Summer 1988

Compensation for Regulatory Takings: Finality of Local Decisionmaking and the Measure of Compensation

David A. Arrensen
Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Administrative Law Commons, Constitutional Law Commons, and the Courts Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol63/iss3/7

This Note is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
Compensation for Regulatory Takings: Finality of Local Decisionmaking and the Measure of Compensation

INTRODUCTION

In recent years, courts and commentators have vigorously debated whether the fifth amendment requires compensation for overly burdensome land use regulations. Resolution of this issue would affect the balance of power between local land use regulators on one hand, and land developers on the other. In June of 1987, the United States Supreme Court finally decided the issue in First English Evangelical Lutheran Church of Glendale v. Los Angeles County. In this case, the Supreme Court held that the just compensation clause requires government entities to compensate landowners for land use regulations that are so restrictive that they constitute a “taking” of private property for public use. First English will thus affect local and state land use decisionmaking because such land use decisions potentially may subject a locality to substantial governmental liability.

While First English establishes that the government must compensate for temporary regulatory takings, it did not articulate when the regulatory taking should begin for purposes of calculating compensation. This timing issue is more problematic than the case of a straightforward physical appropriation of private property through the power of eminent domain. This Note suggests that, in the zoning context, a taking begins upon the date of a final administrative order or decision from which the complaining landowner has no recourse but to seek judicial review of the regulation.

Section I of this Note begins by providing a brief historical overview of zoning and land use planning in this country. It then summarizes "takeings

2. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").
4. Note that even when a locality asserts its traditional power of eminent domain, the question of when the actual taking begins is not always easily answered. See generally 3 Nichols on the Law of Eminent Domain § 8.5 (J. Sackman 3d ed. 1985) [hereinafter Nichols].
jurisprudence,” and analyzes the most ambitious attempt to synthesize the rules of decision employed by courts when deciding whether a particular regulation impairs the economic use of property to such an extent as to constitute a taking. Finally, Section I analyzes how the issue of compensation for regulatory takings has emerged and intensified in recent years.

Section II reviews the recent United States Supreme Court decisions which will shape the legal context of the treatment of the compensation issue in the years to come. Section III focuses on the local political context in which the struggle between land use officials and land developers occurs. It then analyzes the proper role of judicial review in resolving the inherent conflicts which exist between the parties. This Note concludes that the relevant considerations suggest that the date of the final local administrative decision is the most appropriate time from a policy standpoint to serve as the onset of a regulatory taking. Finally, Section IV offers an additional policy argument in favor of the proposed measurement rule based upon economic considerations concerning how the measure of compensation for regulatory takings will influence risks and incentives in land development markets.

I. THE EMERGENCE OF WIDESPREAD LAND USE CONTROLS AND THE RISE OF COMPENSATION CLAIMS

A. Eminent Domain and Police Power

Traditionally, the power of eminent domain5 and the exercise of police power6 have been thought of as two conceptually distinct functions of state

---

5. "Eminent domain is the right or power to take private property for public use. It is an inherent and necessary attribute of sovereignty and exists independently of constitutional provisions and is superior to all property rights." United States v. 209.25 Acres of Land, Etc., 108 F. Supp. 454, 459 (D. C. Ark. 1952), rev'd on other grounds, 211 F.2d 1 (8th Cir. 1954), cert. denied, 347 U.S. 1015 (1954). The language of the just compensation clause of the fifth amendment "makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." First English, 107 S. Ct. at 2386 (emphasis in original).

6. "The police power of the State, which is coextensive with sovereign power, denotes the power of the state to impose restraints on private rights which are necessary for general welfare . . . ." Plebst v. Barnwell Drilling Co., 243 La. 874, 881, 148 So. 2d 584, 589 (1963). The Supreme Court first upheld the general constitutionality of zoning and land use laws as a legitimate exercise of the police power in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Court put to rest lingering doubts as to whether it would tolerate the spate of zoning regulation which emerged in the 1920's:

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional
and local governments. The exercise of the power of eminent domain has long been held to require compensation through condemnation proceedings under the just compensation clause of the federal constitution.\(^7\) This is true even when the state has only sought to obtain a small fraction of a particular tract of property, such as an easement for utility lines.\(^8\) The just compensation clause, in general, reflects the emerging liberal conceptions of private property ownership prevalent during the period in which the Constitution was adopted, and the perceived threat to private property posed by the actual and symbolic power of eminent domain.\(^9\)

Exercise of police power through government regulation, however, has generally been held to be a noncompensatory event.\(^10\) Government regulation restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. . . .

If these reasons [for various types of zoning regulations], thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Euclid, 272 U.S. at 386-87, 395.

7. First English, 107 S. Ct. at 2385-86. In addition, every state except North Carolina has a compensation clause in its state constitution. Twenty-six states have a "taking or damaging" clause which, in some instances, may suggest a broader independent state ground for requiring compensation for regulatory takings than exists as a result of the minimal standards embodied in the takings clause of the federal Constitution. 2 Nichols, supra note 4, § 6.01[3].

8. For a rather extreme example, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In Loretto, a New York state statute required landlords to allow a cable television company to install its cables through their property. Hence, even though the physical intrusion may have been no more than the circumference of a wire cable, the Court held that this was still equivalent to a taking of private property without just compensation.


10. "As long recognized, some values are enjoyed under an implied limitation and must
has long been recognized as having differential effects on individuals—that is, almost any regulation will have positive effects on some persons, and negative effects on others. Further, as Justice Holmes acknowledged: “Government[s] hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” Because governmental regulation in American society has assumed such considerably diverse forms, and has arisen from such pluralistic origins, incremental losses of value arising from some regulations are balanced by the greater incremental gains generated by other regulations. Government regulation, according to this analysis, thus places society in a Pareto superior position, placing no one in a worse position while improving the positions of many others. Many persons would dispute whether such balancing occurs for those with the weakest voices in American politics. Still others dispute the assertion that regulation, in toto, is more beneficial than harmful to society. Nonetheless, this conceptual underpinning clearly serves to justify much of government regulation.

yield to the police power.” Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Note also Justice Brennan’s statement in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-128 (1978), in which the Court rejected a developer’s taking claim based upon a New York historic preservation law which prevented the developer from erecting a fifty story skyscraper atop Grand Central Station in mid-town Manhattan:

[Appellants observe that New York City’s law differs from zoning laws and historic-district ordinances in that the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities. It follows, they argue, that New York City’s law is inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation and which they maintain is a constitutional requirement if “just compensation” is not to be afforded. It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a “taking.” Legislation designed to promote the general welfare commonly burdens some more than others. . . . [Z]oning laws often affect some property owners more severely than others but have not been held to be invalid on that account.]

Penn Central, 438 U.S. at 133-34. But see 28 U.S.C. § 1491 (1982) (requiring the federal government to compensate property owners for damage to their property resulting from a specific set of governmental acts).


12. Mahon, 260 U.S. at 413.


14. Id.

15. For a discussion of the differential outcomes for various demographic groupings resulting from urban land use planning, see D. Harvey, Social Justice and the City 50-118 (1973).

Despite the traditional conceptual distinction between the power of eminent domain and a government's police power, the actual consequences of regulation for property owners in some instances may not be greatly different than the consequences of the exercise of eminent domain. This became more common as government regulation expanded in a number of policy areas in the late nineteenth and early twentieth centuries. A number of regulations which restricted individuals' property, contract, or "economic" rights came to be challenged under the Federal Constitution on due process grounds, and somewhat less frequently, on equal protection grounds. Additionally, land owners who felt overburdened by particular regulations asserted that the regulations had effected a "taking" of private property without just compensation in contravention of the fifth amendment. As a result, a substantial body of case law has developed in this century to determine when regulations are so invasive of the rights of private property as to constitute a taking of that property.

B. The Development of "Takings Jurisprudence"

Many commentators have attempted to reconcile the diverse case law holdings that discuss when a regulation is so intrusive as to constitute a taking. This attempt has met with substantial conceptual obstacles; not only do different jurisdictions apply different rules, but the case law of any given jurisdiction is likely to lack consistency. One commentator described the attempt to explain when a regulation becomes a taking as "the most haunting jurisprudential problem in the field of contemporary land use law;... one that may be the lawyer's equivalent of the physicist's hunt for the quark."
The difficulties faced by legal scholars in formulating clear rules with which to predict when a particular land use regulation will constitute a taking has important implications for local officials making land use decisions. That many of the local officials are nonlawyers compounds the difficulties. Local officials must be able to confidently predict whether particular regulations or their application may result in a taking. Otherwise, the presumed salutary effect of encouraging greater scrutiny of the impact of such regulation resulting from the threat of liability under the just compensation clause may be more than offset by the chilling effect such liability will have if planners cannot predict the exact consequences of the regulation in question. The difficulty of identifying regulatory takings in advance is exemplified in what may be the leading treatment of the issue.

Professor Michelman, in an often cited article, delineated four “rules of decision” that have been employed at various times by courts to determine whether a regulation amounts to a taking of property. The four rules Michelman synthesized are: 1) whether the regulation permits an actual public physical intrusion on to private property; 2) whether the regulation creates too great of a diminution in the economic value of the property; 3) whether the private burden imposed upon the land owner outweighs the public gain; and 4) whether the regulation is aimed at enriching the public welfare or preventing public harm caused by private activity.\(^{22}\)

The first rule, concerning regulation which allows an actual physical invasion of private property—that is, changing private land into public land or by allowing some type of public access to private land—is the only predictable and consistently applied test of the four.\(^{23}\) Federal and state courts have consistently held that such regulation amounts to a taking even where the physical intrusion is minimal.\(^{24}\) Unfortunately, even this rule lacks a certain amount of practical sense because compensation will be required even for relatively small intrusions, but may not be required for very burdensome regulations that do not involve physical intrusion.

The other rules proposed by Professor Michelman tend to require subjective, fact-specific judgments that severely restrict the ability of lawyers, let alone lay government officials, to predict whether a particular regulation constitutes a taking. First, the “diminution of value” test,\(^{25}\) looks to the degree of harm to the property interest involved. Where all, or substantially all, possibility of reasonable use of the property is destroyed, the regulation “goes too far”\(^{26}\) and will be considered a taking. Uncertainty arises on two levels: one can seldom predict beforehand precisely what degree or per-

\(^{22}\) Michelman, \textit{supra} note 13, at 1183-1201.

\(^{23}\) \textit{Id.} at 1184-90.

\(^{24}\) See, e.g., \textit{Loretto}, 458 U.S. at 419.

\(^{25}\) Michelman, \textit{supra} note 13, at 1190-93.

\(^{26}\) This is the now famous phrase coined by Justice Holmes in \textit{Mahon}, 260 U.S. at 415.
centage of diminution will suffice for a judicial finding that a taking has occurred,\textsuperscript{27} and officials can seldom estimate precisely the effect on property value a particular regulation will have.

The next test, a balancing test, looks to the relative weight of the public good obtained and the private burden imposed by a given regulation.\textsuperscript{28} This test also involves subjective judgments and, as Professor Michelman points out, courts seldom explain whether they are asking a basic efficiency question (\textit{e.g.}, do gains outweigh losses), or rather, whether they are engaging in some other kind of balancing process.\textsuperscript{29}

Finally, courts may look to whether the regulation is aimed primarily at enhancing public welfare (taking), or at preventing public harm caused by private activity (no taking).\textsuperscript{30} This test suffers from a fatal ambiguity: almost all regulation can simultaneously be framed in terms of benefitting the public, or alternatively, of protecting the public from private harm.

Many commentators have continued, undaunted in the past two decades, to seek the key to unraveling the tangled web of takings jurisprudence.\textsuperscript{31} Other commentators have doubted whether takings questions can be reduced to a set formula, given the fact-specific nature of each particular regulation, the parcel of land involved, and the shifting conceptions of what constitutes the "reasonable economic use" of property.\textsuperscript{32} For purposes of this Note, the important point to reemphasize is the difficulty of predicting with substantial accuracy when a regulation will constitute a taking. Hence, when a regulatory taking requires compensation during the period while local land use officials are in the process of reviewing, adjusting and approving a particular development, the rule for measuring the corresponding compensation will have a dramatic effect upon the decision making process in many borderline cases.\textsuperscript{33} Thus, uncertainty surrounding the effects of broad zoning ordinances upon particular tracts of land, and the potential liability arising from such effects, may well deter otherwise rational land use planning.

\textbf{C. The Growth of Land Use Controls and the Emergence of Compensation Claims}

The general question whether compensation is required for regulatory takings, and the more specific question of the proper means of measuring that compensation, have gained importance in recent decades in large part

\textsuperscript{27} Williams, \textit{supra} note 20, at 220-21.
\textsuperscript{28} Michelman, \textit{supra} note 13, at 1193-96.
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.} at 1196-1201.
\textsuperscript{31} See, \textit{e.g.}, sources cited \textit{supra} note 19.
\textsuperscript{32} See, \textit{e.g.}, Bauman, \textit{supra} note 19, at 30-32.
\textsuperscript{33} Williams, \textit{supra} note 20, at 223-25.
because of a significant increase in the complexity and, some would say, the intrusiveness of contemporary land use controls. Much of this increase is attributable to two phenomena: the emergence of a host of environmental and other, generally urban, land use issues in the past three decades; and, the urgency of fiscal and economic limitations arising in local governments during roughly the same period. The urgent fiscal and economic limitations also brought land use issues into sharper focus because land use controls often can be employed with relatively low implementation costs.

Hence, contemporary land use regulation, particularly in relatively highly regulated states such as California, bears little resemblance to the early rudimentary attempts at land use control which emerged in the 1920's. The size and complexity of a local or state government’s zoning regulations, and administration of those regulations, may vary considerably depending upon a number of factors. Nevertheless, it is common today for a sizable number of local government actors and departments to become involved regularly in land use decisionmaking. Thus, bureaucratic delay now causes an increasing number of complaints from land developers. The level of intrusiveness and the length of delay in local zoning apparatuses has led to greater incentives to employ the judicial process to review local land use regulations.

Initially, the only remedy courts made available to land owners claiming that a regulation amounted to a taking was a declaratory judgment invali-
dating the regulation without the institution of condemnation procedures. However, because land development became a more time-consuming process, due to the greater complexity of obtaining approval for development, developers became less satisfied with seeking only declaratory relief. By the 1970's especially, land owners began seeking to invalidate overburdensome land use restrictions and began seeking compensation for the interim through inverse condemnation proceedings. Traditionally, inverse condemnation has been a judicial remedy available to property owners who claimed that a government entity had appropriated the owners' property without compensation. While a number of state courts were sympathetic to plaintiffs' inverse-condemnation claims for overly burdensome land use regulations, the high courts of California and New York, two states with a high volume of land use litigation, held that invalidation was the only available remedy for overly burdensome regulation. By the late 1970's, the stage had been set for the United States Supreme Court to resolve the compensation question under the Federal Constitution.

II. THE SUPREME COURT AND THE COMPENSATION ISSUE

It took a number of years for the Court to find a case in a procedural stance which would allow it to reach the merits of the interim compensation issue. At least four times, the Court granted certiorari on claims for compensation for regulatory takings without reaching the interim-compensation issue. Finally, in First English Evangelical Lutheran Church of Glendale v. Los Angeles County, the Court held that the just compensation clause required interim compensation for regulatory takings.

The fact pattern of First English is quite distinctive, yet it illustrates the manner in which a land use ordinance can severely affect the value and use of a particular tract of property. In January 1979, the county passed an

43. See Strasser, supra note 34, at 7-8.
46. See, e.g., City of Austin v. Teguea, 570 S.W.2d 389 (Tex. 1978).
50. Id. at 2383.
ordinance prohibiting the construction, reconstruction, or enlargement of any building or structure in an area commonly referred to as "Mill Creek Canyon." The county passed the ordinance in response to severe flooding in the area. The flooding had been increasing substantially as a result of a forest fire which had denuded the hills laying upstream. In fact, the plaintiff in First English had lost its chapel, retreat center, and other buildings the year earlier to flooding.

Barred by the ordinance from rebuilding, the church filed suit setting forth two major claims. First, it claimed that the county was liable under a California statute for the dangerous flood conditions created by the county-owned upstream properties. Second, the church requested compensation because the 1979 ordinance "denies all use of Lutherglen." The defendant successfully moved to strike the second claim on the basis of the California Supreme Court's holding in Agins v. City of Tiburon, in which the Court limited the remedy for regulatory takings to declaratory invalidation. The California Court of Appeal affirmed on the basis of Agins and the California Supreme Court denied review.

After granting certiorari, the United States Supreme Court reversed the striking of the compensation claim on the basis of the state court holding that compensation is unavailable as a remedy for a regulatory taking. Justice Rehnquist's majority opinion rested on three major points. First, the Court stated that close scrutiny of the just compensation clause shows that the clause in no way bars the public appropriation of private property, but rather, merely serves to ensure that the private property owner is fairly compensated for that appropriation. Second, the Court argued that a number of its precedents have held overly burdensome regulations, even without an actual physical appropriation of property, to be "takings" within the meaning of the fifth amendment. Third, the Court argued by analogy from a number of other Court decisions which have required compensation for temporary physical appropriations of property. The Court explained

51. Id. at 2381-82.
52. Id. at 2381.
53. Id. at 2382.
56. Id. at 2382-83.
57. Id. at 2385-86.
58. Id. at 2386-87.
59. Id. at 2387-88 (citing Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor, 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945)). Justice Rehnquist's opinion rejected two other arguments presented by the county. First, the county argued that a regulatory taking does not begin until the regulation in question has been judicially determined to be indeed a taking. The county relied on earlier Court decisions involving physical appropriations of property in which the Court held that the taking did not begin when the legislature passed the authorization to initiate condemnation procedures. Rather,
that the short duration of a taking does not act as a bar to compensation.\(^60\)

While the Court's opinion in *First English* leaves no doubt that just compensation is required under the fifth amendment for regulatory takings, the opinion does not directly confront the problem of properly measuring that compensation. Although the Court rejected the county's use of Court precedent to argue that a regulatory taking does not begin until it has been judicially deemed invalid, it did state that:

> these cases merely stand for the unexceptional proposition that the valuation of property which has been taken *must be calculated as of the time of the taking*, and that depreciation in value of the property by reason of preliminary activity is not chargeable to the government. . . .

> It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.\(^61\)

The rule in physical appropriation cases that valuation must be calculated as of "the time of the taking," though at times a vigorously debated factual issue, generally can be readily determined by a court.\(^62\) The complexity of the "zoning game" as a process involving a number of levels of review, negotiation, and approval, makes defining and identifying when a regulatory taking begins considerably more problematic.

The complex process of local land use decisionmaking is illustrated in another recent regulatory taking case, *Williamson County Regional Planning Commission v. Hamilton Bank*.\(^63\) However, in this case, the Court did not reach the compensation issue because plaintiffs failed to show a final administrative decision upon which the Court could fashion a remedy.\(^64\) In *Hamilton Bank*, the bank's predecessor-in-interest sought to begin a "cluster" development of residential housing in 1973.\(^65\) That year, the commission
approved a preliminary plat submitted by the developer based upon the county's cluster development zoning regulations. Over the next six years, the developer revised the preliminary plat at least four times and submitted it for further approval. Each time, the commission approved the plan. During this period the developer also submitted smaller final plats of particular parcels where construction of the homes was about to begin. The commission also approved these plans as they were submitted.

Meanwhile, in 1977, the county amended the cluster-development regulations, placing greater restrictions on allowable densities. Initially, the commission continued to apply the 1973 regulations to this development. In 1979, however, the commission decided that further development of the cluster project should be governed by the 1977 regulations. Thereafter, the commission rejected a number of plats submitted by the developer on various grounds relating to the 1977 regulations, and as a result, further development stopped.

As explained by Justice Blackmun in his majority opinion, the developer could still have sought variances from the county's Board of Zoning Appeals, an administrative body. Instead, the developer chose to file suit in federal court under section 1983 claiming that the commission had violated the Federal Constitution through the uncompensated “taking” of their property. The Court held that on this basis alone, the plaintiff had failed to show a final administrative order or decision since it is unknown what variances, if any, the Board may have granted. One or more variances might have had the effect, at the very least, of ameliorating the diminution in the value of plaintiff's property. In fact, it is quite possible that a variance may have relaxed the restrictions on development enough that a taking would not have been found at all.

The point to emphasize is that the lengthy review and approval process and the opportunity for further appeal found in the Hamilton Bank case are the rules rather than the exceptions, especially for projects of a substantial size. Because the process is lengthy, the date upon which the taking is held to occur will have a substantial impact upon the potential liability local communities will face as a result of their land use regulations. Hence, it is essential that a clear rule is delineated to determine when a regulatory taking

66. Id. at 176-78.
67. Id. at 178.
68. Id.
69. Id.
70. Id. at 178-79.
71. Id. at 179-82.
72. Id. at 187-88.
73. Id. at 187-94.
74. Id. at 188.
75. Id. at 191.
occurs. Such a rule will provide all parties in the "zoning game" with a bright line upon which they can rely.

The Supreme Court's limited discussions of the proper means of measuring interim compensation for regulatory takings suggests that the date of the final administrative order or decision by local decision makers is the appropriate date for determining the onset of the taking. The Court's first detailed discussion of the compensation issue was in Justice Brennan's dissent in San Diego Gas & Electric Co. v. San Diego. Justice Brennan argued forcefully that interim compensation is required under the fifth amendment for regulatory takings. His discussion of the measurement of compensation, however, is much less clear and reflects a conceptual trap awaiting an ambiguous articulation of the manner in which the onset of the taking is to be determined:

The constitutional rule I propose requires that, once a court finds a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

Though it is possible that this statement, in hindsight, is amenable to more than one interpretation, a fair reading of the phrase "first effected" indicates that the mere enactment of a zoning ordinance that denies the viable economic use of a particular tract of property immediately triggers the compensation "clock."

Such a rule would directly threaten established practices of local land use planning and decision making. Most zoning ordinances, and especially comprehensive land use master plans, tend to be broad in scope, making it difficult for legislators and administrators to assess the exact economic consequences for every single tract of property affected by the regulation. Such breadth of scope raises the necessity of variances, permits, and other adjustment tools and procedures. Yet, a rule holding a taking to begin upon the enactment of an ordinance which, when applied to a specific tract

76. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting). Justice Brennan's dissent carried considerable weight as authority in the years preceding the First English decision. Not only did three other Justices join in his dissent, but Justice Rehnquist, though agreeing that the case should be dismissed on procedural grounds, stated that he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." Id. at 633-34. By simple arithmetic then, Justice Brennan's opinion attained a sort of quasi-precedential status since it appeared that five of the then sitting Justices approved of his opinion. See, e.g., Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982).
77. San Diego Gas & Elec., 450 U.S. at 646-61.
78. Id. at 658 (emphasis added).
79. See Freilich, supra note 42, at 472-73; Williams, supra note 20, at 223.
80. See Williams, supra note 20, at 224-25. See also supra text accompanying notes 19-33.
of property denies the viable economic use of that property, presumably requires compensation even where the locality ultimately provides complete relief from the ordinance through some sort of adjustment. This is true at least for the period between the enactment of the ordinance and the date adjustment is granted.\textsuperscript{82}

The Supreme Court's treatment of subsequent regulatory taking cases suggests that Justice Brennan's "first effected" formulation of the measurement rule, and the drastic effect such a rule would have on established local land use practices, is no longer contemplated by the Court. In \textit{Hamilton Bank}, Justice Blackmun's majority opinion stressed that the failure of the plaintiff to seek variances after the planning commission began applying the more restrictive regulations left the Court without a final decision and prevented it from measuring what actual harm, if any, the plaintiff suffered as a result of the amended ordinance.\textsuperscript{83} Without such a final decision, no valuation of harm can be made.\textsuperscript{84}

The significance of a final decision or order is amplified further by Justice Rehnquist in his opinion in \textit{First English}. The Court first rejected the county's argument that requiring interim compensation amounted to a judicial usurpation of the legislature's power to decide whether to invoke the power of eminent domain. In so doing, Justice Rehnquist further noted an important caveat to the peculiar stance of the case in which the passage of the ordinance was, in itself, a final decision. The Court explicitly pointed out that the facts of this case differed from those in a normal zoning context in which the passage of the ordinance or regulation is only the beginning step in the process of local decisionmaking and not the final one.\textsuperscript{85}

\begin{itemize}
  \item Id. See also Williams, \textit{supra} note 20, at 223-24. Williams, Smith, Siemon, Mandelker, and Babcock offer two additional problems with such a measurement rule both relating to the speculative and uncertain nature of real estate development markets. First, developers under such a rule would have an incentive to "sandbag" a taking claim since they can be assured at some later date of recovering the fair market value of the use of the land from the date of the enactment of the regulation. Second, land speculators who had no present intention of making improvements on any particular tract could seemingly still recover compensation if the regulation would deny the economic use of the property had any development been attempted. \textit{Id.}  
  \item See \textit{supra} notes 63-75 and accompanying text.  
  \item \textit{Hamilton Bank}, 473 U.S. at 190-94. In \textit{MacDonald, Sommer & Frates v. Yolo County}, 106 S. Ct. 2561 (1986), the Court similarly rejected a developer's claim on the ground of the lack of a final decision upon which to base a remedy. In that case the Court had an even easier time rejecting plaintiff's taking claim since it had only submitted one development proposal to local land use officials and had not made any showing that the county would reject other, economically viable projects. \textit{Id.} at 2566-69.  
  \item Justice Rehnquist, speaking for the majority, stated:

\begin{quote}
  We limit our holding to the facts presented and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us. We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations.
\end{quote}

\textit{First English}, 107 S. Ct. at 2389.
\end{itemize}
noted that "normal delays" in the zoning process were not the subject of the holding of this particular case.\textsuperscript{86}

By recognizing the potential for drastically altering local land use practices, the Court is also recognizing an allied policy consideration which focuses upon allowing local decisionmakers some leeway in formulating and executing land use policies. Justice Rehnquist has noted, citing prior Court decisions in the area of eminent domain, that during the process of decisionmaking by local officials, some fluctuation in property value is to be expected and loss due to such fluctuation is not constitutionally protected under the just compensation clause.\textsuperscript{87} This policy is reflected in eminent domain case law through the long-standing, general rule that the date of a physical taking is not the date of the legislative enactment authorizing the institution of eminent domain procedures. Rather, a taking occurs on the date upon which compensation is paid and title passes to the government.\textsuperscript{88}

In sum, the Court's discussion of the proper measurement of damage to a landowner due to a regulatory taking indicates an increasing focus on the importance of finality of local decisionmaking. Finality provides courts with means of assessing damages and of avoiding undue interference with the structures and processes of local land use planning. Nevertheless, policy reasons why a final administrative order or decision should be employed as a bright line to determine the onset of a regulatory taking must be examined.

\section*{III. The Politics of Land Use Regulation and the Role of Judicial Review}

If the formula for determining interim compensation for regulatory takings is overly protective of the economic rights of land owners and developers,

\textsuperscript{86} Id.

\textsuperscript{87} Citing earlier cases, Justice Rehnquist also noted:

"[A] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project," but "[s]uch changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." \textit{Agins}, likewise rejected a claim that the city's preliminary activities constituted a taking saying that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.'"  

\textit{Id.} at 2388 (citation omitted).

The reference to delay points to one of two situations in which municipal liability may arise from bad faith activity on the part of local officials in the land use context. Liability may arise, first, where local officials display bad faith in order to frustrate a developer's plans, and second, where local officials deliberately employ "downzoning" (i.e., reclassifying property to a less satisfactory economic use) to depress the value of the property so as to be able to purchase the property for substantially less at a later date. See Freilich, \textit{supra} note 42, at 482-83. The issue of damages for such actions is distinct from the one of measuring compensation for a regulatory taking.

such as the one proposed by Justice Brennan in *San Diego Gas & Electric Co. v. San Diego*, it would undoubtedly have some chilling effect on local government's exercise of land use control. Furthermore, such a formula would likely lead to hasty capitulation on the part of planners in many instances in which a land owner asserts that a particular regulation amounts to a taking of his property. However, given the political and economic realities of urban politics and land use development, it is questionable whether land developers are in need of the strict, zealous constitutional protection that such a rule would provide. In general, land developers are crucial in helping local governments maintain and improve their revenue base, much of which comes from property taxes. Hence, the generally favored status of developers as revenue base enhancers suggests that zealous protection for these actors is not nearly as compelling a policy interest as is the protection of suspect classes who are adversely affected by local regulation because they lack the substantive political clout of major developers.

The fiscal limitations facing localities are currently commonplace features in most urban communities. On the one hand, local governments, unlike nation-states, cannot effectively control the movement of capital used for investment and development through their jurisdictional boundaries. The mobility of capital used for development thus creates enormous competition between localities to attract investment for the purpose of maintaining their respective revenue bases and providing services. Thus, except in the rare instance of a community whose revenue base is extremely safe, there is a general disincentive for localities to overburden property developers.

On the other hand, the chilling effect of a highly protective measurement rule would create additional costs for many local communities. First, in general, land use regulation is the primary means that localities employ to prevent harmful and uncontrolled growth in their communities. These very

---

90. Williams, *supra* note 20, at 201-08.
91. *Id.* See also P. Peterson, CITY LIMITS 17-38 (1981).
92. By analogy, this point is similar to that raised in connection with the level of scrutiny in the context of equal protection and due process based upon the classification of the burdened group and the ability of that group to obtain access to the political process that is found in J. ELY, DEMOCRACY AND DISTRUST (1980).
95. P. Peterson, *supra* note 91, at 3-93.
96. One may try to argue that since land is one capital resource which cannot be moved beyond a locality's boundaries, local government need not worry about enforcing onerous zoning regulations upon it. The resulting disincentives created for capital outside of the locality to invest in that locality's property, however, should still act to discourage such regulation.
limits are those generally challenged in regulatory taking claims. Second, urban political economists have long viewed zoning regulation as a means enabling localities to reach an efficient level of city services by allowing growth only to a particular level. Uncontrolled growth might otherwise overwhelm the ability of the locality to provide essential services. Finally, land use regulation serves as a means of controlling and allocating scarce community property rights in urban areas to promote compatible uses by individual private property owners. All of these current goals of land use regulation would be jeopardized by an overly protective formula for determining interim compensation for regulatory takings.

In sum, the Supreme Court's increasing focus on the possible deleterious effects of interfering too greatly with established land use control practices through regulatory taking damage rules is quite appropriate. Land owners are still protected once a locality has made a final decision regarding the effect of a regulation on a particular tract of property. The Court's concern is also appropriate given the division of powers in our federal system. Generally, state courts decide a much higher number of land use cases and are much more familiar with the zoning practices common to their jurisdictions than is the United States Supreme Court. Should a state court decide under its own state constitution that land use control practices peculiar to that state require greater protection for land developers than provided by a measurement rule using the date of the final local decision as the onset of the regulatory taking, it should be free to provide such enhanced protection. In fact, Justice Brennan acknowledged the advantage of allowing states to experiment in his dissent in San Diego Gas & Electric:

It should be noted that the Constitution does not embody any specific procedure or form of remedy that the States must adopt: "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die." The States should be free to experiment in the implementation of this rule,

---

98. For example, in Agins, the regulation in question restricted allowable densities on residential properties. 447 U.S. at 257. Likewise, in Hamilton Bank, the restrictions on cluster developments were intended to address concerns of density, access, availability of city services and the like. 473 U.S. at 177. Finally, in San Diego Gas & Electric, the proposed development was a nuclear power plant. 450 U.S. at 624.
99. See Tiebout, supra note 94.
100. See W. Fischel, supra note 37, at 82-101.
101. See supra text accompanying notes 83-86.
102. This is especially true because the Court has only recently begun to turn its attention to a number of land use issues. Between the mid-1920's and the mid-1970's, the Court invalidated only one local zoning ordinance. Williams, supra note 20, at 200 (discussing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)).
103. Williams, supra note 20, at 199-200.
104. See supra note 7.
provided that their chosen procedures and remedies comport with the fundamental constitutional command.10

In short, the date of the final local administrative decision could serve as a minimum constitutional benchmark from which a state could later deviate if a state court deemed such additional protection to be necessary.

IV. THE PROPER MEASURE OF COMPENSATION AND THE RISKS AND INCENTIVES INVOLVED IN LAND DEVELOPMENT MARKETS

The manner in which compensation is measured for regulatory takings will undoubtedly affect how developers view the risks and incentives to invest in land. Some commentators have argued strongly that compensation is necessary to minimize those risks by adopting an economic perspective based upon the risks investors face from the uncertainty of whether a locality will decide to regulate a particular tract of land so as to deny the economic use of it.106 In the absence of a rule requiring compensation, developers will tend to be somewhat risk averse because of the large potential losses involved if a change in a locality's zoning laws should deny the developer the economic use of his property. In a market in which compensation for regulatory taking was unavailable, the price of land would not adequately reflect the risk of a regulatory taking to developers.107 The market, under this analysis, cannot guard against this risk and the resulting under-valuation of land because of the difficulty of providing some sort of private insurance for burdensome land use regulation.108 It is thus argued that an appropriate level of compensation for regulatory takings acts as a sort of after-the-fact insurance plan for developers, one that may not be as efficient as a common private insurance plan where premiums are paid beforehand,109 but one still preferable to no insurance at all.

105. 450 U.S. at 660 (emphasis added) (citations omitted).
107. Id. at 584-92.
108. Blume and Rubinfeld point to two problems facing any private insurance plan against governmental policy changes. The first, "moral hazard," results where the insured can affect either the probability or magnitude of the event against which he is protected. Id. at 593-95. The second problem, "adverse selection," may make private insurance even more problematic. Adverse selection results where insurers cannot accurately predict the probabilities of the risks that they insure against. In addition, if premiums are not compulsory, only those who perceive their risks to be higher than average will opt for coverage, while those with less than average risks will not. Hence, the pool of insured will tend to have a higher probability of risk as a group than will have been calculated for the population as a whole. Id. at 595-97.
109. While government might be able to lessen the adverse selection problem by taxing all developers for compensation "insurance," it will generally still be inefficient because it will be difficult to match the risks of a particular developer with the amount of their "premium." Id. at 615.
As a more recent analysis suggests, however, looking only at how compensation for regulatory takings affects risks ignores the issue of how such compensation would affect incentives in land development markets. This analysis stresses that, for the investor, risks generated by legal transitions (e.g., regulations which alter the value or use of one’s personal or real property such as land use regulation) should not be treated any differently than other non-governmental generated risks facing investors speculating in uncertain markets. Under this analysis, guaranteeing compensation for legal transitions generally leads to over-investment in whatever market is involved. Hence, a measurement formula which provides a high degree of certainty and safety for the land investor, like the one proposed by Justice Brennan, will serve to provide an incentive to over-invest in land development markets since the investor will be protected at a very early date from adverse land use regulation.

On one hand, a formula for determining the proper measure of interim compensation for temporary regulatory takings which uses the date of the final administrative decision or order as the date when the regulatory taking begins would help to minimize over-investment in land markets due to the payment of compensation for onerous regulation. Investors speculating in land will not be allowed to recover for the period in which developers typically should expect to be required to obtain necessary adjustments through variances, permits, and the like. On the other hand, developers faced with intransigent local land use officials will be protected during the period in which they must seek judicial review of the locality’s final decision, a period of time which can be quite long, thereby lessening the risks involved for developers of land. In sum, the date of the final local administrative decision is a convenient and clear compromise that does not over-emphasize either risks or incentives.

CONCLUSION

In First English, the Supreme Court clearly held that some measure of interim compensation is required for temporary regulatory takings. The Court’s failure to address when a taking begins for purposes of determining the proper measure of compensation must be resolved quickly and correctly. Otherwise, local land use regulators and land developers will face numerous problems of substantial consequence.

110. Kaplow, supra note 11.
111. Id. at 522-33.
112. Id. at 528-29.
113. Id. at 537-41.
114. Again, note that developers should be entitled to recover for damages resulting from bad faith delay in administrative review and deliberate downzoning to destroy much of the value of the property involved. See supra note 87.
A historical review of Supreme Court discussions on compensation issues indicates that an appropriate, if not the only appropriate, date upon which a taking begins is the date upon which a final local administrative decision or order is issued. Such a rule for determining when compensation for a taking must begin is bolstered by two important policy considerations. First, the Court should be wary of altering the balance of power too drastically between local land use regulators and land developers because of the need for local government autonomy. Second, the economics of land-development markets indicate that an overly protective measurement rule would skew land-investment incentives. The Supreme Court must keep these policy considerations in mind when it determines the timing issues involved in subsequent cases. As a result, the Court should find that a taking begins when a final local decision is made.

DAVID A. ARRENSEN