable, but unsuccessful, attempts to secure development approvals.

B. As-Applied Takings Claims

The second method of attacking governmental regulations is as applied to the property owner's land. An as-applied claim generally presumes that the applicant has made reasonable efforts to develop in compliance with challenged regulations before seeking relief from the courts.[97] In such a claim, the plaintiff is not required to show that no economically viable use of his or her property is possible under the challenged regulations, but only that reasonable use has in fact been denied.[98]

In the as-applied context, courts also may consider whether the governmental regulatory scheme, though reasonable on its face, inflicts irrational or excessive results on the particular property owned by the

94. *MacDonald*, 477 U.S. at 348.

95. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 908, 900-01 (9th Cir. 1975) (ordinance restricted housing development growth rate to 500 dwelling units per year).

96. *See supra* notes 65-69 and accompanying text.

97. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985); Agins v. Tiburon, 447 U.S. 255, 260 (1980). Indeed, such efforts are required before an as applied claim may be deemed ripe for adjudication. For a further discussion of ripeness, see *infra* notes 181-227 and accompanying text.

98. *Agins*, 447 U.S. at 260; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978).

plaintiff.[99] Judicial review here is more flexible and more fact specific than in a facial challenge.[100] As a result, the Supreme Court has admitted its inability to define clear guidelines in the as-applied area.[101] The Supreme Court emphasized three factors as the most important: (1) the "character" of the governmental action; (2) its "economic impact;" and (3) its interference with any "distinct, reasonable investment-backed expectations" of the landowner.[102] These factors are not exclusive, but are identified as "of particular significance" in determining "when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[103]

No published decision specifically has applied these three factors to growth control regulations. In the context of growth management regulations, the claim will normally be delay of the landowner's development plans. Landowners may allege either that the regulations have inflicted gratuitous delay without a good or adequate public purpose, or that the impact of delay has amounted to a temporary taking which requires compensation. Nevertheless, analysis of the specific factors mandated by the Supreme Court normally will not favor the conclusion that a taking has occurred, absent periods of extraordinary delay or special circumstances.

1. Character

The character of the governmental action serves primarily to distinguish takings which are physical or appropriative in nature from those which are purely regulatory. In addition, assessment of the character of regulatory actions also requires consideration of whether the actions are arbitrary, or unfairly single out an individual property owner to bear public burdens.

Governmental actions which require the landowner to submit to actual physical occupation or to public use of a portion of the property are far more likely to be deemed a taking than those which merely regulate

99. *Cf.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 332 (1981) (rejecting as unripe challenge alleging statute may be irrational as applied to some properties).

100. *Agins*, 447 U.S. at 260-63; *Penn Cent.*, 438 U.S. at 124; United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

101. *Penn Cent.*, 438 U.S. at 124; *Central Eureka Mining*, 357 U.S. at 168.

102. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

103. *Hodel*, 452 U.S. at 295 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

the owner's use.[104] Actions which also extinguish or appropriate a distinct "fundamental attribute of ownership"[105] may more readily be labelled as takings, even if they do not totally deprive the property of value. To date, the only such fundamental interests identified by the Supreme Court are the rights to exclude others[106] and to devise property.[107] The right to sell, however, is apparently not such a fundamental attribute.[108] Evidence that a growth control measure has interfered with resale of the property is thus not, in and of itself, sufficient to demonstrate a taking.

At the opposite extreme are governmental regulations which are purely regulatory in nature, and operate by adjusting public benefits and burdens on a broad scale. Growth control regulations generally fall within this category. Growth control pursues generalized, community-wide public benefits, while distributing the burdens on a broad class of property owners rather than on one or a few individuals. A different case might arise where a single property was singled out for regulation, or where a growth control system was entirely irrational in concept. In the normal case, however, growth control measures amount to legitimate, purely regulatory actions, and thus, may not be labelled as takings on the basis of character.[109]

2. Economic impact

The economic impact factor requires consideration of whether the government regulation imposes an actual economic loss on the plaintiff.

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104. *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (ordinance requiring landlord to allow physical installation of cable television wiring on premises found to be taking) *and Kaiser Aetna,* 444 U.S. at 180 (government imposed public navigational easement) *with* PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1979) (fact that property was physically invaded was not determinative of a taking).

Regulations that simply function as a disguised form of appropriation of public easements or other property interests, may also be deemed takings, unless justified by the need to mitigate adverse impacts caused by development of the property. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (public access easement on beach found to be taking where no logical relationship between dedication requirement and adverse impacts of proposed use). Such issues are not normally considered in growth management regulations which merely attempt to regulate the timing of development.

105. *Agins,* 447 U.S. at 262.

106. *Loretto,* 458 U.S. at 435-36 (power to exclude traditionally considered one of most treasured strands in one's bundle of property rights); *Kaiser Aetna,* 444 U.S. at 179-80 (power to exclude fundamental).

107. Hodel v. Irving, 481 U.S. 704, 716-18 (1987).

108. *See* Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (federal law making it illegal to sell bald or golden eagle parts although material was legally obtained, did not amount to a taking).

109. Creative Env'ts v. Estabrook, 680 F.2d 822, 831-34, *cert. denied,* 459 U.S. 989 (1982); Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 381-82, 285 N.E.2d 291, 304, 334 N.Y.S.2d 138, 154-55, *appeal dismissed,* 409 U.S. 1003 (1972).

Economic impact is measured against the economic value left to the property owner after the alleged taking, rather than by the economic value lost to the owner.[110] The Supreme Court has stated that, "[i]mpairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking."[111] Even drastic restrictions or downzonings of property have routinely been found to be merely legitimate regulation of land rather than takings.[112]

It is not entirely clear whether regulations need always deprive the owner of all economic value of the property to effect a taking. The character of the action may sometimes be sufficient to support a taking claim.[113] In addition, extreme periods of delay may sufficiently erode the land's current value that a temporary taking might be found during the period that the land is totally unsalable.[114] Absent such special circumstances, however, a regulatory taking probably will not be found where the property retains economically viable uses or substantial economic value.

Consideration of the economic impact of a governmental action also permits consideration of factors beyond those strictly related to the use of land. Where the economic effect is palpably *de minimus*, even regulations which impose burdens of an arguably physical character may not amount to a taking.[115] Another important economic consideration is the market value of the land after the imposition of the regulation. As previously noted, however, even a substantial interim reduction in the market value of land will not support a taking claim. The Court has explained, "[a]t least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment."[116]

The economic impact factor also permits another important eco-

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

111. Kirby Forest Indus. v. United States, 467 U.S. 1, 15 (1984).

112. *Penn Cent.*, 438 U.S. at 131; William C. Haas & Co. v. City & County of San Francisco, 605 F.2d 1117, 1121 (9th Cir. 1979); HFH Ltd. v. Superior Court, 15 Cal. 3d 508, 514, 542 P.2d 237, 244, 125 Cal. Rptr. 365, 369 (1975).

113. *See, e.g., Loretto*, 458 U.S. at 434-35 (physical character); *Kaiser Aetna*, 444 U.S. at 179-80 (physical taking for public use).

114. Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327, 1331 (1977) (property rendered valueless and unsaleable by pre-condemnation activities).

115. *See, e.g., PruneYard*, 447 U.S. at 83-84 (allowing freedom of expression and right to petition on private shopping center property does not sufficiently impair value to be considered a taking). *But see Loretto*, 458 U.S. at 434-37 ("Constitutional protection for the rights of private property cannot be made to depend on the size of the area occupied.").

116. *Kirby Forest*, 467 U.S. at 15 (footnotes omitted).

nomic consideration—that of any "reciprocal benefits" which accrue to the property as a result of regulation.[117] The ordinance involved in *Agins v. Tiburon*[118] restricted density to between one and five single family residences per five acres of land.[119] In determining reciprocal benefits, the *Agins* Court noted:

> The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellant's [five]-acre tract is the only property affected by the ordinance. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that appellants might suffer.[120]

Community-wide growth control regulations are likely to create precisely the type of reciprocal benefits discussed in *Agins* and other cases. Purchasers of homes in growth-control communities presumably enjoy a benefit in terms of reduced traffic, crowding and community character; such benefits are likely to be reflected in the purchase price received by the developer. Such regulation may thus indirectly result in an economic windfall to the developer.

3. Reasonable investment-backed expectations

The significance which must be afforded the landowner's reasonable investment-backed expectations is not well defined by the case law.[121] Despite the terminology, this phrase does not authorize consideration of the purely subjective expectations of the landowner or developer. The relatively narrow scope of the analysis of investment-backed expectations in takings cases is suggested by the Supreme Court in *Kirby Forest Industries v. United States*:[122]

> Under some circumstances, a land-use regulation that severely interfered with an owner's "distinct investment-backed expec-

117. *See, e.g., Agins*, 447 U.S. at 262; *Penn Cent.*, 438 U.S. at 134-35.

118. 447 U.S. 225 (1980).

119. *Id.* at 257.

120. *Id.* at 262.

121. *See Kaiser Aetna*, 444 U.S. at 175; *Penn Cent.*, 438 U.S. at 124; Park Avenue Tower Assocs. v. City of New York, 746 F.2d 135, 139 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985); Sussna, *The Concept of Highest and Best Use Under Takings Theory*, 28 URB. LAW. 113, 113-35 (1984).

122. 467 U.S. 1 (1984).

> tations" might precipitate a taking. . . . The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of "the advantage of living and doing business in a civilized community," some are so substantial and unforeseeable, and can so easily be identified and redistributed, that "justice and fairness" requires that they be borne by the public as a whole.[123]

The case law emphasizes that interference with settled expectations must be substantial and unforeseeable, and also that the expectations must be reasonable.[124] In areas subject to extensive, ongoing regulation, there can seldom be a reasonable expectation that current rights will remain inviolate against future regulation.[125] There are clearly few areas as subject to extensive ongoing regulation as land use.

The limitation on the doctrine of distinct investment-backed expectations is constitutionally based. The takings clause protects property, not expectations.[126] While the notion of property includes a variety of legal rights going beyond the right of mere physical possession,[127] no court yet has recognized a property interest created solely by the unilateral acts or declaration of the owner. The zone of protected property interests has been confined to settled expectations, usually based on state property laws.

In *Penn Central Transportation Co. v. New York City*,[128] the Supreme Court acknowledged the relationship between property rights and constitutionally cognizable expectations by noting past cases in which takings claims were dismissed on the ground that, "while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expec-

123. *Id.* at 14 (citations omitted).

124. *See Ruckelshaus*, 467 U.S. at 1005-07.

125. *See, e.g., Connolly*, 475 U.S. at 226-27 (employers had no reasonable expectation that regulations involving pension plans would not be changed in manner which imposed substantial additional liabilities); *Ruckelshaus*, 467 U.S. at 1006-07 (no reasonable investment-backed expectation that data submitted to the Environmental Protection Agency would be kept confidential); Atlas Corp. v. United States, 895 F.2d 745, 758 (9th Cir.) (regulation of nuclear industry), *cert. denied*, 111 S. Ct. 46 (1990); Pace Resources v. Shrewsbury Township, 808 F.2d 1023, 1033 (3d Cir. 1987) ("[D]istinct, investment-backed expectations are reasonable only if they take into account the power of the state to regulate in the public interest.").

126. Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980); *Pace Resources*, 808 F.2d at 1033.

127. See *supra* notes 105-08 and accompanying text for a discussion of property rights other than physical possession.

128. 438 U.S. 104 (1978).

tations of the claimant to constitute 'property' for Fifth Amendment purposes."[129] While the takings analysis may leave some room for recognition of legal rights and mutual understandings beyond those which are traditionally deemed property, it does not authorize a landowner to unilaterally redefine property rights or limit governmental prerogatives on the basis of purely subjective expectations. A landowner's investment-backed expectations are thus significant, or reasonable, only when they are consistent with settled legal understandings, usually based on state law.[130]

In the 1990s, difficulty arises in arguing that enactment of growth control regulations interferes with reasonable investment-backed expectations. Twenty years ago landowners may have argued that time-related growth restrictions were sufficiently beyond the pale of foreseeable zoning regulation to defy the reasonable expectations of developers. Such an argument has no merit today. Growth control measures have been common since the 1970s. A developer who buys or holds land for future development in any urbanizing area must be deemed to do so with the knowledge that local government agencies may adopt growth management regulations.[131]

III. SUBSTANTIVE DUE PROCESS

Substantive due process[132] analysis is based on the notion that the powers of government, broad as they may be, are subject to limits.[133] Exercises of the government's police power are valid only as long as they are rational and serve some colorable public interest.[134] The test for substantive due process is, at least on the surface, essentially the same as the

129. *Id.* at 124-25.

130. Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (property rights "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law."). *See, e.g., Ruckelshaus*, 467 U.S. at 1001; *Webb's Fabulous*, 449 U.S. at 161.

131. Developers may protect themselves from the effects of future regulations through negotiation of development agreements or similar devices in some states. *See, e.g.*, CAL. GOV'T CODE § 65865 (West 1983). In the absence of such agreement, it appears that a developer normally will have no vested right to build even an already approved project free from the time restrictions imposed by new growth control measures, unless such projects are specifically exempted. *See* Pardee Constr. Co. v. City of Camarillo, 37 Cal. 3d 465, 471-73, 690 P.2d 701, 705-06, 208 Cal. Rptr. 228, 232-33 (1984).

132. *See* U.S. CONST. amends. V, XIV, § 1.

133. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 367, 372-73 (1976); E. BARRETT, W. COHEN & J. VARAT, CONSTITUTIONAL LAW 551-52 (1989).

134. *Village of Euclid*, 272 U.S. at 367, 372-73.

first prong of the *Agins v. Tiburon*[135] test for regulatory takings.[136] A regulation will be upheld against a substantive due process challenge unless it is found "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[137]

To challenge a governmental action or regulation on substantive due process grounds successfully, the plaintiff thus must plead and prove that the government action is wholly arbitrary and capricious or irrational, or utterly fails to serve any legitimate purpose.[138] This test is applied with extreme deference to both the policy judgments of elected legislative bodies, and the means chosen to implement legislative goals.[139] The regulations are presumed valid, and will be upheld if their relationship to legitimate goals is "fairly debatable."[140] Some federal circuits appear to impose an even stricter standard, requiring the plaintiff to show virtually malicious or intentionally arbitrary governmental conduct.[141] Governmental conduct does not violate substantive due process simply because it is mistaken, violative of state or local laws, or relies on bad assumptions or information.[142] Gross violations of local or state laws, such as the imposition of impermissible special conditions or denial of ministerial permits, may, however, amount to arbitrary and capricious conduct.[143] Such cases, however, generally involve specific arbitrary acts directed at particular property owners, rather than the enactment or enforcement of general regulations.

The leading due process case on growth control regulations, *Con-*

135. 447 U.S. 255 (1980).

136. *See supra* notes 41-44 and accompanying text.

137. *Village of Euclid*, 272 U.S. at 395; *see also* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (zoning ordinance that injured plaintiff's property and did not promote city general welfare violated fourteenth amendment).

138. Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1577 (11th Cir. 1989); Nelson v. City of Selma, 881 F.2d 836, 839 (9th Cir. 1989); Pace Resources v. Shrewsbury Township, 808 F.2d 1023, 1034-35 (3d Cir. 1987).

139. *See Nectow*, 277 U.S. at 185; *Nelson*, 881 F.2d. at 839.

140. *Nelson*, 881 F.2d at 839; *accord* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

141. Coniston v. Village of Hoffman Estates, 844 F.2d 461, 467-68 (7th Cir. 1988); Burrell v. City of Kanakee, 815 F.2d 1127, 1129 (7th Cir. 1987); Chiplin Enter. v. City of Lebanon, 712 F.2d 1524, 1527 (1st Cir. 1983).

142. Harding v. County of Door, 870 F.2d 430, 431-32 (7th Cir.) (erroneous interpretation of state law), *cert. denied*, 110 S. Ct. 154 (1989); Creative Env'ts v. Estabrook, 680 F.2d 822, 833-34 (1st Cir.) (noncompliance with state or local regulations not basis for substantive due process claim), *cert. denied*, 459 U.S. 989 (1982).

143. Bateson v. Geisse, 857 F.2d 1300, 1303-04 (9th Cir. 1988) (city council's singling out of individual deemed arbitrary and thus violative of substantive due process); Littlefield v. City of Afton, 785 F.2d 596, 606 (8th Cir. 1986) (imposition of unconstitutional condition on grant of permit violated substantive due process).

struction Industry Association v. City of Petaluma,[144] suggests that substantive due process attacks are extremely unlikely to succeed in most cases. The ordinance challenged in *Petaluma* was a classic growth control system which restricted the issuance of building permits for new residential projects to five hundred units per year.[145] Projects involving four or fewer housing units were exempt from the regulations.[146] The Ninth Circuit had no difficulty identifying a legitimate public purpose for the regulations—that of avoiding "uncontrolled and rapid growth," and its attendant adverse consequences in terms of increased traffic, noise, loss of community character and other factors which also have been summarized as the "quality of life."[147]

The *Petaluma* court also rejected a number of other arguments commonly advanced in growth control litigation, and emphasized the narrow scope of substantive review permitted under the federal due process clause.[148] The Ninth Circuit specifically rejected the argument that regulations could be challenged on the ground that they had an exclusionary purpose, or other undesirable side effects.[149] The court similarly rejected the argument that the regulations violated substantive due process because they failed to address perceived regional housing needs or other competing public concerns: "[T]he federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests."[150] The decision thus also clearly rejected the use of a "regional welfare" standard employed by some state courts,[151] as the measure of legitimate public purposes. The court stated: "If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to

144. 522 F.2d 897 (9th Cir. 1976).

145. *Id.* at 901.

146. *Id.*

147. *Id.* at 906; *see also* Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 245 (1st Cir. 1990) (zoning regulation's purpose to lessen congestion, prevent overcrowding, provide adequate light and air deemed legitimate public purpose).

148. *Petaluma*, 522 F.2d at 906.

149. *Id.*

150. *Id.* at 908.

151. *See, e.g.*, Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 601, 557 P.2d 473, 483, 135 Cal. Rptr. 41, 51 (1976) (constitutionality of zoning restriction which significantly affects residents of surrounding communities must be measured by its impact not only on welfare of enacting community, but also on welfare of surrounding region); Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 204-05, 456 A.2d 390, 415 (1983).

intervene and adjust the system."[152]

The *Petaluma* decision reflects the difficulties facing any substantive due process challenge to growth management regulations. The federal constitution does not require growth control restrictions to be linked to specific resource or infrastructure constraints—such as lack of adequate roadways, schools, water supplies or other essential services—to be valid. More general "quality of life" objectives will almost invariably provide the legitimate public purposes necessary to sustain growth control plans against general facial attacks. Such quality of life objectives have been found legitimate in numerous cases.[153] The means adopted by growth control regulations—restricting growth—are clearly one means of substantially advancing these public objectives, and therefore possess the rational relationship to their lawful goals which is necessary to survive constitutional scrutiny.

If landowners are to challenge growth management regulations successfully on substantive due process grounds, they will have to address narrower issues. Growth control measures which purport to be based solely on resource constraints or other narrow grounds may be vulnerable. Scarcity of resources, such as water supplies or sewage treatment capacity, are normally constitutionally permissible grounds for restricting development.[154] Factual questions may arise, however, as to whether the purported scarcity actually exists. A development ban based solely on purported water shortages, for example, may not be valid where abundant water is, in fact, available and being given freely to other users.[155] Regulations cannot be deemed substantially to advance any legitimate

152. *Petaluma*, 522 F.2d at 908.

153. *See, e.g.*, *Agins*, 447 U.S. at 261 (preservation of open space, prevention of premature urbanization); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (preservation of quiet, healthy community character); Barancik v. County of Marin, 872 F.2d 834, 837 (9th Cir.) (preservation of agriculture and "bucolic atmosphere"), *cert. denied*, 110 S. Ct. 242 (1989); *Pace Resources*, 808 F.2d at 1030 ("Controlling the rate and character of community growth is the very objective of land use planning . . . ."); Giuliano v. Town of Edgarton, 531 F. Supp. 1076, 1080-85 (D. Mass. 1982) (insure adequate provision of municipal services and orderly development beneficial to community as a whole); Dateline Builders v. City of Santa Rosa, 146 Cal. App. 3d 520, 528-30, 194 Cal. Rptr. 258, 265 (1983) (deterrence of leapfrog development patterns).

154. *See, e.g.*, Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1383-84 (D. Md. 1975) (growth moratoria implemented on ground of inadequate sewer service permissible so long as pursuant to comprehensive plan for improvement of sewer system); Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (development demand may be impeded where growth restrictions are imposed pursuant to well reasoned comprehensive plans for improvement of physical infrastructure of region), *appeal dismissed*, 409 U.S. 1003 (1972).

155. Lockary v. Kayfetz, 917 F.2d 1150, 1155-56 (9th Cir. 1990).

public interest in such cases if there is no actual or threatened shortage or resulting threat to the public welfare. The significance of this rule for planning jurisdictions with general police powers may be limited. As long as development regulations are based, at least in part, on larger quality of life concerns, they should remain largely immune from substantive due process challenge under the federal constitution.[156] Limitations upon the rate or amount of further development will by definition further the purposes of preserving existing community character or aesthetics, open space, or other legitimate values.

Substantive due process claims might also challenge the methods by which building permits or other entitlements are issued under a growth management ordinance. Growth management systems rely on a variety of procedures for allocating development permits. Such procedures vary from simple first-come-first-serve systems through elaborate procedures, often dubbed "beauty contests," in which competing development

156. Growth control regulations often set forth a statement of purposes and corollary findings in recitals or preambles. This frequently facilitates summary adjudication of substantive due process challenges, since the public objectives and rationality of the means chosen can be ascertained from the face of the regulations. However, landowners may also seek to capitalize on these statements of purpose by questioning the factual basis for any included legislative findings, by insisting that only those objectives specifically set forth in the recitals be considered, or by alleging that the stated purposes are simply a sham, intended to conceal impermissible (usually elitist) ulterior motives.

Whether alleged subjective motives may be considered in a due process attack on an ordinance or other legislative act is questionable. Legislative motives are generally relevant only in cases of discrimination. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-66 (1977). Where the governmental action furthers legitimate governmental purposes, the subjective motive of the decision-makers, absent racial animus or other expressly prohibited conduct, is irrelevant. *Smithfield*, 907 F.2d at 245 (not province of court to monitor input into each legislative decision). Some basic logic exists in this position. First, if the action furthers some legitimate public interest, it is necessarily within the scope of the police power. The fact that it was done for the wrong reasons does not render the act *ultra vires*. Stated in other terms, if the public benefits, it is immaterial that it benefits out of spite.

Conversely, courts may also consider other purposes beyond those expressly stated on the face of regulations. However, where a valid purpose and reasonable means are apparent from the face of the action, a landowner is not entitled to a full trial on the "real reasons" for governmental action. Northside Sanitary Landfill v. City of Indianapolis, 902 F.2d 521, 522 (7th Cir. 1990).

A number of decisions indicate that improper motives may be considered in determining whether individual permit or zoning decisions violate substantive due process. *See, e.g., Greenbriar*, 881 F.2d at 1579 n.18 (personal animosity); Haskell v. Washington Township, 864 F.2d 1266, 1277 (6th Cir. 1988) (desire to suppress abortion clinic); Brady v. Town of Colchester, 863 F.2d 205, 217 (2d Cir. 1988) (decisions motivated by desire to suppress free speech or engage in political retaliation); Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1427-28 (8th Cir. 1986) (retaliation for resort to courts); Wilkerson v. Johnson, 699 F.2d 325, 328-29 (6th Cir. 1983) (bias in issuance of barbershop license). Such cases, however, involve the singling out of individuals and their property for allegedly arbitrary treatment, an element not likely to be present in the enactment of general zoning regulations.

projects are ranked and granted priority on the basis of various merit criteria adopted by the local government.[157] Other systems rely on the phasing of growth geographically, in accordance with development patterns ordained by a general plan or infrastructure development plans.[158] These allocation systems conceivably may be attacked on the ground that they are arbitrary, irrational or utterly fail to further their professed purposes. A merit allocation system which rates competing developments upon criteria having no tangible bearing on the public welfare would not likely withstand substantive due process review.[159] Where the selection criteria tend to further any legitimate government goal, however, due process is not offended.

The application of growth control regulations may also at times engender substantive due process claims. Developers who are unsuccessful in obtaining permits through allocation systems may feel that the selection criteria or the system itself have been applied unfairly or arbitrarily in practice. Such claims, however, will probably fall under the rules applicable to individual permit challenges which limit review to the question of whether the decisionmaker could have any reasonable basis under the relevant criteria for denial,[160] they should not affect the validity of the parent regulations themselves.

IV. RELATIONSHIP BETWEEN TAKINGS AND SUBSTANTIVE DUE PROCESS

The relationship between takings analysis and substantive due process analysis is less than clear in the existing case law. Efforts either to reconcile or explain the two constitutional theories in the context of land use litigation have spawned a variety of analyses, and in some cases vari-

157. *See, e.g.*, Pacifica Corp. v. City of Camarillo, 149 Cal. App. 3d 168, 172-73, 196 Cal. Rptr. 670, 673 (1983).

158. *See, e.g., Ramapo*, 30 N.Y.2d at 366-67, 285 N.E.2d at 294-95, 334 N.Y.S.2d at 142-43.

159. Examples of such regulations might be rating systems which rank development projects based upon the applicant's performance in a dance contest before the city council, loyalty to a local athletic team, the political affiliation of the property owner, or other matters unrelated to proper police power regulation.

In addition, selection criteria which relate exclusively to benefits conferred on neighboring residents or other narrow private interests may be suspect. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14 (1922) (coal mining regulations which benefitted only overlying private landowners held a taking). *But see Nelson*, 881 F.2d at 840 (local neighborhood concerns properly considered in rejecting zoning application).

160. *See, e.g., Bateson*, 857 F.2d at 1303 (arbitrary denial of building permits); Scudder v. Town of Greendale, 704 F.2d 999, 1002-03 (7th Cir. 1983) (building permits properly rejected); Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347, 1352 (11th Cir. 1983) (subdivision plat denied upon basis of criteria not authorized by applicable regulations).

ous hybrids complete with a new vocabulary of their own.[161]

Arguably, takings analysis should not address the propriety of governmental regulations at all, but merely whether the damage is sufficient to amount to a taking. Under such an approach, the first prong of the *Agins v. Tiburon*[162] test—whether the regulation substantially advances legitimate state interests[163]—would be treated simply as a substantive due process issue. This is consistent with the role of substantive due process as essentially a check on the legitimacy or validity of exercises of the police power, and would reserve takings analysis for the question of whether property has been damaged to the extent that compensation is required. It is also consistent with the express language of the fifth amendment, which provides for compensation only where property is taken "for public use."[164] While regulations which fail to further any legitimate public purpose may well violate the constitution, it cannot logically be said that such regulations take property for the public benefit.

Nevertheless, it appears that due process considerations are too deeply imbedded in takings jurisprudence to permit a withdrawal now. The Supreme Court stared the issue in the face in *Williamson County Regional Planning Commission v. Hamilton Bank*[165] and walked away leaving both species of claims intact.[166] The *Williamson County* decision further suggests that if push comes to shove, the Supreme Court would prefer to abolish substantive due process as an independent claim rather than limit the two prong *Agins* test for takings. The Supreme Court, indeed, has recently indicated a willingness to eliminate substantive due process as the all-purpose constitutional tort it has become, and limit substantive due process claims to those cases where no colorable independent constitutional guarantees applied.[167]

Elimination of either the first prong of *Agins* or substantive due process as an independent cause of action likely would simplify land use cases, at the possible expense of lively ongoing academic debate. Despite the similarities between substantive due process analysis and analysis

161. *See, e.g.*, Eide v. Sarasota County, 908 F.2d 716, 721-22 (11th Cir. 1990) (distinguishing "arbitrary and capricious due process" claim from "due process takings claim"); Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 242 (1st Cir. 1990) (distinguishing substantive due process claims from classic due process claims).

162. 447 U.S. 255 (1980).

163. *See supra* notes 41-48 and accompanying text.

164. U.S. CONST. amend V.

165. 473 U.S. 172, 197-200 (1984).

166. *See id.*

167. *See* Graham v. Connor, 109 S. Ct. 1865, 1870-71 (1989) ("validity of claim must be judged by reference to the specific constitutional standard which governs the right, rather than to some generalized . . . standard").

under the reasonable basis branch of the takings test, there are significant practical differences in the way such cases must be litigated. These practical considerations include questions of ripeness, statutes of limitations and measure of damages, all of which may have major tactical implications in any given case. These differences are discussed further in later sections.[168] There is, however, also a substantial question as to whether the applicable standards for review under the due process and takings clauses of the Constitution are in fact the same.

A. Are the Standards for Due Process and Takings the Same?

In *Williamson County* the Supreme Court explained substantive due process, in the land use context, as resting on the theory that "regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment."[169] It went on to explain that the remedy in such cases is invalidation of the overreaching regulations, and "if authorized and appropriate, actual damages."[170] Under this theory, regulatory takings and substantive due process claims are co-extensive, and the only distinction is in the choice of remedy.

There are, however, other bases for substantive due process claims. Not every government regulatory action which fails to advance some legitimate governmental purpose logically can be equated with a taking. The courts commonly have employed the terms "arbitrary," "capricious," or similar terms of condemnation for the type of government action which violates the substantive limitations of the due process clause.[171] Some federal circuits have suggested that even more is required to recover damages under a substantive due process theory. These courts require a showing that the governmental action was virtually willful or malicious in nature.[172] Under such a standard, a land-

168. *See infra* notes 181-257 and accompanying text.

169. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 197 (1984).

170. *Id.*

171. *See, e.g.*, Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1577 (11th Cir. 1989) ("[A] deprivation of a property interest is of constitutional stature if it is undertaken ' "for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis." ' " (citations omitted)); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) ("Thus, by 'arbitrary and unreasonable' . . . we meant invidious or irrational."); Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir. 1988) (" 'a deprivation must contain some element of abuse of governmental power, for the "touchstone of due process is protection of the individual against arbitrary action of the government" ' " (citations omitted)).

172. *See, e.g.*, Chongris v. Board of Appeals of Andover, 811 F.2d 36, 43 (1st Cir.) (no

owner will likely find that he or she faces a lesser burden of proof by attacking the government actions on a takings theory.

The Supreme Court also has clouded the waters recently with language found in *Nollan v. California Coastal Commission*.[173] At issue in *Nollan* was whether the California Coastal Commission could condition the granting of a permit to rebuild the Nollan's residence upon the Nollans agreeing to provide the public with an easement across their beachfront property.[174] The Court held that, on the facts of the case, the permit condition did not further the governmental purpose advanced as justification for the condition—offsetting the visual impacts of development to inland viewers,[175] thus the state would have to pay for the access.[176] A footnote in *Nollan* suggests that the *Agins* formulation—that government regulations substantially advance legitimate state interests—may mandate a more stringent level of judicial review than afforded under traditional substantive due process review.[177] The Court stated:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the legitimate state interest sought to be achieved . . . not that "the state 'could rationally have decided' the measure adopted might achieve the State's objective."[178]

The dissent vigorously disagreed, arguing that the two tests have historically been co-extensive.[179] It is unclear whether the comments in *Nollan*'s footnote three are intended to apply outside the particular subarea of takings analysis at issue in the *Nollan* case. The comments are also dicta, and arguably do more to pose the question than answer it. Nevertheless, they have been greeted as evidence in some circles that significantly less deference will be afforded in the future to government judgments as to what means are permissible for pursuing zoning

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evidence of "malice, ill will or corrupt motive" or "egregious official behavior"), *cert. denied*, 483 U.S. 1021 (1987); Chiplin Enters. v. City of Lebanon, 712 F.2d 1524, 1527 (1st Cir. 1983) ("improperly motivated" denial insufficient; "additional factors might give rise to genuine constitutional issues;" examples given include racial discrimination and retaliation for exercise of first amendment rights).

173. 483 U.S. 825 (1987).

174. *Id.* at 831.

175. *Id.* at 836-37.

176. *Id.* at 841-42.

177. *Id.* at 834-35 n.3.

178. *Id.* (citations omitted).

179. *Id.* at 843-44 n.1 (Brennan, J., dissenting).

objectives.[180]

It is too early to tell whether the dicta of *Nollan*'s footnote three will blossom into a new standard of review distinguishing takings and substantive due process claims. If this proves to be the case, governmental agencies will likely be required to expend greater efforts justifying challenged land use regulations, including growth control restrictions, in future litigation.

B. Procedural Differences Between Takings and Due Process Claims

Pleading a claim on a taking or substantive due process theory may have significant procedural implications. The most important of these is that future takings claims will almost always be relegated to state courts due to the federal ripeness requirement. Other considerations beyond forum shopping, such as availability of monetary damages and statutes of limitations, may be significant strategic considerations. The following sections summarize the more significant procedural differences between takings and substantive due process claims.

1. Ripeness

Both takings and substantive due process challenges face a most formidable procedural obstacle in the "ripeness" doctrine set forth by the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank*.[181] In *Williamson County*, the plaintiff developer spent eight years attempting to secure approvals of subdivision plans.[182] Ultimately, after a series of changes in the zoning regulations and revisions to the plan, the plaintiff was unable to secure approvals for the desired density on part of the property.[183] The Supreme Court dismissed the plaintiff's takings claim as not ripe for review, citing the lack of any "final decision" regarding the level of development to be allowed, and the failure of the plaintiff to first seek just compensation through available state procedures.[184] The plaintiff's substantive due process claim was similarly dismissed as not ripe for lack of a "final decision."[185] The ripeness requirements of *Williamson County* and subsequent Supreme Court

180. *Id.* at 834-35.
181. 473 U.S. 172 (1985).
182. *Id.* at 176-82.
183. *Id.* at 181-82.
184. *Id.* at 186-96.
185. *Id.* at 199-200. The Court explained that resolution of the question depends on an analysis of the effect of the Commission's application of the zoning ordinance on the property and profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. *Id.*

cases[186] have, in the words of one federal appellate court, "erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards."[187] Aside from its jurisdictional basis, this doctrine serves the rather sensible purpose of preventing premature litigation of cases involving only speculative future damages, rather than concrete injuries to landowners.

a. state compensation remedies

Exhaustion of available state remedies is not ordinarily required in actions brought in federal courts to enforce constitutional rights.[188] The requirement for exhaustion of state remedies in takings cases, however, derives from the particular wording of the fifth amendment. As explained in *Williamson County*, "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[189] From this, the Supreme Court has reasoned that "a

186. *See, e.g.*, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

187. Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1988). Cases addressing the ripeness issues include: Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990); East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n, 896 F.2d 1264 (11th Cir. 1990); Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989); St. Clair v. City of Chico, 880 F.2d 199 (9th Cir.), *cert. denied*, 109 S. Ct. 1557 (1989); Greene v. Town of Blooming Grove, 879 F.2d 1061 (2d Cir. 1989); Landmark Land Co. of Oklahoma v. Buchanan, 874 F.2d 717 (10th Cir. 1989); Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988); Unity Ventures v. County of Lake, 841 F.2d 770 (7th Cir.), *cert. denied sub nom.* Alter v. Schroeder, 488 U.S. 891 (1988); Lai v. City & County of Honolulu, 841 F.2d 301 (9th Cir.), *cert. denied*, 488 U.S. 994 (1988); Austin v. City & County of Honolulu, 840 F.2d 678 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988); Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988), *cert. denied*, 488 U.S. 851 (1989); Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir.), *modified*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); Cassettari v. Nevada County, Cal., 824 F.2d 735 (9th Cir. 1987); Kinzli v. City of Santa Cruz, 818 F.2d 1449 (9th Cir. 1987), *modified on other grounds*, 830 F.2d 968, *cert. denied*, 484 U.S. 1043 (1988); Norco Constr. v. King County, 801 F.2d 1143 (9th Cir. 1986); McMillan v. Goleta Water Dist., 792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987); Zilber v. Town of Moraga, 692 F. Supp. 1195 (N.D. Cal. 1988).

188. Patsy v. Florida Bd. of Regents, 457 U.S. 496, 502 (1982). This general rule does not apply uniformly to procedural due process claims. In such cases, the inadequacy of state procedures is an element of the claim itself. *See id.* at 505. However, a number of federal courts have reasoned that, where adequate state legal remedies exist, the only process that is due is provided by state law. *See* Huron Valley Hosp. v. City of Pontiac, 887 F.2d 710, 716 (6th Cir. 1989); *Lake Nacimiento*, 841 F.2d at 879-80 (procedural due process claims properly denied due to adequate state remedy); Bello v. Walker, 840 F.2d 1124, 1128 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988); Chongris v. Board of Appeals of Andover, 811 F.2d 36, 40, 43 (1st Cir.) (no procedural due process claim where revoked permits had been restored through state court), *cert. denied*, 483 U.S. 1021 (1987); Arroyo Vista Partners v. County of Santa Barbara, 732 F. Supp. 1046, 1050-51 (C.D. Cal. 1990).

189. *Williamson County*, 473 U.S. at 194.

property owner has not suffered a violation of the just compensation clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation . . . ."[190]

The state remedies requirement only applies where state compensation procedures existed at the time of the taking.[191] Since the Supreme Court, in *First English Evangelical Lutheran Church v. Los Angeles County*,[192] declared money damages to be the constitutionally mandated remedy for takings,[193] damages are now universally available in inverse condemnation actions in state courts. The net effect of *Williamson County* is thus effectively to require takings claims to be brought in state courts..

The state compensation remedies requirement of *Williamson County* does not apply to substantive due process claims.[194] Plaintiff landowners desiring a federal forum may, therefore, be required to bring their claims solely on a substantive due process theory. Some federal courts, however, have suggested that the availability of adequate state judicial remedies may be a factor in determining whether alleged violations of substantive due process are of sufficient magnitude to justify federal intervention. The Seventh Circuit has stated that "in addition to showing that the decision was arbitrary and irrational, the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies."[195] The reasoning supporting this requirement is similar to that applied in procedural due process cases—constitutional due process requirements are satisfied if redress is fully available at the state level.

b. final decision ripeness

The second major obstacle to litigation of takings and substantive due process claims is the final decision requirement of *Williamson County*.[196] Unlike the state compensation doctrine, this requirement also applies to substantive due process claims.[197]

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190. *Id.* at 195; *accord Austin*, 840 F.2d at 680-81; *Cassettari*, 824 F.2d at 737-38.

191. Lockary v. Kayfetz, 917 F.2d 1150, 1153-54 (9th Cir. 1990); *Hoehne*, 870 F.2d at 533-34; Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1516-20 (11th Cir. 1987).

192. 482 U.S. 304 (1987).

193. *Id.* at 316.

194. Sinaloa Lake Owners Ass'n v. Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989).

195. Polenz v. Parrott, 883 F.2d 551, 558-59 (7th Cir. 1989).

196. *Williamson County*, 473 U.S. at 186.

197. *Id.* at 199-200; Herrington v. County of Sonoma, 857 F.2d 567, 569 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); *Unity Ventures*, 841 F.2d at 775.

The doctrine requires that the landowner make an actual attempt to develop, or make other reasonable use of, the land under the existing zoning regulations before challenging an alleged governmental failure to permit reasonable use.[198] The landowner must actually file at least one "meaningful" development application and pursue the application to some formal decision.[199] In addition, if any variances or other exceptions to the regulations are available, the owner must apply for the variance and receive a denial.[200] In takings claims, the rejection of a single large-scale or "grandiose" development plan does not count as a "final decision."[201] In such cases, no basis exists for determining that reasonable development will be denied. The landowner's remedy is simply to apply for approval of less ambitious development plans, or seek changes in the applicable regulations.[202] A single denial, however, may in some circumstances be ripe for review under a substantive due process theory.[203]

The cases have recognized that the reapplication requirement of *MacDonald, Sommer & Frates v. County of Yolo*[204] may be excused where further applications would clearly be futile.[205] The Ninth Circuit, which has issued by far the greatest number of opinions on ripeness issues, has held that the futility exception may only be invoked where at least one "meaningful" application has been filed and formally denied.[206] While it is not clear whether other federal circuits will follow a strict application of this rule, it is clear that the threshold requirements for demonstrating the futility of pursuing normal application procedures are high.[207] At least one case has suggested in dicta that futility may be established if the government's response to an application is unreasonably delayed.[208] It appears, however, that the period of delay would have to be very substantial. In *Norco Construction v. King County*,[209] the al-

198. *Williamson County*, 473 U.S. at 187.

199. *Id.* at 187-88.

200. *Id.* at 188-90; Tahoe-Sierra Preservation Council v. State Regional Planning Agency, 911 F.2d 1331, 1336-37 (9th Cir. 1990).

201. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351, 352-53 n.8 (1986).

202. *Id.* at 352-53.

203. *See, e.g., Herrington*, 857 F.2d at 570.

204. 477 U.S. 340 (1986).

205. *See, e.g., Tahoe Sierra*, 911 F.2d at 1336-37; *Hoehne*, 870 F.2d at 534-35.

206. *See, e.g., Kinzli*, 818 F.2d at 1454-55.

207. *See Landmark Land*, 874 F.2d at 722; *Unity Ventures*, 841 F.2d at 776.

208. *Norco Constr.*, 801 F.2d at 1145 ("[A] claim might also arise when it is clear beyond peradventure that excessive delay in such a final determination has caused the present destruction of the property's beneficial use.").

209. 801 F.2d 1143 (9th Cir. 1986).

leged period of wrongful delay was five years.[210] In *McMillan v. Goleta Water District*,[211] the case was not deemed ripe until eight years after a moratorium was invoked.[212] Similarly, in *Williamson County*, the Supreme Court found the case unripe eight years after initial applications were filed.[213]

Significantly, final decision ripeness requirements are deemed not to apply to facial challenges.[214] This is consistent with the theory of such actions—that the mere enactment of the challenged regulation in and of itself prohibits all possible economically viable use, or is an arbitrary and unlawful exercise of police power.[215] Nevertheless, the scope of such a challenge is limited.[216] Ripeness considerations will preclude a facial takings challenge if the effect on specific properties cannot be determined from the face of the regulations.[217] Similarly, where a plaintiff seeks to challenge regulations on the grounds that they may be arbitrarily applied, the case is not ripe until the challenged provisions actually are applied to the plaintiff.[218] A facial substantive due process challenge, however, is normally ripe at the time of enactment, since the gravamen of such a complaint is that the regulations themselves lack any valid justification.[219]

Final decision ripeness requirements apply to both takings and substantive due process claims challenging the implementation of zoning regulations. Nevertheless, the final decision requirement may have a slightly different practical application to substantive due process claims. Specifically, two federal courts have suggested that the reapplication re-

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210. *Id.* at 1145-46.

211. 792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987).

212. *Id.* at 1457.

213. *Williamson County*, 473 U.S. at 171-82, 186.

214. Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 242 (1990); *Zilber*, 692 F. Supp. at 1200-01.

215. *Williamson County*, 473 U.S. at 199; *Smithfield*, 907 F.2d at 242-45.

216. *See supra* notes 92-96 and accompanying text.

217. *See* Pennel v. City of San Jose, 485 U.S. 1 (1988) (plaintiff's taking claim premature because plaintiff failed to avail himself of the provisions of ordinance permitting relief although plaintiff's facial substantive due process challenge was ripe for consideration); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293-95 (1981) (reversing trial court ruling that enactment of steep-slope provisions of Surface Mining Act effected a taking).

218. *Hodel*, 452 U.S. at 298-302 (court rejected challenge to enforcement provisions of Surface Mining Act based on claims that procedures were inadequate and could be arbitrarily applied).

219. *Pennel*, 485 U.S. at 8-9 (although plaintiff's taking claim premature because plaintiff failed to avail himself of the provisions of the ordinance permitting relief, plaintiff's facial substantive due process challenge was ripe for consideration); *Smithfield*, 907 F.2d at 242-44 (plaintiff need not apply for variance for zoning ordinance where alleging that ordinance itself is irrational).

quirement of *MacDonald* may apply differently to substantive due process claims.[220] These courts reasoned that it is not always essential to know the level of use that will ultimately be permitted in order to evaluate whether a current development decision is irrational or unrelated to any valid public objectives.[221] These cases are best understood for the limited proposition that a final administrative decision may be subjected to a form of facial challenge, where the only issue is whether the decision was arbitrary and capricious or otherwise invalid. Where the substantive due process claim is directed at the overall application of the regulatory scheme to the landowner's property, the case is not ripe until all reasonable possibilities of obtaining a constitutionally acceptable outcome have been exhausted.[222]

Under all circumstances, a due process attack may not be made against intermediate or interim decisions of local planning agencies. Denial of due process cannot be claimed if the plaintiff has "not exhausted the *process*."[223] The Supreme Court has stated: "Before a federal court may step in and ascertain whether a local planning authority has taken property arbitrarily, however, it must allow the local authority a chance to take final action."[224] At a minimum, there must be some final administrative decision to challenge.

c. application to growth control regulations

No published opinion has yet applied the ripeness requirements to a challenge to growth control regulations.[225] In growth control cases, the ultimate level of development which may be permitted is not usually an issue. The ultimate use is usually defined by general plans and zoning ordinances. Most growth control regulations also require the applicant to obtain necessary zoning, subdivision or development plan approvals before getting in line for building permits, thus eliminating any dispute about the permitted use of the land. The final decision which remains open, however, is *when* development will be permitted.[226]

220. *See Greenbriar*, 881 F.2d at 1576 n.11 (case ripe for review under due process theory when record demonstrates that no more intensive development would be allowed); *Herrington*, 857 F.2d at 570.

221. *Greenbriar*, 881 F.2d at 1576 n.11, 1578-80; *Herrington*, 857 F.2d at 570.

222. *See Williamson County*, 105 U.S. at 186.

223. *East-Bibb*, 896 F.2d at 1266 (failure to pursue state law procedures).

224. *Landmark Land*, 874 F.2d at 722.

225. In *Zilber v. Town of Moraga*, a federal district court applied the ripeness doctrine to dismiss as applied takings and substantive due process claims against a development moratorium ordinance. 692 F. Supp. 1195, 1200-02, 1207 (N.D. Cal. 1988).

226. See Pardee Constr. Co. v. City of Camarillo, 37 Cal. 3d 465, 470 n.6, 690 P.2d 701, 704 n.6, 208 Cal. Rptr. 228, 231 n.6 (1984) (distinguishing timing of development from traditional

In some systems—those using a straight "first-come, first-serve" system—the amount of delay may be ascertainable by relatively simple calculation. The issue of whether the period of anticipated delay is sufficient to violate constitutional standards thus would appear ripe for decision. Other ripeness questions may remain, however, such as whether the landowner has sought variances, exceptions or alternate development plans which might provide for more expeditious development. The same considerations should apply to growth management systems based on geographical phasing or phased development of infrastructure.

In merit ranking, lottery, or other systems involving annual allocations, ripeness is a major issue. Under such systems the denial of permits during one allocation cycle cannot be equated with a final decision denying development. The applicant remains free to reapply during the next cycle, until eventually permits are obtained. The reapplication requirements of *MacDonald* apply in these cases.

It is conceivable that repeated denials may eventually lead to a situation where the futility of pursuing further applications may be claimed, either because the length of delay already has been excessive, or because, as a practical matter, the criteria used by the system preclude issuance of a development permit to that particular applicant. It is certainly desirable to avoid situations in which one property owner has been singled out to bear an excessive portion of the burden imposed by the growth management system. As previously indicated, however, the unreasonable delay threshold for futility is long. In addition, quantifying damages in such cases carries substantial practical difficulties because damages are measured by the total length of delay. The Supreme Court's decisions have indicated a steadfast refusal to adjudicate when regulations have "gone too far" until it has been determined precisely how far the regulations go.[227]

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zoning restrictions for purposes of determining vested rights under growth control regulations). It is, of course, possible to imagine hybrid cases, in which the landowner contends that a taking results from a combination of overly restrictive use or density restrictions, and the delaying effects of a growth management program. Waiting a very long time to build a very small development may offend the constitution more than waiting a long time to build a large one. However, the ripeness doctrine necessarily requires some final decision on the level of permitted development, as well as timing.

227. *MacDonald*, 477 U.S. at 348. On the policy side, it can be said that it might be in the local government's interest to learn earlier rather than later that the threshold of permissible delay has been crossed, so that it may take corrective action before the damages for a temporary taking mount up. On the other hand, it is almost certain that allowing pre-final decision claims will result in a proliferation of such suits. It is likely that many of these suits would be commenced well before any level of delay that might be deemed a "taking" has occurred, simply in the hopes of "getting the attention" of the local government and exerting pressure to provide special treatment for the developer's project at the next allocation proceeding. Relaxa-

2. Statutes of limitations

Procedurally, plaintiff developers or landowners face another barrier—statutes of limitations. State court challenges to zoning and planning actions—at least those based on substantive due process grounds—are typically governed by extremely short statutes of limitations.[228] If these statutes apply, property owners may be faced with a swift choice between challenging the validity of the ordinances or taking their chances with the system.

On the other hand, statutes of limitations governing inverse condemnation claims may be considerably longer. For example, California's statute of limitations is five years.[229] It is unclear, however, whether these longer limitations periods will control when the claim is based on a specific zoning or permit decision, or whether the special statutes normally applicable to such actions will apply. Two California courts have held that the special statutes governing challenges to permit decisions controlled, and thus dismissed takings claims which were brought after the applicable ninety-day limitations period.[230]

Actions under section 1983,[231] whether in state or federal courts, are controlled by the statute of limitations generally applicable to tort cases in the state where suit is brought.[232] Statutes of limitations begin to run under section 1983 when the plaintiff " 'knows or has reason to know' " that a cause of action has accrued.[233] In a facial challenge, this time would appear to run from the date the challenged ordinance was adopted, at least where public notice of the action was given.[234] Where these time limits have passed, the plaintiff will generally be restricted to an as applied challenge to the regulations.

The time limits in as-applied challenges will normally run from the

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tion of the relatively bright-line final decision requirements may potentially create a situation in which the administration of growth management programs is effectively controlled by legal extortion. The principle losers in such a system would be those property owners who cannot afford or choose not to hire litigation counsel.

228. *See, e.g.*, CAL. GOV'T CODE § 65009 (West 1991) (90 days).

229. CAL. CIV. PROC. CODE §§ 318-319 (West 1982); *see* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1608, 270 Cal. Rptr. 337, 340 (1990).

230. Rossco Holdings v. State of California, 212 Cal. App. 3d 642, 658-59, 260 Cal. Rptr. 736, 744-45 (1989); California Coastal Comm'n v. Superior Court, 210 Cal. App. 3d 1488, 1495-98, 258 Cal. Rptr. 567, 569-71 (1989).

231. 42 U.S.C. § 1983 (1988).

232. Wilson v. Garcia, 471 U.S. 261, 266-71 (1985).

233. *Norco Constr.*, 801 F.2d at 1145 (quoting Trotter v. International Longshoremen's & Warehousemen's Union, 704 F.2d 1141, 1143 (9th Cir. 1983)).

234. *See* Barancik v. County of Marin, 872 F.2d 834, 835-36 (9th Cir.), *cert. denied*, 110 S. Ct. 242 (1989).

time that a final decision has been reached.[235] One federal court, however, has suggested that this time may be extended where the decision is first challenged in state court, reasoning that the decision is not truly final until the status of the property has been finally determined by the state court.[236]

3. Damages

a. takings

The fifth amendment demands that "just compensation" be the measure of damages for takings of private property.[237] Just compensation is generally measured by the fair market value of the property interests taken or destroyed by the government.[238] Where no means for establishing a fair market value exist, however, other means for determining fair and equitable compensation may be devised.[239]

For temporary takings, the kind which will normally be claimed in the growth control context, the measure of just compensation is the value of use during the period of taking, generally measured by fair market rental value.[240] Where the impermissible regulations diminished, but did not destroy the value of land, damages may also be measured as interest, or some other measure of return on the reduction in fair market value of the property caused by the unlawful restriction.[241]

The damages recoverable under a takings theory are limited in a number of respects. Just compensation is construed to require payment solely for the value of property interests taken.[242] Consequential damages—such as lost profits from anticipated sales or other lost opportunities; litigation costs, including attorneys' fees; and other incidental damages, such as relocation costs or lost operating expenses—may not be awarded absent some independent statutory basis for recovery.[243] Nor is

235. *See Norco Constr.*, 801 F.2d at 1145-46; *McMillan*, 792 F.2d at 1457.

236. Corn v. City of Lauderdale Lakes, 904 F.2d 585, 588 (11th Cir. 1990).

237. U.S. CONST. amend. V.

238. United States v. General Motors Corp., 323 U.S. 373, 379 (1945).

239. United States v. 564.54 Acres of Land, 441 U.S. 506, 512, (1979).

240. Yuba Natural Resources v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990) (citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987)).

241. Wheeler v. City of Pleasant Grove, 896 F.2d 1347, 1351 (11th Cir. 1987); Nemmers v. City of Dubuque, 764 F.2d 502, 504-05 (8th Cir. 1985).

242. *General Motors*, 323 U.S. at 379.

243. *Id.* at 379-80; *see also* United States v. Bodcaw Co., 440 U.S. 202, 203-04 (1979) (attorneys' fees and other indirect costs); *Yuba*, 904 F.2d at 1581 (lost profits from mining property); Hellenic Center v. Washington Metro. Area Transit Auth., 815 F.2d 982, 984 (4th Cir. 1987) (cost of appraisal fees and other costs incurred in response to abandoned condemnation effort).

the government required to pay compensation for any special values the land may have to the owner, such as its suitability for a particular use or other special circumstances.[244]

Prevailing in a takings case may have one undesirable effect from the property owner's perspective. If the entire property is deemed permanently "taken," then title logically must be forfeited to the government. In the wake of *First English Evangelical Lutheran Church v. County of Los Angeles*,[245] however, most landowners will likely prefer to seek damages for a temporary taking, and seek prospective relief through invalidation of the offending regulations.

It is unclear whether state courts will award monetary damages in all cases which arguably constitute takings under federal standards. Historically, a number of state courts held that, for policy reasons, damages were simply not an available remedy in takings claims.[246] In the wake of *First English,* these cases clearly no longer bar recovery of damages where the taking consists of an outright prohibition of use.[247] The question remains open as to whether state courts will find that damages are available for takings premised on the reasonable relationship prong of *Agins v. Tiburon*.[248] The problem is one of labelling. Not all claims which fall under the first *Agins* prong have been treated as takings by state courts.[249] The result is that some alleged takings claims may be

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Litigation costs are recoverable by statute in most courts. In actions brought under 42 U.S.C. § 1983 (1988), attorneys' fees may often be recovered pursuant to 42 U.S.C. § 1988 (1988).

244. *564.54 Acres*, 441 U.S. at 511.

245. 482 U.S. 304 (1987).

246. *See, e.g.*, Davis v. Puma County, 121 Ariz. 343, 345, 590 P.2d 459, 461 (1978), *cert. denied*, 442 U.S. 942 (1979); Agins v. City of Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd*, 447 U.S. 255 (1980); DeMello v. Town of Plainville, 170 Conn. 675, 679-80, 368 A.2d 71, 74 (1976). For a further discussion of the damages remedy in takings cases, see *Gould*, First English Evangelical Lutheran Church v. County of Los Angeles: *Compensation for Temporary Takings*, 48 LA. L. REV. 947, 954 (1988).

247. *See First English*, 482 U.S. at 321. *First English* unequivocally mandates payment of monetary compensation only in cases where literally all use of the property has been denied. At least one federal court has also held that damages are not constitutionally required where the taking consists of imposition of unlawful permit conditions or restrictions while the property retains some economically viable use. *See* Moore v. City of Costa Mesa, 886 F.2d 260, 263-64 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 2588 (1990).

248. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1990); *see supra* notes 41-48 and accompanying text.

249. *See, e.g.*, Presbytery of Seattle v. King County, 114 Wash. 2d 320, 329-30, 787 P.2d 907, 912 (taking occurs only where regulation infringes on "fundamental attribute of ownership" or "goes beyond preventing a public *harm* and actually enhances a publicly owned right in property," other constitutional violations must be treated as substantive due process claims), *cert. denied*, 111 S. Ct. 284 (1990).

treated as substantive due process claims by state courts, which may, in turn, drastically affect the availability of a damages remedy.

Moreover, most future takings litigation will likely occur in state courts because of federal ripeness rules. Substantial uncertainty remains as to whether damages will be available for all forms of alleged takings, or whether this remedy will be reserved for a narrower class of regulatory actions which result in near total destruction of property values.

b. substantive due process

In actions brought in federal courts under section 1983,[250] damages may be awarded for violations of substantive due process. The measure of damages under a due process theory is more flexible than under takings jurisprudence. Under due process, damages need not be measured by the fair market value of the affected property interest, but by the actual economic damage inflicted by the regulation.[251] Unlike takings cases, punitive damages may be awarded in due process cases involving "evil motive or intent" or particularly egregious violations.[252] As in takings cases, however, merely speculative damages, including alleged lost profits, may not be recovered.[253] While the net results will often be the same under a takings or substantive due process theory, substantially greater or lesser awards may be available in individual cases, depending upon the circumstances.

The availability of money damages for violations of substantive due process is quite another matter in state courts. Some state courts have expressly held that the remedy for violations of substantive due process is simply invalidation of the offending regulations.[254] In other states, governmental tort immunities, statutory or judicial, also may preclude damages awards.[255] Unlike the takings clause of the fifth amendment, a damages remedy is not specifically mandated by the due process clause of either the fifth or fourteenth amendments, or their counterparts in most

250. 42 U.S.C. § 1983 (1988).

251. *See, e.g.*, Herrington v. County of Sonoma, 834 F.2d 1488, 1505 (9th Cir. 1988) (reversing excessive damages award and limiting damages to loss of return on increased property value which would have accrued in absence of unlawful regulation), *cert. denied*, 489 U.S. 1090 (1989).

252. Smith v. Wade, 461 U.S. 30, 51 (1983); City of Newport v. Fact Concerts, 453 U.S. 247, 268 (1981); Front Royal & Watten County Indus. Park Corp. v. Town of Front Royal, 749 F. Supp. 1439, 1449 (W.D. Va. 1990).

253. *Herrington*, 834 F.2d at 1505 n.21.

254. *Presbytery of Seattle*, 114 Wash. 2d at 332, 787 P.2d at 913.

255. *See, e.g.*, CAL. GOV'T CODE § 818 (West 1980).

state constitutions.[256] Thus, substantive due process claims may, in some states, offer a viable damages remedy only if brought in federal courts, or under federal civil rights statutes.

An in-depth examination of state laws is beyond the scope of this Article. It should be clear, however, that the choice of pleading an action as a takings claim or substantive due process claim may be gravely affected by state law governing damages, as well as by the practical considerations governing litigation in federal courts.

V. CONCLUSION

Growth control regulations are a valid and constitutionally permissible exercise of the police power. A successful facial challenge to growth control regulations is conceivable only in the unlikely case where "growth control" regulations in fact amount to a long-term moratorium, or are drafted in a manner which is truly irrational. The application of growth control regulations also should not result in colorable takings or due process violations, provided that the regulations do not prevent reasonable use of affected lands for excessive periods. Constitutional attacks can be avoided by ensuring that the public purposes served by the regulations are clear and well-known; by avoiding interference with reasonable alternate or interim uses of affected property whenever this can be done consistent with the purposes for the regulations; and by ensuring that no individual landowner is called upon, intentionally or otherwise, to bear excessive delay in achieving some reasonable use of his or her land. The constitution is not offended, however, if this use falls short of that desired by the landowner, or is less than that which would be lawfully permitted in the absence of growth control regulation.

Current law imposes significant procedural obstacles to litigation of takings and substantive due process claims. The final decision ripeness doctrine should bar claims by landowners who have either failed to make genuine efforts to accommodate themselves to reasonable growth control regulations, or whose injuries have simply not yet assumed constitutional dimensions. Nevertheless, the ripeness doctrine also creates substantial uncertainty as to just how much delay or arbitrary treatment a genuinely aggrieved landowner must endure before seeking judicial relief. The potential litigant also faces a bewildering variety of tactical considerations in pursuing a takings or substantive due process case, including differing ripeness requirements, statutes of limitations, availability of monetary

256. *See* CAL. CONST. art I, § 7; FLA. CONST. art. I, § 9; ILL. CONST. art I, § 2; N.Y. CONST. art I, § 6.

damages, and choices among federal or state court procedures and substantive law. These complexities may explain why there are few published decisions applying takings and substantive due process analysis to growth control regulations. They also explain why future attacks on growth control regulation likely will rely on state constitutional or statutory law rather than the federal constitution. Nevertheless, the economic stakes are sufficient that future takings and substantive due process challenges can be expected, and case law on the subject likely will develop accordingly.