KEYSTONE BITUMINOUS COAL, FIRST ENGLISH AND *NOLLAN*: A FRAMEWORK FOR ACCOMMODATION?

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I. INTRODUCTION

In its 1986-87 term, the Supreme Court produced the most important developments for land use law since the mid-1920s. In a series of landmark decisions, the Supreme Court redefined private property rights in the context of the highly complex, resource-sensitive society of the approaching twenty-first century.

Three dominant themes run through these cases: 1) a refinement of the concept that societal complexities surrounding a particular land parcel limit private property rights; 2) a recognition that the costs of protecting land from exploitation by its private owners may not be imposed solely on the private owners without violation of the fifth amendment; and 3) an implied rejection of the traditional approach of allowing a group of inexpert citizens to make technical decisions regarding appropriate use of private property.

In its most significant decision, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[1] the Court ruled that if a government regulation either temporarily or permanently deprives a landowner of substantial use and enjoyment of his land, the fifth amendment requires that the government pay the owner just compensation.[2] *Keystone Bituminous Coal Association v. De Benedictis*,[3] an

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1. 107 S. Ct. 2378 (1987).
2. *Id.*

earlier decision of the same term, establishes a frame of reference for evaluating *First English*. *Keystone* involved a challenge to a state statute regulating the mining of coal, which required landowners to leave in place fifty percent of the coal located under certain structures. The state imposed this restriction to prevent land subsidence. The Court held the statute did not constitute a taking because the state enacted it for a substantial public purpose, and the statute failed to deprive the property owner of all use of his land.

In the third decision, *Nollan v. California Coastal Commission*,[4] the Court refused to defer to the California Coastal Commission's determination of the proper means to accomplish a public purpose. The state commission imposed a public access easement on private beachfront property as a condition to the landowner's receipt of a construction permit for a residence on that property. The Court held the Commission's conditional permit granting scheme invalid unless the state compensated the owner for the easement.

The Court heard three other property rights cases in the 1987 term.[5] In *United States v. Cherokee Nation of Oklahoma*,[6] the Court reaffirmed the rule that government regulation of navigable waters is not an unconstitutional taking of property from the riparian owners who use the stream bed. The Court's rationale was that the property rights of the riparian owners are subject to the "dominant servitude" of the government.

In *California Coastal Commission v. Granite Rock Company*[7] the Court distinguished between land use planning and environmental regulation. The Court ruled that federal land use planning statutes and regulations applicable to federal lands do not preempt state environmental regulation of private mining activity on national forest land. In *Hodel v. Irving*[8] the Court unanimously held that a statute that required small, unproductive land interests owned by individual native

3. 107 S. Ct. 1232 (1987).

4. 107 S. Ct. 3141 (1987).

5. The Court signaled a desire to continue to explore property rights in land by accepting Pennell v. City of San Jose, 107 S. Ct. 1346 (1987). However, the Court declined to decide the issue whether a rent control ordinance that establishes permissible rent levels based on low income tenants' ability to pay constitutes a taking of property because the question was premature since the ordinance had never been applied. Pennel v. City of San Jose, 108 S. Ct. 849, 856-57 (1988).

6. 107 S. Ct. 1487 (1987).

7. 107 S. Ct. 1419 (1987).

8. 107 S. Ct. 2076 (1987).

Americans to escheat to the owner's tribe, rather than descend by intestacy or devise, constituted an unconstitutional taking of property. Although the statute's purpose of encouraging consolidation of divided unproductive land interests may have been legitimate, the Court found that the government's abolishment of the right to transfer by both descent and devise went "too far."[9]

What are the implications of these developments for landowners and regulators? Early returns indicate that *First English* has significant implications for local government planning and budgetary processes. The full impact of the decision, however, will remain unknown until state and local governments face several unanswered questions. The time is ripe for land users, developers, and regulators to attempt to restructure the land use regulation process to accommodate more effectively their respective interests.

Although cities may worry about the impact of *First English* and *Nollan* on their ability to plan and effectively control development, they are not alone. Landowners and developers have also become increasingly concerned that *Keystone* and its progeny represent judicial approval of a legislative tendency to shift a disproportionate share of the social cost of regulating land use to private landowners.[10] When the three cases are read together, what emerges is a sense that both landowners and regulators have important common interests which the American property law system can accommodate.

II. THE *KEYSTONE* CASE

In *Keystone Bituminous Coal Association v. De Benedictis*[11] a sharply divided Court upheld the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act[12] (hereinafter "the Act"), which imposes stringent regulations on the mining of coal in areas subject to subsidence. Section 4 of the Act prohibits mining that causes subsidence damage to public buildings, residences, and cemeteries.[13] The Act's

9. *Id.* at 2084-85. In the course of several concurring opinions in *Hodel*, six justices split on whether the decision expanded or limited an earlier decision that upheld a prohibition of the right to sell parts of endangered eagles as necessary to an environmental protection regulatory scheme. Andrus v. Allard, 444 U.S. 51 (1979).

10. *See* Wall St. J., March 10, 1987, at 12, col. 2 (editorializing that the *Keystone* decision amounted to "expropriation declared legal").

11. 107 S. Ct. 1232 (1987).

12. 52 PA. CONS. STAT. ANN. §§ 1406.1 et seq. (Purdon Supp. 1986).

13. 52 PA. CONS. STAT. ANN. § 1406.4 (Purdon Supp. 1986).

implementing regulations generally require that landowners leave in place fifty percent of the coal under such structures to prevent subsidence.[14] Section 6 of the Act authorizes the Pennsylvania Department of Environmental Regulation to revoke a mining permit if coal removal causes damage to a protected structure or area and the landowner fails to take satisfactory steps to repair damage and satisfy resulting claims.[15]

Justice Stevens, writing for the majority, rejected the coal association's argument that *Pennsylvania Coal v. Mahon*[16] should control. Relying on *Pennsylvania Coal*, the association contended that the state regulations amounted to an unconstitutional taking of that percentage of coal the Act prohibited landowners from mining.[17] Justice Stevens distinguished *Pennsylvania Coal* because the Act in *Keystone* asserted genuine, substantial, and legitimate public purposes associated with health and safety, while the Kohler Act[18] construed in *Pennsylvania Coal* was essentially a private benefit statute.[19] In addition, although the Kohler Act made mining of "certain coal" commercially impracticable, the Act in *Keystone* did not deny the coal mine operators' economically viable use of their property "as a whole."[20] The key factor in Justice Stevens' analysis was the determination that the property interest "as a whole" formed the basis for a taking evaluation, rather than the consideration of any particular "strand of the bundle."[21]

Chief Justice Rehnquist, dissenting, carefully laid the foundation for his majority opinion in *First English*. First, he disagreed sharply with the majority's characterization of Justice Holmes' opinion in *Pennsylvania Coal* as "uncharacteristically . . . advisory." Additionally, the Chief Justice renounced the majority's conclusion that the Kohler Act served only private interests. Rather, according to Justice Rehnquist, the Court in *Pennsylvania Coal* recognized that although the Kohler

14. 25 PA. CODE § 89.143(b).

15. 52 PA. CONS. STAT. ANN. § 1406.6 (Purdon Supp. 1986).

16. 260 U.S. 393 (1922).

17. The amount of coal involved was large in quantity, 27 million tons, but small in relation to the total amount owned, only 2%. Keystone Bituminous Coal Ass'n v. De Benedictis, 107 S. Ct. 1232, 1248 (1987).

18. Act of May 27, 1921, 52 PA. CONS. STAT. ANN. §§ 661-671 (Purdon 1966).

19. *Keystone*, 107 S. Ct. at 1242.

20. *Id.* at 1246-48.

21. *Id.* at 1248 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979) and Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978)).

Act served public interests, the "mere existence of a public purpose was insufficient to release the government from the compensation requirement."[22] In fact, a public purpose was "merely a necessary prerequisite" to the exercise of the taking power.[23] Although the nature of the public purpose may be important because of the nuisance exception to takings law which permits the government to prevent private landowners from injuring others without paying compensation,[24] the statute in *Keystone* did not fall within the nuisance exception, which has been narrowly tailored to allow government to prevent "a misuse or illegal use."[25]

In confining the nuisance exception to discrete and narrow purposes, the Court has refrained from applying it so as to allow complete extinction of the value of a parcel of property.[26] Viewing both the support estate and the right to mine coal as distinct property rights under Pennsylvania law,[27] the Chief Justice considered the twenty-seven million tons of coal required by the Subsidence Act to be left in the ground as an identifiable property interest. Chief Justice Rehnquist concluded that the governmental action destroyed completely "any interest in a segment of property," rather than only "one strand in the bundle," as effectively as if the government had taken possession of the land[28] or mined the coal.[29]

III. THE *FIRST ENGLISH* CASE

In returning to the same themes three months later, Chief Justice Rehnquist found himself in the majority in the landmark *First English* decision. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[30] involved a challenge to a Los Angeles County ordinance which prohibited the construction of buildings in the flood plain of Mill Creek.[31] The County enacted this ordinance after a disas-

22. 107 S. Ct. at 1253-55.

23. *Id.* at 1256, (citing Hawaii Housing v. Midkiff, 467 U.S. 229, 239-43, 245 (1984)); Berman v. Parker, 348 U.S. 26, 32-33 (1954).

24. 107 S. Ct. at 1256.

25. *Id.*

26. *Id.* at 1257.

27. *Id.* at 1259-61.

28. *Id.* at 1258 (citing United States v. Causby, 328 U.S. 256, 261 (1946)).

29. *Keystone*, 107 S. Ct. at 1259.

30. 107 S. Ct. 2378 (1987).

31. *Id.* at 2381-82.

trous flood destroyed a campground owned and operated by the First English Evangelical Lutheran Church.[32]

Initially, the Court dispensed with a series of procedural questions that had stalled the Court on four previous occasions[33] by concluding that the lower courts' summary dismissal of a damages claim for regulatory deprivation of all use of a campground "isolates the remedial question for our consideration."[34] The Court held the California courts' conclusion that the only remedy for excessive regulation was through declaratory judgment or mandamus declarations of invalidity[35] inconsistent with the fifth amendment.[36]

Chief Justice Rehnquist focused on the language of the fifth amendment, noting that Congress designed it not to limit governmental interference with property rights per se, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking.[37] The constitutional right to compensation is self-executing, requiring no formal eminent domain proceedings to trigger its protection.[38] Recognizing that a temporary taking results from a regulation subsequently declared invalid, the Chief Justice stated that the California Supreme Court's rule limiting a landowner's remedy to a declaration of invalidity has "truncated" the fifth amendment's requirement of compensation. Responding to the California courts' desire to preserve the necessary flexibility of local land use planning and to avoid the "inhibiting financial force" of a compensation rule, Chief Justice Rehnquist implied that despite these considerations, the state must pay just compensation for the temporary taking caused by a regulation later declared invalid.[39]

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32. *Id.*

33. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981); Agins v. Tiburon, 447 U.S. 255 (1980).

34. *First English*, 107 S. Ct. at 2384.

35. *See, e.g.*, Agins v. Tiburon, 24 Cal. 3d 266, 275-77, 598 P.2d 25, 29-31 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

36. *First English*, 107 S. Ct. at 2383.

37. *Id.* at 2386. The Court failed to address whether the ordinance in question actually amounted to a regulatory taking by denying all use of the property. Additionally, the Court expressed no opinion on whether the county government could avoid a compensable taking by characterizing the ordinance as a safety regulation within the "nuisance exception" discussed in *Keystone*. *Id.* at 2384-85.

38. *Id.* at 2386.

39. *Id.* at 2387.

The Chief Justice noted that a government can continue to impose a regulation that effects a taking by choosing to pay compensation. Therefore, he reasoned, cases that require the government to pay compensation for temporary takings such as wartime appropriations of property or condemnation of leasehold interests "reflect the fact 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."[40] Chief Justice Rehnquist commented that courts have required the federal government to pay compensation for the taking of leasehold interests of a shorter duration than the six and one-half years the regulation in *First English* denied the church use of its campground. Chief Justice Rehnquist stated:

> The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed. . . . Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. . . . Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.[41]

The Court distinguished prior decisions which held that mere diminution in value from an action by the government prior to the actual taking is not compensable. These cases simply reaffirm the rule that courts should determine valuation for compensation purposes on the date of the taking.[42]

The Court declined to require that a government which had engaged in a regulatory taking must exercise the power of eminent domain at the behest of the property owner.[43] The Court limited its decision to temporary takings, refusing to consider questions arising from normal

40. *Id.* at 2388.

41. *Id.*

42. *Id.*

43. *Id.* at 2389. The Solicitor General made this suggestion to the Court: "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." *Id.*

procedural delays in obtaining building permits, changes in zoning ordinances, and the like.

Justice Stevens, who wrote for the majority in *Keystone*, passionately dissented in *First English*. Justice Stevens characterized the Court's decision in *First English* as a "loose cannon" that would set off an explosion of unproductive litigation.[44] He advanced four arguments. Justices Blackmun and O'Connor supported two of Justice Stevens' procedural arguments.[45] Justice Stevens based a third argument on the Court's analysis of precedent in the regulatory takings area.[46] In his most crucial substantive point, Justice Stevens argued that the due process clause, rather than the takings clause, is the "primary constraint on the use of unfair and dilatory procedures in the land-use area."[47]

In his dissent, Justice Stevens reasserted his position in *Keystone* that a property owner impliedly accepts governmental regulation of his land use when necessary to prevent injury to the community.[48] He argued that regulatory takings differ from physical takings only because a regulatory taking involves no physical invasion. Although virtually all physical invasions amount to a taking, only the most severe regulations constitute takings, despite their effects on property use and value.[49] Justice Stevens suggested that regulations be analyzed from a three dimensional perspective, with their depth, width, and length corresponding to the extent to which the regulation deprives the owner of the use of the property, the amount of property affected, and the duration of the restrictions, respectively.[50] This analysis made Justice Stevens question the distinction between regulatory and physical takings.[51]

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44. *Id.* at 2400.

45. The procedural arguments were that the Court "unnecessarily and imprudently assumes" that the complaint alleged a constitutional taking, and that the Court "incorrectly assumes" that the California Supreme Court has decided that it would never approve a compensation remedy for a regulatory taking. *Id.* at 2390-93, 2396-98.

46. *Id.* at 2393-96.

47. *Id.* at 2390, 2398-2400.

48. Keystone Bituminous Coal Ass'n v. De Benedictis, 107 S. Ct. 1232, 1245 (1987) (quoting Mugler v. Kansas, 123 U.S. 623, 665 (1887)).

49. *Id.* at 2393.

50. *Id.* at 2395.

51. Justice Stevens stated:

> Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction—perhaps one third—[no taking recognized] and a restriction that merely postpones the development of the property for a fraction of its useful life—presumably far less than a third [a taking under the rule of *First English*]?

Justice Stevens also criticized the majority for failing to explain why courts should treat differently the normal delays in the land use control process, which totally deny the desired use of the land, from the denial of use that occurs when landowners challenge regulations in court.[52] Furthermore, Justice Stevens disagreed with the majority's conclusion that the California courts have decided that a landowner burdened by excessive regulations is foreclosed from obtaining a damages remedy.[53]

Although he was at his rhetorical best in the final part of his dissent, Justice Stevens gathered no visible support from the other justices. In this section, he argued that the due process clause, rather than the takings clause, protects and redresses landowners victimized by "improperly motivated, unfairly conducted, or unnecessarily protracted governmental decision making."[54] By resorting to section 1983 litigation in federal court, aggrieved landowners can obtain damages for procedural due process violations.[55] Justice Stevens, however, remained unpersuaded that landowners should receive damages under the takings clause to remedy delays resulting from fairly conducted regulatory proceedings.[56]

Justice Stevens concluded by expressing a fear held by many supporters of governmental land use and environmental regulation. He noted that proponents of governmental regulation fear that the potential of damage awards to an aggrieved landowner may cause local officials to avoid taking necessary regulatory action, even when essential to the health and safety of the community.[57]

IV. THE *NOLLAN* CASE

In *Nollan v. California Coastal Commission*[58] the Court struck down an easement condition attached to a coastal development permit. The condition required the landowners to grant an easement permitting public lateral access to a portion of their beachfront property. Justice Scalia, writing for the majority, focused on the public purpose of the

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Id.

52. *Id.* at 2396.
53. *Id.* at 2397.
54. *Id.* at 2399.
55. 42 U.S.C. § 1983 (Supp. III 1979).
56. *Id.* at 2399.
57. *Id.* at 2399-2400.
58. 107 S. Ct. 3141 (1987).

regulation. In an opinion reminiscent of the Court's approach in *City of Cleburne v. Cleburne Living Center*,[59] Justice Scalia refused to defer to the California Coastal Commission's stated purpose for its regulation.[60] The Commission asserted that constructing a new house, along with other area development, would cumulatively burden the public's ability to see, access, and traverse the shorefront.[61] The majority evaluated this purpose under a standard of review that Justice Brennan in dissent characterized as requiring a degree of exactitude inconsistent with the Court's standard for reviewing a state's exercise of its police power.[62] Justice Scalia concluded that the Coastal Commission's requirements for an easement of lateral access across the Nollan's property lacked the "essential nexus" to the Commission's stated purposes.[63] As a result, the Commission's easement requirement was "an out-and-out plan of extortion."[64]

In the course of his opinion, however, Justice Scalia apparently gave the imprimatur to a whole host of popular regulatory devices such as exactions, dedications, impact fees, and linkage fees, as long as the requisite connection between the regulatory scheme and a permissible public purpose exists.[65]

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59. 473 U.S. 432 (1985).

60. *Nollan*, 107 S. Ct. at 3150. The Court stated:

> As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "substantial advanc[ing]" of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made in condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

Id.

61. *Id.* at 3143-44. The Commission stated that the proposed house would "increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,' " and "would also increase private use of the shorefront." *Id.*

62. *Id.* at 3151. *See supra* note 60.

63. 107 S. Ct. at 3148. *See supra* note 61 and accompanying text.

64. 107 S. Ct. at 3148.

65. *Id.* at 3147-48. The Court stated:

> The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on

Justice Brennan, in dissent, disagreed sharply with Justice Scalia's insistence on closely examining the means-end relationship of the Commission's action and purpose. Justice Brennan argued that the Commission's regulation was a "reasonable effort to respond to intensified development along the California coast."[66] Arguing that the private property owners could make no claim that the regulation disrupted their reasonable expectations, Justice Brennan stated that the Court's decision gave a windfall to the landowners.[67] Clearly, Justice Brennan believed that a reasonable relationship existed between the Commission's action and the burdens that the regulation placed on the public right of access.[68]

Finally, Justice Brennan argued that the lateral access easement requirement fell short of a taking because the Commission failed to interfere with a pre-existing property interest. The landowners had no legitimate expectation of a right to completely exclude the public because the tradition of public access to the coast was guaranteed by the California Constitution.[69] Moreover, the physical intrusion required by the access easement would be minimal since the affected beach property was so narrow. In addition, Brennan asserted that the economic impact of the easement was negligible. He characterized the beach access condition as "a classic instance of government action that

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fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. . . . The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.

Id.

66. *Id.* at 3161-62. Justice Brennan noted:

State agencies . . . require considerable flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast. They should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck. Its reasoning is hardly suited to the complex reality of natural resource protection in the twentieth century.

Id.

67. *Id.* at 3151.

68. *Id.* at 3154-56. Justice Brennan based his approval of the Commission's actions on the combined effect of the constantly fluctuating shoreline and increasing coastal development. *Id.*

69. CAL. CONST., art. 10, § 4 (Supp. 1987).

produces a 'reciprocity of advantages.' "[70]

In a footnote, Justice Brennan stated that his position was consistent with *First English*. Brennan conceded that courts should give states considerable latitude in regulating private development. But, if a regulation denies a property owner the use and enjoyment of his land so as to effect a taking, Brennan concluded that compensation is the proper remedy.[71]

Both Justices Blackmun and Stevens also dissented. Justice Blackmun argued that creative solutions to land use problems are unattainable with an "eye for an eye" mentality.[72] Agreeing with Justice Brennan's dissent, Justice Stevens observed, however, that even if Brennan's position prevailed in this case, there would still be little guidance for land use planners attempting to forecast how the Court will act in subsequent cases.

V. A Framework for Accommodation

The public reaction to the *Keystone, First English,* and *Nollan* decisions is worth noting. Sources protective of private property rights were outraged by *Keystone*.[73] *First English*, on the other hand, was supported by those with property rights interests and those more sympathetic to the land use regulation perspective.[74] Of course, local governmental officials were predictably upset with the new uncertainty *First English* added to their difficult regulatory tasks.[75] *Nollan*, heard

70. Nollan v. California Coastal Comm'n, 107 S. Ct. at 3158.

71. *Id.* at 3162 n.14.

72. *Id.* at 3162. In this context, the "eye for an eye" phrase denotes that requiring local governments to pay property owners compensation equal to the loss incurred because of the taking severely restricts the flexibility the legislature needs for effective land use regulation.

73. *See generally* the Wall Street Journal editorial noted in *supra* note 10.

74. *See, e.g.,* N. Y. Times, June 11, 1987, at A26, col. 1 ("A new . . . decision wisely shifts the current balance of law on the ticklish conflict between a landowner's right to use land freely and government's need to regulate that use in the public interest."); St. Louis Post Dispatch, June 14, 1987, at 2C, col. 1 ("[I]t is appropriate that when land use regulation is tantamount to confiscation, the Constitution's injunction against taking property without just compensation comes into play.").

75. Benna Ruth Solomon, who filed an amicus brief in *First English* for the National Association of Counties, the National League of Cities, and the National Governors' Association, was "very disappointed" by the decision. Local government officials "will have to keep in the back of their minds that some court may decide that they made the wrong choice and that their government will be liable for damages for regulation in the public interest." N.Y. Times, June 10, 1987, at A26, col. 4.

on the last day of the Court's 1986-87 term, received less public attention than did the other cases.[76]

The public reaction, particularly to *First English*, in part reflects the belief that the compensation remedy provides a framework for resolving an increasingly bitter conflict between private property owners and state and local governments. The debate between property owners and local government is a continuing reminder of the frailty of the human condition. That debate has intensified in the past decade. Meanwhile, the Supreme Court has abrogated its *laissez faire* attitude[77] regarding local land use controls while struggling to bring some order to admittedly ad hoc decisions.[78]

Landowners and legislators perceived the "distinct investment-backed expectations" taking factor that Justice Brennan articulated in *Penn Central Transportation Co. v. City of New York*[79] as a bias in favor of the private property owner in land use controversies.[80] In addition, the Court tantalized landowners by suggesting that compensation was a possible remedy for a regulation that deprived property owners of substantially all use and enjoyment of their land.[81] The Court, however, has approved over the past decade a broad array of

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76. It is possible that Justice Powell's resignation, announced on the same day as the *Nollan* decision, diverted media coverage from the third landmark case.

77. After deciding Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) and Nectow v. Cambridge, 277 U.S. 183 (1928), the Supreme Court did not return to zoning cases until Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *See generally* Brooks, *Zoning Since Euclid v. Ambler Realty*, 21 REAL PROP., PROB. & T.J. 409 (1986); Salsich, *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP., PROB. & T.J. 413 (1986).

78. Daniel R. Mandelker, in a recent article, reviews the development of taking law since the Supreme Court's decision in Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). Mandelker concludes that the "distinct investment-backed expectations" factor that the Court added to taking law in that decision has not had a significant effect on taking cases. He suggests abandoning the investment-backed expectations factor in favor of continued reliance on the elements that courts traditionally apply to taking controversies. For example, courts should look at the character of the governmental action and the effect of that action on private ownership interests, without applying a "set formula." Mandelker, *Investment-Back Expectations: Is There A Taking?* 31 WASH. U. J. URB. & CONTEMP. LAW 3, 6 (1987) [hereinafter cited as Mandelker].

79. 438 U.S. 104 (1978). For a critical evaluation of Justice Brennan's theory, see Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status vs. American Law*, 1986 WIS. L. REV. 83, 136 n.279.

80. *See generally* Mandelker, *supra* note 78, at 6.

81. San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting; Rehnquist, J., concurring).

increasingly sophisticated land use and environmental regulations.[82] The Court's failure to resolve the compensation question[83] has resulted in a growing sense of uncertainty and frustration for both the land use planning and development communities.[84]

The Court has yet to define a regulatory taking and whether to grant a damages remedy.[85] In recent years, however, the Court has clarified five important points of substantive law:

1) To establish a taking, property owners must show that a regulation deprived them of all reasonable economic use of their land.[86]

2) Because property owners have no right to use their land to harm others, a regulation that deprives a landowner of all use of her land to prevent a nuisance is not a taking.[87]

3) If a government applies a land use regulation to effect a taking, the fifth amendment requires that the government compensate property owner.[88]

4) In imposing various creative and flexible land use regulations, legislators must base their application of these techniques to particular parcels of land on carefully drawn land use plans. The plans must articulate specific objectives and establish that the regulatory techniques chosen have a reasonable connection with the

82. *See, e.g., Penn Central*, 438 U.S. 104; Agins v. Tiburon, 447 U.S. 255 (1980).

83. *San Diego Gas*, 450 U.S. 621; Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

84. *See, e.g.*, Williams, Smith, Siemon, Mandelker and Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984).

85. *See generally* notes 34-42 and accompanying text. The author has no intention of diminishing the importance of the difficult problems associated with a compensation remedy. The author acknowledges the complexity surrounding issues such as the standard of proof, the measurement of compensation, and the point in the development process at which delay becomes intolerable. In fact, this Article uses these problems to buttress the main themes of accommodation and resolution of differences in a less adversarial setting.

86. *See supra* notes 16-21 and accompanying text. In determining whether a landowner has lost all reasonable economic use of his property, courts must consider use of the entire parcel of land, rather than merely a "strand of the property bundle." *Id.*

87. *See* notes 24-26 and 48 and accompanying text. *See also* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 155-61 (1971); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1235-37 (1967) (*cited in* Keystone Bituminous Coal Ass'n v. De Benedictis, 107 S. Ct. 1232, 1245 n.20 (1987)).

88. *See* notes 34-43 and accompanying text.

legislature's objectives.[89]

5) Courts should impose a stricter standard of review when considering a taking challenge. Rather than simply determining whether a particular regulation will serve the public interest, courts must determine whether the regulation substantially advances legitimate state interests in order for the regulation to survive a taking challenge.[90]

It is unclear who the real winners or losers are in these cases. While interested parties can claim partial victories, the more significant result may be a renewed effort to establish a more effective process to accommodate common interests and resolve differences short of litigation.

A. *Restoring a Delicate Balance*

If *Keystone, First English,* and *Nollan* are considered separately, each may be said to have influenced the property rights/regulation balance. *Keystone* favors property regulators, and *First English* and *Nollan* favor property owners. When read together, however, the cases have actually restored the land use law equilibrium.

Although land use litigation is often framed as a contest between a developer[91] and a land use regulator, scholars and practitioners have recognized a third party in most land use conflicts.[92] An owner's proposed use of a particular tract often has an impact on two different groups of people. Adjacent landowners and residents experience the physical and aesthetic impacts of the size, shape, and density of the specific land use. A larger group of people, including residents and nonresidents of the governmental entity in which the land is located, may also experience a direct or indirect financial impact in the form of increased or decreased taxes. The degree of the impact on taxes depends on whether the particular land development increases the need for public services without a corresponding increase in the tax base, or whether the project increases the tax base without a corresponding increase in the demand for public services.[93] It is also possible for this

89. *See* notes 63-65 and accompanying text.

90. *See* notes 59-62 and accompanying text. *See also* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3147 n.3.

91. The user may be the developer or a user of neighboring land who objects to the proposed use by the developer.

92. *See generally* D. MANDELKER AND R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 130-134 (1979); Salsich, *Displacement and Urban Reinvestment: A* Mount Laurel *Perspective*, 53 U. CINN. L. REV. 333, 367 (1984).

93. This phenomenon is referred to as the "tax ratables" of a land development. The

larger group to experience variations in choice of housing or employment, depending upon the nature of the particular development.[94] These groups will also experience the environmental effects of the development.

These groups and the owner/developer may expect the governmental entity responsible for regulating land use to represent their best interests when making land use regulatory decisions. When subgroups emerge both to support and to oppose a land development project, the land use regulator may find itself caught in the middle of a struggle over competing values. The resulting relationship resembles a triangle with the owner/developer on one side, the neighbors on another, and

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ratables are said to be positive if tax revenues generated by the project outweigh the cost of requiring public services, and negative if the reverse is true. *See* Advisory Comm'n on Intergovernmental Relations, *Fiscal Balance in the Federal System I*, 93-101, 265-66 (Oct. 1967), *reprinted in* D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 44-47 (2d ed. 1971).

94. Perhaps the most dramatic example of this effect is the public controversy over exclusionary zoning. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (upheld municipal requirement that land use regulations provide realistic opportunities for low and moderate income housing); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (a municipality may not use land use regulations to make it physically and economically impossible to provide low and moderate income housing); Blitz v. Town of New Castle, 94 A.D.2d 92, 463 N.Y.S.2d 832 (App. Div. 1983) (ordinance allowing multifamily housing construction providing a properly balanced and well-ordered community plan adequately considering regional needs presumptively valid); Robert E. Kurzius, Inc. v. Incorporated Village of Upper Bronxville, 51 N.Y.2d 338, 414 N.E.2d 680 (N.Y. 1980), *cert. denied*, 450 U.S. 1042 (1981) (upheld minimum lot requirements of five acres as valid exercise of village's police power, and bearing a substantial relation to the health, safety, and welfare of the community); *In re* Elocin, 501 Pa. 348, 461 A.2d 771 (Pa. 1983) (residential zoning district upheld since municipality had provided for a reasonable share of multifamily dwellings); Surrick v. Zoning Bd., 382 A.2d 105 (Pa. 1977) (court used "fair share" test and determined that residential ordinance requiring one-acre minimum lot sizes unconstitutionally excluded multifamily dwellings); Township of Williston v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (Pa. 1975) (ordinance providing for apartment construction in only 80 of 11,589 acres held unconstitutionally exclusionary); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (Pa. 1970) (zoning schemes failure to provide for apartments unconstitutional, even though apartments were not explicitly prohibited by ordinance); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (Pa. 1965) (four acre minimum lot requirement held unconstitutional as impermissible means to create a "greenbelt").

See generally Salsich, *Displacement and Urban Reinvestment: A* Mount Laurel *Perspective*, 53 U. CINN. L. REV. 333, 361-70 (1984); McDougall, *The Judicial Struggle Against Exclusionary Zoning: The New Jersey Paradigm*, 14 HARV. C.R.-C.L. L. REV. 625 (1979); AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING (J. Rose & R. Rothman eds. 1977).

the community at-large on the third.[95] All three groups are locked into this relationship because of the external effects of a land development project, which varies with the nature and size of the development.[96]

As with other relationships in which competing and common interests exist, owner/developers, neighbors, and the community at-large need to support one another for land use relationships to succeed. Although land does not depreciate in the sense that a building does, it is a finite resource that can be wasted by unnecessary or harmful development. When poorly executed development plans waste land, it may be lost for the current generation because of the enormous cost and difficulty of reclaiming such land. Although landowners and developers make the decisions that produce land waste, they are also members of the community at-large. As such, they too will benefit from land use regulations which effectively prevent land waste, and thus the community should urge developers to support such regulations.[97]

Likewise, land use regulators need property users and developers. With the exception of land set aside in public parks and wilderness areas, legislators generally aim their regulations at balancing desirable and undesirable uses of privately owned land to benefit society. If regulations are so onerous that they discourage even desirable development, they do not benefit the community. Thus, the reaction of

95. While the triangle is a useful symbol of typical land use relationships, it is not totally accurate because the owner/developer will also be a member of the community at-large and may, under certain circumstances, be a member of the neighborhood. For example, when a resident-owner of adjacent property develops a vacant lot, he covers all three sides of the land use triangle.

96. Although size is an important indicator of the likely external effects of land development, it is certainly not the only one. Some of the most emotional land use conflicts in recent years have involved buildings of relatively small size. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (group homes for the mentally retarded); Village of Belle Terre v. Boraas, 416 U.S. 1 (1984) (unmarried college students sharing single-family residence).

97. Of course, the regulations must be effective in preventing land waste. For an eloquent warning against uncritical reliance on preservation techniques such as transfer of development rights (TDR), see Richards, *Downtown Growth Control Through Development Rights Transfer*, 21 REAL PROP., PROB. & T.J. 435, 474-83 (1986).

In addition, the argument might be made that landowners would benefit more from an open market in land if they use their land wisely and do not waste it because their better-used land would presumably be scarcer and thus more valuable. Even so, effective land use regulations that prevent land waste will increase the overall value of the total available land in the community and thus benefit the owners of that land.

developers to land regulation provides important feedback to legislators concerning the utility of their regulations.

The availability of compensation as a remedy in taking cases is a significant addition to land use law. The compensation remedy supports those traditional arguments that accepted no difference in principle between "takings by dispossession" and "takings by excessive regulation."[98] In addition, compensation can serve as a necessary check on government and as a means of retaining (or perhaps restoring) the consent of the people in their governments.[99] Finally, compensation can be viewed as the price for public willingness to accept the "innovative," "flexible," and "comprehensive" land use regulations that today's legislators believe necessary.[100]

The American system of property law, with its emphasis on private ownership of land, has two basic goals: to maximize and protect individual freedoms and to effectively utilize land. To achieve these goals, the chief actors in the American property law system—landowners, developers, users, neighbors, and regulators—must respect one another's interests. Additionally, state and local governments must provide the community with appropriate vehicles for asserting these competing interests. Ideally, these interests should exist in equilibrium. If one is perceived to have an unfair advantage, the cooperation necessary for the system's functioning breaks down.[101] The cumulative effect of the cases decided during the 1986-87 term should prevent such breakdowns. Compensation is now available for regulatory takings, even if temporary. The likelihood, however, that a court would find a carefully drawn and carefully tailored regulation to be a taking has dimin-

98. *See, e.g.,* San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621, at 638 (Brennan, J., dissenting).

99. *See generally* Freilich, *Solving the Taking Equation: Making the Whole Equal the Sum of the Parts,* 15 URB. L. 447, 479-83 (1983) (approving damages rather than compensation for tortious interference with property rights).

100. *See, e.g.,* First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 107 S. Ct. 2378, 2399 n.17 (1987) (Stevens, J., dissenting); Nollan v. California Coastal Comm., 107 S. Ct. 3141, 3161-62 (1987) (Brennan, J., dissenting).

101. Morton P. Fisher, Jr., of Baltimore, Md. forcefully stated the case for cooperation at a recent conference of real estate lawyers: "Every lawyer representing a developer has a silent client—the city. You must take time to understand it. A city has been described as an oversized marshmallow. You can knead it, punch it, roll it, shake it; but if you heat it up, it becomes very sticky." Address by Morton P. Fisher, Jr., American College of Real Estate Lawyers, Land: Its Use, Abuse, Non-Use and Re-Use, Baltimore, Maryland (October 20, 1986).

ished considerably.[102]

B. *An Accommodation Process*[103]

The *First English* decision clearly outlines a new phase of land use regulation. It would be unfortunate if the only persons who benefit from it are the lawyers and experts retained to argue the fine points of regulatory takings and compensation. The costs and uncertainties of the *First English* approach are so great that reason suggests that both land users and regulators seek an alternative to this new phase.

A possible alternative to Justice Stevens' feared "litigation explosion"[104] would be to establish a mechanism to identify potential regulatory takings as early as possible. The purposes of the mechanism[105] would be to allow aggrieved landowners to raise regulatory taking challenges sooner rather than later, and to give the regulatory body a vehicle for responding to and resolving any resulting disputes.

Early review systems are currently available in a number of other land use control contexts. For example, the Pennsylvania eminent domain statute authorizes a landowner whose property is subject to eminent domain proceedings to obtain an early hearing from the local board. Under the statute, local boards can award just compensation on the ground that the delay in prosecuting the eminent domain action itself amounts to a taking.[106] Additionally, the Supreme Court's reluctance to review the merits of taking cases until the aggrieved landowner has exhausted all local and state appeal procedures[107] highlights the importance of statutory provisions that authorize landowners to bring inverse condemnation actions when there is an excessive delay in

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102. *See* notes 86-90 and accompanying text.

103. The concept of an accommodation process to resolve land use disputes through techniques such as transferable development rights was stated eloquently in Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976).

104. First English Evangelical Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, at 2400 (1987) (Stevens, J., dissenting).

105. Such a mechanism could be created by state statute as a local administrative review board, or established by local ordinance as a taking review process within the established land use regulation system.

106. PA. STAT. ANN., tit. 26, § 1-502(e) (Purdon 1981).

107. *See, e.g.*, Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194-97 (1985); Pennell v. City of San Jose, 108 S. Ct. 849, 856-57 (1988); Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988).

the prosecution of an eminent domain action.[108]

The concern over delay is equally important in the land use regulation context. Developers have a relatively brief "window of opportunity" for particular projects.[109] Instability of interest rates, costs of construction, and the expense of maintaining non-income-producing land can increase the cost of a project beyond the developer's financial ability.[110]

Regulatory takings raise an additional question that is inapplicable in the eminent domain context: Does delay caused by the regulatory process effects a taking in a situation in which the government has no plans to acquire a property interest? In the eminent domain setting, the government decides to acquire a property interest. The landowner's concern in a delayed eminent domain proceeding is whether the government will pay just compensation if market values drop during the delay period.[111]

Resolution of this regulatory taking question requires sophisticated analysis of the relationship between regulatory delay, reasonable expectations of landowners, including investment-backed expectations, and the possible uses for the land during the delay period. This analysis may be carried out in the local regulatory process as well as in the courthouse. Although the Supreme Court has yet to decide whether delay alone can amount to a taking, the emphasis in *Keystone, First English*, and *Nollan* on deprivation of all reasonable economic use of property suggests a negative answer. While the delay may prevent the owner from using the land as she desires, it is unlikely to deprive her of all economic use of the land. Therefore, some prohibition of use, in addition to a delay, would be necessary for a court to find a taking.

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108. *See, e.g.*, CAL. CODE CIV. PROC. § 1245.260 (1982); Cassettari v. County of Nevada, Cal., 824 F.2d 735, 738 (9th Cir. 1987).

109. Address by Assistant Professor Alan Weinberger, Saint Louis University School of Law (August 24, 1987).

110. *First English*, 107 S. Ct. at 2399 (Stevens, J., dissenting). Thus, a developer's "window of opportunity" can rapidly close as a result of inordinate delays in the construction process, whether those delays are caused by acts of God or "improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking." *Id.*

111. "Condemnation blight" cases raise this issue and courts which accept the argument that governmental delay has artificially depressed property values usually backdate the assessment of just compensation on the date at which the delay became excessive. *See* Lange v. State, 86 Wash. 2d 585, 547 P.2d 282 (1976). *See generally* Salsich, *Displacement and Urban Reinvestment: A* Mount Laurel *Perspective*, 53 U. CINN. L. REV. 333, 359 n.115 (1984).

Landmarks preservation programs currently use an administrative review process to evaluate the economic impact of the regulation on property owners.[112] For example, the Seattle Landmarks Preservation Ordinance requires the administering board to seek an agreement with the owner of a designated landmark on an appropriate range of "controls and incentives" to preserve property.[113] If the parties are unable to reach an agreement within a designated time, the board prepares recommended controls and incentives and forwards them to a hearing examiner who conducts a public hearing on the matter.[114] Following the hearing, the hearing examiner may submit recommendations to the Seattle City Council, which has authority to enact ordinances establishing specific controls and economic incentives with respect to designated landmarks.[115]

An important limitation on the Seattle landmarks regulatory process is that no regulation may deprive landowners of "a reasonable economic return."[116] In determining the reasonable return on a site, the ordinance limits consideration to five factors: 1) the market value of the site before and after the imposition of controls or incentives; 2) the owner's yearly net return on the site for the previous five years; 3) estimates of future net returns on the site, with and without the controls or incentives in question; 4) the net return and the rate of return necessary to attract capital for investment on the site after the imposition of controls, if available, or on a comparable site with comparable controls; and 5) the net return and rate of return realized on comparable sites with comparable controls.[117]

A final area in which local governments employ early-warning administrative review procedures is rent control. The rent control ordinance recently upheld by the Supreme Court in *Pennell v. City of San Jose*[118] establishes an advisory commission on rents and rental disputes

112. *See, e.g.*, SEATTLE, WA., CODE, § 25.12.010 (1977).

113. SEATTLE, WA., CODE, § 25.12.490 (1977). For a superb analysis of the use of negotiated agreements as a basis for land use regulation, see Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957 (1987).

114. SEATTLE, WA., CODE, §§ 25.12.520 to 25.12.560.

115. *Id.* at § 25.12.610.

116. *Id.* at § 25.12.580.

117. *Id.* at § 25.12.590.

118. 107 S. Ct. 1346 (1987).

and a hearing officer to mediate rental increase disputes.[119] The San Jose ordinance allows rent increases of up to eight percent per year.[120] Unless a tenant has appealed to the hearing officer, increases in excess of eight percent may go into effect automatically after landlords have given notice of the increase to the affected tenants. Tenants who wish to appeal must file a timely petition for a hearing.[121] The hearing officer is to conduct a hearing and determine within ten days whether, in light of all the evidence presented, the proposed rent increase is reasonable.[122]

If the hearing officer determines that any part of the proposed increase is unreasonable, a thirty-day mediation process commences in which the landlord and tenants seek an appropriate rental increase. If the parties fail to reach an agreement, the hearing officer determines and grants a reasonable increase.[123] Each party has seven days to appeal the hearing officer's decision to an arbitrator. The arbitrator conducts a hearing and reviews the report of the hearing officer and any additional documentation the parties supply within ten days after the hearing. Within seventeen days of the appeal hearing, the arbitrator makes a final determination of the allowable rental increase, supported by written findings of fact.[124] The entire process is set up to permit landlords a fair and reasonable return on the value of their property while protecting tenants from arbitrary, capricious, or unreasonable rent increases.[125]

An early-warning administrative review process would give landowners an opportunity to voice their concerns about the effects that land use regulations may have on their property rights.[126] The early

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119. SAN JOSE, CALIF., MUN. CODE, §§ 5702.3, 5702.7, 5705.1-5705.7, 2249.100-2249.101 (1979).

120. *Id.* at § 5703.2. The statute states that increases exceeding eight percent shall be subject to review.

121. *Id.* at §§ 5703.6, 5703.12 and 5703.27.

122. *Id.* at § 5703.17. Generally, the landlord has the burden of proving the reasonableness of a particular rent increase. In determining reasonableness, the hearing officer must consider a number of factors relating to costs of capital improvements, maintenance and operation, rehabilitation, debt service, rental condition of the premises, increases or decreases in services, and "the economic and financial hardship imposed on the . . . tenants." *Id.* at §§ 5703.28 and 5703.29. (The tenant hardship provision was the subject of the *Pennell* case).

123. *Id.* at § 5703.20.

124. *Id.* at §§ 5703.22 to 5703.25.

125. *Id.* at § 5703.28.

126. In the context of land use regulation, the Supreme Court defines "property

review process would alert the responsible authorities before the particular regulation actually effects a taking. Early review would also encourage affected parties to identify and accommodate common interests through compromise following negotiation or mediation.[127] Finally, early review would give the municipality a greater role in framing the issues for judicial review since the aggrieved party would base his appeal on the record developed at the local arbitration hearing.

Rather than creating another layer of review that might contribute to the existing delays, state and local governments could incorporate the early review process into the basic land use regulatory system. The following essential elements of the early review process may already be in place, or local governments could add them to most land use regulatory systems with little difficulty.

1. Expertise in Land Economics and Land Use Law

The factual findings required to determine whether a particular regulation effects a taking necessitate a sophisticated analysis of highly technical data. Much of the data is prospective in nature, such as market trends and cost projections. The compensation remedy requires municipalities to incorporate the ability to make those determinations in their existing process of developing and evaluating land use regulations.

Justice Scalia's requirement in *Nollan* of a substantial nexus between regulations and specific public purposes together with his willingness to submit land use regulations to a heightened standard of review[128] re-

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right" as the owner's right to make "economically viable use" of his land. Keystone Bituminous Coal Ass'n v. De Benedictis, 107 S. Ct. at 1242 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980), and citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)). Chief Justice Rehnquist, however, may have contributed to the uncertainty about that definition of property rights by using the denial of "all use" rather than "economically viable use" in *First English* as his standard for determining whether a fifth amendment taking has occurred. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2384, 2385, 2388, 2389 (1987).

127. For an excellent review of creative approaches to resolving land use conflicts, see G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1986).

128. Although the legitimacy of a regulation's purpose may well be a "question of federal, rather than state, law, subject to independent scrutiny by . . . [the Supreme] Court," Keystone Bituminous Coal Ass'n v. De Benedictis, 107 S. Ct. 1232, 1256 (1987) (Rehnquist, C.J., dissenting), the crucial inquiry, whether a regulation deprives the owner of all reasonable economic use of his land, is basically a factual question to be determined at the administrative level.

veal another area of land use regulation that is highly technical. This area is the development and articulation of the requisite connection between a particular regulation and the purpose for which the government is considering it.

Both the taking determination and Justice Scalia's nexus requirement should be made before the government applies a regulation to a particular property interest.[129] The three landmark cases illustrate that municipalities that retain the traditional, "nonprofessional citizen" format for land use regulation and that engage in land use regulation without the technical capability to make taking and nexus determinations do so at the peril of the taxpayers' pocketbooks. The technical review of a challenged regulation's actual effects on a particular tract of land should be conducted by either a hearing examiner with land use expertise or by a technical panel composed of specialists who would present their findings to a hearing examiner.

The technical review would not be designed to produce a legal decision concerning whether a taking has occurred. Rather, the review's purpose would be to identify those situations in which an unlawful taking is likely to occur.[130] The technical review would focus on the requisite nexus for the application of the regulation and on the economic effect of the regulation on the property.

An example of the use of technical experts and public hearings to establish a requisite nexus for an impact fee regulation is the San Francisco Transit Impact Development Fee Ordinance, upheld in *Russ Building Partnership v. City & County of San Francisco.*[131] By requiring developers of downtown commercial property to pay a transit fee of up to five dollars per square foot of office space, the legislators intended to offset anticipated costs of getting new riders to and from the new buildings. In approving the ordinance, the court noted that the city performed numerous studies and held public hearings to determine the reasonable cost of the increased transit services.[132] With this in mind, the city hired consultants to project the long-term needs and costs of transit services.[133]

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129. *See* notes 60-65 and accompanying text.

130. Chief Justice Rehnquist noted in *First English* that governments retain the flexibility either to pay compensation for a taking or to modify the regulation to prevent a taking from occurring. *First English*, 107 S. Ct. at 2389.

131. 234 Cal. Rptr. 1 (Cal. Dist. Ct. App. 1987).

132. *Id.* at 6.

133. *Id.*

2. Consultation Between Landowner and Regulatory Staff

Planning is an "endeavor that requires a search for consensus."[134] The earlier in the process that the search begins in earnest, the less likelihood there is of destructive controversy. The remedy of compensation provides an incentive that should enhance that search, thereby encouraging consensus. One means of obtaining consensus is to talk to the property owner whose land is threatened. For example, the Seattle Landmarks Preservation Ordinance[135] permits the owner of property designated as a landmark to initiate a consultation process with the Landmarks Preservation Board and staff. The parties meet with the purpose of reaching agreement on specific elements of a building to be preserved and the methods of preservation.[136] State and local governments could implement a similar process to trigger a "taking review" and search for accommodation that would help eliminate the taking issue.[137] In addition, this process could allow the government to confront the taking question and to compensate the owner through a "zoning with compensation" technique.[138]

At the present time, informal consultation is often unsuccessful because the typical land use regulatory process is adversarial in nature. As such, *ex parte* contacts may raise suspicion among the interested parties. A built-in consultation process would encourage *ex parte* contacts. Therefore, care would have to be taken to insure that the public interest is protected, possibly by requiring any agreements developed by such consultation to be subject to public review through a public hearing and a ratification vote by the decision-making body.[139]

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134. Professor Julian H. Levi, Hastings College of Law, Statement at Annual Meeting Program of the ABA Section of Urban, State and Local Government Law, San Francisco, California (August 10, 1987).

135. *See supra* notes 110-22 and accompanying text.

136. SEATTLE, WA., CODE, § 25.12.460 (1977).

137. Legislation authorizing development agreements is one possible approach to accommodating the interests. *See generally* Wegner, *supra* note 113, at 1008-27.

138. "Zoning with compensation" is not a new idea, but it has not been used very often because of the Supreme Court's acceptance of noncompensatory zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). When courts find both a proper public purpose and a substantial relationship to public health, safety, morals, or general welfare of the community, courts will approve government action as a "joint exercise of the power of eminent domain and the police power." City of Kansas City v. Kindle, 446 S.W.2d 807, 813 (Mo. 1969).

139. Professor Wegner discusses in considerable detail the problem of protecting the public interest in the context of contingent zoning and development agreements. *See* Wegner, *supra* note 113, at 986-94, 1008-27.

3. Standards for Triggering the Early Review

Because the early review process could contribute to delay, it should only be available to those with an economic stake in the land in question. Thus, neighbors opposing a proposed use should have access to the early review process only if the proposed land use would so injure their use of neighboring property as to effect a taking of property. Generalized expressions of concern about decline in property values, so typical of land use conflict today, should be insufficient to confer standing to trigger early review. A municipality, however, should not ignore potential depreciation when a large number of landowners express such a concern stemming from limitations on the use of their property that could result from the proposal under review.

A landowner or developer with a legally enforceable means of gaining control of the property, such as an option to purchase, should be able to trigger the process by a written communication to the regulatory body. Such notification should state that application of the challenged regulation would deny the owner "economically viable use" of the land.

4. Identification of Techniques that Could Necessitate Early Review

There are three obvious candidates for early review: first, when a local government imposes additional regulations as conditions for receiving a permit when a landowner has already met the objective standards governing the issuance of permits; second, when there is a substantial delay in governmental decisionmaking with respect to an application for a permit, or in the assessment of impact fees, exactions, or linkage charges; and finally, early review would be warranted in the case of regulation of privately owned land in anticipation of future public development.

The nexus requirement of *Nollan*,[140] however, raises questions about the validity of a wide range of traditional forms of land use control that may have been imposed without regard to a specific nexus. Thus, it is impossible and undesirable to delineate precisely the types of regulations that should trigger early review. The Supreme Court of New Hampshire suggested a useful standard for evaluating whether early review ought to be available: the greater the cost of accomplishing something which is considered to be in the public interest, the greater

140. *See generally* notes 58-65 and accompanying text.

the reason why a single individual should not be required to bear that burden.[141]

5. Burden of Proof

The landowner should bear the burden of establishing that the effect of the disputed regulation will constitute a taking. The Seattle Landmarks Preservation Ordinance suggests several factors that could be useful in determining whether a regulation denies an owner economically viable use of land: a) market value before and after application of the regulation; b) yearly net return on the site; c) estimated future yearly net return with and without the regulation; d) net return and rate of return necessary to attract capital for investment; and e) net return and rate of return on comparable sites not subject to the disputed regulation.[142]

6. Public Hearing and Appeals

A separate public hearing is unnecessary unless the taking question arises at a point in the regulatory process that precludes the presentation of the complaint before the planning or governing body. The hearing on the taking question should proceed in an adjudicative manner. If the taking question is raised as part of the regular legislative hearing, the legislature should appoint a hearing examiner to conduct that portion of the hearing. Aggrieved parties would base their appeals on the record developed at the administrative level. This formal judicial-type hearing is warranted because the questions raised by an as applied taking challenge normally involve technical questions of fact and law, rather than competing values that require legislative policy decisions.[143]

State and local governments should establish an administrative land use review process that incorporates techniques of negotiation and mediation along with professional planning expertise. Implementation of such a review process at the front end of the land use regulatory system would enable governments to identify the substantive limits of land use

141. Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981), (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)); Monongahela Navigat'n Co. v. United States, 148 U.S. 312, 325 (1893).

142. SEATTLE, WA., CODE, § 25.12.590 (1977).

143. *See, e.g.*, the hearing procedures established for landmarks preservation disputes in Seattle, *supra* notes 113-117 and accompanying text; the rent control process in San Jose, *supra* notes 119-125 and accompanying text.

regulation. Thus, governments can prevent taking challenges arising from the lack of a nexus or from the denial of all reasonable economic use through accommodation or through payment of compensation.

Under this proposed early review system, landowners and developers would have a heavy burden of proof on the taking question. At the same time, however, these parties would gain important access to a reviewing authority relatively early in the regulatory process. Thus, cities would have a method both for guarding against regulatory excesses and for keeping the compensation "tiger" manageable. As a result, land use planners could take "reasonable" chances, and landowners could obtain redress if the fallout from those chances proves harmful.

VI. CONCLUSION

Effective use of an early review system, along with regulations carefully tailored to specific land use policies, would enable municipalities to continue to plan and regulate land in comprehensive, flexible, and innovative ways. *Keystone* established that a challenged regulation must deprive the owner of all economic use of his land, not just the economic use of a "strand of the property bundle." *First English* recognized that compensation is a proper remedy when a *Keystone* taking occurs. Although *Nollan* imposes a stricter standard of review and a means-end relationship, the Court also approved a wide range of regulatory techniques in which the regulators can establish the requisite means-end relationship. As a result, landowners have access to the compensation remedy, but continue to have an extremely difficult time proving a taking. Cities that fear the compensation remedy can prevent a taking by implementing an early review system.

Other approaches that governments may consider include: statutory limitations on the amount of compensation that landowners may recover; the granting of immunity to planning and regulatory officials for decisions made in their official capacities; shortened statutes of limitations for compensation claims; and finally, the use of mediation techniques to settle disputes before the compensation issue arises. These alternative approaches, however, are merely suggestions for future developments in the land use regulatory process. For now, the best response to the Supreme Court's taking trilogy is the use of an early review process coupled with carefully tailored land use regulations.

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