NOTES

LAND USE REGULATION AS A "TAKING" OF PROPERTY: PROPOSALS FOR REFORM

PART I
INTRODUCTION

Under current law, a landowner can be restricted from altering a building if the proposed alteration would conflict with an ordinance protecting the site as "historic."[1] A local regulation can restrict or reduce allowable building density for purposes of open space preservation.[2] An owner can also be prevented from filling a wetland, in order to preserve its natural character and the benefits that are received by the public from its preservation.[3] These restrictions and numerous other local, state, or federal regulations can result in considerable financial loss to the landowner. The fifth and fourteenth amendments protect individuals from a taking of private property for a public purpose without just compensation.[4]

The relationship between the "taking clause" of the Constitution and excessive regulatory action formed the basis of questions recently presented to the Supreme Court in *San Diego Gas & Electric Company v. City of San Diego*.[5] Specifically, the Court was asked to rule "that a State must provide a monetary remedy to a landowner whose property allegedly has been 'taken' by a regulatory ordinance" in violation of the fifth amendment.[6] The trial court had awarded three million dollars to the electric company for land which was given an "open space" designation in the city's general plan.[7] The court found that the

1. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). Penn Central Terminal was designated an historic site. The law restricted future development of the property. The owner sued the city, claiming the operation of the ordinance effected a fifth amendment taking of his property. The court upheld the ordinance where the owner was permitted a "reasonable beneficial use" of the property. *Id.* at 138. *See* discussion in text accompanying notes 80-85 *infra*.
2. *See* Agins v. City of Tiburon, 447 U.S. 225 (1980); Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980). In both cases residential dwelling density was "downzoned" to a less dense classification.
3. *See* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); this is the rule in Wisconsin. *But cf.* State v. Johnson, 265 A.2d 711 (Me. 1970) (application of restrictions in state statute which stopped appellant's proposal to fill wetland and denied owner a commercial use of the land was held to be equivalent to a taking of the property).
4. The fifth amendment provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. In addition, the just compensation clause applies to the states through the due process clause of the fourteenth amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 101 S. Ct. 446 (1980).
5. 101 S. Ct. 1287 (1981).
6. *Id.* at 1289.
7. *See* note 63 *infra*.

designation deprived the plaintiff of the practical use of its property and constituted an unconstitutional taking of the property.[8] Upon reconsideration, the court of appeals ruled that administrative mandamus, not compensation, is the plaintiff's remedy when excessive or arbitrary regulation results in a taking of his property.[9]

The Supreme Court did not answer the compensation question in *San Diego*. Instead, it dismissed the case for lack of jurisdiction.[10] The compensation question was addressed in a dissenting opinion drafted by Justice Brennan, however. Justices Stewart, Marshall, and Powell joined in the dissent, and Justice Rehnquist, in a concurring opinion, expressed agreement with the dissent's approach to the taking question.

Curiously, in their attempt to set forth the law, the five Justices have characterized the taking question as one which is separate from a substantive due process question.[11] The dissent argues that "the Constitution demands that a government entity pay just compensation" if a regulatory taking occurs.[12]

The California court of appeals in *San Diego* followed an earlier California Supreme Court opinion, *Agins v. City of Tiburon*, in which that court held that a similar deprivation is not compensable and that the injured landowner's remedy is mandamus.[13] The Supreme Court dissent in *San Diego* rejected the California view, characterizing it as holding that a city's exercise of its police power "could not *as a matter of federal constitutional law* constitute a 'taking' under the Fifth or Fourteenth Amendments".[14]

This note will adopt the terminology of cases which preceded *San Diego* and give the label "a taking" to the point at which overzealous regulation goes "too far" in its effect on the beneficial use and value of land. It will define a test which may be legislatively or judicially administered. The test will determine at what point a taking occurs and what remedies are available to the landowner, including monetary compensation, mandamus, or a combination of these. In certain respects this standard will parallel a test which was set forth in the *San Diego* dissent. This note will propose that a monetary remedy be permitted to the extent that a taking has occurred. The monetary remedy should be applied, however, only if the taking is "irreversible." Where invalidation of an ordinance would reverse the harm or render the taking temporary, the proposed method would permit the court to invali-

8. *See* note 66 *infra*.

9. *See* note 64-66 *infra*.

10. The California Supreme Court opinion, which vacated the court of appeals judgment and transferred the case to that court for reconsideration, was not a final judgment for purposes of 28 U.S.C. § 1257 (1976). *San Diego*, 101 S. Ct. at 1288.

11. *Id.* at 1296 (J. Brennan, dissenting).

12. *Id.* at 1304.

13. Agins v. City of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1975).

14. *San Diego*, 101 S. Ct. at 1297.

date the ordinance and award the minimum monetary award that is constitutionally required.

Legal Uncertainty

There is no clear judicial method for determining at what point a land use ordinance is so severe, as specifically applied, that it effects a taking of private property.[15] Furthermore, neither legislatures nor courts have provided an appropriate remedy for overzealous regulation. Where regulatory action effects a taking, it is unclear whether a court can or must award monetary compensation. The dissenting opinion in *San Diego* suggests that the view of the Supreme Court may conflict with that of the California court and others who have interpreted the law as requiring invalidation of the ordinance in this situation.[16] Confronted with conflicting interpretations of the law and constrained by rules which require compensation in an eminent domain proceeding in the amount of the "highest and best use,"[17] a court may elect to rely upon a presumption that the statute is constitutional. Thus, an arguably "unfair" statute is upheld. When this happens, the landowner has no right to even an intermediate level of relief.[18]

Attempted Reform

In some instances, state legislation provides relief for an individual, when the value of his property is greatly reduced as a result of a land use restraint.[19] More sweeping legislative reform has been recom-

15. Under the rule in Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922), the constitutional right is triggered only when a regulation goes "too far." *See* note 84 *infra*. *Penn Central*, 438 U.S. 104 (1978), and *Agins*, 447 U.S. 255 (1980), are among the cases which have defined this limit. *See* notes 1 and 2, *supra*. Various scholars are not satisfied with the rule as it is applied, however. Michelman, for example, has expressed frustration with judicial attempts to reduce the "method of reasoning" to doctrinal principles and rules of decision. He recommends a return to "*first principles*." Michelman, *Property Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1171, 1172 (1967) [hereinafter cited as Michelman] (emphasis added). The rule that he ultimately recommends is one of "fairness," based upon John Rawl's theory. *Id.* at 1172, 1218-24. Van Alstyne has similarly accused courts of relying upon procedural rules in order to avoid articulating a substantive test. He has shown concern, also, about the "heavy (factual) burden" borne by the plaintiff where unconstitutionality is alleged. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 13 (1970-1971) [hereinafter cited as Van Alstyne]. What constitutes a taking "depends upon the circumstances in each case." *See Penn Central*, 438 U.S. at 124.

16. *See* note 92 *infra*.

17. *See* note 39 *infra*.

18. *See* Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1037 (1975) [hereinafter cited as *"Fair" Compensation*].

19. For examples of statutes which currently address land use regulation as a "taking," *see, e.g.*, R.I. GEN. LAWS, § 2-116 (Supp. 1980). Other legislation is worded in a manner which sets forth a constitutional threshold for compensation. The purpose is apparently to protect the legislation from invalidation; its emphasis is not on "fairness" to the landowner. *See* CONN. GEN. STAT. ANN. §§ 22a-34, 22a-43a (West Supp. 1980); MASS. ANN. LAWS ch. 130, § 105 (Michie/Law Co-op Supp. 1980); N.H. REV. STAT. ANN. §§ 483-A:1, 483-A:6 (Supp. 1979). The Connecticut and New Hampshire statutes provide an option of invalidation or compensation. The Massachusetts statute expressly provides for a taking, by eminent domain, of less

mended by some authors.[20] Others have attempted to justify an extention of the police power without compensation.[21] Rejecting an argument that compensation is due an individual only when the value of his property is severely diminished, as a result of stringent regulation, these scholars argue that the public possesses greater rights than were possessed in the past. They argue that regulation is an appropriate means for asserting public rights and that no taking of private property results.

A "Taking" of Development Rights—Can We Go Too Far?

Whether one adopts the viewpoint of a proponent of individual rights or of public rights, it is evident that in order to preserve a government's power to regulate land use while preventing unfairness to an individual landowner, clarification of the law is necessary. Both judicial and legislative responses are required.

This note proposes the following analytical approach: A legitimate governmental objective is a prerequisite to a constitutional exercise of the police power. It logically follows that the public welfare will be enhanced by an appropriate regulation. It will be presumed that the legitimate expansion of government power to regulate is consistent with the public interest. An exception occurs when a regulation lacks a legitimate objective or does not employ a means reasonably related to that end. This would be an "easy case" for invalidating the regulation.

Similarly, an "easy case" for upholding a regulatory exercise occurs when a law is reasonably related to the prevention of harm that would be caused by an individual and when the law achieves its purpose by enjoining the individual from his harmful activity.

The "tough case" for a regulator, the case which is most likely to raise a complaint of "unfairness" to an individual, is the situation in

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than a fee interest. *See also* ALI MODEL LAND DEVELOPMENT CODE §§ 5-105, 5-106 (1975). The Code would authorize government acquisition of an interest in land for protection of environmental values, preservation of historical sites and open spaces, and other purposes. The power to regulate for these purposes is granted at sections 2-108 and 2-109.

20. *See "Fair" Compensation*, *supra* note 18; Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts from Land Use Controls*, 54 J. URBAN L. 45 (1976) [hereinafter cited as Hagman]. Proposals which emphasize the recapture of government "windfalls" to landowners, in conjunction with reform of "wipeout" compensation practices, include: Wexler, *Betterment Recovery: A Financial Proposal for Sounder Land Use Planning*, 3 YALE REV. L. SOC. ACT. 192 (1973); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973). *See also* Michelman, *supra* note 15. He recommends "deemphasis of reliance on judicial action." *Id.* at 1167. He considers the legislature better able than the court to administer a "fairness discipline." *Id.* at 1255. *Cf.* Durham, *A Legal and Economic Basis for City Planning (Making Room for Robert Moses, William Zeckendorf, and a City Planner in the Same Community)*, 58 COLUM. L. REV. 650 (1958) [hereinafter cited as Durham]; Elickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1937) [hereinafter cited as Elickson]. (Durham and Elickson recommend approaches to land use controversies calling for increased use of the marketplace.)

21. *See* BOSSELMAN, CALLIES & BANTA, THE TAKING ISSUE (1973) [hereinafter cited as BOSSELMAN, CALLIES & BANTA]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter cited as Sax].

which the government finds it necessary to regulate an innocuous use of land—a use which would normally be considered socially acceptable—for a greater public purpose.[22]

The objectives of a regulatory scheme should be threefold. The scheme should maximize government power to protect public rights. At the same time it should minimize the regulation of innocuous private activities. Finally, a regulation should provide a remedy to an individual who is unduly affected by its application. A monetary remedy should be available where the interests of fairness and justice demand that compensation be paid to an individual who suffers special injury from application of the regulatory scheme.

Legislatures may be characterized as most diligent in pursuing the first objective noted—the maximization of regulatory power in the public interest.[23] A practical approach to achieve the three regulatory objectives noted above requires the proposal of a remedy for individuals which may be judicially administered. It will be presumed that the regulation of innocuous activities is minimized by the implementation of the individual remedy.

Analytical Framework

Using the factual backdrop of *San Diego Gas & Electric Co. v. City of San Diego*,[24] this note sets forth a method of judicial analysis to answer the following questions:

I. At what point does a regulatory action become excessive and effect a taking?
II. What is the nature of the taking?
III. Is compensation required?
IV. Is compensation appropriate where invalidation of the ordinance is an alternative?
V. If compensation is due, what is the value of the property taken, and how much compensation should be awarded?[25]

Supreme Court cases which have addressed the claim of a taking by regulatory action have squarely answered only the first of these questions.[26]

22. *See, e.g.*, Euclid v. Ambler Co., 272 U.S. 365 (1926). *Euclid* held that a law is not rendered invalid by "the inclusion of a reasonable margin to insure effective enforcement." *Id.* at 388.
23. *See generally* note 19 *supra*.
24. *Supra* note 5.
25. An ideal compensation strategy would include recapture provisions for windfall. Under current law, the recapture of windfall occurs, to a limited extent, when special or general benefits are set off against damages in an eminent domain proceeding. *See* 27 AM. JUR. 2d *Eminent Domain* § 367 (Supp. 1980). The judicial method proposed here would eliminate some windfall which accrues to "existing users." *See* note 39 *infra*. Its emphasis, though, is to set forth a fair system for compensating those who bear public burdens (who experience a "wipeout"). Other authors have included methods for windfall recapture in their proposals for land use regulatory reform. *See* note 20 *supra*.
26. The Court's response to these questions is reviewed in Part II of this note *infra*. *See also* the California Supreme Court decision in *Agins*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1975).

This note will review basic constitutional policy behind the taking issue. First, existing case law is reviewed, and tests for a taking defined. Second, a methodology for answering the five questions presented here is suggested. Traditional assumptions relating to property rights are also challenged. A "continuum" of constitutional rights is recognized. The taking question may involve more than fifth or fourteenth amendment considerations.[27] Public "property rights" (resources) are broadly defined.[28] Private rights which have been recognized as compensable in the past are strengthened in some respects and appear to be diminished in others.[29] Property rights which involve more than the physical possession of land, such as development "expectancies," are increasingly recognized.[30] Other private activities (which may have been viewed as property rights in the past) must succumb, without compensation, to increased pressure from the public in assertion of rights which it may have previously possessed but did not enforce.[31]

The proposed test attempts to determine whether the plaintiff is being forced, unfairly, to bear a burden which is far greater than that borne by the rest of the public.[32] If the burden is too great, the court, using community standards, determines the extent to which the owner's intended uses can reasonably be considered to attach to ownership. These "uses" are intangible property rights.[33] The court awards compensation only to the extent of the value of uses which "attach," however, and not to the extent of other windfalls which an owner reaps as a member of the public.[34]

Potential for Legislative Refinement of the Proposed Judicial Method

The judicial method which will be proposed is ideally suited for legislative adoption and refinement. Specifically, a legislature could place the task of determining whether a taking has occurred in the hands of a local administrative body, which is presumably better qualified than the court to determine questions of an eminent domain char-

27. Neither property rights nor government regulatory powers are absolute. Other liberties guaranteed by the Constitution must be factored into a determination of their scope. Various liberties may weigh in favor of the landowner while others weigh in favor of the public. It is alleged, for example, that the public has an interest in the protection of wetlands, floodplains, open space, and wilderness; under this analysis, it may not be necessary to characterize these as property interests. *Cf.* Sax, *supra* note 21; (Sax felt that a recognized public property interest was present in public rights.) *But see* Reich, *The New Property*, 73 YALE L.J. 733 (1974). Reich supports the landowner's interest. He considers liberty and property interests to be inseparable. *See* discussion at note 139 *infra*.

28. *See* note 132 *infra*.

29. *See* note 139 *infra*.

30. *Id.*

31. *See* note 132 *infra*.

32. *See* note 82 and text accompanying note 114 *infra*.

33. *See* note 139 *infra*.

34. Other authors have suggested legislative solutions which would award "fair compensation" in amounts less than would traditionally be awarded in an eminent domain proceeding. *E.g.*, *"Fair" Compensation*, *supra* note 18.

acter. On appeal, the conclusions of the local body should be granted great deference.

The proposed method of judicial reasoning is intended to provide a landowner with the minimum amount of compensation that is constitutionally required to counter a taking objection. To minimize judicial involvement in the regulatory process, a court would invalidate an unconstitutional ordinance; any reenactment in constitutional form would be a legislative prerogative.

A legislature might elect to endow its courts with additional options by which the ordinance could be preserved and compensation awarded. This would result in greater regulatory flexibility, as well as greater fairness to the landowner.

PART II
THE TOUGH CASE REVISITED

The "tough case" arises in the following context: a property use is prohibited by regulation. It may not be clearly harmful, or its harmful nature may have become known to the public only recently. In addition, it may have received express government sanction prior to enactment of the regulation in question.[35] The use is one which the owner could reasonably have expected to be permitted to pursue.

Current Law Favors "Existing" Use

If the land was undeveloped at the time the regulation became effective and if the owner's *intended* use of the land[36] is one which was previously sanctioned, additional unfairness related to his status as an owner of undeveloped land may result. Commonly, land use regulation is prospective in nature; it may prohibit development but permit continuation of existing use.[37] These practices effectively place the owner of undeveloped land in a class of persons who are "more regulated." In addition, current judicial tests which determine when a regulatory taking occurs augment the difference in treatment. The regulation of a development expectancy is less likely to be found by the court to constitute a taking.[38]

35. Examples might include: construction in a floodplain, wetland, or open space area. For instances in which no taking was found, despite the fact that a "lawful" prior use was prohibited, see *Agins*, 100 S. Ct. 2138 (1981), and *Rogin*, 616 F.2d 680 (3d Cir. 1980); Miller v. Schoene, 276 U.S. 272 (1928); Goldblatt v. Hempstead, 369 U.S. 590 (1962).

36. *See* note 42 *supra*. Similar reasoning would also apply if the owner planned to sell the land to someone who intended this use.

37. To accomplish its objectives, it limits only future development. *See* 82 AM. JUR. 2d *Zoning* § 178 (Supp. 1980).

38. In Part II of this paper, the tests which determine whether a taking has occurred will be discussed. *See* note 68 *infra*. Recent cases suggest that the determination may turn, in large part, upon whether a regulation (which will effectively limit or prohibit development) would permit continuation of the existing use. The fact that the existing use of the property was not prohibited received emphasis in *Penn Central*, 438 U.S. 104 (1978), for example, and no taking was found. While these "prospective" regulatory practices might protect the land-

Further inequities result from rules regarding compensation which are unequal in their allocation of both burdens and benefits. First, when a taking occurs and compensation is awarded, the owner may reap a windfall, equal to the development value of his property, to the extent that this value is reflected in the fair market value.[39] However, to the extent that regulation affecting undeveloped land fails to trigger the taking provision, this windfall will not accrue. Furthermore, because an owner may be deprived, without compensation, of some reasonable uses of his property,[40] he may be burdened to the extent of that deprivation.

It might be argued that no constitutionally protected property right inheres in the right to develop.[41] This rule would require an alternative to the market value approach to compensation, which awards an owner the value of intangible expectancies to the extent that they are reflected in the fair market value of the property.[42] Under the alternative approach, the owner of developed property would receive an amount equal to the value of the property, if its use were limited according to its current zoning classification (the "existing use level"). He would no longer receive a windfall for prospective upzoning to a more profitable use level. This is only a partial solution, however. The owner would continue to reap a windfall for his fortuitous prior development (now an "existing use"), absent a government attempt to recoup the value of that development.

In other words, current law rewards "development" in a manner consistent with governmental views as to acceptable land use as of the time that the development occurs. Values which attach to that use be-

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owner in the existing use of his land (but not the "future use"), he is not necessarily protected in the existing use. *See Miller*, 276 U.S. 272 (1928); *Goldblatt*, 369 U.S. 590 (1962).

39. Because, in an *eminent domain* exercise, the owner receives an amount equal to the value of the land for its "highest and best use under existing or *reasonably probable land use controls*," if upzoning is likely, he will receive a windfall. *See "Fair" Compensation*, *supra* note 18, at 1043. On the other hand, the award will not be discounted for prospective downzoning, even though the downzoning is reasonable and legitimate. *Id.* at 1044. In no instance is the owner entitled to an award which reflects the value in an unregulated state. *Id.* at 1043. *See also* United States v. Commodities Trading Corp., 399 U.S. 121 (1950).

40. *See Penn Central*, 438 U.S. at 139 (J. Rehnquist, dissenting).

41. A windfall recapture/wipeout mitigation proposal may, for example, provide that there is *no right* to develop at levels which exceed the existing zoning classification. The government may subsequently sell or exchange *rights to develop* in excess of this level for an agreement to *restrain* development at another location (for example, an historic site). *See, e.g.*, Costonis, *The Chicago: Plan Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972). This approach which sets an "ownership" threshhold at the *existing zoning classification* is not substantially less objectionable than those which are unfair *at an existing use level*. It is necessary to ask if the public health, safety, morals, or general welfare is benefited by a height restriction which may be "confiscated" by the government and exchanged for an alternative police power objective. Van Alstyne notes that governmental asset enhancement is an impermissible objective of the police power. Van Alstyne, *supra* note 15, at 23.

42. A "market value" award in an eminent domain proceeding would include the value of "anticipated uses" to the extent that a hypothetical purchaser would pay an amount which reflects his development expectancies. In effect, the owner would be receiving a windfall for the "sale" of the development rights to the extent they are reflected in the market value.

come the property of the owner, although he technically possesses no more right to develop than does the owner of an undeveloped plot.

This unequal treatment might pass constitutional muster,[43] yet it seems unfair. Courts may have inadvertently characterized development interests as too speculative for compensation and thus overlooked the resulting unfairness. Yet, land use restriction may severely limit the profit potential of an undeveloped tract of land, and the loss of anticipated profits may be very real to the owner of the undeveloped land. The owner will be injured, and, while the injury is not tangible, it is measurable. The loss will be reflected in the amount of money paid for the property and in his investment decisions during the period of ownership. When reflected in the market value, the loss of anticipated profits would be realized if a compensable taking were found. The loss is, therefore, not too speculative to merit compensation.

The Supreme Court has indicated that it will consider "reasonable investment expectations" in its determination of whether a taking has occurred.[44] The extent to which a court will consider development expectancies will determine how far it intends to go in remedying this unfairness. Compensable rights in property should inhere regardless of whether or not a structure has been built upon the land and whether or not it is "existing" when a regulation is enacted.

The "Tough Case"—A Specific Example—*San Diego Gas & Electric Company v. City of San Diego*

In 1966 the San Diego Gas & Electric Company assembled a 412-acre parcel of undeveloped property as the intended site for a nuclear power facility.[45] The company alleged that a "course of regulatory conduct" by the city of San Diego had effected a taking of approximately 200 acres of the parcel.[46] The conduct included the city's efforts to implement an open-space plan and "downzoning," which accompanied planning activities.[47] The case presented the issue: Does a taking by regulatory action give rise to an inverse condemnation cause of action, that is, a suit for damages?[48]

The property that was the subject of the suit is lowland, poorly

43. *See* New Orleans v. Dukes, 427 U.S. 297 (1976).

44. *Agins*, 100 S. Ct. at 2142. *See* note 138 *infra*.

45. *See* Brief for Appellant at 5 (obtained from Louis E. Gobel, San Diego, Cal.), San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981). The brief for Appellant indicated that property was purchased as the future site for a power plant. The brief for Appellee specified that a nuclear facility was contemplated. Brief for Appellee at 34 (obtained from C. Alan Sumption, San Diego, Cal.), San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981).

46. Brief for Appellant at 16.

47. *See id.* at 7.

48. *Id.* at 17. The California Supreme Court in *Agins*, 24 Cal.3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1975), held that the sole remedy for a taking of this sort is injunction or mandamus. The United States Supreme Court did not answer the question. *See Agins*, 447 U.S. 255 (1980).

drained and sparsely vegetated.[49] It consists of tidal flats and marshland, some of it subject to tidal action.[50] According to the city, three to four feet of landfill would have been required to adapt it to the company's proposed industrial use.[51]

At the time of purchase, approximately 120 acres of the subject property was zoned for industrial use, and the remainder was classified primarily agricultural or holding zone.[52] The city was aware of the owner's intended future use. This use was apparently consistent with current regulations and policy.[53]

In 1972, approximately fifty acres of the property zoned for industrial or residential use were downzoned to an agricultural or holding zone.[54] In addition, the city began to prepare an open space land use plan, which, at different stages of formulation, affected approximately 100 to 200 acres of the subject property.[55] During 1972 and 1973, the city conducted a series of hearings on the proposed open space plan.[56] Voters subsequently rejected a referendum proposal to purchase some of the Company's property for a public park reserve.[57] The property retained its "open space" designation in the General Plan, however.[58]

The Company filed this lawsuit in 1973. It alleged that the city's "policy of requiring consistency between the actual use and development . . . and the . . . General Plan" precluded industrial use.[59]

The trial court found that the "continuing course of conduct of the defendant city . . . in particular, the designation of substantially all of the subject property as open space . . . [deprived plaintiff] of all practical, beneficial or economic use of the . . . property."[60] The court ordered an award in excess of $3 million.[61] The court of appeals affirmed.[62] The California Supreme Court, however, having recently decided *Agins v. City of Tiburon*,[63] remanded the case to the court of appeals for "reconsideration."[64] The United States Supreme Court was presented with the second court of appeals opinion, which held that a party's remedy for arbitrary unconstitutional exercise of the police power that effects a taking is administrative mandamus; compensation

49. Brief for Appellant at 5.
50. Brief for Appellee at 5.
51. *Id.* at 16.
52. Brief for Appellant at 6.
53. *See id.* at 5; in 1967 the city's General Plan designated most of the subject property "for industrial use and . . . 'future growth.'" *Id.* at 6.
54. Brief for Appellee at 7.
55. *Id.* at 8-11.
56. *Id.*
57. *Id.* at 9.
58. *Id.* at 10, 11.
59. Brief for Appellant at 13.
60. *Id.* at 14, citing Finding of Fact 29.
61. *San Diego*, 101 S. Ct. at 1291.
62. *Id.*
63. 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1975).
64. *San Diego*, 101 S. Ct. at 1291.

is "not required."[65] The court found that it did not have jurisdiction because the California ruling was not a final judgment for purposes of review.[66] It did not reverse the holding of the California court with respect to the remedy for a taking of property by overzealous regulation.

Much of the present controversy regarding land use control, as it effects a taking of property, has resulted from confusion about the appropriate test for determining the constitutional issues.[67] For example, the court may assess the constitutionality of the exercise of the police power.[68] As part of this determination, or in a separate analysis, it may review claims that a taking occurred.[69] Then, the question presented in *San Diego*[70] may confront the court: Is the taking which results when "regulation goes too far" one which requires compensation?[71]

Where invalidation is available as an alternative remedy, the court assumes a legislative role. The court must decide the extent to which it *should* become involved in effecting a "taking *with* compensation" (by awarding compensation and preserving the ordinance). The scope of judicial involvement has not been defined by courts or legislatures, however.[72] If compensation is due, the amount owed comes into controversy, and the court is again required to set forth a standard which could greatly affect land use policy-making.

The "Test" as Defined by the Cases

Few cases presenting these questions have reached the Supreme Court. The test which defines the bounds within which a legislature must act remains ill-defined.[73] The factors to be considered and the weight to be given them in determining the constitutionality of the ex-

65. *Id.* at 1292.
66. *See* note 10 *supra*.
67. For example, the "physical invasion," "diminution of value," "balancing," or "prevention of harm" (nuisance) test. A good discussion and critique is presented by Michelman, *supra* note 15, at 1183-201.
68. *See* notes 90 & 107 *infra*.
69. *See* notes 90-93 *infra*.
70. 101 S. Ct. 1287 (1981).
71. Where the Supreme Court has awarded compensation, the factual contexts presented to date would support a determination that a "physical invasion" occurred, or that the unconstitutional exercise could not be remedied by invalidation. (This might also be considered a physical invasion.) For example, in Kaiser Aetna v. United States, 444 U.S. 164 (1979), the Court found a property right in the right to exclude others from a lagoon area which was dredged and filled by the owner to create a marina. The marina was "taken" by the government as a navigable waterway. Even *Kaiser Aetna* appeared to hold that the government might have an *option* of "regulating" the waters, but *not "using"* the property for a public aquatic park; the exercise would cease to require compensation. *Id.* at 172-73. Other "physical invasion" cases include: United States v. Causby, 328 U.S. 256 (1946); United States v. Dickinson, 331 U.S. 799 (1950); United States v. Kansas City Ins. Co., 339 U.S. 799 (1950); Griggs v. Allegheny County, 369 U.S. 84 (1962). Interference with an existing use is more easily classified a physical invasion, than is interference with development rights. *See* inequities discussed in text accompanying notes 36-44 *supra*.
72. *See* Van Alstyne, *supra* note 15, at 72.
73. *Infra* notes 119 & 122.

ercise have not been consistently stated.[74]

Pennsylvania Coal v. Mahon set forth the test for a taking by excess regulation by stating that "if regulation goes too far, it will be recognized as a taking."[75] The exercise was found to be unconstitutional. It is notable that compensation was not awarded, however, because a claim for compensation was not presented.

In 1926, four years after the decision in *Pennsylvania Coal*, a case involving the constitutionality of a municipal zoning ordinance came before the Supreme Court. In *Euclid v. Ambler Co.*, the Court held that this form of land use regulation was constitutional, unless "clearly arbitrary and unreasonable, having *no substantial relation to the public health, safety, morals, or general welfare*."[76] The fact that zoning has as its objective the control of activities which might cause a nuisance was emphasized. The regulation of innocuous activities was upheld as within a "reasonable margin" necessary to ensure effective enforcement.[77] The Court did not mention the rule in *Pennsylvania Coal*.

In *Goldblatt v. Hempstead*, the Court considered an ordinance regulating dredging and pit excavation. It held that the taking question is not raised where the regulation is enacted to prevent a noxious use.[78] In dicta, however, the Court seemed to accept the possibility that the *Pennsylvania Coal* test might apply to the regulation of a harmful activity where evidence of a reduction in property value is presented.

Then, in 1978, the Court was presented with a claim that the application of a historic landmark law to Penn Central Terminal in New York City was a taking of the owner's property and that compensation was due.[79] The Court held that no taking had occurred. It based its holding on a finding that (1) the action bore a substantial relation to promotion of the general welfare and (2) the plaintiff was permitted a "reasonable beneficial use" of the property.[80]

The Court went further, however, and discussed in detail the rule

74. *See* the Court's summary of these factors in *Penn Central*, text accompanying notes 83-84 *infra*.

75. 260 U.S. 393, 416 (1922). *See* note 15 *supra*. The owner of subsurface mining rights challenged a statute which, in effect, denied him all use of his property. In his opinion, Justice Holmes held that there is a limit to the exercise of police power beyond which point it becomes a "taking." This limit was required *in order to give meaning to the contract and due process clauses of the Constitution*. *Id.* at 413, 414. In his analysis, Justice Holmes weighed the public interest in the regulation and found it to be insufficient. His methodology may be better characterized as *a balancing test*, although he spoke of the point at which an exercise of the police power might cause private property to "disappear." *Id.* at 415, 416. It is this concern about "disappearance" that has probably stimulated the diminished value test and suggested a "continuum" approach to the question of a taking. *See* text accompanying note 90 *infra*.

76. *Euclid*, 272 U.S. 365, 395 (1926).

77. *Id.* at 388.

78. 369 U.S. 590 (1962). The Court asks the following: (1) Does the public interest "require such interference?"; (2) Are the means reasonably necessary for accomplishing the purpose?; and (3) Are they unduly oppressive upon the individual? *Id.* at 595. *See also* "the easy case" discussed in Part I *supra*.

79. *See Penn Central*, 438 U.S. 104 (1978).

80. *Id.* at 138.

of law which is to be applied when a regulation is claimed to have effected a taking. The constitutional guarantee against a taking prevents the government from placing upon an individual burdens that "in all *fairness and justice* should be borne by the public as a whole."[81] The Court asks whether an interference with a right is "of such a magnitude" that compensation is required.[82] Unable to develop "any set formula" and relying "largely upon the circumstances [in that] case," the Court identified factors which are significant in its analysis.[83] One of these factors is whether the existing use of the property is prohibited.[84]

Both *San Diego*[85] and *Agins*[86] presented the taking issue in the context of land downzoned pursuant to a state legislative mandate for local open space plans. The regulations restricted future development, not existing uses. The validity of open space regulation had never been before the Supreme Court. In *Agins*, legislation passed the constitutional tests which were applied. It "substantially advance[s] legitimate governmental goals."[87] It did not deny the owner "the best use of [his] land,"[88] and a balancing test weighed in favor of the public interest.[89]

81. *Id.* at 123 (emphasis added). *See also Agins*, 447 U.S. 255, 256 (1980). The focus in *Penn Central* is on a finding of "reasonable beneficial use," and economic factors receive emphasis in the discussion. 438 U.S. at 138. A review of the Court's method of reasoning, however, suggests that the test to be applied has greater breadth than the end result might suggest. *See* discussion in note 126 *infra*.

82. 438 U.S. at 136.

83. *Id.* at 124. Most important is the Court's emphasis on the basic test—one of fairness. *Id.* at 123. "Factors" in the analysis are mere *components* of a test which will determine the basic constitutional issue. *See* Part III *infra*. These factors include "the economic impact of the regulations on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and whether the character of the governmental action can be characterized as a physical invasion." *Penn Central*, 438 U.S. at 124.

84. *See id.* at 136. The Court first noted that regulations have been upheld despite the fact that an existing use is prohibited. *Miller* and *Goldblatt* were among the cases cited. *See Penn Central*, 438 U.S. at 126-27. Later in the opinion, however, the Court indicated that the law challenged by the plaintiff, Penn Central, *did not interfere with the existing use of the terminal, and for that reason, did not interfere with Penn Central's "primary expectation concerning the use"* (emphasis added). It did not prevent Penn Central terminal from obtaining a "reasonable return on its investment." 438 U.S. at 136. The Court's methodology in *Penn Central* may be consistent with a view that there is only a *presumption* that the existing use comports with "expectation" and that a "reasonable return" is *not necessarily a reasonable return in the economic context*. Reasonable return is, instead, related to the owner's reasonable expectations, but these expectations may include *socially induced expectations*, as well as investment-backed expectations. This determination invokes an objective standard relating to the "foreseeability" of regulation. *See* notes 130 & 137 *infra*.

85. 101 S. Ct. 1287 (1981).

86. 447 U.S. 255 (1980).

87. *Id.* at 260.

88. *Id.* at 262.

89. *See id.* The Court has applied the traditional test for validity of a zoning ordinance; open space regulation is clearly within the "zoning power." The Court linked a determination that "a fundamental attribute of ownership" was not extinguished where owners "are free to pursue their reasonable investment expectations" to the question of whether "justice and fairness" had been denied. *Id. See* discussion of *Penn Central* in text accompanying notes 70-79 *supra*. *See also Kaiser Aetna*, 444 U.S. 164 (1980).

The Scholars' Interpretation

Legal scholars have attempted to identify the rules of law set forth in *Pennsylvania Coal* and the cases which followed. One view is that the range of regulation, from a valid police power exercise to a "taking," is a "continuum" and that compensation requirements are triggered when the taking occurs.[90] Under this view, a "taking" with just compensation begins to take on the appearance of a constitutional right. By going "too far," the government enters a new realm of its regulatory authority, one where compensation is required to validate an exercise.

Under a second view, compensation is not required for regulatory action which results in a "taking." A "taking" in this context is merely an unconstitutional exercise of power, and the appropriate remedy is mandamus or injunction.[91]

Other views, consistent in basic theory with the second, provide an alternative. The legislative body is given the option of accepting invalidation of the unconstitutional regulation by the court or of paying compensation in order to convert the exercise into a valid taking.[92]

A view which is contrary to the continuum approach (discussed first) regards the police power as an "umbrella" encompassing the power of eminent domain. A taking by eminent domain is thus viewed as a means to an end—compensation legitimizes an otherwise unconstitutional exercise of the police power.[93]

PART III
PROPOSED METHOD OF JUDICIAL REASONING FOR *SAN DIEGO*

The Court, in dicta in *Penn Central* and *Agins*, did not define the level of compensation required to rectify a taking by regulatory action. The dissenting opinion in *San Diego* indicated that compensation may be required if a taking is established.[94]

90. In support of a construction of the taking clause which would constitutionally require compensation, see Beuschler, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1 URBAN L. ANN. 1 (1968); *see also* Durham, *supra* note 20. (The "continuum" from police power to eminent domain should be distinguished from the "Constitutional continuum" suggested in note 25 *supra*.) *See also* the dissenting opinion in *San Diego*, 101 S. Ct. at 1296.

91. *See* Note, *Inverse Condemnation, Its Availability in Challenging the Validity of a Zoning Ordinance*. 26 STAN. L. REV. 1439 (1974) [hereinafter cited as Note]. *See* the discussion of *Agins* in the *San Diego* dissent, 101 S. Ct. at 1296.

92. *See, e.g.*, Michelman, *supra* note 15, at 1169. Michelman rejected an approach which focused attention on distinguishing police power from eminent domain. He characterized the issue as a broader question: "When a social decision to redirect economic resources entails painfully obvious opportunity costs, how shall these costs be distributed?" *Id.*

93. *"Fair" Compensation*, *supra* note 18, at 1037. The Court's rationale in *Kaiser Aetna*, 444 U.S. 164 (1979), is consistent with this approach to the question. *See* note 71 *supra*.

94. The dissent, drafted by Justice Brennan, stated that "in my view" the government must pay compensation "once a court establishes that there was a regulatory 'taking.'" *See San Diego*, 101 S. Ct. 1287, 1304 (1981) (J. Brennan, dissenting). Justice Brennan was joined by three Justices in dissent.

The dissenting opinion further suggested that a court does not have the power to invalidate an ordinance, when a remedy for a "taking of property is sought."[95] While recommending invalidation as a means of converting a "permanent" taking into a temporary one, the dissent indicated that is the responsibility of the legislative body, not the courts to formulate the option.

The *San Diego* dissent did not discuss *Kaiser Aetna v. United States*,[96] a recent case involving federal regulatory action taken pursuant to the commerce power. In that case the Court ruled that a regulation authorizing public use of a marina constructed by the plaintiff effected a taking of private property in violation of the fifth amendment. Compensation was awarded. Two factors may distinguish *Kaiser Aetna* from *San Diego* and other cases. First, the taking resulted from a congressional exercise of the commerce power. It may be that the Court will more easily award compensation in this scenario, that is, when a taking results from federal governmental action. Second, *Kaiser Aetna* presented a "taking" which for all practical purposes *could not be reversed by invalidation* of the regulation. This can be distinguished from a taking by regulatory interference where invalidation of the ordinance provides a remedy other than compensation.[97]

Because the dissenting Justices in *San Diego* rejected the view that invalidation may serve as a remedy for a taking,[98] their failure to support an argument for monetary compensation by reference to *Kaiser Aetna* is worthy of note.

Before the question of compensation is addressed, the court must first determine whether a taking has occurred.[99] Recalling both the "continuum" of constitutional rights previously suggested[100] and the many "factors" which must be considered,[101] it is clear that the test set forth in the case law has been obscured by the "particular circumstances" of a given case[102] and by the constitutional issues which the particular facts raise. With a view to both case law and policy interests, the method which follows will serve to distinguish the factors in the analysis from any basic constitutional "test." In a similar vein, this method will sever interests which are not property interests from the analysis.[103]

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95. Notably, the dissent discussed "the *government's* power to rescind or amend the regulation." Whether rescission by the government occurred is a question of fact. *See San Diego*, 101 S. Ct. at 1305 (emphasis added). A temporary taking terminates "on the date that [t]he government entity chooses to rescind or otherwise amend the regulation." *Id.* at 1304.
96. 444 U.S. 164 (1979).
97. *Id.*
98. 101 S. Ct. at 1304-05.
99. *See* notes 129-31 & 138 *infra*.
100. *See* text at note 25 *supra*.
101. *See* text at notes 83-85 *supra*.
102. *See, e.g., Penn Central*, 438 U.S. at 124.
103. For example, noxious uses. *See* discussion at note 109 *infra*. The Court in *Penn Central* did not modify the "rule" that some activities are outside the realm of economic interests which require compensation if taken. *See, e.g., Penn Central*, 438 U.S. at 125-27.

The proposed method can serve two functions. First, with respect to the landowner, the method attempts to cause a return to basic constitutional principles of fairness and due process. Second, it attempts to maximize government power to regulate in the public interest.[104]

Judicial Methodology

I. Has the landowner been deprived of *substantial due process*, resulting in a taking of his property in violation of the fifth and fourteenth amendments?

A. Does the exercise bear *"no substantive relation* to the public health, safety, morals, or general welfare?"[105]

1. The ordinance *may* be required to bear *only a "rational relationship"* to a legitimate state interest.[106]

B. Was he deprived of the reasonable beneficial use of his property?[107]

1. Was "property" taken?[108]

a. Noxious use is not a property right.[109]

b. In other respects, an expanded concept of property rights, on the part of the landowner, is recognized.[110]

i. Property includes reasonable investment-backed expectations.[111] It includes the "essential stick" in a bundle of rights.[112]

C. Is the burden one which *"in all fairness and justice should be borne by the public as a whole?"*[113]

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104. *See* discussion in Part I *supra*. While this note presumes the maximization of government power to be one objective, proponents of a market approach to the taking issue would have government involvement minimized. *See, e.g.*, Elickson, *supra* note 20; Durham, *supra* note 20. On the other hand, if public rights are presumed to be cognizable interests, regulation for their protection *should not be viewed as interference with private interests*.

105. *Euclid*, 272 U.S. at 395 (emphasis added).

106. *Rogin*, 616 F.2d at 689. The court noted that the test for substantive due process is now similar to that for equal protection analysis. A rational relationship must be found. *Cf. Euclid*, 272 U.S. at 390 (the Court suggested a "without substantial relation" standard). *See* discussion at note 76 *supra* and *Rogin*, 616 F.2d at 688.

107. *See* note 80 *supra*. One question is whether the court asks first: "Is the exercise of power unconstitutional?" (and then concludes that a taking has occurred as a result of the unlawful exercise); or whether it asks: "Did a taking occur without just compensation?" (thereby making the exercise of power unconstitutional). It appears that the Supreme Court looks at the issue from both perspectives. *See Agins*, 447 U.S. 255 (1980). The court looks first for a "substantial relationship." *Id.* at 260, 261. It then considers the extent to which the plaintiff has been denied the "economically viable use" of his property. *Id.* Either may determine the substantive due process issue. *See also Rogins*, 616 F.2d 680 (3d Cir. 1980).

108. In *Kaiser Aetna*, 444 U.S. at 178, the Court defined a property right as one which "has the law back of it"; it is an "essential stick" in the bundle of rights which may be characterized as property. *Id.* at 176. *See also* United States v. Gen. Motors Corp., 323 U.S. 373 (1945). Michelman suggests the following definition: "the pattern of behavioral assumptions and ethical values which have come to be associated with institutions dictating some degree of permanent distribution." Michelman, *supra* note 15, at 1023.

109. *See Goldblatt*, 369 U.S. 590 (1962).

110. An expanded concept of property rights on the part of the landowner is suggested with respect to rights which relate to his status. *See* notes 127 & 138 *infra*. Expanded views of public rights may have more weight, however, on balance. *See* notes 116 & 132 *infra*.

111. *See Agins*, 447 U.S. at 262; *Penn Central*, 438 U.S. at 136.

112. *See* note 108 *supra*.

113. *See* note 81 *supra* (emphasis added).

1. The question "who should bear the burden" includes the above determination as to "what is property" and whether it was taken.[114]

2. Property rights and other constitutional rights of the public might be involved in the determination and weighed against the rights of the landowner.[115]

II. What is the "character" of the taking? (A taking by regulatory action may be distinguished from a physical invasion.)[116]

A. It may not be necessary to answer this question, except to distinguish "takings" which can be made temporary by enjoining the regulatory action.[117]

III. If the ordinance is invalid, is the court *required* to award compensation?

A. Compensation is not required if the regulatory action can be enjoined and no taking occurs.[118]

B. If a "temporary taking" occurs while the regulation is in force, compensation *should* be awarded. The temporary taking is not unlike one which would be considered a "physical invasion" and compensation is due.[119]

IV. *Should* compensation be awarded where invalidation is an alter-

114. *See* note 108 *supra*. First, harmful activities are considered not to be "property" and are eliminated from the analysis. *See* text at note 109 *supra*. The court then "balances" the extent to which the plaintiff has been deprived of the reasonable use of his property (diminished value) against the extent to which the public, *and the landowner as a member of the public*, will benefit from the regulation, in effect balancing wipeouts against any windfalls from "general benefits." Traditional "windfall recapture" only considers special benefits, *supra* note 25. This "formula" is consistent, for the most part, with tests which have been set forth in the cases, as well as with the interests of fairness and justice to the plaintiff.

115. An early view seems to have presumed the existence of a universe of private property rights. It was reasoned that an individual's *private* space was invaded when a nuisance activity occurred. Van Alstyne has noted that an exercise of police power could be supported without compensation because of the reciprocal benefits that a regulated property owner received. Van Alstyne, *supra* note 15, at 5. Subsequent case law has been more flexible in authorizing regulation in the public interest. *See id.* Sax and Bosselman are recognized for their expanded views of public rights. *See* note 21 *supra*. It is suggested that a new concept of "public rights" is needed, one that is broader than that proposed by Sax or Bosselman. Both the right to public "property" (*i.e.*, public resources) and certain public "liberties" would be included. In addition, to the extent that these liberties can be considered "fundamental"—that is, if they are balanced against "mere" economic interests on the part of the landowner—they would be favored in any assessment of the constitutionality of a regulation which protects them. For an example of the Court's consideration of a regulation affecting only an "economic" interest, see *Dukes*, 427 U.S. 297 (1976). *See generally* note 27 and accompanying text *supra*.

116. *See* note 71 *supra*.

117. Property is considered as a unit which includes both the physical component and associated rights. *Supra* note 108. *But see* text accompanying note 85 *supra*.

118. *See Goldblatt*, 369 U.S. 590 (1962).

119. *See* the California Supreme Court decision in *Agins*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1975). Note, *supra* note 91. *See also* Brief for Appellant at 36, San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981). The exercise of the power of eminent domain (and the payment of any compensation) is not a constitutional right; it is merely a means to an end. It is a factor which, when present, can prevent a right from being violated. *See "Fair" Compensation*, *supra* note 18, at 1037.

native, that is, should compensation be awarded for a permanent taking, where the court could enjoin the action and terminate the taking?

A. Compensation should not be awarded where invalidation is an alternative.[120]

B. Where a local authority normally decides whether the power of eminent domain should be exercised and compensation awarded, the court may, by legislation, be empowered to give the local entity an "option."[121] It may decide whether to award compensation and retain title, or accept invalidation of the ordinance.[122]

V. If compensation is due, what amount should be awarded?[123]

A. When a regulation effects a taking, the "property" taken is the right to *use* property in a certain way.[124]

1. The extent of government restriction defines the quantity of "rights" which have been taken.

a. Only those property uses *which are restricted* can be included as "taken."[125]

b. Only that part of the exercise *which is an unreasonable exercise* effects a taking.[126]

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120. Compensation should be awarded for the property (the use) taken, for the temporary period. *See also* note 123 *infra*.

121. Policy reasons for not requiring that the court award compensation include the following:
(1) Prevention of chilling effect on government land use regulation;
(2) Deference to legislature in land use matters, and control of financial resources; and
(3) Impact of large damage awards on government finances.
See Note, *supra* note 91; Van Alstyne, *supra* note 15. In addition, the alternative of invalidating the ordinance and awarding compensation for only a *temporary* taking (*see* note 120 *infra*) might be viewed as a *less restrictive alternative remedy* available to the court; the court should *not* enter the legislative realm by in effect requiring a purchase of the property in fee. For example, in *San Diego*, a proposal to purchase the plaintiff's property by eminent domain was rejected by the electorate. *See* Brief for Appellee at 9, San Diego Gas & Elec. Co. v. City of San Diego, 101 S. Ct. 1287 (1981). Along similar lines, see *"Fair" Compensation*, *supra* note 18. Costonis argues for legislative attention to the compensation question; he suggests that the "premise" that the police power and eminent domain are correlative has had its own chilling effect on land use regulation. *Id.* at 1033. *See* note 90 *supra*.

122. *See* discussion of legislation which grants such an option, *supra* note 19.

123. A related question is "Should non-monetary compensation be awarded?" It is this author's opinion that certain fundamental concepts of liberty are associated with the right to a reasonable use of property. *See* note 138 *infra*. The importance of these rights weigh against an argument for non-monetary compensation unless it is optional.

124. *See* discussion of "Type II" rights in text accompanying note 129 *infra*. The purpose of characterizing the taking as a taking of a "use" is to assist the court in justifying compensation at an amount less than market value. *Infra* notes 124 & 125. This characterization is for purposes of compensation only. The determination of which uses attach as property rights requires consideration of the property "as a whole." *See Penn Central*, 438 U.S. at 131.

125. This is, in effect, a taking, to the extent of the restriction.

126. The "value" of the restriction is limited. The court will compensate *only to the extent that the restriction is "unreasonable."* The award proposed here would equal the market value of the property subject (only) to "reasonable" regulation; it would reflect the value subject to the most stringent regulation which would, absent compensation, be constitutionally pemissible. Traditionally, the value of the "highest and best use" has been awarded. *See* note 39 *supra*. Costonis has suggested that legislatures adopt a similar rationale for compensation. *"Fair" Compensation*, *supra* note 18, at 1048. His legislative recommendation followed his disappointment in the judiciary. Costonis argues that *Euclid*, 272 U.S. 365 (1926), (which "dethroned" the "highest and best use" standard for a police power exercise) "could have paved

2. The determination of the rights which have been taken necessarily involves a determination of what are property rights in this context. *Only those "uses" which attach as property rights should be compensated.*[127]

a. Five categories of use evolve:

i. Type I—pure physical possession[128] (no spillover[129] effect),

ii. Type II—the right to a reasonable use[130] of public resources (reasonable spillover) which is corollary to ownership (compensable),[131]

iii. Type III—the right to a reasonable use of resources (reasonable spillover) in common with other members of the public which is not corollary (not compensable),[132]

iv. Type IV—uses which continue to be permitted (not barred by the regulation), and

v. Type V—unreasonable uses.[133]

B. The method of analysis involves three tiers.

1. There should be a determination of what constitutes a "reasonable use." This standard is applied in determining at what point a taking occurs.[134] It is also the first tier in determining the amount of compensation due. For the purpose of the latter determination, the property value of the "use" may be elevated slightly, to the extent that the court is relieved of obligations to "presume constitutionality" and to defer to the legislature with regard to the presumption.[135]

a. The court will be required to specify a test for this determination. Factors will be considered in light of objective community standards. They include:

i. Reasonable expectancies for development, based

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the way" for a judicial role in eminent domain, limiting compensation to the amount necessary to cure the taking objection. *Id.* at 1043.

127. *See* property definitions in note 108 *supra*.

128. *See also* note 71 *supra*. To the extent that a person's economic interests are increasingly defined by his status in society, it becomes less important to distinguish "physical possession."

129. *See* note 138 *infra*. The "spillover" effect of property use is noted. This author does not fully subscribe to Sax's approach to spillover. Sax places too great an emphasis on the government as allocator. The taking question might arise whenever it can be said that a member of the private sector has a right to use a resource in other than its natural state. Most uses, in fact, would fall into this category. *See* Sax, *supra* note 21.

130. *See* note 138 *infra*.

131. *See* notes 137 & 138 *infra*.

132. These include public rights in public resources as well as other public interests. *See* note 116 *supra*. They are not compensable; furthermore, pressure upon these resources, resulting from growth in both industrialization and population, demands greater assertion of these rights on the part of the public than may have occurred in the past. By defining certain resources to be publicly "owned," this note suggests a regulatory perspective somewhat different than a traditional police power analysis. The end result is the same, however. The approach is similar to the public trust doctrine discussed by BOSSELMAN, CALLIES & BANTA, *supra* note 21, at 313. *See also* Sax, *supra* note 21.

133. For examples of noxious uses, see note 103 *supra*.

134. *See* note 107 *supra*.

135. *See Dukes*, 427 U.S. at 303.

upon existing and foreseeable future land use regulation (reasonable investment-backed expectations);

ii. Competing interconnected uses of any shared public resources[136]; and

iii. The circumstances of each case.[137]

What is "reasonable" is to be determined from a social perspective, not an economic perspective. For example, an owner who purchases floodplain lands which he should know are essential for water conservation and protection of a public water supply has *no* reasonable investment-backed expectation to recover what an economist would define to be a reasonable return. The approach suggested here is supported by two principles: first, diminished value action alone is not a taking; and second, regulation for the prevention of harm does not effect a taking.[138]

2. A determination of whether the "uses" which have been taken are compensable property rights is required. Types I and II uses are compensable. Type III reasonable uses are shared public rights and are not compensable. The second tier requires separation of these uses.

a. Economic interests are increasingly defined by one's status in society, that is, the value of property reflects its institutional setting.[139] The regulatory setting is one component. Consistent with this trend, this note proposes increased recognition of Type II property rights as compensable if taken, regardless of whether Type I rights are taken.

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136. *See* Sax, *supra* note 21.

137. *See Euclid*, 272 U.S. at 387; *Penn Central*, 438 U.S. at 124.

138. *See Penn Central*, 438 U.S. 104 (1978). A better approach might be a legislative solution, such as that proposed by Costonis. He asks what a "reasonable rate of return" should be and recommends legislative standards which codify the criteria that recur in land use decisions. These "reasonable beneficial use rates" are heavily interlaced in community standards (cultural plus technical). He suggests that the net result would be only a modest increase in compensation. *"Fair" Compensation*, *supra* note 18, at 1053.

139. For example, Reich objects to a classification of property rights and liberty rights as "separable." He argues for greater recognition of a private right to use property (even if the use is "unreasonable"). Reich, *The New Property*, 73 YALE L.J. 733-74 (1964). He rejects the view that the majority (public) interest should define the scope of private rights. He is concerned with government largess (including government regulatory power—permit power, professional licensing, and public resources control). Government manipulation of its largess can define an individual's status in society in a variety of ways and determine his right to receive income. *See id.* at 739. Reich recognizes that this largess is not necessarily property. *Id.* at 735. It can be taken away if a legitimate public policy is served. *Id.* at 774. He argues, however, for the creation of private rights in the largess; he sees no likelihood of retreat from the public interest state, yet rights in the largess have become an increasingly important form of wealth. *See id.* at 778. Reich's opinion is consistent with two ideas which are presented in this note:

(1) the concepts of liberty and property are not separable, and
(2) uses of property which are regulated in the public interest are not necessarily property but at some point they take on the character of property; they become a right in the eyes of the community.

A qualitative difference exists between Reich's suggestions and the expanded notion of the public domain presented at note 115 *supra*. The latter would effectuate, in a sense, a "reduction" in the "private rights" which are recognizable as property rights. This suggestion is not inconsistent with Reich's opinion that majority interest should not rule. It rejects, however, his apparent characterization of "reasonable use" as one which benefits the majority.

b. The concurrent recognition of public rights—Type III rights—will counterbalance greater recognition of Type II rights.

3. The extent of the governmental restriction should be determined. Property rights are "taken" only to the extent they are unreasonably restricted. At the third tier the temporary or permanent character of the restriction and the extent to which it is unreasonable are determined.

Summary of Method of Reasoning

Type I and Type II uses are property rights, and compensation should be awarded if they are taken temporarily or permanently. (It is not necessary to separate these uses in calculating compensation due).

Type III and Type IV uses are not property rights. No compensation should be awarded for any part of the "market value" which reflects these uses.

Type V uses are also not compensable. They are subtracted when all but the "restricted" uses are excluded.

The court will first determine whether the exercise is constitutional. The focus, where a "taking" question is raised, is whether an individual landowner should, in fairness and justice, bear the burden of a regulation which serves a legitimate public purpose. This question is reduced to whether the owner *has been deprived of a reasonable use* of his property and whether that use *is one that is corollary to ownership* (one that is a compensable property right). Unreasonable uses are not property and are not considered in the determination.

If the court determines that a taking of property by regulatory action has occurred, it must determine the amount of compensation due. Uses which are *not restricted* by the regulation are *not among those taken*. Similarly, *uses subject to "reasonable regulation"* (regulation which would be permitted without compensation) are *not among those taken*. Only that part of the regulation which is an unreasonable exercise effects a taking. This might be labelled a taking of property valued at its "highest and best use," subject to the most severe level of regulation which could be reasonably, constitutionally applied.

Simply stated, the amount of compensation due is equal to the value of *property rights* restricted by *unreasonable regulation*.

Federal Statutory Remedies in Damages

The federal statutory remedy for deprivation of a constitutional right, 42 U.S.C. § 1983, authorizes both injunctive and monetary relief.[140] Following the rationale above for a judicial remedy absent this statutory provision, damages in an amount less than the fair market value of the property would be justified under section 1983.[141]

140. 42 U.S.C. § 1983 (1976).

141. The Fifth Circuit attempted to apply the rule in *San Diego*, *Agins*, and *Penn Central* to a

PART IV
CONCLUSION

The Supreme Court in *San Diego* had an opportunity to clarify the test for determining when a regulation effects a taking in violation of the fifth or fourteenth amendment and to decide whether compensation is constitutionally required. If the California court returns a final judgment in *San Diego* that is consistent with its ruling in *Agins*, it will answer the taking claim by enjoining operation of the ordinance.

In a case similar to *San Diego*, the Supreme Court is likely to be asked whether compensation is required or whether it is ever a remedy. The Court may decide these questions in a manner which reflects modern economic realities. It should award compensation to owners who have been actually deprived of property, whether by a physical taking or an intangible deprivation of a reasonable use. A chilling effect on governmental regulation will be minimized if the Court sets forth a test which will provide "fair and just compensation" at a level which does not exceed the amount necessary to remedy the taking objection. If possible, the Court should enjoin the operation of an invalid ordinance and order compensation only for the temporary period during which it is effective.

If the Supreme Court has another opportunity to address these issues, it may do more than award compensation. It may indicate to local governing bodies that a legislative option is open to them. They may provide limited compensation for landowners unduly affected by a particular land use regulation in an amount which would satisfy a potential taking objection. The local government may implement legislation that gives the court the option to exercise the power of eminent domain to effect a permanent taking with compensation after a trial in which the ordinance is declared unconstitutional. With this option, the local body could elect to purchase the property right associated with the desired use restriction, thereby avoiding invalidation of the ordinance by the Court.

The Court may elect to combine any recommendations with notice that it intends to continue its deference to legislative judgment. Where constitutional rights are violated, however, it will remedy the wrong, but in so doing, the Court will select methods that minimize judicial assumption of traditionally legislative functions. It will enjoin the government exercise and award damages for any temporary taking which

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section 1983 action in Hernandez v. City of Lafayette, 693 F.2d 1188 (5th Cir. 1981). The court held that an action for damages would lie under section 1983 when "property is taken for public use without just compensation by a municipality through a zoning regulation that denies an owner any economically viable use, thereof." *Id.* at 1200. In *Hernandez*, the alleged taking occurred as a result of the city's *failure to rezone* the property. The court stated that "a taking" does not occur *until* the . . . governing body is given a reasonable time . . . to review its zoning legislation . . . and to correct the inequity." *Id.* (emphasis added). "The measure of damages . . . will be an amount equal to just compensation for the value of the property during the period of the taking." *Id.*

occurred prior to invalidation. In so doing, the Court will provide a remedy to injured property owners. At the same time, however, it will perhaps chill the regulation of innocuous activities. If *legislatures fail* to define judicial options and increase the flexibility of judicial remedies, legislative policy interests, including limitation of regulatory power, may suffer severely. To achieve model regulatory objectives, the proposed judicial remedy, which responds only to constitutional requirements, should be coupled with legislative responses which address a broader range of policy interests.

Carol L. Dorge*

* B.S., Cornell University, 1975; M.S., Illinois Institute of Technology, 1977; J.D., Notre Dame Law School, 1981.