INVESTMENT-BACKED EXPECTATIONS: IS THERE A TAKING?

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In *Penn Central Transportation Co. v. City of New York*[1] Justice Brennan added a new factor to the judicial lexicon of the taking clause. A taking may occur, he stated, when legislation frustrates "distinct investment-backed expectations."[2] Although Justice Brennan stated that investment-backed expectations are but one factor in the application of a taking clause that has no "set formula,"[3] they add yet another complexity to the doctrinal muddle of taking law.

This article reviews the meaning of the investment-backed expectations taking factor and examines its application in taking cases.[4] It first discusses the Supreme Court's formulation of this taking factor in *Penn Central* and later decisions and a leading article on taking theory which

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R. Marlin Smith, one of the nation's leading land use lawyers, died unexpectedly on June 15, 1986. This article is dedicated in his memory.

1. 438 U.S. 104 (1978).

2. *Id.* at 127.

3. *Id.* at 124.

4. In most of the cases discussed in this article, the plaintiffs claimed a land use regulation to be a taking. *Penn Central* was also a land use case. In addition, the article reviews other property regulation cases that considered the expectations taking factor, such as condominium conversion cases and cases considering requirements for the maintenance of historic landmarks. References to land use taking law in the text are meant to provide a reference point for analysis of the expectations taking factor, and not to exclude consideration of this taking factor as applied to other regulations affecting property.

influenced the Court to adopt this taking factor. The next section provides another perspective on the investment-backed expectations taking factor. Investment-backed expectations arise in property markets, where market participants invest with the expectation that they will obtain capital gains from the development of their property. This section considers the way in which property markets function and the investment-backed expectations they produce. The question is whether a taking occurs if market-created expectations in capital gains are frustrated. The analysis of property markets provides the basis for taking clause theories that can help answer this question.

A final section considers lower federal and state court taking decisions that applied the investment-backed expectations taking factor as formulated by the Supreme Court. This section relies on the analysis of investment-backed expectations in property markets to further explore the role of investment-backed expectations in taking law.

I. INVESTMENT-BACKED EXPECTATIONS: A PRELIMINARY ANALYSIS

The Supreme Court's taking law before *Penn Central* was not highly structured. The Court stressed factors such as the extent to which regulation diminished the value of land and whether regulation prevented negative market impacts by prohibiting a noxious use.[5] Landowner expectations and investments did not figure in Court decisions, except to the extent that the Court recognized an "expectation" that the landowner should be allowed a reasonable use of his land.[6] The investment-backed expectations taking factor adds a new dimension to the taking calculus.

Justice Brennan's emphasis on investment-backed expectations in taking cases indicates that this factor must be isolated for consideration. The inference is that a court must always examine the extent to which government regulation of property frustrates investment-backed expectations. Justice Brennan did not indicate whether frustration of investment-backed expectations would be enough to find a taking. His inclusion of these expectations in a list of "factors" suggests that frustration alone is not enough. The Court has not yet resolved this

5. D. MANDELKER, LAND USE LAW §§ 2.6-2.20 (1982) (hereinafter LAND USE LAW).

6. The Court confirmed this rule in *Penn Central*. Some state courts find a taking if a land use regulation substantially diminishes the value of land. LAND USE LAW, *supra* note 5, § 2.28.

question.[7]

What does a consideration of investment-backed expectations add to taking theory? Landowner expectations must now be protected if they are investment-backed. A well-established doctrine in land use law provides protection for landowner expectations of this type. The estoppel and vested rights doctrines protect a landowner from a change in land use regulations if he makes substantial expenditures on a development project in good faith reliance on a government act.[8] Most courts find an estoppel or a vested right only if the landowner acts in reliance on a building permit.[9] The estoppel and vested rights doctrines are a clear judicial recognition of investment-backed expectations. The expectation is created by the issuance of a building permit, and is investment-backed by the landowner's good faith reliance expenditures.[10]

Curiously, Justice Brennan did not mention either the estoppel or

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7. *But see* Furey v. City of Sacramento, 592 F. Supp. 463 (E.D. Cal. 1984), *aff'd on other grounds*, 780 F.2d 1448 (9th Cir. 1986). The court held a finding that a landowner's investment-backed expectation was frustrated is only a threshold requirement. The court must still apply the rule that "justice and fairness" determine whether a taking has occurred. This rule requires a balancing of public and private interests. *Id.* at 470-471. *See also infra* text accompanying notes 117-26. For excellent discussions of the investment-backed expectations taking factor in other regulatory settings, see Drobak, *Constitutional Limits on Price and Rent Controls: The Lessons of Utility Regulation*, 64 WASH. U.L.Q. 107 (1986); Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. REV. 65, 103-109 (1985).

For an illuminating analysis of the use of formalism in taking law see Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 372 (1986). Professor Ross distinguishes stochastic and deterministic decisional models that can be used to decide taking cases. The multifactor balancing test that Justice Brennan adopted for taking clause analysis is a stochastic model. This type of model does not presume "to delimit precisely the actual decision-making framework of each of the Justices." *Id.* at 375.

The investment-backed expectations factor added by Justice Brennan to taking clause analysis appears to be a deterministic decision-making model to the extent this taking factor is intended to control decisions. Justices using a deterministic decision-making model "would decide takings cases solely by reference to the questions contained in the model." *Id.* at 376. The insertion of a potentially deterministic decision-making model through Justice Brennan's adoption of the investment-backed expectations taking factor makes analysis of this factor critical to taking law.

8. LAND USE LAW, *supra* note 5, §§ 6.11-6.21. The two terms are used interchangeably and do not usually produce different results in taking cases.

9. LAND USE LAW, *supra* note 5, §§ 6.14-6.15.

10. Land use lawyers Charles Siemon and Wendy Larsen, in an excellent and extended treatment of the vested rights issue, suggest that investment-backed expectations should provide the basis for an alternative vested rights doctrine. C. SIEMON & W. LARSEN, VESTED RIGHTS 61-68 (1982).

vested rights doctrines in *Penn Central*. This omission may be an oversight, or may indicate that investment-backed expectations must be considered even though they do not create an estoppel or a vested right. If this interpretation is correct, the expectations taking factor introduces a landowner tilt in taking theory that did not exist before. By emphasizing the property owner's investment in his property, the Court favors the property owner's rather than government's interests. This tilt is especially important because the Court, since a landmark 1922 case,[11] has seldom held a regulation of property to be a taking.[12] Because this tilt in the expectations taking factor is favorable to property owners, it may increase the number of cases in which courts find a taking. For example, the mere purchase of land, with an expectation that it will be developed for a use disallowed by a land use regulation, could create an investment-backed expectation protected by the taking clause.

The investment-backed expectations taking factor could also strengthen the constitutionality of government regulation of property. The taking clause protects expectations only if they are investment-backed. A court could limit taking clause protection by not recognizing expectations based on limited investments in property. It could require landowners to make an investment that creates a vested right in order to claim protection under the taking clause. Investment in property does not support a vested rights claim. The landowner must make substantial good faith expenditures on his development in reliance on a governmental act. This requirement would substantially strengthen the constitutionality of restrictions on property rights.

The Supreme Court has not considered the implications of the expectations taking factor on judicial attitudes toward the regulation of property. Instead, it has defined the elements of this taking factor without indicating whether it strengthens or weakens property regulation. The Court has provided the following interpretations of what the investment-backed expectations taking factor means:

1) Consideration of the "bundle" of rights that constitutes property determines the investment required to establish an investment-

11. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *See infra* text accompanying notes 16-18.

12. *But see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (taking found when a cable television company, authorized by a New York law, installed cables and boxes on the roof of an apartment building).

backed expectation. Only some "strands" in the property rights bundle are protected as investment-backed.

2) The taking clause does not protect a landowner's mere "expectation" in the use of his property absent an investment protected as part of the property rights bundle.

3) Landowner expectations are not recognized when a landowner is on notice that government regulation may limit his expectations in the use of his property.

4) Landowner expectations are protected when there is a sudden change in the regulations applicable to his property.

These interpretations of the investment-backed expectations taking factor are both static and dynamic. The emphasis on property rights is static. It does not consider the regulatory process and the effect the process has on landowner expectations. The emphasis on property owner notice and the administration of the regulatory process add a dynamic dimension to the expectations taking factor. This emphasis stresses the fairness of the regulatory process as determined by the conduct of governmental agencies and landowners.

II. THE EXPECTATIONS TAKING FACTOR IN *PENN CENTRAL*

The *Penn Central* case, in which the Court adopted the investment-backed expectations taking factor, arose when New York City declared Grand Central Terminal an historic landmark and rejected a proposal to construct a high-rise office building in the airspace over the Terminal.[13] The Grand Central Station owners claimed a facial and an as applied taking through the landmark designation and the rejection of their building proposal. Justice Brennan disagreed, and introduced the investment-backed expectations factor to help explain the scope of the taking clause. After noting that the Court had not adopted a "set formula" for the taking clause, that "justice and fairness" ultimately determine when a taking occurs, and that the application of the taking clause depends on the circumstances of each case, he continued:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of

13. For discussion of *Penn Central*, see LAND USE LAW, *supra* note 5, § 2.27; Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977).

> course, relevant considerations. So, too, is the character of the governmental action.[14]

Justice Brennan added that a taking is found more readily when an interference with property occurs because of a physical invasion rather than "some public program adjusting the benefits and burdens of economic life to promote the common good," a clear reference to regulatory restrictions.[15]

Justice Brennan illustrated the investment-backed expectations taking factor by discussing *Pennsylvania Coal Co. v. Mahon*,[16] a landmark Supreme Court taking decision authored by Justice Holmes. Although Justice Brennan stated that *Pennsylvania Coal* was "the leading case" for the investment-backed expectations proposition,[17] this phrase does not appear in the *Pennsylvania Coal* opinion. In *Pennsylvania Coal*, a coal company sold the surface rights to property on which a dwelling was constructed, but expressly reserved the subsurface right to mine coal. Pennsylvania later adopted a statute prohibiting coal mining that caused residential dwellings to subside. As Justice Brennan summarized the *Pennsylvania Coal* decision, the Court held that a taking occurred because the statute "made it commercially impracticable to mine the coal" and so "had nearly the same effect as the complete destruction of the property rights" the coal company reserved.[18]

Justice Brennan's reliance on *Pennsylvania Coal* to illustrate the expectations taking factor suggests that it applies if a regulation extinguishing a divisible property interest effectively prohibits the use of property, at least when a formal deed reservation creates the interest. This situation is rare. Justice Brennan did not extend the expectations taking factor to divisible property interests unprotected by formal reservation: " 'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[19] This statement was made to counter a claim by the owners of Grand Central that the taking clause protected their property rights in the airspace over the terminal. Justice Brennan's refusal to recognize these property rights means that not all strands in the bundle of property rights have taking

14. *Penn Central*, 438 U.S. at 124.
15. *Id.*
16. 260 U.S. 393 (1922).
17. 438 U.S. at 127.
18. *Id.*
19. *Id.* at 130.

clause protection. Ancient doctrine holds that the landowner has a property right to the airspace over his property, at least to reasonable limits.[20] Justice Brennan would not give taking clause protection to this strand in the property rights bundle, even though he would have extended protection to the subsurface rights at issue in *Pennsylvania Coal.*

Justice Brennan extended his withdrawal of taking clause protection from intangible property rights in an additional holding in *Penn Central*: "[T]he submission that [Penn Central] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest they heretofore had believed was available for development is quite simple untenable."[21] A narrow and a bold interpretation of this statement is possible. A narrow interpretation would limit the statement to the *Penn Central* facts. Penn Central had a viable and productive property on the site. It admitted in oral argument that Grand Central Terminal was providing a reasonable rate of return.[22] Perhaps Justice Brennan meant that when a landowner makes a profitable use of one part of the airspace over his land, he has sufficiently "exploited" the bundle of interests known as property. When this situation occurs, enough "investment" remains with the property owner to defeat a taking claim. The property owner has claimed one strand of the bundle of property rights and can claim no more.

A bold interpretation of Justice Brennan's exploitation statement takes it beyond the *Penn Central* facts. This statement can be applied to the common land use case, in which a property owner holds and wishes to develop land for a use prohibited by a land use regulation. Justice Brennan's exploitation statement, applied broadly, means that a court should not find a taking in this case because the property owner had only a "belief" that his land "was available for development." This bold interpretation works a radical change in taking law. It insulates much land use regulation from a taking attack. A different question arises if a governmental act induces the property owner's "belief." The property owner may then be able to claim a vested right or a zoning estoppel.

The distinction between divisible property interests entitled to taking

20. R. BOYER, SURVEY OF THE LAW OF PROPERTY 257 (3d ed. 1981).

21. 438 U.S. at 130.

22. Justice Brennan noted that Penn Central conceded in its brief that they could obtain a "reasonable" return on the property without further development. *Id.* at 129 n.26.

clause protection and an exploitation interest not entitled to protection suggests two additional distinctions necessary in applying the expectations taking factor. Because some property interests are protected and some are not, a distinction can be made between primary and secondary investment-backed expectations. The inference is that the taking clause protects only the primary investment-backed expectation in property. In *Penn Central*, for example, Justice Brennan held that the landmark law did not interfere with the "primary expectation concerning the use of the parcel" as a railroad terminal.[23]

The distinction between divisible property interests protected under the taking clause because they are formally created and an exploitation interest that is not protected suggests a distinction between subjective and objective investment-backed expectations. Formally-created property interests are objective and protected. Exploitation interests are subjective and not protected.

III. INVESTMENT-BACKED EXPECTATIONS AND PROFESSOR MICHELMAN'S TAKING THEORY

Additional insight on the meaning of the expectations taking factor is provided by Justice Brennan's reliance on a leading article on compensation under the taking clause by Professor Frank Michelman of the Harvard Law School.[24] Investment-backed expectation analysis appears most strongly in Professor Michelman's contingent acceptance of Benthamite utilitarian property theory. As Professor Michelman sums it, property according to Bentham "becomes 'a basis of expectations' founded on existing rules." These rules protect "the will to labor and the will to invest" that must "depend on reliable assurances about the future enjoyment about any product."[25] This insight teaches that "capricious redistributions" of property should be prohibited.[26] Utili-

23. *Id.* at 136.

24. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1229-34 (1967).

25. *Id.* at 1212. *See* Patterson, *Property Rights in the Balance—The Burger Court and Constitutional Property*, 43 MD. L. REV. 518, 550 (1984) (noting the investment backed expectations taking factor is similar to certain aspects of John Locke's labor desert theory of property).

26. Michelman, *supra* note 24, at 1212. *See* Siemon, *What Goes Around, Comes Around*, in PERSPECTIVES ON FLORIDA GROWTH MANAGEMENT ACT OF 1985, at 115, 122-31 (J. DeGrove & J. Juergensmeyer eds., Lincoln Institute of Land Policy Monograph No. 86-5, 1986) (reviewing cases applying investment-backed expectations taking factor).

tarian property theory, however, "does *not* require payment of compensation in every case of social action which is disappointing to justified, investment-backed expectations."[27] The conclusion is that "[a]n imposition is compensable if not to compensate would be critically demoralizing."[28]

Professor Michelman does not rely entirely on Benthamite property theory for his compensation theory, for he turns to the "justice as fairness" theories of John Rawls to supplement the utilitarian approach. He concludes his discussion of Rawls by asking questions similar to those asked by the utilitarian approach.[29] Professor Michelman ultimately formulates a compensation theory that makes compensation under the taking clause turn on settlement costs, efficiency gains, and the extent to which harms are concentrated.[30]

Justice Brennan does not cite this analysis of taking theory, although it clearly provides the basis for his recognition of the expectations taking factor. The pages from Professor Michelman's article cited by Justice Brennan to support his adoption of the expectations taking factor discuss the diminution in value theory of the taking clause.[31] This theory asserts that a taking occurs if regulation substantially diminishes the value of property. Professor Michelman states in these pages that a court should find a taking when people are the victims of "a special kind of suffering" that occurs when they are subject to unprincipled exploitation.[32] He illustrates this rule with a discussion of cases in which courts found a taking because divisible property rights were destroyed. He cites *Pennsylvania Coal*, on which Justice Brennan relied to illustrate the expectations taking factor, as one example.[33] His other examples are governmental acquisition and use of land that violates an equitable servitude, such as a residential building restriction; public acquisition of flowage rights; and land use regulations prohibiting nonconforming uses.[34] By implication, Professor Michelman contends that the destruction of these interests destroys an investment on which

27. *Id.* at 1213 (emphasis in original).

28. *Id.*

29. *Id.* at 1223.

30. *Id.*

31. *Id.* at 1229-34.

32. *Id.* at 1230.

33. *Id.*

34. *Id.* at 1230-34.

the property owner depended.[35] A taking occurs when a claimant is deprived of "distinctly perceived, sharply crystallized, investment-backed expectations."[36]

At this point, on a page cited by Justice Brennan, Professor Michelman makes a distinction that qualifies this analysis. Professor Michelman compares the owner of a nonconforming land use with "the nearby land speculator who is unable to show he has yet formed any specific plans for his vacant land [and who] still has a package of possibilities with its value, though lessened [by land use regulation], still unspecified—which is what he had before."[37] Because the speculator has "what he had before," a land use regulation that lessens the value of his land is not a taking. The speculator exception is consistent with the bold interpretation of Justice Brennan's exploitation holding.[38]

Later in the article, on pages not cited by Justice Brennan, Professor Michelman bases his speculator exception on actual notice. He gives as an example a landowner who buys land along a scenic highway, knowing that a clear possibility exists that regulation will prohibit development along the highway.[39] He notes that the market should reflect this possibility, so that the price paid by the landowner for his land should be discounted by the possibility the prohibition will be imposed. Because the landowner got what he meant to buy, society has perhaps imposed no redistribution and no taking has occurred. The situation is comparable to a loss on a sweepstakes ticket, another gamble that does not require compensation. Professor Michelman concluded that this analysis is consistent with "a proper utilitarian regard for security" because "deliberate speculations may be treated as speculations" if "the credibility of the usual presumption of a right to rely" is not destroyed.[40]

An understanding of Professor Michelman's speculator exception is critical to analysis of the expectations taking factor. His speculator exception is a blend of subjective and objective elements. It is based on

35. *Id.* at 1234.

36. *Id.* at 1223.

37. *Id.* (bracketed material added).

38. Unlike Justice Brennan, Professor Michelman would apply the exception only if the speculator does not have "specific plans." What Professor Michelman means by this phrase is not clear.

39. Michelman, *supra* note 24, at 1238.

40. *Id.* at 1239.

an argument that society may censure morally unacceptable behavior, and an argument that the taking clause need not recognize property losses discounted in land markets. His speculator exception also works a radical change in taking law.[41] It allows the land use regulation system to define taking clause protection because a proposed regulatory change defeats a taking claim if the landowner has actual notice of the proposed change.[42] Whether these different justifications can be harmoniously married is problematic. A revision of the speculator exception, basing it solely on market behavior and eliminating *ad hominem* elements, is presented in Part V.

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41. See R. EPSTEIN, TAKINGS 155 (1985): "If notice is sufficient to defeat the obligation to compensate, then the eminent domain provision has no force or effect." Professor Epstein also criticizes Professor Michelman's speculator exception because it protects the buyer of land at a discounted price but not the seller "against a capital loss upon enactment of the restriction." *Id.* at 156.

This criticism is incorrect. The equities of the seller's position depend on whether the proposed change in the land use regulation is an upzoning or a downzoning. If the change is an upzoning, the land will be zoned for a low-intensive use, such as residential development, and the price the seller paid should be based on the low-intensive zoning. If he paid more, in the hope the land would be upzoned to a more intensive use, the additional payment also was speculative.

If the proposed change is a downzoning, the land will be downzoned to a less intensive use. The seller will suffer a loss because the price he paid for the land will be based on the zoning for the more intensive use. He has a cause of action he can sell in this situation. The seller can protect himself from loss by requiring the buyer to reimburse him if the buyer overturns the downzoning, or by conditioning the sale on the buyer's success in having the downzoning invalidated. If the seller is left with a loss in this situation, it is because the land use regulation process downzoned his land, not because a market transaction forced him to suffer a loss he could not escape.

All of this assumes that a zoning ordinance applied to the land when the seller bought it. The seller has even less reason to complain if he bought the land before the zoning ordinance was adopted.

42. Whether knowledge of a pending change in a land use regulation will defeat a vested rights or estoppel claim has led to conflicting results. Recall that a landowner who in bad faith makes substantial expenditures on his development project in reliance on a building permit does not have a vested rights or estoppel claim. *See supra* text accompanying notes 8-10. Some courts apply a subjective test of bad faith, and find bad faith when a landowner should have known that a change in land use regulations might block his development. *See, e.g.*, Carty v. City of Ojai, 77 Cal. App. 3d 329, 143 Cal. Rptr. 506 (1978); Graham Corp. v. Board of Zoning Appeals, 140 Conn. 1, 97 A.2d 564 (1953). Courts that take an objective view of bad faith may reach a contrary conclusion. *See, e.g.*, Yocum v. Power, 398 Pa. 223, 157 A.2d 368 (1960). *See generally*, LAND USE LAW, *supra* note 5, § 6.17.

IV. THE INVESTMENT-BACKED EXPECTATIONS FACTOR IN LATER SUPREME COURT DECISIONS

A. *Must Expectations be Distinct, Reasonable, or Severe?*

In *Penn Central* the Supreme Court held that the expectations protected by the taking clause must be distinct.[43] Later cases held that the expectation must be reasonable.[44] These qualifiers carry different connotations. "Distinct" implies that the expectation must have some concrete manifestation. "Reasonable" implies that the expectation must be appropriate under the circumstances. Determining whether a regulation is reasonable may also require a balancing test that weighs public benefits against private costs. The Supreme Court has suggested the use of a balancing test in its taking decisions.[45]

The Court took a somewhat different view of the expectations entitled to protection under the taking clause in *Kirby Forest Industries v. United States*,[46] a case reviewing a compensation award in a condemnation action. The Court held that a regulation of property would be a taking if it severely interfered with a property owner's investment-backed expectations.[47] The "principle that underlies this doctrine" is that the burdens of government action must usually be borne by landowners as members of a civilized community. The Court noted, however, that "some [burdens] are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole."[48] *Kirby's* reformulation of the expectations taking factor introduces new elements. The requirement that the regulatory burden be unforeseeable suggests that expectations need protection only when regulatory change is unexpected. This holding narrows the formulation of the expectations taking factor in *Penn Central*, which made the factor applicable to all regulatory restrictions. *Kirby* emphasizes the governmental process in which land use decisions are made, not the property interests entitled to protection under the taking clause. *Kirby* also modifies the speculator exception. It implies that a court should find a taking when a change in regulation is sudden and unexpected. The Court implies that

43. 438 U.S. 104, 124 (1978).

44. *E.g.*, PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

45. *See* Agins v. City of Tiburon, 447 U.S. 255, 261 (1980).

46. 467 U.S. 1 (1984).

47. *Id.* at 14.

48. *Id.*

sudden change is not enough notice to the landowner to defeat a taking claim.[49]

B. *The Divisible Property Interest Cases*

Another group of Supreme Court cases considered the *Penn Central* holding that a divisible interest in property creates an expectation protected by the taking clause. *Andrus v. Allard*[50] supports this principle, with the added qualification that a divisible interest is not protected just because it is profitable. In *Andrus*, federal legislation prohibited the sale of any part of protected birds. Justice Brennan did not find a taking. Citing *Penn Central* and Professor Michelman, he held that when a property owner possesses a full "bundle" of property rights, "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[51] The legislation prevented the most profitable use of bird artifacts, but permitted their owners to exhibit them. The loss of future profits, without a physical property restriction, "provides a slender reed upon which to rest a taking claim:"[52] "[P]rediction of profitability is a matter of reasoned speculation that courts are not especially competent to perform."[53]

In two other cases, the Court adopted different views of the "right to exclude" as a property interest entitled to protection as an expectation. In *Kaiser Aetna v. United States*[54] a residential developer converted a

49. The United States Claims Court also adopted this interpretation of the expectations factor in Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983), *aff'd*, 765 F.2d 159 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 279 (1985). The court stated in dictum that "[t]his somewhat cryptic phrase . . . suggests that even valid regulatory action can result in a taking if government shifts too heavy a burden upon a few individuals, and does so in a sudden and unanticipated manner so that those adversely affected have little to protect themselves in a marketplace." *Id.* at 242.

50. 444 U.S. 51 (1979).

51. *Id.* at 65-66. *See* United States v. Locke, 105 S. Ct. 1785, (1985), upholding a federal statute of limitations on the filing of mining claims. The Court held that the filing requirement imposed in the statute was only a minimal burden. Property right regulation is not a taking "when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." *Id.* at 1799.

52. *Id.* at 66.

53. *Id.*

54. 444 U.S. 164 (1979). For a discussion of his case, see Note, *Determining the Parameters of the Navigation Servitude Doctrine*, 34 VAND. L. REV. 451 (1981); Note, *Navigational Servitude and the Right to Just Compensation: Kaiser Aetna v. United States*, 1980 DET. C.L. REV. 915; *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 76, 205-223 (1980).

private lagoon into a marina and dredged access to the ocean. Access was limited to residents of the project. The Army Corps of Engineers acquiesced in these changes. Arguing that the marina had become a navigable water, the United States brought suit to determine whether the developer could deny access to the public. Justice Rehnquist held that imposing a right of public access without compensation was a taking of property. The Corps' acquiescence in the creation of the marina and its access, although not an estoppel, could "lead to the fruition of a number of expectancies embodied in the concept of 'property.' "[55] Justice Rehnquist stated that these expectancies, if "sufficiently important,"[56] must be condemned and compensated. He held that the right to exclude was a fundamental property right within the category of property interests that the government cannot take without compensation.[57]

The Court did not recognize a property right to exclude in *PruneYard Shopping Center v. Robins*.[58] The owner of a private shopping center argued that he could exclude solicitors. The state court held this activity to be free speech protected under its state constitution. The Supreme Court accepted the state court's view, although it provided more free speech protection than previous Court decisions.[59]

The Court then held that allowing the exercise of "state-protected rights of free expression and petition" in a private shopping center was not a taking.[60] Although the right to exclude was part of the property rights bundle, not every destruction of property rights was a taking.

55. 444 U.S. at 179.

56. *Id.*

57. *Id.* at 179-80.

58. 447 U.S. 74 (1979). For a discussion of this case, see Comment, PruneYard Shopping Center v. Robins, 9 HOFSTRA L. REV. 289 (1980); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 76, 169-78 (1980).

59. In Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), the Court rejected a claim that the constitutional rights of free speech and petition prohibited exclusion from shopping malls of individuals who wished to distribute handbills. The Court held that property does not "lose its private character merely because the public is generally invited to use it for designated purposes. . . . The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." *Id.* at 569. The Court distinguished *Lloyd* in *PruneYard* by holding that *Lloyd* did not consider an interpretation of a state law. *PruneYard*, the Court claimed, dealt with a state-imposed limitation on property use. The only issue was whether the state's constitutional mandate violated the federal taking clause. *PruneYard*, 447 U.S. at 80-81.

60. *Id.* at 83.

Denying a right to exclude did not impair the shopping center owner's reasonable investment-backed expectations. It would not impair the use or value of his property, which was a large commercial complex with many stores. The state court had also held that the shopping center owner could adopt protective time, place, and manner restrictions that would prevent excessive activity. The Court distinguished *Kaiser Aetna* on its facts. In that case private property was developed as an "exclusive marina . . . open only to fee-paying members."[61] In *PruneYard* private property was developed to create a shopping mall open to the public.[62]

Andrus is consistent with the *Penn Central* holding that a desire to exploit property for greater profitability is not an expectation entitled to protection. *Kaiser Aetna* reinforces the holding in *Penn Central* that an intangible property right, such as the right to develop airspace, is not entitled to taking clause protection. *Kaiser Aetna* protected a right to exclude conferred by a private right of access. This property right is judicially created, and is most forcefully recognized in the highway access cases.[63]

C. *The Notice Problem*

Recall Professor Michelman's conclusion that a landowner on notice that a land use regulation may be changed to prohibit the intended use of his property does not have a taking claim.[64] The Supreme Court addressed the notice element in the investment-backed expectations taking factor in *Ruckelshaus v. Monsanto Co.*[65] The federal Insecticide, Fungicide and Rodenticide Act[66] authorizes the Environmental Protection Agency to disclose data submitted by applicants seeking re-

61. *Id.* at 84.

62. The Court also held the two cases could be distinguished by the property right in question. The Court implied that although the riparian rights in *Kaiser Aetna* were subject to federal definition, state law established the property rights in *PruneYard. Id.*

63. The classic treatment is found in R. NETHERTON, CONTROL OF HIGHWAY ACCESS (1963). *See also* note, *Compensation Claims for Losses of Access Rights to Interstate Highways*, 14 DEPAUL L. REV. 130 (1964).

64. *See supra* text accompanying note 36.

65. 467 U.S. 986 (1984). Following *Monsanto*: Eli Lilly & Co. v. Environmental Protection Agency, 615 F. Supp. 811 (S.D. Ind. 1985); New Jersey State Chamber of Commerce v. Hughey, 600 F. Supp. 606 (D.N.J. 1985), *aff'd in part & rev'd in part*, 744 F.2d 587 (3d Cir. 1985).

66. 7 U.S.C.A. §§ 136-136x (1980 & Supp. 1985).

gistration under the Act. Monsanto claimed that the Act was a taking of property because it required disclosure of its trade secrets.

Justice Blackmun held that the taking clause protected trade secrets as property, but the "force" of the expectations factor was "so overwhelming" that it partly defeated the taking claim.[67] A reasonable investment-backed expectation "must be more than a 'unilateral expectation or an abstract need.' "[68] Monsanto had no reasonable investment-backed expectations in trade secrets disclosed after the enactment of the Act because the Act put Monsanto on notice that its trade secrets might be disclosed. In addition, disclosure was not an unconstitutional condition on a valuable government benefit.[69] Justice Blackmun found that Monsanto was aware of the conditions, which were rationally related to a legitimate governmental interest,[70] and Monsanto voluntarily submitted the data in return for an economic advantage.

Although the Court did not cite his article, *Monsanto* is an important application of Professor Michelman's rule that a property owner does not have protected expectations if he is on notice that these expectations may be frustrated. Broadly applied, *Monsanto* saves any regulation of property from invalidation under the taking clause if property owners are given constructive notice of government regulations after they are adopted. This broad interpretation may not be possible because the Court found that the company knew of the statutory disclosure requirement. The Court also noted that Monsanto secured the

67. 467 U.S. at 1007.

68. *Id.* at 1005 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)).

69. 467 U.S. at 1007.

70. *Id. See also* Connolly v. Pension Benefit Guaranty Corp. 106 S. Ct. 1018 (1986) (federal pension law imposing liability on employers did not frustrate investment-backed expectations because employers were on notice of liability provisions).

The holding in *Monsanto* on unconstitutional conditions may be inconsistent with other Supreme Court cases if interpreted to mean that registration is a privilege not entitled to constitutional protection. The cases dismissing the right-privilege distinction as applied to procedural due process claims are an example. *See, e.g.*, Perry v. Sinderman, 408 U.S. 593 (1972). In land use law, the subdivision cases in which a municipal exaction for roads and other public facilities is claimed to be a taking are the closest analogy. A few state courts hold that subdivision approval is a privilege subject to any condition, like an exaction, the municipality chooses to impose. *See, e.g.*, Mid-Continent Builders, Inc. v. Midwest City, 539 P.2d 1377 (Okla. 1975). Most state courts do not take this position. LAND USE LAW, *supra* note 5, §§ 9.11-9.14. The Court's view of unconstitutional conditions in *Monsanto*, if applied to land use regulation, would substantially diminish its vulnerability to taking clause objections.

economic advantage of registration in return for its trade secrets disclosure. Property regulation does not always confer economic advantages that balance restrictions on property use.

V. INVESTMENT-BACKED EXPECTATIONS IN PROPERTY MARKETS

As noted earlier,[71] the expectations taking factor reflects a philosophical concern with stability in the ownership of property. Property is traded in property markets. One interpretation of the concern with stability is that the taking clause should protect expectations in property created by acceptable market behavior. This section considers two property markets in which expectations arise: the market for undeveloped land and the market for historic landmarks. The market in undeveloped land is of interest because landowners who trade in this market may have only unilateral expectations in the exploitation of land. These expectations should not be protected under the exploitation exception to the expectations taking factor adopted by Justice Brennan in *Penn Central*. The market for historic landmarks is of interest because the decision in which Justice Brennan adopted the expectations taking factor was an historic landmark preservation case.

A. *The Market for Undeveloped Land: Speculation and Exploitation*

One of the important limitations Justice Brennan placed on the expectations taking factor was his assertion that a landowner has no expectation entitled to protection in the exploitation of land.[72] This limitation echoes Professor Michelman's limitation that the land speculator is not entitled to taking clause protection.[73] These limitations on protected investment-backed expectations reflect the moral judgment that land speculation is socially undesirable.

The land speculation most often the target of negative social criticism occurs on the undeveloped urban fringe, where the developed urbanized area gradually pushes into undeveloped agricultural and other land. The key to land speculation in these areas is the downward slope of land prices as distance from the urban center increases.[74] Prices on

71. *See supra* text accompanying note 24.

72. *See supra* text accompanying note 21.

73. *See supra* text accompanying note 36.

74. *See, e.g.*, Knaap, *The Price Effects of Urban Growth Boundaries in Metropolitan Portland, Oregon*, 61 LAND ECON. 26 (1985).

the undeveloped fringe increase as urban development pushes outward. Opportunities for profit naturally arise in this situation.

Profit opportunities arise from uncertainties in the urbanization and land development process.[75] Knowledge of where urban development will next occur is incomplete. The location of new development depends on private initiative and the willingness of local governments to make land available. Opportunities for speculation would not arise if information about impending development were complete. Because information on development trends is incomplete, a speculator can buy land at less than its development value and gamble on the expectation he will be able to sell it for its development value when development becomes possible. Critics argue that taking advantage of this opportunity for capital gain is improper.

Whether this criticism of speculation is correct depends on how the land speculation process is evaluated. Critics of land speculation claim speculation distorts land markets because speculators restrict the land available for development by holding it off the market for capital gain. They claim that land withholding produces inefficient patterns of development because developers must "leapfrog" over land held for speculation to areas where development should not occur. Leapfrogging may require the premature development of agricultural land, with negative impacts on agricultural use.[76]

The impact of speculation on the ability of speculators to demand monopoly profits is less clear. Some commentators argue that land speculators will not be able to demand monopoly profits if the supply of land not held for speculation is sufficient to create competitive market conditions.[77] This argument does not take into account the need for developers to buy land at inappropriate locations, such as prime agricultural areas that should not be developed, in order to counter speculative land holding. Land speculation may also lower prices because speculators can make their land available on the market when demand is high and supply is scarce.[78]

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75. Clawson, *Urban Sprawl and Speculation in Suburban Land*, 38 LAND ECON. 99, 104 (1962). See also Dunford, Marti & Mittelhammer, *A Case Study of Rural Land Prices at the Urban Fringe Including Subjective Buyer Expectations*, 61 LAND ECON. 10 (1985).

76. R. HEALY & J. SHORT, THE MARKET FOR RURAL LAND 225 (1982).

77. *Id. See also* Davis, *Issues in Municipal Public Land Banking*, ANNALS OF REGIONAL SCIENCE, Nov. 1976, at 55, 61; Smith, *The Ontario Land Speculation Tax: an Analysis of an Unearned Increment Land Tax*, 52 LAND ECON. 1, 3 (1976).

78. Elias & Gillies, *Some Observations on the Role of Speculators and Speculation in*

An evaluation of speculator criticism is also complicated by difficulties in distinguishing between land speculation and land investment. One definition states that the investor holds land to earn profit on activities, conducted on the land during the holding period like farming. The speculator holds land to earn profit on its capital appreciation when it is sold.[79] Unfortunately, determining whether a purchaser of land buys for investment or speculation requires an analysis of motive, an analysis complicated by the tendency of motives to change over time. The purchaser who initially buys for investment may later decide to hold for speculation.

The motive analysis does not include the effect of land use controls on the market for undeveloped land.[80] Opportunities for speculation occur because of uncertainties in the market. Uncertainties in the administration of land use controls are an important contributing factor. Reducing uncertainties in the administration of land use controls would reduce market uncertainties that permit land speculation.[81]

The extent to which land use controls can reduce market uncertainty is evident in control systems that make distinctions between urban and non-urban land markets. The Oregon state land use control system draws this distinction clearly.[82] This system requires local governments to designate Urban Growth Boundaries that must be approved by the state land use agency. Urban development is permitted only within these boundaries. A study of the Urban Growth Boundary in the Salem and Portland areas showed that in a clearly segmented market of this kind, land prices outside the boundaries decreased while land prices inside the boundaries increased.[83]

Land Development, 12 U.C.L.A. L. REV. 789, 792 (1965). *See also* Brown, Phillips & Roberts, *Land Markets at the Urban Fringe: New Insights for Policy Makers*, 47 J. AM. PLAN. ASS'N 131 (1981). *But see* Lindeman, *Anatomy of Land Speculation*, 42 J. AM. INST. PLAN. 142, 143 (1976) (claims speculation leads to higher prices because speculators withhold land).

79. R. HEALY & J. SHORT, *supra* note 76, at 65 (1982).

80. *See* Vaillancourt & Monty, *The Effect of Agricultural Zoning on Land Prices, Quebec. 1975-1981*, 61 LAND ECON. 36 (1985).

81. Elias & Gillies, *supra* note 78, at 798.

82. For discussion of the Oregon system, see H. LEONARD, MANAGING OREGON'S GROWTH: THE POLITICS OF DEVELOPMENT PLANNING (1983).

83. A. NELSON, EVALUATING URBAN CONTAINMENT PROGRAMS (Center for Urb. Studies, Portland State Univ. (1984)). Nelson notes that the program "apparently removed speculative use value without compensation." *Id.* at 97. For a published report of this study, see Nelson, *Using Land Markets to Evaluate Urban Containment Programs*, 52 J. AMER. PLAN. ASS'N 156 (1986). *See also* Knaap, *supra* note 74.

The Urban Growth Boundary substantially reduces market uncertainty and speculation because speculation is unlikely except at boundary margins, where the boundary may be moved outward. The implications of this land use control system for taking doctrine are less obvious. One conclusion is that purchasers who buy land outside the boundary and pay a premium based on the possibility that permission to develop will be given are speculators unentitled to taking clause protection.

Theorists differ on the extent to which the taking clause should protect land speculators. Professor Michelman would deny taking clause protection to the speculator who is on notice of a possible change in land use regulations that affect his property. A broader view of land speculation is possible. It would deny taking clause protection to purchasers who enter a land market in which a speculator's gain depends on permission from a land use agency allowing the development of his land.[84] This view of speculation denies taking clause protection to purchasers in land markets who must rely on the possibility that a land use decision will be favorable. It allows the land use regulation system to define the property rights protected by the taking clause. Landowners who enter a land market subject to regulation are at risk in that market and are denied taking clause protection for expectations based on their market activities. Actual notice of a pending change in land use regulations is not necessary[85] and landowner motives are disregarded.

HFH Ltd. v. Superior Court,[86] decided before the Supreme Court

84. I have explained this view of speculation in D. MANDELKER, ENVIRONMENT AND EQUITY 49-51 (1981) [hereinafter ENVIRONMENT AND EQUITY]. *See also* MANDELKER, THE TAKING ISSUE IN LAND USE REGULATION IN THE LAND USE POLICY DEBATE IN THE UNITED STATES 167 (J. de Neufville ed. 1981).

In his review of ENVIRONMENT AND EQUITY, Professor Tarlock states that my "argument is in fact a restatement of Professor Michelman's principle that a utilitarian theory of property rights need not recognize claims if the government has clearly put the claimant on notice that claims will not be recognized." Tarlock, Book Review, 32 J. LEGAL EDUC. 461, 464 (1982). This statement is incorrect. I read Professor Michelman to require actual notice of a pending land use change. My view of the taking clause protection given to land speculators does not require actual notice. Under my view, the speculator loses taking clause protection when he enters a land market in which the land use regulation system places him at risk. Actual notice of a pending change in land use regulations is not necessary.

85. Whether this view of the taking clause protection given to speculators is correct or incorrect is not relevant to the line of analysis in this article. The view is advanced as one possible interpretation of the investment-backed expectations taking factor. Some courts have adopted this view. *See infra* text accompanying notes 130-31.

86. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S.

adopted the expectations taking factor, applied both views of speculation. After the plaintiff bought land zoned for commercial use, the city declared a moratorium on the use of the land, temporarily zoned in agricultural, and refused to adopt a commercial rezoning. The city subsequently downzoned the land for low density, single family use. Plaintiffs sued in inverse condemnation for the reduction in the value of their land caused by the downzoning. The court rejected their inverse condemnation claim and held: "The long settled state of zoning law renders the possibility of change in zoning clearly foreseeable to land speculators and other purchasers of property, who discount their estimate of its value by the probability of such change."[87] This statement adopted the broad view of speculation. The court also quoted and relied on Professor Michelman's notice view of speculation.[88] It held that the "real possibility" of a zoning change was evident in the plaintiffs' insistence that the owner from whom they bought the land obtain favorable zoning before conveying the land to them.[89]

This discussion of the market in undeveloped land indicates that Justice Brennan's hypothetical landowner, who wishes to "exploit" the

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904 (1976). For discussion of this case, see Comment, *Limiting the Availability of Inverse Condemnation as a Landowner's Remedy for Downzoning*, 13 URB. L. ANN. 263 (1977).

87. 15 Cal. 3d at 521, 542 P.2d at 246, 125 Cal. Rptr. at 374. Professor Tarlock has provided the following comments on the role of the nonrecognition doctrine in taking law:

> The concept of the nonrecognition of property rights because of prior notice that the state will not honor the claim has a short and ambiguous history. The clearest precedent is the navigation servitude which denies the site value of water-related uses to riparians who own land below the high water mark of a navigable river when their land is condemned. There are two possible bases for the doctrine. First, the idea of shared public and private rights in navigable waters, common to all major legal systems, is so engrained in our system that it constitutes a special case. Second, the claim has been asserted so long by the government with so much success that landowners are estopped to claim surprise. In short, landowners have a duty to discount the site value when purchasing land burdened by the servitude.
>
> The navigation servitude thus has two limiting features. It was not until the California Supreme Court opinion in *HFH, Ltd.*, that courts linked the concept of notice with the longstanding hostility against speculators and introduced the idea that land development is a sport with equal expectations of gain and loss. A close reading of Michelman does not support this reading. In short, the concept of notice rests on easy to justify rules of nonrecognition but does not support the denial of compensation in all cases where it is now being used.

Letter from Professor Dan Tarlock to the author (May 8, 1986).

88. 15 Cal. 3d at 521, 542 P.2d at 246, 125 Cal. Rptr. at 374.

89. *Id.*

development of his land, exists in land markets. The extent to which these market participants should fall within Justice Brennan's exploiting landowner category is another question.

B. *The Historic Landmark Market*

In *Penn Central* the owners of Grand Central Terminal conceded that the Terminal was earning a reasonable return. They merely wished to develop the airspace over the Terminal. What of the more difficult yet common case in which the historic landmark is not earning a reasonable return and is deteriorated and in need of repair? The landmark owner is denied permission to demolish the landmark and to construct a building that makes a more intensive use of the site. Is there a taking? Are there investment-backed expectations in demolition and more intensive development? *Penn Central* did not consider these important questions.

An insight on investment-backed expectations in historic landmarks is possible by examining the way in which the market for historic landmarks functions. The owner of a historic landmark, like the owner of any building, holds it for current net income or future capital gain: "Buildings are preserved when the private demand for a preserved structure is greater than the private cost of ownership, including the cost of withholding the asset . . . from alternative uses."[90] This is an efficiency rule, which is a neutral gains-maximizing criterion economists apply to the use of capital resources like land and buildings. If these conditions for preservation do not hold, conversion of the site to an alternative use is market-efficient because the owner maximizes gains from the use of the site. This analysis suggests that the landmark owner has investment-backed expectations entitled to taking clause protection whenever demolition and conversion are an efficient use of the property. If the market efficiency standard is adopted to define the landmark owner's expectations, then a decision denying the demolition of the historic landmark and its conversion to an alternative use consti-

90. Gold, *The Welfare Economics of Historic Preservation*, 8 CONN. L. REV. 348, 350 (1976). Gold explains this point by comparing the preservation of rare postage stamps with the preservation of rare buildings. He suggests that stamps are preserved because their alternative face value as postage is small as compared to their value as collectibles. The opportunity cost of preservation is only the cost of replacement postage, which is the face value of the stamp. Preservation of a building may impose higher opportunity costs. The alternative to preservation is redevelopment of the site, which may be highly profitable. The cost of preserving a building might be much more than the market value of the building. *Id.*

tutes a taking. This rule should hold even if the landmark is earning a reasonable return. Although the rule is contrary to *Penn Central*, its abandonment entails rejection of market efficiency as the criterion for investment-backed expectations. A court may decide to reject the efficiency test; nothing in the taking clause compels its use. Yet courts could use the expectations taking factor to prevent the imposition of inefficient expectations on landowners in the use of property.[91]

These problems become more complicated if the historic landmark is deteriorated and in need of repair. The landmark owner may intentionally allow his property to deteriorate, perhaps indifferent to current income and hopeful of future capital gain when the property is sold. He may also have no choice, especially if the landmark is located in a deteriorated area in which the market cannot support the rents a rehabilitated structure commands. Is the landmark owner entitled to create investment-backed expectations in demolition and conversion by allowing the landmark to deteriorate?

Society intervenes to prevent property deterioration, either through housing codes[92] or through provisions commonly contained in landmark ordinances requiring landmark maintenance.[93] Cases decided before the Supreme Court adopted the expectations taking factor took different views of the constitutionality of maintenance requirements under the taking clause. In housing code cases, a number of courts held that repair can be required if not excessive as compared with the value of the building.[94] This approach takes an "as is" view of the capital value of a building, and ignores conversion opportunities.

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91. This argument assumes that only private gains and losses need be considered. The demolition of a landmark, however, may impose a social cost that private market traders need not consider. This kind of social cost is called a negative externality. If the demolition of an historic landmark is found to impose a negative externality, government action preventing demolition would not be a taking. The application of land use regulation to prevent the imposition of negative externalities is a well-recognized use of the police power. *See* ENVIRONMENT AND EQUITY, *supra* note 84, at 7-14. Because Justice Brennan did not recognize the external cost problem in his formulation of the expectations taking factor in *Penn Central*, the discussion here does not consider it. This discussion assumes that the owner of an historic landmark has an expectancy entitled to taking clause protection when demolition of the landmark confers private efficiency gains.

92. See Mandelker, Gibb, & Kolis, *Differential Enforcement of Housing Codes—The Constitutional Dimension*, 55 U. DET. J. URB. L. 517 (1978).

93. For model provisions of this type, *see, e.g.*, MODEL LAND DEV. CODE §§ 2-208 (landmark sites), 2-209 (special preservation district) (1975).

94. Apple v. City of Denver, 154 Colo. 166, 390 P.2d 91 (1964) (upheld requirement of separate lavatories and adequate tubs and sinks); Adamec v. Post, 273 N.Y. 250, 7

One leading housing code case[95] refused to require the addition of bath facilities in multi-family units when the substandard character of the area and low tenant incomes indicated that the building would not earn a reasonable return following rehabilitation. Other landmark preservation cases adopted a somewhat different view. They required the value of an historic landmark after rehabilitation to exceed the pre-rehabilitation value of the building plus the cost of rehabilitation before ordering improvements.[96]

One indication that a court may not allow a landmark owner to realize his expectations for more intensive development by demolishing a landmark and converting the site to an alternative use is evident in a New York case, *Society for Ethical Culture v. Spatt*.[97] This case was decided before the Supreme Court adopted the expectations taking factor in *Penn Central*. The Society owned a landmark building used as an office, but sought to demolish the landmark to construct a high-rise office building on the site. The court applied the New York rule applicable to charitable uses, which permits "the landmark designation restriction only so long as it does not physically or financially prevent, or seriously interfere with the carrying out of the charitable purpose."[98] The court did not find a taking. It distinguished an earlier similar case[99] in which it found a taking because a church unsuccessfully tried to modify an inadequate landmark structure. The Ethical Society did not make this effort: "[R]ather, the complaint is instead that the

N.E.2d 120 (1937) (safety and sanitary improvements amounting to 37% of the property's value held valid).

95. City of St. Louis v. Brune, 515 S.W.2d 471 (Mo. 1974). See Comment, *The Landlord's Economic Inability to Meet Housing Code Requirements: The "Hot Bath" Ordinance, An Illustration*, 23 ST. LOUIS U.L.J. 163 (1979).

96. Foundation for San Francisco's Architectural Heritage v. City of San Francisco, 106 Cal. App. 3d 893, 165 Cal. Rptr. 401 (1980); Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Dep't of Hous. & Community Dev., 432 A.2d 710 (D.C. App. 1981), *cert. denied*, 454 U.S. 1054 (1981); Broadview Apartments Co. v. Comm'n for Historical & Architectural Preservation, 49 Md. App. 538, 433 A.2d 1214 (1981); State v. Erickson, 301 N.W.2d 324 (Minn. 1981); Lafayette Park Baptist Church v. Scott (I), 553 S.W.2d 856 (Mo. Ct. App. 1977). *But see* Mayor of Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974).

97. 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

98. *Id.* at 455, 415 N.E.2d at 925, 434 N.Y.S.2d at 935.

99. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). Commentators were divided on the constitutionality of historic landmark preservation prior to the *Penn Central* decision. *See* COSTONIS, SPACE ADRIFT 19 (1974); Gold, *supra* note 90; Note *Urban Landmarks: Preserving Our Cities' Aesthetic and Cultural Resources*, 39 ALB. L. REV. 521 (1974).

landmark stands as an effective bar against putting the property to its most lucrative use."[100] Had the court in *Ethical Culture* considered the investment-backed expectations taking factor, it probably would not have applied the factor to protect the landmark owner's expectations in both the demolition of the landmark and the conversion of the site to a more intensive use.

VI. VARIATIONS ON A THEME: THE EXPECTATIONS TAKING FACTOR APPLIED

The following discussion reviews lower federal and state court cases that applied the investment-backed expectations taking factor. The discussion reviews cases applying this factor when landowners claimed taking clause protection for divisible property interests, cases applying the exploitation and notice exceptions, historic landmark cases, and cases applying the expectations taking factor when the landowner could have claimed a vested right or an estoppel. The court decisions are linked to theories of property market behavior that define which investment-backed expectations the taking clause should recognize.

A. *The Divisible Property Interest Cases*[101]

What is more fitting to illustrate the divisible property interest problem than a federal court of appeals case upholding a statute similar to the statute invalidated in *Pennsylvania Coal*? In *Keystone Bituminous Coal Association v. Duncan*[102] the plaintiffs challenged, under the taking clause, a Pennsylvania statute and state agency regulations prohibiting coal mining that would cause subsidence damage to certain structures.[103] The statute and regulations also required other protective

100. 51 N.Y.2d at 456, 415 N.E.2d at 936, 434 N.Y.S.2d at 936.

101. For additional cases defining property interests entitled to protection under the taking clause, see Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984) (pro bono lawyer appointment system may take property right to practice law); Matter of Gifford, 688 F.2d 447 (7th Cir. 1982) (nonpossessory nonpurchase money security not protected as property); Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981) (statute establishing federal government's right of first refusal in designated property not a taking), *cert. denied*, 455 U.S. 1007 (1982); Beacon Syracuse Assoc. v. City of Syracuse, 560 F. Supp. 188 (N.D.N.Y. 1983) (change in permitted use of property in urban renewal plan does not take property of adjacent landowner); Superior Sav. Ass'n v. City of Cleveland, 501 F. Supp. 1244 (N.D. Ohio 1980) (improper demolition of building on which plaintiff held mortgage deprives plaintiff of property interest).

102. 771 F.2d 707 (3d Cir. 1985), *cert. granted*, 106 S. Ct. 1456 (1986).

103. Plaintiffs challenged provisions in the statute that required coal mine operators to leave part of the coal under certain structures for support. Plaintiffs claimed this

actions, such as a requirement that coal operators leave 50 percent of their coal in place for support.[104]

After distinguishing *Pennsylvania Coal*,[105] the court turned to the "fields of inquiry" it considered relevant to taking clause analysis. The court first noted that a physical invasion had not occurred. It then considered whether the prohibition on the use of the support estate owned by the coal companies constituted a diminution in the value of property sufficient to be a taking. The court relied on *Andrus v. Allard*[106] to hold that the prohibition did not destroy the plaintiff's entire bundle of property rights, even though the statute prohibited the use of the support estate. The coal companies could mine coal if they prevented subsidence. The expectations of the coal companies, therefore, were not frustrated:

> The ownership of the support estate does not afford a mine operator a reasonable expectation to profit at the expense of the public at large, . . . Thus, a property owner's reasonable expectations as to the possible uses of this property are always circumscribed by the limitations on its use that may be imposed by the state in the public interest.[107]

In *Pennsylvania Coal*, the court added, the coal companies had distinct investment-backed expectations, based on the damage waivers they obtained from owners of surface estates who might suffer subsidence.[108]

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requirement violated the taking clause. *Id.* at 711. Plaintiffs also challenged other statutory requirements, including a requirement that mine operators pay subsidence damage to various structures even though the surface owner had executed a damage waiver. *Id.* The court rejected a claim that this provision violated the contract clause. *Id.* at 717-18.

104. The statute was, in part, a response to the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. §§ 1201-1309 (Supp. 1985). Pennsylvania was allowed to assume control over mining reclamation activities in the state after federal approval of its statute and program. 771 F.2d at 711.

105. *Id.* at 714-15. The court interpreted the statute at issue in *Pennsylvania Coal* as a law protecting one small group of private parties at the expense of other private parties. The court apparently meant that owners of surface estates who conveyed the support estate to coal companies were protected at the expense of the coal companies. *But see* Miller v. Schoene, 276 U.S. 272 (1928) (upholding a statute protecting owners of apple trees at expense of owners of cedar trees). The court in *Keystone* also stated that the statute in *Pennsylvania Coal* made coal removal commercially impracticable. 771 F.2d at 714. For discussion of *Pennsylvania Coal*, see *supra* text accompanying notes 16-18.

106. *See supra* text accompanying notes 50-53.

107. 771 F.2d at 716-17.

108. *Id.* at 716.

Keystone adopted a narrow reading of the expectations taking factor. Expectations arise only if the property owner has a property interest created by private voluntary action. Intangible property rights, such as the right to mine coal and presumably the right to develop land, are not protected as expectations. These rights are always circumscribed by public interest regulation. This holding supports the broad interpretation of Justice Brennan's exploitation exception in *Penn Central.* Whether the *Keystone* court meant that public regulation of expectations not privately created could never be a taking, or that the expectations factor did not apply to the case, is not clear.

B. *The Exploitation and Notice Cases*[109]

A number of cases applied the exploitation[110] and notice[111] exceptions to the expectations taking factor to hold a taking had not oc-

109. *Compare* American Sav. & Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981). For purposes of taking analysis, the court applied the expectations taking factor to consider separately the effect of a land use regulation on two contiguous parcels in a coastal area under one ownership. One parcel was zoned for high densities, and the second was zoned for low densities. The court held that the regulation isolated the low density tract as unique. *Penn Central* was not applicable for this reason. In *Penn Central,* the Supreme Court held that property interests could not be divided discretely for purposes of taking clause analysis.

110. *See, e.g.,* Land Assocs. v. Metropolitan Airport Auth., 547 F. Supp. 1128, 1136 (M.D. Tenn. 1982) (refusal to upzone land to be acquired for airport), *aff'd per curiam,* 712 F.2d 248 (6th Cir. 1983). *See also* Loretto v. Teleprompter Manhattan CATV Corp., 43 N.Y.2d 124, 150-51, 423 N.E.2d 320, 333, 440 N.Y.S.2d 843, 856 (1981) (taking clause protects only an "investment made with a now frustrated particular purpose or 'expectation' in mind"), *rev'd on other grounds,* 458 U.S. 419 (1982). *Compare* William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (pre-*Penn Central*; "disappointed expectations" from inability to develop land after property downzoned not held a taking), *cert. denied,* 445 U.S. 928 (1980).

111. *See, e.g.,* Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc., 592 F. Supp. 304 (N.D.N.Y. 1984) (upholding restrictions on hotel rates during Olympic games, noting that hotel owner invested with knowledge of rate limitations); County of Ada v. Henry, 105 Idaho 263, 668 P.2d 994 (1983) (property owners charged with knowledge of agricultural zoning restrictions applicable to property at time of purchase); Claridge v. New Hampshire Wetlands Bd., 125 N.H. 745, 485 A.2d 287 (1984) (wetlands permit denial; person who purchases with notice of statutory impediments to right to develop can justify few if any legitimate investment-backed expectations of development rights that rise to the level of constitutionally protected property rights). *See also* Gateway Apartments, Inc. v. Mayor of Nutley, 605 F. Supp. 1161 (D.N.J. 1985) (upholding ordinance requiring landlords to pass 75% of property tax rebates on to tenants, noting that landlord did not have an expectation of a certain rent at a certain time because ordinance was "ensconced" in heavily regulated landlord and tenant area).

curred. These cases narrowed the application of the taking clause to the regulation of property even when the regulation substantially prohibited the development of land. Land use controls substantially prohibiting development in wetlands are an example. In some of the other exploitation cases, courts found no taking where regulations prohibited development by a "speculator" in land markets on the undeveloped urban fringe. Some of these cases held that market participants who gambled on the chance of success in the "zoning game" and lost did not have a taking claim.[112]

The wetlands cases are a difficult test for the exploitation exception. Wetlands regulations usually deny landowners the right to develop their land, in order to protect the wetlands resource.[113] Wetlands taking cases decided before the Supreme Court adopted the expectations taking factor were divided. The recent cases have not usually found a taking. Some of these cases held that prohibiting the right to "exploit" natural resource areas, like wetlands, does not violate the taking clause.[114] These cases are consistent with the exploitation exception Justice Brennan adopted in *Penn Central.*

Graham v. Estuary Properties, Inc.,[115] a leading case applying Justice Brennan's exploitation exception, held that a refusal to allow development in a wetlands is not a taking. Permission to develop a substantial residential community in a coastal wetlands area was denied under a state land use law. The court held that investment-backed expectations in the use of the land were a factor to be applied in a taking clause analysis. The developer's expectations were not investment-backed because it "had only its own subjective expectation that the land could be developed in the manner it now proposes."[116] The court added that

112. *See supra* text accompanying notes 83-84.

113. LAND USE LAW, *supra* note 5, § 12.2.

114. *Id.* §§ 12.5, 12.6. The leading case is Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), *noted in* 86 HARV. L. REV. 1582 (1973). *See also* Manor Dev. Corp. v. Conservation Comm'n, 180 Conn. 692, 433 A.2d 999 (1980); Chokecherry Hills Estates, Inc. v. Deuel County, 294 N.W.2d 654 (S.D. 1980).

115. 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981).

116. *Id.* at 1383. The court distinguished two earlier cases in which a denial of the right to fill and develop submerged bottom lands was held a taking; Zabel v. Pinellas County Water & Navigation Control Auth., 171 So. 2d 376 (Fla. 1965), and Askew v. Gables-By-The-Sea, 333 So. 2d 56 (Fla. Dist. Ct. App. 1976), *cert. denied*, 345 So. 2d 420 (Fla. 1977). In *Zabel*, the state transferred property to the landowners in a conveyance that carried a statutory right to bulkhead and fill the property. A subsequent denial of a fill permit by the state "amounted to the state's reneging on the agreement." *Estuary*, 399 So. 2d at 1379. The court in *Estuary* also found that in both of these cases

the developer realized it should not develop its land in a way that would have a serious adverse impact on the surrounding environment.

Courts have also applied the exploitation exception to cases in which open space planning and zoning prohibited the development of land on the urban fringe. In *Furey v. City of Sacramento*[117] the plaintiff's land was zoned and used for agricultural use, but the plaintiff and the city expected it would be developed for residential and commercial use, as indicated in numerous city planning documents. In reliance on this expectation, plaintiff invested substantial sums in the installation of sewers. After the state amended the California planning law to require the adoption of local open space plans, the city adopted a plan designating plaintiff's lands as open space. The city did not change the agricultural zoning. The open space plan designation allowed agricultural and other consistent uses, but precluded residential or commercial development. Plaintiff did not attempt to obtain a rezoning, but brought suit claiming compensation for the open space plan designation and reimbursement for the sewer investment.

The plaintiff based his taking claim on the frustration of his investment-backed expectations. He admitted that the mere purchase of property was not an investment protected by law. The court agreed, holding that this contention "would be tantamount to arguing for a vested right to develop if consistent with sound business judgment."[118] Plaintiff based his expectations claim on his investment in sewers and argued that the sewer investment was reasonable because it was consistent with the city's comprehensive plan at the time. The court held

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a denial of the right to fill the land would deprive landowners of all reasonable use of their property. Without the right to fill, their land would be submerged and "totally useless." In *Estuary*, the property was not submerged entirely and the landowner did not purchase the property from the state, but from a private individual. In addition, the landowner in *Estuary* could have been allowed to build a development half the size of the original proposal. *Id.* at 1381-82. *See also* Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (no denial of investment-backed expectations when permit was denied under federal dredge and fill permit program because substantial development was possible on other portions of property for which permits to develop were previously granted), *cert. denied*, 455 U.S. 1017 (1982); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981) (no taking from permit denial in same program, noting that investment-backed expectations of developer were not frustrated), *cert. denied*, 455 U.S. 1017 (1982).

117. 592 F. Supp. 463 (E.D. Cal. 1984), *aff'd on other grounds*, 780 F.2d 1448 (9th Cir. 1986). The court of appeals did not consider the district court's investment-backed expectations analysis, but held only that no taking occurred because the landowner could make an economically viable agricultural use of the land. 780 F.2d at 1453 n.4.

118. 592 F. Supp. at 469.

that this expectation was not reasonable because the developer was not entitled to rely on the plan. A plan is tentative, subject to change, and precedes the adoption of zoning ordinances intended to implement it: "[a] property owner cannot, by voluntarily preparing his property for intensive development, circumscribe the City's power and authority to legislate in the public interest."[119]

The court then assumed that the plaintiff's reasonable investment-backed expectations were frustrated. Although this assumption was relevant to the taking claim, the ultimate question was whether justice and fairness required the landowner, rather than the public, to bear the burden of government regulation.[120] Answering this question required a weighing of public and private interests. The landowner's private interest was entitled to no weight to the extent that it contemplated the maximum exploitation of his property.[121] A landowner need retain only some economically viable use of the land. Therefore, the public's interest in preserving open space was legitimate and substantial.

When it balanced the equities, the court also considered the role voluntarily assumed by the plaintiff. This plaintiff was not a small family farmer "deprived of his livelihood by unconscionable actions of governmental entities."[122] He bought the land with the knowledge that it was zoned for agricultural use, but with the intent to use it for more intensive development at the most opportune time. The court noted that zoning affects the price of land and relied on this insight to conclude:

> The plaintiff herein chose to play what has been called "the zoning game." The price his predecessor paid for the land . . . was determined in part by the County's exercise of the police power in a manner advantageous to plaintiff . . . The plaintiff, having taken advantage of the City and County's zoning power in acquiring the land, is hardly entitled to complain that the City's denial of a rezoning has caused him a constitutionally cognizable injury.[123]

The *Furey* holding adopts the broad interpretation of Justice Bren-

119. *Id.* at 470.

120. *Id.*

121. *Id.* at 471.

122. *Id.*

123. *Id.* at 471-72. *Accord*, Habersham at Northridge v. Fulton County, 632 F. Supp. 815 (N.D. Ga. 1985), *aff'd*, 791 F.2d 170 (11th Cir. 1986). *See also* Hedlund v. City of Maplewood, 366 N.W.2d 624 (Minn. Ct. App. 1985). The court in *Hedlund* upheld a variance denial. Although it did not discuss the expectations taking factor, the court held that the landowner's predicament under the zoning ordinance was self-im-

nan's exploitation exception in *Penn Central*. It also adopts the view, discussed earlier,[124] that market behavior defines expectations in property markets. Under this view, market participants who rely on the chance that they will obtain a favorable land use decision from a land use agency do not have investment-backed expectations protected by the taking clause.[125] This interpretation of *Furey* supports a wide variety of open space, agricultural, and related land use regulations.[126]

Other courts adopted a view similar to the exploitation exception by holding that no taking occurs if a land use regulation does not frustrate a landowner's primary expectations in the use of his land. In *MacLeod v. County of Santa Clara*[127] the court held that denial of a right to harvest timber was not a taking. The landowner could continue to hold his land for investment and use it in the interim as a cattle ranch or for grazing. In *Flynn v. City of Cambridge*[128] the court upheld an ordinance prohibiting a condominium owner from evicting a tenant in order to take possession of the condominium. The court upheld the ordinance as applied to condominium owners who bought before the city adopted ordinance. The owners' primary expectations were not frustrated even though the ordinance denied them the right to occupy their dwellings. They were using their dwelling units for rental housing when the ordinance took effect. This investment-backed use could continue. The court relied on Justice Brennan's *Penn Central* holding that the taking clause does not protect a subjective belief that property can be exploited.

Courts also applied the notice exception to the expectations factor to hold that no taking had occurred. In *Flynn* the court held that owners who purchased condominiums after the ordinance was enacted could

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posed. The landowner was an experienced real estate developer, yet he did not properly research the applicable zoning ordinance.

In *Furey*, the court also found no taking because of "fiscal realities." The landowner had received almost a 200% return on his investment, in addition to farming profits, and retained title to profitable agricultural land. 592 F. Supp. at 472.

124. *See supra* text accompanying notes 83-94.

125. *See* Dunford, Marti & Mittelhammer, *supra* note 75.

126. For a case upholding open space zoning under a theory similar to that adopted in *Furey*, see Kinzli v. City of Santa Cruz, 620 F. Supp. 609, 622 (N.D. Cal. 1985) ("Plaintiffs waited to develop or sell their property and have suffered a loss. Their loss does not devolve into a taking."). For earlier proceedings in this case, see Kinzli v. City of Santa Cruz, 539 F. Supp. 887 (N.D. Cal. 1982) (denying motion to dismiss complaint).

127. 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2705 (1985).

128. 383 Mass. 152, 418 N.E.2d 335 (1981).

not claim a taking. The ordinance put them on notice that they had no right to use their property as owner-occupied housing, and "fairly warned" them that they were purchasing property that could be used for rental housing only.[129]

Sucesion Suarez v. Gelabert[130] took an even broader view of the notice exception. *Suarez* held that landowners were placed on notice by regulatory provisions contained in a land use regulation program. The State Environmental Quality Board had denied the plaintiffs a sand extraction permit. The court did not find a taking and held:

> [Plaintiffs] should have known, given the law of property of Puerto Rico regarding natural resources, that the operations they chose to conduct were subject to constant regulation, supervision and were intertwined with matters of public policy that at some time might not be balanced in their favor. Whatever "investment backed expectations" . . . plaintiffs had in their land were unreasonable if they ignored the law of Puerto Rico on the exploitation of natural resources.[131]

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129. *Id.* at 160, 418 N.E.2d at 339. The court added that the purchase price of the housing should reflect this restriction. *Id.* Because the condominium owners were on notice of the ordinance, the city did not deny them a right to which they had a legitimate expectation. The court did not require the municipality to compensate an individual for denying him a "right to use" that he never owned. *Id.* at 160, 418 N.E.2d at 339-40. *Accord,* Loeterman v. Town of Brookline, 524 F. Supp. 1325 (D. Mass. 1981) (ordinance prohibited owner of condominium from recovering possession from tenant), *vacated as moot,* 709 F.2d 116 (1st Cir.), *cert. denied,* 456 U.S. 906 (1983). *But see* Silverman v. Barry, 727 F.2d 1121 (D.C. Cir. 1984) (refusing to dismiss, on jurisdictional grounds, taking claim against ordinances restricting condominium conversion).

In Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984), an ordinance allowed the demolition and renovation of single room occupancy (SRO) buildings only if the city certified that no harassment of tenants took place in the three-year period prior to an application for renovation or demolition. Because plaintiffs purchased their SRO buildings three weeks after the law was signed, they "had no basis at the time of closing for an expectation that there would be no obstacles to the development of their real estate." *Id.* at 318. Plaintiffs made a substantial monetary investment in the property prior to the time the city enacted the law, but they could have cut their losses by refusing to close. *Id.*

130. 541 F. Supp. 1253 (D.P.R. 1982), *aff'd,* 701 F.2d 231 (1st Cir. 1983). *See* Consolidated Rail Corp. v. Metro-North Commuter R.R., 638 F. Supp. 350 (Regional Rail Reorganization Act Spec. Ct. 1986) (upholding statute relieving congressionally created rail corporation of obligation to operate commuter service).

131. 541 F. Supp. at 1260. The court also noted:

> The [Board of Environmental Quality] did not physically invade plaintiffs' land or order them to deliver all sand in their property to the government, [n]or . . . limit plaintiff's use and enjoyment of their land in any other way. Plaintiffs are still the owners of the land and they may rent, sell or develop it in some other way or refill the pit that they themselves created. . . . The action of the BEQ preventing the

This holding adopts a constructive notice exception that extends the more limited actual notice exception advocated by Professor Michelman.

Another element in these cases requires comment. In *Furey* and *Flynn* the landowner could have argued that the restrictive change in regulations was sudden and unexpected. These cases did not consider the holding in *Kirby* that the expectations taking factor protects landowners against sudden and unexpected regulatory change. *Kirby* was decided after *Flynn* and just prior to *Furey*. The question is whether *Kirby* requires a different interpretation of the exploitation and notice exceptions. A court could hold that these exceptions do not bar a taking claim if sudden and unexpected regulatory change frustrates investment-backed expectations. This problem is addressed in cases that link the expectations taking factor to the protection given landowners by the vested rights and estoppel doctrines.[132]

C. *Historic Landmark Restrictions*

The discussion of the historic landmark market suggested that landmark owners have an investment-backed expectation in the demolition of the landmark and conversion of the site to a more intensive use if this produces the greatest private efficiency gains.[133] The demolition and conversion question usually arises when an historic landmark is in poor condition and in need of rehabilitation,[134] problems not present in *Penn Central.*

The court considered the investment-backed expectations of an owner of a deteriorated historic landmark in *900 G Street Associates v. Department of Housing and Community Development.*[135] A permit to demolish an historic building was denied under the District of Columbia's historic landmark preservation act. The building was structurally sound, but in a poor condition of maintenance and repair. The court did not find a taking. It combined the exploitation and notice excep-

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continued exploitation of sand does not significantly affect plaintiff's "bundle of property rights."

Id.

132. *See infra* text accompanying notes 140-58.

133. *See supra* text accompanying notes 90-91.

134. *See* Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975) (pre-*Penn Central*, suggesting that a rehabilitation requirement may be a taking), *cert. denied*, 426 U.S. 905 (1976).

135. 430 A.2d 1387 (D.C. 1981).

tions to hold that the building's designation as an historic landmark and public efforts to adopt a more stringent historic preservation law limited the landmark owner's realistic expectations. The landmark owner, in the purchase agreement for the property, agreed to make an additional payment if the District approved demolition. These purchases, the court held, were necessarily speculative.[136]

The court noted the *Penn Central* holding, which stated that no taking occurs even if a landowner's expectation of profits is not satisfied when a landmark is economically viable and a beneficial use of the property remains.[137] This principle required the application of the common zoning rule that a taking does not occur if "*any* reasonable economic use exists for the property."[138] The landmark owner has the burden of proof on this issue. The court found evidence to substantiate the District's contention that the building could be rented "as is" with minimal renovation, or fully renovated and rented for less than the owners' claimed cost.

900 G Street did not consider the problem presented when an historic building cannot earn a reasonable return and its owner wants to demolish it to make more intensive use of the site. By holding that no taking occurred because the landmark owner could make a reasonable use of the landmark building, the court may have meant that investment-backed expectations are satisfied whenever a landmark building earns a reasonable return. In this situation, a court would not have to consider private efficiency gains from demolition and conversion.[139]

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136. *Id.* at 1390. The court also noted that the prior owner of the property had experienced difficulty in obtaining a demolition permit for the property. The court stated:

> These [factors] all must have influenced the price which [the landmark owner] was willing to pay for the property, its realistic expectations for the uses which could be made of the property, and the profit that could be made from such use or resale of the property. [These purchases] . . . are, by their very nature, speculative and profits on use of the land must necessarily be conjectural.

Id. (words in brackets added).

137. *Id.* at 1391 (quoting *Penn Central*, 438 U.S. at 127).

138. *Id.* (emphasis in original). The court found that its threshold taking standard was high. The court summarized this standard by holding:

> [I]f there is a *reasonable* alternative economic use for the property after the imposition of the restriction on that property, there is no taking, and hence no unreasonable economic hardship to the owners, no matter how diminished the property may be in cash value and no matter if "higher" or "more beneficial" uses of the property have been proscribed.

Id. at 1390 (emphasis in original).

139. Recall that in *Ethical Society*, the court apparently held that a landmark ordi-

This holding is consistent with *Penn Central.*

D. *The Vested Rights Cases: When Do Expectations Ripen?*

Earlier discussion[140] indicated the close kinship between the expectations taking factor and the protection given landowners from changes in land use regulations under the vested rights and estoppel doctrines. Under the majority rule, a landowner can claim a vested right or an estoppel that protects him from land use regulation changes if he relies in good faith on a building permit by making substantial expenditures on his development. The issuance of a building permit and the landowner's reliance on the permit by making development expenditures should make his expectations sufficiently "distinct" to be entitled to investment-backed protection.[141] Estoppel and vested rights cases also illustrate "sudden and unexpected" changes in land use regulations from which the Supreme Court would protect landowners under the expectations factor. In these cases, municipalities suddenly and unexpectedly changed land use regulations after the landowner began development.

The courts are aware that a landowner's investment in his property should be weighed when they apply the expectations taking factor. *Furey*[142] held that the mere purchase of land, with only an expectancy that a municipality would zone it for development, was not enough to create an investment-backed expectation. *Oceanic California, Inc. v. City of San Jose*[143] adopted a similar view, but analyzed the landowner's taking claim under both vested rights doctrine and the expectations taking factor. Oceanic claimed that the city initially encouraged the intensive urban development of its land, citing examples such as a bond election to fund the construction of sanitary sewers. Oceanic asserted that it made major expenditures in reliance on the city's encouragement by collecting geologic and engineering data, ana-

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nance may prohibit the realization of private efficiency gains. In that case, the landmark building was not deteriorated. See *supra* text accompanying notes 97-100. Recall also that the inclusion of private efficiency gains in a landmark owner's reasonable expectations is suspect as a taking clause factor. *See supra* note 91.

140. *See supra* text accompanying notes 97-100.

141. In *Penn Central* Justice Brennan held that "distinct" investment-backed expectations are entitled to protection under the taking clause. 438 U.S. at 124. The court recognized the link between estoppel and the investment-backed expectations taking factor in *Kaiser Aetna. See supra* text accompanying notes 54-57.

142. *See supra* text accompanying notes 117-26.

143. 497 F. Supp. 962 (N.D. Cal. 1980).

lyzing costs and fiscal impacts, and preparing land use applications. These expenditures are not usually considered the type of reliance expenditures that give rise to a vested right or an estoppel.[144] The city then adopted a general plan that designated most of Oceanic's land for low density development. The city later rejected a proposal by Oceanic to rezone the land for development at much higher densities.

The court held that no taking occurred. Oceanic did not have a vested right in its proposed development.[145] Its "alleged expectations of future high intensity use approval" were not a basis for a taking claim.[146] Neither were Oceanic's investment-backed expectations frustrated.[147] The development for which the city denied the rezoning was "far outside the parameters of the general plan," and Oceanic's development expectations were not reasonable.[148] The court did not accept Oceanic's claim that informal and unofficial inducements by city officials gave rise to a binding legislative commitment.[149]

Although the court did not explicitly make this comparison, its reasons for holding that Oceanic's investment-backed expectations were not reasonable also support its holding that Oceanic did not have a vested right. The vested rights doctrine does not protect a landowner unless he relies on some concrete governmental act, like a building permit.[150] As the court pointed out, the city's plan did not support Oceanic's development proposal and the city's assurances were informal. *Oceanic* indicates that expectations are not reasonable when they are not based on a binding governmental act.

Hamilton Bank v. Williamson County Regional Planning Commis-

144. LAND USE LAW, *supra* note 5, §§ 6.18-6.20.

145. 497 F. Supp. at 974.

146. *Id.*

147. The court noted that "[w]hat exactly comprises a 'reasonable investment expectation,' and whether such an expectation can be said to constitute a cognizable property right subject to confiscation . . . are questions not directly answered by any Supreme Court opinion." *Id.*

148. *Id.*

149. *Id. Compare* Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 849-50 (E.D. Va. 1980), holding that a landowner's investment-backed expectations are not frustrated by the designation of a national historic landmark. The designation did not prohibit development or use of the land, even though it triggered federal administrative review of surface mining and of federal and federally-assisted activities in the area. *See also* LAND USE LAW, *supra* note 5, § 3.23.

150. LAND USE LAW, *supra* note 5, §§ 6.13-6.16.

sion[151] found a taking based on estoppel and frustration of investment-backed expectations. The commission approved a preliminary plat for a residential project and later approved final plats for several sections. Project development began in sections and the developer spent several million dollars for improvements. The commission then asked the developer to submit a revised preliminary plat before requesting approval for the remaining stages. Approval of the revised preliminary plat was denied, in part because the project exceeded lower densities required by a downzoning adopted while the earlier sections of the development were being built.

The court found that the developer proved an estoppel claim.[152] It also held that a taking would exist even in the absence of an estoppel because the developer's investment-backed expectations were frustrated. The developer had a reasonable expectation that its development would be completed. The commission approved plats for several sections of the development with knowledge that the developer intended development of the entire property. Completion of the entire project was the developer's primary expectation concerning his land.[153]

Hamilton Bank is consistent with *Oceanic* to the extent it holds that investment-backed expectations ripen only when expenditures on a development project are made in reliance on government approval. This approval was missing in *Oceanic*, but was present in *Hamilton Bank*. These cases are also consistent with the market participant theory of the expectations taking factor, which holds a landowner at risk when he relies on the chance that a municipality will change land use regulations. When a municipality modifies market rules by approving a landowner's development, investment in reliance on this approval is sufficient for protection under the expectations taking factor.[154] In

151. 729 F.2d 402 (6th Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 3108 (1985) (taking claim was not ripe for decision).

152. 729 F.2d at 407. The court found the estoppel finding consistent with the finding a taking had occurred. Although the estoppel finding made the taking of the developer's property temporary, the court held that the taking clause covers temporary as well as permanent takings. *Id.* at 407-08.

153. *Id.* at 407.

154. The possibility remains that the expectations taking factor protects a landowner even if he does not rely on a government approval. This possibility follows from the Supreme Court's holding that one purpose of the investment-backed expectations taking factor is to protect landowners against sudden and unexpected change in the regulation of property. *See supra* text accompanying notes 46-49. The court in *Oceanic* might have reached a different decision had it applied the sudden and unexpected change principle.

Hamilton Bank the court believed that preliminary approval of the project provided a sufficient basis for the developer's expectations.

Hamilton Bank did not merge vested rights doctrine with the expectations taking factor. *County of Kauai v. Pacific Standard Life Insurance Co.*[155] took this additional step. The *Kauai* court considered the limitation that estoppel and vested rights doctrines do not protect developers who act in bad faith. The bad faith disqualification reflects Professor Michelman's speculator theory that a landowner on notice of a change in land use regulations does not have investment-backed expectations.

In *Kauai* a developer planned to build a resort complex on one of the Hawaiian islands. The county rezoned the land to allow the development, but a referendum petition was filed on the rezoning before the developer could obtain a required environmental permit. The county issued environmental and building permits after the petition was filed, but in the referendum the electorate voted to repeal the rezoning ordinance. Under Hawaii law, a zoning estoppel must be based on a county's final discretionary action in its approval of a development. In *Kauai* the final discretionary action was the issuance of the permits, but they were not issued until after the referendum petition was filed. The issuance of the permits after the filing date did not create an estoppel because the referendum vote was the final discretionary action on which the developer had a right to rely.

The court first considered the developer's claim that he had acquired a vested right to proceed with development, noting that the vested rights doctrine rarely produced a different result than the estoppel doctrine. The court held that when a developer has proceeded toward development under existing zoning, the initial inquiry is whether his actions constituting irrevocable commitments "were reasonably made or were speculative business risks not rising to the level of a vested property right."[156] The court merged its holding on the vested rights claim with an analysis of the expectations taking factor, quoting *Penn Central* and noting Justice Brennan's exploitation exception. The court held that after the county certified the referendum, the developer's ability to comply with the zoning ordinance was speculative. Subsequent governmental assurances "were tarnished and could not

155. 65 Haw. 318, 653 P.2d 766 (1982). For discussion of this case, see Kudo, *Nukolii: Private Development Rights and the Public Interest*, 16 URB. LAW. 279, 294 (1984).

156. 65 Haw. at 338, 653 P.2d at 780.

give rise to reasonable expectations upon which to base investments."[157] The developer's expenditures on the project were "business risks rather than a basis for a constitutional claim."[158]

VII. INVESTMENT-BACKED EXPECTATIONS: ARE THEY NEEDED?

The Supreme Court's adoption of the investment-backed expectations taking factor added a new element to taking jurisprudence. Because this taking factor emphasized the property owner's interests, it suggested that courts should apply it to strengthen the position of the property owner against government property regulation. The investment-backed expectations taking factor has not had this effect. It has not altered the results in taking cases and has added little to taking law. In some cases, it has weakened rather than strengthened the application of the taking clause to regulations affecting property interests.

The Supreme Court has also held that the expectations taking factor protects divisible property rights from regulation. This holding is limited because courts do not protect all divisible property rights. Courts deny taking clause protection, even though a strand in the property rights bundle is affected, if enough other strands are left to the property owner. In this type of case, courts find no taking if government regulation does not frustrate the property owner's primary investment-backed expectations. This view of the expectations taking factor equates it with the rule, traditionally applied in taking law, that no taking occurs if regulation allows the property owner a reasonable use of his property. A holding that the property rights remaining with the property owner must allow a reasonable use is implicit in the holding that a taking does not occur if primary expectations are not frustrated.

The courts have also limited the application of the investment-backed expectations taking factor by limiting the type of expectation they find investment-backed. They have held that the mere purchase of land does not make an expectation investment-backed. Without investment, an expectation in the use of land is a mere belief in its exploitation, which, as Justice Brennan held in *Penn Central*, the taking clause does not protect. The view that the taking clause does not protect the mere purchase of land with only an expectation of development is also consistent with traditional taking law. The only expectation taking law recognizes is the expectation that regulation will not restrict

157. *Id.*
158. *Id.*

the use of land so that no reasonable use remains. This taking law principle is recognized by the interpretation of the expectations taking factor that does not find a taking if the landowner's primary expectations in the use of his land are not frustrated.

The cases denying taking clause protection to mere expectations adopted one view of expectations that arise in markets for undeveloped land. Under this view, anyone entering land markets to speculate on opportunities for capital gain is at risk that he will not secure governmental approvals for more intensive development that are necessary to make these gains possible. The speculator is denied taking clause protection from any losses he suffers if the necessary governmental approvals are not given. This application of the expectations taking factor strengthens the constitutionality of land use regulation under the taking clause. It effectively eliminates the application of the taking clause to land use regulation in markets for undeveloped land by allowing the land use regulation system to determine taking clause protection. This result is acceptable if the view that individuals who enter markets for undeveloped land are at risk in those markets is incorporated in taking law.

Investment-backed expectations have long been recognized in land use law, though not in name, by the estoppel and vested rights doctrines. The Supreme Court's decision in *Kaiser Aetna*[159] recognized the link between the vested rights and estoppel doctrines and the expectations taking factor, and held that expectations are protected even in the absence of an estoppel or a vested right. Other decisions also recognized this doctrinal link, but did not always merge these doctrines for purposes of taking clause analysis.

The Supreme Court could redefine the investment-backed expectations taking factor to give it a more meaningful role in taking law. One way the Court could do this is to equate investment-backed expectations with vested rights and hold that the expectations taking factor incorporates vested rights doctrine into federal taking law. State vested rights law has a constitutional basis because a vested right consists of property protected by the taking clause in state constitutions.[160] Nothing in taking theory prevents the Supreme Court from interpreting the federal taking clause to include comparable vested rights protection. Whether federal taking clause protection of vested rights is desirable is

159. *See supra* text accompanying notes 54-57.

160. *See* Minch v. City of Fargo (I), 297 N.W.2d 785 (N.D. 1980), *cert. denied*, 464 U.S. 829 (1983) (compensation required for zoning change affecting vested right).

another matter. The federal courts have turned to state law to determine whether a landowner has a vested right[161] and the Supreme Court has required adjudication under state law as an alternative to adjudication of some constitutional issues in federal courts.[162] Incorporation of vested rights law into the taking clause of the federal constitution may unnecessarily involve the federal courts in the administration of local land use regulation.

The Supreme Court has emphasized it does not apply the taking clause under a "set formula." The investment-backed expectations taking factor modified this emphasis. It added a specific litmus test to the Court's taking factors that so far has not produced significant changes in federal taking law. Unless the Court wishes to totally recast its taking jurisprudence, it should abandon the investment-backed expectations taking factor, reaffirm its disbelief in set formulas, and continue to use the factors traditionally applied to taking controversies.

EPILOGUE

As this article went to press, the Supreme Court affirmed the *Keystone* case, but did not adopt the interpretation of investment-backed expectations used by the court of appeals.[163] The Supreme Court held only that the coal mine owners' reasonable investment-backed expectations were not materially affected by the duty to retain the small percentage of coal necessary to support structures protected by the Pennsylvania legislation.

161. *See, e.g.*, Wermager v. Comorant Township Bd., 716 F.2d 1211 (8th Cir. 1983); Nemmers v. City of Dubuque, 716 F.2d 1194 (8th Cir. 1983); Bass River Assocs. v. Mayor of Bass River, 573 F. Supp. 205 (D.N.J. 1983), *aff'd*, 743 F.2d 159 (3d Cir. 1984).

162. *E.g.*, Parratt v. Taylor, 451 U.S. 527 (1981) (plaintiff may not bring court claim under 42 U.S.C. § 1983 for due process violation without first utilizing state post deprivation remedies).

163. Keystone Bituminous Coal Ass'n v. De Benedictus, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987).