

**EVERGLADES RESTORATION: A  
CONSTITUTIONAL TAKINGS ANALYSIS**

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I. INTRODUCTION

Courts and commentators frequently describe one area of constitutional takings jurisprudence as straightforward and unambiguous: government action which results in a permanent physical invasion and occupation of private property will require compensation.<sup>1</sup> In contrast to the deep complexities in the area of regulatory takings, it is clear that private property may not be *physically* conscripted for the public good without payment of just compensation.<sup>2</sup> Justice Scalia, in *Lucas v. South Carolina Coastal Council*,<sup>3</sup> described physical takings as "discrete categories of regulatory action [which are] compensable without case-specific inquiry into the public interest advanced in support of the restraint. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."<sup>4</sup>

The profound ecological crisis of the Florida Everglades and the South Florida ecosystems<sup>5</sup> compels various ongoing and possible future restoration endeavors, which this article will describe as "reversionary engineering." This process entails the dismantling or modified management of previously constructed flood control

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1. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

2. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).

3. *Id.*

4. *Id.* at 2893.

5. See generally Steven M. Davis & John C. Ogden, *Everglades: The Ecosystem and Its Restoration* 769-96 (1994); Norman Boucher, *Smart as Gods*, *Wilderness*, Winter 1991, at 10; James Webb, *Managing Nature in the Everglades*, *EPA Journal*, Nov.-Dec. 1990, at 48, 50.

structures. The goals are to restore the hydrology of the region to more closely approximate pre-flood control and pre-drainage groundwater levels, flooding and sheet flow dynamics; effect the "unchanneling" of once meandering rivers; and transform agricultural or residential lands to wetlands.<sup>6</sup> Such reversionary engineering, when of a scope sufficient to save the ecology of the region from progressive degradation, will affect thousands of acres of now privately owned lands by the intermittent but arguably "permanent invasion" of floodwaters or elevated groundwaters.<sup>7</sup>

At first blush the categorical rule for physical takings appears to impose, if not a roadblock, at least a highly expensive toll highway upon federal, state, or local government endeavors to restore the hydrology of the Everglades region. Under the *Lucas* Court's formula, for example, is not the flooding of agricultural lands, as a consequence of government action, rendering it unusable for crop production, let alone residential development, a *per se* taking, no matter how "weighty the public purpose behind it"?<sup>8</sup> Largely because of this seemingly self-evident fact, most projects underway or under consideration to date contemplate the voluntary acquisition or eminent

6. The premier project of reversionary engineering is the Kissimmee River restoration project. This project has been characterized as the largest river restoration effort in the United States, if not the world. The Kissimmee River was once a wide, meandering, 103-mile-long river feeding into Lake Okeechobee, and constituting the headwaters of the Everglades ecosystem. A federally funded Army Corps of Engineers (Corps) flood control project authorized in 1948 transformed the river into a narrow, 56-mile-long flood control ditch. The project resulted in a loss of between 35,000 and 45,000 acres of wetlands, a 90% decline in wading birds along the river, and more intensive agricultural uses. On April 23, 1994, ceremonial work began on the federally authorized \$372 million restoration project aimed at removing 22 miles of channel, restoring 43 miles of river, and reclaiming 26,500 acres of wetlands. Craig Quintana, *Work to Begin on Restoring Kissimmee Ceremony Today to Kick off Nation's Biggest River Project*, ORLANDO SENTINEL, April 23, 1994, at D1; Larry Lipman & Kirk Brown, *Kissimmee River to Meander Again*, PALM BEACH POST, Oct. 9, 1992, at A1; Brian Culhane, *The Kissimmee Connection*, WILDERNESS, Winter 1991, at 17.

More wide-ranging engineering scenarios for the hydrologic and ecologic restoration of the South Florida ecosystem were recently suggested in a report to the Corps by the Science Sub-Group of the South Florida Management and Coordination Working Group, and are currently under consideration by the Corps. SCIENCE SUB-GROUP, SOUTH FLORIDA MANAGEMENT AND COORDINATION WORKING GROUP, FEDERAL OBJECTIVES FOR THE SOUTH FLORIDA RESTORATION (1993). Additionally, the U.S. Man and the Biosphere Program's ongoing study of the Everglades International Biosphere Reserve and the South Florida ecosystem is exploring various scenarios for large-scale ecologic restoration of the ecosystem. U.S. MAN AND THE BIOSPHERE PROGRAM, ISLE AU HAUT PRINCIPLES (1994). See also DAVIS & OGDEN, *supra* note 5, at 792, 794 (recommending, *inter alia*, that "the reduction in ecosystem size and compartmentalization of the remaining system are trends that must be reversed in any Everglades restoration initiative," and that it is necessary to "integrate elements into rainfall-based water delivery plans that will mimic extended periods of flooding as they would have occurred in the remnant Everglades marshes under pre-drainage conditions.").

7. See generally *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

8. *Id.* at 2893.

domain condemnation of lands sufficient to cover the area impacted by wetlands and flood and sheet flow system restoration at a very substantial public expense.<sup>9</sup> However, no governing case law squarely addresses the unique legal issues associated with the intersection of constitutional takings law and hydrologic restoration projects.

No court has yet *compelled* a government to pay compensation for the hydrologic effects of reversionary engineering. Scrutiny of these issues reveals that the result of a careful judicial analysis would not necessarily require the application of the categorical physical takings rule. A key feature of reversionary engineering which distinguishes it from the traditional physical takings case is that the government action does not impose an entirely new burden on property which, but for the government action, it would never have sustained. Quite unlike the conventional physical invasion case, reversionary engineering restores land to a natural condition which would have existed, but for the consequences of largely government-funded channeling, drainage, and other flood control projects.<sup>10</sup>

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9. The \$372 million Kissimmee River restoration project contemplates the acquisition by the South Florida Water Management District (SFWMD) of over 80,000 acres of land, of which 48,351 had been acquired as of July 1994. Interview with Stanley J. Niego, Attorney SFWMD.

On March 9, 1994, the Everglades National Park Protection and Expansion Act of 1989 was amended to authorize a 25% contribution of federal funds for acquisition of "those lands or interests therein adjacent to, or affecting the restoration of natural water flows to, the park or Florida Bay which are located east of the park and known as the Frog Pond, Rocky Glades Agricultural Area, and the Eight-and-One-Half-Square-Mile Area." Everglades National Park Protection and Expansion Act, § 104, 108 Stat. 98 (1994).

10. In 1990, The Wilderness Society commissioned an economic analysis of public subsidies and externalities affecting water use in South Florida. Included within the scope of the study is an analysis of the capital costs of the Central and South Florida Flood Control Project (CSFFCP), the project which accounted for the overwhelming majority of land reclamation and wetland destruction in South Florida. The CSFFCP, authorized in 1948, involved over 1,300 miles of canals and levees, a dozen high volume pump stations, over 60 spillways, and several hundred secondary structures. It was intended to allow more profitable use of 1.57 million acres of existing crop and pasture land, and to create 726,000 acres of new agricultural land. The Corps financed most of the work on the CSFFCP, with the State of Florida contributing from general revenues, and the water management district, then called the Central and South Florida Flood Control District, contributing from its own ad valorem revenues. The total acquisition and construction costs of the project were \$529 million, or \$1.47 billion in 1990 dollars. Of that total, The Wilderness Society study determined that the federal government paid \$1.21 billion, the State of Florida \$114.3 million, and South Florida property owners \$151.6 million through ad valorem water district taxes. Based on their 1990 share of the tax base, the study in turn determined that \$149.1 million of the flood control district contribution was raised from urban interests, and the remaining \$2.5 million from agricultural interests (although the report cautioned that the actual agricultural proportion may have been higher, as the agriculture share of the property tax base was higher in the 1950-73 period). In sum, it appears that less than half of one percent of the capital costs of the CSFFCP was paid by the agricultural property owners who benefited most directly from the project. *An Analysis of Public Subsidies and Externalities Affecting Water Use in South Florida*, submitted to The

The distinguishing characteristics of reversionary engineering raise perplexing questions not found in any of the traditional physical invasion scenarios: When is a landowner entitled to claim a compensable property interest in a condition on her property created solely at government expense? Is a government entitled to alter a project in response to newly perceived and understood adverse environmental consequences, without paying compensation to affected landowners? Is it not arguable that no "taking" has in fact occurred in these instances?

Even where a government elects to lessen its exposure to protracted litigation by using eminent domain to acquire properties, it may have to resolve related issues before determining an accurate fair market value. To what extent, for example, is the value added as a consequence of government drainage projects an "artificially inflated" value which the government need not compensate? When government creates new land through drainage and rechanneling projects on the previous site of sovereign navigable waters, who owns that land and may claim compensation for its "taking"?

The *Lucas* Court, in the context of a regulatory takings analysis, supported "our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments."<sup>11</sup> The courts should look to "background principles of nuisance and property law" to determine whether the activity which regulation prohibits on a plaintiff's land is an activity which the plaintiff would otherwise have a reasonable expectation of conducting.<sup>12</sup> In accordance with the approach counseled by *Lucas*, this article will explore "background principles" of flood damage, water rights, and flood protection law and identify guiding principles to address these various questions related to the constitutional implications of hydrological restoration projects.

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Wilderness Society at 14-16 (Florida Atlantic University/Florida International University Joint Center for Environmental and Urban Problems, Ft. Lauderdale, Fla.), December 1990, at 14-16. As one commentator has observed:

It is not too much to say that the cost sharing for the \$529 million FCD project has favored agricultural interests—and especially the corporate farming enterprises of the Everglades Agricultural Area—in an outrageously unfair way. This seems especially true in light of the other government subsidies available to these enterprises.

*The Florida Experience: Land and Water Policy in a Growth State*, (Resources for the Future, Inc. Washington, D.C.) 1974 at 96 [hereinafter *The Florida Experience*].

11. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992).

12. *Id.*

## II. THE "CATEGORICAL" LAW OF PHYSICAL TAKINGS

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides: "[n]or shall private property be taken for public use, without just compensation."<sup>13</sup> Until the watershed case of *Pennsylvania Coal v. Mahon*,<sup>14</sup> this clause was commonly construed as limited in its applicability to cases of outright appropriation, or of physical encroachment and occupation.<sup>15</sup> In *Pennsylvania Coal*, Justice Holmes concluded that the Takings Clause could apply to regulatory limitations on the use of property, and stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>16</sup> The *Pennsylvania Coal* analysis has spawned generations of court decisions, and an abundance of commentary, exploring the subject of how much regulation is "too far."<sup>17</sup>

In the wake of this jurisprudential explosion, the subject of physical takings was left in relative obscurity and inactivity. If any tendency can be discerned in the courts, it is to contrast the complexity of regulatory takings analyses with the relative simplicity of physical takings law. In its comprehensive analysis of the then-existing law of takings, the Supreme Court in *Penn Central Transportation Co. v. New York City*,<sup>18</sup> observed that the Court "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . ."<sup>19</sup> The Court noted, however, that the "character of government action" may have particular significance in

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13. U.S. CONST. amend. V.

14. 260 U.S. 393 (1922).

15. See generally Frank J. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-28 n.5 (1982).

16. 260 U.S. at 415.

17. Witness the hundreds of articles exploring the recent Supreme Court decisions of *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). A particularly interesting collection of analyses is provided in papers presented in a 1992 conference entitled *Windfalls and Wipeouts: Environmental Regulation, Property and the "Takings" Clause after Lucas v. South Carolina Coastal Council*, 17 VT. L. REV. 695 (1993). See also AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION (David L. Callies ed., 1993).

18. 438 U.S. 104 (1978).

19. *Id.* at 124.

the "ad hoc" analysis of each case.<sup>20</sup> For instance, in *United States v. Causby*,<sup>21</sup> the Court had held that frequent flights of military aircraft at low altitudes over the plaintiff's property was a compensable taking, where the impact of the flights diminished, but did not destroy, the value of the property.<sup>22</sup>

In *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>23</sup> the Court took a further step in defining the applicable standard for physical takings analysis. In *Loretto*, the statute at issue was a New York law requiring landlords to allow television cable companies to install cable facilities on their apartment buildings.<sup>24</sup> The precise amount of space occupied by the cable facilities at issue was at most one and one-half cubic feet of a five story apartment building.<sup>25</sup>

The Court, through Justice Marshall, conceded that facilitating the availability of cable television served a valuable public purpose, and in fact enhanced the value of the apartments for the plaintiff's tenants. Nevertheless, the Court concluded that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."<sup>26</sup> It further stated that "[i]n such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation."<sup>27</sup> A strong dissent by Justices Blackmun, Brennan and White accused the majority of an inherent inconsistency because it "acknowledge[d] [the Court's] historical disavowal of a set formula in almost the same breath as it construct[ed] a rigid per se takings rule."<sup>28</sup>

The *Loretto* Court's articulation of a standard for physical takings led to Justice Scalia's observation in *Lucas* that physical takings "at least with regard to permanent invasions" were compensable "no matter how minute the intrusion, and no matter how weighty the public purpose."<sup>29</sup> An analysis of decisions both before and after

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20. *Id.* "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., *United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*

21. 328 U.S. 256 (1946).

22. *Id.* at 266-68.

23. 458 U.S. 419 (1982).

24. *Id.* at 421.

25. *Id.* at 438.

26. *Id.* at 425.

27. *Id.* at 440.

28. *Id.* at 442 (Blackmun, J., dissenting).

29. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).

*Lucas* suggests, however, that Justice Scalia's synopsis of physical takings law in dictum is appropriately qualified in two important respects. First, and particularly relevant to the subject of this article, physical takings are limited by "existing rules or understandings that stem from an independent source such as state law,"<sup>30</sup> in the same manner that regulatory takings were so described in *Lucas*. Second, it is now clear that government may impose permanent invasions of private property as *conditions* to the grant of other public benefits, such as building permits and zoning approvals, provided that the requirement is "related both in nature and extent to the impact of the proposed development."<sup>31</sup>

Though the majority opinion in *Loretto* observed that it is generally true that a property owner "entertains a historically rooted expectation of compensation"<sup>32</sup> from physical invasions, such historical expectations do not arise in every case. This was the teaching of Justice Holmes in *Jackman v. Rosenbaum Co.*,<sup>33</sup> decided by a unanimous Court in the same term as *Pennsylvania Coal v. Mahon*.<sup>34</sup> In *Jackman*, the Court addressed a constitutional challenge to a party wall statute, which authorized a landowner to build a party wall, even if it entailed removing and replacing an existing wall of an adjoining landowner, without paying compensation to the adjoining landowner. The statute authorized a physical invasion by a third party, and one clearly more substantial, more disruptive, and more permanent than occasioned by the cable installation in *Loretto*. Nonetheless, the Court found the statute was not a taking, as "the custom of party walls was introduced by the first settlers in Philadelphia under William Penn," and that custom implicitly qualified the "right" to be free from physical intrusions.<sup>35</sup> As will be explored below, where the "right" to

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30. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972), *quoted in* 112 S. Ct. at 2901.

31. Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994) (finding a requirement of dedication, by deeded easement, of public greenway and pedestrian/bike path, on private property was a taking because it lacked the required relationship).

32. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

33. 260 U.S. 22 (1922).

34. 260 U.S. 393 (1922). *Jackman* is overlooked in the *Loretto* Court's review of physical takings law, and in fact disproves that Court's assertion that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." 458 U.S. at 427.

35. *Jackman*, 260 U.S. at 31.

The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike . . . Such words as 'right' are a constant solicitation to fallacy. We say a man has a right to the land that he has bought and that to subject a strip six inches or a foot wide to liability to use for a party wall therefore takes his right to that extent. It might be so and we might be driven to the economic and social considerations that we have

be free from flooding has been historically qualified by the forces of nature, the Fourteenth and Fifth Amendments are similarly unlikely to create new entitlements to compensation.

### III. INVASION BY FLOODING: WHAT CONSTITUTES A TAKING?

Flooding as a consequence of reversionary engineering is a new and legally uncharted phenomenon. But for more than a century the courts have analyzed the rights of private property owners subjected to varying degrees of flooding as a direct or indirect consequence of public works projects. An analysis of these cases reveals two general principles which may bear significantly on the legal interpretation of reversionary engineering: (1) when governments intentionally obstruct natural water flows and consequently cause permanent or recurring periodic flooding, courts will find a compensable taking; (2) when, either through negligence or simple impossibility, government flood control projects do not effectively reduce natural flooding, even where the project increases the magnitude or frequency of natural flooding, courts generally will not find a taking.

#### A. *Public Works for Navigational Improvement*

The seminal flood takings case is *Pumpelly v. Green Bay Co.*<sup>36</sup> In *Pumpelly*, the Green Bay and Mississippi Canal Company had constructed a dam pursuant to state statute to improve the navigation of the Fox River.<sup>37</sup> The dam caused the overflowing of 640 acres of the plaintiff's land, "the water coming with such a violence . . . as to tear up his trees and grass by the roots, and wash them, with his hay by tons, away, to choke up his drains and fill up his ditches . . ."<sup>38</sup> The defendant argued that the state had "the right and power of improving the navigation of the river, and may improve it without liability for remote and consequential damages to individuals."<sup>39</sup> The Supreme Court disagreed, stating "[w]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to

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mentioned if the law were an innovation, now heard of for the first time. But if, from what we may call time immemorial, it has been the understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke the police power.

*Id.* (citations omitted).

36. 80 U.S. 166 (1871).

37. *Id.* at 167-68.

38. *Id.* at 167.

39. *Id.* at 171.



effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution . . ."40

In *United States v. Lynah*,<sup>41</sup> the federal government had erected a dam on the Savannah River, also for the purpose of improving navigation. The dam raised the level of the river at the plaintiff's rice plantation, interfering with operation of the plantation's drainage system and causing a "superinduced addition of water" of approximately eighteen inches.<sup>42</sup> The *Lynah* Court held that because the flooding was a permanent condition which destroyed the agricultural capacity of the plantation and left it as an "irreclaimable bog," the property no longer had value.<sup>43</sup> The Supreme Court, following *Pumpelly*, found that "where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment."<sup>44</sup>

Both *Pumpelly* and *Lynah* concerned a total deprivation of value as a consequence of government public works. A later case, *United States v. Cress*,<sup>45</sup> made it clear that a partial taking could be found as a consequence of flooding as well. In *Cress*, a dam and lock constructed as navigation improvements to the Kentucky River caused a permanent condition which subjected the plaintiff's land to frequent overflows of water from the river.<sup>46</sup> The flooding did not render the land valueless, but allegedly caused its value to depreciate by half.<sup>47</sup> The Court found a partial compensable taking, holding that "[t]here is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other."<sup>48</sup> Similarly, in *United States v. Dickinson*,<sup>49</sup> the Court found

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40. *Id.* at 181.

41. 188 U.S. 445 (1903).

42. *Id.* at 450.

43. *Id.*

44. *Id.* at 470. It should be noted that the plantation in *Lynah* had been "reclaimed by drainage, and had been in actual continued use for seventy years and upwards as a rice plantation." *Id.* at 448. This is the only reference to that fact in the case. There is no discussion of who incurred the expense of the reclamation, nor did the government seek to assert any defense to the taking claim based on government investment in the original reclamation project.

45. 243 U.S. 316 (1917).

46. *Id.* at 318.

47. *Id.*

48. *Id.* at 328.

49. 331 U.S. 745 (1946).

that a dam project had resulted in the taking of an "easement for intermittent flooding," for which compensation was ordered.<sup>50</sup>

### B. Flood Control Projects

In the foregoing cases takings were found when the government's attempt to improve navigation caused flooding on private property where none had existed before. However, when government seeks to affirmatively benefit private property through flood control engineering which somehow fails to constrain the damaging effects of natural forces, the general rule is that the government is not liable to pay compensation for a taking.<sup>51</sup>

In *Sanguinetti v. United States*,<sup>52</sup> the plaintiff owned land, situated between two rivers, that had "always been subject to inundation by overflow therefrom, as well as by reason of periodic heavy rainfall."<sup>53</sup> In an effort to control flooding in the area, the government constructed a canal between the two rivers.<sup>54</sup> A levee built with fill along one side of the canal had the unintended effect of acting as a dam, and the plaintiff's land flooded more frequently in years following the construction project.<sup>55</sup> The Supreme Court rejected the plaintiff's taking claim, stating that "in order to create an enforceable liability against the government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."<sup>56</sup> The Court appeared most persuaded by the fact that, unlike the previously discussed cases where the land in question had not been subject to flooding prior to the government project, here the project simply aggravated a natural condition: "[t]he most that can be said is that there was probably some increased flooding due to the canal and that a greater injury may have resulted than otherwise would have been the case."<sup>57</sup>

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50. *Id.* at 751.

51. *See Sanguinetti v. United States*, 264 U.S. 146, 150 (1924).

52. 264 U.S. 146 (1924).

53. *Id.*

54. *Id.*

55. *Id.* at 147.

56. *Id.* at 149.

57. *Id.* at 150. *See also Coleman v. United States*, 181 F. 599 (N.D. Ala. 1910):

Injury to both timber and crops, from overflows, was occurring frequently, if not annually, before any dam was built . . . The effect of the dam was merely to increase the likelihood and extent of similar overflows and the damage resulting therefrom, and thereby impair the value of plaintiff's property for cultivation to a greater extent.

*Id.* at 603-04.

Two lower federal court decisions appear to depart from the Supreme Court's analysis in *Sanguinetti*, finding aggravation of pre-existing flooding compensable. In *Jacobs v. United States*,<sup>58</sup> the Fifth Circuit distinguished *Sanguinetti* primarily on the basis of the trial court's finding in *Jacobs* that statutory language authorizing the public works in question expressly contemplated that property owners would be compensated for consequent harm, constituting an "implication of a promise" to pay.<sup>59</sup> In *King v. United States*,<sup>60</sup> the Court of Claims cited, and perhaps miscited, *Jacobs* as standing for a general proposition that "where property on a river is subject to intermittent overflows in its natural state and the construction of a down-river[sic] dam makes it more subject to overflows than before, the difference is merely one of degree for purposes of compensation."<sup>61</sup>

With *King* excepted, the Federal Claims Court, which has jurisdiction under the Tucker Act<sup>62</sup> over takings claims against the United States, has consistently followed *Sanguinetti* and denied flood takings claims where pre-project flooding or groundwater saturation conditions raise substantial questions concerning causation. For example, in *Leeth v. United States*,<sup>63</sup> the court held the plaintiffs failed to make a prima facie case of a Fifth Amendment taking where property had been particularly susceptible to flooding prior to construction of a dam, even though government hydrology studies showed limited incremental increases in elevation and duration of flooding attributable to dam.<sup>64</sup> In *Laughlin v. United States*,<sup>65</sup> the court held there was no taking although a marsh created by a flood control project may have increased groundwater levels, where land was always subject to the risk of continuous periodic overflows by floodwater.<sup>66</sup>

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58. 45 F.2d 34 (5th Cir. 1930), *rev'd on other grounds*, 290 U.S. 13 (1933).

59. *Id.* at 38.

60. 427 F.2d 767 (Ct. Cl. 1970).

61. *Id.* at 769.

62. 28 U.S.C. § 1491(a)(1) (1988).

63. 22 Cl. Ct. 467 (1991).

64. *Id.* at 473, 485.

65. 22 Cl. Ct. 85 (1990).

66. *Id.* at 102. "To attach liabilities to the Bureau [of Reclamation] . . . every time the Bureau made releases in response to insufficient storage and groundwater invaded the root zone of his crops would make a government agency responsible for whatever climactic conditions nature chooses to deliver." *Id.* at 106-07; *see also* *Bartz v. United States*, 633 F.2d 571, 577 (Cl. Ct. 1989); *Accardi v. United States*, 599 F.2d 423, 429 (Ct. Cl. 1979); *Ark-MoFarms, Inc. v. United States*, 530 F.2d 1384, 1386 (Ct. Cl. 1979); *Hartwig v. United States*, 485 F.2d 615, 620-21 (Ct. Cl. 1973); *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955); *Creech v. United States*, 60 F. Supp. 885, 896 (Ct. Cl. 1944), *cert. denied*, 325 U.S. 870 (1945) (concerning flooding of islands in Lake Okeechobee by wind tides as an alleged result of construction of a levee on perimeter of lake). *Cf.* *Turner v. United States*, 23 Cl. Ct. 447, 455

### C. Florida Authorities

In flood takings cases, Florida state courts have followed the *Sanguinetti* analysis, declining to find a taking where pre-project flooding was at most aggravated by public works.<sup>67</sup> In *Arundel Corp. v. Griffin*,<sup>68</sup> the plaintiff alleged that the Arundel Corporation and the Everglades Drainage District had negligently constructed drainage works, causing damage through increased flooding. Prior to the construction, the plaintiff's property was "peculiarly subject to heavy and continued overflow in unusual rainfalls[.]"<sup>69</sup> The Florida Supreme Court found there was no taking based on its finding that the construction did not physically invade the plaintiff's property or cause permanent overflow.<sup>70</sup>

In *Poe v. State Road Dept.*,<sup>71</sup> the plaintiff owned a truck farm, a portion of which was subject to infrequent flooding during heavy rainfall. The state redesigned the drainage system of a nearby state highway in a way that the plaintiff alleged caused flooding to his property after normal rainfall, rendering it unsuitable for farming.<sup>72</sup> The court denied compensation based in part on its finding that the plaintiff failed to establish the state's actions resulted in permanent overflowing or physical invasion.<sup>73</sup>

### D. Summary

In sum, two common themes can be deduced from these flood takings cases. First, where government public works create artificial structures which cause flooding where no such condition naturally

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(1991) (flooding and sand deposition of downstream agricultural tracts developing after river channelization was a compensable taking, where there was "no suggestion that the damage would have occurred without the channelization.").

Other federal court decisions provide further support for the *Leeth* and *Laughlin* decisions. See *Allain-Lebreton Company v. Dept. of the Army*, 670 F.2d 43, 44-45 (5th Cir. 1982) (holding there was no taking where government intentionally failed to locate hurricane protection levee on portion of plaintiff's property, in order to preserve wetland environment); *Miller v. United States*, 583 F.2d 857, 864 (6th Cir. 1978), *dismissed on remand*, 480 F. Supp. 612 (E.D. Mich. 1979) (noting that even if government structures aggravated or prolonged flooding the plaintiffs could not show "direct appropriation" because natural factors had historically caused fluctuation in the levels of the lake at issue).

67. See *Arundel Corp. v. Griffin*, 103 So. 422 (Fla. 1925); *Poe v. State Road Dept.*, 127 So. 2d 898 (Fla. 1st DCA 1961).

68. 103 So. 422 (Fla. 1925).

69. *Id.* at 424.

70. *Id.*

71. 127 So. 2d 898 (Fla. 1st DCA 1961).

72. *Id.* at 898-99.

73. *Id.* at 902. See also *Dudley v. Orange County*, 137 So. 2d 859 (Fla. 2d DCA 1962) (no compensation required where dams constructed during a natural disaster increased the degree of flooding).

existed, little question exists that a compensable physical taking has occurred.<sup>74</sup> Government, in effect, invades and occupies private property by means of the artificial diversion of natural forces. Where, however, some, even intermittent, flooding characterized the natural state, there is far less certainty that courts will find a physical taking by the government.<sup>75</sup> Even with little factual question that government activity aggravated the flooding frequency or duration, courts are more likely to treat the flooding as a noncompensable injury rather than a constitutional taking.<sup>76</sup> These decisions effectively remove accountability from government for compensation for the diminished utility of land which is primarily the consequence of pre-existing natural forces. Government may attempt to control the natural forces, but if unsuccessful, courts will generally not require government to pay the consequences.<sup>77</sup>

These precedents allow the prediction that flooding which stems from reversionary engineering—restoring land to its pre-flood control condition or establishing some intermediate condition of lesser flood control—would also not automatically be considered a taking by physical invasion. The fact that in a reversionary engineering case the flooding is predictable and intentional, whereas in the foregoing flood control cases the flooding was generally negligent or inadvertent, would undoubtedly give a court some pause.<sup>78</sup> However, as indicated in the cases discussed below,<sup>79</sup> even an intentional balancing of values which results in a lessening of flood control protection has survived constitutional challenge.

#### IV. GOVERNMENT ALTERATION OF FLOOD CONTROL PROJECTS: COMPENSABLE TAKING OR PREROGATIVE?

##### A. *Federal and Non-Florida Authorities*

Does government construction of flood control projects which positively benefit private property create an entitlement allowing the property owner to prevent the government from altering the project to

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74. See *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

75. See *Sanguinetti v. United States*, 264 U.S. 146 (1924); *Arundel Corp. v. Griffin*, 103 So. 422 (Fla. 1925); *Poe v. State Road Dept.*, 127 So. 2d at 898 (Fla. 1st DCA 1961); *Dudley v. Orange County*, 137 So. 2d at 859 (Fla. 2d DCA 1962).

76. See *Arundel Corp.*, 103 So. at 423.

77. See *id.* at 424.

78. In one unsuccessful flood takings case, however, the Court of Claims concluded that "the Government's foreknowledge will not convert an otherwise insufficient injury into a taking." *National By-Products v. United States*, 405 F.2d 1256, 1275 (Ct. Cl. 1969).

79. See *infra* part IV.

her consequent disadvantage or to receive compensation for a taking? Put another way, is it government's prerogative to undo what it has done?

A 1924 Minnesota case is the earliest one addressing this issue. In *Lupkes v. Town of Clifton*,<sup>80</sup> the plaintiff was a farmer whose land traversed a wide and shallow natural ravine which carried flood waters across the plaintiff's fields.<sup>81</sup> At some time in the past, the county had constructed drainage ditches along the northern and southern boundaries of the plaintiff's farm, intersecting the natural ravine at right angles.<sup>82</sup> Just to the north of the southerly ditch, the county constructed an embankment with the fill removed in ditch construction to serve as a county road.<sup>83</sup> The southerly ditch and embankment diverted flood waters off of the plaintiff's land in the natural ravine and down the ditch, presumably making the land more amenable to agriculture. The court emphasized the "significant fact" that the south half of the plaintiff's farm "was subjected to a very substantial assessment and the resulting tax because of the benefits considered . . . to result to that land, through the construction of the ditch."<sup>84</sup>

The litigation arose when the county determined that the force of the flood waters from the ravine was washing away the county road, and that an effective remedy for the situation was construction of a bridge in the embankment, which would allow the waters to resume their original course across plaintiff's land in the ravine. The plaintiff brought suit to enjoin the opening of the embankment. The county contended that its duty was to maintain the road and it had the authority to remove the embankment and install a bridge.<sup>85</sup>

The court acknowledged the plaintiff had no original right to compel the county to protect his lands from flooding.<sup>86</sup> The question presented was whether the plaintiff had, because "the natural status has been changed by the establishment of the ditch, . . . a resulting property right, appurtenant to the land, to the maintenance of the

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80. 196 N.W. 666 (Minn. 1924).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 667.

85. *Id.* at 667-68.

86. *Id.* at 668.

As nature left plaintiff's land, and for all the empire building work that he may have done in converting it from mere land into a farm, there is no right in him to have the ravine dammed (as it is by the ditch embankment), and the natural flow of water onto and across his land intercepted.

changed status."<sup>87</sup> In finding for the plaintiff, the court placed principal reliance on the fact that the flood control project was originally financed by a special assessment which the plaintiff had been required to pay.<sup>88</sup>

An opposite result has obtained, however, where there is no evidence that the landowner has been specially assessed for the cost of flood control projects. The leading case in this area is *United States v. Sponebarger*.<sup>89</sup> In *Sponebarger*, a property owner in the Mississippi River flood plain brought a takings claim against the federal government in connection with flood control activities implemented under the Mississippi Flood Control Act of 1928.<sup>90</sup> The Act implemented a system where spillways would be placed at predetermined points to release waters contained by the levees under flood conditions.<sup>91</sup>

The plaintiff's property lay within the area of a floodway to be created by one of the proposed spillways, which was also a natural floodway.<sup>92</sup> The plaintiff contended that the planned spillway exposed her property to possible jeopardy, and the consequent diminished market value constituted a taking compensable under the Fifth Amendment.<sup>93</sup>

Ultimately, the Supreme Court held no taking had occurred, reasoning that the plaintiff's land had always been subject to unpredictable flooding without the government plan.<sup>94</sup> The Court laid heavy

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87. *Id.* at 688.

88. *Id.* at 668-69. *Accord* *Fischer v. Town of Albin*, 104 N.W.2d 32 (Minn. 1960). *Cf.* *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (finding that imposition of public access constituted a taking). *Kaiser* is further support for the proposition that private investment in ecology-altering projects can give rise to protected property rights. In *Kaiser*, property owners, with the consent of the government, dredged at their own expense a previously non-navigable shallow lagoon. The United States contended that the consequent navigable marina was subject to a navigational servitude, and that the property owners did not have the right to deny the public a right of access. *Id.* at 179-80.

As noted in *supra* note 10, the argument that agricultural property owners contributed significantly to the capital costs of the major reclamation and flood control project in South Florida appears to be a weak one. Moreover, it is important to distinguish between payment of the capital costs of a reclamation or flood control project, through flood control district special assessments or otherwise, which under the *Lupkes* case could give rise to a protected property interest in the continued existence of the project, and payment, through assessments or other taxes, of periodic maintenance costs of such projects. The latter is presumably recouped in ongoing benefits, and does not in the same sense as the *Lupkes* case's reasoning give rise to any expectation of permanency.

89. 308 U.S. 256 (1939).

90. Ch. 569, §§ 1-12, 14, 45 Stat. 534 (1928) (current version at 33 U.S.C. §§ 702a-m (1988)).

91. *Sponebarger*, 308 U.S. at 261.

92. *Id.* at 262-63.

93. *Id.* at 257.

94. *Id.* at 265.

emphasis on the condition of the plaintiff's land prior to the institution of any flood control measures:

This record amply supports the District Court's finding that the program of improvement under the 1928 Act had not increased the immemorial danger of unpredictable major floods to which respondent's land had always been subject. Therefore, to hold the Government responsible for such floods would be to say that the Fifth Amendment requires the Government to pay a landowner for damages which may result from conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no work of any kind. So to hold would far exceed even the "extremist" conception of a "taking" by flooding within the meaning of that Amendment. For the Government would thereby be required to compensate a private property owner for flood damages which it in no way caused.<sup>95</sup>

In focusing on the condition of the plaintiff's property before flood control, the Court was apparently unimpressed by the significance of the plaintiff's more time-limited argument that the 1928 flood control provisions would more adversely impact her property than the previous uninterrupted levee system.

In *Kirch v. United States*,<sup>96</sup> another imperiled property owner in the Mississippi flood plain brought suit against the federal government. The plaintiff had purchased a tract of land in 1918 on the banks of the Mississippi River, in an area that had been subject to continual encroachment of the river due to erosion.<sup>97</sup> In 1925, the government built a levee, set back from the original 1879 levee, which protected the plaintiff's property from flooding.<sup>98</sup> Pursuant to a new flood control effort in 1930, portions of the 1925 levee were strengthened and enlarged.<sup>99</sup> However, in the vicinity of the plaintiff's land the 1925 levee was left untouched and a newer and larger set-back levee was constructed well behind the older levee. The construction left a pocket of 153 acres of the plaintiff's land between the old and the new levees.<sup>100</sup> To the north and south of the plaintiff's land, the new levee connected with the reconstructed 1925 levee.<sup>101</sup> Upon construction of

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95. *Id.* at 265 (footnote omitted).

96. 91 Ct. Cl. 196 (1940).

97. *Id.* at 198.

98. *Id.*

99. *Id.* at 199.

100. *Id.* at 198.

101. *Id.* at 199.



the new levee, the old levee "was left to the destructive effect of natural forces."<sup>102</sup>

In 1937, the old levee caved in, causing twelve to fourteen feet of flooding. Although the waters receded, recurrent flooding thereafter rendered the success of the plaintiff's farming unpredictable, forcing the plaintiff to move his residence off the land.<sup>103</sup> Despite the substantial impact the new flood control strategy had on the value of the plaintiff's property, both before<sup>104</sup> and after the flooding, the Court of Claims rejected the plaintiff's Fifth Amendment claim:

[T]he flood control act did not, in itself, assume responsibility to an owner of riparian land for damages that might be consequential or that might arise as an incident to the construction of levees along the Mississippi River or the construction of set-back levees. Nor did the act assume responsibility for damages to private property which might, as in the case at bar, result from the failure of the Government to construct and maintain a riverside levee of sufficient grade and strength as would insure an owner, whose land lay immediately behind such old levee, against the natural consequences of encroachment of flood waters of a river upon that levee. Plaintiff's claim for a taking can have its foundation only upon the assertion that it was the duty of the Government to provide complete protection to lands situated behind the old river-front levee. The Government is under no legal obligation to construct and maintain levees that will protect every riparian owner. <sup>105</sup>

Even where property owners are specially assessed for a drainage project, they have no entitlement to prevent government from restoring water levels to that originally contemplated by the project. In another Minnesota case, *In re Lake Elysian High Water Level*,<sup>106</sup> a county constructed a drainage ditch to enlarge the outlet of Lake Elysian, a "meandered body of clean and clear water with well defined banks, containing fish of many kinds, with a large watershed estimated at some 50 square miles."<sup>107</sup> The purpose of the project was to allow more effective drainage of the surrounding slough lands and

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102. *Id.* at 199-200.

103. *Id.* at 200.

104. *Id.*

As long as the old levee was being maintained, . . . the Kirch Tract was fairly worth \$100 an acre, the value prevailing for alluvial lands in the vicinity. As soon as it became apparent that . . . the set-back levee would in effect be substituted for the old levee, the Kirch Tract became valueless both for loan purposes and for sale.

*Id.* at 201.

105. *Id.* (relying on *United States v. Sponenbarger*, 308 U.S. 256 (1939)).

106. 293 N.W. 140 (Minn. 1940).

107. *Id.*

to control flooding of the low lands surrounding the lake's shore. Pursuant to Minnesota law, the plaintiff property owners were assessed for the benefits of the project.<sup>108</sup>

During the course of the ensuing thirty-three years, natural forces of erosion deepened and enlarged the humanly engineered ditch, resulting in more drainage of the lake than originally contemplated, and a lowering of the mean high water level by three and one-half feet. This lowering of the water level caused the lake to become polluted, giving the lake a yellow, muddy color, rendering it unsuitable for swimming, and damaging fish life.<sup>109</sup>

In what is perhaps the earliest instance of reversionary engineering in the case law, the Minnesota Commissioner of Conservation decided that "a restoration of the lake level to what it was prior to the construction of the ditch will prove of public benefit by restoring its recreational facilities."<sup>110</sup> The Commissioner undertook to accomplish this restoration by construction of a dam at the lake outlet, recognizing that:

restoration of the water level, such as ordered, would cause substantial damage to lands 'adjacent to and in the vicinity' of the lake. Their use 'will be substantially depreciated'; that the owner of a farm who has at an expense of approximately \$5000 laid tile into the lake upon the assumption that the lake as thus lowered would remain will suffer substantially a total loss to his tiling system and to the property served by it.<sup>111</sup>

Although the affected property owners did not assert a constitutional claim, they did contest, in administrative proceedings, the authority of the Commissioner to restore the lake to its original water level.<sup>112</sup> Relying on *Lupkes*, the district court, on appeal from the administrative proceedings, agreed with the property owners.<sup>113</sup> The Minnesota Supreme Court reversed, finding that the original drainage project did not contemplate a permanent lowering of the lake, and that the property owners were not entitled, by their assessment and the *Lupkes* rule, to any added entitlements beyond the flood control benefits for which they were assessed.<sup>114</sup>

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108. *Id.*

109. *Id.* at 141-42.

110. *Id.* at 142.

111. *Id.* (paraphrasing Commissioner's findings).

112. *Id.*

113. *Id.* at 143.

114. *Id.* "No riparian owner has a right to complain of improvements by the public whereby the water is maintained in the condition which nature has given it . . . The law

The Minnesota Supreme Court also disagreed with the property owners' contention that the long period of time in which their lakeside property had remained in a drained condition acted to foreclose the government from the option of restoring original water levels.<sup>115</sup> The court stated that it was not "persuaded that the long delay occurring between the establishment of the ditch and the present proceedings in any way tends to diminish the state's right to proceed as here. As against the sovereign, absent statutory limitation, no prescriptive rights can be obtained by anyone."<sup>116</sup>

Similarly, in *Drainage Dist. No. 2 v. City of Everett*,<sup>117</sup> the Supreme Court of Washington held that a public owner of a long-standing dam had the prerogative to remove the dam, despite the objections of downstream owners.<sup>118</sup> In *City of Everett*, the city was the successor in interest to a water company, which had acquired the right in 1901 to "perpetually divert and impound" the waters of Woods Creek, a natural channel with a daily water flow of two and one-half to four million gallons.<sup>119</sup> The water company constructed two dams and reservoirs, impounding virtually all of the water in the creek. Landowners subsequently filled in the creek bed for agricultural use during the ensuing quarter century. Landowners also formed a county drainage district and constructed various drainage improvements, none of which contemplated, or were prepared to cope with, any restoration of water flows of the original creek.<sup>120</sup>

In 1931, the city decided to abandon the water system.<sup>121</sup> The water in the reservoirs was allowed to gradually escape and flow down the natural bed of the stream. The drainage district brought suit for damages sustained by sedimentation of its drainage ditches, and sought to enjoin the city from permitting the water to flow through the original channel of Woods Creek.<sup>122</sup> The district argued that because the city diverted and impounded water for thirty years, it constituted a permanent change, and that the district was entitled to a continuance of the artificial condition.

The Washington Supreme Court rejected this argument, reasoning that the right to maintain the dam, "like other rights, could be

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justified the maintenance of the lake at its natural and usual height and level." *Id.* (quoting *Stenberg v. County of Blue Earth*, 127 N.W. 496, 497 (Minn. 1910)).

115. *Id.* at 144.

116. *Id.*

117. 18 P.2d 53 (Wash. 1933).

118. *Id.* at 55.

119. *Id.* at 54.

120. *Id.*

121. *Id.*

122. *Id.* at 55.

abandoned," and that the city could not be compelled to maintain the dam for the benefit of the lower landowners:

The acquisition of the right to divert the waters and to maintain a reservoir for impounding those waters, though that artificial condition was maintained by appellant for the prescriptive period, carried with it no reciprocal right to have its maintenance continued for the benefit of the servient estate . . . "An artificial condition of a water course may be established which, in favor of its owner, may be as permanent as though the condition was natural, and that the acquisition of a right to maintain this condition carried with it no reciprocal right to have it maintained." 123

Lastly, one significant case affirms the ability of a federal agency to abandon, mid-way, a reclamation dredge and fill project over the objection of property owners, where newly arisen environmental concerns override the public interest in land reclamation. In *Creppel v. U.S. Army Corps of Engineers*,<sup>124</sup> Congress passed the Federal Water Pollution Control Act Amendments of 1972,<sup>125</sup> while the Army Corps of Engineers (Corps) was engaged in Phase II construction of a flood control and land reclamation project involving the planned drainage of a 3,700 acre tract of wetlands in the Mississippi bayou.<sup>126</sup> The Act mandated Environmental Protection Agency (EPA) permits for the

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123. *Id.* (quoting HENRY P. FARNHAM, WATERS & WATER RIGHTS § 827, at 2422 (date omitted)).

An annotation of the *City of Everett* decision reviews a collection of 19th and early 20th century cases on the right of riparian landowners to continuance of artificial conditions established above or below their land. P.H. Vartanian, Annotation, *Right of Riparian Landowners to Continuance of Artificial Conditions Established Above or Below Their Land*, 88 A.L.R. 130 (1934). Decisions in California, Connecticut, Massachusetts, Missouri, North Carolina, Ohio, and Washington supported the *City of Everett* court's conclusion that there is no reciprocal right to have an artificial condition maintained. Michigan and Minnesota had conflicting decisions, with the later decisions supporting the *City of Everett* analysis. Courts in Delaware, Iowa, Maine, New Hampshire, New York, South Carolina and Wisconsin have recognized such a reciprocal right. The decisions in the latter states turned either on a theory of prescriptive right by adverse use (e.g., *Smith v. Youmans*, 70 N.W. 1115 (Wis. 1897)), or on a theory of equitable estoppel (e.g., *Shephardson v. Perkins*, 58 N.H. 354 (1897)). The annotation points out that the prescriptive right theory "is severely criticized by some text-writers as having no legal foundation, on the ground that in such cases the element of adverse use, so essential to acquisition of rights by prescription or presumptive grant, is lacking." 88 A.L.R. at 132, (citing 3 FARNHAM, *supra*). This theory would seem particularly inappropriate in the Everglades context, where the drainage and reclamation efforts could hardly be characterized as "adverse" to the agricultural landowners. With respect to the estoppel theory, while it may be applicable as between rights of private landowners in the cases collected in the A.L.R. annotation, as discussed *infra*, part V, it is much less likely to be applied when the *government* seeks to remove an artificial condition.

124. 500 F. Supp. 1108 (E.D. La. 1980), *rev'd on other grounds*, 670 F.2d 564 (5th Cir. 1982).

125. Pub. L. No. 92-240, 86 Stat. 47 (1972) (codified as amended at 33 U.S.C. § 1251 (1988)).

126. 500 F. Supp. at 1113.

discharge of dredge or fill material into navigable waterways.<sup>127</sup> The Corps delayed the project pending EPA review. Subsequently, the EPA review found "that the permanent blockage of the bayous and the drainage of the interior would result in the irretrievable loss of valuable wetlands, having an unacceptable adverse impact on wildlife and recreational areas and would not be in the public interest."<sup>128</sup>

In response to the EPA's objections, the Corps decided to modify the project to eliminate construction of the pumping station which would drain the plaintiffs' lands. The Corps also ordered that certain "earthen dikes . . . be removed and replaced with movable floodgates to restore and maintain normal water flows."<sup>129</sup> The landowners whose land would have been drained brought an action seeking to compel completion of the project as originally planned on the basis that the Corps was bound by its original determination that the benefits of the project outweighed its costs.<sup>130</sup>

In dismissing the suit, the district court noted the Corps had an "affirmative duty," not only under the newly amended Federal Water Pollution Control Act, but also under the Flood Control Act and the Rivers and Harbors Act,<sup>131</sup> to effect environmental preservation when authorizing a project involving dredging and filling in navigable waters.<sup>132</sup> The court reviewed detailed findings by the EPA in a 1976 study which underscored the importance of the wetlands for maintenance of a salinity gradient necessary to "the continued production of estuarine dependent species such as the commercial fish and shellfish," a gradient which would be disrupted by the proposed pumping station.<sup>133</sup> The court also cited the importance of the wetlands tract for supporting "flora and fauna which are of direct value to man for recreation, fishing, aesthetics and timber production."<sup>134</sup>

The district court concluded that "the Corps has the authority to modify a project as it progresses and it is not an abuse of discretion to alter the original project where flood control purposes continue to be

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127. *Id.*

128. *Id.*

129. *Id.* at 1114.

130. *Id.* at 1116.

131. *Id.* at 1116-17 *citing* Flood Control Act, Pub. L. No. 93-251, § 73, 88 Stat. 32 (1974) (current version at 33 U.S.C. § 701b-11 (1988)); Rivers and Harbors Act of 1849, ch. 425, § 11, 30 Stat. 1151 (1899) (current version at 33 U.S.C. § 404 (1988)).

132. *Id.* at 1117. The court's decision was despite the fact that the legislation postdated the project's origination. "We cannot . . . restrict our review of the agency's decision to the terms of the Project's costs and benefits at its inception . . . without taking into account the Congressional policies expressed in subsequent environmental legislation." *Id.*

133. *Id.* at 1118-19.

134. *Id.* at 1119.

served."<sup>135</sup> The plaintiffs argued that the project as altered would not provide any flood control benefits, because without the pumping station, flood control levees would serve under certain conditions to impound, rather than to protect against, encroaching high waters. The court found that the Corps had not abused its discretion in determining that the risks from the impoundment of some waters did not outweigh the harm from destruction of the wetlands, and that there was still some hurricane and flood protection from the project as modified.<sup>136</sup>

Lastly, the district court easily dismissed the plaintiffs' constitutional claim that their property was taken without just compensation because they would be unable to develop it for industrial and residential purposes.<sup>137</sup> On appeal, the Fifth Circuit Court of Appeals generally affirmed the district court's analysis, finding that "[t]he hand that approves projects initially has the implied power to change their course,"<sup>138</sup> but reversed and remanded on the narrow issue of whether the Corps had fulfilled certain statutory mandates regarding assurance of local cooperation with the project as revised.<sup>139</sup>

### B. Florida Cases

The issue of the constitutional implications of reversionary engineering has been raised in two recent Florida cases. In the first

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135. *Id.* at 1118 (relying on *United States v. Sponenbarger*, 308 U.S. 256 (1939); *United States v. 2,606.84 Acres of Land*, 432 F.2d 1286 (5th Cir. 1970).

136. *Creppel v. U.S. Army Corps of Engineers*, 500 F. Supp. 1108, 1119 (E.D. La. 1980). "[T]he [Corps'] order merely reflects a decision . . . to modify the Project so as to bring it into conformity with the existing environmental regulations. This action did not result in the abandonment of all flood control benefits but merely resulted in the elimination of the land reclamation aspects of the Project." *Id.*

137. *Id.*

It is well established that where the United States exercises its superior right, pursuant to its power under the commerce clause, which results in the frustration of an individual property owner's business opportunity or enterprise, such action does not constitute a taking of property within the meaning of the Fifth Amendment.

*Id.* *But cf.* *Creppel v. United States*, 30 Fed. Cl. 323 (1994) (raising claim for compensation of a taking under the Fifth Amendment pursuant to the Tucker Act where court did not reach substance of the claim but rather found it to be barred by the statute of limitations).

138. *Creppel v. U.S. Army Corps of Engineers*, 670 F.2d 564, 572 (5th Cir. 1982).

139. In subsequent proceedings, the district court granted summary judgment sustaining the EPA's decision to require modification of the project, and held that a proceeding under the Tucker Act in the Federal Claims Court was the plaintiffs' sole source of relief for a takings claim. *Creppel v. U.S. Army Corps of Engineers*, 19 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,134 (E.D. La. June 30, 1988). See *supra* note 62 and accompanying text.

case, *Bensch v. Metropolitan Dade County*,<sup>140</sup> the District Court for the Southern District of Florida concluded, consistent with the authorities discussed herein, that a requisite of a successful takings claim with respect to modification of a drainage/flood control project is a showing that the modification did more than eliminate drainage benefits, and actually increased flooding over pre-project conditions.<sup>141</sup>

In *Bensch*, landowners in an eight and one-half square mile area in the East Everglades brought suit against the South Florida Water Management District (SFWMD), contending that emergency relief measures taken by SFWMD to restore water flows to the Everglades National Park acted to artificially elevate their ground water levels. The plaintiffs asserted this subjected them to increased risks of flooding, and actual flood damage.<sup>142</sup> The plaintiffs further contended that these effects had "driven [their] land values toward zero; prevented them from obtaining financing or from selling their property; and damaged their roads, personal property, trees and other land improvements."<sup>143</sup>

SFWMD moved to dismiss, asserting in part that the plaintiffs failed to allege that the flooding was caused by affirmative government action, rather than natural causes.<sup>144</sup> SFWMD relied substantially upon an analysis of *Sponenbarger* and *Creppel*.<sup>145</sup> The plaintiffs did not dispute the application of these cases, nor did they dispute that they had to prove SFWMD's actions had increased flooding over pre-drainage conditions. The plaintiffs argued that the complaint was broad enough to encompass such a claim, and they were "willing to prove it."<sup>146</sup> The district court, after a discussion of both *Sponenbarger* and *Creppel*, agreed with SFWMD's contention that "[i]t was a logical

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140. 798 F. Supp. 678 (S.D. Fla. 1992), *dismissed*, 855 F. Supp. 351 (1994).

141. *Id.* at 683.

142. *Id.* at 684. The plaintiffs had earlier raised similar claims in a state action. That action was dismissed on the pleadings for failure to allege that the flooding experienced was sufficient to constitute "substantial ouster," an infirmity which the plaintiffs corrected in their federal pleading. *Bensch v. Metropolitan Dade County*, 541 So. 2d 1329, 1331 (Fla. 3d DCA 1989); see *Bensch*, 798 F. Supp. at 684.

143. 798 F. Supp. at 684 (quoting from amended complaint).

144. *Id.* at 683 ("A reading of the complaint shows that the plaintiffs are actually aggrieved as a result of a withdrawal of and/or failure to provide flood protection benefits, which, if true, is a discretionary government decision, and not a taking of private property.") Finding the standard of proof had been met, the court rejected SFWMD's motion to dismiss the takings claim with the stipulation that plaintiffs had 30 days to amend the complaint to correct any deficiencies mentioned. *Id.* at 684.

145. *Id.*

146. Plaintiffs' Reply to SFWMD's Motion to Dismiss at 3, *Bensch v. Metropolitan Dade County*, 798 F. Supp. 678 (S.D. Fla. 1992) (No. 90-252-CIV-HOEVELER), *dismissed*, 855 F. Supp. 351 (1994).

extension of *Sponenbarger* and *Creppel* to conclude that no taking had occurred where the government had modified a flood control project to eliminate drainage benefits, which it had no duty to provide in the first instance."<sup>147</sup> Since the plaintiffs appeared to have alleged flooding in excess of pre-drainage conditions, the court sustained the sufficiency of the allegations of the complaint in this respect.<sup>148</sup>

In the second Florida case, the constitutional issue was raised but not addressed substantively. In *South Dade Land Corp. v. Sullivan*,<sup>149</sup> property owners and farmers in South Dade's "Frog Pond" area asserted the Corps and SFWMD intentionally failed to prevent flooding from the Everglades National Park into agricultural areas to the east, violating various statutory duties, and amounting to an uncompensated taking.<sup>150</sup> The plaintiffs later voluntarily dismissed the case.<sup>151</sup>

Lastly, though it is a regulatory rather than a physical takings case, the leading Florida decision of *Graham v. Estuary Properties, Inc.*,<sup>152</sup> is likely to figure prominently in the judicial evaluation of a reversionary engineering taking case. In *Estuary Properties*, the respondent Estuary Properties owned 6,500 acres on the southwest coast of Florida, only 526 of which were dry enough to be classified as nonwetlands.<sup>153</sup> Estuary sought approval of a development plan which would dredge and fill thousands of acres, destroying 1,800 acres of black mangroves and constructing 26,500 dwelling units, plus eleven commercial centers and various recreational facilities.<sup>154</sup> The regional planning council denied the application, finding that the proposed development would increase the risk of pollution to the surrounding bays, and thus adversely affect the commercial fishing, shellfishing, and sport fishing industries.<sup>155</sup> The council indicated that it would consider an application to construct fewer than half of the proposed dwelling

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147. *Bensch*, 798 F. Supp. at 683.

148. *Id.*

149. 853 F. Supp. 404 (S.D. Fla. 1993).

150. *Id.* at 405-06. On the plaintiffs' motion for a temporary restraining order, the court found a lack of probability of success on the merits of the constitutional claim on procedural grounds (exclusive remedy was Tucker Act claim for monetary compensation assertable only in the claims court). *Id.* at 408-10.

151. Order Granting Motion to Dismiss, *South Dade Land Corp. v. Sullivan*, 853 F. Supp. 404 (S.D. Fla. 1993) (No. 93-2210) (granting the plaintiffs' Notice of Voluntary Dismissal file Apr. 18 1994).

152. 399 So. 2d 1374, *cert. denied*, 454 U.S. 1083 (1982).

153. *Id.* at 1376.

154. *Id.*

155. *Id.* at 1376-77.



units, limited to the upland acreage, leaving the submerged mangrove forests undeveloped.<sup>156</sup>

The First District Court of Appeals held that such a substantial limitation on the use of Estuary's property constituted a compensable taking.<sup>157</sup> The Florida Supreme Court reversed, finding the proposed restrictions on Estuary's use of its property a valid exercise of the police power, which did not totally deprive Estuary of any beneficial use of the property.<sup>158</sup> The court noted that the land in question was close to navigable waters held in trust by the state for the benefit of the public.<sup>159</sup> The court concluded that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injuries [sic] the rights of others."<sup>160</sup> The court suggested that the proposed development presented "exceptional circumstances because of the interrelationship of the wetlands, swamps, and natural environment to the purity of the water and natural resources such as fishing."<sup>161</sup>

Similarly, the interrelationship of the wetlands, swamps, and natural environment to the purity of the water and natural resources such as fishing forms the nexus of the ecological argument for reversionary engineering projects in the Florida Everglades.<sup>162</sup> The Florida Supreme Court's recognition, in *Estuary Properties*, that this interrelationship constituted "exceptional circumstances" under which a taking claim would be subject to particularly critical scrutiny, certainly would carry over into the reversionary engineering context. Likewise, if a property owner has "no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state[.]"<sup>163</sup> it is not an unreasonable further step to conclude, following *Lake Elysian, City of Everett*, and *Creppel*, that the property owner has no absolute right to prevent the government from altering flood control systems to restore the essential natural character of the land.

### C. Florida Commentary

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156. *Id.* at 1377.

157. *Estuary Properties, Inc. v. Askew*, 381 So. 2d 1126, 1140 (Fla. 1st DCA 1979).

158. *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382, *cert. denied*, 454 U.S. 1083 (1982).

159. *Id.* (citing *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972)).

160. 399 So. 2d at 1382 (quoting 201 N.W.2d at 768).

161. 399 So. 2d at 1382 (citing 201 N.W.2d at 761).

162. *See infra* note 170.

163. 399 So. 2d at 1382 (quoting 201 N.W.2d at 768).

Without addressing the particular question of a government's right to alter a flood control project which diminishes a property owners' protection, the authors of the authoritative treatise on Florida water law address the converse problem of whether a landowner who has been receiving water from a man-made channel can claim the right to the continuation of the flow on the basis of estoppel.<sup>164</sup> Maloney cites Weil for the proposition that the landowner has no such entitlement.<sup>165</sup>

In a more recent analysis of western water rights law and this converse problem of constitutional entitlement to diversion of waters onto, instead of away from, private property, Joseph Sax reaches a similar conclusion that there should be no Fifth Amendment takings consequences to government diminishment of prior water diversion to address environmental concerns.<sup>166</sup> If investment in reliance on the continued artificial diversion *to* property does not create an entitlement to continued diversion, one might query why investment in reliance on the continued artificial diversion of water *away* from property should create such a right.

#### D. Summary

The *Bensch* federal district court decision did not afford a full testing of the issues of the constitutional implications of reversionary engineering because the plaintiffs elected not to challenge SFWMD's analysis of those issues. The court's approval of that analysis, based on *Creppel* and *Sponenbarger*, appears well founded. It is clearly an expansion of the *Creppel* analysis to construe reversionary engineering as a "change of course" of a flood control and reclamation project undertaken decades ago. The critical factual distinction on which property owner interests are likely to rely is the fact that in *Creppel* no land had yet been re-claimed, and reasonable "investment-backed expectations" in an engineering plan on the drawing board are less well-founded than expectations based on projects actually completed and functioning.<sup>167</sup> *Lake Elysian* and *City of Everett* suggest, however,

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164. FRANK E. MALONEY ET AL., WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE 252-57 (1968).

165. *Id.* at 255-56 (citing 1 SAMUEL C. WEIL, WATER RIGHTS IN THE WESTERN STATES § 57 (3d ed. 1911)).

166. JOSEPH L. SAX, THE CONSTITUTION, PROPERTY RIGHTS AND THE FUTURE OF WATER LAW, at 12-13, 15-19 (Western Water Policy Project Discussion Series No. 2, Natural Resources Law Center Discussion Paper Series, 1990).

167. As the Supreme Court observed in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), factors that have "particular significance" in takings analyses include "the economic impact of the regulation and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . ." *Id.* at 124.

that passage of time is no bar to the government's efforts to restore water levels to their natural condition, and that even possession and use of drained land may not, under a state's common law, create a reasonable investment- backed expectation of permanent use.

In this respect the *Kirch* case is also directly supportive of the case for the entitlement to reversionary engineering. In *Kirch*, the land-owner had the protection of the 1925 levee for five years before government plans sought to substitute a set-back levee as the primary flood control levee, and for a total of 12 years before the 1925 levee collapsed through maintenance neglect and natural forces.<sup>168</sup> One might argue that in *Kirch* the decision to move the levee back and to eliminate the protection of 153 acres of plaintiff's land was practically compelled by the ineluctable forces of the encroaching river. However, the increasing pathology of the Everglades ecosystem, as a consequence of earlier drainage and flood control systems, like the yellow, muddy, unswimmable Lake Elysian, is an analogous imperative natural force compelling rethinking and readjustment of flood control systems.

At a minimum, it is clear from the cases discussed in the preceding two sections that courts have paid careful attention to the property's original, natural condition in evaluating flood takings claims and their corresponding causation issues. The courts have given deference to government agencies who alter public works projects in response to concerns regarding natural conditions. These facts, both uniquely relevant to an analysis of flood by reversionary engineering scenarios, suggest that courts should give considerable pause before applying a categorical physical takings rule in this context. They also speak against applying the second categorical takings rule identified in *Lucas*, where a regulation "denies all economically beneficial or productive use of land."<sup>169</sup>

Analysis of reversionary engineering consistent with the foregoing cases would suggest that it is the natural hydrology of the Everglades region, and not artificial manipulations of that hydrology by government, which might preclude agricultural or other "productive" uses of lands in the region.<sup>170</sup> Indeed, the foregoing analysis of

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The concept of "reasonable investment-backed expectations" refers to the value of property derived from the purchaser's intended use of the land; e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2903 (1992); *Penn Central*, 438 U.S. at 105.

168. *Kirch v. United States*, 91 Ct. Cl. 196, 198 (1940).

169. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).

170. On the subject of "productive" use of land, while perhaps not wholly consistent with Justice Scalia's 19th century-based view of the concept ("[For] what is the land but the profits thereof[?]," *Id.* at 2894, quoting 1 EDWARD COKE, INSTITUTES ch. 1, §1 (1st Am. ed. 1812); "our

"background principles" of state and federal law suggests that where government activity is limited to the dismantling of reclamation and flood control structures constructed at government expense, or the management of those structures to more closely approximate natural hydrologic conditions, there has been in effect no taking, and the Fifth Amendment analysis should stop there.

## V. THE QUASI-CONTRACT AND ESTOPPEL ARGUMENTS

An argument closely aligned to the concept of "investment-backed expectations" is that the government has represented the permanence of the flood control structures or systems, and that landowners detrimentally made substantial investments in reliance on such representations.<sup>171</sup> A review of the Federal statutes authorizing the reclamation and flood control projects in South Florida discloses little support for the contention that those projects were represented to be permanent and not subject to discretionary modification, particularly modification aimed at ameliorating environmental harm.<sup>172</sup>

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prior takings cases evince an abiding concern for the productive use of, and economic investment in, land . . .;" *Id.* at 2895 n.8), it is disputed by few ecologists that from a whole ecosystem point of view reconversion of agricultural land in South Florida to wetlands will *enhance* the long term economically beneficial and productive use of the land. The major economic commodities which are most imperiled by current agricultural uses of the land, and which had been historically enhanced and protected by the Everglades wetlands, are freshwater purity and commercial fisheries in Florida Bay. See DAVIS & OGDEN, *supra* note 5, at 779-89; SCIENCE SUB-GROUP, *supra* note 6, at 3-15.

171. *Cf.* Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) ("[W]hile the consent of individual officials representing the United States cannot 'estop' the United States . . . it can lead to the fruition of a number of expectancies that, if sufficiently important, the Government must condemn and pay for . . .").

172. See e.g., Flood Control Act of 1954, Pub. L. No. 780, 68 Stat. 1257 (1954) (codified at 33 U.S.C. §§ 701-709b (1988)). This statute authorizes a comprehensive plan for flood control in Central and Southern Florida, "with such modifications thereof as the Congress may hereafter authorize or, as in the discretion of the Chief of Engineers may be advisable . . ." See also the Comprehensive Report by the Chief Engineers on Central and Southern Florida for Flood Control and Other Purposes, H.R. DOC. NO. 643, 80th Cong., 2d Sess. 4 (1948), *incorporated in* The Flood Control Act of 1948, Pub. L. No. 80-858, 62 Stat. 1176 (1948) (codified at 33 U.S.C. §§ 701-709b (1988)), providing that "[t]he plan of improvement has also been developed in full recognition of the importance of the Everglades National Park which as been established recently at the southwestern tip of Florida peninsula." The report also found that:

Insofar as the Everglades National Park is concerned, the main points for consideration are the maintenance of an adequate level of fresh ground water to prevent saltwater encroachment which would change the environment for wildlife, as well as the vegetation; and the critical need for attaining a reasonably large supply of fresh water so that disastrous fires may be prevented . . .

*Id.* at 1. The Report of the Chief of Engineers on Water Resources for Central and Southern Florida, H.R. DOC. NO. 369, 90th Cong., 2d Sess. 1-2 (1968), *incorporated in* The Flood Control Act of 1968, Pub. L. No. 90-483, 82 Stat. 731 (1968) (codified at 33 U.S.C. §§ 701-709b (1988))

Even without such statutorily authorized modification provisions, the proposition that contractual receipt of government benefits may not be legislatively modified has been rejected in an analogous western water rights case. In *Peterson v. United States Department of the Interior*,<sup>173</sup> the court addressed a claim by western water districts that the Reclamation Reform Act of 1982<sup>174</sup> constituted a Fifth Amendment taking. The Reclamation Act legislated a modification of existing contracts for the provision of irrigation waters, reducing the size of leased tracts eligible for subsidized water rates. Although the court primarily rejected the claim because the districts had not presented a compelling case for their interpretation of the government's contract, the court also suggested that even an undisputed express contractual commitment for the provision of water would generally be subject to sovereign legislative modification.<sup>175</sup>

With respect to the weight to be given to investments made by landowners in contemplation of indefinite continuation of flood protection, the Ninth Circuit in *Peterson* was not impressed by claims by the Water District that they, and the property owners whom they served, had made substantial investments based on the expectation of unlimited provision of subsidized water to leased lands:

The Water Districts offer no authority for the proposition that a constitutionally protected property interest can be spun out of the yarn of investment-backed expectations . . . Whether a "taking" has

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provides that "preservation of Everglades National Park is a project purpose and that available water should be provided on an equitable basis with other users . . ." In addition, S. REP. NO. 895, 91st Cong., 2d Sess. 20 (1970, on Pub. L. No. 91-282, 84 Stat. 310 (1970)), provides:

While there have been special studies of the ecology of the park, and other studies are continuing, our knowledge of this unique area and its needs will continue to develop . . . the Engineers will review the water resource needs in central and southern Florida by 1980, prior to scheduled completion of the project in 1984. The review will "determine whether further modifications of the project are warranted, and give further assurances of maintaining the essential water supply to insure the protection of the Park's ecosystem."

*Id.* (quoting S. REP. NO. 528, 91st Cong.).

173. 899 F.2d 799 (9th Cir. 1990).

174. 43 U.S.C. § 373 (1982).

175. 899 F.2d at 807 (reasoning that three principles should be considered when interpreting federal government contracts: (1) the sovereign's contractual arrangements are subject to legislation; (2) government contracts should be construed to avoid foreclosing the exercise of sovereign authority; and (3) interpretation of ambiguous terms can only be made in light of policies underlying the legislation). See also *Pankey Land & Cattle Co. v. Hardin*, 427 F.2d 43 (10th Cir. 1970); *Osborne v. United States*, 145 F.2d 892, 896 (9th Cir. 1944) (both holding termination of grazing rights on federal lands not a taking); *Organized Fishermen of Florida v. Watt*, 590 F. Supp. 805, 815-16 (1984) (cancellation of commercial fishing permits in the Everglades National Park not a taking).

occurred is the second step of the inquiry. Here, . . . the Water Districts have failed to survive the first step, which is establishing that a property right exists. Thus, the Water Districts' reliance on *Ruckelshaus* is misplaced, leaving them with no support for the curious proposition that investment-backed expectations can give rise to a constitutionally protected property interest.<sup>176</sup>

With respect to the argument that action or inaction by agencies or officials may equitably estop government from withdrawing benefits, under federal law, the general rule is that equitable estoppel is not applicable to the government acting in its sovereign capacity. The only exception to this rule, recognized in the Ninth Circuit, but not embraced as a basis for estoppel by the United States Supreme Court, is in instances of "affirmative misconduct" by government officials.<sup>177</sup> In *United States v. Angle*,<sup>178</sup> another western water rights case, the court held that the historic provision of water to ranchers in amounts in excess of that to which they were legally entitled did not constitute "affirmative misconduct" under this rule.<sup>179</sup> In *Office of Personnel Management v. Richmond*,<sup>180</sup> the Supreme Court held there was no estoppel against the government by claimants seeking public funds. Though the Court declined to state that invoking estoppel against the government would never be possible, it suggested that the occasions for estoppel would be highly exceptional.<sup>181</sup>

The Florida state courts have been somewhat more hospitable to the concept of equitable estoppel against the government.<sup>182</sup> Florida

176. 899 F.2d at 813. The court rejected the Water District's reliance on a 1984 Supreme Court case, finding the factual situation to be a misapplication. *Id.* (explaining holding in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) by stating that investment-backed expectations are not a property interest by themselves, but merely constitute a factor in determining whether a regulation goes so far as to constitute a taking).

177. *See United States v. Hatcher*, 922 F.2d 1402, 1409-11 (9th Cir. 1991); *Peterson v. United States Dept. of the Interior*, 899 F.2d 799, 811 n.17 (9th Cir. 1990); *United States v. Angle*, 760 F. Supp. 1366, 1377 (E.D. Cal. 1991).

178. 760 F. Supp. 1366 (E.D. Cal. 1991).

179. *Id.* at 1377.

180. 496 U.S. 414, 434 (1990).

181. *Id.* at 422 (noting that the Court has reversed every finding of estoppel against the government that it has ever reviewed); *accord Feldman v. Commissioner of Internal Revenue*, 20 F.3d 1128, 1134 (11th Cir. 1994). *See also Organized Fisherman of Florida v. Andrus*, 488 F. Supp. 1351, 1356 (S.D. Fla. 1980); *Buccaneer Point Estates, Inc. v. United States*, 12 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,732 (S.D. Fla. Feb. 25, 1982).

182. *See Council Bros., Inc. v. City of Tallahassee*, 634 So. 2d 264, 266 (Fla. 1st DCA 1994). The *Council* court noted that "equitable estoppel will apply against a governmental entity 'only in rare instances and under exceptional circumstances[.]'" *Id.* (citing *North America Co. v. Green*, 120 So. 2d 603, 610 (Fla. 1959)), but that "[t]he reasonable expectation of every citizen 'that he will be dealt with fairly by his government' can form the basis for application of equitable estoppel . . ." *Id.* (citing *Hollywood Beach Hotel Co. v. City of Hollywood* 329 So. 2d 10, 18 (Fla. 1976)).

law generally recognizes that a municipality may be equitably estopped from exercising its zoning power when a property owner, relying in good faith upon an act or omission of the government, has made a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights the owner acquired.<sup>183</sup> The doctrine is much less frequently applied outside of the zoning context in Florida.<sup>184</sup> The applicability of equitable estoppel in the zoning context has been limited in some lower court decisions by the "new peril" exception as when:

[T]he municipality can show that some new peril to the health, safety, morals, or general welfare of the municipality has arisen between the granting of the building permit and the subsequent change of zoning to the detriment of the landowner, the change of zoning may effectively revoke a building permit.<sup>185</sup>

In *Macnamara v. Kissimmee River Valley Sportsman's Assoc.*,<sup>186</sup> the Florida Second District Court of Appeals rejected an estoppel argument quite like one which might be made by landowners in a reversionary engineering context.<sup>187</sup> In that case, Macnamara was the owner of various tracts of land bordering Lake Hatchineha at the entrance to the Kissimmee River.<sup>188</sup> During the Central and Southern Florida Flood Control Project's channelization of the Kissimmee River, the spoil from dredging operations was deposited adjacent to Macnamara's tracts, creating a large spoil island rising as high as twenty feet above the water.<sup>189</sup> Macnamara sought to enclose the island with a barbed wire fence, to the distress of the plaintiff Kissimmee River Valley Sportsmans' Association.<sup>190</sup>

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183. *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1550 (11th Cir. 1994).

184. *See State Dept. of Revenue v. Anderson*, 403 So. 2d 397 (Fla. 1981); *Bryant v. Peppe*, 238 So. 2d 836 (Fla. 1970).

185. *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So. 2d 867, 870 (Fla. 4th DCA 1973), *aff'd and rev'd on other grounds*, 329 So. 2d 10 (Fla. 1976); *accord Metropolitan Dade Co. v. Rosell Construction Corp.*, 297 So. 2d 46 (Fla. 3d DCA 1974); *see also Texas Co. v. Town of Miami Springs*, 44 So. 2d 808 (Fla. 1950). *But see Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15 (Fla. 1976), in which the court indicated that it did not yet expressly recognize the exception. This principle would appear to be particularly relevant to a reversionary engineering situation. *See supra* note 170.

186. *Macnamara v. Kissimmee River Valley Sportsman's Assoc.*, 19 Fla. L. Weekly D2208 (Fla. 2d DCA October 14, 1994), *appeal docketed*, No. 84-267 (Fla. Sup. Ct. Aug. 29, 1994).

187. *Id.* at D2211.

188. *Id.* at D2208.

189. *Id.* at D2208-09.

190. *Id.*

After determining the island was sovereignty lands because it lay within the high water boundary of Lake Hatchineha,<sup>191</sup> the court considered Macnamara's estoppel arguments.<sup>192</sup> Macnamara claimed to have a permit to fence the property from the Corps, and alleged verbal authorization by a Florida Department of Natural Resources employee. He also claimed that his ownership of the property was evidenced by the fact that the water management district requested, and received, an easement from him over the property in connection with the channelization, and that he had paid ad valorem taxes on the property.<sup>193</sup> The court rejected the estoppel argument:

Although equitable estoppel can apply against the state in its sovereign capacity, such claims can be pursued only in rare instances where there are exceptional circumstances . . . Among the elements that must be proven is a positive act by an authorized official, upon which reliance is based . . . Under no circumstance, can the state be estopped by the unauthorized acts or representations of its officers . . . None of the alleged authorizations relied on by the Defendant constitute an act or statement by a state officer authorized to permit private fencing of public land bottoms.<sup>194</sup>

The court further rejected the contention that payment of property taxes could give rise to an estoppel-based ownership claim to sovereignty lands:

Nor is the possible payment of taxes sufficient to justify equitable estoppel . . . Even if taxes had been paid, such payment cannot form the basis for equitable estoppel because it is the Trustees of the Internal Improvement Fund rather than the tax assessor who are authorized to speak for the state on the subject of boundaries on navigable lake bottoms. § 253.12(1), Fla. Stat. If a taxing error has taken place, the remedy is a tax refund rather than conversion of lake bottoms to private ownership.<sup>195</sup>

In sum, it appears unlikely that either the federal or the Florida courts would apply the doctrine of equitable estoppel to bar reversionary engineering projects initiated by the government to reverse land reclamations and flood control benefits. As in *Peterson v. United States Department of the Interior*,<sup>196</sup> the landowners' private invest-

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191. *Id.* at D2209-11.

192. *Id.* at D2211.

193. *Id.*

194. *Id.* (citations omitted).

195. *Id.* The district court has denied Macnamara's motions for rehearing, rehearing en banc and certification to the Florida Supreme Court as a question of great public importance. A petition for certiorari has been filed with the Florida Supreme Court.

196. 899 F.2d 799 (9th Cir. 1990); see discussion at text *supra*.



ments based upon an assumption of continued flood control benefits only become relevant if a threshold determination is made that they have a protected property interest in those benefits. The analysis set forth in part IV *supra* suggests that such a threshold determination is unlikely in the reversionary engineering context.

## VI. QUANTIFYING JUST COMPENSATION: ISSUES UNIQUE TO REVERSIONARY ENGINEERING

In the face of admitted uncertainty concerning the application of the physical takings rule to Everglades restoration, and the urgent need for action in the face of a continually deteriorating ecosystem, most restoration efforts to date involve the acquisition, voluntary or through eminent domain proceedings, of land affected by reversionary engineering.<sup>197</sup> In the context of such acquisitions, however, there are also issues unique to reversionary engineering situations which should not be overlooked. One is the very basic question of who owns, and can claim compensation for, reclaimed lands which were originally included within the high water mark of navigable waterbodies. The second is whether compensation should be paid for that portion of the value of property which is solely the result of government investment.

### A. Ownership of Rechanneled and Reclaimed Waterbodies

When Florida became a state in 1845, it "received title to all lands beneath navigable waters, up to the ordinary high water mark, as an incident of sovereignty."<sup>198</sup> Those sovereign lands included the beds of waterbodies which were "navigable-in-fact," and not merely those actually used for navigation or commercial use.<sup>199</sup> Shortly after statehood, in the 1850's, Congress conveyed approximately twenty million acres of swamp and overflow uplands to the State of Florida. The lands were thereafter vested in the Board of Trustees for the

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197. See *supra* note 9.

198. *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339, 342 (Fla. 1986), cert. denied, 479 U.S. 1065 (1987).

199. Donna R. Christie, *Florida*, in 6 WATERS AND WATER RIGHTS 87, 91 (Robert E. Beck, ed., 1991); MALONEY ET AL., *supra* note 164, § 22.2(a).

For a detailed examination of the Florida law concerning navigability of submerged lands, see Richard Hamann & Jeff Wade, *Ordinary High Water Line Determination: Legal Issues*, 42 FLA. L. REV. 323, 383-84 (1990). See also David Guest, *The Ordinary High Water Boundary on Freshwater Lakes and Streams: Origin, Theory and Constitutional Restrictions*, 6 J. LAND USE & ENVTL. L. 205 (1991).

Internal Improvement Fund of Florida. The Trustees were authorized to convey the swamp and overflow lands into private hands, in connection with drainage and reclamation efforts.<sup>200</sup>

In contrast to the swamp and overflow lands, sovereign lands underlying navigable waters were for public use, "not for the purpose of sale or conversion into other values, or reduction into several or individual ownership."<sup>201</sup> Although those lands were "subsequently assigned to the Trustees [of the Internal Improvement Fund], the Trustees' authority to dispose of the land was rigidly circumscribed by court decisions and was separate and distinct from their authority to dispose of swamp and overflowed lands."<sup>202</sup>

### 1. *Accretion and Evulsion*

Like much in nature, the location of waterbodies is not immutable. They may change through gradual erosion and accretion, or they may suddenly change through earthquakes and other geological events. The general common law rule, followed in Florida, is that when land bordering a waterbody increases through the gradual and imperceptible accumulation of land ("accretion") or by the gradual and imperceptible withdrawal of water ("reliction"), the new land belongs to the owner of the upland to which it attaches.<sup>203</sup> However, where land increases through a sudden change of the banks of the waterbody, such as by hurricane or earthquake ("avulsion"), the state retains the uncovered land as sovereign lands.<sup>204</sup>

Common law rules vary from jurisdiction to jurisdiction as to whether public works drainage and rechanneling projects are treated as accretion or avulsion for purposes of determining ownership of the uncovered lands.<sup>205</sup> In *Martin v. Busch*,<sup>206</sup> the Florida Supreme Court held that when drainage operations of the state had caused the waters of Lake Okeechobee to recede, owing to the lowering of the level of the lake, lands between the original and the new high water marks

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200. See generally *The Florida Experience*, *supra* note 10, at 57-81.

201. *Coastal Petroleum*, 492 So. 2d at 342 (quoting *State v. Gerbing*, 47 So. 353, 355 (1908)); FLA. CONST. art. X, § 11.

202. *Coastal Petroleum*, 492 So. 2d at 342, (citing David L. Powell, Comment, Unfinished Business—Protecting Public Rights to State Lands From Being Lost Under Florida's Marketable Record Title Act, 13 FLA. ST. U. L. REV. 599, 606-08 (1985)).

203. *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc.*, 512 So. 2d 934, 936-37 (Fla. 1987).

204. *E.g.*, *id.* at 940; *cf.* *Municipal Liquidators v. Tensch*, 153 So. 2d 728, 731 (Fla. 3rd DCA 1963), *cert. denied*, 157 So. 2d 817 (Fla. 1963).

205. See, *e.g.*, *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), *overruled by Oregon ex. rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

206. 112 So. 274 (Fla. 1927).

"were sovereignty lands when covered by the waters of the navigable lake, [and] . . . remained sovereignty lands when the water receded."<sup>207</sup> A number of Florida cases and commentators have supported and followed *Martin* for the principle that artificial drainage does not alter boundary lines or divest the state of previously sovereign lands.<sup>208</sup>

The applicability of the *Martin* rule to a coastal waters case was called into question by the Florida Supreme Court in *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc.*<sup>209</sup> In *Sand Key*, the plaintiff corporation brought an action to quiet title to lands that had gradually and imperceptibly accumulated over ten years on its beachfront property. The accretion was the undisputed result of a jetty constructed by the government and the Trustees of the Internal Improvement Trust Fund consequently claimed title to the beachfront in accordance with state law.<sup>210</sup> Section 161.051, *Florida Statutes*, provides that additions or accretions to the upland caused by coastal public works "shall remain the property of the state."<sup>211</sup> The Florida Supreme Court held that section 161.051 was only applicable to accretions to property owners who had participated in the improvements which caused the accretions. The court held that because Sand Key Associates had been uninvolved in construction of the jetty that had effected the expansion of its beachfront, it retained title to the accreted land.<sup>212</sup>

In so holding, the court also rejected the Trustees' additional argument that *Martin* supported the contention that upland owners have no right to artificially caused accretion.<sup>213</sup> The *Sand Key* decision did not purport to overrule *Martin*, but held that the Trustees' reliance on it was "misplaced."<sup>214</sup> The *Sand Key* court noted that the *Martin*

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207. *Id.* at 284.

Reliction is the term applied to land that has been covered by water, but which has become uncovered by the imperceptible recession of the water. The doctrine of reliction is applicable where from natural causes water recedes by imperceptible degrees, and does not apply where land is reclaimed by governmental agencies as by drainage operations.

*Id.* at 287.

208. *E.g.*, State v. Florida Nat'l Properties, Inc., 338 So. 2d 13 (Fla. 1976); State v. Contemporary Land Sales, Inc., 400 So. 2d 488 (Fla. 5th DCA 1981); Padgett v. Central & So. Fla. Flood Control Dist., 178 So. 2d 900 (Fla. 2nd DCA 1965); MALONEY ET AL., *supra* note 164, § 126.4.

209. 512 So. 2d 934 (Fla. 1987).

210. *Id.*; FLA. STAT. § 161.051 (1981).

211. FLA. STAT. § 161.051 (1981).

212. *Sand Key*, 512 So. 2d at 941.

213. *Id.*

214. *Id.* at 939.

decision's sole issue was a boundary dispute and that "the portion of the opinion relied on by the Trustees relates to a general statement concerning water rights rather than a holding in the case."<sup>215</sup> The court refused to question the accuracy of the *Martin* case's recitation of "general water law principles," but distinguished the case factually.<sup>216</sup> The court observed that the reclamation by drainage operation in *Martin* was "not reliction by 'imperceptible degrees'" and that a case cited in *Martin* "explains the distinction between upland property that disappears suddenly and property that disappears slowly and gradually and then reappears."<sup>217</sup>

The *Sand Key* court distinguished between the gradual accumulation of beach sands over a ten-year period as a consequence of a jetty construction (an accretion) and the more abrupt uncovering of inland lands as a consequence of drainage operations, which the court implicitly suggested is legally a case of avulsion. The case thus reads *Martin* as creating a distinction not based on whether causation is natural or artificial, but on whether the land gradually accumulated or abruptly emerged from submerged property. Under this reading, *Sand Key* leaves untouched the principle that inland drainage operations do not divest the state of sovereign land.<sup>218</sup>

215. *Id.* at 940.

216. *Id.*

217. *Id.* at 940 (citing *Baumhart v. McClure*, 153 N.E. 211 (Ohio Ct. App. 1926)).

218. Justice Ehrlich offers a vigorous dissent in *Sand Key*, arguing that "the majority disregards or misunderstands some crucial points established by over half a century of Florida case law, misconstrues the plain language of section 161.051 and grossly misinterprets *Martin v. Busch*." *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc.*, 512 So. 2d 934, 941 (Fla. 1987). Justice Ehrlich argues that as a matter of *fact*, the consequences of drainage operations are not so immediate that they can properly be described as avulsion, and that the *Martin* rule was clearly a holding and not dicta. *Id.* at 942-45.

If [as *Martin* held] to serve a public purpose the state through drainage operations causes water to recede, thus exposing sovereign lands, and title remains in the state, then when the state to serve a public purpose causes sovereign lands to become accreted by construction of a jetty, title to these lands, too, should remain in the state. Because this issue is critical for resolution of this case, it is my view that we should either adhere to this point of *Martin v. Busch* or else expressly overrule it, but certainly not misstate the factual underpinnings of the case which the majority opinion blatantly does. It is my opinion that *Martin v. Busch* has served us well and should be reaffirmed.

*Id.* at 946. The *Sand Key* majority clearly did not adopt Justice Ehrlich's view with respect to the legal effects of beachfront accretion. Justice Ehrlich's interpretation of the majority opinion is not inconsistent with this author's view that *Sand Key* neither expressly nor by implication overruled the *Martin* rule with respect to the legal consequences of inland drainage operations.

One commentator has suggested that, beyond a plain reading of the *Sand Key* case, general equity principles suggest that the logic of the case in the context of coastal projects doesn't translate to the inland context:

The cases construing section 161.051 address accretions resulting from coastal construction, and these holdings may not apply to artificial reliction of navigable inland waters. In the case of coastal property, the riparian owner is subject to loss by erosion. The common law balanced this vulnerability by granting the owner rights to accretions. These equitable considerations do not exist in the case of artificial relictions. If the state artificially raises water levels above natural levels, it may be liable for the taking of a flowage easement. If water levels are artificially lowered, it would be inequitable for the riparian owner to acquire sovereign land. In both cases, the public would lose.<sup>219</sup>

## 2. *The Marketable Record Title Act*

The Marketable Record Title Act,<sup>220</sup> passed in 1963, provides that any person whose chain of title extends from any title transaction recorded over thirty years has a marketable record title free and clear of all claims except for certain claims specified in the statute. Section 712.04 of the act indicates that all governmental rights depending on any act or event prior to the date of a root of title were extinguished excepting rights in favor of the state reserved in deeds by which Florida parted with title.

In 1981, the Florida Fifth District Court of Appeal held that the Marketable Record Title Act extinguished any claim of the state to lands originally below the high water mark of a lake which had been reclaimed by artificial means.<sup>221</sup>

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219. Hamann & Wade, *supra* note 199, at 383-84.

220. FLA. STAT. §§ 712.01-.10 (1993).

221. *State v. Contemporary Land Sales, Inc.*, 400 So. 2d 488, 492 (Fla. 5th DCA 1981) (citing *Odom v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1976) and *Sawyer v. Modrall*, 286 So. 2d 610, 613 (Fla. 4th DCA 1973), *cert. denied*, 297 So. 2d 562 (Fla. 1974)). The Fifth District Court apparently relied upon dicta in *Odom* stating that claims of the state "to beds underlying navigable waters previously conveyed are extinguished by the [Marketable Record Title] Act." *Odom*, 341 So. 2d at 989; see *Coastal Petroleum v. American Cyanamid*, 492 So. 2d 339, 344 (Fla. 1986) ("The statements [in *Odom*] concerning the effect of MRTA on navigable waterbeds were dicta and are non-binding in the instant case inasmuch as there were no navigable waterbeds at issue in *Odom*").

Another statutory limitation to the state sovereignty over submerged navigable lands was carved out in the Riparian Act of 1856, ch. 791, Laws of Fla. (1856) and the Butler Act of 1921, ch. 8537, Laws of Fla. (1921). *Department of Natural Resources v. Industrial Plastics Technology, Inc.*, 603 So. 2d 1303 (Fla. 5th DCA 1992); see generally, MALONEY ET AL., *supra* note 164, § 123. Until their complete repeal by the Bulkhead Act of 1957, ch. 57-362, Laws of Fla. (1957),

In the 1987 decision of *Coastal Petroleum Co. v. American Cyanamid Co.*,<sup>222</sup> the Florida Supreme Court had an opportunity to directly consider the applicability of the Marketable Record Title Act to navigable waters included within tracts of swamp and overflowed lands conveyed to private owners. The court concluded, contrary to *Contemporary Land Sales*, that in fact the legislature had not intended to extinguish state claims to navigable waters by the Marketable Record Title Act:

We are persuaded that had the legislature intended to revoke the public trust doctrine by making MRTA applicable to sovereignty lands, it would have, by special reference to sovereignty lands, given some indication that it recognized the epochal nature of such revocation. We see nothing in the act itself or the legislature [sic] history presented to us suggesting that the legislature intended to casually dispose of irreplaceable public assets.<sup>223</sup>

Although *Coastal Petroleum* did not on its facts concern drained sovereign land, the holding would appear to be equally applicable to sovereign lands formerly beneath navigable waters which "continued to be sovereignty lands after they were exposed."<sup>224</sup>

### 3. Issues Unique to Lakes

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these acts enabled riparian owners to obtain title to submerged lands by construction of bulkheads and filling and improving them by wharves and other commercial amenities. *Industrial Plastics*, 603 So. 2d at 1306-07. The Riparian Act only applied to navigable streams, bays, or harbors, and not to lakes. MALONEY ET AL., *supra* note 164, § 123.1. The Butler Act's conveyance of title was conditioned upon the riparian owner's actually making the required improvements. *Id.* at § 123.2(b); *Stein v. Brown Properties, Inc.*, 104 So. 2d 495, 499 (Fla. 1958); *Duval Eng'g. & Contracting Co. v. Sales*, 77 So. 2d 431 (Fla. 1954); *Holland v. Fort Pierce Fin. & Constr. Co.*, 27 So. 2d 76, 80 (Fla. 1946). Because these statutes deal with filling and not draining, and are contingent on the property owner's construction of commercial improvements at his own expense, they are not applicable to the recovery of submerged lands through government drainage activity.

222. 492 So. 2d 339 (Fla. 1987).

223. *Id.* at 344. The *Coastal Petroleum* court found the Court's statements in *Odom v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1976) that the MRTA extinguished claims to beds underlying navigable waters were dicta and thus irrelevant. 492 So. 2d at 344; *see supra* note 221.

224. *State v. Contemporary Land Sales, Inc.*, 400 So. 2d 488, 492 (Fla. 5th DCA 1981 ). One commentary on *Coastal Petroleum* has observed that in its wake:

[O]ne reaches the conclusion that the lands hundreds and even thousands of yards above the existing water level may be sovereignty land owned by the State. For those who bought the land and have for years farmed it, paid taxes on it, and even build their homes on it, this is certainly a disturbing conclusion.

Joseph W. Jacobs & Alan B. Fields, "Save our Rivers" or "Save our Property": *The Costs and Consequences of Coastal*, FLA. B.J., Jan. 1988, at 59.

The foregoing authorities for retention of previously reclaimed lands in the state applies to lands formerly beneath navigable lakes as well as navigable rivers. In *Martin v. Busch*,<sup>225</sup> the Florida Supreme Court held:

navigable waters include lakes, rivers, bays, or harbors, and all waters capable of practical navigation for useful [sic] purposes, whether affected by tides or not, and whether the water is navigable or not in all its parts towards the outside lines or elsewhere, or whether the waters are navigable during the entire year or not. <sup>226</sup>

The court also ruled that the state holds title to the beds of navigable lakes up to the ordinary high water mark, "however shallow the water may be at the outside lines or elsewhere if the water is in fact a part of the particular lake that is navigable for useful purposes."<sup>227</sup> With lakes, however, the problem is more complicated. Following the acquisition of Florida by the United States, surveys were commissioned to identify new lakes and confirm their navigability status by recording a meander line along their perimeters.<sup>228</sup> Probably due to the uncomfortable and often hazardous conditions plaguing the surveyors, only 190 out of an estimated 30,000 lakes were actually meandered.<sup>229</sup> The absence of a meander line complicates, but does not preclude, a judicial determination of navigability.<sup>230</sup>

In *Odom v. Deltona Corp.*,<sup>231</sup> the Florida Supreme Court held that "meandering is evidence of navigability which creates a rebuttable presumption thereof," and that "[t]he logical converse of this proposition . . . is that non-meandered lakes and ponds are rebuttably presumed non-navigable."<sup>232</sup> Developing historical evidence regard-

225. 112 So. 274 (Fla. 1927).

226. *Id.* at 283.

227. *Id.*

228. MALONEY ET AL., *supra* note 164, § 22.2(b).

229. *Id.* David Guest has suggested that a more accurate figure may be 231 out of 3,000 "named" lakes. Conversation with David Guest, Managing Attorney, Sierra Club Legal Defense Fund, Florida Office.

230. *Odom v. Deltona Corp.*, 341 So. 2d at 977, 988-89; MALONEY, *supra* note 164, § 22.2(b). Indeed, in the case of *Macnamara v. Kissimmee River Valley Sportsman's Assoc.*, the court concluded that the manual for the surveyors of meander lines "contained hopelessly garbled instructions," and the court disregarded the meander lines of lake Hatchineha in determining the ordinary high water mark. *Macnamara v. Kissimmee River Valley Sportsman's Assoc.*, 19 Fla. L. Weekly D2208, D2209 (Fla. 2d DCA October 14, 1994) (citing Guest, *supra* note 199, at 222-23).

231. 341 So. 2d 977 (Fla. 1976).

232. *Id.* at 988-89. In *Coastal Petroleum v. American Cyanamid*, 492 So. 2d 339, 346 (Fla. 1987) the dissenting opinion by Justice Boyd interprets the majority opinion as rejecting the principle that determinations by official surveyors that water bodies were non-navigable should be presumed correct. It is unclear whether Justice Boyd correctly reads the majority,

ing navigability for nonmeandered lakes would undoubtedly present a challenge of historical scholarship, but would not be impossible.<sup>233</sup>

Accordingly, to the extent Everglades restoration involves lands in the vicinity of navigable waters whose boundaries have been altered by drainage or channeling, it is possible that a considerable portion of lands that have been privately utilized for years, remains sovereignty land owned by the state, for which no taking claim could arise.<sup>234</sup> In

which refers to the principle that meandering creates a presumption of navigability, but not to the converse. See Hamann & Wade, *supra* note 199, at 339.

233. A final complication with respect to lands previously beneath navigable lakes is section 253.141(2), *Florida Statutes* (1993). This act provides:

Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state without reservation of public rights in and to said waters.

FLA. STAT. § 253.141(2) (1993). Maloney presents a persuasive argument that this act, which was originally included in a chapter on taxation, should be construed as a definition of navigability for taxation purposes alone, and not to alter prior principles of property law which would have the lake bottom retained in the public trust. MALONEY, *supra* note 164, § 22.3(b). In 1985, in a case dealing with the applicability of section 253.141(1), *Florida Statutes*, (then § 197.228) the Florida Supreme Court adopted Maloney's interpretation, noting that "[n]o case has ever held section 197.228 applicable as property law to riparian rights. Thus we . . . hold that section 197.228 is a tax law and therefore not applicable to this case." *Belvedere Development Corp. v. DOT*, 476 So. 2d 649, 653 (Fla. 1985). The following year, in *Coastal Petroleum*, the Florida Supreme Court confronted a claim of entitlement to submerged lands based in part on section 197.228(2), but apparently overlooked its earlier categorical limitation of the statute. *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339, 343 (Fla. 1987) (finding the act, on its face, did not apply to navigable *rivers* and the legislature did not intend to divest the state of interests which are not transferable to private entities). Under the reasoning of either *Belvedere* or *Coastal Petroleum*, it would appear that section 253.141 does not support a claim to private ownership of previously submerged lands.

234. One might argue that those lands have been adversely possessed by adjoining private property owners. The cases hold, however, that parties cannot adversely possess sovereign land. *United States v. Vasarajs*, 908 F.2d 443, 447 (9th Cir. 1990); *United States v. Pappas*, 814 F.2d 1342, 1343 (9th Cir. 1987). See also discussion of estoppel arguments, *supra* part V. It has been estimated that thousands of acres involved in the Kissimmee River restoration project are sovereign lands along the river's original meandering channel, now claimed to be the property of ranchers. Lipman & Brown, *supra* note 6, at A1. In 1987, the Trustees of the Internal Improvement Trust Fund filed and immediately dismissed a quiet title action as to lands below



some instances, the precise boundaries of those lands may be difficult to ascertain, as no official high water marks were established until after drainage or rechanneling operations.<sup>235</sup> It might well be worth the effort to delineate them, and to adjust compensation for overflowed land to reflect the government's ownership interest and rights with respect to those portions.<sup>236</sup>

*B. Does "Just Compensation" Include the Value Added by Government Reclamation Activity?*

Generally, when government acquires private property through eminent domain, it is required to pay "fair market value" for the property.<sup>237</sup> Fair market value is the amount of money which a willing buyer would pay in cash to a willing seller.<sup>238</sup> The Supreme Court has, however, "refused to make a fetish even of market value, since that may not be the best measure of value in some cases."<sup>239</sup> "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law."<sup>240</sup>

the ordinary high water mark of the Kissimmee River before drainage and rechanneling—some more than two miles from the river. *Trustees of the Internal Improvement Trust Fund v. Latt Maxcy Corp.*, No. 87-2044 (Fla. 9th Cir. Ct. 1987). See *Jacobs & Fields*, *supra* note 224, at 61. The dismissal was presumably in light of a decision to proceed with acquisition of the properties.

235. The Florida Department of Natural Resources reportedly estimated that the cost to determine the ordinary high water line on previously submerged lands along the Kissimmee River would run between \$500,000 and \$1 million. *Jacobs & Fields*, *supra* note 242, at 62.

236. David Guest has recommended:

All lakes with portions of their bed permanently exposed as a result of government-sponsored drainage projects should be identified. The Trustees [of the Internal Improvement Trust Fund] should then designate all lakes that they intend to restore to their previous levels. That process should balance equitable considerations resulting from the passage of time against environmental considerations and prospective public uses.

All exposed lake bottoms that are not designated for restoration should be sold to the riparian land owners at prices reflecting the real value of the property rights being transferred.

Guest, *supra* note 199, at 231.

237. *E.g.*, *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 441 U.S. 506, 511 (1979); *United States v. Cors*, 337 U.S. 325, 332 (1949); *United States v. Miller*, 317 U.S. 369, 374 (1943).

238. *564.54 Acres*, 441 U.S. at 511; *Miller*, 317 U.S. at 374.

239. *Cors*, 337 U.S. at 332.

At times some elements included in the criterion of market value have in fairness been excluded, as for example where the property has a special value to the owner because of its adaptability to his needs or where it has a special value to the taker because of its peculiar fitness for the taker's project.

*Id.*

240. *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)).

One longstanding qualification to the fair market value measure is the equitable doctrine that a condemnor is not obliged to compensate a property owner for an enhancement in the value of property which the condemnor created.<sup>241</sup> This principle has been held to exclude in the calculation of fair market value the value of public works projects, constructed on the condemned property, solely at government expense. In *Washington Metropolitan Area Transit Authority v. One Parcel of Land*,<sup>242</sup> (WMATA) the condemnor transit authority had obtained a right of entry onto certain property to facilitate its construction of a transit station on an adjacent piece of property which it had purchased. In the course of construction, the Authority brought fill onto the property and constructed a culvert, at a total estimated value of \$320,000. The Authority then sought to condemn the property, and the owner claimed compensation for the value of the fill and culvert. The Authority countered that such an award would be unjust enrichment:

WMATA objects to paying twice for the same improvements, the first time when it erected an improvement and the second upon condemning the property in its improved state . . . [I]t would not be fair for the public to pay compensation for improvements erected by the taking authority and then to give the owner of the land a windfall by paying him for improvements erected by another. 243

The district court had awarded compensation for the improvements, but the Fourth Circuit agreed with WMATA's arguments and reversed:

there are certain guideposts for courts in determining questions of valuation . . . The first is that owners should be awarded only just compensation for what has actually been taken. This means that they should not be given a windfall for value added to the property.

When we apply that principle to the case at hand, the district court's decision to value the land after and including the improvements made to the land at WMATA's expense was improper. 244

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241. *Fuller*, 409 U.S. at 492; *United States v. Five Parcels of Land in Harris County*, 180 F.2d 75, 78 (5th Cir. 1950), *cert. denied*, 34 U.S. 812 (1950)(dissenting opinion), and cases cited thereunder; 3 NICHOLS, *THE LAW OF EMINENT DOMAIN* § 8A.01 (1991).

242. 780 F.2d 467 (4th Cir. 1986).

243. 780 F.2d at 470.

244. *Id.* at 471. *See also* *Bibb County, Ga. v. United States*, 249 F.2d 228 (5th Cir. 1957) (just compensation need not include the value of housing units and other buildings mistakenly constructed on what was thought to be government land).

The WMATA court effectively distinguished two earlier federal decisions, which had awarded compensation for pre-condemnation improvements made on the condemned prop-

The foregoing cases are distinguishable from the general rule that enhanced value from public works such as roads, public transport, sidewalks, or a post office in the vicinity of property will be considered in determining fair market value.<sup>245</sup> In those instances, the public works which were properly included in fair market value determinations were adjacent to, but not on, the condemned property, and benefited the public generally rather than the condemned property specially. The public would continue to enjoy the benefits of the improvements after condemnation, and therefore, it was not unjust that the public pay the condemnee the value in which all property in the vicinity share. The property owner has not received any greater "windfall" than all property owners benefited by public works financed by tax revenues. By contrast, where property has already received a windfall through publicly constructed improvements specially located on the property which does not generally benefit the public at large, awarding compensation to the property owner upon condemnation in the value of the improvements would double the windfall.

The situation of property owners enjoying the benefits of land reclamation solely at government expense is directly analogous to the principal *WMATA* and *Bibb* holdings, if not more compelling a case for limiting compensation.<sup>246</sup> The owners of reclaimed property initially enjoyed a windfall through the construction of vast public

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erty by the government. 780 F.2d at 470-71. (distinguishing *Five Parcels of Land*, 180 F.2d at 77, and *United States v. Certain Space in Rand McNally Building*, in Chicago, Cook County, Ill., 295 F.2d 381 (7th Cir. 1961). In both of those cases the government had constructed improvements during a period of occupancy of the property pursuant to leases. The holdings in those cases stemmed less from general principles of just compensation than from contract law. The courts in each instance construed the parties' intent pursuant to those leases to include retention of the benefits of the permanent improvements in the property owner, and the lease price to be based upon that intent. *Five Parcels of Land*, 180 F.2d at 77; *Certain Space*, 295 F.2d at 383-384; 780 F.2d at 470-71.

245. See *United States v. Fuller*, 409 U.S. 488, 492-93 ("The Government may not demand that a jury be arbitrarily precluded from considering as an element of value the proximity of a parcel to a post office building, simply because the Government at one time built the post office."); *WMATA*, 780 F.2d at 472 (finding that fair market value determinations should take into account the fact that the value of the parcel has risen because of construction of the Metro in the vicinity).

246. One recent environmental law text has suggested the concept of a "takings compensation offset" in precisely this context:

If . . . the state and federal governments created thousands of acres of private agricultural land out of Florida swamps by channelizing the Kissimmee River at public expense, must they now, 30 years later, pay full dry-land market value when they decide that groundwater levels must be raised, returning some of the lands to wetlands . . . ?

ZYGMUNT J.B. PLATER, ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 473 (1992).

works which, primarily if not exclusively, benefited them, rather than the public at large.<sup>247</sup> It is arguable that in fact the public at large has "paid" for the public works twice—once in the cost of construction and operation, and again in the environmental, recreational, and commercial costs of drainage and reclamation which have more recently come to light.<sup>248</sup> Requiring compensation for those "improvements" when government condemns the property to remedy the consequent harms of the project would make government pay yet a third time. As in *WMATA*, the property owners should not enjoy a triple windfall.

## VI. CONCLUSION

Efforts to preserve and restore wetlands through reversionary engineering present novel challenges not simply to engineers and environmental scientists, but also to attorneys and the courts. There is little case law addressing the constitutional implications of restoration of private property to a pre-engineered, less artificial state. The categorical physical takings rule may appear to be facially applicable when one's analysis is limited to a short-term time perspective. However, it becomes far less compelling when one considers restoration as a withdrawal of government intervention in natural conditions rather than a new intervention.

A search of background principles of common law reveals surprisingly little support for the contention that property owners have a protected property interest in their artificially altered land when the alteration was predominantly at government expense. Even where governments decide to restore wetlands through acquisition and eminent domain, they should not ignore the scope of the property owner's entitlement to just compensation. The property owner may not be entitled to compensation to the extent that value has been created by government public works specially enhancing their property. A foray into the intricacies of Florida water law suggests that they in fact do not even own reclaimed land formerly beneath navigable inland waterbodies.

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247. See *Bibb*, 249 F.2d at 230.

248. See *supra* note 170.

# ZONING: A REPLY TO THE CRITICS

BRADLEY C. KARKKAINEN\*

## I. INTRODUCTION

In November 1993 voters in Houston narrowly rejected a referendum to establish zoning in that city.<sup>1</sup> This was the third time in a half-century that Houston voters had rejected zoning. Thus Houston remains the only major city in the United States without zoning. To zoning's supporters, Houston represents an unenlightened backwater that has stubbornly resisted the tide of twentieth century land use regulation. To zoning's critics, Houston stands as a lonely beacon of economic rationality, or at least a living laboratory in which alternatives to zoning can be fairly tested.<sup>2</sup>

Extensive academic literature critical of zoning has accumulated in the last twenty years, beginning with Bernard Siegan's landmark 1970 study lauding Houston's non-zoning approach,<sup>3</sup> and followed shortly

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\* J.D. 1994, Yale Law School. Law Clerk, Hon. Patricia M. Wald, U.S. Court of Appeals, D.C. Circuit. The author thanks Robert Ellickson for helpful comments on earlier drafts. The author also thanks Ann Mongoven and Emma Karkkainen Mongoven for their support and patience, without which this article would not have been possible.

<sup>1</sup> The margin was 52% to 48%. R. A. Dyer, *Zoning Defeated by Narrow Margin*, HOUSTON CHRON., Nov. 3, 1993, at A1; Peter Cooney, *Houston Voters Reject Zoning for Third Time*, REUTERS NEWS SERVICE, Nov. 3, 1993, available in LEXIS, Nexis Library. Pre-election polls predicted the referendum, backed by the mayor, a city council majority, and many civic organizations, was headed for passage. Sam Howe Verhovek, "Anything Goes" Houston May Go the Limit: Zoning, N.Y. TIMES, Oct. 27, 1993, at A14. Several factors explain this pre-election discrepancy. With an incumbent mayor facing token opposition, voter turnout was low, and expectations that the referendum would pass may have lulled supporters into staying home. Second, zoning opponents spent about four times the amount of supporters in promoting their position, see Cooney, *supra*, suggesting that opponents had more intense (though perhaps narrower) support, superior resources, and superior organizing tactics, see Dyer, *supra*. Third, pro-zoning forces aroused populist opposition by trying to adopt zoning through city council action rather than by referendum in a city where voters had twice previously rejected zoning. Finally, despite charges that they were engaging in unprincipled racial scare tactics, opponents apparently convinced lower-income minority communities that zoning would mean costlier housing and racial segregation: 72% of Black voters and 58% of Mexican-Americans opposed the referendum. *Id.*; cf. RICHARD F. BABCOCK, *THE ZONING GAME* 25-28 (1966) (stating that in the 1948 and 1962 referenda, which were lost by wider margins, opponents outspent proponents and the strongest "no" vote came from low-income minority communities).

<sup>2</sup> For the moment at least. Zoning proponents in Houston, confident that public opinion and sound public policy are on their side, have vowed to continue their efforts to enact a zoning ordinance. See Dyer, *supra* note 1.

<sup>3</sup> Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970) (arguing that land use patterns in Houston are similar to those in other cities, but the patterns are achieved more efficiently because of the absence of zoning).

thereafter by Robert Ellickson's broader theoretical critique of zoning.<sup>4</sup> Subsequent academic literature has been almost as uniformly critical of zoning<sup>5</sup> as public policy has been uniformly in favor of it. Although few academic defenders of zoning have stepped forward, governmental decision-makers have proceeded with zoning apace, apparently untroubled by the academic onslaught. By some estimates, 9,000 municipalities, large and small, in every region of the country and representing at least 90% of the nation's population, have zoning schemes in place.<sup>6</sup> The closeness of last November's vote, and Houston's status as the only major holdout against zoning, can give little cheer to zoning's critics. No trend toward abolishing zoning appears on the horizon, and indeed, non-zoning in Houston hangs by a thread.

Why is this? How do we account for the fact that this nearly universal feature of local government enjoys such disrepute in academia? Are local governments simply in the grip of irrationality? Have local officials hoodwinked the public on a massive scale? Or have the academic critics somehow missed the mark?

This article argues that the academic critiques of zoning, though based on insights that have some validity, are often overstated. They simply prove less than their authors think they prove. In particular, this article argues that in some circumstances, such as in mature neighborhoods in large urban centers, zoning can be a rational and justifiable public policy response to very real problems and can be made to work at least as well as any of the alternatives the critics propose.<sup>7</sup> The analysis of this article is descriptive in part, illustrating

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<sup>4</sup>. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 779-80 (1973) [hereinafter Ellickson, *Alternatives*] (recognizing the need for land use regulation to control negative externalities, but arguing that restrictive covenants, modified nuisance law, and administrative fines would operate more efficiently and fairly than zoning).

<sup>5</sup>. See, e.g., WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985); ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND USE REGULATION* (1977); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. Pa. L. Rev. 28 (1981); Jan Z. Krasnowiecki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980); Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 Yale L.J. 617 (1991).

<sup>6</sup>. Ellickson, *Alternatives*, *supra* note 4, at 692; FISCHER, *supra* note 5, at 22-23 (stating that for all practical purposes, we may assume zoning is a universal feature of local government in the United States).

<sup>7</sup>. Cf. Eric H. Steele, *Participation and Rules—The Functions of Zoning*, 1986 AM. B. FOUND. RES. J. 709, 713 (1987) (finding that despite academic criticism, "[r]esistance to changing the basic nature of zoning springs from a widespread, if unarticulated, perception that the institution is serving some vital social function.").

zoning at its best, in rather limited circumstances.<sup>8</sup> Yet principally this article is normative, discussing zoning as it might be made to work, in a way that is justifiable and that meets many of the objections offered by its critics. Therefore, the purpose of this article is not to offer a general defense of zoning. Its task is the more modest one of showing that many of the critiques, despite the broad claims of their authors, should not be taken as general indictments of zoning, but rather as indicators of particular dysfunctions that must be addressed if zoning is to work effectively.

## II. TRADITIONAL JUSTIFICATIONS FOR ZONING

Initially, the question of why we even have zoning must be addressed. Zoning's proponents traditionally have offered two rationales, neither of which stands up to close scrutiny. First, zoning advocates suggest that zoning is necessary to protect or enhance property values,<sup>9</sup> particularly the values of residential properties (and especially single-family homes).<sup>10</sup> On this analysis, zoning serves principally to protect property owners from the negative externalities of new developments. Without zoning (or some comparable system of land use regulation), residential property owners would face plummeting property values if a development with significant

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<sup>8</sup>. Cf. *id.* at 722-23 (describing zoning in Evanston, Illinois, as a participatory process designed to preserve existing well-established mature urban neighborhoods). My analysis is also descriptive in the sense that it tries to capture the core unarticulated purposes of zoning —the "vital social function" it is thought to perform, even though in many instances actual performance falls short of the perceived ideal.

<sup>9</sup>. BABCOCK, *supra* note 1, at 116-17. Advocates of the nation's first comprehensive zoning ordinance, enacted by New York City in 1916, argued that zoning was necessary to protect property values. See City of New York, Board of Estimate and Apportionment, Committee on the City Plan, Final Report of the Commission on Building Districts and Restrictions, June 12, 1916, at 12-14, reprinted in ROY LUBOVE, *THE URBAN COMMUNITY: HOUSING AND PLANNING IN THE PROGRESSIVE ERA 95-98* (1967) (arguing for enactment of zoning ordinance principally as a means to protect existing property values). See also Daniel P. McMillen & John F. McDonald, *Could Zoning Have Increased Land Values in Chicago?*, 33 J. URB. ECON. 167, 168 (1993) (proponents of Chicago's first zoning ordinance claimed it would raise property values by one billion dollars over 25 years by eliminating negative externalities and objectionable land uses). For instance, much of the impetus for the early New York ordinances came from carriage-trade Fifth Avenue retailers who saw their business threatened by the encroachment of the garment industry's loft-type manufacturing buildings northward from lower Manhattan. SEYMOUR I. TOLL, *ZONED AMERICAN* 110-16, 158-61 (1969). See *infra* pp. . Other early supporters of zoning, however, argued that mere enhancement of some property owners' financial interests at the expense of other owners' property rights would not be constitutionally permissible insofar as it would not provide a valid "police power" justification for zoning. See EDWARD M. BASSETT, *ZONING* 52-53 (1936).

<sup>10</sup>. BABCOCK, *supra* note 1, at 1, 115; Marc A. Weiss, *Skyscraper Zoning: New York's Pioneering Role*, 58 J. AM. PLAN. ASS'N 201 (1992) (stating that although from the beginning zoning in New York was principally concerned with large commercial developments, in other cities the central focus has been on protecting residential neighborhoods).

negative externalities—a junkyard or brick factory, for example—moved in next door. Moreover, the mere prospect that such a development could move in would tend to depress the value of residential property. The solution is to divide the municipality into zones so that industries are sited near other industries, commercial enterprises near other commercial enterprises, and residential properties with other residential properties.<sup>11</sup> This rationale has some intuitive appeal, based on the real or imagined horrors of entirely unregulated development.

A significant problem with the property values rationale for zoning, however, is that such a rationale is difficult to support with empirical evidence. It has not been clearly established that zoning results in higher market values for residential property.<sup>12</sup> Another problem with this rationale is that zoning's advocates have not clearly established that zoning is the only means, or even the most effective or efficient means, of controlling externalities.<sup>13</sup>

Second, zoning is defended as a tool of a broader scheme of comprehensive urban planning.<sup>14</sup> However, in many smaller

11. This approach seems to presuppose that the external effects of a particular type of land use (e.g., industrial) are not negative externalities with respect to neighboring land uses of the same type. A factory, for example, will produce equivalent amounts of air pollution, odor, noise, vibration, and heavy truck traffic regardless of where it is sited; but these effects, which are negative externalities if its neighbors are residential properties, are not negative externalities if its neighbors are other factories. A full explanation of the externalities theory would need to account for not only zoning by type of land use, but also zoning by density, minimum lot size, and building height and bulk, which are other typical features of a comprehensive zoning scheme. These arguments, while perhaps not impossible, are more tenuous; it is arguably less clear, for example, why a two-flat building in a neighborhood otherwise composed of single-family homes would produce significant negative externalities.

12. See, e.g., McMillen & McDonald, *supra* note 9, at 168-69 (study of historical data shows no increase in residential property values over a period of years after Chicago adopted its first zoning ordinance). The empirical literature on this and related questions is reviewed in William A. Fischel, *Do Growth Controls Matter? A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulation*, LINCOLN INSTITUTE OF LAND POL'Y 1990. Fischel finds the empirical evidence inconclusive. While it has not been definitively established that zoning results in higher residential property values over time, Fischel argues that this result is nonetheless consistent with the hypothesis that zoning is working well to steer developments with substantial negative externalities to sites where they do the least harm. *Id.* at 12; cf. Steele, *supra* note 7, at 714 (suggesting that density and congestion, while regarded as undesirable and regulated under most zoning schemes, are not correlated with reduced property values). Furthermore, while zoning may not increase the value of a particular property, it may prevent the decrease of that property's value by limiting land uses that can have a negative impact on that particular property.

13. See *infra* notes 59-77 and accompanying text.

14. BABCOCK, *supra* note 1, at 120-25; NELSON, *supra* note 5, at 59; Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1154 (1955) (stating that unless zoning conforms with a comprehensive plan broader in scope than the zoning scheme itself, zoning "lacks coherence and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve" and is therefore constitutionally



communities that cannot afford their own planning agencies, zoning is often not accompanied by comprehensive planning.<sup>15</sup> Furthermore, critics suggest that in bigger cities that do have planning departments, planners often find zoning a bothersome, time-consuming, and highly technical distraction from what they regard as their more important planning functions, i.e., charting the future of that area. Therefore, it is not clear that zoning has ever been well-integrated with the other tools at a planner's disposal.<sup>16</sup> In particular, with regard to mega-developments that often preoccupy big-city planning departments, traditional zoning appears to play a relatively minor role among the array of available planning tools.<sup>17</sup> Finally, Houston, which has never had a zoning ordinance, does have an active and apparently effective

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infirm). Progressive, reform-minded advocates of New York's 1916 zoning ordinance also cited zoning's role as a tool of comprehensive, scientific urban planning similar to that then practiced in Bismarck's Germany, which they admired. See TOLL, *supra* note 9, at 128-31, 140; LUBOVE, *supra* note 9, at 13-14 (stating that Progressive Era social reformers supported zoning as a tool of comprehensive urban planning aimed at improving social conditions and beautifying cities). In New York, as in many cities, however, once zoning was in place, the push for broader forms of urban planning was largely abandoned. TOLL, *supra* note 9, at 178-80, 279.

<sup>15</sup> FISCHER, *supra* note 5, at 31; Robert F. Benitendi, Comment, *The Role of the Comprehensive Plan in Ohio: Moving Away from the Traditional View*, 17 DAYTON L. REV. 207 (1991)(arguing that a "comprehensive plan" requirement in a state zoning enabling act is deemed to be met by a comprehensive zoning ordinance; in fact, many small zoned municipalities do little or no "planning").

<sup>16</sup> BABCOCK, *supra* note 1, at 62-65. It is sometimes said that zoning, which by its very nature consists of a series of "negative" local prohibitions on particular kinds of land uses, cannot serve as an effective planning tool because it can neither compel nor encourage any particular kind of development. See, e.g., LUBOVE, *supra* note 9, at 13-14. This broad generalization probably overstates the case, however. If there is sufficient market demand for gas stations, for example, then prohibiting them in residential zones but permitting them in commercial zones will almost certainly result in gas stations being sited in commercial zones, even though public officials cannot literally compel such a result. What is not likely to work is what some courts and commentators have insisted upon: a zoning scheme that embodies a comprehensive, inflexible, expert-designed community master plan. See BABCOCK, *supra*, at 123-24 (arguing that although planning may be desirable, planning may be just as arbitrary and irrational as zoning); cf. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1160-64 (1985) (criticizing this "adjudicatory" model of zoning as "problematic"). See also FISCHER, *supra* note 5, at 33 (arguing that in most communities, zoning is driven by political interests, not professional planning); NELSON, *supra* note 5, at 77-83 (arguing that the notion that a community can conform its development trajectory to an expert-designed master plan is just misguided wishful thinking); *contra* Haar, *supra* note 14 (arguing for this kind of professional planning); *Fasano v. Board of County Comm'rs*, 507 P.2d 23 (Or. 1973) (requiring all zoning decisions to conform to comprehensive land use plan).

<sup>17</sup> See Robin Paul Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67, 73-82 (1987) (describing zoning as one tool, along with "co-financing," grants and tax incentive programs, by which municipalities try to influence large developments); Weiss, *supra* note 10 (describing role of innovative zoning techniques such as transferable development rights and planned unit developments, along with special districts, negotiated development, and "linkage" exactions, as tools municipalities use to steer large-scale developments).

planning department. This suggests that zoning is not a necessary component of successful urban planning.<sup>18</sup>

More recently, some zoning advocates have suggested the prevention of "fiscal freeloading" as a third rationale.<sup>19</sup> According to this view, some new developments place a greater burden on public services than they contribute in new taxes. Zoning is a means by which such developments can be screened out in favor of developments that pay their fair share.<sup>20</sup> This may indeed be one of the ways zoning is used in some exclusive, and exclusionary, suburban communities,<sup>21</sup> but it does not appear to be a major factor in big-city zoning schemes.<sup>22</sup> Moreover, where the fiscal freeloading rationale is

<sup>18</sup> Siegan, *supra* note 3, at 73.

<sup>19</sup> This view is most prominently associated in academic literature with Bruce Hamilton. See, e.g., Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, URB. STUD., June 1975 (arguing that, in a metropolitan area with a large number of competing municipal jurisdictions, the use of zoning as a neutral fiscal device can make residential property taxes function as an efficient price for public services).

<sup>20</sup> See Michelle J. White, *Fiscal Zoning in Fragmented Metropolitan Areas*, in FISCAL ZONING AND LAND USE CONTROLS 31-33 (Edwin S. Mills & Wallace E. Oates eds., 1975) (arguing that most zoning is done for fiscal purposes, either on a neutral basis in which newcomers pay exactly the marginal cost of the services they consume, or on a "fiscal-squeeze" basis in which newcomers are required to pay more than the marginal cost of services in order to benefit long-term residents). White argues, however, that even where zoning is fiscally motivated, the legal rationale is typically cast in terms of controlling externalities. *Id.* at 33.

<sup>21</sup> Techniques typically employed in exclusive suburbs include large minimum lot sizes, minimum house sizes, and exclusion of multi-family housing developments. Legal challenges to exclusionary zoning, based on state rather than federal constitutional requirements, were briefly successful in New Jersey in both *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 724-25 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975) (Mt. Laurel I) (holding exclusionary zoning violates New Jersey constitution), and *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390, 452, 467 (N.J. 1983) (Mt. Laurel II) (establishing numerical quotas for low-income housing and authorizing courts to grant "builder's remedies," i.e., court orders allowing proposed low-income housing developments to be built in order to achieve compliance with numerical goals). Communities have continued to find creative ways to resist compliance with the Mount Laurel decisions, however. See RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* 214-33 (1985).

<sup>22</sup> I do not mean to suggest that planners in big cities are insensitive to the fiscal impact of proposed developments, and especially of large-scale developments. But as I previously suggested, big cities typically address such concerns through planning tools other than, or in addition to, zoning. See *supra* note 17. Moreover, the notion of excluding the poor is a concept largely alien to big cities, where large numbers of the poor already reside. Thus, a low-income multi-family rental housing development that would be disfavored for fiscal reasons in some suburbs may be welcomed in the central city, where such a development is likely to be seen not as attracting new low-income residents, but rather as benefiting current low-income residents. Although big-city zoning has been used to exclude the poor from particular neighborhoods, see *infra* notes 36-37 and accompanying text, such decisions usually result in relocation of the proposed developments to poorer city neighborhoods, so the fiscal impact on the municipality is negligible.

Some public policy analysts have suggested that the central cities' generosity in providing welfare benefits to the poor is at best pointless and perhaps self-defeating. Rather than ending poverty, they suggest, these programs merely encourage the poor to remain in the central cities, where jobs and economic opportunities are scarce; thus, the poor stay poor and in the

employed, it has troublesome normative implications. Typically, it is lower-income, multi-family rental housing developments that are thought not to "pay their own way."<sup>23</sup> Such developments often increase the demand for public services by the sheer increase in numbers of new residents they bring to the community. This effect may be compounded if low-income residents require more public services per capita than higher-income residents. Yet, low-income housing is generally less costly (and therefore has a lower taxable value) per household and per capita than the housing of more affluent residents; consequently, ad valorem property tax revenues will be lower per new resident.<sup>24</sup> If allowed to proceed, such lower-income housing developments might permit lower-income persons to share in a higher quality of public services than otherwise would be available to them, including public schools with better funding and higher quality academics. Such developments might allow low-income persons to reside in closer proximity to what are often the fastest-growing job markets.<sup>25</sup> Thus, the fiscal freeloading argument may become a rationale for excluding lower-income (and often minority) persons from suburban residency and opportunities for economic advancement.<sup>26</sup>

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central cities—to the detriment of both the poor and the cities. See Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795 (1991). To my knowledge, no one has advanced a similar argument concerning the central cities' "generosity" with respect to zoning, but conceivably it could be argued that the cities' willingness to accommodate low-income housing through their zoning standards has a similar self-defeating effect, keeping the poor in the cities where they are likely to stay poor. Liberals are unlikely to make such an argument because it implies a harsher approach toward the poor.

Free-market conservatives, who typically favor less government regulation, are unlikely to make this argument because it implies more regulation, in the form of stricter big-city zoning. Instead, they would argue for leveling the playing field at a lower level of regulation by lowering zoning barriers to low-income housing in the suburbs. See *id.* at 831-52; *infra* notes 35-46 and accompanying text.

<sup>23</sup> Schill, *supra* note 22, at 812-14; Siegan, *supra* note 3, at 120. But cf. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 406 n.55 (1977) [hereinafter Ellickson, *Growth Controls*] (stating that because tenant families usually have fewer school-age children and apartment buildings are often subject to higher effective property tax rates, apartments are more likely to "pay their own way" in property taxes than are modest single-family homes).

<sup>24</sup> Ad valorem property taxes are still the principal local revenue source in most municipalities. See JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE AND LOCAL TAXATION* 8-12 (5th ed. 1988). Other local tax revenues, based on income or consumption, would also tend to be lower per capita on low-income residents.

<sup>25</sup> Schill, *supra* note 22, at 796-97.

<sup>26</sup> Cf. Ellickson, *Alternatives*, *supra* note 4, at 704 (finding that exclusionary zoning "may cause substantial inefficiencies by widely separating housing for working-class families from industrial job opportunities."). In addition, it has been suggested that suburban fiscal zoning may result in an undersupply of low-cost housing throughout the metropolitan area, including in the central city. See White, *supra* note 20, at 98.

### III. THE CRITIQUES

Most of the critiques of zoning fall into four broad categories. Two concern fairness or equity and the other two are based on considerations of economic efficiency. Zoning is said to be: (A) unfair because it benefits some landowners at the expense of others; (B) exclusionary, and therefore unfair to those excluded from a particular community; (C) inefficient insofar as it adds large transaction costs to development decisions, outweighing the benefits (if any) of zoning; and (D) inefficient in that it "distorts" land use allocation decisions, resulting in inefficient patterns of land use. Let us briefly consider each of these arguments.

#### A. *Zoning Is Unfair To Some Property Owners*

Some critics contend that zoning is fundamentally unfair because it grants special privileges to some property owners (typically, current owner/occupants of single-family homes) at the expense of others, including principally those (usually non-resident) owners who wish to develop their property for non-residential purposes.<sup>27</sup> Stated this way, the argument concedes that zoning confers a real benefit to some property owners, e.g., single-family homeowners.<sup>28</sup> In this common non-utilitarian or deontological version of the argument, it is enough to assert that a fundamental norm of fairness is violated when property-owners are treated differently. This argument rests on the normative judgment that the benefit to homeowners does not justify the harm to would-be developers. A variant of this argument is the utilitarian version, which argues that the wrong is the fact that the

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<sup>27</sup>. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 263-66 (1985) (zoning frequently results in uncompensated taking of private property in violation of constitutional principles and fundamental norms of fairness). Epstein recognizes, however, that zoning sometimes has beneficial outcomes such as controlling nuisances or benefiting the regulated party along with her neighbors, "so it is out of the question to invalidate all zoning per se." *Id.* at 265; Ellickson, *Alternatives*, *supra* note 4, at 699 (arguing that zoning reduces some property values while raising others; the losers are typically not compensated, and the winners reap a windfall); Ellickson, *Growth Controls*, *supra* note 23, at 438-40 (arguing that some forms of land use controls effectively allow current homeowners to skim off developers' profits, violating principles of horizontal equity); Robert C. Ellickson, *Three Systems of Land-Use Control*, 13 HARV. J.L. & PUB. POL'Y 67, 72-73 (1990) [hereinafter Ellickson, *Three Systems*] (stating that political processes of zoning are biased in favor of local residents).

<sup>28</sup>. Some more radical economic critiques, however, suggest that zoning provides no benefit to homeowners, or at least that such benefits are isolated, fortuitous, and incidental results of a fundamentally misconceived regulatory scheme. See, e.g., McMillen & McDonald, *supra* note 9, at 187 (concluding that Chicago's first zoning ordinance had no overall beneficial effect on property values and may have created as many externality problems as it solved).

harm to would-be developers outweighs the benefit to homeowners.<sup>29</sup> Yet the basic unfairness argument need not go this far. Therefore, under this critique, even if the benefit to homeowners outweighs the harm to would-be developers, zoning is wrong.

At one time, this argument was of constitutional dimensions,<sup>30</sup> but *Village of Euclid v. Ambler Realty Co.*<sup>31</sup> settled the dispute by holding that zoning is constitutionally permissible, at least on due process grounds.<sup>32</sup> Absent a constitutional or positive law norm prohibiting unequal treatment of different classes of property owners, advocates of this position must rely on some deeper moral principle. Yet our legal system recognizes many other kinds of unequal burdens by type of property, such as differential tax treatment. This suggests that under contemporary notions of property, the moral and legal norms implicated here are at best very weak. Ultimately, this type of critique must rest on a highly controversial (and ultimately insupportable) natural rights notion of property in which property rights are seen as having some nearly-inviolable, pre-political status.<sup>33</sup>

### B. Zoning Is Exclusionary

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<sup>29</sup>. Since the "harms" and "benefits" in this utilitarian calculus are thought to be economic harms and benefits, the utilitarian version of the fairness argument thus appears to collapse into economic arguments about efficiency. See discussion *infra* notes 56-77 and accompanying text.

<sup>30</sup>. See *supra* note 9 (showing that some early advocates of zoning feared that protection of property values from negative externalities, thus benefiting some property owners at the expense of others' property rights, provided inadequate "police power" justification to pass constitutional muster).

<sup>31</sup>. 272 U.S. 365, 389-90 (1926) (upholding local zoning ordinance against claims that it unconstitutionally deprived landowners of property without due process of law).

<sup>32</sup>. In cases where zoning imposes extreme burdens on some property owners to benefit others, especially if the burdens are unrelated to the purposes of the regulation, the jurisprudence of regulatory takings may still have some bite. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (establishing requirement of a "nexus" between regulatory purpose and burden imposed on property owner). But these cases involve claims by property owners against the government for compensation for a "taking" of private property; unequal treatment may be a relevant consideration, but in itself is neither necessary nor sufficient to establish a takings claim. Moreover, the remedy for a taking is typically compensation, not invalidation of the zoning scheme. Nor is the equal protection doctrine likely to help those seeking to overturn zoning; since would-be developers are not likely to be a "suspect class," all the government needs to show is that the classification passes a "rational basis" scrutiny, i.e., that under some imaginable set of facts it would be rational to impose these classifications. Thus, it is enough to show, for example, that the legislature could have thought that the benefit to homeowners outweighs the harm to would-be developers.

<sup>33</sup>. See, e.g., EPSTEIN, *supra* note 27, at 36 (describing property rights as pre-political "natural rights" with which government may interfere only if it provides dollar-for-dollar compensation). As Epstein recognizes, however, claims based on this theory are ultimately takings claims, resting on the notion that the government's action diminishing the value of A's property is wrong, regardless of how the government treats B. *Id.*

This argument, in its attenuated form, has already been alluded to in the prior discussion on fiscal freeloading.<sup>34</sup> In its more general form, the argument is that zoning, because it is prohibitory in nature, is fundamentally a device of exclusion. It is further argued that, in fact, zoning is widely used to exclude racial groups, economic classes, and economic activities that are deemed to be undesirable.<sup>35</sup> These arguments are more commonly directed at suburban zoning<sup>36</sup> because big cities, by their very nature, tend to be less exclusionary, taking all comers.<sup>37</sup> It does appear, however, that while big cities do not use zoning to exclude groups entirely, some neighborhoods within the cities do use zoning as an exclusionary device.<sup>38</sup> At first glance these arguments have some appeal, but they often are stated vaguely. Once we unpack them, it becomes clear that they should not stand as a general indictment of zoning.

The idea that some racially discriminatory applications of zoning should somehow taint all zoning is a peculiar one. If zoning is consciously used to achieve racial segregation, then a serious problem exists. But this problem should be addressed by constitutional and statutory equal protection claims, not by scrapping zoning.<sup>39</sup> Many

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<sup>34</sup> *Supra* notes 19-26 and accompanying text.

<sup>35</sup> See Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 71-77 (1993) (arguing that zoning is inextricably tied to invidious forms of racial and class exclusion).

<sup>36</sup> See, e.g., Leonard Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 J.L. REFORM 625 (1972); Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 791 (1969). Some critics suggest that zoning is most important in the suburbs, because that is where the largest numbers and greatest dollar value of new land use decisions are made and where zoning restrictions are often the strictest. See, e.g., FISCHER, *supra* note 5, at 34. This may lead to the non-sequitur that, since zoning is of greatest importance in the suburbs, and suburban zoning is exclusionary, therefore zoning in general is exclusionary and ought to be abolished. It does not follow from the premise that since zoning may be exclusionary in some places, it must be exclusionary everywhere. Nor does it follow that where zoning is now practiced with exclusionary motives or results it must necessarily remain exclusionary.

<sup>37</sup> NELSON, *supra* note 5, at 24 (stating that history of zoning in big cities is non-exclusionary; exclusionary uses of zoning are closely tied to suburban regulation of undeveloped land); *but cf.* Kosman, *supra* note 35, at 60-61 (arguing that even in big cities zoning is aimed at exclusion by social class).

<sup>38</sup> *Cf. Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736, 741 (N.D. Ill. 1969) (holding that Chicago's public housing authority had violated the 14th Amendment equal protection rights of black public housing residents by failing to build public housing developments in predominantly white neighborhoods). The Housing Authority claimed it was unable to build the developments without zoning approval from the city, and city council members from those neighborhoods had blocked the necessary zoning changes in response to racial animus in their communities.

<sup>39</sup> *Cf. Ellickson, Growth Controls, supra* note 23, at 418 (suggesting that constitutional remedies should be available for racially-motivated growth restrictions). Certainly some early zoning schemes were explicitly aimed at excluding blacks or segregating housing patterns along racial lines. See BASSETT, *supra* note 9, at 50 n.1 and cases cited therein; *Buchanan v.*

powers and institutions of local government, including public schools, police functions, criminal sentencing, the taxing power, various licensing powers, and powers to hire public employees, grant government contracts, and award public services have been used in unlawfully discriminatory ways. Yet this does not lead to the conclusion that all those powers and institutions should be scrapped.<sup>40</sup> Whenever the zoning power is misused, strong action should be taken. But stripping local government of the zoning power is inappropriate unless it can be shown that the zoning power is incapable of being put to valid uses. Since it is not zoning on its face, but rather its application that results in discrimination, those particular applications, and not all zoning, should be eradicated.

More difficult is the claim that zoning is used to exclude persons by economic class, resulting in the side effect of racial exclusion, because racial minorities generally are not as affluent as the white majority.<sup>41</sup> Again, this charge is typically made against suburbs rather than big cities because big cities embrace a greater diversity of income classes.<sup>42</sup> The problem with this claim is that our legal and political culture is at best ambivalent about the principle of equal treatment on the basis of economic status.<sup>43</sup> Even if society were committed to that principle, the appropriate remedy would not be to reject zoning as an institution, but to challenge particular applications of the zoning power based on impermissible categories of economic status.<sup>44</sup>

Warley, 245 U.S. 60, 82 (1917) (invalidating, on due process grounds, a Louisville ordinance establishing racially segregated residential zoning, because it infringed upon a white seller's property rights to select a buyer).

<sup>40</sup>. Cf. *BABCOCK*, *supra* note 1, at 124-25 (arguing that it is an error to confuse the zoning power with the goals or purposes to which the zoning power is applied).

<sup>41</sup>. Cf. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (holding that absent showing of racial animus, a suburban zoning scheme excluding a low-income housing development does not violate the Equal Protection Clause, even though it has racially disproportionate impact).

<sup>42</sup>. But again, it is entirely likely that big cities exclude the less affluent from particular neighborhoods through minimum lot sizes and other requirements that contribute to making housing unaffordable for lower-income households.

<sup>43</sup>. Compare *Goldberg v. Kelly*, 397 U.S. 254, 264-66 (1970) (recognizing welfare benefits as an interest worthy of due process protection) and *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (holding that a state may not discriminate against newly-arrived residents in awarding welfare benefits, based on constitutionally-protected freedom of interstate travel) with *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (holding that a zoning decision excluding low-income multi-family rental housing, based on fiscal considerations, does not violate equal protection principles, even though its ultimate effect is to exclude racial minorities). *Goldberg* and *Shapiro* represent the high-water mark of constitutional protection for the poor; since *Arlington Heights* was decided, it is clear that constitutional doctrine affords little protection against classifications based on economic status, even where economic status is strongly correlated with race.

<sup>44</sup>. Again, the critics seem to confuse the zoning power with the uses to which it is put. Suppose we retained zoning, but adopted as a matter of constitutional law the principle that

Alternatively, the states or perhaps Congress could enact statutes prohibiting the use of zoning to exclude on the basis of economic status.

More fundamentally, exclusion on the basis of economic status appears to be the entire *raison d'être* for the most exclusive suburbs. Although zoning is one tool used to achieve that goal, it is not the only tool, and abolishing zoning would not necessarily effect a cure.<sup>45</sup> Finally, even if all public regulation of land use were abolished, private devices like restrictive covenants might still be used to achieve the goal of exclusion.<sup>46</sup>

Another variant on the exclusion argument is not concerned with exclusion by economic status, but with exclusion of certain legal but locally undesirable (yet socially necessary) land uses. This is the NIMBY (Not-In-My-Back-Yard) syndrome. It is said that zoning benefits the best-organized and politically most powerful residents who are able to block the siting of locally undesirable economic activities in their own communities. Yet those same residents get some

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zoning may not be used to exclude persons on the basis of economic status. Thus, intentional exclusion by economic status would be an impermissible goal, just as intentional racial exclusion is now. This would severely curtail some uses of the zoning power, especially in exclusive suburbs (and in exclusive big-city neighborhoods). It would not, however, curtail all uses of the zoning power. Most zoning decisions based on density, or on the mixing of commercial and industrial uses with residential uses, would still be permitted.

<sup>45</sup> See Peter Marks, *Home Rule's Exclusive, Costly Kingdoms*, N.Y. TIMES, Feb. 1, 1994, at A1 (stating that numerous small suburban home-rule municipalities are administratively inefficient and intentionally exclusionary, fostering "separateness and racial and economic exclusion"); Fischel, *supra* note 12, at 34 (arguing that although exclusion of the poor motivates some suburban zoning, other evidence suggests segregation by income is primarily a matter of individual decisions and, clear patterns of income segregation pre-date zoning and persist in unzoned communities like Houston); *id.* at 54 (stating that judicial efforts to curb exclusionary zoning helped spawn broad, across-the-board growth controls, "seemingly beyond judicial reproach on exclusionary grounds because they democratically exclude everyone."). It seems unlikely that "mature" exclusionary suburbs like Scarsdale, Grosse Pointe or Winnetka would suddenly be open to a flood of lower-income immigrants from the Bronx, Detroit, or Chicago if zoning were abolished simply because the existing housing stock is prohibitively expensive. Moreover, if those communities were required (through stronger measures than abolition of zoning) to absorb a population of diverse socio-economic status, it seems likely that many of their current residents would flee to other exclusive enclaves through purchases of large private tracts of land, perhaps reincorporating into new, smaller municipalities. See Marks, *supra* (describing division of eastern Long Island into minuscule municipalities, which are easier to keep "exclusive" under the social norms of a handful of property owners).

<sup>46</sup> Cf. Ellickson, *Alternatives*, *supra* note 4, at 714 ("[R]estrictive covenants are widely used as a device to exclude lower income groups."). A solution to this would be to recognize discrimination based on economic status as a violation of equal protection, in which case those provisions of private covenants that exclude by economic status might be unenforceable. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that restrictive covenants discriminating by race are unenforceable because enforcement violates the 14th Amendment guarantee of equal protection). Even then, however, it would be difficult to prevent the affluent from practicing their own private forms of exclusion through purchases of large private tracts of land, or private developments of large homes on large lots, enforced by informal social norms.



portion of the social benefits of those activities when they take place in other, less politically powerful communities. For example, a noxious factory is unlikely to be sited in an exclusive suburban community, even though the wealth that factory produces may directly benefit some residents of the affluent community and indirectly benefit all community residents insofar as they enjoy the economic benefits of the entire metropolitan region.

Like economic and racial exclusion, the NIMBY syndrome is more symptomatic of suburban than big-city zoning.<sup>47</sup> Big cities are usually able to offer some site for almost any legal activity.<sup>48</sup> Indeed, early zoning advocates argued that in order to pass constitutional muster, zoning must provide a place for every otherwise-legal activity.<sup>49</sup> Although contemporary big-city zoning advocates are unlikely to accept this as a realistic goal, much less a legal requirement, big-city

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<sup>47</sup>. Cf. *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1628-29 (1978) (distinguishing "separation" zoning, which "carries the message that the use is incompatible with others and must therefore be located elsewhere in the community to maximize overall welfare," from "selection" zoning which "operates by encouraging some uses while disfavoring or excluding other uses"). Big-city zoning typically "separates" uses, while suburban zoning schemes are often "selective," i.e., exclusionary.

<sup>48</sup>. But the NIMBY syndrome may operate in big cities to exclude certain activities from certain neighborhoods, with the neighborhoods having the most political clout often bumping undesirable activities to less politically powerful neighborhoods. This kind of political power is often (though not always) correlated with socio-economic status and race, so that poor and minority communities often shoulder a disproportionate burden of undesirable land uses. See Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001-03 (1993) (stating that locally undesirable land uses ("LULUs"), such as waste disposal sites, homeless shelters, and drug and alcohol treatment centers, have diffuse benefits and locally concentrated costs; typically, these are resisted by affluent communities and concentrated in poor and minority communities which lack the political effectiveness to stop them). In addition, city planners have had increasing difficulty in siting some land uses, such as landfills and incinerators, at all.

In a sense, all zoning decisions are NIMBY decisions; that is, they exclude some presumptively undesirable activities from particular neighborhoods. But discussion of the NIMBY syndrome usually focuses on two harms: first, that some socially necessary activities will be unable to be sited at a reasonable cost, and second, that some undesirable but necessary activities will be "dumped" on the politically powerless. Although many of these political battles are determined through the zoning process, the political dynamic of NIMBY is by no means co-extensive with zoning; many zoning decisions are unrelated to these NIMBY-like results, and many NIMBY-like results are achieved through market forces and/or levers of political power other than zoning. Thus it is by no means clear that abolition of zoning would curtail the NIMBY phenomenon. Houston, for example, which has never had zoning, nonetheless has its share of NIMBY-like land use patterns. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1400-06 (1994) (citing studies showing environmentally undesirable land uses in Houston are concentrated in poor and minority communities and suggesting that market forces may play a greater role than siting decisions).

<sup>49</sup>. BASSETT, *supra* note 9, at 80-81 (stating that New York's ordinance did not seek to "exclude any use that was necessary or desirable for civilized life"); NELSON, *supra* note 5, at 24.

zoning probably comes much closer to achieving this ideal than suburban zoning.

The critics' recurring mistake is confusing the zoning power itself with the application of that power to achieve a goal they find objectionable. If suburban zoning is too restrictive and produces NIMBY-like results, then perhaps the problem is not with zoning generally, but with the particular goals and practices of suburban zoning, or even with the existence of suburbs themselves as exclusive enclaves within the larger metropolitan community. Some suburbs are intended to be communities that keep out certain kinds of economic activities; zoning is but one tool used to achieve that result.<sup>50</sup> If NIMBY is a problem, then perhaps the solution is a return to the requirement that zoning allow all otherwise-legal economic activities to take place somewhere within its bounds.

A final variant on the exclusion argument is that politically well-connected developers are often able to win the zoning changes they need, while political neophytes and outsiders are disadvantaged.<sup>51</sup>

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<sup>50</sup>. To state the point more strongly, some suburban communities arguably were established to have a parasitic relationship upon the larger metropolitan community —reaping the benefits of participation in the metropolitan economy while avoiding its negative consequences. In that sense, exclusion of persons by economic status and exclusion of locally undesirable economic activities are two aspects of the same phenomenon. There is at least *prima facie* evidence that zoning has been a crucial tool allowing suburbs to achieve these goals.

If the goals and the results are impermissible, there are several alternatives to abolishing zoning, which in my view would unnecessarily cripple non-exclusionary uses of zoning in the cities. One is to effectively abolish suburbs as we know them through metropolitan government or at least substantial consolidation of crucial local governmental functions like zoning. In the Baltimore metropolitan area, for example, the suburban zoning power rests at the county level rather than with individual suburban municipalities. By administering zoning over a such a large area, a zoning scheme could be designed to accommodate all otherwise legal uses. *But cf.* Ellickson, *Growth Controls*, *supra* note 23, at 430-35 (arguing that metropolitan zoning, large-scale suburban zoning, and statewide land use controls would create monopoly zoning power and increase "rent-seeking" behavior, thus exacerbating inequities and inefficiencies); Hamilton, *supra* note 19 (arguing that competition among municipalities tends toward efficiency in zoning).

Requiring each zoning ordinance to make sufficient provision for all otherwise-legal land uses is another possibility; thus, suburban communities themselves would decide, jointly or in combination, how to accommodate industrial and commercial uses, multi-family residential housing, and other uses that might be considered undesirable. A final possibility is to allow decentralized zoning, but to create a metropolitan-wide or statewide override mechanism to protect those uses that might otherwise have difficulty finding a home. Many states, for example, have already created override mechanisms for siting waste disposal facilities, and a few states have experimented with statewide authorities for siting low-income housing. NELSON, *supra* note 5, at 37 (citing Massachusetts and New York as examples).

<sup>51</sup>. Campaign contributions to key decision-makers, large fees to politically-connected attorneys, outright bribes, and personal relationships with planning professionals and politicians are said to be crucial elements in this equation. *See* Ellickson, *Growth Controls*, *supra* note 23, at 407-08 (arguing that large central cities are more vulnerable to "capture" by pro-development interests than are elite suburbs, where homeowners' exclusionary interests predominate); *but cf.* FISCHER, *supra* note 5, at 212-14 (arguing that in addition to the influence

An even harsher version is that self-seeking, entrepreneurial local officials are able to use the zoning power to "shake down" developers for campaign contributions, bribes, patronage jobs, and other private benefits. Only those who "ante up" are awarded the zoning approvals they need. There is substantial evidence that these practices do take place.<sup>52</sup> This has led some to conclude that land use regulation should be more rule oriented.<sup>53</sup> Others argue that the solution is to make zoning more scientific and professional, and less political.<sup>54</sup> Still others argue that these practices are so widespread, and such an unavoidable part of the zoning power, that no solution short of abolition of zoning will suffice.<sup>55</sup> This article addresses these concerns

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of developers' money on politicians, large cities tend to be more pro-development because city residents tend to be concerned about the jobs that accompany development; in this respect, big-city attitudes toward development are similar to those of smaller cities isolated from metropolitan areas). Public officials might also reasonably regard a developer's reputation for fiscal probity, demonstrated ability to secure financing and bring proposed developments to a successful completion, and track record of having produced developments that make ongoing positive contributions to the community as relevant factors that would tend to weigh in favor of granting zoning approval to "insiders" while being more wary of proposals by neophytes and outsiders. See Krasnowiecki, *supra* note 5, at 731 ("There is no local government that is not interested in a developer's financial capacity, reputation for quality, and record of good management," and "local governments have a legitimate interest in a developer's capacity to complete and manage the project and they should have the right to reject a developer who does not demonstrate such a capacity.").

<sup>52</sup>. See Harlan Draeger, *A Crime Waive for Aldermen*, CHI. SUN-TIMES, Jan. 1, 1992, at 1 (stating that of 18 Chicago aldermen convicted of criminal offenses since 1970, seven were convicted for zoning-related bribery or extortion); Ellickson, *Growth Controls*, *supra* note 23, at 408 n.62 (citing incidents of zoning-related graft). See *infra* notes 154-55 and accompanying text.

<sup>53</sup>. Cf. Kmiec, *supra* note 5, at 43-46 (arguing that to counter procedural unfairness zoning decisions should be less "legislative" and more "adjudicatory" in nature). But cf. *id.* at 52-53 (simultaneously arguing that rule-like zoning regulations are often too inflexible).

<sup>54</sup>. See, e.g., Haar, *supra* note 14, at 1155 (arguing that zoning must conform to a master plan "[b]ased on comprehensive surveys and analyses of existing social, economic, and physical conditions in the community and of the factors which generate them . . . direct[ing] attention to the goals selected by the community from the various alternatives propounded and clarified by planning experts.").

<sup>55</sup>. See Kmiec, *supra* note 5, at 31 ("Zoning . . . as presently constituted should be eliminated and replaced by an alternative free enterprise development system . . ."). Even Kmiec would retain some measure of public land use controls, however. *Id.*

Cf. Krasnowiecki, *supra* note 5, at 752-53 (concluding that, while nominally operating as a set of categorical rules, "short zoning" in undeveloped areas in fact results in "an arbitrary permit granting system" in which political favoritism is inevitable; in the interest of candor and effective judicial review, zoning in such areas should be abolished in favor of explicit case-by-case permitting, accompanied by a requirement that the municipality give cogent reasons for denial of a permit). Note that despite the provocative title of his article, Krasnowiecki would not abolish zoning in already-developed areas, such as central cities. *Id.* at 750. His general view appears to be that zoning, designed to meet the needs of the big cities, works tolerably well there, so long as additional flexibility is built into the zoning process, *id.* at 723-27. But zoning is terribly mismatched when applied to undeveloped suburban areas "in the path of development." *Id.* at 726; cf. NELSON, *supra* note 5, at 189 (arguing on efficiency grounds that zoning was designed for, and with modifications may still make sense in, developed urban neighborhoods but should be abolished in undeveloped areas).

in Part IV, arguing that zoning decisions must be policed both from the top-down and from the bottom-up, using processes that encourage neighborhood residents to participate actively in decision-making.

### C. Zoning Adds Unnecessary Transaction Costs

Most proponents of this argument concede that some form of local land use regulation is necessary to control the negative effects of certain types of land uses. Typically, they argue that some alternative form of regulation would be more efficient than zoning because of lower transaction costs.<sup>56</sup> The direct governmental administrative costs of zoning are generally conceded to be relatively low.<sup>57</sup> The higher costs are shifted to developers, especially when the development requires approval for a variance, special use permit, amendment, or planned unit development.<sup>58</sup> Yet these transaction costs are only part of the total cost equation.

Though critics of zoning contend that zoning advocates focus only on the costs of the externalities they seek to prevent (ignoring the transaction costs added by the zoning system itself), the critics themselves may focus only on the transaction costs.<sup>59</sup> In particular, some critics would rely, in whole or in part, on private covenants to

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<sup>56</sup> See, e.g., Ellickson, *Alternatives*, *supra* note 4, at 697-98 (finding that in addition to governmental costs of administering zoning, developers bear the costs of obtaining information, winning approval, developing strategies to cope with uncertainty and delays in allowing a development to go forward); Krasnowiecki, *supra* note 5, at 727-44 (contending that "short zoning" effectively allows local governments to regulate the timing and design of developments, adding to costs; furthermore, the relationship between nominal zoning regulations and actual bases of decision results in frequent litigation, adding further delays and costs); Kmiec, *supra* note 5, at 46-49 (arguing that zoning's inflexibility prevents experimentation with more efficient designs; process delays add to development costs; campaign contributions and bribes further inflate transaction costs).

<sup>57</sup> See Ellickson, *Alternatives*, *supra* note 4, at 697 (finding that the direct governmental administrative costs of zoning are relatively low); *but cf.* Ellickson, *Three Systems*, *supra* note 27, at 72-73 (arguing that governmental administrative costs of zoning are high and are growing as regulation becomes increasingly complex).

<sup>58</sup> Krasnowiecki argues that, as a result of "short zoning," such approvals are required for almost every development. Krasnowiecki, *supra* note 5, at 734. Fischel notes that most of these transaction costs are attributable to legal restrictions on the terms of trade. Developers cannot "buy" zoning rights through outright cash payments, but instead must arrange complex and circuitous barter agreements to remain within legally permissible boundaries. In addition, cumbersome public decision processes, which involve many parties with their own private agendas, make bargaining difficult. FISCHEL, *supra* note 5, at 131-35.

<sup>59</sup> *But see* Ellickson, *Alternatives*, *supra* note 4, at 694 ("The pertinent goal is minimization of the sum of nuisance, prevention, and administrative costs."). Like other critics, Ellickson argues that the "prevention" and "administrative costs" of zoning outweigh any reduction in "nuisance costs" (i.e., negative externalities prevented as a result of zoning). *Id.* at 693. *Cf.* Kmiec, *supra* note 5, at 46; Siegan, *supra* note 3, at 141. The evidence to support this assertion consists largely of anecdotes, hypotheticals, and arguments from theory, however.

perform some of the nuisance-avoidance functions of zoning.<sup>60</sup> As has been frequently noted, however, the transaction costs of getting all residents of an existing neighborhood to agree to restrictive covenants are prohibitively high.<sup>61</sup> Thus, private covenants are likely to be effective only in previously undeveloped areas where a private developer can impose them as part of the subdivision of a large parcel.

Moreover, that alternative schemes of land-use regulation would result in lower transaction costs is both a controversial and unproven assertion. Ellickson, for example, proposes establishing "Nuisance Boards" empowered to declare certain land uses presumptive nuisances and to adjudicate nuisance claims.<sup>62</sup> Other commentators have suggested that such a scheme might actually involve higher transaction costs.<sup>63</sup> To his credit, Ellickson himself acknowledges that the case supporting his proposal on the basis of transaction cost efficiency is a problematic one.<sup>64</sup>

#### D. Zoning Produces Inefficient Land Use Allocation Decisions

In its purest form, an economic critique of zoning might argue that zoning (or any scheme of land use regulation) is inherently inefficient because it forces landowners to make land use allocation decisions other than those they would make in a free market. According to classical economic theory, free markets efficiently allocate economic resources, and neither legislative-type categorical regulations nor case-by-case decisions by bureaucratic regulators can make such decisions

<sup>60</sup>. See Siegan, *supra* note 3, at 142; Ellickson, *Alternatives*, *supra* note 4, at 711-19 (urging expanded use of covenants as substitute for zoning).

<sup>61</sup>. Ellickson, *Alternatives*, *supra* note 4, at 718; Fischel, *supra* note 12, at 14. The result of this argument is that, while the transaction costs associated with zoning are real and visible for all to see, the transaction costs associated with private covenants are effectively hidden —the costs are so high (in the context of already-established neighborhoods) that the transaction never takes place. Thus, simply referencing the transaction costs of zoning is highly misleading.

<sup>62</sup>. Ellickson, *Alternatives*, *supra* note 4, at 762-66.

<sup>63</sup>. See, e.g., Krasnowiecki, *supra* note 5, at 721-22 (arguing that Ellickson's proposed system of land use regulation would "in practice be even more costly and chaotic than zoning" because developers would not be able to predict *ex ante* the nuisance damages to which they would be subject). In addition, of course, a system dependent on case-by-case adjudications of damage awards is likely to produce wildly uneven outcomes, and entail enormous litigation costs. See FISCHEL, *supra* note 5, at 27. Nor would Ellickson's proposal to give adjudicatory jurisdiction to administrative Nuisance Boards necessarily reduce litigation costs, since due process principles would almost certainly require that administrative adjudications be subject to appeal. Ellickson, *Alternatives*, *supra* note 4, at 762 ("The major drawback of the nuisance approach is potentially excessive administrative costs.").

<sup>64</sup>. Additionally, others such as Fischel find the empirical evidence inconclusive. Fischel, *supra* note 12, at 53 ("Abolition of zoning and related controls would create a demand for alternative controls, and it is not clear that the alternatives are less costly to administer or more efficient in their effects than zoning.").

as efficiently as the market. Thus, land use decisions made under a regulatory scheme inevitably result in inefficient distortions of the market.<sup>65</sup>

The classic objection to such a pure *laissez-faire* approach is that it does not take into account externalities or spillovers from land uses. Internalizing the externalities requires some kind of regulatory scheme.<sup>66</sup> The *laissez-faire* response argues that land-use conflicts involve highly localized and concentrated externalities. Therefore, only a few neighboring properties are significantly affected.<sup>67</sup> No major obstacles exist to Coasean bargaining<sup>68</sup> to resolve that conflict efficiently. In addition, the existing common law of nuisance offers landowners remedies for negative "spillovers" from noxious uses of neighboring properties. This common law should produce efficient results where neighbors recover damages for such negative spillovers.<sup>69</sup>

Surprisingly, no major critic of zoning makes this *laissez-faire* argument in quite so pure a form. Perhaps Bernard Siegan comes the closest.<sup>70</sup> At some points Siegan seems to argue that the Houston

<sup>65</sup>. See, e.g., Siegan, *supra* note 3, at 142-43 (contending that free market land use decisions tend to follow rational and efficient patterns, which are distorted by zoning).

<sup>66</sup>. Even renowned critics of zoning, such as Ellickson, recognize that land uses may produce powerful negative externalities impinging on neighboring property owners. See, e.g., Ellickson, *Alternatives*, *supra* note 4 (arguing for a variety of regulatory schemes to control negative externalities of noxious land uses).

<sup>67</sup>. See John P. Creche et al., *Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J.L. & ECON. 79, 95 (1967); but cf. Mingche M. Li & H. James Brown, *Micro-Neighborhood Externalities and Hedonic Housing Prices*, 56 LAND ECON. 125 (1980) (finding that neighborhood externalities are important factors in determining housing values).

<sup>68</sup>. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (positing that in a world free of transaction costs parties will bargain to efficient outcomes regardless of initial assignments of entitlements). Here, it is suggested that with few parties affected, transaction costs are low, and parties will be more likely to bargain to efficient outcomes.

<sup>69</sup>. Ellickson, *Alternatives*, *supra* note 4, at 722-48. Ellickson, however, regards traditional nuisance law as doubly inadequate to this task. First, traditional nuisance law does not give a remedy for all negative externalities. Second, the traditional nuisance remedy, an injunction against the noxious use, provides too much protection for the injured property owner. Ellickson would reformulate nuisance law to allow nuisance remedies in broader circumstances and, at the same time, to limit nuisance remedies to a) damages or b) a novel Calabresian remedy in which the party making the nuisance claim pays the tortfeasor to stop the noxious activity. *Id.* at 738-48; cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1116 (1972) (traditional tort remedies are incomplete insofar as they omit an efficiency-maximizing remedy, that of having the tort victim compensate the tortfeasor to refrain from the tort-producing activity).

Ellickson also recognizes, however, that some negative externalities of land uses are sufficiently widespread and diffuse that bargaining, backed up by bi-polar nuisance litigation, may not work effectively to prevent or compensate injuries. Therefore, Ellickson would add a regulatory scheme consisting of fines, mandatory prohibitions or both. Ellickson, *supra*, at 772-79.

<sup>70</sup>. Siegan, *supra* note 3, at 142-43.

market creates a "rational" pattern of land use allocation decisions that results in relatively few, highly localized, and concentrated negative externalities.<sup>71</sup> The implication is that no regulatory scheme is needed.<sup>72</sup> Similarly, Andrew Cappel suggests that prior to the adoption of New Haven's first zoning ordinance, the market produced a rational pattern of land use allocation that at least equaled, and possibly surpassed, the efficiency of land use allocation under zoning.<sup>73</sup> Elsewhere, both Siegan and Cappel seem to argue that zoning merely replicates the allocation of land uses that the market would make—but at a higher cost due to higher transaction costs.<sup>74</sup>

Most of zoning's critics recognize the need to control negative externalities through some regulatory scheme, but do not make the pure laissez-faire "market distortions" argument.<sup>75</sup> Since any regulatory scheme is arguably subject to the laissez-faire market distortions objection, their objections to zoning principally turn on

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* Siegan's point is that generally the negative externalities of land use allocations are no worse in unzoned Houston than in zoned cities; but overall, Houston's land use is more efficient because, for example, under a free market more apartment buildings are built, which keeps rental housing prices lower.

<sup>73</sup> Cappel, *supra* note 5. Cappel suggests that zoning in New Haven was a "solution" to a non-existent problem because the market was already allocating land use efficiently and rationally with few significant negative externalities. But Cappel recognizes that land use patterns in New Haven had been affected by previous, less stringent land use regulations, such as building set-back requirements.

<sup>74</sup> See Siegan, *supra* note 3, at 142 ("[I]n general, zoning in the major cities, which contain diverse life styles, has responded and accommodated to most consumer demands. This has not occurred usually in the more homogeneous suburbs."); Cappel, *supra* note 5, at 636 (arguing that with minor exceptions, New Haven's zoning ordinance "simply confirmed existing patterns of development" and therefore "may well have brought zoning to [a community] where it was not really needed."). Note, however, that *most* early zoning ordinances, including New York's, did not attempt radical surgery on existing patterns of land use, but instead were seen as prophylactic. TOLL, *supra* note 9, at 186 (finding that despite claims that zoning was an instrument of "planning," New York's first zoning ordinance generally adopted status quo in land use); BASSETT, *supra* note 9, at 53 (finding that New York's ordinance was adopted in conformity with principle that "[z]oning should not ordinarily be used to force a change to a status not existing."); McMillen & McDonald, *supra* note 9, at 185-86 (arguing that Chicago's first zoning ordinance simply incorporated existing land use patterns). Given that Cappel's findings concerning New Haven fit a broader pattern applicable to even the largest cities, it is not clear what significance we should attach to Cappel's study.

<sup>75</sup> Cf. Ellickson, *Alternatives*, *supra* note 4 (arguing private covenants, expanded nuisance law, fines, and some mandatory prohibitions are necessary to control negative externalities); Krasnowiecki, *supra* note 5, at 753 (stating land use control "is dictated by some urgent social and political realities, many of which are not intrinsically bad," but proposing elimination of zoning in undeveloped areas in favor of explicit case-by-case permitting process); Kmiec, *supra* note 5, at 66-70 (recognizing need to regulate intensity of land use); FISCHER, *supra* note 5, at 163-73 (arguing some form of zoning or alternative land use regulation is necessary to protect local public goods); NELSON, *supra* note 5, *passim* (arguing some form of public control over land use is necessary, but should be more flexible and responsive to market forces than current forms of zoning).

equity and transactional efficiency arguments. Many critics suggest that zoning produces some distortions in land use decisions. For example, both Ellickson and William Fischel contend that restrictive suburban zoning and growth controls contribute to suburban sprawl (together with the related ills of transportation inefficiencies, air pollution, and loss of "agglomeration economies" for business) and inflated housing costs.<sup>76</sup>

Jane Jacobs' classic critique of zoning<sup>77</sup> might be considered a sociological variant on the distortions argument. Jacobs argues that healthy, lively, innovative, and economically dynamic cities are founded upon diversity within their neighborhoods.<sup>78</sup> Zoning renders cities sterile and uncreative, by stifling the diversity of land uses within neighborhoods and generally segregating land uses by type. Thus, to Jacobs, zoning distorts the natural allocation of land use within cities in a way that is detrimental not only to economic innovation and growth but also to the flowering of culture and the natural pleasures of city life.

#### IV. ZONING: ANOTHER LOOK

##### A. Zoning To Protect The Neighborhood Commons

This article contends that both supporters and critics of zoning have misconceived the nature of zoning. Zoning is only partially about protecting individual property owners against the effects of "spillovers" or negative externalities that adversely affect the market values of their property.<sup>79</sup> Specifically, zoning protects a homeowner's consumer surplus in a home and in the surrounding

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<sup>76</sup>. Ellickson, *Alternatives*, *supra* note 4, at 695; Ellickson, *Three Systems*, *supra* note 27, at 72; Fischel, *supra* note 12, at 56-57. An agglomeration economy refers to the production and consumption advantages gained by having people in close proximity, such as in a large city. For further discussion on agglomeration economies, see FISCHEL, *supra* note 5, at 252-54.

<sup>77</sup>. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

<sup>78</sup>. *Id.*

<sup>79</sup>. *Cf.* NELSON, *supra* note 5, at 7-10 (describing zoning's origins in nuisance law). According to Nelson, the legal justification offered for zoning, from the earliest zoning ordinances to contemporary schemes, relies on an analogy to nuisance law in order to invoke the police power to protect public health, safety, and welfare. Traditional nuisance jurisprudence was widely regarded as unsatisfactory, however, because case-by-case and highly context-dependent adjudication made it impossible to predict with any certainty what would and what would not be considered a nuisance; *but cf.* BASSETT, *supra* note 9, at 79, 93-95 ("Zoning is not based to any extent on the doctrine of nuisance."). According to Bassett, although some uses may be both nuisances and violative of zoning regulations, nuisance and zoning serve different purposes: one, the protection of private property rights, and the other a public purpose of protecting "the health, safety, morals, comfort, convenience, and general welfare of the whole community."



neighborhood, that lies above the market value of that home. This consumer surplus has essentially been overlooked and is fundamental to an understanding of zoning.

Arguably, protecting against the effect of negative externalities on market values can be achieved more efficiently by providing property owners with what Guido Calabresi and A. Douglas Melamed call "liability rule" protection.<sup>80</sup> Armed with such protection, neighbors would either bargain with would-be developers to achieve efficient outcomes or bring suit to recover their losses.<sup>81</sup> On its face, however, zoning appears to function as what Calabresi and Melamed call an "inalienability rule," categorically prohibiting any development proscribed by the zoning ordinance.<sup>82</sup> As numerous commentators have suggested the reality is much different. In fact, zoning functions more like a "property rule," allowing neighborhood residents (or their governmental representatives) to enjoin a proposed development that does not conform to current zoning, while leaving room for the would-be developer to "buy" the entitlement to build through design concessions, campaign contributions, and the like.<sup>83</sup> But property rule

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<sup>80</sup>. Calabresi & Melamed, *supra* note 69, at 1106-10. A "liability rule" protects an entitlement by awarding damages for breach. A "property rule" protects an entitlement by awarding injunctive relief. An "inalienability rule" is an absolute, categorical prohibition, usually enforced by criminal sanctions. Calabresi and Melamed point out that where damages are easy to determine, liability rules typically lead to economically efficient outcomes since if the nuisance-producing activity is more valuable than the harm it causes, the nuisance producer will simply compensate the injured party.

<sup>81</sup>. This is the core of Ellickson's proposed alternative to zoning, although Ellickson also proposes expanded use of private covenants and, in limited circumstances, mandatory rules backed by fines. Ellickson, *Alternatives*, *supra* note 4, *passim*.

<sup>82</sup>. Calabresi & Melamed, *supra* note 69, at 1111.

<sup>83</sup>. See Krasnowiecki, *supra* note 5, at 734; Ellickson, *Alternatives*, *supra* note 4, at 709-10. The analogy to a "property rule" in the Calabresi-Melamed sense is imperfect. In a true property rule, each individual property owner would have a right to enjoin a proposed development that harmed his property. Consequently, to buy the right to develop, the developer would need to reach an agreement with and compensate every adversely affected property owner. This obviously gives each property owner enormous bargaining leverage, and encourages rent-seeking holdouts; moreover, in most situations the costs of identifying all affected property owners and bargaining with each of them would be prohibitively high. In zoning, by contrast, only the municipality has a property rule-type right to enjoin which it theoretically exercises on behalf of local residents. Calabresi and Melamed recognize that such hybrid rules—in effect, property rules in which the right to enjoin is held by a collective entity (here, the municipality)—may be desirable in situations where large numbers of parties are involved and the costs of individualized injury valuations are high, as with zoning. Calabresi & Melamed, *supra* note 69, at 1122 n.62.

The municipality could, obviously, hold out until it has captured all the economic rent that is available. But the municipality's incentives are mixed; the decision is subject to competing political pressures, including pressures from neighborhood residents (who may favor, oppose, or be apathetic about the development), fiscal considerations (which may weigh for or against the development), and pressures from political leaders who may or may not be influenced by political contributions (or outright bribes) from the developer or other interests (such as

protection in this kind of situation theoretically allows property owners (or the municipality acting as their proxy) to hold out for more than the damages they would actually suffer (in the form of reduced market values for their property) from the proposed development.<sup>84</sup>

Yet the notion that property owners should merely be protected by a liability rule compensating them for the loss in market values suffered at the hands of a new development does not square with our intuitions about the entire package of values zoning seeks to protect. Consider this example, which is a true story from Houston. In a quiet residential neighborhood, a new neighbor moves in and promptly opens a loud marble-grinding business in his backyard. This forces neighbors to contemplate either expensive (and probably only partly effective) sound-proofing of their homes, or moving out. As a long-time neighborhood resident put it: "He's cutting and grinding and polishing all day. It's nuts."<sup>85</sup> Most people would feel the long-time resident has a legitimate grievance, and that merely compensating him for any decreased market value of his home is not an adequate remedy. Clearly one's home is more than a monetary investment.

Zoning in urban neighborhoods is not merely a system for protecting the market values of individual properties,<sup>86</sup> but rather is a device to protect neighborhood residents' interests in their entirety, including consumer surplus in their homes, as well as their interests in what this article calls the neighborhood commons.<sup>87</sup>

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building trades unions, which may favor the development). See FISCHEL, *supra* note 5, at 189, 212-13. Furthermore, bargaining between the municipality and the developer is constrained by legal restrictions on the terms of trade, and by procedural rules that require participation by large numbers of people, further complicating bargaining. *Id.* at 74-78, 131-35.

<sup>84</sup> See Ellickson, *Growth Controls*, *supra* note 23, at 424-40. Fischel notes that quite the opposite problem arises if the municipality's public officials deal on their own behalf, rather than that of the homeowners they represent: they will sell out too cheaply. Not only will the wrong party (the politician rather than the homeowners) be compensated, but from a pure economic efficiency standpoint, the politician is likely to settle for a bribe (or campaign contribution) that is less than the collective cost to the homeowners. FISCHEL, *supra* note 5, at 72.

<sup>85</sup> Lianne Hart, *Houston May Break New Ground on Land Use; Voters Fed Up With a Wide-Open Mix of Businesses and Homes Could Soon Approve the City's First Zoning Law*, L.A. TIMES, Oct. 25, 1993, at A5.

<sup>86</sup> Indeed, zoning does not necessarily protect market values. Some proposed developments that would be prohibited under zoning schemes may have positive spillover effects on market values. For example, New York's Fifth Avenue was a prime residential street before it was developed for retail and other commercial uses. Had a zoning scheme been in place, possibly those retail and other commercial developments would have been prohibited, even though they undoubtedly increased the values of properties in the path of commercial development.

<sup>87</sup> See *infra* note 91; cf. NELSON, *supra* note 5, at 11 (arguing that the practical underlying purpose of zoning is to "protect neighborhoods from uses that threatened in some way to reduce the quality of the neighborhood environment"); Steele, *supra* note 7, at 711 (contending that zoning protects not just objectively measurable values but "subjective values" such as what changes are destructive and communities are viable); Ellickson, *Alternatives*, *supra* note 4, at

Although typically not addressed in the literature, which generally discusses only objectively measurable market values, the notion of consumer surplus in an individual parcel of property is quite straightforward.<sup>88</sup> The concepts of "home" in general, and "home ownership" in particular, are areas where consumer surplus are particularly important.<sup>89</sup> What distinguishes a mere "house" from a "home" is the consumer surplus we have in the latter. "Home" provides continuity, security, familiarity, and comfort for our most intimate and satisfying life experiences. The intimately bound ideas of home and family strike deep emotional chords in our culture. Since

735-36 (recognizing the concept of consumer surplus, consisting of "experience in using this particular house and sentimental memories connected to it," and proposing that nuisance damage awards include a "consumer surplus bonus," calculated as a percentage of market value damages, to compensate for lost consumer surplus).

<sup>88</sup> Cf. FISCHER, *supra* note 5, at 106 (discounting notion that consumer surplus in homes should be recognized, "People may get consumer's surplus from their clothes or automobiles, but arguments that either good should be allocated by anything but the market are heard less frequently."); *but cf.* Ellickson, *Alternatives*, *supra* note 4, at 711 (recognizing homeowner's consumer surplus in his "non-fungible" individual property, and proposing that nuisance damage awards include "consumer surplus bonus"). Ellickson recognizes that consumer surplus in a home is likely to increase over time, as "experience" and "memories" grow richer. Ultimately, however, his proposed accommodation of consumer surplus —adding a modest "consumer surplus bonus" to nuisance damages awards —trivializes the concept. Consumer surplus is not necessarily proportional to market value; nor will every instance of lost consumer surplus coincide with a loss of market value sufficient to reach the threshold of substantial harm justifying a money damages award in Ellickson's scheme. We also should not be quick to accept Ellickson's characterization of homeowners with high levels of consumer surplus as "hypersensitive" and not entitled to protection.

<sup>89</sup> Cf. Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 362 (1986) (suggesting that conventional economic arguments against rent control do not consider that "very high subjective welfare almost always . . . inheres in being able to maintain the same residence."). Radin ultimately rejects this argument from consumer surplus as a basis for her defense of rent control. Instead she argues that one's home falls into a special category of property that is "bound up with one's personhood" insofar as its continuity is tied up with our sense of our own continuity and personal identity, and therefore is normatively deserving of greater protection than "property that is held merely instrumentally or for investment and exchange." *Id.* I believe Radin articulates a powerful intuition in describing one's home as being "bound up with one's personhood"; in my view, however, this is precisely what explains why consumer surplus is so strong with respect to one's home, and there is no need to rely on separate metaphysical categories of "personal" (in Radin's sense) as opposed to "fungible" property.

Dennis Coyle notes an interesting convergence of Radin's social constructivist argument with libertarian arguments for protecting private property as a bulwark of individual liberty. Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817, 839 (1993) (describing importance of private property in protecting "preferred rights" like free expression, privacy, and liberty interests generally). See also Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1353 (1993) ("[L]and remains a particularly potent safeguard of individual liberty. Like no other resource, land can provide a physical haven to which a beleaguered individual can retreat."). I contend that this "physical haven" to which one retreats is, typically and paradigmatically, residential property, and more specifically one's *home*. To the extent homeowners value these liberty interests, it further contributes to their consumer surplus in their homes.

most people feel that these values cannot be reduced to dollars, people tend to be especially sensitive when the use and enjoyment of the home is threatened.<sup>90</sup> In part, this reflects the importance of a homeowner's financial stake, which typically represents a substantial part of that homeowner's net worth. If the only concern were to protect financial investments, however, monetary compensation for any loss of market value would be acceptable. Part of zoning's appeal lies in the fact that it allows homeowners to protect *all* the value we place in a home, including the consumer surplus that lies above and beyond the market price of the home.

The failure of zoning's critics to account for the importance of "home" to the homeowner suggests that their critiques are based on an incomplete cost-accounting. But the notion of individuals' consumer surplus in their homes, by itself, is not sufficient to explain or justify zoning. An adequate account of zoning must also deal with the *collective* values zoning seeks to protect. Zoning is a device that protects a neighborhood from encroachments by land uses inconsistent with its character, regardless of the positive or negative effects of a proposed development on the market values of individual properties.

Neighborhoods are not just made up of individual parcels, but include collective resources comprising a neighborhood commons,<sup>91</sup> and the property rights of an urban neighborhood dweller typically

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<sup>90</sup>. Additionally, psychological studies have demonstrated that people consistently place a higher subjective value on property they already own than on property they do not own. FISCHER, *supra* note 5, at 136. We might surmise that this psychological effect, which appears even with low-value and easily replaced property, may be magnified in the case of non-fungible and highly valued property, such as a home.

<sup>91</sup>. A commons is a resource used collectively by the members of a community. See Ralph Townsend & James A. Wilson, *An Economic View of the Tragedy of the Commons*, in THE QUESTION OF THE COMMONS 311 (Bonnie J. McKay & James M. Acheson eds., 1987) (distinguishing "common property" used collectively by members of a well-defined community, from an "open access regime" in which anyone may use the resource). Examples of commons (or open access regimes) include common pastures, fisheries, public parks, streets, and the atmosphere.

We typically think of a commons as consisting of some particular tangible resource. What this article describes as the neighborhood commons, by contrast, includes intangible elements (e.g., human institutions such as churches, schools, and clubs) and mixed tangible/intangible elements (e.g., public accommodations). In addition, rather than constituting a single, clearly-defined resource, the neighborhood commons as described is multidimensional, consisting of a web of sometimes-overlapping and sometimes-unrelated resources that may be used in different combinations or not used at all by members of the neighborhood community, and some parts of which are "open-access" in that they may be used by non-residents as well. Thus, some may wish to contest the choice of the term commons. Nonetheless, even if we should decide that the proper use of the term commons should be reserved for a narrower category of isolable tangible resources, I believe it is still instructive to look at the neighborhood as a commons in a *metaphorical* sense as a set of local tangible and intangible resources in which neighborhood residents share a stake.

consist both in specified rights in an individual dwelling and inchoate rights in a neighborhood commons. This commons consists of open-access (but use-restricted) communally-owned property, such as streets, sidewalks, parks, playgrounds, and libraries. It also includes restricted-access but communally-owned property, such as public schools, public recreational facilities, and public transportation facilities.

It further includes privately-owned "quasi-commons" to which the public generally is granted access, but with privately-imposed restrictions as to use, cost, and duration. These generally include restaurants, nightspots, theaters, groceries, and retail establishments.<sup>92</sup> It will include (risking the appearance of an oxymoron) "private commons," like churches, temples, private schools, political organizations, clubs, and fraternal and civic organizations. These are essentially private associations, but are characterized by some substantial degree of open access to members of the community.<sup>93</sup> Finally, the neighborhood commons will include other intangible qualities such as neighborhood ambiance, aesthetics, the physical environment (including air quality and noise), and relative degrees of anonymity or neighborliness.

These features together make up the "character" of a neighborhood. They are what give the neighborhood its distinctive flavor. A purchaser<sup>94</sup> of residential property in an urban neighborhood buys not only a particular parcel of real estate, but also a share in the neighborhood commons. Typically, differences in the neighborhood commons may be as crucial to a decision to purchase as differences in individual parcels.<sup>95</sup>

To some extent, differences in the neighborhood commons will be reflected in the market values of individual parcels.<sup>96</sup> If, for example, other things being equal, neighborhood A has better public schools and more desirable parks than neighborhood B, property in

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<sup>92</sup>. Some retail establishments have more of a "commons" character than others. A restaurant or tavern, for example, holds itself out to public use and enjoyment in a rather different way than a dry cleaner or a jeweler.

<sup>93</sup>. These may or may not be associated with particular parcels of real property.

<sup>94</sup>. By "purchasers," I mean to include renters as well as property owners. The positive and negative values of the neighborhood commons will be reflected in market rents in much the same way they are reflected in home values. Moreover, renters are likely to make rental decisions taking neighborhood considerations into account, in much the same way that homeowners make their decisions to purchase. The difference, of course, is that a rental decision usually does not reflect the same level of long-term commitment, and therefore long-term expectations, that accompany the purchase of a home.

<sup>95</sup>. See Li & Brown, *supra* note 67 (arguing that neighborhood "amenities" are significant factors in market value of residential real estate).

<sup>96</sup>. *Id.*

neighborhood A will have a higher market value than similar property in neighborhood B. But because different people value different features in a neighborhood, not all such neighborhood differences will be reflected in property values.

For many people, a high level of consumer surplus may attach to particular features of a neighborhood commons.<sup>97</sup> I may be particularly attached to my church, for example, or to a particular local club or political organization, or to a particular spot in a local park where I am accustomed to walk at sunset. These values are highly subjective and may not be widely shared by people who have never lived in the neighborhood, so they may add little or nothing to the market value of the property. Moreover, these resources are for the most part non-fungible and therefore irreplaceable. To me, enjoying the use of these resources is precisely what it means to live in my neighborhood. In addition to protecting the market value of my home and my consumer surplus in that particular piece of real estate, I will naturally want to protect those collective resources of my neighborhood that I care about most, whether they are reflected in the market value of my property or are part of my consumer surplus.<sup>98</sup> These values can be almost priceless, especially for long-term neighborhood residents. Like one's home, one's neighborhood may be centrally bound up in one's definition of self and sense of his or her place in the world.

Apart from consumer surplus, even those neighborhood features that are capitalized in market value come in different mixes from neighborhood to neighborhood. I may be more concerned about parks and less concerned about public transportation, and you vice-versa. While better parks and better public transportation may both make positive contributions to market values, I may prefer a neighborhood with good parks and mediocre public transportation, while you prefer a neighborhood with good public transportation and mediocre parks. Properties in the two neighborhoods may be similarly priced, but you and I will place entirely different values on the characteristics unique to each neighborhood.

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<sup>97</sup>. As with a homeowner's consumer surplus in an individual home, we might expect that a neighborhood resident's consumer surplus in a neighborhood will increase over time. I take it as axiomatic that those features of a neighborhood that attract new residents will be reflected in the market values of homes in the neighborhood. But consumer surplus accumulates over time, as the convenient butcher shop becomes "my butcher"; the church becomes "our church" and so on.

<sup>98</sup>. Cf. Ellickson, *Growth Controls*, *supra* note 23, at 416 (finding that if the homeowners' subjective value of the house is reduced due to rapid growth, the loss of consumer surplus is "a true welfare loss, albeit one not reflected in market prices.").

Some neighborhood differences are simply inconsistent. For example, I might prefer a quiet, neighborly, low-density neighborhood of single-family homes, with access to parks and good neighborhood schools; you might prefer the faster pace, excitement and anonymity of a high-rise condominium in a high-density neighborhood featuring interesting restaurants, bistros, music venues, and trendy boutiques. Yet my house and your condo may have identical market values because some people are willing to pay the same price for my house as others are willing to pay for your condominium. In this example, the individual properties are themselves not interchangeable, but additional subjective value attaches to the features of the neighborhood that we each find desirable.

However, some of the same neighborhood features that add value to your property in your neighborhood might detract value from my property in my neighborhood. A hot new jazz club, for example, might be a welcome addition in your lively, trendy neighborhood, but would be a nuisance in my quiet neighborhood. To some extent, the spillover effects on your individual property are different; noise, traffic congestion, and heavy pedestrian traffic are presumably of less concern to you.

This example illustrates that *some* land uses are incompatible with the neighborhood commons that current property owners have come to rely on. It further illustrates that negative externalities are contextual. A land use that would have severe negative externalities in my neighborhood may be an amenity in your neighborhood.<sup>99</sup>

It is not always the case, however, that inconsistent uses will lower market values. Suppose my quiet single-family neighborhood is located within a few blocks of some successful high-rise developments. Absent some system of land-use control, a developer might acquire the previously single-family parcels adjacent to mine, and proceed to put up more high-rises. The value of my *house* may go

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<sup>99</sup> This is a problem for Ellickson's proposal to create standard metropolitan-wide categories of presumptive nuisances. See Ellickson, *Alternatives*, *supra* note 4, at 762-63 (metropolitan-wide nuisance board would "publish regulations stating with considerable specificity which land activities are considered unneighborly by that metropolitan population at that time.") (emphasis added). Thus, as I understand it, under Ellickson's scheme, the hot new jazz club would either be an unneighborly land use, or it wouldn't, regardless of neighborhood context. Ellickson tries to address this with an additional "substantial harm" requirement, *id.* at 766-67, under which few high-rise neighbors of the "unneighborly" jazz club would be able to show sufficient harm to recover nuisance damages. Yet Ellickson's scheme seems to create a great deal of perpetual uncertainty for owners of jazz clubs if jazz clubs are declared "unneighborly," and inadequate protection for residents of quiet neighborhoods if jazz clubs are *not* declared "unneighborly." Under most zoning schemes, by contrast, neighborhood context counts; the hot new jazz club would probably be prohibited in my quiet residential neighborhood, and probably allowed in your trendy high-density neighborhood.

down because of spillover effects from the new high-rise, but the value of my *land* may increase, as my property becomes attractive as a potential site for additional high-rise developments.<sup>100</sup> Under a market value based system, I would be entitled to no relief since my property is worth exactly what it was before. Yet under these circumstances many homeowners would feel aggrieved by this development. In part this is because the direct spillovers (e.g., noise and aesthetics) would interfere with the use and enjoyment of my home. To recoup that loss by selling my home would subject me to the additional cost and inconvenience of moving.<sup>101</sup> More importantly, however, my loss of consumer surplus in this particular home would go uncompensated.<sup>102</sup>

Additionally, my neighbors and I may be equally concerned about the effect of the new high-rise development on the neighborhood. The coming of the first high-rise means, at least initially, more intensive uses of the neighborhood commons (e.g., streets, sidewalks, on-street parking, public transportation facilities, etc.) which means that more people are competing for diminishing shares of fixed resources (e.g., on-street parking). Again, since land prices may rise, the result may be that I suffer no net financial loss.<sup>103</sup> But what I suffer now (in addition to my uncompensated loss of consumer surplus in my own home) is a loss of consumer surplus in my interest in the neighborhood commons. In short, the neighborhood is taking the first step toward

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<sup>100</sup>. Cf. Siegan, *supra* note 3, at 86-88 (describing how, in the absence of land use restrictions, market values of homes along busy thoroughfares and in areas where demand for apartments is high will increase, even though the desirability of these sites for single-family homes will decline). Siegan cites this phenomenon as an argument *against* zoning. In his view, it undercuts the argument that zoning is necessary to preserve market values of residential property. *Id.* at 91. This article contends that it shows precisely why an analysis of zoning based only on market values is deeply flawed. Furthermore, it demonstrates why nuisance law, pegged to loss of market value, is not an adequate substitute for zoning.

<sup>101</sup>. These additional losses are also objectively measurable in dollars, however, and theoretically could be compensated under an appropriately designed liability rule scheme.

<sup>102</sup>. Note that even under Ellickson's nuisance scheme, which recognizes consumer surplus, I would get no relief, since *ex hypothesi* I have suffered no loss of market value.

<sup>103</sup>. A number of zoning's critics have suggested that, due to "agglomeration economies" of commercial and industrial developments, an unregulated land market will produce a high degree of separation of commercial and industrial from residential uses. See Siegan, *supra* note 3, at 111; Ellickson, *Alternatives, supra* note 4, at 693-94. But this "invisible hand" of the real estate market is no comfort to homeowners faced with the incursion of an unwelcome type of development in their neighborhood. They will reasonably suspect that this first development merely signals that market conditions are ripe for similar developments. Thus, homeowners will typically argue not about the direct spillovers from *this particular development*; instead, they argue about what will follow if a precedent is set for allowing *this kind of development*.

As Calabresi recognizes, the mere fear of such disruptive changes "will be a significant factor for most people and a crucial one for some." GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 221 (1970).



becoming something other than the neighborhood where I chose to live. Although difficult to place in quantitative terms, the loss is great.

What's wrong with this? Well, nothing, I suppose, unless you were that homeowner who had been quite happy with your home and neighborhood but now find them to be no longer what they were. Of course you can move, but it may not be easy (and in some crucial respects is impossible) to replicate those features of your old home and neighborhood that made your life what it was.

Zoning is aimed at preventing, or at least limiting, precisely these kinds of changes in the use of property that are disruptive of a neighborhood's character because they are inconsistent with current uses of the neighborhood commons.<sup>104</sup> These include changes in density, as well as shifts from residential to commercial or industrial uses.<sup>105</sup>

Furthermore, inconsistent uses of neighborhood commons are not limited to residential neighborhoods. Seymour Toll argues that although advocates of New York's first zoning ordinance tried to justify it in terms of protecting property values and instituting comprehensive planning, the impetus to enact the ordinance came largely from the desire of Fifth Avenue retailers to protect themselves against incursions by garment manufacturers.<sup>106</sup> To be successful the retailers needed a particular kind of neighborhood commons, one with many high-quality retail establishments in close proximity to one another, with a sufficient critical mass to attract shoppers. This area also needed to be free from competing uses that would detract from the ambiance their affluent customers preferred.<sup>107</sup> Now it may well be

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<sup>104</sup>. Cf. Steele, *supra* note 7, at 711 (arguing that zoning seeks to protect viable residential communities against "overly rapid," "traumatic" and "destructive" change, as defined by subjective values of neighborhood residents); NELSON, *supra* note 5, at 11 ("[zoning] protect[s] neighborhoods from uses that threaten[] in some way to reduce the quality of the neighborhood environment"); *id.* at 14 ("[zoning] maintain[s] the character of the best residential districts . . . by severely restricting the scope for new development or changes in the intensity and type of use of existing property . . .").

<sup>105</sup>. Cf. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Hardin's classic article describes one kind of tragedy of the commons—a tragedy of overuse, because no individual has adequate incentives to refrain from adding marginally more intensive uses. I contend that an equally serious problem with a commons is inconsistent uses. For example, in the conquest of the American West, white settlers wishing to use open rangeland for cattle grazing did battle with Native Americans seeking to preserve the use of that rangeland for their nomadic hunter-gatherer lifestyle based on the buffalo. In the next phase, cattlemen fought sheepmen over inconsistent uses of open rangelands, which presumably could have sustained substantial numbers of sheep or cattle, but not both. Zoning, I submit, is a scheme to limit both the intensity of use (i.e., density) and simultaneously to prevent inconsistent uses of the neighborhood commons.

<sup>106</sup> TOLL, *supra* note 9, at 110, 158-61.

<sup>107</sup>. Incursions by garment manufacturing loft buildings interfered in several ways: they directly displaced retail establishments, threatening to reduce the density of retailing necessary

that the encroaching garment manufacturers reduced the market value of retail properties along Fifth Avenue, but equally plausible is that the demand for loft manufacturing space drove up the price of properties along Fifth Avenue. In either case the market value of property along Fifth Avenue was not really the central concern. Instead, the impetus for New York's original zoning ordinance came from a desire to maintain Fifth Avenue as a particular kind of neighborhood commons—one in which it was possible for carriage-trade retailers to conduct their business.<sup>108</sup>

This insight is implicit in the writing of Eric Steele, who concludes that zoning is only partially concerned with "aggregate welfare economics."<sup>109</sup> In a mature urban setting, Steele argues, zoning instead serves principally to "conserve viable [residential] communities."<sup>110</sup> While Steele is correct that zoning does function to preserve viable residential communities, this may actually *contribute to aggregate welfare* by allowing neighborhood residents to preserve their consumer surplus in their neighborhoods and in their individual homes.<sup>111</sup>

If zoning serves to protect not just market values but the consumer surplus of neighborhood residents in their homes and neighborhoods,

to sustain a critical mass. At the same time, the noise and traffic congestion caused by transportation of materials and finished goods, combined with the heavy pedestrian traffic of labor-intensive manufacturing, reduced the attractiveness of Fifth Avenue as a shopping district.

<sup>108</sup>. In the Fifth Avenue example, of course, the retailers' loss is not a loss of consumer surplus, but a loss of business profits, objectively measurable in dollars. Those profits, in turn, were predicated upon the retailers' location in a particular kind of commons, amidst a critical mass of high-quality retailing along a great thoroughfare in close proximity to one of the world's greatest concentrations of disposable wealth and income. Such an advantageous retailing situation may not be easily replicated elsewhere, even in Manhattan. Presumably, the right kind of liability rule could compensate these retailers for their losses. But note that their loss is not strictly a loss of market real estate values; while the reduced value of Fifth Avenue sites for retailing would be capitalized in lower real estate prices, that loss may have been offset, in whole or in part, by demand for those sites for manufacturing.

<sup>109</sup>. Steele, *supra* note 7, at 710.

<sup>110</sup>. *Id.*; see also Radin, *supra* note 89, at 368 (rent control may be justified if it serves to preserve continuity of existing communities, "even at some expense to fungible property interests of others."). Both Steele and Radin would say that "community preservation" is an independent value that in some instances should trump "aggregate welfare economics."

<sup>111</sup>. Ultimately, I would not rest a defense of zoning upon the controversial and unverifiable claim that these consumer surpluses are always (or even usually) sufficiently large to make zoning an efficient welfare-maximizing institution. I would, however, suggest that the case *against* zoning on efficiency grounds is also not clear-cut once we take consumer surplus into account. Given that we are necessarily uncertain about which course of action will maximize aggregate welfare, it is reasonable to choose a course, zoning, that would simultaneously protect the stability of existing neighborhoods and likely maximize the welfare of current neighborhood residents. Thus this argument differs from that of Steele and Radin, *supra* notes 109-110; community preservation may not trump welfare maximization, but it can act as a tie-breaker when (as here) we are simply uncertain as to the course of action that maximizes welfare.

then why isn't a liability rule a more efficient substitute? The answer is obvious: consumer surplus is notoriously difficult to measure.<sup>112</sup> Faced with that problem, homeowners' consumer surplus might simply be ignored, and they would only be compensated for losses of market value.

In that case, homeowners are forced to bear the full costs of lost consumer surplus, whatever that cost may be.<sup>113</sup> If consumer surpluses in our homes and neighborhoods are small, this may make little difference; but the converse is also true. First, where the surpluses are high, current neighborhood residents would be made to bear a substantial part of the cost of new developments. Second, many unzoned neighborhoods would become less stable. Homeowners, fearing potential risks, would have reduced incentives to invest in their homes and neighborhoods and greater incentives to move to areas where they perceive the risks of unwelcome development to be lower.<sup>114</sup>

Another possibility would be to rely upon a liability rule, while also adding some fixed amount or percentage to the damages award to account for lost consumer surplus.<sup>115</sup> Fixed damage schedules are likely to be highly inaccurate, however. Some homeowners would

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<sup>112</sup>. CALABRESI, *supra* note 103 at 97-100, 203-05, 221.

<sup>113</sup>. *Id.* at 204.

<sup>114</sup>. *See id.* at 215-16, 221. Some early advocates of zoning appear to have recognized this core insight. For example, Robert Whitten wrote in 1921:

As soon as the confidence of the home owner in the maintenance of the character of the neighborhood is broken down with the coming of the store or apartment, his civic pride and his economic interest in the permanent welfare of the section declines. As the home owner is replaced by the renting class, there is a further decline of civic interest and the neighborhood that once took a live and intelligent interest in all matters affecting its welfare becomes absolutely dead in so far as its civic and social life is concerned. Zoning is absolutely essential to preserve the morale of the neighborhood.

Robert H. Whitten, *Zoning and Living Conditions*, 13 PROC. NAT'L CONF. ON CITY PLANNING 22, 25 (1921), *quoted in* Kosman, *supra* note 35, at 82. While there is an obvious and unfortunate class bias to Whitten's argument, it does reflect a sensitivity to neighborhood dynamics. It is often true that homeowners, who typically have a longer-term commitment to a particular neighborhood, make greater investments of time and energy in the "civic and social life" of the neighborhood. When they lose confidence in the neighborhood's long-term viability as the kind of place they want to live, they are likely to stop making those investments.

<sup>115</sup>. This is part of Ellickson's proposed approach. *See supra* note 88.

then be severely undercompensated for their loss of consumer surplus, and others dramatically overcompensated.<sup>116</sup>

Calabresi suggests that in such circumstances where it is simply too costly (or impossible) to calculate the subjective value of a loss, "specific deterrence" (either a property rule or an inalienability rule) may be justified.<sup>117</sup> Since the true costs are unascertainable there is no way to decide how to allocate them fairly or efficiently. In effect, we must decide whether to err on the side of developers (by adopting a rule that ignores or discounts homeowners' consumer surplus) or on the side of homeowners (by adopting a rule that protects their consumer surplus). If, as I have argued, consumer surplus in one's home and neighborhood is likely to be quite substantial, a "specific deterrence" rule may be the preferable approach, on grounds both of fairness and efficiency.<sup>118</sup>

But what kind of "specific deterrence" approach should be adopted? In addressing this question we are once again confronted with zoning's ambiguity: while zoning appears facially similar to what Calabresi and Melamed call an inalienability rule it appears to function in practice like something more akin to a property rule. The municipality (theoretically acting on behalf of neighborhood residents) may stop a proposed development inconsistent with the zoning scheme, and the developer may "buy" the development rights through various kinds of concessions.<sup>119</sup>

Some critics have suggested that zoning ought to be refashioned into something more explicitly resembling a property rule in the Calabresian sense.<sup>120</sup> These critics propose that zoning ought to be

<sup>116</sup> CALABRESI, *supra* note 103, at 221.

<sup>117</sup> *Id.* at 97-100, 203-05.

<sup>118</sup> Note, however, that in eminent domain situations we generally do not recognize consumer surplus. CALABRESI, *supra* note 103, at 203-04. And when consumer surplus is taken into account for purposes of eminent domain valuations, it is usually with an add-on of some relatively small fixed percentage of market value. Arguably, this might reflect a societal calculation that consumer surplus in residential property is generally quite small; but on the other hand, it may merely reflect parsimonious governmental management. Perhaps more instructive is the fact that proposals for eminent domain takings of viable residential neighborhoods (for example, for urban expressways or airport expansions) typically produce enormous political resistance and organized community opposition. This, I take it, is *prima facie* evidence that at least some neighborhood residents' consumer surplus in their homes and neighborhoods must be quite large in these situations, because absent consumer surplus they would be content to receive fair market value. Cf. FISCHER, *supra* note 5, at 135 (arguing more generally that because there are heavy start-up costs to organizing, it will not be worthwhile to do so unless there is a sufficiently large economic interest at stake).

<sup>119</sup> See *supra* note 83 and accompanying text.

<sup>120</sup> NELSON, *supra* note 5, at 208-14. See also FISCHER, *supra* note 5, at 189-92 (communities should have alienable property rule protection for "normal" and "subnormal" land use regulations, but only liability rule protection for "supernormal" regulations). Fischer's concern is that full property rule protection would give communities an incentive to establish

"freely alienable," that is, that neighborhood residents should be allowed to sell zoning rights for cash, in-kind compensation, or whatever equitable trade-off is deemed appropriate.<sup>121</sup> In addition to the high administrative costs of such a system,<sup>122</sup> it is unsound on other grounds. Compensating individuals in cash for their willingness to sacrifice community resources may be utility-maximizing in the short run. In the long run it reinforces norms of individual gain at the expense of shared community resources, which ultimately may be destructive of the sense of community that zoning aims to protect. More fundamentally, such a system is deeply contrary to our most cherished democratic and legal traditions.<sup>123</sup> For these reasons, such a system seems to be inadvisable.

This article has argued that, although ultimately we can never be certain, zoning may be welfare-maximizing.<sup>124</sup> Since we must decide amidst uncertainty, we should choose the course that appears most likely to simultaneously protect the welfare of current neighborhood residents and reinforce community values, resources and institutions (which themselves contribute to the welfare of current and future neighborhood residents). We should also recognize that the limits of our knowledge mean that our initial choice of zoning regulations may sometimes be wrong. Sometimes a neighborhood may be willing to accept a proposed development not permitted by the regulations in

excessively strict ("supernormal") land use regulations in order to extract economic rents from developers. In addition, unlike Nelson, Fischel would continue traditional legal limitations on the terms of trade so that developers would not be allowed to offer cash in exchange for zoning rights, but instead could offer only local public goods. *Id.* at 70-71.

<sup>121</sup>. *Id.*

<sup>122</sup>. One way to administer such a system would be to hold an election for every proposed zoning change. See Ellickson, *Alternatives*, *supra* note 4, at 709-10. Not only are elections costly to conduct, but the burden on the citizenry of absorbing so much information would be excessive; turnout would be low, and because outcomes may be easily manipulated by payments to a small number of voters, the results would not be fairly representative. Such a system might also taint other well-established electoral processes by establishing norms of vote-buying and low voter participation.

Alternatively, Nelson proposes placing collective property rights in private neighborhood associations which would have power to "sell" zoning rights on behalf of the neighborhood. NELSON, *supra* note 5, at 206-13. However, the administrative costs of establishing, maintaining and policing these associations may be prohibitively high, and there is little reason to believe they would be less prone to corruption and self-dealing than established political processes.

<sup>123</sup>. Cf. FISCHEL, *supra* note 5, at 70-71, 163 (allowing free sale or auction of zoning rights would contradict "police power" and "public purpose" rationales which are essential to legal justification of zoning and our traditional understanding of the bases of local government legitimacy; instead, "[z]oning should be used only to provide local public goods."). Fischel recognizes that zoning also entails private benefits to current neighborhood residents. This, he says, does not delegitimize zoning, so long as it can also be justified in terms of pure public goods, but "these private transfers ought not to be counted as part of the community benefits in evaluating the benefits and costs." *Id.* at 163.

<sup>124</sup>. *Supra* notes 109-118 and accompanying text.

exchange for other benefits. By limiting the terms of that bargain to community benefits, however, we retain community-reinforcing norms.<sup>125</sup> Zoning thus can be seen as a peculiar kind of property rule—one in which developers can in limited ways "buy" the rights to develop contrary to the zoning entitlement, but only by compensating the community for its loss.

In this idealized model zoning gives current neighborhood residents a kind of "right of prior appropriation" over the neighborhood commons. This right trumps the right of other property owners to use their land in ways that interfere with, or are inconsistent with, current uses of the neighborhood commons. Developments may proceed as long as they are either consistent with current uses of the neighborhood commons, or in ways the neighborhood has agreed in advance (through the political process) to allow. This protects the expectations of neighborhood residents. Moreover, neighborhood residents have the right to change course and to agree to modify the rules to permit developments facially inconsistent with the presumptive prohibitions. But the only compensation that may be offered or accepted for such exceptions is compensation that benefits the community as a whole, i.e., that preserves a healthy and vibrant commons.

### *B. Normative Implications*

This analysis has several further normative implications. First, zoning should not be understood solely as a means of protecting property market values. Instead, it protects values that may be only partially captured in market values. Second, it suggests that zoning should not be understood principally as a tool of rational/scientific urban planning. Indeed, the visions of planning bureaucrats may sometimes stand in sharp contrast to the values of neighborhood residents, who seek to protect the neighborhood in which they have chosen to live. This analysis further suggests that rather than seeking to impose a rigid uniformity over all residential neighborhoods, zoning should seek to accommodate diversity among neighborhoods.

Not all neighborhoods are alike, nor should they be. The whole point of urban land use zoning is to allow people to live in the kind of neighborhood they want. Imposed uniformity defeats that goal. Some residential neighborhoods, for example, may be more tolerant of

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<sup>125</sup> This is broadly consistent with the precepts of "civic republicanism," which argues that our political system is designed to promote and crucially depends on public participation in defense of public values so that when these public values conflict with private welfare maximization, the public values ought to trump.

certain kinds of, or higher concentrations of, commercial activities than others.<sup>126</sup> Thus a zoning scheme should be designed with a sensitivity toward the neighborhood context, taking into account the particular needs, interests, and desires of the residents of particular neighborhoods.<sup>127</sup>

A zoning scheme also should not attempt to freeze a neighborhood in time. Despite the apparent conservatism inherent in the notion of "protecting" a neighborhood against inconsistent changes in land uses, this does not imply that all changes are unwelcome.<sup>128</sup> For instance, a new restaurant may be entirely consistent with neighborhood residents' vision of the kind of neighborhood in which they have chosen to live, while a new liquor store may be inconsistent with that vision.<sup>129</sup> A properly designed zoning scheme should attempt to predict, from consultation with current neighborhood residents, what kinds of changes would be welcome in a particular neighborhood and accommodate those changes while presumptively (though not conclusively) ruling out other changes.

Such a prediction is bound to be at best only an estimation for several reasons. First, there are obvious epistemic limitations. No clear, objective measures of the preferences of neighborhood residents exist, and in the absence of detailed information about particular, concrete choices, residents themselves are likely to be unable to articulate their preferences. Perhaps the best evidence of these pref-

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<sup>126</sup>. Cf. JACOBS, *supra* note 77 (arguing that zoning is destructive of a healthy diversity within neighborhoods); NELSON, *supra* note 5, at 18 (positing that many neighborhoods would tolerate or even welcome a greater diversity of uses, especially small-scale commercial uses, than is permitted by overly-rigid categorical zoning regulations).

<sup>127</sup>. A few cities have begun to recognize the need for sensitivity to particular neighborhood needs and interests. See Jerry Ackerman, *A Reshaping of the Future Boston; Zoning Code Revision Near*, BOSTON GLOBE, June 1, 1991, at 41 (showing that the Boston Redevelopment Authority is in the process of developing a new neighborhood-sensitive zoning code "replacing the traditional broad-brush classes of residential, industrial and commercial land use with carefully-tailored mandates" specific to each neighborhood).

<sup>128</sup>. Steele suggests that zoning is principally aimed at controlling the rate of change in land use. Steele, *supra* note 7, at 711 ("[C]ontemporary urban zoning functions as a dynamic, participatory mechanism to protect existing viable residential communities from the destructive and traumatic impact of overly rapid changes in land use."). My analysis suggests that it is the character, as much as the rate, of change that is at issue.

<sup>129</sup>. Cf. NELSON, *supra* note 5, at 18 (finding that although a neighborhood deli is an example of a kind of business that is frequently welcomed in residential neighborhoods, no provision is made in inflexible zoning ordinances to accommodate such changes). A problem with current zoning schemes, from this perspective, is that they may not be sufficiently fine-grained to serve the neighborhood's interests. Both a restaurant and a liquor store may fall within the same broad "commercial" classification, so that zoning to allow one would necessarily allow the other. Given a Hobson's choice—either your zoning scheme must allow *both* the restaurant and the liquor store, or it can allow *neither*—neighborhood residents may well opt for the scheme that allows *neither*.

erences is what currently exists in the neighborhood, which is why it seems eminently sensible that zoning should have started by simply incorporating the status quo of land uses into regulations.<sup>130</sup>

Second, neighborhood values can change over time. This can be the result of such factors as the change of individual interests and points of view, the fluctuation in attractiveness of particular kinds of residences and businesses due to market conditions, and the influx of new residents, as well as the departure of old residents. Third, at some point a proposed development of an unanticipated kind may come along that is seen by neighborhood residents as consistent with the vision they had of their neighborhood all along, although the use falls outside what is permitted under the current zoning scheme.<sup>131</sup> Fourth, it is possible that a proposed development prohibited under the existing zoning scheme could be so beneficial to the neighborhood that it would cause neighborhood residents to change their vision of what their neighborhood should be. Current neighborhood residents should not be rigidly bound by the preferences of past generations.<sup>132</sup>

This underscores the need for flexibility in zoning.<sup>133</sup> Zoning should accommodate changes over time, through mechanisms that encourage individual variances and amendments when supported by neighborhood residents, as well as periodic comprehensive updates of the zoning scheme to reflect larger-scale shifts in neighborhood values.

### C. Zoning And Bargaining

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<sup>130</sup>. See *supra* note 74.

<sup>131</sup>. For example, while the zoning in a residential neighborhood may categorically prohibit commercial uses, residents may be inclined to allow certain *kinds* of commercial uses, such as small scale businesses geared toward serving a local clientele. An ice cream parlor or small cafe may actually add to the neighborhood's charm and ambiance in ways consistent with residents' preferences.

<sup>132</sup>. This points to a problem with the Ellickson-Siegan solution of restrictive covenants. Since covenants run with the land, they explicitly bind future generations of owners, unless there is unanimous agreement to amend or abolish them. In that respect they are inherently less flexible than zoning, which in most jurisdictions can be changed at any time by ordinary legislative action. See FISCHER, *supra* note 5, at 27-28.

<sup>133</sup>. Cf. Krasnowiecki, *supra* note 5, at 725-27 (arguing that the principal defect of big-city zoning is its inflexibility, which cities try to cure through variances, special use permits, planned unit developments and other devices). *But cf.* Kmiec, *supra* note 5, at 52 (finding that the frequency with which zoning variances and amendments are granted is a defect of zoning, and that actual performance is inconsistent with stated goals of zoning, and "a sub rosa system of individualized land use standards is unsatisfactory because it almost certainly leads to unfair and inefficient allocation practices.").

In part, my proposal is to legitimize flexibility in zoning by formalizing bargaining and bringing it out into the open. I acknowledge, however, that this goal stands in tension with the goal of providing neighborhood stability by protecting the expectations of neighborhood residents. See *supra* note 103 and accompanying text.



A zoning scheme, because it is inherently rule-like, may appear fundamentally incompatible with this kind of fine-grained contextual sensitivity to neighborhood preferences and flexible accommodation of changes over time. Rather than conceiving of zoning as consisting of legislative-type rules, we should understand zoning as establishing mere presumptions or baseline rules that precipitate and provide a convenient substantive starting point for negotiations between developers and representatives of neighborhood interests.<sup>134</sup>

In a Coasean world, free of transaction costs, such bargaining would take place even in the absence of a zoning scheme.<sup>135</sup> But in our world such bargaining is unlikely because the transaction costs, and more particularly the problems of coordination among dozens or hundreds of neighborhood residents and property owners who would be affected by a proposed development, are simply too great. Zoning, however, can actually facilitate such bargaining and reduce information costs (an important part of transaction costs) in several ways.

Foremost, zoning establishes brightline rules under which some categories of land uses are automatically permitted. As a practical matter, bargaining is therefore unlikely to be necessary in these cases. The Coase theorem, of course, tells us that in the absence of transaction costs, bargaining to efficient outcomes will take place whatever the initial assignment of property entitlements. The transaction costs involved in organizing neighbors to oppose a proposed development that meets current zoning requirements, however, are sufficiently high that in most cases the developer can proceed with reasonable confidence. In these cases, zoning acts as a positive short-hand signal of the community's likely acceptance of the proposed development.

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<sup>134</sup>. See Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983); Rose, *supra* note 16, at 1168-70 (arguing that zoning can be seen not as legislation or adjudication, but as negotiation); Steele, *supra* note 7, at 740 (contrasting "rule enforcement" conception of zoning with "participatory" model aimed at protecting community values through mediation and negotiation with developers); Ellickson, *Alternatives*, *supra* note 4, at 709-10 ("To the credit of the institution, many zoning decisions today are largely shaped by private bargaining between a potential developer and his neighbors."). Ellickson sees such bargaining as a highly desirable process that reduces the likelihood of arbitrary action by public officials, who are in a worse position than neighborhood residents to calculate the "nuisance costs" of proposed developments. However, Ellickson argues that prohibitively high administrative costs make a fully participatory model of zoning impractical.

<sup>135</sup>. Note that in Coasean world without transaction costs, bargaining would take not only market values but consumer surplus into account. Thus, if the market value of a proposed new development's detrimental effect on my property was \$100, but I subjectively valued it at \$150, then I would either pay \$150 to prevent that development, or accept \$150 in compensation to permit it.

Secondly, zoning establishes categories of proposed land uses which are presumptively prohibited, signaling to the developer that the proposed development must win approval of the municipality, acting as the neighborhood's representative, in order to proceed.<sup>136</sup> The developer will then bargain for such approval (so long as the developer expects the costs of such bargaining, including both transaction costs and the costs of any additional concessions likely to be required to win approval, will be less than the benefits to the developer of the proposed development).<sup>137</sup>

Third, by empowering an identifiable party to grant variances, amendments, and/or wholesale revisions of the zoning scheme, the zoning ordinance identifies a single party with whom the developer can initiate bargaining without the need to identify and bargain individually with all potentially affected homeowners. This promotes efficiency of both time and money.

Fourth, by placing bargaining power directly in the hands of elected officials (or, alternatively, in the hands of persons accountable to elected officials) zoning creates political incentives for the neighborhood's representative to bargain on the neighborhood's behalf.<sup>138</sup>

Finally, by initiating such bargaining, zoning opens channels for the transfer of information between the developer and the neighbor-

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<sup>136</sup>. Cf. Steele, *supra* note 7, at 749 (finding that zoning rules provide "a checklist of objective physical characteristics that crudely and indirectly" stand as proxies for community preferences and values, signaling potential conflicts to would-be developers).

<sup>137</sup>. The developer will, of course, also take into account the opportunity costs; if she is likely to get a better deal elsewhere, she will go there. In that sense, a multiplicity of competing municipalities arguably contribute to efficiency in zoning by constraining the degree to which municipalities can engage in rent-seeking behavior. FISCHER, *supra* note 5, at 306. On the other hand, a multiplicity of competing zoning schemes will presumably add to the developer's cost of acquiring information.

<sup>138</sup>. This, of course, is a highly contestable proposition. Many recent critiques of zoning rest, implicitly or explicitly, on public choice theories telling us that public officials do not genuinely represent (or at least are unlikely to represent) the "public interest," including the "neighborhood interest" I have identified here. These theories variously tell us that there is no public interest but only competing private interests. Alternatively, they tell us if there is a public interest, it will invariably (or at least frequently) lose out to private interests, because elected officials (or public officials generally) are venal and self-seeking, and because some private interests are more skillful, better-organized, and more highly-motivated (because their interests are acute and concentrated) than the public generally, whose interests are weak and diffuse. These critiques, of course, raise deep and troubling questions about whether it is possible to have rational, responsible, public-spirited democratic decision-making. If they are valid, their implications would go far beyond zoning. I shall not undertake to answer these theories here, except to say that I do not share their extreme skepticism as to the possibility of democratic decision-making. I do, however, share their recognition of symptoms of disorders in our democratic processes, see *supra* notes 51-55 and *infra* notes 154-162 and accompanying text; in my view the disease is too little democracy rather than too much, and the cure is more democratic decision-making, not less.

hood. The neighborhood acquires the necessary information about the proposed development needed to gauge whether the proposed development is consistent with neighborhood interests, while the developer learns more about the needs and interests of the neighborhood and can gauge whether, given the costs and benefits, it is sensible to proceed.<sup>139</sup> Thus, zoning can actually reduce transaction costs, by supplying and channeling information useful to both community residents and potential developers.<sup>140</sup>

#### D. Zoning As A Participatory Democracy

The core functions of zoning can best be served if zoning is decentralized<sup>141</sup> and participatory.<sup>142</sup> A decentralized and participatory neighborhood zoning process, which gives neighborhood residents a direct voice in zoning decisions affecting their neighborhood, is critical for several reasons. First, neighborhood residents, not planners or elected officials, are in the best position to evaluate their own consumer surplus in their homes and in their neighborhoods. To the extent zoning is designed to protect these values, the most effective way to elicit that information is through

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<sup>139</sup>. Steele, *supra* note 7, at 749-50. Steele also suggests that zoning disputes themselves tend to foster community organizing, with lasting residual benefits of community solidarity. *Id.* at 747-48. Such community organization and solidarity can, in my view, do much to reinvigorate the democratic process, and make public officials more responsive to community concerns; thus, participatory zoning can help to create a positive cycle of democratic participation in decision-making.

<sup>140</sup>. *Cf.* FISCHER, *supra* note 5, at 95-96 (arguing that community participation in zoning can play a useful role in deciding preferences for "pure public goods" because the costs of acquiring information as to individual preferences for these goods are prohibitively high).

<sup>141</sup>. *Cf.* Ellickson, *Growth Controls*, *supra* note 23, at 407-08 (arguing that zoning in big cities is likeliest to follow an "interest group" model of politics, and therefore be subject to "capture" by developer interests). Ellickson notes, however, that this tendency may be different in cities with ward representation, because ward-level politics may more closely approximate the "median voter" model that typically characterizes suburban politics.

The author's personal experience as an assistant to a Chicago alderman (representing a ward of approximately 60,000 people in a city of 3,000,000) partially confirms Ellickson's hypothesis. Chicago aldermen, who by custom have something close to exclusive power over zoning matters affecting only their own wards, are extremely sensitive to ward-level voter concerns, and on ward-level zoning matters the "median voter" model usually predominates. But at the same time, the influence of developers' money, especially on decisions involving large-scale developments (most often in the central business district), is undeniable. Even at the ward level, however, some Chicago aldermen have been known to "sell" zoning for campaign contributions (which, if made to ward-level political party organizations, need not be disclosed under Illinois law) or take outright bribes. My hypothesis is that this kind of graft is inversely related to the actual level of citizen participation in zoning matters in the ward. See *infra* notes 161-162 and accompanying text.

<sup>142</sup>. *Cf.* Steele, *supra* note 7, *passim* (describing Evanston zoning as participatory democracy).

residents' participation in neighborhood zoning decisions.<sup>143</sup> Second, decentralized and participatory zoning is essential to shift zoning decision-making out of the "interest group" paradigm—in which neighborhood residents are just one of a number of competing interest groups, and a weak and disorganized one at that—into something more akin to the "median voter" model in which decision-making more clearly reflects neighborhood preferences.<sup>144</sup> Third, as I shall argue below, citizen participation is essential to combat bribery and the corrupting influence of political contributions by developer interests.

It must be mentioned that there is also a cost associated with increased citizen participation. As Fischel points out, citizen participation involves large numbers of people in some level of the negotiation process, making bargaining cumbersome and difficult.<sup>145</sup> This is partly a function of sheer numbers; but it also reflects the fact that idiosyncratic and self-seeking voices ("cranks") will have an opportunity to disrupt the bargaining.<sup>146</sup> Thus, we may expect that, other things being equal, the transaction costs of bargaining will be higher with more citizen participation.

Perhaps the best that can be said in response is that if, as I have suggested, citizen participation is the only way to elicit the true preferences of neighborhood residents, there can be no such thing as truly "efficient" decision-making in local land-use decisions. From the point of view of a developer, a well-placed bribe or campaign contribution

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<sup>143</sup> Cf. Fischel's claim that political participation in the "median voter" model is the most effective way to elicit information about preferences for local public goods. FISCHEL, *supra* note 5, at 95-96. I take this as roughly the equivalent of my claim that zoning should account for homeowners' interest in what I call the neighborhood commons. But in addition, participatory zoning will elicit information about homeowners' consumer surplus in their own homes, which I have argued is a relevant factor in cost-benefit calculations of development decisions, *supra* notes 85-90 and accompanying text.

<sup>144</sup> Of course, the realities of big-city politics may prevent a complete transition from "interest group" to "median voter" politics. Campaign contributions, jobs, municipality-wide fiscal pressures and other factors will continue to play some role in zoning decisions, unless (as seems unlikely) the entire zoning power is transferred to neighborhood residents. But the middle ground between interest group and median voter politics may not be such a bad one. Ellickson, for example, characterizes big-city interest group politics as excessively (and corruptly) pro-developer, and suburban median voter politics as excessively (and exclusionarily) anti-development. Ellickson, *Growth Controls*, *supra* note 23, at 407-08. See also FISCHEL, *supra* note 5, at 207-16 (distinguishing big-city interest group from suburban median voter politics, but with a more nuanced conception of both interest group and median voter politics). A middle position, balancing elements of both models, could arguably provide an appropriate voice to both neighborhood residents and competing interests (e.g., developers, workers and persons in the broader municipality who may have some stake in a proposed development or in the economic and fiscal condition of the city).

<sup>145</sup> FISCHEL, *supra* note 5, at 133-35.

<sup>146</sup> *Id.*

may appear to be a more efficient transaction than a lengthy and messy process of neighborhood hearings and complex public negotiations. Yet as Fischel points out, from a utility-maximizing standpoint such a solution is not likely to be efficient at all (and certainly not equitable) because it ignores the relevant preferences of neighborhood residents who will be affected by the development.<sup>147</sup> Thus, the high transaction costs of community participation appear to be the price to be paid to ensure that the interests of neighborhood residents are adequately taken into account.

Just how this decentralization and participation should be accomplished is a more difficult question. Elections are too costly and cumbersome a process.<sup>148</sup> While Nelson proposes turning the zoning power over to formally constituted neighborhood associations, this is probably too extreme a solution, in part because it too is costly and difficult to administer.<sup>149</sup> In addition, because it is difficult to sustain high levels of community participation in such formal structures, they are subject to capture by cranks.

To some extent this is an inherent feature of participatory politics.<sup>150</sup> But in my view a more appropriate balance can be achieved by leaving ultimate decision-making power in the hands of an official elected to represent the neighborhood.<sup>151</sup> This official must then sort out the cranks from the truly representative voices. The existence of this type of official can create more opportunities for democratic participation through required public notice and neighborhood hearings,<sup>152</sup> and through ongoing structures of community representation in neighborhood zoning negotiations and decision-making, albeit in an advisory capacity.<sup>153</sup>

<sup>147</sup>. *Id.* at 72.

<sup>148</sup>. See Ellickson, *Alternatives*, *supra* note 4, at 709-10 (discussing neighborhood voting schemes and dismissing them as too costly); see also *supra* note 122.

<sup>149</sup>. See *supra* note 122 for criticism of Nelson's proposal on grounds of administrative costs.

<sup>150</sup>. Cf. FISCHEL, *supra* note 5, at 133-35 (arguing that median voter politics typically suffers from complexities added by participation of individuals with their own agendas).

<sup>151</sup>. My proposal thus fits most neatly with the ward system of representation, *supra* note 141. I do not have specific proposals applicable to cities where all officials are elected on a citywide basis.

<sup>152</sup>. These requirements have traditionally been part of zoning law, FISCHEL, *supra* note 5, at 33-34; but in big cities they are not always tailored to promote neighborhood participation. Hearings, for example, may be held downtown instead of in the neighborhoods; are not always well-publicized in the neighborhoods; and may be held during normal business hours, when many neighborhood residents are working.

<sup>153</sup>. An example in Chicago's 49th Ward is the 49th Ward Community Zoning and Planning Board. The 49th Ward (which perhaps not coincidentally shares a boundary with Evanston, and is roughly comparable in total population and demographic diversity, though overall somewhat less affluent) has, like Evanston, a well-established tradition of participatory

### E. Corruption And Favoritism In Zoning

The problems of corruption and favoritism, which were identified in Part III, must be addressed in any normative account of zoning. To some extent, these are problems associated with government generally,<sup>154</sup> and especially local government.<sup>155</sup> If local government does tend toward corruption, it may appear sensible at first glance to strip local government of the zoning power (and any other powers it

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democracy and "reform" politics. The current Alderman and his immediate predecessor have attempted to institutionalize community participation in zoning decisions by establishing a Community Zoning and Planning Board, made up of representatives of a cross-section of community organizations, interests, and demographic stripes. The Zoning Board has no official decision-making power (and it is doubtful whether under Illinois law a local official or the municipality itself could delegate such power); but it actively researches, publicizes, informs business and community groups, and advises the Alderman on all neighborhood zoning matters. In addition, the Zoning Board together with the Alderman make great efforts to inform individual neighbors, hold informal neighborhood meetings, and insist on formal hearings in the neighborhood on zoning matters of concern to the community. And finally, the Zoning Board is not merely a passive vehicle, responding to zoning issues as they come up; it proactively reviews the ward's zoning on an ongoing basis, an activity that demands consultation with individual citizens and organized local interests.

Skeptics will point out that these measures are entirely at the pleasure of, and subject to manipulation by, the Alderman. But I submit that the establishment of the 49th Ward Zoning Board has created norms and expectations of community participation in zoning decisions at a very high level, so that in practice it would be very difficult for the Alderman or any successor to retreat from these measures, or to compromise their integrity, without serious political costs. Thus, I conclude that it is possible to create something close to the "average voter" model of citizen participation in neighborhood zoning in a big city with ward representation.

Whether it is possible to create mandatory structures and processes that re-create this level of community participation in all of Chicago's 50 wards is another matter.

<sup>154</sup>. For reasons that are not entirely clear, there appear to be fewer widely publicized cases of bribery or corruption involving state and federal government officials than local officials. One explanation is that, being more visible and prominent, state and federal officials refrain from corrupt practices because they run a greater risk of being caught. An alternative explanation is that state and local officials, being less visible and further removed from the public spotlight, are in fact engaging in similar behavior but are less frequently exposed. Institutional culture and incentives could play a role—state and federal officials are frequently career civil servants, and typically better-compensated than local officials; this arguably breeds a culture of professionalism and discourages corruption. Political considerations may also be at play. Local corruption is often exposed by politically ambitious state and federal prosecutors who use the attendant publicity to advance their careers; but prosecutorial incentives may be weaker with regard to corruption at the state and federal levels.

<sup>155</sup>. In Chicago alone, more than 400 public officials and employees, including 18 aldermen or former aldermen, have been convicted over the past 20 years for soliciting and taking bribes, extortion, or embezzlement of public funds in connection with zoning, building permits, business licenses, liquor licenses or law enforcement; fixing cases in both the civil and criminal justice systems; the awarding of government contracts and jobs; "ghost payroll" schemes; and fraudulently purchasing tax-delinquent property. Additional illegal activities by public officials and public employees have taken place in connection with voting irregularities, theft or misuse of government property, perjury, and tax evasion. Ben Joravsky, *By Chicago Standards, Rosty Looks Honest*, L.A. TIMES, Aug. 1, 1993, at M1; Draeger, *Supra* note 52; Matt O'Connor, *Roti Fixed Zoning, His Lawyer Concedes*, CHI. TRIB., Jan. 13, 1993, at 6. Chicago, of course, is not typical, either in the frequency or brazenness of local government corruption; but it does suggest the range of corrupt practices that may be found in local government.

can do without), especially if an alternative regulatory scheme can accomplish the same ends with a lower risk of corruption.<sup>156</sup> When corruption and favoritism crop up periodically in other areas of local government, the problem usually brings about a call for prosecution of the individual offenders, institutional reforms, and more effective policing, not abolition of the police department, the judiciary, the building code, or whatever institution may have committed the offense. Is zoning somehow different? The critics might suggest that corruption is so prevalent in zoning that the institution simply cannot be salvaged. Further, they contend that such large financial interests are at stake in zoning decisions that corruption is particularly tempting.<sup>157</sup>

I submit that zoning, while a particularly important power of local government, is not so different from other powers and institutions of local government. We should be concerned about corruption and work to eradicate it. Our response to corruption in other areas, in the form of swift and tough prosecution of offenders, more effective policing, institutional safeguards, and requirements of openness in

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<sup>156</sup>. Apart from the question of whether alternative institutions can accomplish the same ends equally effectively, it is not immediately apparent why other public or quasi-public bodies like Ellickson's proposed community nuisance boards or Kmiec's density controllers should be any less prone to self-dealing and outright corruption than zoning officials—except, perhaps, because they would provide a fresh start, free from a historic culture of corruption. Nor is there any basis in empirical evidence or economic theory to believe that private institutions are inherently less prone to corruption than public institutions. See SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 197-99, 208 (1978) (corruption is equally likely to occur in private as well as public institutions, and for similar reasons; but private corruption is less likely to be prosecuted and to receive exposure in news media); see also, e.g., Ralph Blumenthal, *A Contractor Speaks Out on Agent-Payoff Scheme*, N.Y. TIMES, Mar. 10, 1994, at B3 (describing pervasive pattern in New York City of demands by private commercial and residential building managers for kickbacks from plumbing repair contractors).

<sup>157</sup>. See Ellickson, *Alternatives*, *supra* note 4, at 701 ("Given the huge amounts at stake, it is not surprising that special influence problems have plagued zoning from its inception."). Of the 18 Chicago aldermen convicted of corrupt practices over the past 20 years, seven were convicted of bribery in connection with zoning, although most of those were also convicted of other felonies as well. Draeger, *supra* note 52. These numbers are astonishingly high, and are probably just the tip of the iceberg, since it is likely that not all bribe-takers are caught and convicted. Still, to keep the zoning question in perspective, this means that substantially more aldermen were convicted of crimes unrelated to zoning; and of the approximately 400 other public officials and employees convicted of corrupt practices during that same 20-year period, very few were convicted of crimes related to zoning. While these figures hardly inspire confidence in local government, they do suggest that zoning is far from unique in its susceptibility to corruption. Moreover, corruption crops up in equally spectacular forms whenever the economic stakes are high. See, e.g., Clifford Kraus, *Giuliani Sets New Policy to Spur Drug Arrests by Officers on Beats*, N.Y. TIMES, Apr. 7, 1994, at A1 (recounting "systemic corruption" in New York City police department in 1970s when local precincts had authority over gambling and drug-related arrests).

transactions, should apply here as well.<sup>158</sup> Zoning may also require special policing, for example, through a special state agency with broad investigatory powers, established solely to monitor and investigate zoning corruption cases.

Ultimately, as with other avenues of municipal corruption, what matters most is effective policing from the bottom up through effective participatory democracy. As Steele has documented, the Chicago suburb of Evanston, with its tradition of citizen participation, has not experienced graft and influence-peddling in the zoning process.<sup>159</sup> It would be a mistake to assume that this is purely a function of the size of the municipality or the result of suburban homogeneity. Other municipalities in the Chicago metropolitan area of the same size or even smaller are notoriously corrupt,<sup>160</sup> and Evanston is one of the most diverse communities in the metropolitan area.<sup>161</sup> But on the whole, graft becomes impossible (or at least ineffective, and therefore not worthwhile for the developer) under the watchful eyes of the citizenry and its active involvement in the zoning process.<sup>162</sup>

Ironically, just around the turn of the last century a great wave of Progressive Era reform swept over municipal politics offering centralization and professionalization of big-city government as the solution to parochialism and petty graft. But centralization came at the cost of removing citizens in the big cities from active involvement in the day-to-day workings of their municipal government, and removing public officials from the watchful eyes of the citizenry, thus increasingly subject to the influence of organized interests.<sup>163</sup> Today a

<sup>158</sup>. See ROSE-ACKERMAN, *supra* note 156, at 199 (corruption results when monitoring of agents is inadequate; "a well-informed public is a critical check on corruption" in both public and private sectors).

<sup>159</sup>. See *generally*, Steele, *supra* note 7, for a description of a non-corrupt, highly participatory zoning process in a medium sized, "mature" Chicago suburb.

<sup>160</sup>. Cicero and Chicago Heights are the most notorious examples.

<sup>161</sup>. See Steele, *supra* note 7, at 717-37.

<sup>162</sup>. When citizens are actively involved in the zoning process, campaign contributions by developer interests may actually prove more damaging than helpful to politicians seeking reelection if full disclosure of such contributions is required. Politicians will thus have an incentive to avoid the appearance of being "bought."

This could bring an unintended side effect of driving developer-politician transactions underground so that they take the form of bribes. But once again I would contend that the most effective antidote to bribery is citizen participation. The only way voters will know that a politician has sold out community interests is if those community interests are fully aired through a vibrant participatory process. Once those interests and preferences are fully aired, politicians will have a more difficult time carrying out their part of the bargain with a developer, at least if they hope to be re-elected.

<sup>163</sup>. See FISCHER, *supra* note 5, at 208 ("When both voters and politicians are ignorant of one another's preferences and positions, there is an opportunity for special-interest groups to try to influence both of them.").



new wave of reform is needed, at least in the processes of zoning but perhaps in other aspects of municipal government as well. This time, I suggest, the reform should aim at increasing citizen participation.

#### V. CONCLUSION

This article has argued that, by limiting their analyses of zoning costs and benefits to monetizable values, both defenders and critics of zoning have substantially missed the mark. While zoning does have significant effects on the market values of individual parcels, and larger-scale economic consequences as well, a complete cost accounting must also consider zoning's role in protecting crucial, non-monetizable values. These include each homeowner's surplus in his or her home, as well as neighborhood residents' interest in preserving the unique set of common neighborhood resources—the neighborhood commons—upon which they rely. Far from being trivial, or mere ancillary values, "home" and "neighborhood" are central components of our identities. Precisely because these values are notoriously insusceptible to objective valuation, we afford them property rule protection in the form of zoning laws.

Thus conceived as a means of protecting the legitimate interests of current neighborhood residents, zoning regulations should be flexible to change over time, sensitive to unique neighborhood concerns and contexts, and based upon a participatory process. Citizen participation both gives voice to the interests of current neighborhood residents and provides the most effective safeguard against corruption of the zoning process.

# THE RIPENESS DOCTRINE OF THE TAKING CLAUSE: A SURVEY OF DECISIONS SHOWING JUST HOW FAR FEDERAL COURTS WILL GO TO AVOID ADJUDICATING LAND USE CASES

GREGORY OVERSTREET\*

## I. INTRODUCTION

The ripeness doctrine of the Taking Clause is the most important legal principle in federal land use litigation. If a taking<sup>1</sup> claim arising from a land use agency's decision does not meet the rigid standards of the ripeness doctrine<sup>2</sup>, and almost every one does not,<sup>3</sup> a federal court

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<sup>1</sup>. The scope of this article is limited to regulatory taking claims under the Taking Clause of the Fifth Amendment.

Often, property owners allege violations of the procedural and substantive Due Process and Equal Protection Clauses in addition to the Taking Clause of the Fifth Amendment. See generally *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir.) (describing the four most common constitutional claims in a refusal to rezone case), *cert. denied*, 112 S. Ct. 55 (1991). For a discussion of the ripeness issues involved in a substantive due process claim, see Stuart Minor Benjamin, Note, *The Applicability of Just Compensation to Substantive Due Process Claims*, 100 YALE L.J. 2667 (1991).

Some due process and equal protection claims are subject to different ripeness standards than Fifth Amendment taking claims. For an excellent explanation of how the various circuits treat non-Fifth Amendment land use cases, see *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). Most federal courts do not apply the ripeness doctrine to non-Fifth Amendment land use claims. See, e.g., *Picard v. Bay Area Transit Dist.*, 823 F. Supp. 1519, 1523 (N.D. Cal. 1993) ("Unlike plaintiffs' taking claims, their remaining federal claims [substantive and procedural due process and equal protection] are not barred" by the ripeness doctrine). But see *Taylor Inv. Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3rd Cir.) (applying ripeness doctrine to substantive and procedural due process and equal protection claims), *cert. denied*, 114 S. Ct. 304 (1993). The application of the ripeness doctrine to non-Fifth Amendment claims is directly counter to the Supreme Court's rationale that the ripeness doctrine is applicable uniquely to taking claims because of the nature of that constitutional right. See *infra* note 2.

<sup>2</sup>. The ripeness doctrine of the Taking Clause is different than the broader ripeness doctrine having to do with Article III justiciability. For a discussion of Article III justiciability, see *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

The ripeness doctrine of the Taking Clause "is a special ripeness doctrine applicable only to constitutional property rights claims." Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992). Accordingly, references to the "ripeness doctrine" in this article are to the ripeness doctrine of the Taking Clause.

The ripeness doctrine of the Taking Clause applies only to taking claims because the "nature of the constitutional right" involved is different than other constitutional rights. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 n.13 (1985). "[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no

will not hear the case. The effect of the ripeness doctrine is to "close the federal court house door"<sup>4</sup> on almost all land use taking cases.<sup>5</sup>

The primary rationale behind the ripeness doctrine is that federal courts cannot decide land use cases until the existence of a taking can be determined. The existence of a taking, in turn, can be determined only after a final decision has been rendered on the permissible uses of the property and after a state inverse condemnation action has been completed in state court. In effect, the ripeness doctrine excludes land use cases from federal court and requires a property owner to litigate a taking case in state court. Significantly, once a land use case is in state court, the same federal ripeness doctrine has been used increasingly by state courts to dismiss it.<sup>6</sup> Thus, the ripeness doctrine has been used first by federal courts, and then by state courts, to deny property owners just compensation.

A taking claim alleges a serious constitutional violation. Federal courts routinely devote vast resources to protect citizens from other constitutional violations by adjudicating thousands of section 1983 suits.<sup>7</sup> Inexplicably, however, federal courts seem to consider land use taking cases unimportant.<sup>8</sup> Some federal courts have declared that protecting citizens from unconstitutional takings in land use cases is simply too burdensome.<sup>9</sup>

It is extremely important that property owners have access to federal courts.<sup>10</sup> In the typical taking case, a property owner is alleging wrongful conduct by a local or state government. An almost

constitutional violation occurs until just compensation has been denied." *Id.* (emphasis in original). Therefore, the existence of a taking cannot be determined until a final decision has been found to exist and state compensation is found to be inadequate.

<sup>3.</sup> See Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 91 (1988) (showing that from the years 1983-1988 only 5.6% of land use cases were found to be ripe).

<sup>4.</sup> See generally *id.*

<sup>5.</sup> This article discusses taking claims made in the context of land use cases.

<sup>6.</sup> See *infra* text accompanying notes 195-206.

<sup>7.</sup> 42 U.S.C. § 1983 (1988) creates a cause of action to enforce constitutional rights. Now it is recognized that "[t]he rights of property are fundamental civil rights deserving of protection under 42 U.S.C. § 1983 . . ." Blaesser, *supra* note 3, at 74-75. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963). Currently, the majority of taking cases are brought under section 1983.

<sup>8.</sup> For example, in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) the Seventh Circuit found alleged violations of the Fifth and Fourteenth Amendments, to "represent[] a garden-variety zoning dispute dressed up in the trappings of constitutional law."

<sup>9.</sup> In *Scudder v. Town of Glendale*, 704 F.2d 999, 1003 (7th Cir. 1983), the Seventh Circuit held the "availability of federal review of every zoning decision would only serve to further congest an already overburdened federal court system."

<sup>10.</sup> See Blaesser, *supra* note 3 at 74 (discussing the reasons that federal courts are much better equipped to protect property rights).

certain prejudice is created by having an elected or appointed state judge, sitting in the same local area as the alleged taking, decide the case. In contrast, federal judges who enjoy life-tenure are far more likely to be removed from local biases. Even though plenty of reasons exist why federal courts are better able to protect property rights, a more fundamental point must be made: property rights are protected by the federal constitution and should be enforced in federal courts.

In addition to having their unpopular claims against local government heard by state courts, property owners are unfairly burdened by the ripeness doctrine in numerous practical ways.<sup>11</sup> First, requiring developers to have a final decision from land use agencies gives those agencies an incentive to delay decisionmaking, which adds to the risk and expense of property development. Second, the cost of seeking just compensation is greatly increased by the ripeness doctrine since two lawsuits are necessary: one in state court and a second in federal court. Third, the odds of conforming to ripeness requirements and actually winning a taking case are staggering, thus discouraging potential litigants with valid claims. Finally, litigating a taking claim is unpredictable because ripeness relates to subject matter jurisdiction,<sup>12</sup> and can therefore be raised at any time during the judicial process, wiping out years of litigation and thousands of dollars of legal fees at the last minute.

Are federal courts merely "too busy" to compensate property owners when perhaps millions of dollars of property have been taken away from innocent citizens?<sup>13</sup> As the following decisions illustrate, federal courts go to great lengths to find land use cases unripe because, as they openly admit, they simply do not like to hear them.

A pattern of nearly unobtainable two-step requirements emerges from the federal judiciary's disinterest in protecting the rights of property owners. First, the final decision prong must be satisfied, and, if it is, the state compensation requirement is heaped upon the property owner. Then, if these Article III case or controversy re-

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<sup>11</sup>. See Blaesser, *supra* note 3 at 120-21 (discussing obstacles and pitfalls bestowed upon property owners as a result of the ripeness doctrine).

<sup>12</sup>. See *infra* notes 61-63.

<sup>13</sup>. The most common reason for dismissing land use cases is that federal courts believe that land use cases are better handled at the state level. In an ideal world, states would adjudicate these cases—unfortunately, this is not a reality. See *infra* text accompanying notes 195-206. However, if a land use agency's decision violates the federal constitution why do federal courts resist providing a remedy? The problem seems to be that so many governmental decisions result in compensable takings. The Seventh Circuit was mistaken when it bemoaned that the land use case at issue was "dressed in the trappings of constitutional law." *Supra* note 9. Land use cases are indeed constitutional law because they allege violations of the Fifth or Fourteenth Amendments of the United States Constitution. See *supra* note 8.

quirements are found to exist, federal courts can use the abstention doctrine to dismiss a taking claim.<sup>14</sup>

## II. DEVELOPMENT OF THE RIPENESS DOCTRINE

### A. Williamson County Regional Planning Commission v. Hamilton Bank

The United States Supreme Court introduced the ripeness doctrine in *Williamson County Regional Planning Commission v. Hamilton Bank*.<sup>15</sup> This case is discussed extensively in several other treatises and articles.<sup>16</sup> The following brief description of *Williamson* highlights the rationales and tests that have emerged.

In *Williamson*, a land use agency rejected a property owner's proposal to expand a subdivision. The property owner then filed a sec-

<sup>14</sup> Article III, section 2, of the United States Constitution provides that "Judicial Power shall extend" to enumerated "cases" and "controversies." Along with standards arising from the ripeness doctrine, parties bringing constitutional claims must answer issues of advisory opinions, mootness, and standing, before their case is justiciable.

The Article III "case or controversy" requirement has these important policy justifications: it 1) limits the "occasions for judicial intervention into legislative or executive processes, [which] reduces the friction between the branches produced by/judicial review"; 2) helps to ensure that "constitutional issues will be resolved only in the context of concrete disputes, rather than in response to problems that may be hypothetical, abstract, or speculative"; and 3) promotes "individual autonomy and self-determination by ensuring that constitutional decisions are rendered at the behest of those actually injured." G EOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 84-85 (2d ed. 1991).

Abstention is another doctrine that limits federal adjudication of land use cases. Abstention is *not* an Article III requirement, but rather a court-created prudential requirement. Under this doctrine, federal courts abstain from deciding state law issues. See generally Blaesser, *supra* note 3, at 83-89 (describing how the abstention doctrine is used to dismiss land use cases in federal court). Blaesser correctly points out that the ripeness and abstention doctrines "intersect" and are "similar in that they both provide ground rules for the exercise of federal court jurisdiction." *Id.* at 89. See *infra* note 157.

<sup>15</sup> 473 U.S. 172 (1985). One commentator argues that the "analytical framework" for the ripeness doctrine emerged five years earlier in *Agins v. City of Tiburon*, 477 U.S. 255 (1989). R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases From Hamilton Bank To Lucas*, 9 J. LAND USE & ENVTL. LAW 101, 110 (1993). However, the details of the present ripeness doctrine were formulated by *Williamson*.

<sup>16</sup> See generally DANIEL R. MANDELKER, FEDERAL LAND USE LAW, § 4A.02[2] (1986); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court converted Federal Judges into Fruit Peddlers*, INSTITUTE ON PLANNING, ZONING, & EMINENT DOMAIN (1991); Michael M. Berger, "Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions Is An Exercise in Futility, 11 ZONING & PLAN. L. REP. 57 (1988); Kassouni, *supra* note 2; Lyman, *supra* note 15.

*Williamson* has been the subject of two student notes: James D. Smith, Note, *Ripeness for the Taking Clause: Finality and Exhaustion in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 13 E COLOGY L.Q. 625 (1986); Junji Shimazaki, Note, *Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases*, 1 B.Y.U. J. PUB. L. 375 (1987).

tion 1983 action in federal district court alleging a regulatory taking<sup>17</sup> in violation of the Fifth Amendment.<sup>18</sup> Before filing the federal suit, the property owner did not pursue a variance, an appeal to the County Council, an amendment to the general plan, or a state inverse condemnation suit, all of which were available.<sup>19</sup>

When it reached the United States Supreme Court, the Court decided that the existence of a taking could not be determined because there had been no "final decision" from the Planning Commission and because the property owner had not sought "state compensation."<sup>20</sup> Therefore, the claim was unripe, requiring its dismissal from federal court.<sup>21</sup> The resulting *Williamson* ripeness test centers on the two prongs "final decision" and "state compensation."

The Court began its decision by analyzing the final decision prong. The following test emerged: "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue."<sup>22</sup>

After examining other taking cases, the Court found that its earlier decisions expressed a "reluctance to examine taking claims until . . . a final decision has been made."<sup>23</sup> The first rationale for requiring a final decision was the long-standing principle that cases should be decided on non-constitutional grounds whenever possible.<sup>24</sup> Therefore, administrative procedures and remedies should first be

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<sup>17</sup>. The difficult question of what constitutes a taking was not at issue in *Williamson*, 473 U.S. at 185, and is not discussed in this article. In fact, in almost every ripeness case discussed *infra*, the issue of whether a regulation constitutes a taking is not reached because the claim is found to be unripe (and hence nonjusticiable) before the court reaches the merits of case.

<sup>18</sup>. The property owner also alleged a violation of substantive and procedural due process and equal protection. The district court granted a directed verdict against the property owner's claim and the jury found no denial of procedural due process. *Williamson*, 473 U.S. at 182 n.4. The Supreme Court discussed the property owner's due process claim. *Id.* at 197. For a discussion of the different constitutional claims available in a land use taking case, see *supra* note 1.

<sup>19</sup>. See *Williamson*, 473 U.S. at 196-97.

<sup>20</sup>. *Id.* at 185. The Court did not use the term "state compensation" in its opinion; however, the term is used in this article because it succinctly describes the requirements of the prong. See *infra* n.157.

<sup>21</sup>. *Id.* at 183.

<sup>22</sup>. *Id.* at 186.

<sup>23</sup>. *Id.* at 190.

<sup>24</sup>. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905))).

sought, thereby reducing the need to decide a case on taking grounds.<sup>25</sup>

The second, and more important, rationale for this prong is that a final decision is necessary before the crucial issue of whether a taking has occurred can be determined. Because the test for the existence of a regulatory taking includes determining the extent that economically viable use of property has been denied,<sup>26</sup> a court cannot determine whether a taking has occurred until the regulating agency declares exactly how limited the owner is in using his or her property.<sup>27</sup>

Similarly, the third<sup>28</sup> rationale given in *Williamson* for the final decision requirement is that in order for a property owner to be deprived of all economically viable use of his or her property, the regulation must actually be applied to the property.<sup>29</sup> If a property owner never pursues a variance, appeal, or amendment, a court cannot know exactly how the regulation (or a modification of it) would have affected the potential uses of the property. Consequently, the existence of a taking remains unknown until the land use agency

<sup>25</sup> As the Court stated, "If [the property owners] were to seek administrative relief under these [administrative] procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." *Williamson*, 473 U.S. at 187 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981)).

<sup>26</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992) (holding that land use regulations that deny the property owner of all economically viable use are *per se* total takings unless "logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with"). This "denial of economic viable use" test is only one of at least three kinds of takings. Under the "denial of economic viable use" test for a taking, the issue of whether a decision is final arguably does affect the determination of whether a taking has occurred because a non-final decision leaves open the possibility for some economically viable use.

However, the ripeness doctrine from *Williamson* should not similarly apply to the other two kinds of takings. They are: 1) failure of a regulation to "substantially advance a legitimate state interest," see *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); and 2) frustration of "reasonable investment-backed expectations," see *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1980). The finality of a land use agency's decision has nothing to do with these two kinds of takings. The finality or non-finality of a decision cannot advance a legitimate state interest or frustrate investment-backed expectations. This has led one commentator to argue that the rationale behind the ripeness doctrine only applies to takings from a deprivation of economically viable use, and that therefore, the doctrine should not be applied to the other two types of takings. See *Kassouni*, *supra* note 2, at 20.

<sup>27</sup> *Williamson*, 473 U.S. at 187.

<sup>28</sup> Lower courts have subsequently identified two additional rationales for the ripeness doctrine. The first is federalism, the belief being that state courts should resolve local matters such as land use cases. See, e.g., *City of Oak Creek v. Milwaukee Metro. Sewerage Dist.*, 576 F. Supp. 482, 487 (E.D. Wis. 1983) ("Section 1983 was never intended as a vehicle for federal supervision of land use policy"); *Golemis v. Kirby*, 632 F. Supp. 159, 162-63 (D.R.I. 1985).

The second rationale is the dislike by federal courts of adjudicating land use cases documented and discussed throughout this article. See *supra* text accompanying notes 8 & 9.

<sup>29</sup> *Williamson*, 473 U.S. at 190.

renders a final decision as to how the regulations at issue will be applied to "the particular land in question."<sup>30</sup>

Next, the Court in *Williamson* applied these principles to the property owner's taking claim. The property owner's failure to seek a variance led the Court to conclude that the owner "hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision . . ."<sup>31</sup> This, in turn, led to the conclusion that no "final decision" had been rendered, and therefore that the property owner's claim was not ripe.<sup>32</sup>

The Court in *Williamson* went on to analyze "state compensation," the second prong<sup>33</sup> of its ripeness inquiry. The following test emerged: "if the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."<sup>34</sup> The Court explained that "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before [seeking] a section 1983 action."<sup>35</sup>

<sup>30</sup> *Id.* at 191.

<sup>31</sup> *Id.* at 190. Note that because the property owner's proposed use was *inconsistent* with the applicable land use regulations, a variance could have actually been useful because an ordinance was being violated. This is because "a variance is an authority to a property owner to use property in a manner forbidden by the ordinance . . ." *North Shore Steak House, Inc. v. Board of Appelas*, 282 N.E.2d 606, 609 (N.Y. 1972) (discussed in *D ANIEL R. MANDELKER, LAND USE LAW* § 6.39 (3d ed. 1993)). In contrast, when a proposed use *conforms* with applicable regulations, a variance is useless because no ordinance is being violated. See *infra* note 110.

<sup>32</sup> *Williamson*, 473 U.S. at 194.

It is important to note that the Court distinguished the *Williamson* final decision prong applicable only to taking claims from the "exhaustion of remedies" doctrine that applies to other § 1983 claims. The exhaustion of remedies doctrine holds that there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. See *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982). At first glance, the final decision rule from *Williamson* seems impermissibly to require a property owner in a taking case to exhaust administrative remedies by seeking a variance and appeal. The *Williamson* Court distinguished the ripeness doctrine by explaining that the exhaustion of remedies doctrine presupposes that a wrong has occurred, while the final decision requirement is concerned with whether a wrong has occurred at all. *Williamson*, 473 U.S. at 192. Thus, an "exhaustion of remedies" argument would not be a successful defense to the final decision prong. *But see* *Blaesser, supra* note 3, at 73-76 (criticizing this view).

<sup>33</sup> Significantly, the two prongs are not dependent on each other—failure to meet either one means the claim is unripe. See, e.g., *Southern Pacific Transp. Co. v. Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990) ("Ripeness . . . involves two independent prerequisites . . ."), *cert. denied*, 112 S. Ct. 382 (1991); *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir. 1992) (characterizing the *Williamson* prongs as "two distinct" requirements).

<sup>34</sup> *Williamson*, 473 U.S. at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 & 1018 n.21 (1984)).

<sup>35</sup> *Williamson*, 473 U.S. at 194 n.13 (emphasis in original).



The scope of the state compensation prong depends on what constitutes an "adequate process" for obtaining compensation. The obvious avenue for compensation in a land use case is state<sup>36</sup> inverse condemnation law. The *Williamson* Court pointed to this state remedy as an "adequate process" for obtaining compensation.<sup>37</sup> The Court concluded that until a claimant shows that a state inverse condemnation procedure is "unavailable or inadequate," the claim is not ripe.<sup>38</sup> In other words, the burden is on the property owner either to seek compensation first in state court or to make the difficult showing that no such remedy is available.<sup>39</sup>

### B. MacDonald, Sommer & Frates v. County of Yolo

Another Supreme Court case, *MacDonald, Sommer & Frates v. County of Yolo*,<sup>40</sup> expanded upon the ripeness doctrine by adding the "meaningful application" and the "reapplication" requirements and introducing<sup>41</sup> the futility exception. In *MacDonald*, property owners submitted plans to develop agricultural acreage into single-family and multi-family lots. The plans were rejected by the County land use agency. Significantly, there were no direct ways to appeal the County's decision, but merely indirect remedies such as mandamus

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Justiciability is another reason why state remedies must be sought because "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* at 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)).

Yet another reason, but one that is rarely articulated, for the requirement that state remedies be sought is the abstention doctrine discussed *supra* note 14. The abstention doctrine holds that federal courts should abstain from deciding state law issues; whether state law would compensate a property owner in a given case would be just such an issue a federal court would likely abstain from deciding. *See generally* *Lockary v. Fetz*, 974 F.2d 1166, 1174 (9th Cir. 1992) (holding that an abstention challenge during a taking proceeding is not frivolous).

<sup>36</sup>. Compensation must be sought at the state level in the typical case because the vast majority of land use decisions are from state or local agencies. In the rare instance that the land use decision was made by the federal government or an Indian nation, compensation would naturally be sought in federal or tribal court, not from a state court. Since most land use decisions are made at the state level the compensation prong will be discussed throughout this article as it applies to seeking relief in state courts.

<sup>37</sup>. *Williamson*, 473 U.S. at 196-97.

<sup>38</sup>. *Id.* at 194-95.

<sup>39</sup>. After *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which held that a temporary regulatory taking is compensable under the federal constitution, federal courts may conclude that an adequate state remedy automatically exists as a result of *First English*. In reality, this remedy is not "adequate" because the landowner still is often denied access to federal court. *See infra* text accompanying notes 180-86.

<sup>40</sup>. 477 U.S. 340 (1986).

<sup>41</sup>. The "futility exception" was not discussed in the majority opinion. Justice White's dissent, however, contained language that was used by the Ninth Circuit to create the exception. *See infra* notes 137-38.

and declaratory judgment actions.<sup>42</sup> The property owners first filed an action in state court alleging a taking and seeking monetary and declaratory relief. After losing in state court, they sought relief in the United States Supreme Court.

Given that the property owners in *MacDonald* could not obtain a variance and actually sought state compensation, under the rationales of *Williamson* the case should have been ripe for federal adjudication. However, the Court in *MacDonald* came to the opposite conclusion. The Court in its holding emphasized the importance of variances and appeals to the ripeness doctrine by observing that "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with one hand they may give back with the other."<sup>43</sup> The Court in *MacDonald* added even more hurdles to having a land use taking case heard in federal court.

First, *MacDonald* required that the decision of a land use agency must not only be "final and authoritative," as in *Williamson*, but also the decision must now describe the "type and intensity" of development legally permitted.<sup>44</sup> One commentator has described this as going a "giant step further" than *Williamson*.<sup>45</sup> Lower courts have interpreted the "type and intensity" language to require a "meaningful application" and a "reapplication" before a final decision can exist.<sup>46</sup>

Second, *MacDonald* articulated the "futility exception" to the ripeness doctrine. Note that the Court never held that the exception exists or attempted to define it. Instead, Justice White explained in his dissent that "[n]othing in our cases . . . suggests that the [government] decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position."<sup>47</sup> Therefore, to Justice White, a final decision<sup>48</sup> could be established upon a showing of futility.

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<sup>42</sup>. *MacDonald*, 477 U.S. at 344. See *Agins v. City of Tiburon*, 447 U.S. 255, 259 (1980) (commenting that in California the "sole remedies for such a taking . . . are mandamus and declaratory judgment").

<sup>43</sup>. *MacDonald*, 477 U.S. at 350. In *MacDonald*, a variance could have led to a final decision because the proposed use was inconsistent with the applicable regulations. See *infra* note 110.

<sup>44</sup>. The Court stated that as a "prerequisite" to a taking claim, there must be a "final and authoritative determination of the *type and intensity* of development legally permitted on the subject property." *MacDonald*, 477 U.S. at 348 (emphasis added).

<sup>45</sup>. Kassouni, *supra* note 2, at 24.

<sup>46</sup>. The rationale is that a meaningful application detailing the proposed uses must be made before the type and intensity of the permitted uses are known. See *generally*, *Southern Pacific Transp. Co. v. Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) (discussing the meaningful application requirement).

<sup>47</sup>. *MacDonald*, 477 U.S. at 359 (White, J., dissenting).

### C. Lucas v. South Carolina Coastal Council

The Supreme Court's decision in *Lucas v. South Carolina Coastal Council*<sup>49</sup> adds little or nothing to the ripeness doctrine. Some commentators claim that *Lucas* put an end to the futility exception,<sup>50</sup> and that *Lucas* makes ripeness discretionary rather than a matter of subject matter jurisdiction.<sup>51</sup> Another commentator even claims that *Lucas* "modified existing [ripeness] doctrine significantly."<sup>52</sup>

In contrast to these claims, *Lucas* has not changed the ripeness doctrine. First, *Lucas* hardly mentioned ripeness; rather, the Court analyzed at length the issue of whether a taking had occurred.<sup>53</sup> Second, *Lucas* cited *Williamson* and *MacDonald* with seeming approval, and merely applied their holdings to the facts of Mr. Lucas' case.<sup>54</sup> Third, in a footnote the *Lucas* majority states merely that a "pointless" application need not be made to satisfy the ripeness doctrine.<sup>55</sup> The footnote simply rebuts one of Justice Blackmun's dissenting arguments, and in no way constitutes a holding. It is unlikely that the Supreme Court would announce a substantial change to an important doctrine by burying it in a footnote.

The *de minimis* effect of *Lucas* on the ripeness doctrine is further evidenced by the way it was applied to the facts in the case. *Lucas* was

Previous lower court decisions had never found a final decision based on the futility exception, but some had discussed the possibility. See Kassouni, *supra* note 2, at 47 n.283.

<sup>48</sup>. Does the futility exception apply only to the final decision prong, or to the entire ripeness doctrine? Justice White described futility as one way to show the existence of a "final decision." See *MacDonald*, 477 U.S. at 359 (White, J., dissenting) ("Moreover, I see no reason for importing [the requirement that repeated applications and denials are necessary to pinpoint the decisionmaker's position on development] into the 'final decision' analysis") (emphasis added).

Most commentators, however, describe futility as an exception to the ripeness doctrine as a whole and not just the final decision prong. See, e.g., Kassouni, *supra* note 2, at 48 ("In Justice White's view, the 'ripeness' requirements of both *Williamson County* and *MacDonald* could be satisfied upon a showing of futility") (emphasis added). To further cloud the issue, some courts have applied the futility exception to the state compensation prong. See *infra* note 134. This article analyzes the futility exception as a component of the final decision prong.

<sup>49</sup>. 112 S. Ct. 2886 (1992).

<sup>50</sup>. See *infra* note 135.

<sup>51</sup>. See Richard M. Frank, *Inverse Condemnation Litigation in the 1990s—The Uncertain Legacy of the Supreme Court's Lucas and Yee Decisions*, 43 WASH. U. J. URB. & CONTEMP. L. 85, 103 (1993).

<sup>52</sup>. Lyman, *supra* note 15, at 124.

<sup>53</sup>. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (ripeness discussed only on p. 2886; existence of a taking discussed from pp. 2892-2926).

<sup>54</sup>. See *Lucas*, 112 S. Ct. at 2886 n.3.

<sup>55</sup>. *Id.* at 2891 n.3 ("Justice Blackmun insists that this aspect of Lucas's [sic] claim is 'not justiciable,' . . . because Lucas never fulfilled his obligation under [ *Hamilton Bank*] to 'submi[t] a plan for development of [his] property' to the proper state authorities . . . [b]ut such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application.").

a rare example of a ripe claim: the land use agency stipulated that no use was allowed under the regulations at issue. In the Court's words, "as the [land use agency] stipulated below[,] . . . no building permit would have been issued under the [regulations], application, or no application."<sup>56</sup> This is no different than the situation in *Carpenter v. Tahoe Regional Planning Agency*,<sup>57</sup> where a land use agency unambiguously told a property owner in a letter that no development was allowed. This land use agency admission satisfied the ripeness doctrine in *Carpenter* because a court could determine exactly how much use was allowed—none. Similarly, in *Lucas* the land use agency admitted by stipulation that no use was allowable. *Lucas* stands for nothing new under the ripeness doctrine other than the surprising proposition that the Supreme Court finally found a taking claim to be ripe.

Finally, perhaps the most practical reason why *Lucas* did not change the ripeness doctrine is that lower federal courts have not followed any kind of "new" *Lucas* ripeness doctrine. In fact, after *Lucas*, federal courts continue to apply the *Williamson* ripeness doctrine.<sup>58</sup> Therefore, even if it could be said that *Lucas* changed the ripeness doctrine on an intellectual level, it cannot be said that any practical changes have been reflected in the real cases litigated everyday in lower courts. Turning now to those cases, the following is an analysis of the ripeness case law created by the lower courts.

### III. CURRENT RIPENESS DOCTRINE

#### A. Preliminary Ripeness Issues

The two prongs of the ripeness doctrine are independent.<sup>59</sup> Hence, the failure to meet one prong of the ripeness doctrine is fatal to a taking claim. Ripeness is a question of subject matter jurisdiction. "If a [taking] claim is not ripe for review, the federal courts lack subject matter jurisdiction and they must dismiss the claim."<sup>60</sup> Thus,

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<sup>56</sup> *Lucas*, 112 S. Ct. at 2886 n.3.

<sup>57</sup> 804 F. Supp. 1316 (D. Nev. 1992).

<sup>58</sup> See, e.g., *Cory v. Thompson*, 996 F.2d 310, WL 220599 (10th Cir. 1993); *Kerr-McGee Chemical Corp. v. Edgar*, 837 F. Supp. 927, 937 (N.D. Ill. 1993).

<sup>59</sup> See *supra* note 33.

<sup>60</sup> *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 621 (9th Cir. 1992). See also *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.) ("Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of Article III of the federal Constitution"), *cert. denied*, 493 U.S. 993 (1989).

One commentator argues that the ripeness doctrine is not a matter of subject matter jurisdiction, but rather is discretionary after the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). See Frank, *supra* note 51, at 101-02 ("It appears

ripeness is a "threshold issue"<sup>61</sup> in a federal land use case. An unripe claim can therefore be disposed of by a motion to dismiss for lack of subject matter jurisdiction.<sup>62</sup>

Ripeness is a question of law<sup>63</sup> and therefore is reviewed *de novo*.<sup>64</sup> Additionally, "[d]ecisions on ripeness issues are fact-sensitive,"<sup>65</sup> and "to prove that a final decision was indeed reached, the facts of the case must be clear, complete, and unambiguous."<sup>66</sup>

Whether the challenge to a land use regulation is facial or as applied generally<sup>67</sup> determines if the ripeness doctrine is triggered. If the challenge is as applied, the doctrine controls; if the challenge is facial, it does not.<sup>68</sup>

that a majority of the Court no longer views the ripeness doctrine as a necessary prerequisite to the courts' subject matter jurisdiction, but rather as a jurisprudential standard to be invoked if and when the facts warrant."). No case, however, has echoed this proposition.

<sup>61</sup>. Schnuck v. City of Santa Monica, 935 F.2d 171, 173 (9th Cir. 1991); Riverdale Realty Co. v. Town of Orangetown, 816 F. Supp. 937, 942 (S.D.N.Y. 1993).

<sup>62</sup>. The proper motion is one under FED. R. CIV. P. 12(b)(1), and not a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. See *St. Clair*, 880 F.2d at 201. Additionally, a motion to dismiss, and not a motion for summary judgment, has been held to be the proper way to challenge ripeness because "ripeness affects judiciousity." *Taylor Investments Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1290 (3rd Cir. 1993).

<sup>63</sup>. *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1988).

Because it is an issue of subject matter jurisdiction, a motion to dismiss on ripeness grounds can be made at any time including on appeal or *sua sponte* by the court. *Reahard v. Lee County*, 978 F.2d 1212, 1213 (11th Cir. 1992) ("ripeness is a matter of subject matter jurisdiction . . . We always must investigate questions of subject matter jurisdiction, whether or not they are raised by the parties to the case . . .").

<sup>64</sup>. See *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 888 F.2d 1573, 1575 (11th Cir. 1989) ("The district court's application of *Williamson* constitutes a question of law which we review *de novo*"). See also *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 163 (9th Cir. 1993).

<sup>65</sup>. *Eide v. Sarasota County*, 908 F.2d 716, 727 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991).

<sup>66</sup>. *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989).

<sup>67</sup>. However, in the Ninth Circuit facial challenges are apparently also subject to the ripeness doctrine. See *Southern Pacific Transp. Co. v. Los Angeles*, 922 F.2d 498, 505-06, (describing the "ample confusion in this area" and citing cases holding both ways).

<sup>68</sup>. Compare *Hoehne*, 870 F.2d at 529 (applying *Williamson* ripeness doctrine in as applied challenge) with *Triple G Landfills, Inc. v. Board of Comm'rs of Fountain County*, 977 F.2d 287 (7th Cir. 1992) (not applying *Williamson* ripeness doctrine in facial challenge).

The Fourth Circuit explained this distinction by noting, "The theme of the [Supreme] Court's decisions reflects a reluctance to render opinions on the constitutionality of land use ordinances as applied prior to their actual application to a specific piece of land." *Beacon Hill Farm Associates II, Ltd. Partnership v. Loudoun County Bd. of Supervisors*, 875 F.2d 1081, 1083 (4th Cir. 1989) (emphasis in original).

The rationale of the ripeness doctrine compels that it be used only in as applied challenges. The ripeness doctrine is supposed to allow a court to determine if any development is possible. However, a facial challenge alleges that an ordinance prohibits all development of any type, no matter how it is applied. Therefore, a facial challenge answers the question of how much development is allowed by alleging that none is.

A final and very significant aspect of the ripeness doctrine is that federal courts strongly dislike adjudicating land use cases and attempt to dismiss them whenever possible. As the Ninth Circuit stated, in order to "guard against the federal courts becoming the Grand Mufti of local zoning boards, . . . ruling case law makes it very difficult to open the federal courthouse door for relief from state and local land-use decisions."<sup>69</sup> Implying that it was too busy to hear land use cases, the Seventh Circuit stated that the "[a]vailability of federal review of every zoning decision would only serve to further congest an already overburdened federal court system."<sup>70</sup> Also, federal courts seem to view land use cases as not terribly important<sup>71</sup> and somewhat beneath them. For instance, the Eleventh Circuit stated, "we stress that federal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions."<sup>72</sup>

### B. Final Decision Prong

Broadly speaking, there are two ways for a federal court to find a land use agency's decision to be "final." The first is a specific agency action unambiguously declaring that its decision is indeed final. As land use practitioners know, such declarations are extremely rare. The second and most common way for a federal court to find a land use agency's decision to be "final" involves an analysis of the various rules and rationales from *Williamson* and *MacDonald*, which are discussed below. The analysis of the final decision prong begins with the first of these two ways.

#### 1. Specific Agency Actions That Constitute "Final Decisions"

In general, when a land use agency itself unambiguously declares that a decision is final, a "final decision" exists. Perhaps the most unambiguous way to make such a declaration is for a land use agency to put its decision in writing. For example, a Nevada district court

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<sup>69</sup>. *Hoehne*, 870 F.2d at 532. A Grand Mufti is a high judge in Islamic law. See also *Executive 100, Inc., v. Martin County*, 922 F.2d 1536, 1543 (11th Cir. 1991) ("[I]f we [affirm the property owner's taking claim] we are opening the doors of the federal courts to review virtually all Florida zoning rulings . . .").

<sup>70</sup>. *Scudder v. Town of Glendale*, 704 F.2d 999, 1003 (7th Cir. 1983).

<sup>71</sup>. See *supra* note 8.

<sup>72</sup>. *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989). See also *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) ("We are concerned that federal courts not sit as zoning boards of appeals . . .").

determined that a final decision had been made when the attorney for a land use agency stated in a letter to the property owner, "[y]ou may consider this letter [to be] the final administrative determination on the status of [your development] . . . application."<sup>73</sup> Additionally, when an agency staff member verbally informed a property owner that his future applications would be denied, the final decision prong was held to have been satisfied.<sup>74</sup>

Agency actions, taken as a whole, can sometimes satisfy the final decision prong. For instance, the Eleventh Circuit found that the final decision prong was satisfied when the city "effectively conceded" that any development must be under zoning restrictions not permitting the plaintiff's intended use.<sup>75</sup> Similarly, final decisions were held to exist in two other Eleventh Circuit cases when it was clear that absolutely no development was allowed.<sup>76</sup> The total building moratoria involved in these cases answered the crucial ripeness question of how much development would be allowed.<sup>77</sup>

The "run around" is another agency action that could satisfy the final decision prong. For instance, in a Ninth Circuit case, the property owner inquired several times to determine exactly how to comply

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<sup>73</sup> *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1323-24 (D. Nev. 1992).

Not surprisingly, when a planning agency letter clearly states that a decision is *not* final, no final decision exists. In *St. Clair v. City of Chico*, 880 F.2d 199, 203 (9th Cir. 1989), the city's letter to property owners stating that a city determination of whether to allow sewer hookups would be "inappropriate 'at [this] time'" was held to be evidence of a non-final decision.

<sup>74</sup> *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990). See also *Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989) (finding that statement by county employee that the property owner would have "no chance" of amending the plan constituted a final decision).

<sup>75</sup> *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989). The court's conclusion was based on the fact that the city council, which had final authority over zoning matters, rejected the property owner's development plan.

Contrary to *Greenbriar*, other cases present facts which also seem to show that a planning agency has "effectively conceded" that no development would be allowed, yet still hold that no final decision has been made. For example, in *Unity Ventures v. Lake County*, 841 F.2d 770, 776 (7th Cir.), *cert. denied*, 488 U.S. 891 (1988), the city stated in a letter merely that its position was not that it would "never" approve the property owner's request for a sewer connection. Because some possibility remained for approval of the request, the court held that the final decision prong had not been satisfied.

<sup>76</sup> See *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020, (1989). *But see Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

<sup>77</sup> A moratorium must ban 100% of potential development to constitute a final decision. See *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477 (N.D. Fla. 1992) (holding that ordinance prohibiting development on 95% of a lake-front lot not a final decision because the allowable use of the remaining 5% of the lot had not yet been determined). In this way, a government can effectively take 95% of the value of property and still not have to even defend its action in a federal court—let alone pay for the property it just took—because the ordinance generously left the property owner with 5% of his or her property.

with applicable regulations only to be continuously turned away by agency staff members.<sup>78</sup> In another case, an amendment to the general plan preventing a property owner's intended use was also held to satisfy the final decision prong.<sup>79</sup> Finally, in the very rare situation where an agency action is held to constitute a physical taking,<sup>80</sup> a final decision exists *per se* because "the physical invasion is itself a final governmental action."<sup>81</sup>

## 2. *Specific Agency Actions That (Shockingly) Do Not Constitute "Final Decisions"*

The following cases illustrate just how far federal courts will go to avoid concluding that a land use agency has made a "final decision." For example, a Florida district court concluded that no final decision had been rendered when a property owner originally sought development permits that were never issued because of a building moratorium.<sup>82</sup> Then he sought permits for a scaled-down project that were granted but later revoked. Finally, an ordinance required the property in question to remain 95% undeveloped.<sup>83</sup> To find that the claim was unripe, the court seized upon the fact that the property owner had not alleged in his complaint that he had requested approval of the permits in accordance with the 95% non-development ordinance. Thus, amazingly, the court was able to conclude that the property owner had not met his burden of pleading that the limits on development rendered the project 100% economically unviable.<sup>84</sup>

Additionally, a land use agency's decision is not final if other actions are necessary from any other agency or person. For example, a New York case involved a property owner who was required to

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<sup>78</sup> Harris v. County of Riverside, 904 F.2d 497 (9th Cir. 1990).

<sup>79</sup> See A.A. Profiles, 850 F.2d at 1487 (finding that the run around "undeniably constituted a final, definitive position" of the agency). See also Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989).

<sup>80</sup> A physical taking occurs when government action permanently destroys the three rights associated with the ownership of property: the power to possess, to use, and to dispose. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).

<sup>81</sup> Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575, 579 (9th Cir. 1991) (holding that mobile home rent control ordinance was a physical taking because ordinance transferred possessory interest to tenants, and therefore that a final decision existed), *cert. denied*, 113 S. Ct. 1049 (1993). *But see* Eide v. Sarasota County, 908 F.2d 716, 720, n.6 (11th Cir. 1990) (expressing no opinion as to whether *Williamson* ripeness doctrine would apply to physical taking).

Other kinds of physical takings have been held to constitute a final decision. See, e.g., Mitchell v. Mills County, 847 F.2d 486 (8th Cir. 1988) (property owner's land flooded); J.B. Ranch, Inc. v. Grand County, 958 F.2d 306 (10th Cir. 1992) (ordinance giving public access to private roads).

<sup>82</sup> Villas of Lake Jackson, Ltd. v. Leon County, 796 F. Supp. 1477 (N.D. Fla. 1992).

<sup>83</sup> *Id.* at 1479-81.

<sup>84</sup> *Id.* at 1481.



obtain, as a prerequisite to a building permit, a certificate from a housing agency verifying that the landlord did not harass tenants.<sup>85</sup> Until the property owner applied for the certificate from the other agency, revocation of his building permit was held not to be a final decision.<sup>86</sup> Similarly, in another case from a New York federal district court, an agency's decision was held not to be final when a property owner's plan was rejected because it lacked a prerequisite solid waste site permit from a state environmental agency.<sup>87</sup>

Another example of this rule appears in a Virginia case involving eminent domain.<sup>88</sup> In this case, the condemnation hearing to perfect title under a "quick-take" eminent domain statute<sup>89</sup> was held not to be a final decision because the hearing was an additional action by a court, which was an agency other than the city. This rule also applies if the property owner is the person who must take the additional necessary action. For instance, a Nevada case held that no final decision had been rendered because the property owner failed to "explore the possibility" of obtaining transferable development rights (TDRs) from the planning agency.<sup>90</sup>

A related rule is the requirement that before a decision can be "final," it must come from, in the words of *Williamson*, the "government entity charged with implementing the regulation."<sup>91</sup> Lower courts have followed this rule by holding that when a city refused to connect a property owner's project to a municipal sewer system, and the property owner obtained a final decision from the state agency overseeing the sewer system, there had been no final decision from the city, which was the agency "charged with implementing the regulation."<sup>92</sup>

### C. The Meaningful Application Requirement

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<sup>85</sup>. *Weissman v. Fruchtman*, 700 F. Supp. 746 (S.D.N.Y. 1988).

<sup>86</sup>. *Id.* at 754.

<sup>87</sup>. *CECOS Int'l, Inc. v. Jorling*, 706 F. Supp. 1006 (N.D.N.Y. 1989).

<sup>88</sup>. *HMK Corp. v. Chesterfield*, 616 F. Supp. 667 (E.D. Va. 1985).

<sup>89</sup>. Under the statute, defeasible title vests in the state pending condemnation proceedings; after the proceedings, the state's title becomes indefeasible. V A. CODE ANN. §§ 33.1-89, 33.1-122 (Michie ed. 1987).

<sup>90</sup>. *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1325 (D. Nev. 1992).

<sup>91</sup>. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

<sup>92</sup>. *Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir. 1988). See also *St. Clair v. City of Chico*, 880 F.2d 199, 203 (9th Cir. 1989) (holding that a taking claim against County was unripe since the "County rejected the [property owners' application to build] because it believed they had not yet received a rejection from the City on their [related] application . . ." (emphasis added)).

A land use agency can make a final decision only when it has an application before it. The *MacDonald* rationale is that without a "meaningful" application from the property owner, the agency cannot determine exactly how the regulations would be applied to the property.<sup>93</sup> Therefore, the existence of a final decision cannot be determined without a meaningful application.

Two courts have briefly addressed the definition of "meaningful." In one case, the Ninth Circuit held that an application for a variance seeking to erect a fence, instead of the required wall, around a parking lot was only "minor," and hence, not meaningful.<sup>94</sup> Another Ninth Circuit case held that the submission of an "informal" draft of a development plan for comments by land use agency staff members was not a meaningful application.<sup>95</sup>

*MacDonald* held that a meaningful application cannot include a request for "exceedingly grandiose development."<sup>96</sup> One case has discussed the meaning of an "exceedingly grandiose development" application.<sup>97</sup> The property owner planned to build a large resort on a 210-acre parcel of Hawaiian beach. This property was later downzoned to preservation and park uses. Given the stark contrast between the property owner's intended use and the zoning classification of the land, the court concluded that any applications to develop the property as a resort were "exceedingly grandiose."<sup>98</sup>

Even if an application is a "meaningful" one, it must be formally rejected before it can be a final decision. This means that an aban-

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<sup>93</sup>. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 n.8 (1986) (holding that at least one "meaningful application" must be submitted before a decision is "final").

The rationale is well illustrated in *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). In *Vogler*, a federal agency required a miner to obtain a permit before he could enter a national preserve and to submit a mining plan before he could mine. His taking claim was held to be unripe because he never applied for a permit or submitted a plan. *Id.* at 642.

<sup>94</sup>. *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 n.7 (9th Cir. 1990). The application was not meaningful because the denial of the fence variance "gives no indication of how the City would respond to a major development application." *Id.* The *Southern Pacific* court warned that the "meaningful application requirement also mandates that claimants pursue their applications and not abandon their applications at an early stage." *Id.* at 503.

<sup>95</sup>. *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 876-77 (9th Cir. 1987), *cert. denied*, 488 U.S. 827 (1988).

<sup>96</sup>. *MacDonald*, 477 U.S. at 353 n.9.

<sup>97</sup>. *Kaiser Dev. Co. v. City & County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).

<sup>98</sup>. *Id.* at 942 & n.21. Note the reasoning: because the city destroyed almost all the property's value by regulation, any attempt to use the property is an "exceedingly grandiose" proposal and therefore the case is unripe. In other words, because the taking was so extensive, there is less of a chance of the property owner receiving compensation.

doned application cannot be a final decision.<sup>99</sup> For example, a California district court held that the actual plan or application submitted by the property owner must be rejected, even if other circumstances made the approval or rejection of the plan irrelevant.<sup>100</sup> In this case, a property owner submitted a "meaningful" development plan, but the city then passed an openspace ordinance prohibiting any development of his land. The property owner withdrew his application; the city, however, never formally rejected his plan. The court held that no final decision had been rendered on his development plan, even though the court admitted that it was reasonable under the circumstances for the property owner to have abandoned his plan.<sup>101</sup>

*1. Types of Administrative Relief That Must Be Sought: Variance, Appeal, or Amendment*

Recall that the rationale for the requirement to seek administrative relief was that "what [land use agencies] take with the one hand they may give back with the other."<sup>102</sup> Accordingly, both *Williamson* and *MacDonald* established that before a property owner can claim a land use agency decision resulted in a taking, he or she must seek administrative relief from that decision. The relief sought can be a variance, appeal, or an amendment.<sup>103</sup>

*a. Variance*

A property owner must seek a variance if one is available before the final decision prong can be satisfied.<sup>104</sup> Recall that the primary

<sup>99</sup>. See, e.g., *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir.), *modified*, 830 F.2d 968 (1987); *Long Grove Country Club Estates v. Village of Long Grove*, 693 F. Supp. 640, 653 (N.D. Ill. 1988).

<sup>100</sup>. *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988).

<sup>101</sup>. The judge in *Zilber* recognized the unfairness of the ripeness doctrine as it applied to that case, but felt constrained by precedent. *Id.* at 1200.

In a similar case, *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), the property owner initially applied for a water hookup to a property in an openspace zone. He later abandoned his application after a city public works staff member told him that the city "could not provide water services to the property." The court found that this was not a final decision because the application itself was not rejected. *Id.* at 1454.

<sup>102</sup>. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350 (1986).

<sup>103</sup>. Property owners have been required to seek other forms of administrative relief under the ripeness doctrine. See, e.g., *Stephans v. Tahoe Planning Dev. Agency*, 697 F. Supp. 1149, 1154 (D. Nev. 1988) (transferable development rights); *Ross v. City of Berkeley*, 655 F. Supp. 820, 841 (N.D. Cal. 1987) (arbitration).

<sup>104</sup>. To seek a variance is to seek "[p]ermission to depart from the literal requirements of a zoning ordinance." BLACK'S LAW DICTIONARY 1553 (6th ed. 1990). A variance is often granted where strict adherence to the zoning regulations would cause "unique hardship." *Id.* A variance should only be required if the property owner's proposed use is inconsistent with existing

reason cited by the *Williamson* court why no final decision existed was that the property owner had not sought a variance.<sup>105</sup> The Sixth Circuit has held that seeking an available variance is a "prerequisite" to a successful taking claim.<sup>106</sup> In fact, courts in almost every circuit have held that a property owner must seek a variance before a decision can be considered final.<sup>107</sup>

However, a property owner need not seek a variance when one is not available. Four cases from the United States Court of Federal Claims illustrate this rule well.<sup>108</sup> All four involved taking claims arising from wetlands regulations which prohibited any development of the property in question. The wetlands regulations provided for no variances whatsoever.<sup>109</sup> The Court of Federal Claims held in all four cases that, given the lack of variance provisions in the regulations, the claims were ripe.

When a property owner's proposed use *conforms* to land use regulations, a variance need not be sought because a variance still would not allow the development.<sup>110</sup> Also, a variance need not be sought when a land use agency lacks the authority to grant variances

land use regulations. See *infra* note 110. However, federal courts often dismiss taking cases because a variance was available, without even analyzing whether the use conformed or was inconsistent. See *infra* note 112 and accompanying text.

<sup>105</sup>. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985) ("Thus, in the face of [the property owner's] refusal to follow the procedures for requesting a variance . . . [the property owner] hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision . . .").

<sup>106</sup>. *Seguin v. City of Sterling Heights*, 968 F.2d 584, 589 (6th Cir. 1992). See also *St. Clair v. City of Chico*, 880 F.2d 199, 203 (9th Cir. 1989) (describing the "two-step test" for determining ripeness as first, a "final decision" analysis and second, whether a variance was sought).

<sup>107</sup>. See, e.g., *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir. 1992); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir. 1991); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, *rev'd on other grounds*, 938 F.2d 153 (9th Cir. 1991); *Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir. 1988); *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506, 515 (1st Cir. 1987); *Sudarsky v. City of New York*, 779 F. Supp. 287 (S.D.N.Y. 1991); *Wilhelmsen v. Board Comm'rs*, 694 F. Supp. 809 (D. Wyo. 1988); *Wintercreek Apts. v. City of St. Peters*, 682 F. Supp. 989 (E.D. Mo. 1988); *Jackson Court Condos. v. City of New Orleans*, 665 F. Supp. 1235 (E.D. La. 1987), *aff'd*, 874 F.2d 1070 (5th Cir. 1989).

<sup>108</sup>. See *Formanek v. United States*, 18 Cl. Ct. 785 (1989); *Ciampetti v. United States*, 18 Cl. Ct. 548 (1989); *Beure-Co. v. United States*, 16 Cl. Ct. 42 (1988); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988).

The Eleventh Circuit has followed the Court of Claims. See *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1575 (11th Cir. 1989) (holding taking claim ripe where "there are no variances available under the applicable local law").

<sup>109</sup>. See 33 C.F.R. §§ 320-24 (1992).

<sup>110</sup>. See *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1502 (9th Cir. 1990) ("Because the nature and density of appellants' proposed development did not conflict with express terms in the City's zoning ordinances or its general land use plan, a variance would not have led to tentative map approval, and the failure to seek a variance does not affect the ripeness of appellants' claim.").

such as when the planning agency is prevented by statute from granting variances for inconsistent uses.<sup>111</sup> Despite the above cases holding that a property owner need not always seek a variance, courts often dismiss taking claims based on a property owner's failure to seek a variance without fully investigating whether a variance would allow the proposed use or is even available.<sup>112</sup>

### *b. Appeal*

An administrative appeal is one of the administrative remedies that a property owner must exhaust before the final decision prong can be satisfied. This requirement is illustrated by a district court decision from California.<sup>113</sup> A property owner's development plan was rejected by the town council. Shortly thereafter, his property was reclassified as openspace by an initiative and he abandoned his plan. The new openspace ordinance contained a review process for the classification of property as openspace. The property owner's claim failed the final decision prong because he failed to utilize that appeal process.<sup>114</sup> In a Connecticut case, the classification of a parcel as openspace, allegedly done by mistake, did not constitute a final decision because the aggrieved property owner should have sought a reclassification.<sup>115</sup>

### *c. Amendment*

The Ninth Circuit went so far as to hold that a property owner whose development plan was rejected must seek an amendment to the zoning ordinance.<sup>116</sup> A later Ninth Circuit panel reversed this holding,<sup>117</sup> and no other circuit has adopted the amendment re-

<sup>111</sup>. See Kassouni, *supra* note 2, at 27 (discussing *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), *amended in part*, 857 F.2d 567 (1988)).

<sup>112</sup>. See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1336 (9th Cir. 1990), *rev'd*, 938 F.2d 153 (1991) (*Tahoe-Sierra I*).

<sup>113</sup>. *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988).

<sup>114</sup>. *Id.* at 1200. See also *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 888 F.2d 1573, 1575 (11th Cir. 1989) (holding taking claim unripe because property owners failed to utilize an available, albeit burdensome, appeal process—challenging a planning agency's decision through certiorari to a state court).

<sup>115</sup>. *Celentano v. City of West Haven*, 815 F. Supp. 561, 569 (D. Conn. 1993).

<sup>116</sup>. *Tahoe-Sierra I*, 911 F.2d at 1336.

In *Tahoe-Sierra I*, "The Ninth Circuit's 'holding' appears to be the opinion of a single judge—the Honorable Stephen Reinhardt." Kassouni, *supra* note 2, at 25 n.153. In a special concurrence, Judge Fletcher stated that she did not agree with the "ripeness" portion of the opinion, since she "would not reach the ripeness issue." *Id.* In a partial dissent, Judge Kozinski excepted to the "'ripeness' holding of the *per curiam* opinion." *Id.*

<sup>117</sup>. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 938 F.2d 153, 156 (9th Cir. 1991) (*Tahoe-Sierra II*).

quirement yet. However, this issue must be explored because another circuit might revive the amendment requirement, and because the reasoning behind the requirement illustrates just how far federal courts will go to avoid adjudicating land use cases.

In the Ninth Circuit case that introduced the amendment requirement,<sup>118</sup> property owners challenged a general plan that imposed a virtual building moratorium. Because the general plan included an amendment procedure, the court concluded that the property owners were required to seek an amendment to the plan before their claim could be considered ripe.<sup>119</sup> According to the court, an available amendment process "offers the same possibility regarding development as does a system for requesting variances."<sup>120</sup>

In fact a variance and an amendment are very different, and the variance requirement should not be used interchangeably with an "amendment requirement." "A variance provides relief *from the application* of a land use regulation . . . For this reason, the granting of a variance is an *adjudicatory* function."<sup>121</sup> In contrast, "[t]he adoption and amendment of a general plan . . . is a *legislative* function."<sup>122</sup> Actually requiring property owners to pursue legislative relief is the exact opposite of attempting to reach a final decision. "An amendment . . . requires an exercise of political judgment. Political processes are, by their nature, infinite . . . There is thus no way for a court to say that a legislative process has come to rest with respect to a challenged law."<sup>123</sup>

Given the rationales for the ripeness doctrine, the final decision prong must be limited to adjudicatory relief. In essence, the ripeness doctrine requires that the land use agency adjudicate the permissible uses of a given parcel of property. Only when these uses have been decided upon can the existence of "taking" be determined according to *Williamson* and *MacDonald*. In contrast, legislative relief does not involve this process; if anything, decisions are less final. For these reasons, a court that requires property owners to seek what amounts to legislative relief clearly goes against the holdings and rationales of *Williamson* and *MacDonald*.<sup>124</sup>

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118. *Tahoe-Sierra I*, 911 F.2d 1331 (9th Cir. 1990).

119. *Id.* at 1336.

120. *Id.*

121. Kassouni, *supra* note 2, at 36 (second emphasis added).

122. *Id.* (emphasis added).

123. *Tahoe-Sierra I*, 911 F.2d at 1345-46 (Kozinski, J., dissenting) (footnotes omitted).

124. If seeking legislative relief should not be required of property owners, it also follows that a court should not require them to seek textual amendments to zoning ordinances.

## 2. "Reapplication" Requirement

Though *Williamson* required a property owner to receive a final decision on his or her application, *MacDonald* added the requirement that he or she must reapply after an initial rejection.<sup>125</sup> The reapplication requirement came from the statement in *MacDonald* that a property owner must obtain a "final and authoritative determination of the *type and intensity* of development legally permitted."<sup>126</sup> Lower courts have interpreted this to mean that only after a reapplication has been submitted can the "type and intensity" of permissible development be determined. A Ninth Circuit case explained that the reapplication rule means "a landowner may need to resubmit modified development proposals that satisfy the local government's objections to the development as initially proposed."<sup>127</sup> No case has indicated exactly how many reapplications are necessary.

Inherent in the reapplication rule is an assumption that property owners must make significant concessions to land use agencies. For example, the property owner should apply for less intensive uses. In one case, the final decision prong was not satisfied after a property owner's original development plan, which would have adversely impacted a deer habitat, was rejected as inconsistent with a state environmental law.<sup>128</sup> The Second Circuit held that no final decision had been rendered because the property owner "did not attempt to modify the location of the units or otherwise seek to revise its application."<sup>129</sup> Other courts seem to require property owners to compromise by scaling down their original project and seeking transferable development rights for future projects.<sup>130</sup>

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<sup>125</sup> See *supra* notes 44-46.

<sup>126</sup> *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) (emphasis added).

<sup>127</sup> *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990).

<sup>128</sup> *Southview Assoc. v. Bongartz*, 980 F.2d 84 (2nd Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993).

<sup>129</sup> *Id.* at 92.

<sup>130</sup> See *Stephans v. Tahoe Regional Planning Agency*, 697 F. Supp. 1149, 1154 (D. Nev. 1988); *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1352 (D. Nev. 1992). Transferable development rights (TDRs) are a means of satisfying and avoiding the just compensation requirement, since "TDRs can ease the burden of a regulation such that it will not amount to a taking." JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 1214 (3d ed. 1993). See also *Developments in the Law--Zoning*, 91 HARV. L. REV. 1427, 1497-1501 (1978) (arguing that TDRs move the regulation away from the "too far" point which would constitute a taking). For further discussions of TDRs, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 188-90 (1985); David E. Ervin & James B. Fitch, *Evaluating Alternative Compensation and Recapture Techniques for Expanded Public Control of Land Use*, 19 NAT. RESOURCES J. 21 (1979).

The reapplication requirement apparently mandates political concessions as well. The Ninth Circuit seems to require a property owner not only to compromise with the land use agency itself, but he or she must also convince another municipality to make "political concessions" to the first agency.<sup>131</sup> In another case, one of the reasons that the Tenth Circuit found that the final decision prong had not been satisfied was because the property owners had made "no efforts to explore the possibility of alternative development plans with the City."<sup>132</sup> Similarly, a Kansas district court held that the final decision prong had not been satisfied in part because the court found that "there has been little or no dialogue between plaintiff and the City."<sup>133</sup> The apparent requirement that a citizen must make concessions to the government before his or her constitutional rights can be enforced in a federal court is a very novel concept in American constitutional law. This shows just how far federal courts will go to avoid adjudicating land use cases.

### 3. *Futility Exception*

The futility exception to the ripeness doctrine holds that if further applications would be "futile," a de facto final decision can be imputed to the land use agency.<sup>134</sup> As a prerequisite,<sup>135</sup> however, to satisfying the futility exception, a property owner must submit at least one "meaningful" application and seek any available administrative relief. "As harsh and counterintuitive as it may sound, . . . even when the local statute clearly precludes approval of any meaningful application . . . the futility exception to the final decision requirement will not

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<sup>131</sup> St. Clair v. City of Chico, 880 F.2d 199, 203 (9th Cir. 1989).

<sup>132</sup> Landmark Land Co. v. Buchanan, 874 F.2d 717, 721 (10th Cir. 1989).

<sup>133</sup> Mid Gulf, Inc. v. Bishop, 792 F. Supp. 1205, 1210 (D. Kan. 1992).

<sup>134</sup> The futility exception is usually applied either to the final decision prong or sometimes to the entire ripeness doctrine. See *supra* note 48.

The futility exception has occasionally also been applied to the state compensation prong. See, e.g., Schnuck v. City of Santa Monica, 935 F.2d 171, 174 (9th Cir. 1991) (finding that the property owner "has not shown that bringing her claims in state court would be futile"); Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F. Supp. 1068, 1073 (M.D.N.C. 1992) (concluding that "it would be futile and a waste of judicial resources to require [the property owner] to apply for and be denied just compensation [by a state court] before continuing this action"), *aff'd*, 19 F.3d 11 (4th Cir. 1994).

<sup>135</sup> The *Lucas* decision could be read to cast some doubt on whether a meaningful application is a prerequisite to the futility exception. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2891 n.3 (1992) (stating that an application for a development permit or variance is not required where it would be "pointless").

*Lucas'* language has led one commentator to argue that "[s]ubmission of a development application is therefore *not* a prerequisite to application of the futility exception." Kassouni, *supra* note 2, at 51. However, *Lucas* did not substantially change the ripeness doctrine. See *supra* text accompanying notes 49-58.



apply, absent at least one rejected application and one rejected variance request."<sup>136</sup> The futility exception is not Supreme Court precedent,<sup>137</sup> the Ninth Circuit created it.<sup>138</sup> So far, not every circuit has adopted the futility exception.<sup>139</sup>

Note that "[t]he precise test for determining whether a landowner has established the futility of pursuing a development application has not been clearly defined."<sup>140</sup> Not surprisingly, the property owner has the "heavy burden"<sup>141</sup> of establishing the futility exception, and "any reasonable doubt ought to be resolved against that party."<sup>142</sup> The Ninth and Tenth Circuits hold that the futility exception is not available unless it is "clear beyond peradventure that excessive delay in . . . a final decision [would cause] the present destruction of the property's beneficial use."<sup>143</sup>

Under the futility exception, a property owner is excused from proving that the land use agency has made a final decision if "special circumstances exist such that a permit application is not a 'viable option,' or where the granting authority has dug in its heels and made it transparently clear that the permit, application or no, will not be forthcoming."<sup>144</sup> The futility exception "serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved."<sup>145</sup> The futility exception is a narrow one: "[T]he mere possibility, or even the probability, that the responsible agency may deny the permit should not be enough to trigger the [futility] excuse."<sup>146</sup>

<sup>136</sup> Zilber v. Town of Moraga, 692 F. Supp. 1185, 1199 (N.D. Cal. 1988).

<sup>137</sup> See *supra* text accompanying note 41.

<sup>138</sup> The first case to discuss the futility exception is *American Sav. & Loan Ass'n v. Marin County*, 653 F.2d 364, 371 (9th Cir. 1981), which held that in a land use case, the property owner has "the heavy burden of showing that compliance with local ordinances would be futile."

<sup>139</sup> The First, Sixth, Ninth, Tenth, and Eleventh Circuits have applied the futility exception. See *Gilbert v. City of Cambridge*, 932 F.2d 51, 60-61 (1st Cir. 1991) *cert. denied*, 112 S. Ct. 192 (1991); *Seguin v. City of Sterling Heights*, 968 F.2d 584, 588 (6th Cir. 1992); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987); *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 721-22 (10th Cir. 1989); *Reahard v. Lee County*, 968 F.2d 1131, 1134 (11th Cir. 1992).

<sup>140</sup> *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990).

<sup>141</sup> *Traweek v. City & County of San Francisco*, 920 F.2d 589, 594 (9th Cir. 1990).

<sup>142</sup> *Gilbert*, 932 F.2d at 61.

<sup>143</sup> *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). The Tenth Circuit has adopted this language. See *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 721 (10th Cir. 1989).

<sup>144</sup> *Gilbert*, 932 F.2d at 61 (citations omitted).

<sup>145</sup> *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990).

<sup>146</sup> *Gilbert*, 932 F.2d at 61.

A property owner can fall within the futility exception by making an application under land use regulations that do not provide for administrative relief. For example, the Ninth Circuit found it would be futile for a property owner to seek a variance where the general plan did not have a variance procedure.<sup>147</sup> Conversely, the availability of a variance means that no futility exception will be recognized.<sup>148</sup> Another way for a property owner to fall within the futility exception is if the land use regulations clearly do not allow the contemplated use.<sup>149</sup> A property owner may also fall within the futility exception if a land use agency takes a clearly unreasonable amount of time on his or her application.<sup>150</sup> However, a delay of *six years* was held *not* to trigger the futility exception.<sup>151</sup> At least two courts have hinted that a delay of up to eight years (the length of the delay in *Williamson*) would not trigger the futility exception.<sup>152</sup>

Curiously, the futility exception has not been applied when the applicable land use regulations are amended to prevent a property owner's proposed use. For example, no futility exception was recognized when an ordinance was passed specifically to block the conversion of the property owner's apartments to condominiums.<sup>153</sup> Similarly, when an initiative downzoned a property owner's land to openspace, and could be amended only by the vote of a majority of the town's citizens, the Ninth Circuit did not recognize the futility exception because the property owners never submitted a plan to develop their property.<sup>154</sup> This example of downzoning by initiative most clearly shows the futility of a property owner putting his or her

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<sup>147</sup>. *Hoehne v. County of San Benito*, 870 F.2d 529, 534 (9th Cir. 1989).

<sup>148</sup>. *See, e.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987).

<sup>149</sup>. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989) (recognizing futility exception when city "effectively conceded that the only alternative plan of development would have been under the existing zoning ordinance" which prohibited the project). *See also Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir. 1987) (holding that testimony of county official showed futility of seeking variance).

<sup>150</sup>. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1338 n.5 (9th Cir. 1990), *rev'd* 938 F.2d 153 (1991) ("Obviously a procedure designed to keep aggrieved landowners on ice *indefinitely*, or for longer than the government could reasonably require in order to reach a final decision under the circumstances" [could trigger the futility exception.]) (emphasis in original); *Kinzli v. City of Santa Cruz*, 818 F.2d 1499, 1454 n.5 (9th Cir. 1987) (an "excessive amount of time" may trigger futility exception).

<sup>151</sup>. *See Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986).

<sup>152</sup>. *See Kinzli*, 818 F.2d at 1454 n.5; *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989).

<sup>153</sup>. *Traweek v. City & County of San Francisco*, 920 F.2d 589, 594 (9th Cir. 1990).

<sup>154</sup>. *Kinzli*, 818 F.2d at 1455. *See also Amwest Invs., Ltd. v. City of Aurora*, 701 F. Supp. 1508, 1514 (D. Colo. 1988) (not recognizing the futility exception when property owner's land downzoned by initiative and city rejected his subdivision plan).

property to a contemplated use; however, the futility exception was not recognized.

Some circuits not only place the burden of proving futility on the property owner,<sup>155</sup> but amazingly require him or her to file, and then lose, a state court inverse condemnation suit before the futility exception is triggered.<sup>156</sup> The only plausible explanation for requiring a state inverse condemnation suit to be lost before making any determination on the clearly unrelated matter of whether a "final decision" has been made is that federal courts often use very questionable legal reasoning to avoid hearing land use cases.

#### D. State Compensation Prong

The second of the two *Williamson* ripeness prongs is "state compensation."<sup>157</sup> *Williamson* requires that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."<sup>158</sup> In other words, for a taking claim to be heard in federal court, a property owner must first pursue compensation in state court.<sup>159</sup> Nearly every circuit has decided at least one case holding that the state compensation prong is

<sup>155</sup>. See *supra* notes 138-39.

<sup>156</sup>. See *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). See also *Anderson v. Alpine City*, 804 F. Supp. 269, 273 (D. Utah 1992).

<sup>157</sup>. Regarding the name of this prong, *Williamson* used the term "compensation," *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 185 (1985), and other cases have used "state remedies," see, e.g., *Zilber v. Town of Moranga*, 692 F. Supp. 1195, 1201 n.6 (N.D. Cal. 1988).

The essence of this prong is that *compensation* must be pursued in *state* court before a federal claim is ripe. Combining these two concepts, the term "state compensation" seems the most descriptive.

It is at the state compensation prong that the ripeness and abstention doctrines "intersect." *Blaesser, supra* note 3, at 89. See also *supra* note 35 (discussing the abstention doctrine as a possible additional reason that *Williamson* required state compensation to be sought). This intersection occurs because "the availability of an adequate state remedy for inverse condemnation (an issue of ripeness) can itself become the unsettled question of state law which may warrant abstention by the federal courts." *Blaesser, supra* note 2, at 90.

<sup>158</sup>. *Williamson*, 473 U.S. at 194-195 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984)).

The ripeness requirement that property owners must seek state compensation is "conceptually distinct" from the exhaustion of remedies doctrine in other § 1983 cases. *Id.* at 192. The questionable rationale for excepting taking cases from every other kind of constitutional claim recognized under § 1983, which unlike taking claims do not require an exhaustion of remedies, is discussed in *Blaesser, supra* note 2, at 73-76.

<sup>159</sup>. See *Picard v. Bay Area Regional Transit Dist.*, 823 F. Supp. 1519, 1523 (N.D. Cal. 1993) ("until state court procedures have been pursued, federal courts lack subject matter jurisdiction over taking claims").

not satisfied when a property owner initially files a land use case in federal court, instead of first pursuing state court relief.<sup>160</sup>

The extreme importance of the state compensation prong must be amplified. Because failure to meet one of the two prongs means a claim is unripe,<sup>161</sup> the existence of an adequate process for receiving state compensation in a land use case means that a taking claim is always unripe and hence never justiciable in federal court.

### 1. *Type of State Court Relief That Must Be Pursued*

In order to satisfy the state compensation prong, a property owner must seek *compensation*, not injunctive relief. The First Circuit explained that "*Williamson* leaves no doubt that, so long as the State provides an adequate process for securing compensation, federal equitable intervention in advance of resort to that [state] procedure is premature."<sup>162</sup> The Seventh Circuit clearly illustrated this requirement when it held that a claim was unripe because the property owners sought injunctive relief, not compensation.<sup>163</sup>

### 2. *"Adequate" Process for State Compensation*

Recall that *Williamson* requires a property owner to seek state compensation before turning to federal court, but only if an "adequate process for obtaining compensation" exists in the state court.<sup>164</sup> Accordingly, the existence of "adequate" compensation determines whether a property owner must file suit first in state court.

As a preliminary matter, it should be noted that the burden of proving whether state compensation is "adequate" is on the property owner. The burden is heavy: "[U]ntil the state courts establish that

<sup>160</sup>. See, e.g., *Rocky Mtn. Materials & Asphalt, Inc. v. Board of County Comm'rs*, 972 F.2d 309 (10th Cir. 1992); *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1992); *Schnuck v. City of Santa Monica*, 935 F.2d 171 (9th Cir. 1991); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573 (7th Cir. 1990); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *Sudarsky v. City of New York*, 779 F. Supp. 287 (S.D.N.Y. 1991), *aff'd*, 969 F.2d 1041 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1059 (1993); *Abiss v. Delaware Dep't of Transp.*, 712 F. Supp. 1159 (D. Del. 1989); *Q.C. Constr. Co. v. Verrengia*, 700 F. Supp. 86 (D.R.I. 1988); *Northern Va. Law Sch. v. City of Alexandria*, 680 F. Supp. 222 (E.D. Va. 1988); *Jackson Court Condos., Inc. v. City of New Orleans*, 665 F. Supp. 1235 (E.D. La. 1987).

<sup>161</sup>. See *supra* note 33.

<sup>162</sup>. *Gilbert v. City of Cambridge*, 932 F.2d 51, 64 (1st Cir. 1991) (citation omitted).

<sup>163</sup>. See *Coniston Corp. v. Village of Hoffmann Estates*, 844 F.2d 461, 463-64 (7th Cir. 1988) (holding that compensation prong not satisfied because property owners "have not explored the possibility of obtaining compensation for an alleged regulatory taking. In fact, they do not want compensation; they want their site plan approved.").

<sup>164</sup>. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

landowners may not obtain just compensation through an inverse condemnation action *under any circumstances*, [state] procedures are adequate within the terms of *Williamson County* and [the property owner's] failure to use them cannot be excused.<sup>165</sup> State compensation is "adequate" when it provides monetary relief.<sup>166</sup> However, state compensation can also be "adequate" even if it provides only injunctive<sup>167</sup> or both injunctive and monetary relief.<sup>168</sup> An "adequate process" for state compensation can also be administrative relief such as a state claims commission which awards monetary damages.<sup>169</sup>

### 3. Examples of Adequate State Compensation

Federal courts, once again because of their dislike of adjudicating land use cases, go to great lengths to find a state's compensation

<sup>165</sup>. *Austin v. City & County of Honolulu*, 840 F.2d 678, 681 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988) (emphasis added). *See also* *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991) ("Because the plaintiffs have not yet been turned away empty-handed [from state court], it is not clear whether their property has been taken without just compensation."), *cert. denied*, 112 S. Ct. 1174 (1992); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 (9th Cir. 1991) ("[A property owner's] allegation of mere generalized hostility of the state courts to taking claims does not excuse her failure to seek relief there. She must show that 'state courts establish that landowners may not obtain just compensation through an inverse condemnation action *under any circumstances*.'" (citation omitted) (quoting *Austin*, 840 F.2d at 681) (emphasis added); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1479 (9th Cir. 1989) ("adequate" state compensation existed despite property owner's allegation of "the California court's longstanding hostility toward taking claims" and "long delays" before taking claims are heard by state courts), *cert. denied*, 494 U.S. 1016 (1990); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) (a "suit for just compensation is not ripe until it is *apparent* that the state does not intend to pay compensation . . .") (emphasis added).

<sup>166</sup>. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456 (9th Cir. 1987) (concluding that the state remedy was "adequate" because California law recognizes monetary damages for inverse condemnation claims).

Interestingly, one court has held that compensation from a different sovereign than the one taking the property is not an "adequate remedy." *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1341 (9th Cir. 1990) (concluding that federal compensation for taking by either California, Nevada, or federal interstate compact agency was not "adequate"), *rev'd*, 938 F.2d 153 (1991).

<sup>167</sup>. *Queen Anne Courts v. City of Lakeville*, 726 F. Supp. 733, 739 (D. Minn. 1989) (holding that even though current Minnesota inverse condemnation law provides only injunctive relief, until Minnesota expressly holds that monetary damages are not available, state compensation is still "adequate").

Not surprisingly, federal courts make a great distinction between compensation and injunctive relief when it comes to requiring property owners to seek only compensatory relief, *see supra* notes 162-63. By stringently insisting that only compensation be sought, federal courts thus exclude more land use cases from their dockets. However, these same courts irreconcilably lump compensatory and injunctive relief together when deciding whether a state remedy is adequate, thus excluding even more cases. *See infra* note 168.

<sup>168</sup>. *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 (1st Cir. 1991) (finding the state remedies "adequate" because Massachusetts law provides both injunctive and monetary relief).

<sup>169</sup>. *See MAK Co. v. Smith*, 763 F. Supp. 1003, 1005 (W.D. Ark. 1991) (holding that the Arkansas Claims Commission constituted an "adequate state remedy").

remedy "adequate." At least superficially, federal courts recognize that a property owner should not be forced to pursue non-existent state compensation.<sup>170</sup> As the following cases illustrate, however, federal courts often require property owners to pursue state remedies that are arguably non-existent.

The fact that a state has never awarded monetary damages in an inverse condemnation case does not mean that state procedures for awarding compensation are inadequate. For example, a district court found that Iowa state law provided an "adequate" state compensation remedy merely because an inverse condemnation cause of action could be "implied from the Iowa Constitution" despite the fact that no case recognizing such an action was cited.<sup>171</sup> Similarly, after the First Circuit could find no Puerto Rico inverse condemnation cases awarding monetary damages, it nevertheless dismissed a property owner's claim by concluding that state compensation was adequate.<sup>172</sup>

Federal courts do not hesitate to dismiss land use cases as violative of the state compensation prong even when the status of a state's inverse condemnation law is unclear. For example, even though Missouri cases were "less than certain" concerning the availability of monetary damages for inverse condemnation, a district court held that state procedures for awarding compensation were "adequate."<sup>173</sup> The Missouri cases were "less than certain" because one case seemed to recognize monetary damages, while another did not.<sup>174</sup> Similarly, the Ninth Circuit found that even though Hawaiian inverse condemnation

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<sup>170</sup>. *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993) ("However, a plaintiff is not required to bring a state court action where it would be futile under existing state law.").

From its *Christensen* holding, the Ninth Circuit seemingly has created a "futility" exception to the compensation prong, where previously an exception by the same name was applied only to the final decision prong. See *supra* note 134.

<sup>171</sup>. *Mitchell v. Mills County*, 673 F. Supp. 332, 336 (S.D. Iowa 1987). See also *Southview Assocs. v. Bongartz*, 980 F.2d 84, 100 (2d Cir. 1992) (concluding that even though Vermont law has never recognized an inverse condemnation cause of action, the Vermont constitution could be interpreted to provide such a remedy).

<sup>172</sup>. *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506 (1st Cir. 1987).

<sup>173</sup>. *Wintercreek Apts. v. City of St. Peters*, 682 F. Supp. 989, 993 (E.D. Mo. 1988).

<sup>174</sup>. Compare *Harris v. Missouri Conservation Comm'n*, 790 F.2d 678, 681 (8th Cir. 1986) (recognizing that Missouri law provides inverse condemnation action for landowner challenging zoning designation) with *D & R Pipeline Constr. Co. v. Greene County*, 630 S.W.2d 236, 238 (Mo. Ct. App. 1982) (holding that Missouri law does not provide inverse condemnation action for landowner challenging refusal to rezone).

The *Wintercreek* court recognized that *D & R Pipeline* was a pre-*First English* case and probably would be decided differently in 1986 when *Harris* was decided. See *Wintercreek*, 682 F. Supp. at 993 n.3.

law was "unclear" (no Hawaiian case had ever recognized the cause of action), Hawaii provided an adequate state remedy.<sup>175</sup>

Federal courts also conclude that very limited compensation remedies are adequate. For example, the Eighth Circuit held that Minnesota's compensation remedy was adequate where inverse condemnation damages are limited in that state to cases where the "taking or damage is irreversible."<sup>176</sup> The availability of a state mandamus proceeding to compel a land use agency to institute eminent domain proceedings was held by the Sixth Circuit to be "adequate" state compensation.<sup>177</sup>

Federal courts also use the order in which suits are filed to dismiss land use cases. A Rhode Island district court case exemplifies how strictly federal courts apply the state compensation prong against property owners.<sup>178</sup> In that case, the property owner originally filed a declaratory judgment suit in state court alleging a taking. After the city failed to respond to the state court suit, the property owner removed the case to federal court. The federal court held that the claim was unripe because the property owner should not have abandoned the state suit; the fact that the property owner originally filed in state court convinced the federal court that state compensation was adequate.<sup>179</sup>

*a. Effect of First English on what Constitutes "Adequate" State Compensation*

The Supreme Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (First English)*<sup>180</sup> is extremely significant to the ripeness doctrine. In *First English*, the Supreme Court established that *after* a taking has been shown to exist,<sup>181</sup> the Taking Clause of the *federal* constitution requires the

<sup>175</sup>. *Austin v. City & County of Honolulu*, 840 F.2d 678 (9th Cir. 1988). See also *Southview Assocs.*, 980 F.2d at 99-100 (concluding that "unsure and undeveloped" remedies in Vermont, which has never decided a regulatory taking inverse condemnation claim, are adequate).

<sup>176</sup>. *Littlefield v. City of Afton*, 785 F.2d 596, 609 (8th Cir. 1986).

<sup>177</sup>. *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031, 1035 (6th Cir. 1992).

The Sixth Circuit held that an available mandamus procedure was adequate "compensation" even though a successful litigant in such a proceeding would not receive any compensation, but rather would "receive" an eminent domain lawsuit, which may not result in any compensation.

<sup>178</sup>. *Q.C. Constr. Co. v. Verrengia*, 700 F. Supp. 86 (D.R.I. 1988).

<sup>179</sup>. *Id.* at 88.

<sup>180</sup>. 482 U.S. 304 (1987), *cert. denied*, 493 U.S. 1056 (1990).

<sup>181</sup>. The Court presumed the existence of a taking. *Id.* at 313 n.7. Therefore, the *First English* holding only applies after the existence of a taking has been established; of course,

government to provide "just" compensation to an aggrieved property owner, and not merely to invalidate the offending regulation.<sup>182</sup> It is important to remember that "[t]he Court's holding in *First English* is limited to the compensation remedy."<sup>183</sup> It is also important to remember that the holding in *First English* defined already existing remedies under the *federal*, but not any state, constitution.<sup>184</sup>

*First English* establishes a federal right to receive compensation once a temporary taking is found. Through the doctrine of incorporation, this federal right becomes a mandatory federal floor at the state level. As a result, property owners can no longer claim that the state does not have procedures to award just compensation.<sup>185</sup> Therefore, *First English* extinguishes the futility exception as applied to the second prong of the ripeness analysis. More importantly, if every state must provide compensation because of *First English*, arguably the state compensation prong is always satisfied. In turn, every case then becomes unripe because the land use agency's satisfaction of one prong renders the case nonjusticiable. Thus if *First English* automatically creates an adequate state remedy, taking claims could never be heard by federal courts. Obviously, this cannot be the case.

However, this mandated procedure does not guarantee "adequate" state remedies. State courts could easily deny property owners just compensation through state procedural and taking law. On the issue of how state procedural law could be used to deny just compensation, one state court candidly explained, "*First English* . . . did not address

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under the ripeness doctrine, claims are almost always dismissed *before* the existence of a taking is determined.

<sup>182</sup> *Id.* at 321-23.

<sup>183</sup> DANIEL R. MANDELKER, *LAND USE LAW* 338 (2d ed. 1988).

<sup>184</sup> *First English*, 482 U.S. at 307 (concluding that "the Fifth and Fourteenth Amendments to the United States Constitution would require compensation" for a taking).

*First English's* protections apply to the states through the incorporation doctrine, which holds that the "fundamental rights" protected by the Bill of Rights apply to the states through the Due Process Clause of the Fourteenth Amendment. See *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994). The Taking Clause has been held to be one of those fundamental rights applied to the states through the Fourteenth Amendment. See *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 159 (1980).

<sup>185</sup> See, e.g., *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993) ("Compensation has been available *under California law* for inverse condemnation claims based on regulatory takings since the Supreme Court decided *First English*") (citation omitted) (emphasis added); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173-74 (9th Cir. 1991) (after *First English*, "California could not deny a damages remedy for a taking by regulation . . . It is clear, then, that a procedure for seeking compensation from the state was available to the [property owners.]; Northern Va. Law Sch. v. City of Alexandria, 680 F. Supp. 222, 225 n.3 (E.D. Va. 1988) ("Given the [*First English* decision], it seems unlikely that a Virginia court would deny compensation should it find that a taking has occurred [under the Virginia state constitution].").



the *procedural means* by which a [state] claim for inverse condemnation is asserted."<sup>186</sup> For example, state procedural law could impose upon taking claims stringent pleading requirements, short statutes of limitations, or long delays for a trial date. Similarly, states could define a "taking" so narrowly as to virtually prevent property owners from having a claim.

Because states could ensure that compensation is not awarded by crafting their own procedural and taking law, it should still be the case after *First English* that property owners could claim state procedures are futile. Under the current law, a property owner could lose his or her property without the benefit of an unbiased forum to decide the temporary takings claim under *First English*. This is so since a property owner who seeks a federally established remedy in state court would be barred from bringing the same claim in federal court under the doctrine of *res judicata* if the issue has been decided before by a state forum. Therefore, *First English* should not be relegated to an unfriendly court without any redressability in an unbiased court system.

#### 4. "Inadequate" State Compensation

Only three land use cases, out of over one hundred, can be found to hold that state compensation was inadequate. In the first case, a North Carolina district court found that state inverse condemnation law had repeatedly not recognized an amortization period for billboard prohibitions,<sup>187</sup> and therefore held that the state compensation remedy was satisfied.<sup>188</sup>

In the second case, a Florida district court found that state inverse condemnation law did not recognize a claim for a taking by confiscatory zoning.<sup>189</sup> Thus, a federal taking claim based on the confiscatory zoning was ripe.<sup>190</sup> (Florida state law subsequently

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<sup>186</sup>. *Roscco Holdings Inc. v. California*, 260 Cal. Rptr. 736, 743 (1989) (emphasis in original), *rev. denied* Cal. App. 2d (1989), *cert. denied*, 494 U.S. 1080 (1990).

<sup>187</sup>. *Naegle Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068 (M.D.N.C. 1992). After finding that North Carolina state law provided inadequate compensation, the federal court in *Naegle* found the case ripe by concluding that "[g]iven this court's jurisdiction to hear the Fifth Amendment [taking] claim, it would be futile and a waste of judicial resources to require [the property owner] to apply for and be denied just compensation [by a state court] before continuing this action [citation omitted]. Thus, [the property owner's] claim is ripe for resolution by this court." *Id.* at 1073.

<sup>188</sup>. *Id.*

<sup>189</sup>. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987). See also, *Dade County v. National Bulk Carriers, Inc.*, 450 So. 2d 213, 216 (Fla. 1984) (holding that, under Florida state law, confiscatory zoning does not constitute a taking).

<sup>190</sup>. *Corn*, 816 F.2d at 1517.

provided compensation for confiscatory zoning takings.<sup>191</sup> Accordingly, a later case in Florida district court alleging a confiscatory zoning taking was dismissed as unripe.)<sup>192</sup>

In the third case, a property owner challenged a mobile home rent control ordinance. In contrast to most land use taking claims, there is a split in federal and state law: federal law considers these claims to be a compensable taking, while the relevant state law did not.<sup>193</sup> In this rare case, the court concluded that no adequate state remedies existed for this type of taking claim.<sup>194</sup>

5. *Even "Adequate" State Compensation is Inadequate: State Courts Use the Ripeness Doctrine to Avoid Hearing Land Use Cases*

The tragic irony of the ripeness doctrine is that state courts, taking a cue from their federal counterparts, increasingly find taking claims unripe based on a borrowed version of the ripeness doctrine. It seems that federal ripeness cases have sent the signal to state courts that taking claims are not important, unnecessarily burdensome, and can be easily disposed of with the ripeness doctrine. For example, in an Oregon case, property owners who sought judicial review in Oregon state court of a land use agency's decision were denied just compensation because their state claim was "unripe" given the lack of a "final decision."<sup>195</sup> Interestingly, the Oregon state court in that case applied a ripeness analysis virtually identical to the federal ripeness doctrine<sup>196</sup> and even cited *MacDonald* as authority for its version of the doctrine.<sup>197</sup> Numerous other cases from Oregon state courts have

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The favorable holding in *Corn* seems to be an anomaly; Eleventh Circuit courts have been distinguishing the case to such an extent that it could almost be considered overruled. See, e.g., *Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990).

<sup>191</sup> *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622 (Fla. 1990).

<sup>192</sup> *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477, 1483 (N.D. Fla. 1992).

<sup>193</sup> *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991).

<sup>194</sup> *Id.* at 579. See also *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951 (9th Cir. 1991).

Before the *First English* decision, when many states had not yet decided to provide remedies for temporary regulatory takings, some land use cases met the state compensation prong. This principle is discussed in *JAMA Constr. v. City of Los Angeles*, 938 F.2d 1045, 1048 n.2 (9th Cir. 1991).

<sup>195</sup> *Larson v. Multnomah County*, 854 P.2d 476, 478 (Or. Ct. App. 1993). In a state court version of the ripeness doctrine, only the final decision prong can be used to find a claim unripe; the state compensation prong of the ripeness doctrine could not apply to a state ripeness doctrine because compensation is already being sought in state court.

<sup>196</sup> The court found that the property owners had not reapplied. *Id.* at 477.

<sup>197</sup> *Id.*

dismissed taking claims based on a state version of the ripeness doctrine.<sup>198</sup>

Oregon, however, is by no means the only state to use a state version of the ripeness doctrine to prevent property owners from receiving just compensation for their property. A state ripeness doctrine has been used in this way in Illinois,<sup>199</sup> Michigan,<sup>200</sup> New Hampshire,<sup>201</sup> New York,<sup>202</sup> Pennsylvania,<sup>203</sup> Rhode Island,<sup>204</sup> Virginia,<sup>205</sup> and Washington.<sup>206</sup>

#### IV. CONCLUSION

This article has shown that, on the whole, federal courts dislike adjudicating land use cases and have applied the ripeness doctrine harshly in an effort to close the federal court house doors to land use taking cases. In order to do so, federal courts have been forced to stretch logic and violate the original rationales for the doctrine. For example, a land use agency's decision is not "final" even when an ordinance has been amended to prevent the project.<sup>207</sup> In some cases, property owners must seek to amend ordinances that violate the Constitution<sup>208</sup> or they must make concessions to the government<sup>209</sup> before a federal court will consider hearing the case. In other cases, state compensation is considered "adequate" when no case or statute

<sup>198</sup>. The state version of the ripeness doctrine occurs after the property owner is first denied permission to use their land as they wanted, and then did not seek an amendment to the general plan.

See, e.g., *Dority v. Clackamas County*, 838 P.2d 1103 (Or. Ct. App. 1992); *Cope v. City of Cannon Beach*, 836 P.2d 775 (Or. Ct. App. 1992); *Joyce v. Multnomah County*, 835 P.2d 127 (Or. Ct. App. 1992).

<sup>199</sup>. *Drover Bank of Chicago v. Village of Hinsdale*, 566 N.E.2d 899 (Ill. App. Ct. 1991).

<sup>200</sup>. *Lake Angelo Assocs. v. Township of White Lake*, 498 N.W.2d 1 (Mich. Ct. App. 1993).

<sup>201</sup>. *Blue Jay Realty Trust v. City of Franklin*, 567 A.2d 188 (N.H. 1989).

<sup>202</sup>. *Albany Area Builders v. Town of Clifton Park*, 576 N.Y.S.2d 932 (A.D. 3 Dept. 1991); *In re Sterling Idea Ventures*, 570 N.Y.S.2d 96 (A.D. 2 Dist. 1991); *Town of Islip v. Zalak*, 566 N.Y.S.2d 306 (A.D. 2 Dept. 1991); *In re Matter of Stone v. McGowan*, 157 A.D.2d 882 (A.D. 3 Dept. 1990); *Petosa v. City of New York*, 522 N.Y.S.2d 904 (A.D. 2 Dept. 1987); *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183 (N.Y. 1986).

<sup>203</sup>. *Gardner v. Commonwealth Dep't of Environmental Resources*, 603 A.2d 279 (Pa. Commw. Ct. 1992); *Ass'n of Concerned Citizens of Butler Valley v. Butler Township Bd. of Supervisors*, 580 A.2d 470 (Pa. Commw. Ct. 1990).

<sup>204</sup>. *State v. Distant*, 455 A.2d 305 (R.I. 1983).

<sup>205</sup>. *Gary v. Board of Zoning Appeals*, 429 S.E.2d 875 (Va. 1993).

<sup>206</sup>. *R/L Assocs. v. Klockars*, 763 P.2d 1244 (Wash. Ct. App. 1988).

A handful of state cases have applied a state version of the ripeness doctrine and found a land use taking claim ripe for adjudication. See, e.g., *Matthews v. Shelby County Comm'n*, 615 So. 2d 605 (Ala. Civ. App. 1992); *Weingarten v. Town of Lewisboro*, 542 N.Y.S.2d 1012 (Supp. 1989); *De St. Aubin v. Flacke*, 496 N.E.2d 879 (N.Y. 1986).

<sup>207</sup>. See *supra* text accompanying note 113.

<sup>208</sup>. See *supra* notes 118-20.

<sup>209</sup>. See *supra* notes 128-33.

in that state has ever recognized an inverse condemnation cause of action.<sup>210</sup> A land use agency's six-year delay in reaching a decision is held not make the application "futile."<sup>211</sup> Admittedly, federal dockets are crowded. But why have the property rights at issue in land use cases been singled out as civil liberties unworthy of protection?

Property rights deserve to be protected by federal courts. To open the federal court house doors to the important constitutional interests at stake in land use cases, federal courts must resist the urge to dismiss such cases on the technicalities and strained reasoning they currently employ and instead must begin to protect the right to be free from government confiscation of property.

The broad solution would be to overrule the ripeness doctrine of *Williamson* and *MacDonald*. Property rights are constitutional rights. Accordingly, federal courts (and a growing number of state courts) should not apply a special "ripeness doctrine" only to taking claims simply because they would rather not adjudicate such cases. A narrower solution would be to lessen the requirements of the ripeness test.<sup>212</sup> First, the final decision prong should be retailored to fit its purpose which is to determine when a decision is final. With that in mind, the final decision prong should require a land owner to submit one application. Then the land use agency, if it denies the request, must explain the reasons for the denial and suggest ways the property owner's next application could be approved. If the property owner's second application was denied, a final decision may truly be said to exist. After all, the land use agency has the information regarding which uses are permissible—why should it be up to the property owner, who lacks this crucial information, to make multiple guesses? The common law has almost always held that the party having exclusive control of relevant information bears the burden of proving or disproving that issue.<sup>213</sup> Thus, the land use agency, which makes the decision about permissible uses and therefore has exclusive

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<sup>210</sup>. See *supra* notes 171, 175.

<sup>211</sup>. See *supra* note 151.

<sup>212</sup>. A suggested solution was to treat section 1983 taking cases as "disfavored" claims, and relegate the current ripeness test to a one application requirement. This would allow land owners to gain access to federal court at a much earlier stage and avoid incessant expenses. However, because calling something a "disfavored" claim reduces the hearing to a paper trial (courts usually require petitioners to prove "disfavored" claims on the pleadings), and raises a strong presumption in favor of government, this solution would place a greater burden on the land owner than that placed upon him or her from going through the current ripeness requirements.

<sup>213</sup>. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (burden will be allocated to defendant if the facts are within the "knowledge and control of the defendant").

control of the information regarding the issue, should be required to bear the burden of going forward.

The strained reasoning and injustice of the ripeness doctrine is the result of a much larger problem. Government often wants its citizens' property, but seldom wants to pay for it. The courts' role must be to halt government's propensity to take.

# CLEANUP OF NATIONAL PRIORITIES LIST SITES, FUNCTIONAL EQUIVALENCE, AND THE NEPA ENVIRONMENTAL IMPACT STATEMENT

HOWARD GENESLAW\*

## I. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> was enacted by Congress to establish a framework for environmental review of actions carried out by the federal government.<sup>2</sup> NEPA imposes certain responsibilities on the federal government including an obligation to assure a safe and healthful environment free from degradation and to achieve a wide range of beneficial uses without risk to health or safety.<sup>3</sup> NEPA mandates that all agencies of the federal government prepare an environmental impact statement (EIS) when they undertake or fund "major Federal actions significantly affecting the quality of the human environment."<sup>4</sup>

At the time NEPA was enacted, the Environmental Protection Agency (EPA) did not yet exist.<sup>5</sup> NEPA's reach extended to *all* agencies of the federal government,<sup>6</sup> including those which were ultimately consolidated into what is now EPA.<sup>7</sup> No blanket exemption was granted in NEPA to EPA's predecessor agencies.<sup>8</sup> Following the creation of EPA in 1970, there has been continuing uncertainty with respect to whether EPA must prepare an EIS when it proposes or

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1. 42 U.S.C. §§ 4321-4370(c) (1988 & Supp. 1990).

2. 42 U.S.C. § 4331 (1988).

3. 42 U.S.C. § 4331(b) (1988).

4. 42 U.S.C. § 4332(2)(C) (1988).

5. EPA was created by Reorganization Plan No. 3, which was submitted to Congress on July 9, 1970 and took effect on December 2, 1970. 35 Fed. Reg. 15,623 (1970).

6. 42 U.S.C. § 4332(2) (1988).

7. Among the predecessor agencies which consolidated to form EPA are the Federal Water Quality Administration of the Department of the Interior and the National Air Pollution Control Administration of the Department of Health, Education and Welfare.

8. See Comment, *Halfway There: EPA's "Environmental Explanations" and the Duty to File Impact Statements*, 3 ENVTL. L. REP. 10,139, 10,140 n.2 (1973).

undertakes a major action significantly affecting the quality of the human environment.

In the last two decades, the federal courts have created a doctrine of functional equivalence which permits EPA to bypass NEPA's environmental impact process, provided that its consideration of a proposed action is responsive to the policies underlying NEPA. Congress has also expressly exempted EPA from compliance with NEPA in several environmental statutes that themselves contemplate a review process much like that mandated by NEPA. Where emergency circumstances exist, the EIS requirement may be waived. The question remains, however, whether Congress in fact intended for EPA to be exempt from NEPA's requirements and whether functional equivalence adequately addresses the policies that underlie NEPA.

Functional equivalence has not yet been applied to EPA's cleanup of hazardous waste sites under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>9</sup> or "Superfund." Enacted in 1980, CERCLA authorizes and provides funding for cleaning up abandoned hazardous waste sites from which (a) a release of hazardous waste into the environment is threatened, or (b) a release of hazardous waste into the environment has occurred or is occurring.<sup>10</sup> Sites which pose an imminent threat or which require prompt cleanup are accorded priority by placement on the National Priorities List (NPL). Since preparation of an EIS in accordance with NEPA may take a year or longer, there is a continuing concern that rather than protecting the environment, preparation of an EIS in compliance with NEPA could actually result in substantial injury through hazardous substance release.

The extent to which EPA's site cleanup and remedy selection procedures are functionally equivalent to a NEPA EIS was first addressed in a law review comment in 1984.<sup>11</sup> It has not been addressed in a law review or journal since. After 1984, EPA revised its procedures to provide earlier public notice of site contamination and proposed remediation, and to allow greater public participation in the selection of a remedy. There have also been several judicial decisions during the intervening decade, arising under statutes other than CERCLA, involving EPA's responsibilities and functional equivalence. This article will examine the underlying policies of NEPA and CERCLA, their legislative histories and the judicial development of

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<sup>9</sup>. 42 U.S.C. §§ 9601-9675 (1988).

<sup>10</sup>. 42 U.S.C. at § 9604.

<sup>11</sup>. Sandra P. Montrose, Comment, *To Police the Police: Functional Equivalence to the EIS Requirement and EPA Remedial Actions Under Superfund*, 33 CATH. U. L. REV. 863 (1984).

the functional equivalence doctrine. Next, it will review EPA's revised public relations procedures, relating to remedy selection and public participation, to determine whether these procedures adequately resolve the deficiencies for which EPA's proposed procedures were criticized in 1984. This article will then review relevant court decisions concerning functional equivalence, particularly those decided since 1984. Lastly, it will address the question of whether EPA is required to prepare a NEPA EIS prior to commencing cleanup of National Priorities List sites.

## II. NEPA

### A. Functions, Purpose & Structure

NEPA was enacted for two principal purposes: to force federal agencies to carefully consider significant environmental impacts arising from projects under agency jurisdiction and to establish a procedure by which members of the public are afforded an opportunity for meaningful participation in the agency's consideration of the proposed action.<sup>12</sup> The EIS is designed to accomplish these purposes by mandating a particular format for presenting the environmental review and by creating opportunities for public comment.<sup>13</sup> Agencies have an obligation to consider environmental consequences identified during the NEPA process, but their review need not elevate environmental concerns above all other issues considered in the agency's ultimate decision on the project.<sup>14</sup> NEPA contemplates balancing a project's environmental costs against its anticipated benefits. Thus, NEPA imposes a procedural obligation, but agencies are not required to mitigate adverse environmental consequences.<sup>15</sup>

NEPA also establishes the Council on Environmental Quality (CEQ) in the Executive Office of the President.<sup>16</sup> CEQ issues regulations relating to the implementation of NEPA and the specific content requirements of an EIS, thus providing a uniform standard for federal

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<sup>12</sup>. 42 U.S.C. §§ 4321-4370 (1988 & Supp. 1990). See also Montrose, *supra* note , at 864; Lawrence Gerschwer, Note, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 Colum. L. Rev., 996 (1993).

<sup>13</sup>. For requirements relating to the format and contents of a NEPA EIS, see 40 C.F.R. §§ 1502.1-1502.25 (1993). See also *infra* part II.B.1. For requirements relating to public participation and public commenting on the EIS, see 40 C.F.R. §§ 1503.1-1503.4, 1506.6, 1506.10 (1993). See also *infra* part II.B.2.

<sup>14</sup>. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (per curiam).

<sup>15</sup>. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>16</sup>. 42 U.S.C. § 4342 (1988).



agencies to follow when meeting their NEPA obligation. The CEQ regulations, establishing requirements for agency compliance with NEPA,<sup>17</sup> require that particular procedures be adopted by agencies relating to preparation of the EIS<sup>18</sup> and require agencies to hold public hearings whenever appropriate.<sup>19</sup> The regulations are binding on federal agencies<sup>20</sup> and "CEQ's interpretation of NEPA [expressed in its regulations] is entitled to substantial deference."<sup>21</sup>

EPA has administrative and review responsibilities under NEPA, which include receiving and filing completed EISs, publishing notice of filing and overseeing the procedures for public commenting.<sup>22</sup> The Administrator of EPA, under the authority of Section 309 of the Clean Air Act,<sup>23</sup> must review and make publicly available written comments relating to the environmental impact of the proposed action.<sup>24</sup> This express authorization to review, comment and publish a substantive decision confers significant power on the Administrator,<sup>25</sup> which under Section 309 extends to any federal action requiring an EIS, whether or not EPA has direct review authority over that action.<sup>26</sup> Where the Administrator determines that the proposed action "is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the [CEQ]."<sup>27</sup> Although CEQ decisions do not bind the involved agencies, they usually lead to modifications or compromise.<sup>28</sup> CEQ is not authorized to prohibit an environmentally unsatisfactory action.<sup>29</sup>

## B. Preparation & Requirements of an NEPA EIS

### 1. Substantive Requirements

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<sup>17</sup> 40 C.F.R. § 1507 (1993).

<sup>18</sup> 40 C.F.R. § 1505 (1993).

<sup>19</sup> 40 C.F.R. § 1506.6(c) (1993).

<sup>20</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979).

<sup>21</sup> *Id.* at 358.

<sup>22</sup> 40 C.F.R. §§ 1506.9, 1506.10 (1993). See generally VALERIE M. FOGLEMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT § 2.9, at 41 (1990).

<sup>23</sup> 42 U.S.C. §§ 7401-7642 (1988 & Supp. 1990).

<sup>24</sup> 42 U.S.C. § 7609(a) (1988). See generally Martin Healy, *The Environmental Protection Agency's Duty to Oversee NEPA's Implementation: Section 309 of the Clean Air Act*, 3 ENVTL. L. REP. 50,071 (1973).

<sup>25</sup> FOGLEMAN, *supra* note , § 2.10, at 42.

<sup>26</sup> DANIEL R. MANDELKER, NEPA LAW & LITIGATION § 2:12, at 2-20 (1984 & Supp. 1991).

<sup>27</sup> 42 U.S.C. § 7609(b) (1988). See 40 C.F.R. § 1504 (1993).

<sup>28</sup> See FOGLEMAN, *supra* note 22, at 46 (citing cases).

<sup>29</sup> MANDELKER, *supra* note 26, at 2-20.

When an action is subject to NEPA, the first step is to determine whether an EIS will be required. The agency with approval authority over the project, which in this case would be EPA, must prepare an environmental assessment (EA).<sup>30</sup> The EA documents the need for the project, the potential environmental effects arising from it and alternatives to the proposed action, thereby functioning as a basis for evaluating the project and determining whether an EIS must be prepared.<sup>31</sup> If EPA determines that the action will result in no significant environmental effects, it issues a finding of no significant impact (FONSI)<sup>32</sup> and its NEPA obligations are completed. Actions that result in no change to existing environmental conditions are considered not to have significant environmental effects.<sup>33</sup> Thus, a decision to fence and cap a site, without removing existing contamination, would arguably not require an EIS. If EPA determines that the project will result in potentially significant environmental effects, it must prepare an EIS.<sup>34</sup>

The first step in the preparation of an EIS is scoping, which identifies the issues that the EIS will address in depth<sup>35</sup> and eliminates from consideration others that are not likely to have significant impacts. Thus, scoping is the stage at which the broad content of the EIS is determined, which then serves as a roadmap for preparation of the EIS. NEPA contemplates a two-step process in which an initial draft EIS is prepared, followed by a final EIS which responds to public comments. Since the substantive requirements are essentially the same, the discussion that follows does not distinguish between the draft and final EIS. The key difference is that the final EIS is envisioned to be a more complete and comprehensive document, since it must reflect issues that were developed during the public hearing and comment process.

The EIS is a concise document which "provide[s] a full and fair discussion of significant environmental impacts" and "inform[s] decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts."<sup>36</sup> It must "[r]igorously explore and objectively evaluate all reasonable alternatives" and "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their

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<sup>30</sup> 40 C.F.R. § 1501.3(a) (1993).

<sup>31</sup> 40 C.F.R. § 1508.9 (1993).

<sup>32</sup> 40 C.F.R. §§ 1501.4(e), 1508.13 (1993).

<sup>33</sup> MANDELKER, *supra* note 26, at 8-121.

<sup>34</sup> 40 C.F.R. § 1501.4(c) (1993).

<sup>35</sup> 40 C.F.R. § 1501.7 (1993).

<sup>36</sup> 40 C.F.R. § 1502.1 (1993).

comparative merits."<sup>37</sup> The EIS must consider and evaluate the no action alternative,<sup>38</sup> identify the environment affected by the proposed action<sup>39</sup> and indicate the direct and indirect effects of the proposed action and each alternative, together with their significance on various environmental values.<sup>40</sup> It must evaluate impacts proportionately with respect to their significance and must consider a range of alternatives that will be considered by EPA.<sup>41</sup> Perhaps most importantly, the EIS must fairly analyze potential impacts of the proposed action at a level of detail sufficient to permit meaningful analysis.<sup>42</sup> It is not intended to serve as a means for justifying a prior decision to proceed with the project.

## 2. Procedural Requirements

Procedurally, NEPA requires that opportunities for public participation be provided at the important stages of the environmental review process. The single exception is determining whether to prepare an EIS. The environmental assessment on which this determination is based is a public document, but NEPA does not require a public hearing prior to a decision by EPA to prepare an EIS or issue a FONSI.<sup>43</sup>

Once the decision is made to prepare an EIS, public participation is encouraged at each subsequent step during its preparation. Beginning with the scoping process, the public is apprised that the EIS process has commenced through publication of notice in the Federal Register.<sup>44</sup> When the draft EIS is completed, EPA must again publish notice in the Federal Register.<sup>45</sup> EPA must circulate the draft EIS<sup>46</sup> and must obtain comments from appropriate federal, state and local agencies that have an interest in the project. It also has an obligation to "affirmatively solicit[] comments from those persons or organizations who may be interested or affected."<sup>47</sup>

EPA must consider the comments received and respond to them in its final EIS.<sup>48</sup> Responses can take a variety of forms, including

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<sup>37</sup> 40 C.F.R. § 1502.14(a), (b) (1993).

<sup>38</sup> 40 C.F.R. § 1502.14(d) (1993).

<sup>39</sup> 40 C.F.R. § 1502.15 (1993).

<sup>40</sup> 40 C.F.R. § 1502.16(a), (b), (d) (1993).

<sup>41</sup> 40 C.F.R. § 1502.2(b), (c) (1993).

<sup>42</sup> 40 C.F.R. § 1502.9(a) (1993).

<sup>43</sup> 40 C.F.R. §§ 1501.4, 1508.13 (1993).

<sup>44</sup> 40 C.F.R. §§ 1501.7, 1508.22 (1993).

<sup>45</sup> 40 C.F.R. § 1506.10(a) (1993).

<sup>46</sup> 40 C.F.R. § 1502.19 (1993).

<sup>47</sup> 40 C.F.R. § 1503.1(4) (1993).

<sup>48</sup> 40 C.F.R. § 1503.4(a) (1993).

modifications to the proposed action or the alternatives considered, consideration of new alternatives, revisions to the analysis presented in the draft EIS, corrections to factual errors, or explanations concerning why comments received do not warrant response.<sup>49</sup> The responses are incorporated into the final EIS, which must be circulated to interested persons and agencies and specifically to individuals, organizations or agencies that commented on the draft EIS.<sup>50</sup> EPA may request and accept comments on the final EIS, although it is not obligated to solicit them.<sup>51</sup> The public is guaranteed a minimum of forty-five days to comment following publication of notice of completion of the draft EIS before EPA can make a decision concerning the project.<sup>52</sup> Moreover, EPA is under a general mandate to "[m]ake diligent efforts to involve the public in preparing and implementing . . . NEPA procedures."<sup>53</sup> EPA must conduct public hearings for actions which are controversial and must provide public notice of such hearings or other related meetings.<sup>54</sup> Thus, NEPA provides substantial opportunities for meaningful public participation in the decisionmaking process.

### C. When Does NEPA Apply?

All federal agencies are subject to NEPA. A federal agency acting in compliance with its own substantive statute or regulations is not exempt from NEPA or the EIS requirement.<sup>55</sup> Similarly, compliance with NEPA does not relieve an agency of its own statutory duties to comply with environmental quality standards or to consult with other federal or state agencies.<sup>56</sup> In certain limited circumstances, where an agency's own statute or regulations conflict with NEPA, compliance with NEPA may be excused.<sup>57</sup>

NEPA applies to all "'major' 'federal actions' 'significantly affecting' the quality of the human environment."<sup>58</sup> Federal participation is

<sup>49</sup> 40 C.F.R. § 1503.4(a) (1993).

<sup>50</sup> 40 C.F.R. § 1502.19(d) (1993).

<sup>51</sup> 40 C.F.R. § 1503.1(b) (1993).

<sup>52</sup> 40 C.F.R. § 1506.10(b), (c) (1993).

<sup>53</sup> 40 C.F.R. § 1506.6(a) (1993).

<sup>54</sup> 40 C.F.R. § 1506.6(b), (c)(1) (1993).

<sup>55</sup> MANDELKER, *supra* note 26, at 1-2. NEPA expressly indicates that its policies and goals "are supplementary to those set forth in existing authorizations of Federal agencies." 42 U.S.C. § 4335 (1988). Recall that EPA did not yet exist at the time NEPA was enacted. *See supra* note 5.

<sup>56</sup> 42 U.S.C. § 4334 (1988).

<sup>57</sup> *See Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976). *See also* MANDELKER, *supra* note 26, at 5-18 to 5-25.

<sup>58</sup> 42 U.S.C. § 4332(2)(C) (1988).

itself sufficient to qualify an action as a "major" action,<sup>59</sup> although a major action has been defined as one that "requires substantial planning, time, resources or expenditure."<sup>60</sup> Alternatively, major actions have also been defined as projects costing over one million dollars, or requiring a substantial amount of time for planning and construction, the displacement of people or animals, or the topographical reshaping of large areas.<sup>61</sup> Under any of these definitions, the vast majority of cleanups at NPL sites would seem to qualify as major actions.

A "federal action" exists within the meaning of NEPA "not only when an agency proposes to build a facility itself, but also when an agency makes a decision which permits action by other parties which will affect the quality of the environment."<sup>62</sup> A decision by EPA requiring cleanup of an NPL site would constitute a federal action.

The third criterion, whether the action "significantly affects" the quality of the human environment, has received relatively little treatment in the courts.<sup>63</sup> CEQ regulations define "significantly" with respect to context and intensity and require consideration of the effects of the proposed action on public health or safety, the extent to which such effects are likely to be controversial and the degree to which such effects are unknown or uncertain.<sup>64</sup> The regulations now take the position that "[m]ajor reinforces but does not have meaning independent of significantly."<sup>65</sup> Courts have interpreted the significance requirement to include direct as well as indirect effects on the human environment.<sup>66</sup> The potential impacts of cleaning up an NPL site would be encompassed by any of these definitions.

#### D. Exemptions

NEPA itself contains no statutory exemptions. It requires that all federal agencies prepare EISs for proposals to undertake "major federal actions significantly affecting the quality of the human environ-

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<sup>59</sup> MANDELKER, *supra* note 26, at 8-79.

<sup>60</sup> Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972).

<sup>61</sup> Ridley v. Blanchette, 421 F. Supp. 435, 445-46 (E.D. Pa. 1976).

<sup>62</sup> Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1088 (D.C. Cir. 1973).

<sup>63</sup> MANDELKER, *supra* note 26, at 8-83.

<sup>64</sup> 40 C.F.R. § 1508.27 (1993).

<sup>65</sup> 40 C.F.R. § 1508.18 (1993).

<sup>66</sup> See Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974) (stating any action that substantially affects soil, beneficially or detrimentally, is an action significantly affecting the quality of the human environment); Natural Resources Defense Council, Inc., v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972).

ment."<sup>67</sup> Nonetheless, three types of exemptions have developed: (1) provisions in other statutes expressly exempting certain activities from preparation of an EIS; (2) the judicially created "functional equivalence" doctrine, which provides an exemption for EPA if its review and comment procedures offer an effective substitute to an EIS; and (3) an exemption from preparation of an EIS in "emergency circumstances."

### 1. Statutory

All actions taken by EPA under the Clean Air Act<sup>68</sup> are expressly deemed not to constitute "major Federal actions significantly affecting the quality of the human environment"<sup>69</sup> within the meaning of NEPA,<sup>70</sup> so that EPA need not prepare an EIS. Similarly, actions taken by EPA under the Clean Water Act,<sup>71</sup> except issuance of discharge permits for new sources of water pollution and the provision of grants for publicly-owned treatment works, are also deemed not to constitute major federal actions within the meaning of NEPA.<sup>72</sup> Thus, EPA is obligated to prepare an EIS under the Clean Water Act only when issuing new source discharge permits or providing grants for publicly-owned treatment works; its other activities are exempt from the EIS requirement.

By its express exemption from preparation of an EIS for all EPA activities under the Clean Air Act and for some EPA activities under the Clean Water Act, Congress has created an inference that EPA is ordinarily required to prepare an EIS unless it has been granted a specific exemption.<sup>73</sup> But conversely, by imposing an express obligation to prepare an EIS when issuing new source discharge permits or providing grants for publicly-owned treatment works, Congress has created a contrary inference that EPA is ordinarily exempt from preparation of an EIS unless a specific obligation to do so is imposed.<sup>74</sup> The courts have been troubled by these conflicting infer-

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<sup>67</sup>. 42 U.S.C. § 4332(2)(C) (1988).

<sup>68</sup>. 42 U.S.C. §§ 7401-7642 (1988 & Supp. 1990).

<sup>69</sup>. 42 U.S.C. § 4332(2)(C) (1988).

<sup>70</sup>. Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 793(c)(1) (1988). This legislation represents a codification of the "functional equivalence" exception to the preparation of an EIS for actions under the Clean Air Act. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

<sup>71</sup>. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1990).

<sup>72</sup>. 33 U.S.C. § 1371(c)(1) (1988 & Supp. 1990).

<sup>73</sup>. See generally *Montrose*, *supra* note 11, at 868-69 n.25, 877-78 n.96.

<sup>74</sup>. *Id.* at 868-69 n.25, 880 n.115. See also *Simons v. Gorsuch*, 715 F.2d 1248 (7th Cir. 1983) (excluding from NEPA all but two categories of activities under the Clean Water Act was not intended to include others as a matter of law).

ences. In some cases, courts have held that since all federal agencies must file an EIS and EPA is a federal agency, it must file an EIS.<sup>75</sup> But other courts have concluded that requiring EPA to file an EIS with itself would be pointless.<sup>76</sup> One court viewed EPA's express exemption from NEPA in the Clean Air Act and the Clean Water Act as "Congress's way of making more obvious what would likely occur as a matter of judicial construction."<sup>77</sup>

## 2. Functional Equivalence

During the last two decades, the federal courts have recognized and developed an exemption from NEPA's EIS requirement where EPA's adherence to "substantive and procedural standards ensure[s] full and adequate consideration of environmental issues."<sup>78</sup> Where this occurs, "formal compliance with NEPA is not necessary, but functional compliance is sufficient."<sup>79</sup> The rationale behind the functional equivalence doctrine lies in the belief that EPA is entitled to greater deference and flexibility with respect to preparation of an EIS because EPA's sole purpose is protection of the environment.<sup>80</sup> Therefore, its actions and decisions necessarily reflect an awareness of environmental considerations.<sup>81</sup> Many courts have held that NEPA compliance is unnecessary where the agency is independently required to consider environmental issues.<sup>82</sup>

The functional equivalence standard was originally articulated in *Portland Cement Ass'n v. Ruckelshaus*<sup>83</sup> and was further developed in *Weyerhaeuser Co. v. Costle*.<sup>84</sup> To satisfy the functional equivalence standard, agency procedures must adequately address the substantive

<sup>75</sup>. *E.g.*, *Anaconda Copper Co. v. Ruckelshaus*, 352 F. Supp. 697, 713 (D. Colo. 1972), *rev'd on other grounds*, 482 F.2d 1301, 1306 (10th Cir. 1973) (stating in dicta that requiring EPA to file an EIS would frustrate NEPA's objectives, but that EPA nevertheless has an obligation to weigh and consider the environmental effects of its decisions).

<sup>76</sup>. *E.g.*, *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 174 (6th Cir. 1973).

<sup>77</sup>. *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 505 (11th Cir. 1990).

<sup>78</sup>. *Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

<sup>79</sup>. *Id.*

<sup>80</sup>. *E.g.*, *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973).

<sup>81</sup>. *Id.*

<sup>82</sup>. *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 504 (11th Cir. 1990).

<sup>83</sup>. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (granting EPA a narrow exemption from NEPA's EIS requirement because review procedures for New Source Performance Standards were the functional equivalent of an EIS, on the basis that (a) the Clean Air Act required consideration of the same factors as an EIS, and (b) EPA's notice and comment rulemaking procedures provided an adequate opportunity for public participation). *See also supra* notes 68-70 and accompanying text.

<sup>84</sup>. 590 F.2d 1011 (D.C. Cir. 1978).

and procedural considerations mandated by NEPA.<sup>85</sup> Thus, the *Portland Cement* functional equivalence standard requires (a) a balancing of environmental costs and benefits; (b) meaningful public participation at key points during the decisionmaking process; and (c) consideration of substantive comments received.<sup>86</sup> The *Weyerhaeuser* court, in a challenge to notice and comment rulemaking, relied on the *Portland Cement* standard in articulating a four-part test to gauge functional equivalence. According to the court's functional equivalence test, EPA had to (a) explain the rationale used in reaching its decision; (b) show some basis for facts in the record; (c) show that the information in the record could allow a reasonable person to reach the same decision EPA did; and (d) permit a level of participation required by sound administrative law.<sup>87</sup> The *Portland Cement/Weyerhaeuser* standard remains the standard used by courts today. Functional equivalence does not exist where each element of the standard is not satisfied.<sup>88</sup>

To the extent that EPA's review process adequately considers environmental impacts and provides an opportunity for public comment, courts will usually grant EPA an exemption based on a finding that EPA's procedures are functionally equivalent to and serve as an effective substitute for, preparing a complete EIS.<sup>89</sup> Courts have recognized that procedures which are functionally equivalent may not "import the complete advantages of the structured determinations of NEPA," but that they do "strike a workable balance between some of the advantages and disadvantages of a full application of NEPA."<sup>90</sup> Many courts generally agree that "an organization like EPA whose regulatory activities are necessarily concerned with environmental consequences need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement."<sup>91</sup>

Functional equivalence does not require duplication of substantive NEPA requirements. Courts will usually grant an exemption based on functional equivalence even where EPA's review is not as rigorous or the opportunities for public participation are not as plentiful as an

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<sup>85</sup> See *Montrose*, *supra* note 11, at 875-78.

<sup>86</sup> *Id.* at 882.

<sup>87</sup> 590 F.2d at 1026-27. See also *Montrose*, *supra* note 11, at 882-83.

<sup>88</sup> 590 F.2d at 1028-30.

<sup>89</sup> See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

<sup>90</sup> *Id.* at 386.

<sup>91</sup> *Wyoming v. Hathaway*, 525 F.2d 66, 71-72 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976).



EIS would ordinarily require.<sup>92</sup> The courts have specifically avoided the question of whether EPA enjoys a blanket exemption from filing an EIS where its procedures are functionally equivalent.<sup>93</sup> They have also limited the functional equivalence doctrine to EPA, refusing to apply it to other federal agencies that administer statutes designed to protect the environment.<sup>94</sup>

Functional equivalence has been held to exempt EPA from preparing an EIS under a variety of environmental statutes.<sup>95</sup> Most recently, EPA's permitting procedure for hazardous waste landfills under the Resource Conservation and Recovery Act (RCRA)<sup>96</sup> was held to be an effective substitute for an EIS.<sup>97</sup> The court found that "RCRA's substantive and procedural standards are intended to ensure that EPA considers fully, with the assistance of meaningful public comment, environmental issues involved in the permitting of hazardous waste management facilities."<sup>98</sup>

### 3. *Emergency Situations*

NEPA recognizes that actions falling within its mandate are occasionally of such an exigent nature that preparation of an EIS would result in a delay that could cause significant environmental harm. An exemption in NEPA permits federal agencies to undertake "alternative arrangements" in emergency situations, provided that they consult with the CEQ and that such arrangements are limited "to

<sup>92</sup>. See *Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650 (D. D.C. 1978) (holding functional equivalence exemption applies even if EPA's action is not environmentally protective).

<sup>93</sup>. See *Wyoming v. Hathaway*, 525 F.2d 66, 72 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976).

<sup>94</sup>. See, e.g., *Jones v. Gordon*, 621 F. Supp. 7 (D. Alaska 1985), *aff'd in part and rev'd in part*, 792 F.2d 821 (9th Cir. 1986) (refusing to extend functional equivalence doctrine to the National Marine Fisheries Service's failure to prepare an EIS under the Marine Mammal Protection Act); *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978) (refusing to apply functional equivalence doctrine to Forest Service under the National Forest Management Act).

<sup>95</sup>. See, e.g., *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976) (Federal Insecticide, Fungicide and Rodenticide Act); *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981) (Toxic Substances Control Act); *Maryland v. Train*, 415 F. Supp. 116 (D. Md. 1976) (Ocean Dumping Act).

<sup>96</sup> 42 U.S.C. §§ 6901-6987 (1988).

<sup>97</sup> *Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990).

<sup>98</sup> *Id.* at 505. The court's holding validated the position taken by EPA in its regulations, which state that "all RCRA . . . permits are not subject to the environmental impact statement provisions" of NEPA. 40 C.F.R. § 124.9(b)(6) (1993). Acceptance of this position by the court is noteworthy because RCRA does not grant EPA an exemption. See 42 U.S.C. §§ 6901-6987 (1988). See also Kristina Hauenstein, Comment, *RCRA Immunity From NEPA: The EPA Has Exceeded the Scope of its Authority*, 24 San Diego L. Rev. 1249 (1987) (arguing that EPA overstepped its authority by categorically exempting its RCRA activities from NEPA).

actions necessary to control the immediate impacts of the emergency."<sup>99</sup> The term "emergency" is not defined in the NEPA regulations, resulting in ambiguity with respect to the extent of imminent harm necessary to activate the exemption.

Courts have generally accorded EPA greater leeway where exigent circumstances exist,<sup>100</sup> and may be more willing to find functional equivalence in an emergency,<sup>101</sup> particularly if immediate action is required or an immediate health hazard exists.<sup>102</sup> Thus, EPA will be held to a lesser functional equivalence standard where an emergency exists.<sup>103</sup> Any such hazard must be real and not advanced solely to avoid compliance with NEPA. Where EPA gave inadequate notice of its proposed action and did not adequately solicit public comment, but took seven months to consider the comments that were received, EPA could not realistically argue that an emergency justified its failure to give notice and solicit comments.<sup>104</sup> If a real emergency exists, EPA's technical expertise may be allowed to substitute for specific considerations required by NEPA.<sup>105</sup>

Although the courts have yet to decide whether NEPA applies to cleanup of NPL sites, two courts have held that functional equivalence satisfies EPA's obligations under NEPA arising from the removal of waste containing polychlorinated biphenyls (PCBs).<sup>106</sup> The waste was found along miles of North Carolina highways and had contaminated the soil with PCBs, creating an imminent hazard. The court found that an EIS prepared by North Carolina, under an environmental statute<sup>107</sup> almost identical to NEPA, satisfied the functional equivalence doctrine because (a) there had been extensive public comment, which the state had responded to;<sup>108</sup> (b) EPA held its own hearing;<sup>109</sup> and (c) EPA reviewed the North Carolina EIS and made changes to the plan to achieve better conformity with federal regulations.<sup>110</sup> Because the procedures undertaken arguably fulfilled

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<sup>99</sup> 40 C.F.R. § 1506.11 (1993).

<sup>100</sup> See *Montrose*, *supra* note 11, at 878-82.

<sup>101</sup> See, e.g., *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976).

<sup>102</sup> See *Maryland v. Train*, 415 F. Supp. 116 (D. Md. 1976).

<sup>103</sup> *Id.* See also *Wyoming v. Hathaway*, 525 F.2d 66; *Montrose*, *supra* note 11, at 878-82.

<sup>104</sup> *Environmental Defense Fund v. Blum*, 458 F. Supp. 650, 659-61 (D. D.C. 1978).

<sup>105</sup> *Maryland v. Train*, 415 F. Supp. at 122-23.

<sup>106</sup> *Twitty v. North Carolina*, 527 F. Supp. 778 (E.D.N.C. 1981), *aff'd*, 696 F.2d 992 (4th Cir. 1982); *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981).

<sup>107</sup> See N.C. Gen. Stat. §§ 113A-1 to 113A-4 (1978).

<sup>108</sup> 528 F. Supp. at 287, 291.

<sup>109</sup> *Id.* at 287.

<sup>110</sup> *Id.* at 293-96.

the substantive and procedural requirements of NEPA, this outcome is not necessarily dispositive of instances in which no EIS is prepared.

### III. CERCLA

#### A. Statutory Framework

Congress enacted CERCLA to protect the environment from the release or threatened release of hazardous substances. CERCLA established the National Contingency Plan (NCP), which provides a mechanism for the discovery, reporting, investigation and assessment of sites where hazardous wastes are located<sup>111</sup> and for response to releases of hazardous materials.<sup>112</sup> The sites posing the greatest risk, according to a hazard ranking system<sup>113</sup> or designation by the state in which they are located,<sup>114</sup> are identified and placed on the NPL.<sup>115</sup> The NPL is the list of "uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response."<sup>116</sup> EPA's response actions must be consistent with the NCP.<sup>117</sup> Cleanup may be undertaken by the parties who own or operate the contaminated site or were responsible for its contamination, or EPA may undertake the cleanup, finance it through Superfund and seek recovery of costs from responsible parties.<sup>118</sup>

CERCLA contemplates two levels of response. Removal actions are short-term measures intended to prevent continuing or threatened releases of hazardous materials into the environment and may include monitoring, evaluating and securing the site.<sup>119</sup> Examples of removal measures include fencing, warning signs, drainage controls, containment, treatment and removal of drums or other containers.<sup>120</sup> Remedial actions are long-term measures intended to mitigate future

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<sup>111</sup>. 42 U.S.C. § 9605 (1988 & Supp. 1990); 40 C.F.R. § 300 (1993).

<sup>112</sup>. 40 C.F.R. § 300.3(b) (1993).

<sup>113</sup>. See 42 U.S.C. § 9605(8)(A) (1988 & Supp. 1990); 40 C.F.R. § 300, app. A (1993).

<sup>114</sup>. 40 C.F.R. § 300.425(c)(2) (1993).

<sup>115</sup>. 42 U.S.C. § 9605(8)(B) (1988 & Supp. 1990). See also 40 C.F.R. § 300 (1993).

<sup>116</sup>. 40 C.F.R. § 300.5 (1993).

<sup>117</sup>. 42 U.S.C. § 9604 (1988).

<sup>118</sup>. 42 U.S.C. § 9607 (1988 & Supp. 1990).

<sup>119</sup>. 42 U.S.C. § 9601(23) (1988 & Supp. 1990). "Removal actions" are defined in CERCLA as "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances . . . or . . . such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." *Id.*

<sup>120</sup>. 40 C.F.R. § 300.415(d) (1993).

potential harm to the public health through storage, neutralization, cleanup, treatment and other activities.<sup>121</sup> Because a release or threatened release of hazardous materials may pose an imminent threat to the public health, an element of exigency exists in EPA's Superfund cleanup activities, particularly those at NPL sites.

### *B. Cleanup Procedures*

The NCP establishes a framework of substantive and procedural considerations and requirements which EPA must follow when undertaking cleanup activities. When EPA receives notification of a release of a hazardous substance into the environment, it must commence a removal or remedial site evaluation, as appropriate.<sup>122</sup> The procedures vary depending on the type of response, as discussed below.

#### *1. Removal Actions*

The first step in a removal action is a removal site evaluation, which begins with a preliminary assessment.<sup>123</sup> The preliminary assessment generally includes an identification of the source and the nature of the release, an evaluation of the magnitude of the threat to the public health and an evaluation of factors to use in determining whether to perform a removal site inspection.<sup>124</sup> A site inspection, if conducted, may terminate when EPA determines that there was no release; the source is not a facility covered within the meaning of CERCLA; the release is not hazardous or does not pose an imminent threat to public health or welfare or is of insufficient quantity to pose such a threat; the release is of a type that CERCLA does not cover; the party responsible for the release is undertaking appropriate response actions; or all desired information is obtained.<sup>125</sup> Based on the site evaluation, EPA may conclude that remediation is a more appropriate response, in which case it must conduct a remedial site evaluation.<sup>126</sup>

The next step in a removal action is to analyze the site evaluation and ascertain whether the parties responsible for the release will un-

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<sup>121</sup> 42 U.S.C. § 9601(24) (1988 & Supp. 1990). "Remedial actions" are defined in CERCLA as "those actions consistent with permanent remedy taken . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.*

<sup>122</sup> 40 C.F.R. § 300.405(f) (1993).

<sup>123</sup> 40 C.F.R. § 300.410(a) (1993).

<sup>124</sup> 40 C.F.R. § 300.410(c)(1)-(d) (1993).

<sup>125</sup> 40 C.F.R. § 300.410(e)(1-7) (1993).

<sup>126</sup> 40 C.F.R. § 300.410(h) (1993).

dertake appropriate cleanup activities.<sup>127</sup> EPA may take removal action, irrespective of whether the site is listed on the NPL, "to abate, prevent, minimize, stabilize, mitigate or eliminate the release or the threat of release."<sup>128</sup> In fashioning an appropriate response action EPA must consider a variety of factors, including potential exposure to humans and animals, actual or potential contamination of ecosystems or water supplies, likelihood that stored materials will be released, potential migration of hazardous substances and threat of fire or explosion.<sup>129</sup> If an exigency exists, EPA may take immediate removal actions.<sup>130</sup> But if the response permits a planning period of at least six months, EPA must conduct an engineering evaluation/cost analysis, which is an analysis of removal alternatives.<sup>131</sup> Removal actions should be designed to contribute to the efficacy of long-term remediation<sup>132</sup> and to the greatest possible extent, must seek to comply with applicable federal or state environmental laws.<sup>133</sup> In determining whether the removal action will so comply, EPA may consider the urgency of the situation and the scope of the action to be conducted.<sup>134</sup>

Procedurally, EPA adheres to a community relations program<sup>135</sup> relating to response actions.<sup>136</sup> Where the proposed action is removal, EPA must designate a site spokesperson to indicate that a release has occurred, provide information concerning the actions taken and respond to public inquiries.<sup>137</sup> If on-site removal activities will begin in less than six months, EPA must establish and advertise the availability of the administrative record within sixty days of commencement of the action<sup>138</sup> and must provide no less than a thirty-day comment period beginning on the day the administrative record is made available.<sup>139</sup> EPA must respond in writing to significant public comments.<sup>140</sup>

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<sup>127</sup> 40 C.F.R. § 300.415(a)(1-2) (1993).

<sup>128</sup> 40 C.F.R. § 300.415(b)(1) (1993).

<sup>129</sup> 40 C.F.R. § 300.415(b)(2) (1993).

<sup>130</sup> 40 C.F.R. § 300.415(b)(3) (1993).

<sup>131</sup> 40 C.F.R. § 300.415(b)(4)(i) (1993).

<sup>132</sup> 40 C.F.R. § 300.415(c) (1993).

<sup>133</sup> 40 C.F.R. § 300.415(i) (1993).

<sup>134</sup> 40 C.F.R. § 300.415(i)(1-2) (1993).

<sup>135</sup> EPA defines "community relations" as a program "to inform and encourage public participation in the Superfund process and to respond to community concerns." 40 C.F.R. § 300.5 (1993).

<sup>136</sup> See OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, COMMUNITY RELATIONS IN SUPERFUND: A HANDBOOK (1992).

<sup>137</sup> 40 C.F.R. § 300.415(m)(1) (1993).

<sup>138</sup> 40 C.F.R. §§ 300.415(m)(2)(i), 300.820(b)(1) (1993).

<sup>139</sup> 40 C.F.R. § 300.415(m)(2)(ii) (1993).

<sup>140</sup> 40 C.F.R. § 300.415(m)(2)(iii) (1993).

If on-site removal action will extend beyond 120 days, EPA must prepare a Community Relations Plan (CRP) within 120 days of the commencement of on-site activities, based on community interviews with affected and interested individuals.<sup>141</sup> The CRP must identify the nature of the community relations that EPA will provide for the duration of the response action.<sup>142</sup> EPA must establish an information repository at or near the site where the administrative record will be available for public viewing and must inform the public of the repository's existence.<sup>143</sup>

For removal actions that will not commence on-site activities for more than six months, EPA must complete its community interviews prior to conducting the engineering evaluation/cost analysis.<sup>144</sup> Next, EPA must publish notice announcing completion of the engineering evaluation/cost analysis, establish an information repository at or near the site and provide a comment period of at least thirty days.<sup>145</sup> EPA must respond in writing to significant public comments.<sup>146</sup>

## 2. Remedial Actions

The first step in a remedial action is to conduct a preliminary remedial assessment which is intended to identify and eliminate from consideration sites which pose no threat to the environment, determine whether a removal action is required and gather data to facilitate classification under the hazard ranking system.<sup>147</sup> EPA then conducts a remedial site inspection which serves as the basis for a report describing the type, nature and migration pattern of the contamination and recommends future action if appropriate.<sup>148</sup> Sites which attain high scores according to the hazard ranking system, or which meet certain other statutory criteria, are included on the NPL.<sup>149</sup>

Formulation of the ultimate remedial action begins with the remedial investigation/feasibility study (RI/FS). The RI/FS involves scoping, which identifies the type, quality and quantity of the data collection and methods of analysis and sampling that will be undertaken;<sup>150</sup> outlines data collection and treatability studies to adequately

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141. 40 C.F.R. § 300.415(m)(3)(i-ii) (1993).

142. 40 C.F.R. § 300.415(m)(3)(ii) (1993).

143. 40 C.F.R. § 300.415(m)(3)(iii) (1993).

144. 40 C.F.R. § 300.415(m)(4)(i) (1993).

145. 40 C.F.R. § 300.415(m)(4)(i-iii) (1993).

146. 40 C.F.R. § 300.415(m)(4)(iv) (1993).

147. 40 C.F.R. § 300.420(b)(1)(i-iv) (1993).

148. 40 C.F.R. § 300.420(c)(1) (1993).

149. 40 C.F.R. § 300.425(c)(1),(d) (1993).

150. 40 C.F.R. § 300.430(b)(5), (8) (1993).

identify the nature, character and extent of contamination and the risks to human health arising therefrom;<sup>151</sup> and includes analysis of remedial alternatives to ensure that an appropriate remedy is selected.<sup>152</sup> In considering alternatives, EPA must evaluate their effectiveness, feasibility of implementation and cost.<sup>153</sup> A detailed analysis must be conducted to determine the extent to which the most feasible alternatives are consistent with the following nine criteria: protection of human health and environment; compliance with state and federal environmental laws and standards; long-term effectiveness and permanence; reduction of toxicity, mobility or volume through treatment; short-term effectiveness; implementability; cost; state acceptance; and community acceptance.<sup>154</sup>

Procedurally, the community relations requirements for remedial actions are more detailed and involved than those for removal actions. Prior to beginning the RI/FS, EPA must conduct community interviews which become the basis for the CRP.<sup>155</sup> It must also establish an information repository at or near the site.<sup>156</sup> Following commencement of the RI/FS, EPA must establish an administrative record.<sup>157</sup>

Upon completion of the RI/FS, EPA selects a remedial action in accordance with a two-step process consisting of: (a) identification by EPA of a preferred alternative and publication of a notice announcing its completion and availability for public review and comment;<sup>158</sup> and (b) evaluation of comments received to determine whether the preferred alternative remains effective and appropriate.<sup>159</sup> Much like a draft EIS, the proposed plan must describe the environmental conditions at the site, identify the proposed remedial action and the reasons supporting it, indicate the alternatives analyzed in the RI/FS and respond to any formal comments received.<sup>160</sup> EPA must provide a thirty-day comment period,<sup>161</sup> during which the opportunity for a public hearing must be provided.<sup>162</sup> A transcript of the hearing becomes a part of the administrative record.<sup>163</sup> If new information

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151. 40 C.F.R. § 300.430(d)(1), (2) (1993).

152. 40 C.F.R. § 300.430(e) (1993).

153. 40 C.F.R. § 300.430(e)(7)(i-iii) (1993).

154. 40 C.F.R. § 300.430(e)(9)(iii)(A-I) (1993).

155. 40 C.F.R. § 300.430(c)(2)(i), (ii)(A-C) (1993).

156. 40 C.F.R. § 300.430(c)(2)(iii) (1993).

157. 40 C.F.R. § 300.815(a) (1993).

158. 42 U.S.C. § 9617(a), (d) (1988); 40 C.F.R. § 300.430(f)(3)(i)(A) (1993).

159. 40 C.F.R. § 300.430(f)(1)(ii) (1993).

160. 40 C.F.R. § 300.430(f)(2)(i-iii) (1993).

161. 40 C.F.R. § 300.430(f)(3)(i)(C) (1993).

162. 40 C.F.R. § 300.430(f)(3)(i)(D) (1993).

163. 40 C.F.R. § 300.430(f)(3)(i)(E) (1993).

significantly changes the features of the proposed remedy prior to its adoption, EPA must discuss the changes in its record of decision (ROD), or must solicit additional public comments if the changes were not of a foreseeable nature.<sup>164</sup> EPA must also provide public notice upon adoption of a final plan.

The final step in the remedy selection process requires EPA to evaluate its preferred alternative in light of the public comments received.<sup>165</sup> It may adopt the preferred alternative with or without modifications, or may select another alternative.<sup>166</sup> The decision becomes a part of the ROD which sets forth EPA's basis for its decision and the extent to which the decision is consistent with applicable requirements and regulations.<sup>167</sup> Finally, EPA must publish a notice of decision and make the ROD available for public inspection.<sup>168</sup>

#### IV. APPLICATION OF NEPA TO NATIONAL PRIORITIES LIST SITES

##### A. *General Considerations*

###### 1. *Legislative Intent*

Consistent with the "emergency circumstances" exemption, EPA takes the position that it need not prepare an EIS for cleanup actions it undertakes under CERCLA.<sup>169</sup> The legislative history of CERCLA indicates that preparation of an EIS was intended in non-emergency situations, as described in this Senate Report:

In some instances, remedial actions are but a continuation of actions necessary to resolve the emergency and such actions can only prevent injury only if they proceed without delay. For example, the construction of dikes around a hazardous waste disposal facility in anticipation of rising waters from melting spring snows, the provision of permanent alternative drinking water supplies to replace water supplies contaminated by released hazardous substances, and the transport, storage, treatment, destruction, or secure disposition offsite of hazardous substances which are explosive, radioactive, or otherwise dangerous if left on-site, are remedial actions which can only prevent harm only if executed without delay. In developing

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<sup>164</sup> 40 C.F.R. § 300.430(f)(3)(ii)(B) (1993).

<sup>165</sup> 40 C.F.R. § 300.430(f)(4)(i) (1993).

<sup>166</sup> *Id.*

<sup>167</sup> 40 C.F.R. § 300.430(f)(5)(i-ii) (1993).

<sup>168</sup> 40 C.F.R. § 300.430(f)(6)(i-ii) (1993).

<sup>169</sup> MANDELKER, *supra* note 26, at 62 n.10 (1991 Supp.). See *Memorandum From EPA General Counsel on Applicability of Section 102(2)(C) of NEPA to Superfund Response Actions*, 13 ENV'T REP. (BNA) 709 (Sept. 17, 1982).



this bill, a number of similar such situations have been reviewed by the Committee. In such circumstances, *remedial actions should not be delayed by the imposition of formal EIS requirements.*

In other circumstances, removal actions can effectively postpone any emergency and provide for a longer lead time and a planning process before remedial actions must be undertaken. In such circumstances, *it is anticipated that a written assessment of proposed alternatives would be prepared along with measures for mitigating adverse environmental effects of the proposed remedial actions and opportunity for public comment and consultation in the decision-making process would be provided.* This requirement is not intended to unduly delay action necessary to protect public health, welfare or the environment, nor are formal hearings necessarily required. In some such circumstances, formal Environmental Impact Statement requirements may be determined to be applicable.<sup>170</sup>

Although the Senate Report to some extent blurs the distinction between removal and remedial actions as they are defined in the act, it does envision a scheme in which an EIS is ordinarily required. The Senate Report indicates that a departure from this standard was contemplated only where an imminent hazard created an emergency, in which case formal EIS requirements were not to be imposed. Yet even for emergency situations, the legislative history does not approve of a wholesale suspension of the environmental attentiveness and public participation which NEPA contemplates. Emergency circumstances merely dispense with formal preparation of an EIS.

With respect to non-emergency actions, the Senate Report at a minimum contemplates a written assessment of alternatives and mitigation measures and an opportunity for public comment. This standard sounds much like functional equivalence, particularly since the Senate Report expresses an intention to avoid unnecessary delay. The report further indicates that an EIS may be required in some circumstances, but it does not identify what these circumstances might be. An earlier section of the Senate Report describes remedial action as "long-lasting response which may include the construction of major facilities and which must often be preceded by considerable study, investigation, planning and engineering before the appropriate actions can be determined."<sup>171</sup>

Though the precise standard which Congress intended is not altogether clear, the Senate Report does indicate the following: (a) for emergency actions, a formal EIS is not required, but the policies un-

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<sup>170</sup> S. REP. NO. 848, 96th Cong., 2d Sess. 61 (1980)(emphasis added).

<sup>171</sup> *Id.* at 54.

derpinning NEPA necessitate some lesser standard of review; (b) for non-emergency actions, a functional equivalence standard may suffice, provided there is some mechanism for receiving public comment, identifying alternatives and presenting mitigation measures; and (c) some actions will require a formal EIS. This interpretation is supported by an opinion from the General Accounting Office, which concluded that "there is nothing in NEPA's legislative history which would require countermanning the conclusion derived from the plain words of the Act that all federal agencies, including EPA, are required, in appropriate circumstances, to file environmental impact statements."<sup>172</sup>

## 2. Policy Considerations

Some observers have suggested that EPA prepare EISs precisely because EPA is an environmental agency and should set an example for other agencies by its own procedural and substantive compliance with NEPA.<sup>173</sup> Other observers have expressed concern that an exemption from NEPA could become a "shield for wholesale backtracking on the part of EPA and the Administration."<sup>174</sup> This sentiment was echoed by Senator Jackson, a sponsor of NEPA, who warned that "it cannot be assumed that EPA will always be the good guy,"<sup>175</sup> implying that NEPA might serve a policing function over EPA should it ever come under the control of those it is currently charged with regulating.<sup>176</sup>

Policy considerations would also seem to implicate preparation of an EIS to ensure that the broad range of activities undertaken as part of a cleanup action are adequately evaluated. Cleanup of NPL sites may involve a variety of activities, including both on-site remediation and off-site removal of contaminated materials. Any cleanup action, or non-action, may result in significant injury to the surrounding area (e.g. through groundwater contamination) or to the site receiving removed hazardous materials. There is also a potential for environmental harm while hazardous materials are in transit to uncontaminated areas for disposal. Moreover, the cleanup method which is selected often determines whether the potential exists for

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<sup>172</sup>. 119 CONG. REC. H8305-08 (1973)(opinion of Comptroller General) *quoted in EPA's Responsibilities Under the National Environmental Policy Act: Further Developments*, 3 ENVTL. L. REP. 10,157 (1973).

<sup>173</sup>. Comment, *supra* note 8, at 10,142.

<sup>174</sup>. *Id.*

<sup>175</sup>. 118 CONG. REC. 16,878, 16,887 (daily ed. Oct. 4, 1972).

<sup>176</sup>. *Id.*

additional environmental harm.<sup>177</sup> Thus, cleanup of an NPL site would seem to be the type of action "significantly affecting the quality of the human environment"<sup>178</sup> that requires an EIS according to NEPA.<sup>179</sup>

### 3. *Significance of Congressional Appropriations*

In situations where Congress has appropriated funds to finance an ongoing project, agencies have argued that the appropriation relieves the agency from its obligation to comply with NEPA. The rationale underlying this argument is that in granting the appropriation, Congress has considered environmental concerns but decided to approve and finance the project anyway.<sup>180</sup> Appropriations that support a broad program like CERCLA, without funding any particular project, do not impliedly repeal regulatory statutes with respect to those programs or projects.<sup>181</sup> The lower courts have extended this doctrine to hold that appropriations do not exempt federal agencies from compliance with NEPA.<sup>182</sup> Since congressional appropriations under CERCLA support the program itself, rather than particular projects conducted under its mandate, such appropriations do not relieve EPA from NEPA compliance. Nevertheless, where Congress has expressed an intention to allow a particular action if the implementing agency conforms to guidelines articulated in the statute, courts may find an implied repeal of NEPA.<sup>183</sup> It does not appear that this approach has been used with respect to CERCLA, but it might be effective since the CERCLA cleanup provisions are arguably detailed enough to constitute an implied repeal of NEPA. However, the Clean Water Act is equally detailed yet this argument does not appear to have been raised, perhaps because many actions under the Clean Water Act enjoy statutory exemptions from NEPA.

### B. *Response Actions*

The analysis used to determine whether EPA's procedures are functionally equivalent to NEPA was cogently set out by a court which found that RCRA procedures are functionally equivalent to a

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<sup>177</sup> Montrose, *supra* note 11, at 866-67.

<sup>178</sup> 42 U.S.C. § 4332(2)(C) (1988).

<sup>179</sup> Montrose, *supra* note 11, at 867-68.

<sup>180</sup> See MANDELKER, *supra* note 26, at 5-12.

<sup>181</sup> Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) (holding congressional appropriation did not impliedly repeal Endangered Species Act as applied to Tellico Dam).

<sup>182</sup> See MANDELKER, *supra* note 26, at 5-14 n.4.

<sup>183</sup> Texas Committee on Natural Resources v. Bergland, 573 F.2d 201 (5th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978).

NEPA EIS.<sup>184</sup> The court examined "whether EPA's action . . . is circumscribed by procedural . . . safeguards in a manner which ensures that the basic purposes and policies behind the environmental impact statement will be carried out in the absence of a formal EIS."<sup>185</sup> The court was satisfied that "[a]s long as the statutory and regulatory framework . . . provides for orderly consideration of diverse environmental factors and . . . strikes a workable balance between some of the advantages and disadvantages of full application of NEPA, the functional equivalent doctrine applies."<sup>186</sup> This analysis is used below to address the present inquiry.

### 1. Removal Actions

A removal action could arguably be considered an emergency action giving rise to an exemption from preparation of an EIS<sup>187</sup> or to a more lenient functional equivalence standard.<sup>188</sup> This is particularly true where the action must be undertaken promptly in response to an imminent hazard. In these circumstances, exemption from the EIS requirement is surely justified, both according to legislative history and CEQ regulations relating to emergencies. But even if a removal action is classified as an emergency, EPA still has an obligation to consult with CEQ and to undertake alternative arrangements "to control the immediate impacts of the emergency."<sup>189</sup> It is extremely unlikely, in light of NEPA's purposes and intent, that the alternative arrangements contemplated for use in emergency circumstances were intended to entirely suspend EPA's obligation to solicit and consider public participation and comment. It is reasonable to view the alternative arrangements provision as contemplating a less formal, more expedited review consistent with NEPA's objectives, except perhaps for those rare instances where the emergency circumstances are particularly grave.

Substantively, EPA's removal site evaluation procedures seem adequate in light of its technical experience and the exigent nature of a release which poses an imminent threat. Since EPA is familiar with the types and likely success of various removal actions, it seems

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<sup>184</sup> . *Alabamians for a Clean Environment v. Thomas*, 18 ENVTL. L. REP. 20,460 (N.D. Ala. 1987).

<sup>185</sup> . *Id.* at 20,462.

<sup>186</sup> . *Id.* (citing *Amoco Oil Co. v. EPA*, 501 F.2d 722, 750 (D.C. Cir. 1974) and *Portland Cement*, 486 F.2d at 386).

<sup>187</sup> . See 40 C.F.R. § 1506.11 (1993).

<sup>188</sup> . See *Maryland v. Train*, 415 F. Supp. 116, 121 (D. Md. 1976); *Wyoming v. Hathaway*, 525 F.2d 66, 73 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); *supra* part II.D.3.

<sup>189</sup> . 40 C.F.R. § 1506.11 (1993).

qualified to commence on-site removal based on fewer formal evaluation procedures. Procedurally, due to limited lead time, there is little EPA can do other than provide a spokesperson to function as liaison between EPA and the community, answer questions and provide information where appropriate. Thus, where a removal action will occur with less than six months planning time, EPA's procedures are sufficient to satisfy NEPA, when balanced in light of the exigent circumstances.

To the extent that the removal action is one which contemplates a planning period of six months or longer, it would be difficult to realistically argue that the emergency justifies a broad exemption from NEPA's mandates. EPA has apparently recognized this, as evidenced by its requirement that a CRP be established where on-site activities are to last longer than 120 days or lead time for planning exceeds six months.<sup>190</sup> EPA's technical expertise seems to justify its selection of a remedy and its engineering evaluation/cost analysis adequately compares alternatives, but its procedural standards seem deficient. Although community interviews occur prior to the engineering evaluation/cost analysis, where on-site activities will not begin for at least six months, it does not appear that an adequate mechanism exists to inform interested individuals that EPA is conducting interviews.<sup>191</sup> Though the EPA spokesperson must inform "immediately affected citizens,"<sup>192</sup> other interested individuals or organizations have no direct opportunity to receive notice. Moreover, the thirty-day comment period which is provided following completion of the engineering evaluation/cost analysis is insufficient, standing alone, to assure adequate opportunities for public participation. A public hearing, which is required both by NEPA and by EPA for remedial actions, is an essential element of the public participation process. Thus, for removal actions commencing more than six months hence, EPA's procedures are not functionally equivalent to a NEPA EIS because no opportunity for a public hearing is provided.

## 2. Remedial Actions

EPA's procedures for remedial actions closely parallel the requirements of NEPA. Substantively, a detailed analysis of alternatives according to nine criteria, which focus on long and short-term effects on the environment and on human health, assure that a remedy will be selected only after appropriate consideration of alternatives.

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<sup>190</sup>. 40 C.F.R. § 300.415(m)(3) (1993).

<sup>191</sup>. Montrose, *supra* note 11, at 876-77.

<sup>192</sup>. 40 C.F.R. § 300.415(m)(1) (1993).

Furthermore, the detailed nature of the RI/FS process and the sampling and analysis methods utilized are at least as substantively sensitive to the environment as NEPA requires.

Procedurally, EPA's public participation program is also sensitive to the demands of NEPA. It provides opportunities for public participation and public inspection of documents throughout the remedy selection process. An opportunity for a public hearing is provided and EPA must consider public comments before reaching a final decision. Moreover, it must provide supplemental opportunities for comment if the preferred alternative is modified in unforeseeable ways following the original comment period.

The one area in which the EPA public participation program is deficient, as discussed in the preceding section, is its failure to publish notice that community interviews are being conducted. While notice is ultimately provided prior to the comment period and public hearing which follow completion of the RI/FS, by this phase it is too late to have any meaningful impact on the development of the preferred alternative. By contrast, NEPA requires public notice when the EIS scoping process commences. This allows interested individuals and organizations to contribute their input into defining the bounds of the investigation that will be conducted at a time when such input may have an important influence on the analysis undertaken. Because EPA's community relations program does not notify the public that the remedy selection process has begun and does not provide for public participation in the scoping process, it is not functionally equivalent to NEPA.

### *3. Challenging Functional Equivalence: Standing & Jurisdiction*

Individuals who believe that EPA's procedures are inadequate lack any meaningful opportunity to obtain judicial review. Challenges to NEPA compliance are normally reviewable based on federal question jurisdiction.<sup>193</sup> Although Superfund expressly grants jurisdiction to the district courts over controversies arising thereunder,<sup>194</sup> it specifically deprives the federal courts of jurisdiction to review challenges relating to the selection of removal or remedial actions.<sup>195</sup> Exceptions permit suits for reimbursement, recovery of response costs and challenges alleging that "the removal or remedial actions *taken*" are in violation of Superfund provisions.<sup>196</sup> This

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<sup>193</sup> 28 U.S.C. § 1331 (1988).

<sup>194</sup> 42 U.S.C. § 9613(b) (1988).

<sup>195</sup> 42 U.S.C. § 9613(h) (1988).

<sup>196</sup> 42 U.S.C. § 9613(h)(1-4) (1988) (emphasis added).

provision precludes challenges to EPA's failure to comply with NEPA prior to completion of the response action.

Recent decisions in three circuits point to the conclusion that federal courts do not have jurisdiction to entertain such challenges. In the most recent of these decisions, a court was without jurisdiction to hear a challenge arising from EPA's failure to comply with the National Historic Preservation Act (NHPA)<sup>197</sup> in conjunction with the cleanup of a Superfund site.<sup>198</sup> An owner of property, part of which contained an Indian burial ground, released toxic waste onto the property and sued EPA to delay response activities based on EPA's alleged failure to comply with NHPA. The court expressed concern that "delayed review may mean no effective review at all," potentially diminishing the site's historical value.<sup>199</sup> Perhaps the court would have been more sympathetic had the historic resources not already been contaminated by the litigant then seeking relief.

This outcome was consistent with two prior decisions. In the earlier of the two, private citizens of Alabama challenged EPA's plan to import hazardous waste from a site in Texas for disposal in Alabama.<sup>200</sup> EPA failed to issue public notice of the remedial action and did not provide the public (at the receiving site in Alabama) with an opportunity to participate in development of the ROD, despite a specific statutory directive to do so.<sup>201</sup> Relying on substantial authority, the court held that jurisdiction was lacking until the response action was completed.<sup>202</sup>

The other case was a direct challenge to EPA's failure to prepare an EIS in conjunction with the cleanup of two landfills that were contaminated with PCBs.<sup>203</sup> Following "intensive public scrutiny" EPA entered into a consent decree which involved surface excavation, capping of the sites and burning of the hazardous wastes in an incinerator.<sup>204</sup> The court held that it lacked jurisdiction to consider the plaintiffs' allegations that EPA acted illegally by failing to prepare an EIS or an RI/FS.

The denial of jurisdiction until response actions are completed was "designed to preclude piecemeal review and excessive delay of

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<sup>197</sup>. 16 U.S.C. § 470 to 470w-6 (1988 & Supp. 1990).

<sup>198</sup>. *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991).

<sup>199</sup>. *Id.* at 1021.

<sup>200</sup>. *Alabama v. EPA*, 871 F.2d 1548, 1551 (11th Cir. 1989), *cert. denied*, 493 U.S. 991 (1989).

<sup>201</sup>. 42 U.S.C. § 9613(k)(2)(B) (1988).

<sup>202</sup>. *Alabama v. EPA*, 871 F.2d at 1558.

<sup>203</sup>. *Schalk v. Reilly*, 900 F.2d 1091, 1093 (7th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990). It is assumed that the sites were listed on the NPL since cleanup proceeded according to the NCP, although the opinion does not so indicate.

<sup>204</sup>. *Id.*

cleanup."<sup>205</sup> CERCLA's legislative history indicates that the section denying jurisdiction was intended to mandate that "there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action [sic] have been completed."<sup>206</sup> While minimizing delay in selecting an appropriate response action is a legitimate goal, doing so without providing exceptions for challenges brought under NEPA, NHPA and other similar statutes may negate EPA's overriding obligation to protect the environment. If this possibility is to be averted, the remedy must come from Congress.

## V. CONCLUSION

EPA's community relations program has become much more consistent with NEPA, due in part to the requirements of the Superfund Amendments and Reauthorization Act of 1986 (SARA),<sup>207</sup> since it was first proposed a decade ago.<sup>208</sup> As a result, the most serious criticisms originally leveled against EPA's community relations policy are no longer problematic.<sup>209</sup> Although much progress has been made, the current public participation policies succumb to some of the same criticisms that were directed at EPA's original proposals.<sup>210</sup> The deficiencies which remain are minor and can be cured by (a) publishing notice that EPA has commenced the response selection and/or community interview process, for both removal and remedial actions and (b) providing an opportunity for a public hearing where removal actions will commence in more than six months. If these amendments are made, EPA's community relations procedures will be functionally equivalent to a NEPA EIS, thereby relieving EPA of the obligation to prepare an EIS. Since courts lack jurisdiction to address these deficiencies, the remedy must come from Congress through new legislation, or from EPA itself through amendments to its regulations.

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<sup>205</sup>. *Chemical Waste Management, Inc. v. EPA*, 673 F. Supp. 1043, 1055 (D. Kan. 1987).

<sup>206</sup>. H.R. REP. No. 253 (I), 99th Cong., 2d Sess. 81 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2863.

<sup>207</sup>. Pub. L. No. 99-499, 1986 U.S.C.C.A.N. (100 Stat.) 1613 (relevant portion codified at 42 U.S.C. §§ 9613, 9617) (1988).

<sup>208</sup>. *Montrose*, *supra* note 11, at 869.

<sup>209</sup>. *Id.* at 891-92.

<sup>210</sup>. *Id.*