THE *HAMILTON BANK* DECISION: REGULATORY INVERSE CONDEMNATION CLAIMS ENCOUNTER SOME NEW OBSTACLES

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When the United States Supreme Court agreed to review the decision of the Sixth Circuit in *Hamilton Bank of Johnson County v. Williamson County Regional Planning Commission*[1] it appeared that the Court would finally have an opportunity to settle definitively the question of whether the Constitution requires that compensation be paid when a regulation is so severe that it amounts to a "taking."[2] It was

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1. 729 F.2d 402 (6th Cir. 1984).

2. In two previous instances the Court concluded that the record did not permit it to reach the issue. In Agins v. City of Tiburon, 447 U.S. 255 (1980), the Court held the restrictions to be facially valid, but declined to reach the question of validity as applied because plaintiff had not sought approval of a specific development as required by the Tiburon ordinance. In San Diego Gas & Electric v. City of San Diego, 450 U.S. 621 (1981), the Court found there had not been a final judgement in the California state courts, thus the issue was not ripe.

Regulation results in a taking when it "denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260. According to Justice Oliver Wendell Holmes, a taking occurs when regulation "goes too far." Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922). How far regulation may legitimately "go" will vary with the facts, the times, and the jurisprudential disposition of the Court. In an opinion that preceded *Pennsylvania Coal* by fourteen years, Holmes had said that when regulation makes property "wholly useless, the rights of property would prevail over the other public interest, and *the police power would fail.* To set such a limit would need compensation and *the power of eminent domain.*" Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (emphasis supplied). Under this approach, regulation is a "taking" whenever the object

not to be. Although a jury had decided that the land use regulations of the Commission did amount to a "temporary taking" and had set compensation at $350,000, the Supreme Court, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*,[3] again avoided a direct confrontation with the claim that when regulation deprives a landowner of all reasonably viable economic use of his land, either permanently or temporarily, then compensation must be paid. About all that is clear from the opinion in *Hamilton Bank* is that the Court does not intend to permit regulatory taking claims for compensation to become routine weaponry in the arsenal of landowners and developers. However, more of that later. First, the setting in which the dispute between the Bank and the Commission arose.

I. THE FACTS

The train of events that culminated in the decision of the Supreme Court was set off by an everyday occurrence in local government. The Williamson County Regional Planning Commission refused to approve a final plat of subdivision that Hamilton Bank had submitted. However, eight years of history preceded that simple act.[4]

In 1973 William Temple owned and farmed the property which the Bank ultimately came to own. A group of developers formed a joint venture to build a residential subdivision on the Temple property. Part of the property was on relatively steep slopes and presented some developmental complications that prevented the application of orthodox subdivision techniques. Thus, the developers of what was to become Temple Hills Country Club Estates proposed to the county that they be permitted to plat the land as a residential clustered subdivision in which houses would be built on comparatively small lots while other

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sought by government can only be achieved by exercising the power of eminent domain. Many believe that Justice Holmes' characterization of unreasonably restrictive regulation as a "taking" was simply a use of the term as a convenient metaphor for regulation that is beyond the reach of the police power. The purpose of this article, however, is not to argue that point again. The author, together with his professional colleagues Richard Babcock, Daniel Mandlelker, Charles Siemon, and Norman Williams, Jr. made that point elsewhere. *See* Williams, Smith, Siemon, Mandelker, Babcock, *The White River Junction Manifesto*, 9 VT. LAW REV. 193 (1984). *See also* Fred F. French Investment Co. v. City of New York, 39 N.Y.2d 587, 594, 385 N.Y.S.2d 5, 8, 350 N.E.2d 381, 385 (1976).

3. 105 S. Ct. 3108 (1985).

4. The facts are drawn from the Court's opinion, the briefs of the parties, and the amicus brief of the Solicitor General of the United States.

land in the subdivision was retained as open space. The idea was a new one for Williamson County and required an amendment of the zoning ordinance. After considerable study, the county adopted the amendment. The new "cluster" amendment provided that density could not exceed the one dwelling unit per acre limit allowed by the zoning ordinance, required the exclusion from the density computation of one-half of all land that was on a slope with a grade of more than 25 percent, and prohibited the construction of houses on steep slopes and other areas deemed unbuildable.

The developers then prepared and submitted to the Commission a preliminary plat of Temple Hills that showed a total project area of 676 acres, 416 of which would be developed with residences. The remaining 260 acres were to be left as open space, with a golf course occupying 245 of those acres. In the grand tradition of optimism that is endemic to the development community, the joint venture proposed to build more residences than the market could absorb either immediately or in the near future. Consequently, although the preliminary plat bore a notation that the "allowable" number of dwelling units was 736, the plat contained lot lines for only 469 dwelling units on 287 of the 416 acres that were designated for residential development. The remaining 129 acres were left blank on the plat and contained the legend "this parcel not to be developed until approved by the planning commission." There was a further caution on the plat that parcels containing that legend were "not a part of the plat and are not included in gross area."[5] The Commission approved the Temple Hills preliminary plat in May of 1973. Despite the approval, the preliminary plat may have conflicted with a provision in the 1973 amendment to the zoning ordinance that required the deduction from total acreage of 50 percent of all land on slopes with a grade of more than 25 percent.

5. This caveat introduced an element of uncertainty because the 736 unit total was computed by multiplying the entire gross acreage of the tract by the allowable number of dwelling units per acre. Incidentally, dwelling units divided by acreage, yields a factor of 1.089, which seemed to have exceeded the maximum allowable density. *See* Merriam, *Caught in the Takings Muddle: Legally We've Been Had*, 51 *Plan.* 23, 24-25 (1985), for a copy of the Temple Hills development plan and a map of the area's topography. The present County Planner concedes that subdivision review in Williamson County in the early 1970s left much to be desired. He also states that although the staff report and minutes did not indicate that the proposed Temple Hills development would violate zoning and subdivision regulations, an after-the-fact review disclosed otherwise. *See* Stein, *Caught in the Takings Muddle: On the Road to the Supreme Court*, 51 Plan. 23, 27 (1985). Stein also concedes that by the time the Bank took over the property, the Planning Commission was pursuing a no growth policy. *Id.* at 29.

Time passed. The developers gave the county a permanent open space easement on the golf course. They built roads. They installed utility lines. They spent $3 million on the golf course and $500,000 on water and sewer facilities. 212 houses were built, leaving, presumably, 524 still to be built. Final subdivision plats were submitted and approved by the Commission before construction began in those sections of Temple Hills in which the houses were built. Arithmetically, only 257 of the remaining 524 units could be accommodated on the 469 lots shown on the preliminary plat. The balance of 267 units would have to go some place on the 129 acres on which no lot lines were shown on the 1973 preliminary plat.

In 1974 and again in 1975, the developers slightly revised the preliminary plat and the Commission reapproved it. The developers did not seek reapproval of the preliminary plat in 1976 and 1977, apparently because of some economic difficulty that the development was experiencing.[6] However, in 1978 and 1979, the Commission reapproved a preliminary plat that was essentially similar to the 1973 plat despite the fact that the plat conflicted with some amendments to the zoning ordinance that had been adopted in 1977. Among those was a requirement that in computing allowable density 10 percent of the total area must be deducted for roads.

Meanwhile, in refinancing the project, a single individual took over the development and the Hamilton Bank emerged as the sole mortgagee holding a $2.4 million mortgage. Hard times hit the residential development industry in 1978 and 1979, and the developer defaulted on the mortgage. In November of 1980, Hamilton Bank bid in the remaining 257.6 acres at a sheriff's sale for $1.75 million, or $1.12 million less than the mortgage debt.[7] However, the Bank took over the property only after the developer had secured a ruling from the County Zoning Board of Appeals that the 1973 regulations governed the development of Temple Hills.

Before folding his tent the developer had, in October of 1980, sought preliminary plat approval for 548 dwelling units. The Commission refused to approve the plat because, in calculating density, the developer

6. The county required annual reapproval of any portions of a preliminary plat for which final plats had yet to be approved. The 1978 and 1979 reapprovals by the county seem to have waived any consequences that might have resulted from the developers' failure to secure reapproval in 1975 and 1976.

7. The total indebtedness, including accrued interest, was $2.87 million. Amicus Brief, Solicitor General, *supra* note 4, at 6.

had not deducted 10 percent of the land for roads, 50 percent of the land with a slope of more than 25 percent and 18.5 acres that had been taken by eminent domain for a parkway. In addition, some proposed lots would be located on slopes of more than 25 percent. The Bank, as the new owner, tried again in June of 1981 with that plat and with a new one that would have permitted a total of 688 dwelling units. Both were turned down for the same three reasons plus a collection of new ones, including that two cul-de-sacs exceeded the maximum permitted length, some road grades exceeded the maximum allowed in the county regulations, and the proposed lots did not comply with the lot size and frontage requirements in the 1980 subdivision regulations. So the Bank sued, filing in the federal court, pursuant to Title 42 U.S.C. § 1983 (1982).

II. The Litigation

The Bank asserted that the Commission's regulations deprived it of due process and equal protection, took its property without compensation, and that, as a matter of state law, the Commission was estopped from retroactively applying the new regulations to the Temple Hills development. The Bank claimed that it was entitled, and had been deprived of the right, to build 476 dwelling units. The Bank arrived at this number of units by subtracting from the 736 units approved in 1973 the 212 units that had already been built and the 48 units that were attributable to the part of the tract that had been condemned for the Natchez Trace Parkway and for which compensation had been paid.

The testimony at trial was apparently conflicting. One of the Bank's witnesses testified that the new regulations imposed by the Commission eliminated 409 potential building sites, leaving only 67 scattered sites available for development, which he said would result in a $1 million loss if the project was completed. Another witness testified that the Bank had been unable to sell the property because no one was interested in purchasing property that could only be developed by sustaining a $1 million loss. On the other hand, the County Engineer testified that he had redesigned the subdivision in a manner that would permit its development with about 300 lots.

The credibility issue was settled by the jury who found that the Bank had been deprived of any economically viable use of its land and that the Commission's regulations had "taken" the land in violation of the Bank's constitutionally protected rights. The jury assessed damages in

the amount of $350,000 for a "temporary taking" from the date of plat disapproval to the date of judgment.[8] The jury also found that, under Tennessee law, the Commission was estopped from applying the current zoning regulations instead of the 1973 regulations. On the strength of that finding, the trial judge enjoined the Commission from applying anything other than the 1973 regulations to the Bank's property. The trial court also set aside the damage verdict, reasoning that as a result of the estoppel verdict there had been only a temporary interference with the Bank's property. The court ruled that such a temporary interference did not constitute a taking for which compensation was required because any damages the Bank sustained resulted from an attempt by the Commission to apply land use regulations in a manner that was not permitted by state law.

The Sixth Circuit reversed the judgment setting aside the damage verdict and reinstated the $350,000 verdict.[9] The Supreme Court granted certiorari. The only issue presented to the Supreme Court was whether it was error for the court of appeals to rule that compensation must be paid for the temporary taking of the Bank's property during the period that it was prevented from proceeding with development.

III. THE OPINION: A FIRST READING

Once more the opportunity to deal definitively with a regulatory inverse condemnation case eluded the Court. This time it was because the Court became persuaded that in the context of the dispute between the Bank and the Planning Commission it was premature to consider whether government is required to compensate landowners who are able to establish that their property has been taken temporarily by the application of governmental regulations. The Court found itself unable to reach that question because a majority of the justices believed that the dispute was not ripe for judicial review. The question of whether the Bank's attempt to secure compensation was premature was injected into the appeal by the United States Solicitor General who filed an amicus brief in support of the Commission's effort to reverse the decision of the Sixth Circuit. Much of the Solicitor General's brief was devoted to the argument that the litigation was premature.[10] Rather

8. The briefs of the parties do not make it clear what testimony the damage award rested on.

9. 729 F.2d at 409.

10. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, at 12-17, Williamson County Regional Planning Commission v. Hamilton Bank, 105 S. Ct.

plainly the argument was persuasive.

The Court's conclusion that the Bank's inverse condemnation claim was premature rested on two findings. First, the Court ruled that the Bank had not obtained a final decision regarding the application of the zoning and subdivision regulations to its property. Second, the Court said that the Bank had not utilized the procedures that were available under Tennessee law for obtaining compensation. Writing for the Court, Justice Blackmun reasoned that the case was not ripe for review because there was no certainty that the Commission would refuse to permit either the development that the Bank had sought or any other economically viable use of the property. Observing that it would have been possible for the Board of Zoning Appeals to grant variances with respect to at least five of the eight objections that the Planning Commission had to the proposed subdivision plat, and that the Bank had not sought those variances, Justice Blackmun said that there had not been a final determination that the regulations which were claimed to result in a taking of the Bank's property would in fact be the restrictions that would actually be applied to the development of the land.

In reaching this conclusion it was necessary for the Court to distinguish between its determination that the dispute was not ripe for judicial review and the question of whether the Bank had failed to exhaust its administrative remedies. In *Patsy v. Florida Board of Regents*,[11] the Court had held that it was not necessary for the plaintiff in a Section 1983 damage action to exhaust administrative remedies before filing suit. The Bank had brought its claim under Section 1983 and argued that it was not necessary under the *Patsy* decision for it to pursue any administrative remedies that might be available. The Court distinguished the *Patsy* decision by saying that it simply held that a Section 1983 plaintiff is not required to resort to remedial procedures designed to review the lawfulness or correctness of an otherwise final administrative action. In contrast, in this case resort to the variance procedure was necessary in order to have a conclusive determination with respect to whether the Bank would be permitted to develop its subdivision in the manner it proposed.[12] The *Patsy* decision did not apply because

3108 (1985). The interest of the Solicitor General undoubtedly was founded upon a concern that a ruling requiring compensation might imperil important federal environmental regulation programs.

11. 457 U.S. 496 (1982).

12. In Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 749 (1975), the Court declined to consider whether the application of the federal surface mining law and regulations effected a "taking" because the plaintiffs did not utilize the

the Commission's denial of plat approval did not, according to the Court, permit a conclusive determination with respect to whether the Bank had been denied all reasonable beneficial use of its property.

The Court also ruled that the Bank's *federal* taking claim was not ripe for judicial review because it had not utilized the state procedures that were available for securing compensation.[13] The Court noted that the fifth amendment does not forbid the taking of property; it just forbids taking property without just compensation. So, as the Court explained in a footnote, it is not possible to say that a violation of the fifth amendment has occurred until it is clear that just compensation has been denied to the property owner.[14] The Court maintained that it cannot be clear that there has been a constitutionally forbidden taking until the property owner has utilized state created procedures for just compensation and been denied compensation.[15] The Court found that the Tennessee statutes permitted a property owner to bring an inverse condemnation action to obtain compensation for an alleged taking of property in some circumstances[16] and that there were Tennessee decisions interpreting the inverse condemnation statute as permitting a re-

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opportunities afforded by the Surface Mining Control and Reclamation Act of 1977. Under the Act, plaintiffs could have requested a waiver or a variance of the requirements they were challenging. The Solicitor General argued that *Hodel* required a party to exhaust administrative remedies and to seek judicial review before pursuing just compensation for a taking. Amicus Curiae Brief for the United States, at 17. The Court agreed with the first part of the Solicitor General's argument but transformed it into a ripeness issue and disavowed any intent to require judicial review of the correctness of the local decision as a prerequisite to an action for compensation.

13. The Court's opinion of the importance of Parratt v. Taylor, 451 U.S. 527 (1981), is now apparent. Justice Blackmun found *Parratt* "analogous" because a due process claim can not be established by simply alleging a deprivation of property resulting from a random and unauthorized act of a state employee. The Constitution does not require predeprivation process when it would be "impossible or impracticable to provide a meaningful hearing." Due process is satisfied by a meaningful post-deprivation remedy. So the constitutional rights of Mr. Parratt, a prisoner who had been deprived of $24 worth of hobby materials, had not been infringed because the Nebraska tort claims statute provided a post-deprivation remedy.

14. 105 S. Ct. at 3121 n.13.

15. The Court adopted the same position that the Oregon Supreme Court took in Suess Builders v. City of Beaverton, 656 P.2d 306 (Ore. 1982). In *Suess Builders* the court held that a § 1983 taking claim could not ripen until the court decided the taking claim under the Oregon Constitution because there was no federal constitutional right of action under the fifth and fourteenth amendments unless state law failed to provide compensation.

16. TENN. CODE ANN. § 29-16-122 (1983) prohibits the state from "entering" condemned land until the state complies with statutory eminent domain procedures and the state pays compensation. TENN. CODE ANN. § 29-16-123 (1983) authorizes a land-

covery when restrictive zoning or development regulations amounted to a taking.[17] The Bank had not shown that the Tennessee inverse condemnation procedure was either unavailable or inadequate. Until the Bank had done so and been rebuffed, the Court said its taking claim was premature.

The Court did note the argument of the Planning Commission that a regulation that is so restrictive that it has the same effect as a taking by eminent domain is a violation of the due process clause of the fourteenth amendment because it is an unconstitutionally excessive exercise of the police power. Under that theory, regulation that results in a taking is simply an improper and invalid exercise of the police power for which the remedy is invalidation of the offending regulation.[18] Although the Court set out the arguments for and against this view, it did not find it necessary to pass upon the merits of that debate. The Court said that even if the issue were viewed as a question of due process, the Bank's claim would still be premature because the effect of the regulations could not be measured until there was a final decision as to how the regulations would apply to the property.

Justice Brennan and Justice Marshall filed a separate short opinion concurring in the result but making it clear that they still adhered to the views expressed in Justice Brennan's dissent in *San Diego Gas & Electric v. City of San Diego*.[19] Justice Stevens concurred in an opinion that took issue with the views expressed by Justice Brennan in his *San Diego Gas* dissent.[20] Justice White dissented from the holding that the

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owner to commence eminent domain proceedings when a governmental entity takes possession of land without following the statutory procedures.

17. The Tennessee decisions on which the Court relied are Davis v. Metropolitan Government of Nashville, 620 S.W.2d 532, 533-34 (Tenn. Ct. App. 1981); Speight v. Lockhart, 524 S.W.2d 249 (Tenn. Ct. App. 1975).

18. *See* Fred F. French Investment Co. v. City of New York, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976); Agins v. City of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d (Cal. 1979), *aff'd.*, 447 U.S. 255 (1980). The Supreme Court in *Agins* did not consider the ruling of the California court that mandamus and declaratory judgment are the only remedies available to an aggrieved landowner. The Supreme Court also did not consider whether a state may limit the remedies available to persons whose land has been taken without compensation. The *Hamilton Bank* decision suggests that the answer to the latter question is that a state may not impose such a limitation.

19. 105 S. Ct. at 3124. *See San Diego Gas*, 450 U.S. at 636. For a description and analysis of the Brennan dissent, see *The White River Junction Manifesto, supra* note 2, at 194-97. There is a perceptive critique of the Brennan dissent in Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L. 491 (1981).

20. 105 S. Ct. at 3125.

issue was not ripe for decision.[21]

IV. THE OPINION: SECOND THOUGHTS

The initial inference that a majority of the members of the Court were not eager to try to formulate a general rule requiring compensation in taking cases has been made doubtful by the subsequent decision of the Court to hear yet a fourth regulatory taking case.[22] It now seems more likely that the Court, or at least four members of it, would like to find a vehicle for settling the regulatory taking controversy. However, it is by no means certain that the members of the Court who have been voting to grant review in inverse condemnation cases are of one mind with respect to how the issue should be resolved. It is possible that four or more members of the Court agree that the temporary regulatory taking issue should be addressed but do not agree that compensation should be the remedy.

The result reached in *Hamilton Bank* was not inevitable. A plausible disposition could have been made of the threshold issues that frus-

21. *Id.* at 3124.

22. The Court's willingness to dispose of the *Hamilton Bank* dispute without reaching the merits initially suggested that the Court may have been relieved to avoid grappling with the main issue in the case. It also suggested that it might be some time before the Court would again be presented with an inverse condemnation case that would qualify a full review. But those assumptions already have been proven wrong. On October 21, 1985, the Court noted probable jurisdiction in MacDonald, Sommer & Frates v. County of Yolo and City of Davis, 106 U.S. 244 (1985), yet another case in which the California state courts have declined to provide compensation as a remedy for a regulatory "taking." The *Yolo County* case burst upon the scene unexpectedly because there was no previously reported decision. The trial court dismissed the complaint, the court of appeals affirmed in an unpublished opinion and the California Supreme Court denied leave to appeal. Jurisdictional Statement of Plaintiff, dated June 28, 1985, U.S. Supreme Court Docket No. 84-2015.

Yolo County presents the following three issues: (1) Did placing land that is not suitable for agricultural use in an agricultural zone and refusing to allow access to streets or to provide sewage disposal, water service, or fire and police protection constitute a taking?; (2) Does the fifth amendment mandate compensation for the time during which the property was subject to the challenged restrictions?; (3) Did the state, by limiting the property owner's remedy to a mandamus action, deprive the owner of an adequate state remedy, thereby depriving him of both due process and rights protected by § 1983. This is not the first time Supreme Court action has produced excited speculation that the Court is searching for a case in which to settle the inverse condemnation debate. The Court granted certiorari in *San Diego Gas* within a matter of days after the Court filed the *Agins* decision. Those who three times have watched the Court charge up to a confrontation with the regulatory taking dispute and then tiptoe away perhaps can be excused if they are unable to generate the same level of eager anticipation that they manifested on prior occasions.

trated a decision on the central issue. Unlike *San Diego Gas*, there was no uncertainty with respect to the status of the determination by a jury that a taking had in fact occurred. Starting from that point, and accepting the Bank's argument that the record demonstrated that it would have been futile for the Bank to pursue further local relief, it would only have been necessary for the Court to characterize the available variances as administrative remedies that fall within the *Patsy* rule, and to hold that inverse condemnation plaintiffs could choose either a federal or a state remedy. The Court's failure to adopt that approach indicates that there may be no solid consensus among the Justices about the general rule that ought to be applied.[23] The Court also may be deterred by the potential for mischief that would lurk in the adoption of a broad rule requiring compensation for temporary takings, and thus be waiting for a case that would enable it to fashion a remedy that will not deluge the federal courts with land use disputes.[24]

The initial reaction to the *Hamilton Bank* decision, especially among the more ardent apostles of compensation as a remedy for regulatory takings, was dismay that the Court had once more managed to dodge a resolution of the inverse condemnation controversy.[25] That view is uncharitable because it has buried in it the assumption that the Justices do not read certiorari petitions carefully enough. It also ignores the possibility that occasionally the Court may take a case because four Justices believe that the lower court has made a mistake that merits correction as well as to write authoritatively on unsettled constitutional issues. Therefore, it is too simplistic to regard the *Hamilton Bank* decision as yet one more dodge of the inverse condemnation issue. The Court may have taken the case because the Justices wanted to make it clear that damages in inverse condemnation for regulatory takings, whether temporary or permanent, are a remedy of last resort and may

23. One view is that the Court's reluctance to rule on the substantive issue is a result of both considerations of comity with state judicial systems and a desire to decrease the workload of the federal courts. *See* Bauman, *Deja Vu, or Et Tu Supreme Court*, 37 LAND USE LAW & ZONING DIGEST 3 (1985).

24. *See, The White River Junction Manifesto, supra* note 2, at 236-40.

25. For example, Professor Gideon Kanner lamented: "For those readers who have been holding their breath waiting for some resolution of the taking/compensation issue, it's time to take another deep breath and to keep on holding it." 29 JUST COMPENSATION, 2 (1985). Notwithstanding the Court's decision to hear the *Yolo County* case, given the hurdles that the *Hamilton Bank* decision has placed in the path of potential inverse condemnation plaintiffs, Professor Kanner's readers would do well to reflect carefully on the opinion before they take his advice lest they turn purple while they wait.

not be used as a substitute for other forms of remedial relief, especially when local remedies remain available. Allowing an inverse condemnation damage judgment for a temporary taking to stand on the facts of this case could easily have emboldened other developers to use the threat of such action to coerce local planning and zoning bodies to act in their favor on contested land use disputes.

Indeed, just that appears to have happened in this case. Having had the educational experience of being on the short end of a $350,000 judgment, the Commission apparently decided to cut its losses. In March of 1983, while the cross-appeals were pending in the Sixth Circuit, the Commission entered into a stipulation with the Bank under which an additional 476 dwelling units could be built by the Bank, variances for cul-de-sacs and road grades were approved, and the parties agreed the 1973 regulations would govern the property.[26] The Court was made aware of that compromise in an Appendix to the Commission's brief. Although the compromise was not mentioned in the opinion, it may well have appeared inequitable to the Court that the Bank should pick up $350,000 on the way to getting permission to build 476 dwellings, which gave the Bank the entire 688 dwelling units to which it had claimed to be entitled. The compromise also may have prompted the suspicion that the Bank might have secured substantial or full relief from the local agencies if it had just persevered. On that reading the message of *Hamilton Bank* is quite simple: Do not take your land use problems to the federal court until it is quite certain that you have been hurt.

From a broader perspective, the effect of the *Hamilton Bank* decision will be to narrow considerably the number of cases involving land use regulations that may be amenable to an inverse condemnation action for just compensation. Now the plaintiff in such an action will have to demonstrate that the decision with respect to the applicability of the regulations is indeed final and that there is no further relief potentially available to the plaintiff which would leave open the question of what regulations or restrictions are applicable to the property and what impact those regulations have on the value of the land.

Notwithstanding the Court's distinction between the question of ripeness for judicial review and the question of whether administrative

26. Appendix to Brief for Petitioners, at 35-39, Williamson County Regional Planning Commission v. Hamilton Bank, 105 S. Ct. 3108 (1985). Since the settlement was negotiated, the Bank has sold the property to a new developer for $3 million. Merriam, *supra* note 5, at 26-27.

remedies have been exhausted, the practical effect of the *Hamilton Bank* decision will be to compel landowners to seek whatever discretionary zoning relief may be available to them before commencing an inverse condemnation action. One also should expect that municipalities will not be slow to recognize the opportunity that the *Hamilton Bank* doctrine affords them to create procedures that will postpone or even eliminate the day of reckoning at the courthouse. The dangers in that fertile source of potential inverse condemnation claims, the amendatory downzoning,[27] can be reduced by requiring vested rights claims to be presented to the zoning board for an administrative determination, based on specific standards in the ordinance, with respect to whether a developer has an investment backed and reasonable expectation that he will be permitted to complete a development that was approved under the formerly effective regulations but which has been caught mid-stream by a change in the applicable ordinances.

Other municipalities may go further and borrow an idea from the federal surface mining legislation by providing that the zoning ordinance shall not be interpreted to deprive any person of all reasonable beneficial use of his land. Claims of deprivation could be aired before the zoning board who would be empowered to grant exceptions, in accordance with standards in the ordinance, whenever a claimant is able to establish that the applicable land use regulations prohibit any reasonable economic use of his property. Such procedures could provide an opportunity for municipalities to relax land use regulations that might otherwise support a plausible taking claim and would defer a final decision on the regulations that are applicable to a particular piece of property until after those procedures have run their course.

Moreover, in states in which an inverse condemnation remedy for excessive regulation is conferred by statute or recognized by judicial decision, inverse condemnation claims resting on the federal Constitution will be premature unless a resort to state created procedures has demonstrated that compensation is not available. Only in states such as California, New York, and Florida,[28] where the courts have declined to recognize the existence of an inverse condemnation remedy

27. The term "downzoning" is used to describe a rezoning that imposes more restrictive controls on density or intensity of use.

28. *See Agins*, 447 U.S. 255 (1980); *Fred F. French Investing*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976). *See also* Dade County v. Natl. Bulk Carriers, 450 S.2d 213 (Fla. 1984) (holding that a confiscatory zoning regulation is invalid and the appropriate remedy is to strike the regulation).

for overly restrictive regulation, will it be possible for landowners to turn immediately to an action in the federal courts grounded on the protection of the fifth amendment. Whether the Supreme Court will ultimately recognize and allow such a remedy remains undecided.

There is additional disquieting news for land use plaintiffs in the *Hamilton Bank* decision because the Court applied the ripeness test to the defendant's due process argument as well. The Commission had argued that compensation was not an appropriate remedy because regulation that is so economically intrusive that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violating the due process clause of the fourteenth amendment. The remedy for such constitutional transgressions would be invalidation of the regulation, and when authorized and appropriate, actual damages.[29] The Court, however, found that, even viewed as a due process claim, the Bank's action was premature because the question of whether regulation "goes too far" cannot be answered until a court can be certain how far the regulation goes.[30] The implication for Section 1983 actions in land use matters is clear. Recourse to a federal remedy, whether for injunctive relief or for damages, will apparently not be available until the aggrieved landowner has endeavored to secure such discretionary relief as state law and the local ordinances may provide. So while the *Patsy* doctrine may retain its vitality in other Section 1983

29. A claim for compensatory damages under Title 42 U.S.C. § 1983 (1982), subjects a municipality to strict liability for damages occasioned by violations, under color of state law, of rights secured by the Constitution or laws of the United States. *See* Owen v. City of Independence, 445 U.S. 622 (1980). For strict liability to attach, however, the acts charged must be the product of an official policy, custom, or usage of the municipality (which includes ordinances). *See* Monell v. New York City Dep't of Social Serv., 436 U.S. 658 (1978).

30. Justice Holmes observed in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), that "the general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." Professor David Callies believes that the *Hamilton Bank* opinion can be read as evidence that the majority of the Court is leaning toward acceptance of the argument that the remedy for regulatory takings, whether permanent or temporary, should be invalidation of the regulation rather than compensation. *See* Callies, *The Taking Issue Revisited*, 37 LAND USE LAW & ZONING DIGEST 6. The Court's recent decision in United States v. Riverside Bayview Homes, Inc., 106 U.S. 455 (1985), makes that reading of the Court's disposition more doubtful. *Riverside* involved the question of whether a Corp of Engineers permit requirement under the Clean Water Act, Title 33 U.S.C. § 1251, produced a taking of Riverside Bayview's property. In rejecting the claim that the permit requirement amounted to a taking, the Court said that "so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." 106 U.S. at 459-60.

litigation, in land use disputes it does not appear that it will excuse aggrieved landowners from pursuing relief, and a final decision, by way of variance or exception. Resort to such procedures is what usually is meant by the requirement that administrative remedies be exhausted.

V. OF REGULATORY TAKINGS: MATTERS OF TAXONOMY

Adoption of a rule that regulatory takings constitutionally require compensation would answer one question at the risk of setting loose a new collection of furies to bedevil municipalities, land owners, developers, and their counsel.

First, the question of what constitutes a regulatory taking is a complex one because the governmental activities that may produce a taking claim occupy a broad spectrum of regulation. Once governmental conduct moves beyond the physical invasion or appropriation of land, the problem of identifying takings becomes progressively more difficult. The difficulty of identifying when a taking has occurred was acknowledged in *Penn Central Transportation Co. v. New York City* where the Court defined a taking as a regulation that makes the use of property no longer "economically viable," but conceded that, "the question of what constitutes a 'taking' for the purpose of the Fifth Amendment has proved to be a problem of considerable difficulty."[31]

It is doubtful that even the most ardent of police power hawks would argue that regulation can *never* result in a taking. Indeed, the government, as amicus, conceded that point in the *Hamilton Bank* oral argument.[32] There are some kinds of regulatory activity that are tantamount to a physical invasion of land and that warrant treatment as such.[33] For example, regulations that had the effect of giving the

31. 438 U.S. 104, 123, 131, 136-38 (1978).

32. Transcript of oral argument at 28-29, *Hamilton Bank*, 105 S. Ct. 3108 (1985).

Question: Well, does the government concede that there could be a taking in the eminent domain sense where there has been no physical occupancy of land?

Mr. Kneedler: Yes, yes, we are not arguing that regulation can never constitute a taking. Our only point is that compensation isn't due unless the legislature has authorized the agency to do this.

Id.

33. In a prior publication the author noted the wide spectrum of regulatory activities that produce taking claims and grouped such claims into the following six categories: (1) The physical invasion cases, such as flowage and avigation easements, and other regulations having the effect of producing a physical invasion; (2) instances in which government plans acquisition, states so, and engages in other inequitable conduct designed to depress the acquisition price; (3) cases in which regulation prevents any

general public access to plaintiff's previously private marina[34] and which authorized a cable television company to place wires on a building without the consent of the owner[35] were both held to be takings which could not be sustained in the absence of compensation.[36]

There is a second class of cases in which it is clear that a governmental body intends to acquire land, has said so, and has delayed or stalled actual acquisition for the purpose, or with the effect, of depressing the price of the land to be acquired. In such cases the landowner's action for inverse condemnation is simply a method of forcing the exercise of the power of eminent domain and, more importantly, of securing a valuation date that precedes the time when inequitable or oppressive governmental conduct began to force down the value of the land.[37]

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reasonable economic use including those cases in which government planned acquisition but abandoned acquisition and substituted severely restrictive regulations; (4) the designation of land for future acquisition unaccompanied by governmental inequitable conduct; (5) cases in which it is claimed that regulation has substantially diminished the value of land; (6) moratorium cases, which involve a prohibition of all use but for a limited period of time. *See* Smith, *The Aftermath of the Brennan Dissent in* San Diego Gas & Electric, 8 PLAN. & L. DIV. NEWSLETTER 1 (1984).

34. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

35. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

36. *See also* Varjabedian v. City of Madera, 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43 (1978) (treatment plant odors that made plaintiff's land virtually uninhabitable); Jupiter Inlet Corp. v. Village of Tequesta, 349 So. 2d 216 (Fla. Dist. Ct. App. 1977), *rev'd*, 371 So. 2d 663 (Fla. 1979) (appropriation of water from beneath plaintiff's land through wells on adjoining land).

37. *See* Martino v. Santa Clara Valley Water District, 703 F.2d 1141, 1147 (7th Cir.), *cert. den.*, 104 S. Ct. 151 (1983) ("a 'taking' can be found without any physical invasion where a public agency acting in furtherance of a public project, directly and substantially interferes with property rights and significantly impairs the value of property," which "typically occurs when the public entity excessively delays condemnation proceedings after the property is slated for acquisition or otherwise acts unreasonably"); Urbanizodora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (use of official map designation to reserve land for future road and freeze property in undeveloped condition for fourteen years deprived owner of its property without due process of law); Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977) (five year "cloud of condemnation" held unreasonable and resulted in a taking at the point in time that the property fell under the cloud); Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970) (action by federal government held to be a "taking of the entire fee" when it included land in tracts to be acquired for Point Reyes National Seashore, effectively prevented subdivision approval, destroyed the marketability of the land, and then declined to condemn or say when it would commence condemnation); Maryland Nat. Capital Park v. Chadwick, 286 Md.1, 405 A.2d 241 (1979) (three year reservation of plaintiff's land for possible acquisition for a public park was an abuse of police power); Jensen v. City of New York, 42 N.Y.2d 1079, (1977), 369 N.E.2d 1179 (1979) (official usage designation that made it impossible for plaintiff to secure a building permit, fi-

A third and more troublesome category are cases in which regulation deprives land of all reasonably viable economic uses.[38] It includes instances in which government restricts the use of land to open space or public use and cases in which it is apparent that severely restrictive regulation has been substituted for acquisition which was attempted but abandoned or which it is plain the agency has concluded it cannot afford.[39] This class of cases has produced three of the five state court decisions that have rested on the rationale of Justice Brennan's dissent in *San Diego Gas*. In *Burrows v. Keene*[40] the city planning board attempted to dissuade the plaintiff from seeking approval of a subdivision plat because the city was trying to preserve the land as open space. Negotiations for purchase ensued, but the parties could not reach agreement on the price. The plaintiff sought subdivision approval and in response the city classified all but 15 acres of the tract in a conserva-

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nancing for repairs, or sell her property, was a deprivation of property without due process); Charles v. Diamond, 41 N.Y.2d 318, 360 N.E.2d 1295 (1977) (regulation that required connection to a public sewer when sewer capacity was not available because of municipal inaction was not facially a taking, but case was remanded for a determination as to the reasonableness of the delay); San Antonio River Authority v. Garrett Bros., 528 S.W.2d (Tex. Civ. App., 1975) (damages awarded for permit delay to hold down acquisition price of a dam site).

38. What constitutes a reasonably viable economic use of land depends heavily on the land's character. As a result, the more recent decisions generally have sustained severely restrictive regulation of environmentally sensitive lands, such as wetlands and floodplains. *See* Brecciaroli v. Connecticut Comm'r of Env. Protection, 362 A.2d 948 (Conn. 1975); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891, *cert. den.*, 409 U.S. 1108 (1973); Maple Leaf Investors v. State of Washington, 88 Wash. 2d 726, 565 P.2d 1162 (1977); Just v. Marinette County, 56 Wisc. 2d 7, 201 N.W.2d 761 (1972). *See also* Graham v. Estuary Properties, 399 So. 2d 1374 (Fla.), *cert. den.*, Taylor v. Graham, 454 U.S. 1083 (1981) (court used harm/benefit analysis, refusing to find a taking despite the fact that the wetlands regulation reduced by one-half the development's size); Smith v. City of Clearwater, 383 So. 2d 681, 685 (Fla. Dist. Ct. App. 1980) (even though acquatic zoning left little use for land, no taking when land's submerged condition meant little use of land anyway). *But see* Annicelli v. Town of Kingston, 463 A.2d 133 (R.I. 1983). In *Annicelli*, plaintiff's barrier beach property was designated a "High Flood Danger" district, prohibiting construction of single family homes. The court held that the restriction was a taking because it deprived plaintiff of all beneficial use and was designed to benefit the public. The court ruled that compensation was the remedy for the taking, rather than invalidation of the restriction and an order directing issuance of a building permit.

39. *See* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal, 1975), *vacated by stipulation*, 417 F. Supp. 1125 (N.D. Cal., 1976), in which after extensive negotiations for acquisition, the Director of Planning proposed the use of regulation instead of acquisition to preserve open space.

40. 121 N.H. 590, 432 A.2d 15 (1981).

tion zone in which development was forbidden. The New Hampshire Supreme Court held that the state constitution required the payment of compensation because "[t]he city sought to enjoy [a] public benefit by forcing the plaintiffs to devote their land to a particular purpose and prohibiting all other economically feasible uses of the land, thus placing the entire burden of preserving the land as open space upon the plaintiffs."[41]

In *Sheerr v. Evesham Township*[42] the classification of land for public park and recreation purposes produced a ruling that the regulations were a taking notwithstanding the protestations of the town officials that acquisition of the plaintiff's land was not intended. Instead of ordering the town to acquire the property, the court held the regulations invalid and set the matter for a hearing to determine the damages sustained by the plaintiff as a result of the temporary taking. In *Ripley v. City of Lincoln*, a similar but more outrageously candid instance, a North Dakota municipality zoned land for "public use" because it intended to use the site for a school, city hall, and possibly a fire station.[43] The ordinance that restricted the land said that its purpose was "to prohibit residential, commercial and industrial use of the land" and "to prohibit any use of the land which would diminish its value in serving the needs of the City." The court held that the restriction was a taking and remanded so that the city could decide whether to repeal or persevere in the restriction and, once it made its choice, for the trial court to determine the appropriate measure of damages.

In each of these three categories of cases, outrage over the conduct of government can easily obscure the real differences. In both of the first two instances, if compensation is awarded in an inverse condemnation action, it will result in the agency acquiring title to, or an interest (such as an easement) in, the land involved. However, in the third class of cases the governmental body does not acquire any right, title, or interest for the "compensation" it pays unless it elects to proceed with acquisition. If instead the government elects to repeal the offending regulation, then compensation for the temporary taking is no more than the assessment of damages against the agency for having adopted an invalid regulation.

The potential sweep of a compensation rule in cases in which the municipality repents and repeals an overly restrictive regulation are

41. *Id.* at 600, 432 A.2d at 21.

42. 184 N.J. Super. 11, 445 A.2d 46 (1982).

43. 330 N.W.2d 505, 507 n.2 (N.D. 1983).

staggering. Once applied to land use regulation, it would be logical to extend the same principle to other types of police power regulation. Not surprisingly, such an extension has already occurred. In *Zinn v. State*[44] the Wisconsin Supreme Court applied the idea of awarding compensation for temporary takings to a technical title divestiture that resulted when a state agency made, and then later corrected, an erroneous determination with respect to the high water mark of a lake.

The broader implications of compensating temporary takings appears to have troubled Justice Stevens for during the course of the *Hamilton Bank* argument he asked counsel for the Bank:

> In thinking back to some of the old rate cases where a commission sets the utility rates at a low level, then they appeal to the state supreme court, and the state supreme court says no, that is a taking without due process of law, the rates are too low, they can't use their property, and they reverse and require that the new rates be put into effect, would the utilities always be able to get damages from the lower commission in those cases?[45]

It was a very pertinent point because it highlights the risk that a rule that is developed in the setting of land use disputes may spill over into unrelated areas of regulation with quite unanticipated and mischievous consequences.[46]

Perhaps it was concern for the potential reach of a compensation rule in the case of temporary takings that led Justice Stevens to provide, in his concurrence, what amounts to a rebuttal of the position taken by Justice Brennan in his *San Diego Gas* dissent. Justice Stevens would apply different analytical approaches to permanent and temporary takings. The former are those restrictions that "permanently curtail the economic value of the property." In contrast, temporary takings involve the employment of procedures to obtain permission to use property in a particular way for a limited time or to remove an unlawful restriction. Those procedures, he conceded, "may temporarily deprive an owner of a fair return on his investment."[47]

Justice Stevens classified permanent harms into three categories: (1) those that are not permitted even if government is willing to pro-

44. 112 Wisc. 2d 417, 334 N.W.2d 67 (1983).

45. Transcript of oral argument at 55, *Hamilton Bank*, 105 S. Ct. 3108 (1985).

46. *See, e.g.*, Pratt v. State Dept. of Natural Resources, 309 N.W.2d 767 (Minn. 1981). In *Pratt*, the court concluded it was possible that a regulation prohibiting the use of mechanical pickers in harvesting wild rice might result in a taking.

47. 105 S. Ct. at 3125.

vide compensation; (2) those that are permissible if compensation is paid; and (3) those that are permissible even if no compensation is paid. When a court concludes that a government regulation does not fall within the third category, Justice Stevens says that a court can either find the regulation invalid or characterize it as a taking. In such situations:

> [T]here is nothing in the Constitution that prevents the Government from electing to abandon the permanent harmcausing regulation. The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that 'goes too far' as a 'taking' does not mean that such a regulation may never be cancelled and must always give rise to a right to compensation.[48]

Justice Stevens agreed that as a "permanent harm" case the dispute before the Court was not ripe for review because it was not possible to determine the severity of the injury. Even though the regulations already had inflicted a "fairly serious harm—one that the jury calculated as worth $350,000," he would classify that harm as temporary.[49]

According to Justice Stevens there are two types of temporary harm: "those that result from a deliberate decision to appropriate property to public use for a limited period of time; and those that are a by-product of governmental decisionmaking." The second category, he said, "is fairly characterized as an inevitable cost of doing business in a highly regulated society" and are an "unfortunate but necessary byproduct of disputes over the extent of the Government's power to inflict permanent harms without paying for them."[50] Although statutes authorizing the recovery of litigation costs and attorneys' fees provide a measure of compensation for some temporary harms, in most cases, as Justice Stevens concedes, there is no effective damage remedy for the property owner unless his constitutional rights have been violated. If the rights of a property owner are harmed:

> . . . even temporarily—without due process of law, he may have a claim for damages based on the denial of his *procedural rights.* But if the procedure that has been employed to determine whether a particular regulation 'goes too far' is fair, I know of nothing in the Constitution that entitles him to recover for this type of temporary harm.[51]

48. *Id.* at 3125-26.

49. *Id.* at 3126.

50. *Id.*

51. *Id.* at 3126-27 (emphasis added).

For Justice Stevens the requirement of fair procedures that flows from the due process clause of the fourteenth amendment is not a command that regulation may never impose any cost upon the citizen "unless the Government's position is completely vindicated."[52]

Justice Stevens' concurring opinion provides an articulate and persuasive rejection of the superficial simplicity of the idea of awarding compensation for temporary takings. The potential ramifications of that idea in areas of police power regulation that are far removed from land use are awesome. The Stevens concurrence has put the issue back in its proper perspective and if adopted by the Court would remove the spectre of governmental monetary liability as an inevitable risk of good faith, procedurally fair attempts to regulate that a court later decides are not constitutionally sustainable. It is also required reading for municipal officials, in whom it should prompt the idea that local ordinances should contain a procedurally fair safety valve for taking claims.

The first of the three categories of permanent harms listed by Justice Stevens suggests a further problem. As he noted, some permanent harms are not permissible even when government is willing to pay for them. A corollary of that observation is that there are some instances in which government does not have authority to acquire property even if it is willing to pay compensation. If government is not authorized to pay compensation for the right to take private property, then by what authority may the courts compel government to do what it would not be allowed to do voluntarily? The Ninth Circuit has considered that point and concluded that an agency or political subdivision that does not have the power of eminent domain cannot be sued for damages for inverse condemnation.[53]

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52. *Id.* at 3127. Justice Stevens rejected the notion that temporary regulatory takings always require compensation. Justice Stevens contended:

> We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though those controversies are costly and temporarily harmful to the private citizens, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable byproduct of every such dispute as a 'taking' of private property.

Id.

53. Jacobsen v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1978), *aff'd in part, rev'd in part*, Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). The Supreme Court did not rule directly on the effect of the

In the ordinary case, the question of whether the government that adopted the land use regulation has authority to take property for public use does not present a problem. Most such regulations are the product of local legislative bodies that do have eminent domain authority. The *Hamilton Bank* case, however, was an exceptional situation because the conduct that was alleged to be a taking there was the action of the Regional Planning Commission, a body which does not have the power of eminent domain.[54] The Commission does, however, have authority to adopt subdivision regulations and approve subdivision plats.[55] Thus, in this particular instance, requiring compensation for regulatory takings would produce an anomalous result. A court would have ordered the Commission to pay for what the laws of Tennessee would not have permitted the Commission to acquire, even if it was willing to pay for the acquisition.[56]

The clamor for a compensation remedy for regulatory takings might more readily be accommodated if it were confined to three classes of cases: (1) those in which regulation results in a physical invasion; (2) those in which the agency intends to acquire and has pursued a course of conduct designed to, or with the effect of, depressing the acquisition price; and (3) those in which government has employed severely restrictive regulation either to avoid the expense of acquisition while still securing a public benefit or to freeze property in an undeveloped state so as to preserve its availability for later governmental acquisition.

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absence of eminent domain authority in the agency. On remand, the district judge carried the logic one step further and stated that it was "beyond the ken of this Court" to explain why damages that were not recoverable in an inverse condemnation action could be secured in a § 1983 due process action for damages. Jacobsen v. Tahoe Regional Planning Agency, 474 F. Supp. 901, 904, (D. Nev. 1979), *aff'd.*, 661 F.2d 940 (1981) (without opinion).

54. The Commission's powers are set out in TENN. CODE ANN. §§ 13-103 and 104 (1973). There is no mention of the power of eminent domain.

55. TENN. CODE ANN. § 13-402 (power to approve plats) and § 13-403 (authority to adopt subdivision regulations).

56. In Fountain v Metropolitan Rapid Transit Auth., 678 F.2d 1038 (11th Cir. 1982), the court disagreed with the *Jacobsen* decision's reasoning that it would "undermine the force of the just compensation clause" if redress were not available, and the state could escape liability under the just compensation clause by taking property through agencies that did not have eminent domain authority. The court asserted: "we think that the threat of this kind of shell game ought to be avoided." 678 F.2d at 1044. *Fountain*, however, was not a regulatory taking case. Plaintiff's inverse condemnation claim was for compensation for temporary obstruction of access during subway construction and permanent deprivation of access from street closings.

As one might suspect, however, more is afoot here than an effort to provide a remedy for egregious or odious conduct by local government. Instances of such municipal malpractice, while not uncommon, are rare when compared to the commonplace fact that land use regulations often adversely affect the value that land would otherwise have. Such an adverse affect often occurs when revision of local land use ordinances produces a downzoning that forecloses land uses that were previously available. Efforts to employ inverse condemnation as a means of securing compensation for a diminution in the value of land occasioned by regulation have been notably unsuccessful.[57] If judicial acceptance of compensation for temporary takings could be gained, however, quite different results might be secured in the value diminution cases. Then a temporary taking that terminated with a determination of invalidity would diminish the return on property, and hence its value, by postponing the realization of income and increasing carrying costs. Moreover, for its advocates, the real charm of compensation for temporary takings is that the landowner gets to retain title to the property and to preserve the possibility of a real windfall if the market subsequently proves him to have been wrong about the amount of damage that was inflicted by the temporary imposition of an invalid regulation.

There are further hazards. The application of the temporary taking nostrum could disrupt comprehensive municipal planning for future land acquisition. Absent some inequitable or oppressive conduct by government, any chilling effect on property value that might result from the designation of land for possible future public acquisition has not usually been thought to require compensation.[58] But Justice Brennan would compensate for the temporary taking of "most" of the land's value.[59] By that measure any diminution of more than one-half of the value of a parcel by reason of its designation for future acquisition would be compensable and would either impose on government the burden of an interim compensation payment or of accelerating the

57. *See* Wm. C. Haas Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); HFH Ltd. v. Superior Court, 15 Cal. 2d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976); Gold Run Ltd. v. Board of County Comm'rs, 38 Colo. App. 44, 554 P.2d 317 (1976); Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. Dist. Ct. App. 1973).

58. *See, e.g.*, Allen Family Corp. v. City of Kansas City, 525 F. Supp. 38 (W.D. Mo., 1981); Selby Realty v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); Fifth Ave. Corp. v. Washington County, 282 Or. 591, 581 P.2d 50 (1978).

59. 450 U.S. at 653.

acquisition of land the need for which had yet to be fully established and which might not ultimately be acquired. Either consequence could severely complicate municipal land use planning.

Moreover, were the contention that temporary takings should be compensated to receive the blessing of the Supreme Court, the ability of municipalities to impose development moratoriums might be emperiled. Such drastic municipal action, often prompted by an environmental or planning crisis, has heretofore enjoyed widespread judicial acceptance.[60] The central feature of the typical moratorium ordinance is that it deprives landowners of *all* use of their land for a temporary period of time—a deprivation that might be constitutionally impermissible if it were permanent. The public welfare justification for such draconian measures is frequently clear. However, if the owners of real estate may constitutionally be required to bear that burden without compensation, why is it unjust to require property owners to bear the financial burdens that attend upon the process of deciding the validity of regulations that have been challenged?

The notion that government should have to compensate individuals affected by land use regulation for any monetary burdens imposed while the validity of the regulation is being determined was rejected by Justice Stevens in his concurring opinion. A similar view was expressed in *Suess Builders v. City of Beaverton*,[61] in which an inverse condemnation complaint alleged that a comprehensive plan designated plaintiff's land for future acquisition and that city officials had told the plaintiff its land was certain to be acquired and that it would be useless to pursue private development plans. Justice Hans Linde, writing for the Oregon Supreme Court, pointed out that many kinds of police power regulations produce economic burdens or financial loss, but that:

> Business invests with the knowledge of such governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for 'just compensation.'. . . Regulation in

60. Donohoe Constr. Co. v. Montgomery County, 567 F.2d 603 (4th Cir. 1977), *cert. denied*, 438 U.S. 905 (1978); Candlestick Properties, Inc. v. San Francisco Bay Conservation Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Collura v. Town of Arlington, 367 Mass. 881, 329 N.E.2d 733 (1975); Capture Realty Org. v. Board of Adjustment, 126 N.J. Super. 200, 313 A.2d 624 (1973), *aff'd*, 133 N.J. Super. 216, 336 A.2d 30 (1975), *cert. denied*, 438 U.S. 905 (1978); City of Dallas v. Crownrich, 506 S.W.2d 654 (Tex. 1974).

61. 294 Or. 254, 656 P.2d 306 (1982).

> pursuit of a public policy is not equivalent to taking for a public use, even if the regulated property is land.[62]

The knowledge that government may make laws for the conduct of business necessarily includes the knowledge that on occasion those laws will prompt a challenge to their validity and that a byproduct of such disputes may be that economic burdens will be imposed while the validity of a regulation is being determined. That happens, as Justice Linde observed, "to many forms of business enterprise and private investment, not peculiarly to investment in real property."[63] Consequently, there is no persuasive reason for exempting investments in real property from the same financial risks and burdens that other forms of investment routinely carry.

VI. Of Regulatory Takings: Matters of Measurement

If the Supreme Court was to accept the idea that compensation must be paid for temporary takings, difficult problems will still remain for it, or what is more likely, for the state and lower federal courts to resolve. Two key issues are entirely unsettled. One is the period of time over which the temporary taking extends. The other is the calculation of the compensation that should be paid for the taking.

The former problem had an easy solution in the *Hamilton Bank* case because the inception of the taking could be pinpointed at the denial of subdivision plat approval. Without saying so, the Sixth Circuit treated the end of the taking period as the trial court judgment finding that the Commission was estopped from applying any regulations other than those that were in effect in 1973.

It will not always be so easy, however. In his *San Diego Gas* dissent, Justice Brennan seemed to accept without critical analysis the idea that the taking would occur on the date that the offending regulation was adopted. There are serious deficiencies, however, with that approach. In the real world, land use regulations that later turn out to be a taking frequently are adopted long before it occurs to a landowner to seek judicial relief from the regulation. A more puzzling problem is presented by the fact that a regulation that is quite reasonable when adopted may, with the passage of time, become unreasonable because of what has happened to land use patterns in the meantime. In those cases, in order to determine when the taking occurred, the courts will

62. *Id.* at 259, 656 P.2d at 309.

63. *Id.*

have to engage in something close to divination in order to fix a commencement date from which to calculate the value of the temporary taking.

The date that the unconstitutional regulation was adopted frequently will not be an appropriate date from which to calculate a temporary taking. In many instances other points in time will be more logical, including the date when the landowner initially requested relief from the governmental body, when relief was refused, and when the regulation was judicially determined to be a taking. Choosing the date of adoption of the unconstitutional regulation as the beginning of the taking period offers an opportunity for abuse because it permits the landowner to suffer in silence and allow his damages to multiply without ever putting the municipality on notice that there is a claim that an unconstitutional regulation has been imposed. As a result, silence in the face of onerous restrictions will be compensated more generously than immediate outrage.

The *Hamilton Bank* decision at least does provide some guidance on the point, although the Court may not have intended it. In holding that an inverse condemnation claim does not ripen until there has been a final decision with respect to the regulations that will be applied to the plaintiff's property, the Court has implied that no taking occurs until all avenues for discretionary relief from the restrictions have been explored and found to be closed. Under this rationale, the period of a temporary taking would commence only at the point in time at which the municipal mind with respect to the applicable regulations has become final.

The measure of compensation presents equally difficult problems. There is first of all the question of whether we are talking about compensation for acquiring an interest in realty or simply compensatory damages for constitutionally wrongful conduct. If it is the former, then the fair market value of the interest taken, the value of an option to purchase, or rental value may be the appropriate measure of compensation. In the latter case, additional out of pocket costs, and perhaps lost opportunity costs, might be more appropriate factors. A diminution in market value or in rate of return might in some cases be an appropriate measure of compensatory damages. Some of these approaches to valuing a temporary taking may be a bit speculative, but it remained for Justice Brennan to provide the most speculative approach of all. In his *San Diego Gas* dissent he said:

> If the regulation denies the private property owner the use and enjoyment of his land and is found to affect a 'taking' it is only fair

> that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it.[64]

Measuring the value of what has been taken temporarily by the government will be difficult enough. Putting a dollar figure on the "cost of benefits received" by the public during the period of the taking ought to tax the ingenuity of even the most innovative members of the bar and the judiciary.

Despite the number of cases that have adopted the "temporary taking" approach of Justice Brennan in *San Diego Gas*, there has been precious little guidance in the reported decisions on the issue of how temporary takings are to be measured and valued.[65] In *Nemmers v. City of Dubuque*[66] a downzoning was involved. The court previously held that the property owner's expenditures in reliance upon the expectation that the property could be developed for industrial purposes had given him a vested right in the prior zoning. The case then was remanded for determination of damages. After the district court had declined to award damages on the ground that insufficiency of the evidence made any damage award uncertain and speculative, the case returned to the court of appeal. The Eighth Circuit held that the period of the temporary taking extended from the date on which the property was reclassified from industrial to residential use to the date the district court entered its judgment. Both parties to the litigation measured damages on the basis of the interest that would have accrued during that three and one-half year period and both used an interest rate of 15 percent. The property owner sought to apply that interest rate to the estimated $510,000 fair market value of the property, while the city contended that it should only be applied to the estimated difference in value occasioned by the downzoning. The court of appeals held that at a minimum the district court should have accepted the city's estimate of a diminished value of $141,450 and computed the value of the temporary taking at 15 percent per annum of that amount. Therefore the court directed the entry of an order awarding damages of $89,812.35.

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64. 450 U.S. at 656.

65. In Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968), the court ruled that a subdivision regulation requiring the reservation for one year of land for possible public acquisition required the payment of the value of an option to purchase.

66. 764 F.2d 502 (8th Cir. 1985).

The *Burrows*, *Suess Builders*, and *Zinn* cases were all remanded to the trial court, *Burrows* and *Zinn* for the assessment of damages and *Suess Builders* for a trial on the merits in which a damage award would have been a possibility. In the *Sheerr* opinion the trial court dealt with the liability phase of the case and reserved the question of damages for a further hearing.

Only the *Zinn* case produced a jury verdict with respect to damages. There the jury found that the period of the temporary taking extended from the agency's erroneous determination to the date on which that decision was vacated. The jury awarded compensation for the rental value of the property taken for that period in the amount of $20,774.66. In addition, the jury found that the plaintiff was entitled to compensation for engineering fees, survey fees, witness fees, photographs, and attorneys' fees, and they assessed compensatory damages on those items in the amount of $11,649.56. That judgment is now on appeal.[67] So in that instance the temporary taking concept produced not only compensation for the value of the interest and property that was taken from the plaintiff but also compensation for the expenses incurred by the plaintiff in securing the award of compensation.

The *Burrows* case was settled when the city bought 124 acres of the property for $110,000 in settlement of all claims, receiving a deed for that part of the property.[68] In the *Suess Builders* case, the question of the computation of damages or compensation was never reached because after a two week trial the jury returned a verdict for the defendant. The case has been appealed again to the Oregon Court of Appeals.[69]

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67. Letter from Thomas O'Meara, Jr., attorney for plaintiff, to the author (October 11, 1985).

68. Letter from Charles H. Morang, former City Attorney for Keene, to the author (October 7, 1985).

69. Letter from Carroll F. Bradley, attorney for the defendant city to the author (October 1, 1985). The case was argued in September 1985. No opinion had been reported when this article went to press. Mr. Bradley included the jury instructions in his correspondence. The portion dealing with the measure of damages reads as follows:

> The interest in property allegedly taken in this case is described as:
>
> The right of the taker to purchase the property at any time, between the time the taking occurred and when it ended, with the requirement that if the taker does decide to purchase the property he must pay its fair cash market value at the time of the purchase.
>
> The term "option" to purchase has been used during trial as a shorthand way to refer to the property interest in question.
>
> If you find that the defendants or either of them, took such an interest in plain-

In the *Sheerr* case the trial court determined that the taking would extend from the initial adoption of the defective zoning to the date that new lawful zoning was in place, either by agreement of the parties to that effect or by judicial determination. The parties were advised that if a lawful zoning was not enacted in a reasonable period of time, the court would order the township to commence eminent domain proceedings. The court ruled that the matter of compensation for the temporary taking was to be based upon the amount of money that would be required to purchase an option to acquire the property for the period of the temporary taking. The value of that option was to be proven by the testimony of an appraiser holding qualifications as a member of the American Institute of Appraisal. The trial court also ruled that the plaintiffs were to be reimbursed for all real estate taxes, witness fees, and counsel fees under the Civil Rights Act.[70] Counsel for the plaintiff estimated that the claim would have totaled some $350,000. The 55 acres of woodland involved in the *Sheerr* case was but a portion of a larger 160 acre tract. The plaintiff decided that partial compensation and favorable zoning for the entire 160 acres would be a more desirable result. Therefore, a consent decree was entered providing for the payment of $25,000 in compensation and a zoning classification for the property that plaintiff thought was sufficiently favorable to permit the sale of the land at an attractive price.[71]

The confusing consequences of Justice Brennan's idea should begin to be apparent. Those few courts that have had to consider the question of the measure of damages have entangled what are logically two separate concepts. Inverse condemnation is a remedy that is designed to allow property owners to compel the valuation of property that has been taken for public use by a governmental body and the payment of compensation for the property or interest in property that has been taken. Section 1983 actions are designed to secure compensatory damages from governmental bodies for transgressions of the Constitution and laws of the United States. In temporary taking cases these quite separate grounds of recovery have become entwined and, as in the *Zinn*

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tiffs' property, it is your duty to determine the fair cash market value of the interest taken.

70. 42 U.S.C. §§ 1983 and 1988 (1982).

71. Letter from Michael D. Varbalow, attorney for the plaintiff, to the author (October 17, 1985). Mr. Varbalow's letter provided important insights into the facts of the case that do not appear in the opinion. For example, the letter reveals that the trial court heard a tape recording of a township board meeting that was very damaging to the defendant's claim that acquisition was not intended.

case, the property owner has been permitted to recover on both grounds. That result raises the question of whether a hidden vice in the temporary taking idea is that it tends to produce a double recovery. So there is real merit in accepting Justice Stevens' view that, as long as the procedures employed by the governmental body are procedurally fair, the cost of awaiting a judicial determination with respect to the question of whether regulation is a taking should be regarded as simply one of the burdens that is borne by all forms of economic activity in a complex society.

VII. Of Regulatory Takings: Matters of Remedy

In the early cases in which compensation was sought for regulation that was tantamount to a taking, the compensation remedy had a more traditional look because the payment of compensation bought something for the governmental body—either title to the property or an easement interest.[72] In such cases the discovery that an award of compensation would be accompanied by the opportunity to deliver a deed undoubtedly dampened the ardor of many property owners for inverse condemnation as a remedy. The popularity of Justice Brennan's temporary taking idea is attributable to the fact that no interest in the realty has to be surrendered by the landowner. He simply recovers for whatever diminution in the value of his land may have resulted from having been required to forego development while the validity of the regulation was being contested. Therefore, a critical flaw in the argument that temporary takings must constitutionally be compensated is that it would upset the fundamental rule of land use law that a diminution in the value of property caused by a land use regulation is not a constitutionally forbidden taking without compensation.[73] A remedy with such precedent shattering consequences that also carries with it the risk of grievous fiscal consequences for municipalities that fail to guess right on a matter of law that gives the Supreme Court "considerable difficulty"[74] ought not to be adopted as long as less disruptive rem-

72. *See, e.g.*, Arastra Ltd. Partnership v. Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated by stipulation*, 417 F. Supp. 1125 (N.D. Cal. 1976).

73. Courts have sustained regulations having far more economic impact than a temporary interruption in use. *See* Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) (75% reduction in value); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% reduction in value); Wm. C. Haas Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (95% reduction in value).

74. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

edies remain available; and there are such remedies.

The advocates of compensation argue that invalidation of the offending regulation is an ineffective remedy because the municipality can replace the invalid regulation with one that gives the property owner little real relief.[75] However, that can occur only if the courts are unwilling to use their equitable powers to fashion genuinely effective remedies. The need for judicial relief that goes beyond invalidation of the unconstitutional regulation was perceived by the Illinois Supreme Court a generation ago. Justice Schaefer of that court then said:

> [I]t is appropriate for the court . . . [to frame] its decree with reference to the record before it, and particularly with reference to the evidence offered at the trial. In most of the cases that have come before us in recent years, a specific use was contemplated and the record was shaped in terms of that use. In such cases the relief awarded may guarantee that the owner will be allowed to proceed with that use without further litigation and that he will not proceed with a different use. If the land owner asserts a broader challenge in terms of a class of uses, the decree may be shaped accordingly.[76]

Decrees forbidding interference with a specific proposed use or with a class of uses have been commonplace in the Illinois courts ever since.

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75. Justice Brennan noted the opportunity for municipalities to avoid the day of reckoning by amending their regulations, thereby requiring the landowner to return to "go" and start over in his *San Diego Gas* dissent. In a footnote, he referred to the arrogant advice given seven years earlier by a speaker at a National Institute of Municipal Law Officers conference in San Diego. The speaker told his fellow attorneys: "If all else fails, merely amend the regulation and start over." *See San Diego Gas*, 450 U.S. at 655 n.22. The author heard the original speech and winced as he did so. The full passage can be found in Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (including Inverse Condemnation)*, 38B NIMLO MUNICIPAL LAW REVIEW 192-93 (1975). Just prior to that conference a California intermediate appellate court had held that compensation in inverse condemnation for regulatory takings was available, producing an air of panic among the distinguished municipal attorneys. The California Supreme Court later restored calm by reversing the heresy of the lower court in HFH Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

76. Sinclair Pipeline v. Village of Richton Park, 19 Ill. 2d 370, 379, 167 N.E.2d 406, 411 (1960). *See also* Franklin v. Franklin Park, 19 Ill. 2d 381, 267 N.E.2d 195 (1960). *Sinclair* dealt with proof that supported the reasonableness of a specific use, and *Franklin* applied the *Sinclair* rationale to a class of uses. Judge David W. Craig of the Commonwealth Court of Pennsylvania has pointed out to the author that similar relief is available in Pennsylvania. In Casey v. Zoning Hearing Board, 459 Pa. 219, 328 A.2d 464 (1974), the Supreme Court of Pennsylvania held that effective relief required that a court go beyond invalidation and grant definitive relief by ordering the issuance of building permits.

In New Jersey, similar relief, called a "builder's remedy," has been authorized as a means of implementing the requirement that every municipality utilize its land use ordinances to ensure the provision of their fair share of the regional need for low and moderate income housing.[77] In Pennsylvania, a statutory mechanism has been adopted that permits landowners to secure judicial relief that guarantees them a reasonable beneficial use of their land.[78] In one form or another invalidation plus a builder's remedy affords effective relief because it ensures that the owner or developer will be able to use the land in a reasonable fashion.

A significant share of the blame for the ineffectiveness of simple invalidation as a remedy is attributable to the still persistent belief that the decisions of local government with respect to the uses to be permitted on a particular parcel of land are legislative decisions the validity of which is to be tested by the same standards as generally are applied to police power regulations. A few courts have recognized that characterizing site specific land use decisions as legislative insulates them from meaningful judicial review. These courts have rejected the characterization of such decisions as legislative and have characterized them as quasi-judicial.[79] The consequence of a quasi-judicial characterization

77. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed, cert. denied*, 423 U.S. 808 (1975) (Mount Laurel I); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mount Laurel II).

78. PA. STAT. ANN. title 53, § 11011(2), (Purdon's Supp., 1980) ("the Curative Amendment" statute) provides:

> If the court . . . finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or, failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order.

79. *See* Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975); Cooper v. Bd. of Comm'rs, 101 Idaho 407, 614 P.2d 947 (1980); Golden v. Overland Park, 224 Kan. 591, 584 P.2d 130 (1978); Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551 (1974); Fasano v. Bd. of Comm'rs., 264 Or. 574, 507 P.2d 23 (1973); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972). One of the more recent decisions to jettison the legislative characterization explained that:

> We are persuaded the cases which characterize as quasi-judicial the action of a zoning body in applying general rules or policies to specific individuals, interests, or situations represent the better rule. The shield from meaningful judicial review which the legislative label provides is inappropriate in these highly particularized

is that on judicial review the question of whether the local decision was arbitrary or capricious is based upon an inquiry into the extent to which there was substantial evidence to support the decision. When a plaintiff prevails in that form of judicial review, the result is not invalidation of the regulation, but a decree finding that plaintiff was entitled to the relief he had sought from the local agency and an order to the agency to grant it. Such specific relief will prevent the pyrrhic victories that may result from a simple invalidation decree.

So the argument that mandatory compensation is the only way to secure effective relief for landowners is not supportable. What it really would do is load the scales in favor of the landowner and developer and make it possible for unscrupulous members of that fraternity to employ bellicose threats of damage liability as a means of coercing local governments to do their bidding in matters of land use regulation. No remedy with such a marked potential for abuse should be given serious consideration as constitutional doctrine.

VIII. CONCLUSION

The Supreme Court said that it had granted certiorari in *Hamilton Bank* "to address the question whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulation."[80] The Court was again unable to reach that question, but it appears to be undiscouraged by its three unsuccessful attempts to do so.[81] The persistence of the issue and the ready acceptance that Justice

land use decisions. The great deference given true legislative action stems from its high visibility and widely felt impact, on the theory that an appropriate remedy can be had at the polls . . . This rationale is inapposite when applied to a local zoning body's decision as to the fate of an individual's application for rezone. Most voters are unaware or unconcerned that fair dealing and consistent treatment may have been sacrificed in the procedural informality which accompanies action deemed legislative. Only by recognizing the adjudicative nature of these proceedings and by establishing standards for their conduct can the rights of the parties directly affected, whether proponents or opponents of the application, be given protection. *Cooper*, 101 Idaho at 410-11, 614 P.2d at 950-51.

80. 101 S. Ct. at 3116.

81. It is by no means certain that a majority of the Court will find the *Yolo County* imbroglio to be a suitable vehicle for addressing the regulatory taking issue. From the pleadings it appears that plaintiffs' land was in the county, was designated on the general plan of the county for residential development and was so zoned. While that designation was in effect, the topsoil was removed and sold under threat of condemnation for use as fill for an expressway. Subsequently the adjacent City of Davis designated the parcel as an agricultural preserve. When the landowner sought approval of a

Brennan's *San Diego Gas* dissent has enjoyed surely give the question some of the sense of urgency that attended the recently unsettled state of the application of the federal antitrust laws to the activities of local government.[82]

In *Hamilton Bank* the Court was careful to phrase the issue as one that involves only the consequences of temporary takings, but a resolution of that aspect of the taking issue will inevitably spill over into other situations in which taking claims are made, such as diminution of value cases and moratorium disputes. Awarding compensation for regulation that "goes too far" is a remedy that would surely damage the ability of local, state, and federal governments to deal effectively with the complex of economic, social, and environmental concerns that underlie land use regulation. Given the complexity of the setting in which land use regulations are applied, there is ground for serious con-

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subdivision map that conformed to the county zoning, the city objected and used its extraterritorial planning authority to block approval. The city also denied access to the property by refusing to permit streets in the proposed subdivision to be connected to city streets that abutted the proposed subdivision, refused to provide police and fire protection, and refused to extend water and sewer lines despite the fact that the property had been assessed $75,000 by the sewer district. Plaintiff claims that the absence of topsoil and an infestation of nematodes precludes agricultural use, partly because the property is too close to existing residences to allow the use of pesticides to eradicate the nematodes. The complaint alleges that there is no further local relief available and that the action of the county on the proposed subdivision map is final. Jurisdictional Statement, *MacDonald, Summer & Frates v. County of Yolo*, Supreme Court Doc. No. 84-2015, at E-1 to E-25. Although the case was decided on a motion to dismiss, the appellate record contains a substantial amount of documentary evidence that would not usually accompany a case that was decided on the pleadings. *See* Joint Appendix, *MacDonald, Summer & Frates v. County of Yolo*, Supreme Court Doc. No. 84-2015. A part of this evidence consists of judicial notice of documents that provide a fuller understanding of the dispute than would ordinarily be the case. *See id.* at 95-99 and Reporters Transcript of Proceedings in *MacDonald, Summer & Frates v. County of Yolo*, Doc. No. 36655, at 100-36. This documentation furnishes a sound basis for the county to defend on the ground that plat approval was denied for reasons of safety (the proposed 159 lot subdivision has only one access road) and as a matter of development timing. As to the latter point, the Court previously declined to consider the leading decision upholding deferral of development as a matter of development timing. *See Golden v. Planning Board*, 30 N.Y.2d 359, 285 N.E.2d 291, *appeal dismissed*, 409 U.S. 1003 (1972). There is also a companion administrative mandamus case pending in the California state courts and until there is a final determination in that case, it remains possible that California law will provide a remedy for the plaintiff by ordering Yolo County to approve the subdivision map.

82. Each new term brings a collection of appeals and certiorari petitions that raise the question. There were three such petitions waiting for the Court in the fall of 1985, one of which was *Yolo County*. Interview with Gus Bauman, Litigation Counsel for the National Association of Home Builders.

cern about the consequences of an inflexible constitutional rule that would require the payment of compensation in every case in which a governmental agency oversteps the constitutional limits on land use regulation. More innovative remedies than simple invalidation may be necessary and a more receptive judicial attitude toward the legitimate grievances of landowners may be desirable, but the worst possible solution would be a rigid constitutional mandate for compensation. Perhaps the Supreme Court can be persuaded to see it that way too.