San Diego Gas & Electric Co. v. City of San Diego: Blueprint for a New Terminable Inverse Condemnation?

I. INTRODUCTION

In many areas of the United States, rapid population growth and related pressures for residential, commercial and industrial development have put undeveloped land at a premium. That a commodity should become precious as demand strains supply is hardly new. What is new, or relatively new, is the perception that undeveloped or "open space" acreage within settled communities has intrinsic value apart from what it will fetch in a rising market. But it is just that—the identification of the scenic, recreational and perhaps even financial value to a community of its open space—which has stimulated interest in the systematic preservation of open space. Government entities have tested various methods, including zoning, to achieve this end.[1] Especially where eminent domain is avoided (as with zoning), government regulation in this sphere frequently provokes challenges based on constitutional protections of property rights. As the forces thinning woodlands, grading meadows, and filling estuaries advance,[2] the controversies over open space are likely to proliferate. With this prospect in sight, a rational approach to the constitutionality of open space zoning deserves a high priority.[3]

The litigants in *San Diego Gas & Electric Co. v. City of San Diego*[4] presented the United States Supreme Court with important issues in this realm of constitutional law. The case involved the

1. The relative merits of zoning, taxation, condemnation, land trusts and conservation easements as devices for preserving open space are discussed in Fenner, *Land Trusts: An Alternative Method of Preserving Open Space*, 33 VAND. L. REV. 1039 (1980).

2. *See* Haskell, *Land Use and the Environment: Public Policy Issues*, [Monographs] ENVIR. REP. (BNA) No. 20, at 4, 8-9 (Nov. 8, 1974).

3. *See* COUNCIL OF STATE GOVERNMENTS, RECREATION AND OPEN SPACE, STATE RESPONSIBILITY IN URBAN REGIONAL DEVELOPMENT 145-146 (1962) *quoted in* Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILL. L. REV. 559, 562 (1964).

4. 450 U.S. 621 (1981).

question of whether a zoning regulation in conjunction with an open space plan was constitutional, and raised the generic question of what remedies are compelled where an ordinance abridges property rights guaranteed by the fifth and fourteenth amendments.

The claimants in *San Diego* sought reversal of a California Court of Appeal's categorical denial of inverse condemnation as a remedy for excessive zoning regulation.[5] In inverse condemnation, a cause of action sounding in constitutional law, a landowner sues for damages equal to the award he would have received had the land been taken by an outright exercise of the power of eminent domain.[6] This theory has been well received in general,[7] but the Supreme Court has never extended it to zoning which effects a taking.[8] In *San Diego*, a majority of the Court failed to reach the merits of the appeal, holding that there was no final judgment from which appeal could lie;[9] however, four justices dissented, finding a final judgment and putting forward a substantive opinion on the merits.[10] A fifth justice, concurring in the majority's result, signaled agreement with "much of" the dissent as to the merits.[11]

The dissent contained intriguing suggestions for administering the inverse condemnation remedy in the context of a regulatory taking. Implicit in this approach is the notion that inverse condemnation challenges would not preclude due process challenges to zoning (or vice versa). The dissent's point of view, looked at in conjunction with recent Supreme Court land use cases, shows an emerging consensus as to the possibility of inverse condemnation as a remedy for a regulatory taking.[12]

5. *Id.* at 630.

6. United States v. Clarke, 445 U.S. 253, 257 (1980); *see* Thompson v. Tulatin Hills Park & Recreation Dist., 496 F. Supp. 530, 538-40 (D. Or. 1980).

7. *See, e.g.*, United States v. Dickinson, 331 U.S. 745 (1947); Batten v. United States, 306 F.2d 580 (10th Cir. 1962).

8. Much of the support for the just compensation remedy for takings effected by zoning is dicta, because it comes not from cases where inverse condemnation was sought, but where a regulation was challenged or invoked. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Other cases acknowledge excessive zoning could effect a taking, without finding a taking on the facts presented. Penn Cent. Trans. Co. v. New York City, 438 U.S. 104 (1978). *See also* Kaiser Aetna v. United States, 444 U.S. 165 (1979).

9. *San Diego*, 450 U.S. at 633.

10. *Id.* at 636-61 (Brennan, J., dissenting).

11. *Id.* at 633-36 (Rehnquist, J., dissenting).

12. Justice Stewart was among the dissenters, so it is unclear whether a majority still supports this view.

This comment analyzes *San Diego's* contribution to the evolving law of land use regulation. Part II outlines the legal setting for *San Diego*. It discusses the major Supreme Court cases in which claimants have alleged an uncompensated taking in the context of land use regulation. This part identifies the criteria the Court has evolved for determining when a taking has occurred, and for evaluating the distinct but frequently concomitant issue of whether a land use regulation fails a due process test. Part III deals with the litigation in *San Diego*, in the state courts and in the Supreme Court. In particular, this part examines the question of whether there was a final judgment issued from the California courts, and focuses on Justice Brennan's proposed remedy. The comment concludes that there was a final judgment below, and that Justice Brennan's proposed compensation rule is justified.

II. Legal Setting

Zoning as a tool of land use regulation has long been subject to two distinct limitations found in the fifth[13] and fourteenth amendments[14] to the United States Constitution. First, since *Pennsylvania Coal Co. v. Mahon*[15] it has been recognized that "if regulation goes too far it will effect a taking. . . ."[16] Second, zoning found to be unduly unreasonable or arbitrary has been struck down as in violation of due process.[17] As the wording of these two formulations would suggest, the takings and due process analyses are not mutually exclusive. They may both be present in the same case, although courts do not always take heed of this.[18] Whether a zoning case is dealt with in takings or due process terms is critical, however, since the attendant remedy is usually deemed to be dependent on characterization of the constitutional violation.[19]

In order to consider the remedial rule formulated by Justice Brennan in his dissent in *San Diego*, it is necessary to examine

13. [N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

14. [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . :" U.S. Const. amend. XVI, § 1.

15. 260 U.S. 393 (1922).

16. *Id.* at 415.

17. *See* Nectow v. City of Cambridge, 277 U.S. 183 (1928).

18. *See* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 594, 596, 350 N.E.2d 381, 385, 387, 385 N.Y.S.2d 5, 8-9, 10-11, *cert. denied*, 429 U.S. 990 (1976).

19. *See infra* text accompanying note 94.

further the criteria the Supreme Court had already developed for analysis of challenges to zoning and, in particular, the extent to which these criteria do or do not provide a basis for the Brennan opinion.

A. *Takings*

In its classic application, the takings clause required that exercise of the government's eminent domain power be accompanied by compensation to the affected property owner.[20] But in cases dealing with stringent land use controls,[21] the Supreme Court has equated overly burdensome regulation with the complete preemption of ownership interests wrought by condemnation.

The opinion written by Justice Holmes for the Court in *Pennsylvania Coal* provides the original argument that a regulation which "goes too far" can become a taking. The plaintiffs, who owned the surface rights to land with a house on it, sought to enjoin the defendant coal company, owner of the subsurface mineral rights, from mining in such a way as to cause subsidence in violation of a state statute.[22] Justice Holmes weighed the public interest in preventing homesites from collapsing into subjacent pits, against the means used to achieve the interest (a mining ban) and the effect on the owner of the mineral rights.[23] The Court, holding the statute to be unconstitutional, invalidated it.[24]

The result in *Pennsylvania Coal* is explainable without resort to the regulatory takings formulation. The implication that the statute lacked a rational relationship to fulfillment of the state interest in safety[25] is a commonplace due process standard. The Court's decision to invalidate the statute likewise sounds in due process. Thus, the Court treated the Holmes taking formulation as dictum.

Subsequent decisions, however, have made it a vital force of constitutional law. Yet a pattern of judicial inattention to the differences in the two separate guarantees has marred the takings due process jurisprudence.[26]

20. *See, e.g.*, Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).
21. *See supra* note 8.
22. *Pennsylvania Coal*, 260 U.S. at 412.
23. *Id.* at 413-14.
24. *Id.* at 414.
25. *Id.*
26. Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 594, 596, 350 N.E.2d 381, 385, 387, 385 N.Y.S.2d 5, 8-9, 10-11, *cert. denied*, 429 U.S. 990 (1976).

Justice Brandeis, in his dissent in *Pennsylvania Coal*,[27] stated his disagreement with the Holmes position. He believed as long as a regulation was intended "to protect the public health, safety or morals from dangers threatened. . . ,"[28] it could not be a taking. With Justice Holmes' ringing dictum and Justice Brandeis' strong dissenting view, the opposing positions for analysis of constitutional limits on the zoning power were in place.

In *Goldblatt v. Town of Hempstead*,[29] the owner-operator of a sand and gravel pit claimed that a regulation which forbade mining below the water line was an uncompensated taking rather than a valid regulation. The town cast the regulation in "safety" terms,[30] bringing it within the deferential approach prescribed by *Village of Euclid v. Ambler Realty Co.*[31] As in *Pennsylvania Coal*, the Court's analysis straddled the fence, scrutinizing the measure under both takings and due process standards. First, finding that claimants had produced no evidence of a loss in value, the Court rejected plaintiff's takings claim.[32] Next, the Court assessed the reasonableness of the regulation as an exercise of the police power. It looked at three factors: first, the "menace against which . . . [the statute] will protect";[33] second, the "availability and effectiveness of other less drastic protective steps";[34] and third, the "loss which appellants will suffer".[35] As with the taking claim, the Court found that appellants had failed to produce evidence sufficient to overcome the traditional presumption of constitutionality.[36] It is noteworthy that one element of this due process inquiry—the economic impact on the owner—was virtually identical to the reasonable beneficial use test employed in the takings context. *Goldblatt*, then, prefigures the emergence of the reasonable beneficial use test as the prevailing standard for measuring the constitutionality of zoning.

In *Penn Central Transportation Co. v. New York City*,[37] the owners of Grand Central Terminal challenged the constitutionality

27. *Pennsylvania Coal*, 260 U.S. at 416.
28. *Id.* at 417.
29. 369 U.S. 590 (1962).
30. *Id.* at 595.
31. 272 U.S. 365 (1926). *See infra* text accompanying note 63.
32. *Goldblatt*, 369 U.S. at 594.
33. *Id.* at 595.
34. *Id.*
35. *Id.*
36. *Id.* at 597.
37. 438 U.S. 104 (1978).

of the Terminal's designation as a landmark under the city's landmark preservation law.[38] This status imposed affirmative duties on the owners,[39] but provided them with transferable development rights usable on contiguous parcels.[40] The Court held the landmark designation did not effect a taking because of the large amount of beneficial use left to the owners and their opportunity to transfer development rights to other parcels.[41] The Court relied heavily on a finding that the owners were left with reasonable economic benefit.[42]

In *Agins v. City of Tiburon*,[43] a sharply defined question of remedies accompanied a takings claim. Property owners demanded just compensation for a zoning classification which permitted either low density development or "open-space" use. The United States Supreme Court sidestepped the remedies issue, holding on a two-pronged test that no unconstitutional taking existed on the face of the statute.

In *Agins*, claimants had acquired five acres of highly desirable ridgeline land in Tiburon, California, with the intention of building homes there.[44] After claimants' purchase, the city adopted zoning ordinances reducing allowable building density to 0.2 to 1 unit per acre.[45] The owners' challenge to the zoning was rejected by the lower courts[46] and in turn by the California Supreme Court, which ruled for the defendant city on two alternative grounds.[47] First, it held that inverse condemnation is not an appropriate remedy for a zoning ordinance which substantially limits the use of property; rather the claimant might obtain invalidation of the ordinance through declaratory relief or mandamus.[48] Second, the

38. N.Y.C. ADMIN. CODE §§ 205-1.0 to 207-21.0 (1976).

39. *Id.* §§ 207-4.0 to 207-10.0.

40. New York City Zoning Resolutions 74-79 to 74-793, *cited in Penn Central*, 438 U.S. at 114. *See also* Note, *New Jersey's Pinelands Plan and the "Taking" Question*, 7 COLUM. J. ENVT'L L. 227, 238 (1982).

41. *Penn Central*, 438 U.S. at 138.

42. *Id.*

43. 447 U.S. 255 (1980).

44. Agins v. City of Tiburon, 24 Cal 3d. 266, 270, 598 P.2d 25, 26, 157 Cal. Rptr. 372, 373 (1979), *aff'd*, 447 U.S. 255 (1980).

45. *Id.* at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374.

46. Agins v. City of Tiburon, 145 Cal. Rptr. 476 (1978), *aff'd*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980).

47. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980).

48. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

California court held that the ordinance was not a taking, since the owner could build between one and five homes; therefore he did not lose "substantially all reasonable use of his property."[49] The court expressed concern that resort to inverse condemnation as a remedy would deter local officials from planning for the preservation of open space.[50]

The United States Supreme Court affirmed, holding that the ordinance did not take property without just compensation.[51] In resolving the takings claim, the Court persisted in the dual analysis seen in *Penn Central, Goldblatt* and *Pennsylvania Coal.* It reasoned that a "taking" could occur in either of two ways: first, where "the ordinance does not substantially advance legitimate state interests"[52] (traditional due process language); second, where the ordinance "denies an owner economically viable use of his land."[53]

On the merits, the Court found "the zoning ordinances substantially advance legitimate state goals,"[54] satisfying the due process test. It also found that there was as yet no proof of denial of reasonable use of the property: "[A]ppellants may be permitted to build as many as five houses on their five acres of prime residential property. . . . [They] are free to pursue their reasonable investment expectations by submitting a development plan to local officials."[55] Having determined that there was no taking, the Supreme Court found it unnecessary to decide "whether a State may limit the remedies available to a person whose land has been taken without just compensation."[56]

Agins thus preserves several strands of the antecedent case law. The test of "reasonable beneficial use" retains primary importance in assessing the constitutionality of zoning.[57] Less salutory, per-

49. *Id.* at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.
50. *Id.* at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377.
51. *Agins*, 447 U.S. at 259.
52. *Id.* at 260.
53. *Id.*
54. *Id.* at 261.
55. *Id.* at 262.
56. *Id.* at 263.
57. While reasonable use (or "economic impact") is the leading one, the Court has developed several criteria which help predict whether government action, including zoning regulation, will be considered a taking for which a landowner must be compensated. *See* Kaiser Aetna v. United States, 444 U.S. 165, 175 (1979). First, a taking will more readily be found when the government's interference with property involves physical invasion. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). Even indirect physical invasions such as flooding, United States v. Dickinson, 331 U.S. 745 (1947), or noise,

haps, is the Court's continued vacillation between takings and due process formulae. Third, and equally important, in *Agins* the Court left unresolved the question raised by the opinion of the California Supreme Court: does inverse condemnation lie for "a regulation that goes too far"?

B. *Due Process Challenges*

The due process guarantee[58] also limits the extent of regulation. Challenges on this theory, however, traditionally have sought invalidation of the statute or ordinance at issue.[59] A due process attack is often formulated in terms of the unreasonableness[60] or arbitrariness[61] of the measure under challenge.

The traditional test of reasonableness, as formulated in *Village of Euclid v. Ambler Realty Co.*[62] was whether the regulation had a "substantial relation to the health, safety, morals and general welfare."[63] In *Euclid*, a zoning plan which forbade industrial uses in a

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922), have been included in this category. Open space zoning would not ordinarily constitute a direct physical invasion.

The second principal criterion is "the economic impact of the regulation." Penn Central, 438 U.S. at 124. It is not established how much value must be left to effect a taking. Reduction in value per se or the loss of the most profitable use will not alone constitute a taking. *Id.* at 131; United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Nance v. EPA, 645 F.2d 701 (9th Cir. 1981). The Court has required only that reasonable use be left intact, the legacy of *Goldblatt* and *Penn Central*.

Andrus v. Allard, 444 U.S. 51 (1979), upheld a regulation forbidding the sale of artifacts containing eagle feathers, on the theory both that "a reduction in the value of property is not necessarily equated with a taking," *id.* at 66, and that other economically beneficial uses might exist. *Id.*

Destruction of property, except under exceptional circumstances, United States v. Caltex, Inc., 344 U.S. 149 (1952) (destruction of property to prevent its falling into enemy hands in time of war not a taking), will be considered a taking. Armstrong v. United States, 364 U.S. 40 (1960) (government action destroyed materialmen's liens).

Short of destruction, the de minimis point at which so little economic value is left that there is necessarily a taking has not been established; however, even a 90% loss in value has been held not a taking by the Supreme Court. Hadacheck v. Sebastian, 239 U.S. 394 (1915). Open space comes very close to the end of the loss value continuum. For other criteria used by the court, *see Penn Central*, 438 U.S. at 128 (public enterprise, public necessity).

58. U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

59. *See supra* note 8; San Diego Gas & Elect. Co. v. City of San Diego, 146 Cal. Rptr. 103, 114 (Ct. App. 1978), *appeal dismissed*, 450 U.S. 621 (1981).

60. *See e.g.*, Fred F. French Investing Co., v. City of New York, 39 N.Y.2d 587, 596, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 10, *cert. denied*, 429 U.S. 990 (1976).

61. *Penn Central*, 438 U.S. at 132.

62. 272 U.S. 365 (1926).

63. *Id.* at 395. Standing within the health and safety classification, as immune from the requirement of compensation, have been the categories of abating noxious uses and abating

residential area was upheld as having the requisite "substantial relation." *Nectow v. City of Cambridge*,[64] provides a counter-example. In *Nectow*, a zoning boundary divided a 100-foot strip, too small for residential development, from the rest of the owner's previously purchased tract. The bulk of his property was zoned non-residential, but the city down-zoned the strip to allow only for residential use. The Court held the instant zoning boundaries to be insufficiently related to public health and safety to justify the injury to the owner.[65] The *Nectow* court ordered the ordinance invalidated.

The "substantial relation" test of due process has survived to the present, but the takings tests of "nature of the invasion" and "reasonable beneficial use" dwarf it in importance. In *Agins*, the decisive factor was the absence of proof that the zoning regulation (on its face) had deprived owners of reasonable use;[66] the same can be said of the *Penn Central* and *Goldblatt* results.

Nonetheless, the remedy most commonly associated with the due process guarantee—invalidation—has retained in vigor most of what the "substantial relation" test of unconstitutionality has lost. For example, in *Fred F. French Investing Co. v. City of New York*,[67] a zoning ordinance found unconstitutional on the grounds of its economic impact on the owner was invalidated.[68] *Pennsylvania Coal* is explainable in essentially the same terms.

C. *The Takings-Due Process Paradox*

The paradox of "takings" jurisprudence comes down to this: in measuring the constitutionality of land use controls, the chief substantive tests come from the law of takings, yet the remedy most

nuisances. Justice Rehnquist pointed out in his dissent in *Penn Central* that "[t]he nuisance exception to the taking guarantee is not coterminous with the police power." 438 U.S. at 145. Rehnquist's reasoning suggests that a regulation could be a valid exercise of the police power, but still constitutionally require compensation.

64. 277 U.S. 183 (1928).

65. *Id.* at 188-89. Note the similiarity of this due process line of analysis to the first type of taking described in *Agins:* "the ordinance does not substantially advance legitimate state interests." 447 U.S. at 260. An ordinance invalidated for lacking "substantial relation to the health, safety, morals and general welfare," *Village of Euclid*, 272 U.S. at 395, might not fall within the "public purpose" requirement of the just compensation clause of the fifth amendment. Justice Brennan would disagree. *See infra* text accompanying note 133.

66. 447 U.S. at 262.

67. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976).

68. *Id.* at 596, 350 N.E.2d at 387, 385 N.Y.S.2d at 10.

often employed—voiding of the ordinance—comes from the law of due process. This doctrinal asymmetry proved a ready target for Justice Brennan in his dissent in *San Diego*, as will be discussed below.

III. SAN DIEGO GAS & ELECTRIC CO. v. SAN DIEGO

In *San Diego*, the United States Supreme Court declined an opportunity to rule on the availability of inverse condemnation as a remedy for a landowner challenging a local "open-space" zoning ordinance. The Court found an absence of a final judgment from the state appellate court record, and dismissed the appeal for want of jurisdiction.[69] But four dissenting justices agreed that a "taking" had been found below, and, in a conscious attempt to announce a new constitutional rule, declared that damages equal to "just compensation" should lie for property owners for the period the offending ordinance is in effect, or until any ultimate recission, invalidation or pertinent amendment of it.[70] Significantly, Justice Rehnquist, concurring in the opinion of the Court, wrote that he "agreed with much"[71] of the dissenting opinion's discussion of remedies—suggesting that in a proper case he would join to form a majority behind the proposed rule of remedies.

This case comment focuses on the rule of remedies proposed in the dissenting opinion written by Justice Brennan and subscribed to by three other justices. Given the Court's open reluctance to avoid inessential constitutional law holdings,[72] it is worthwhile to investigate whether such avoidance was justified in this case. To weigh the propriety of the Supreme Court's "no final judgment" finding and to evaluate the wisdom of Justice Brennan's suggestion, it is necessary to look at the case's progress through the state courts.

A. *Litigation in the Lower Courts*

The dispute in *San Diego* concerned 214 acres of undeveloped land which the San Diego Electric & Gas Co. ("Company") claimed was taken by the City of San Diego ("City"). This was part of a 412-acre tract the Company bought in 1966 for about

69. *San Diego*, 450 U.S. at 633.
70. *Id.* at 653.
71. *Id.* at 633-34.
72. *See, e.g.*, Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947).

$1,770,000 as a possible nuclear power plant site.[73] The Company abandoned that plan when a geological fault was discovered nearby.[74] When purchased, about half the land was zoned for industrial use and half as an agricultural holding zone.[75] In 1967, the City adopted a master plan, designating virtually all the acreage for eventual industrial use.[76]

In June, 1973, however, the City rezoned much of the parcel, reducing the acreage available for industrial development.[77] In addition, the City increased the minimum lot size for portions of the agricultural zone, further limiting development there.[78] Less than two weeks later, the City adopted an open space plan[79] pursuant to the state enabling act.[80] The plan proposed that the City acquire the entire 214-acre tract as parkland.[81] A bond issue to buy land for open space, including the Company's land, went to the polls. The voters rejected it, but the open-space plan remained on the books.[82]

After the defeat of the bond issue, the Company brought an action in the Superior Court of California in August, 1974.[83] It claimed the combination of the rezoning and the City's policy of not approving development inconsistent with its open-space plan[84]

73. *San Diego*, 450 U.S. at 624.

74. *Id.* at 626 n.6.

75. One hundred sixteen acres were classified for industrial use. One hundred twelve were classified as A-1-1 agricultural. The figures add up to more than 214 because the California courts did not distinguish between the 214 acres allegedly taken and 15 other acres the trial court found were damaged by the severance. *Id.* at 624 n.4. An A-1-1 agricultural classification is for "undeveloped areas not yet ready for urbanization and awaiting development, those areas where agricultural usage may be reasonably expected to persist or areas designated as open space in the general plan." *Id.* (quoting SAN DIEGO ORDINANCE No. 8706 (New Series) § 101.0404 (1962)).

76. *Id.* at 624.

77. *Id.* The Company was left with 77 acres zoned for industrial use, 39 for agricultural use and 112 as an agricultural holding zone (A-1-1), with 50 acres of the last category to be considered for future industrial use. *Id.* at 624-25.

78. *Id.* at 624.

79. San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal. Rptr. 103, 109 (Ct. App. 1978), *appeal dismissed*, 450 U.S. 621 (1981).

80. CAL. GOV'T CODE § 65563 (West Supp. 1981). The City's plan defined open space as "any urban land or water surface which is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes." *San Diego*, 450 U.S. at 625.

81. *San Diego*, 450 U.S. at 625.

82. *Id.*

83. *Id.*

84. The city asserted it was not obligated to allow development only in accordance with its open-space plan because of its status as a charter city, *San Diego*, 450 U.S. at 626.

deprived the Company of the entire beneficial use of its land.[85] The tract is "generally at low elevation, is a drainage basin, tidal basin or flood plain . . . ; part is subject to ocean tidal action and portions . . . [are] an estuary and wildlife refuge. . . ."[86] Because the land possessed these characteristics, the Company alleged "the only beneficial use . . . was as an industrial park . . . ,"[87] and that the City's actions had deprived the Company of this use. The Company sought damages in inverse condemnation, as well as mandamus of declaratory relief to strike down the combination of downzoning and open-space plan as unconstitutional and void.[88] After trial, the superior court found the City liable in inverse condemnation.[89]

On appeal by the City, the California Court of Appeal affirmed the trial court's holding that a compensable taking had occurred.[90] In rejecting the claim that the ordinance was void as unconstitutional, the appeals court said the claimants "never presented any evidence notice was improper or the ordinance was arbitrary."[91] The court of appeal thus explicitly tied the invalidation remedy to defects in procedure or in overall statutory conception and the compensation remedy to marked, isolated economic injury.

The court of appeal noted situations where, contrary to the general rule, rezoning might give rise to an inverse condemnation action.[92] An unreasonable regulation "under the guise of zoning"[93] would be such a case. The court reasoned, "[t]he proper remedy depends on what acts of the City are challenged and the findings of

85. *Id.*

86. San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal. Rptr. 103, 109 (Ct. App. 1978), *appeal dismissed*, 450 U.S. 621 (1981). About one third of the acreage is subject to tidal action. *San Diego*, 450 U.S. at 624.

87. *San Diego*, 450 U.S. at 626. This was supported by expert witnesses: "The land could not be used for agriculture because of the soil's high salt content; it could not be used for residences because the land is in a flood plan [sic]; it could not be used economically for grazing; it could not be used for a golf course because of poor drainage. In short, the only possible use of the land was for industrial." San Diego Gas & Electric Co. v. City of San Diego, 146 Cal. Rptr. 103, 113 (Ct. App. 1978), *appeal dismissed*, 450 U.S. 621 (1981).

88. *San Diego*, 450 U.S. at 626. The mandamus theory was dismissed as an improper remedy to challenge legislation. *Id.*

89. San Diego Gas & Electric Co. v. City of San Diego, 146 Cal. Rptr. 103, 108 (Ct. App. 1978), *appeal dismissed*, 450 U.S. 621 (1981). In a separate jury trial, damages were set at over $3 million. *San Diego*, 450 U.S. at 627.

90. San Diego Gas & Electric Co. v. City of San Diego, 146 Cal Rptr. 103 (Ct. App. 1978), *appeal dismissed*, 450 U.S. 621 (1981).

91. *Id.* at 114.

92. *Id.* at 110.

93. *Id.*

the trial court . . . if the zoning is valid but so harsh that it deprives the owner of all beneficial use of its land, there has been a condemnation and damages are proper."[94] The court of appeal found sufficient evidence to support the trial court's finding that there had been an inverse condemnation.[95]

The Supreme Court of California granted the City's petition for a hearing.[96] Under California law, this had the effect of vacating the decision of the court of appeal.[97] Then the California Supreme Court, which in the interim had decided *Agins v. City of Tiburon*,[98] retransferred *San Diego* back to the court of appeal for reconsideration in light of the holding in *Agins* as to remedy.[99] On reconsideration, the court of appeal followed *Agins* and reversed, holding that inverse condemnation was not available as a remedy for unreasonable exercises of the zoning power.[100] It declared that mandamus and declaratory relief were the proper remedies—but that they were precluded by disputed fact issues, which could "be dealt with anew should appellant elect to retry the case."[101] The Company then appealed to the United States Supreme Court.

D. *The Supreme Court Opinion*

After oral argument[102] the Court, in a plurality opinion by Justice Blackmun, dismissed the appeal for want of jurisdiction, hold-

94. *Id.* at 114.

> If the City has acted arbitrarily or discriminatorily in passing the ordinance in question, the landowner should use administrative mandate to have the ordinance changed . . . [citation omitted]; if the City has enacted an unconstitutional or invalid zoning ordinance, the landowner may seek mandate, injunctive relief or declaratory relief . . . [citation omitted] and the governmental agency is immune from any tort liability. . . .

Id.

95. *Id.* at 113.

96. *San Diego*, 450 U.S. at 628. *See* Appellant's Jurisdictional Statement at app. D, *San Diego*.

97. CAL. R. OF CT. 976(f), 977, *cited in San Diego*, 450 U.S. at 628.

98. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980). *See supra* text accompanying notes 43-57.

99. *San Diego*, 450 U.S. at 628. *See* Appellant's Jurisdictional Statement at app. E, *San Diego*.

100. *Id.* at 629. *See* Appellant's Jurisdictional Statement at app. G, *San Diego* (unpublished opinion). Compare the quite different attitude of the California Court of Appeal in its initial consideration. San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal. Rptr. 103, 110 (1978), *appeal dismissed*, 450 U.S. 621 (1981). There the court said that whether a regulation effects a taking without just compensation is a question of fact.

101. *San Diego*, 450 U.S. at 630. The court of appeal, on remand, seemed to consider the case unripe, mentioning the Company's failure to apply for a permit to develop the property, *id.*, and ignoring its own earlier finding that this would have been futile. *Id.* at 628.

102. *San Diego*, 450 U.S. at 621.

ing that the final judgment requirement of 28 U.S.C. § 1257[103] had not been satisfied.[104] Justices Stevens, White and Burger joined in the opinion of the Court. Justice Rehnquist concurred as to the lack of a final judgment, but suggested that if he could have found a final judgment he would have joined the dissenters.[105] Justice Brennan, joined by Justices Stewart, Powell and Marshall, dissented on two interdependent grounds.[106] First, the California Court of Appeal reconsideration had effected a final judgment that just compensation was unavailable as a matter of federal constitutional law. Second, the dissenters said, in the situation giving rise to the underlying controversy, there had been a taking requiring just compensation.

1. Final Judgment Lacking

The Justices' Reasoning. Justice Blackmun, writing for the Court, argued that the judgment being appealed from was nonfinal in three respects. First, the state appellate court's opinion on remand was nonfinal because, first, in its categorical denial of monetary relief it did not reach the question of whether a taking had occurred;[107] second, the initial "taking" affirmance had been vacated by the state supreme court's grant of a hearing;[108] and third, the judgment of the state appellate court on remand contemplated further proceedings in the trial court.[109]

Justice Rehnquist, in a somewhat opaque opinion, suggested that only an imprudent "less-than-literal"[110] reading of the final judgment statute[111] could permit a finding of finality.

Justice Brennan, with three other dissenting justices, found the judgment below to be final. The dissenters reasoned, first, that the judgment below effectively held that just compensation was unavailable as a matter of federal constitutional law.[112] Second, they

103. 28 U.S.C. § 1257 (1976).
104. *San Diego*, 450 U.S. at 633.
105. *Id.* at 633-36.
106. *Id.* at 636-61.
107. *Id.* at 633. Justice Blackmun called this the reverse of the classic nonfinal judgment situation, where a taking was found, but just compensation was not determined. *Id.*
108. *Id.* at 631 n.11.
109. *Id.* at 632.
110. *Id.* at 636.
111. 28 U.S.C. § 1257(2) (1976).
112. *San Diego*, 450 U.S. at 645.

said, under California law the action of the court of appeal on remand only vitiated the finality of judgment on some, not all, of the issues decided by the trial court. The dissenters found that, in particular, it had not undone the finality of the holding that just compensation would not lie.[113]

Analysis of the opinions. The plurality's holding of an absence of finality rests on two major premises. One supposition is that the state court, to finally adjudge the question, must rule on both the presence of a taking and the need for just compensation. Hence, the finding of the unavailability of the monetary remedy was incomplete since it did not hold whether or not a taking was present.[114] The other premise is that mandamus or declaratory relief might still lie upon the reopening of proceedings in the trial court.[115] The second of these two premises is slightly more persuasive, but, as will be seen, does not overcome the logic of the dissent.

The second premise involves the appellate court's failure, on remand, to grant or deny relief. In specific, it left to the trial court the question of whether to issue a writ of mandamus or a declaratory judgment to thwart operation of the ordinance.[116] This second premise is somewhat more tenable than the first one, mentioned above. It stems from the fundamental jurisprudence of avoiding decisions that might be rendered unnecessary by subsequent lower court proceedings. Moreover, declining review until the conclusion of all proceedings below would not preclude eventual review of the important question of just compensation. By contrast, the premise that both the compensation and takings question must be decided—before the judgment is deemed final—is more troublesome. This might revive the rigidity found in practice under the old pleading rules. That is, the question of whether compensation is required in a regulatory taking might never be reached, so long as a state court held as a matter of law that this remedy was unavailable. It would be a mistake to allow a lower court's characterization of its decision to emasculate this constitutional right.

Justice Rehnquist's concurring opinion suggested three bases not articulated by the plurality. But the reasoning in this concurrence

113. *Id.* at 643 n.7.
114. *Id.* at 633.
115. *Id.* at 632-33.
116. *Id.* at 631-32.

was sketchy, undermining whatever support it might have lent to the five-justice majority holding of no final judgment.

First, Justice Rehnquist seemed to insist upon a plain meaning interpretation of the final judgment statute.[117] He termed the instant case illustrative of "the problems which arise from a less-than-literal reading of the [statutory] language."[118] However, he neglected to explain to which "problems" he was referring. Justice Rehnquist concurred in the decision not to take jurisdiction of the appeal,[119] so obviously he did not quarrel with that result. Yet neither did he indicate he found fault with the plurality's reasoning. Indeed, unlike Justice Blackmun, he neglected to distinguish lack of finality caused by the availability of other forms of relief, from that caused by a failure of the court below to resolve all aspects of the taking question.

In a separate passage, Justice Rehnquist invoked the Court's discussion of the final judgment rule in *Cox Broadcasting Corp. v. Cohn.*[120] The quoted exerpt from *Cox*, however, is inapposite to the facts of *San Diego.*[121] It is conceivable that Justice Rehnquist, who dissented from the majority in *Cox*, intended to expose the latter opinion's defects by placing it alongside his preferred plain meaning approach. If so, the comparison was not persuasive.

Lastly, Justice Rehnquist implied that *San Diego's* intricate procedural history required a ruling of nonfinality.[122] He indicated three factors contributed to this result: judicial confusion, the "anomalous"[123] procedural history of the case, and significant division among the justices on the Court. Use of extrinsic factors such as these contradicts the logic of Justice Rehnquist's plain meaning approach, however, since it rejects close analysis of the procedural history as a means of assessing the finality of the judgment below.

117. *Id.* at 636.

118. *Id.*

119. *Id.* at 634-36.

120. 420 U.S. 469 (1975).

121. The *Cox* Court wrote that cases covered by the final judgment rule include those in which:

> reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts. . . .

Id. at 482-83, *quoted in San Diego,* 450 U.S. at 635.

122. *Id.* at 636.

123. *Id.*

Justice Brennan argued that the judgment below possessed finality in that it denied one form of relief, just compensation, as a matter of law.[124] As to the availability of other remedies in remand proceedings, he commented that it "would have no bearing on a Fifth Amendment 'taking' claim."[125] He did not otherwise consider their effect on finality.[126]

Justice Brennan's view of the finality of the just compensation judgment is persuasive. The one holding clearly discernible at the conclusion of the appellate proceedings on remand was that "just compensation" is not available as a remedy for the landowner who claims that "open-space" zoning has effected a taking. On the other hand, his failure to weigh the relevance of the utility of further proceedings below weakens his position. All in all, however, it seems fair to treat it as a final judgment. To do otherwise might permit lower court judges to insulate confiscatory zoning from effective review by characterizing monetary relief as inappropriate as a matter of law. The constitutional framework accords high value to the property right protection embodied in the just compensation clause.[127] Even a policy of avoiding unnecessary constitutional pronouncements, a vital theme in Justice Blackmun's opinion, should not have been allowed to thwart it in this case. The Blackmun rationale applies most forcefully to instances where it is clear that one alternative outcome in the lower courts would pre-

124. *Id.* at 639.

125. *Id.* at 643.

126. *Id.* at 633. Justice Brennan noted that under California law only an unqualified reversal "generally operates to remand the cause for a new trial on all remaining issues." *Id.* at 643 n.7. However, this reversal was qualified to allow retrial of "fact issues *not covered by the trial court in its findings and conclusions.*" *Id.* (emphasis original). Since the "taking issue" was determined by the trial court, Justice Brennan believed that aspect of the case was conclusively decided.

Justice Brennan gave only glancing mention to the effect of the availability of other remedies, saying "they would have no bearing on the Fifth Amendment 'taking' claim." *Id.* at 643. He assumed the availability of other remedies does not affect the finality of the judgment. Even if they did, this situation probably falls within one of the recognized *Cox* exceptions to finality—where the federal claim would survive, whatever the outcome of further proceedings below. *Cox*, 420 U.S. at 480. Brennan believed a due process invalidation would not extinguish the just compensation claim. *San Diego*, 450 U.S. at 653. If he was wrong, the case would no longer fall under the *Cox* exception to finality; nonetheless, such a rigid construction of the final judgment rule might prevent that precise constitutional question from ever being determined. *See supra* note 57.

127. S. BRUCHEY, THE ROOTS OF AMERICAN ECONOMIC GROWTH, 1607-1861, 96-98 (1968); *see also* E. CORWIN, *The Basic Doctrine of American Constitutional Law*, in AMERICAN CONSTITUTIONAL HISTORY, 25, 33-34, 41-45 (1964).

clude the matter from arising on further appeal. But it is not established that, in *San Diego*, invalidation would preclude the Company from raising a takings claim on appeal.[128] The implication of property rights indicates this would be a proper case to treat the judgment as final and hear the appeal as a matter which is capable of repetition, yet evading review.[129]

As to Justice Rehnquist's concurrence, the Court should give greater weight to the constitutional dictates of the just compensation clause than to the mandate of the final judgment rule, which is statutory.

2. Remedy—Justice Brennan's Hybrid

The dissent was the only opinion in *San Diego* to hold that the City of San Diego's zoning was an unconstitutional taking.[130] Likewise, it alone of the three opinions addressed the question of which remedy was appropriate.

Justice Brennan looked to the dictates of the takings clause. Since "just compensation" is prescribed in the clause and invalidation is not, the way he framed the question made inevitable his answer:

> [O]nce a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[131]

128. *Cf.* Fred. F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 595, 350 N.E.2d 381, 386, 385 N.Y.S.2d 5, 9-10 (1976), *cert. denied*, 429 U.S. 990 (1976) (invalidation occurred before a taking).

129. *Cf.* Roe v. Wade, 410 U.S. 113, 125 (1973) (interest of adjudicating an evasive yet important constitutional question).

130. *See supra* note 57. If an open space question is presented to the Supreme Court, unencumbered by procedural issues, it is likely that it will be viewed as a "taking." *San Diego* does not quite reach that de minimus situation in which all value is lost, because for whatever it is worth the Company is left with the land itself subject to the regulation. However, an open space designation will probably destroy any economic benefit to the owner. Thus it falls outside the scope of cases that involve only reduction in value. The Company has lost that which courts seem to favor the most—the economic value of the land, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), or "investment backed expectations," Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). It is this which distinguished Agins v. City of Tiburon, 447 U.S. 255 (1980), where the owner could still build some homes, from the open space designation in *San Diego*. Similarly, the decision in *Penn Central*, that the owners were left with reasonable return on their investment, raises the inference that without that return there would be a taking.

131. *San Diego*, 450 U.S. at 653 (citations omitted).

In fact, Justice Brennan's remedy is a hybrid. That is, it could lead both to invalidation of a regulation and "just compensation" for a claimant property owner, within certain limits. To better understand the implications of this hybrid remedy, it is helpful to look first briefly at the structure of Justice Brennan's argument; next to analyze its legal underpinnings; then to look at the practical implications of this remedy as applied; and finally, to weigh the policy considerations.

Constitutional Foundations. Justice Brennan began with the premise that the fifth amendment requires just compensation as soon as private property is "taken" for public use.[132] Invalidation of the regulation, he reasoned "would hardly compensate the landowner for any economic loss suffered during the time his property was taken."[133] As to the measure of compensation, Justice Brennan indicated that "ordinary principles . . . , regularly applied in cases of permanent and temporary 'takings' involving formal condemnation proceedings, occupations, and physical invasions"[134] are applicable—in specific, to determine the time of the taking and the measure of damages required.[135] For example, the opinion cited cases[136] holding that the reversible nature of regulations neither derogates from the constitutional requirement of just compensation, nor makes the measure of damages impossible to ascertain.[137] Regardless of the government's course of action after a "regulatory taking," Justice Brennan urged, "the action must be sustained by proper measure of just compensation."[138]

The Justice was quick to identify his doctrine with the spirit of the just compensation clause:

> [T]he Constitution does not embody any specific procedure or form of remedy that the States must adopt. . . . The States should be free to experiment in the implementation of this rule. . . . The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a "taking," and recover just compensation if it does so.[139]

132. *Id.* at 654.
133. *Id.* at 655.
134. *Id.* at 658-59.
135. *Id.* at 659.
136. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Causby, 328 U.S. 256 (1946); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).
137. *San Diego*, 450 U.S. at 657.
138. *Id.* at 659-60.
139. *Id.* at 660.

Analysis of Legal Arguments. Justice Brennan constructed his innovative remedy with five constitutional law building blocks. First, the fifth amendment requires compensation for *any sort* of "taking." Second, the compensation requirement arises *as soon as* the "taking" occurs. Third, invalidation is inadequate per se to remedy an unconstitutional exercise of the zoning power. Fourth, valuation for purposes of assessing damages shall be made *as of the time* of the taking. Fifth, the *method* of valuation shall be the same as in comparable exercises of the eminent domain power, permanent or temporary, as the case may be.

Justice Brennan's first argument was that the fifth amendment demands just compensation where a regulatory taking has been found.[140] In effect, he would recognize compensation as a remedy available either independently of, or supplementary to, invalidation. This is satisfactory, but adoption of it demands that courts in the future take care to discriminate between analyses underlying these two remedies. Invalidation traditionally follows a finding that an ordinance *lacks* "substantial relationship to the public health, safety, morals, and general welfare."[141] A taking usually follows from the opposite situation—the dedication to a public purpose of private property, for which the public is required to pay. Where compensation and the voiding of the statute are available as complementary or alternative remedies, courts must be sure to respect the doctrinal differences between the two. Courts adopting the Brennan rule should carefully articulate the logical reasoning supporting the independent finding that a claimant suffered a regulatory taking, where the ordinance also failed a due process test and was voided.

The second step in the dissent's reasoning was that the constitutional requirement of just compensation arises immediately once the events constituting the taking occur.[142] This point is not controversial, and therefore the thinness of Justice Brennan's supporting citations[143] may be excused. For example, *United States v. Clarke*[144] supports the proposition, but only in dicta.

140. *Id.* at 653.

141. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

142. *San Diego*, 450 U.S. at 654.

143. United States v. Clarke, 445 U.S. 253, 257 (1980); Jacobs v. United States, 290 U.S. 13 (1933).

144. *Id.*

The third step, the argument that validation is inadequate,[145] suffers from circularity of reasoning. Once one accepts the premise that a regulation "goes too far" and hence "becomes a taking," the conclusion as to remedy is foreordained. In these terms, Justice Brennan's argument can be drastically compressed: invalidation is not compensation.

The fourth legal argument was that valuation shall be as of the time of the taking.[146] While the dissent was not greatly detailed on this point, it suggested ways to resolve semantical problems of when the "taking" occurs. The opinion's citation to *United States v. Clarke* points to that case's useful distinction between instances of physical invasion (in which the invasion marks the taking), and condemnation proceedings (in which the start of proceedings mark the time of the taking). By a suggested analogy to the condemnation model, the dissent indicated that promulgation of an offending regulation would mark the time of the taking.[147] This is a laudable solution in that it avoids the uncertainties inherent in use of the physical invasion model.[148]

Applying the Remedy. In assessing the extent of compensation, Justice Brennan primarily addressed the situation in which a regulation that effects a "taking" is either rescinded or invalidated.[149] However, once the concept of a regulatory taking is accepted, it becomes instructive to look at all the possible outcomes that could follow a regulatory taking. Justice Brennan suggested some of the possibilities. A deeper inquiry makes four typical contingencies foreseeable. First, the government entity might rescind or amend the regulation. Second, the government might condemn the land affected by the regulation. Third, a court might invalidate the regulation. Last, a regulation might effect a "taking," yet remain in effect with no prospect of termination.

The first situation, regulation followed by rescission or amendment, is the one Justice Brennan most closely examined. He asserted that "once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just com-

145. *Id.*

146. *San Diego*, 450 U.S. at 658-60.

147. *Id.*; Clarke, 445 U.S. at 258.

148. That is, it would be hard to determine what aspect of a regulatory taking would be analogous to a physical invasion: the passing of the regulation, the enforcement, and the denial of a building permit would be among the possibilities.

149. *San Diego*, 450 U.S. at 653-60.

pensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[150] Courts would probably find this rule simple to apply when the regulation has in fact been rescinded or amended. That situation would present the most direct analogy to the "temporary takings" case law Justice Brennan relied on.[151] It would be easy to ascertain just compensation by determining the market value of the "rent," to follow the logic of one prominent case.[152] The technical uncertainty would persist as to when the regulation actually effected the taking, but this uncertainty is present in all the possible regulatory taking situations.

The second possible fact pattern is one in which the locality ends a regulatory taking by an outright condemnation of the affected land. A footnote to Justice Brennan's dissent recognized this possibility.[153] His only suggestion as to ending a regulatory taking by condemnation was that "the action must be sustained by proper measures of just compensation."[154] He gives no specific guidance as to what that compensation would be. If it followed the primary example, the owner would be compensated for the period from the onset of the "taking" until the formal condemnation. This would be in addition to the compensation established during the condemnation proceedings. This leads to the slightly anomalous situation where the landowner gets a larger award than someone whose land is simply formally condemned outright. However, this seems fair when the use during the precondemnation period is viewed as an additional incident of property ownership lost to the owner. In addition, it might serve to discourage bad faith regulation, since otherwise the government entity would enjoy, in effect, a no-lose position. Upon condemnation it would pay X dollars; if it first imposed a regulation and only condemned later, after the owners

150. *Id.* at 653.

151. *Id.* at 657-60 (citing Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Causby, 328 U.S. 256 (1946); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945)).

152. Kimball Laundry Co. v. United States, 338 U.S. 1, 7, 16 (1949) (where there is a temporary taking just compensation is required "for whatever the transferable value [the] . . . temporary use may have had. . . . [T]he proper measure of compensation is the rental that probably could have been obtained. . . .").

153. *San Diego*, 450 U.S. at 653 n.19.

154. *Id.* at 660.

sued, it might pay the same X dollars. With that advantage, a governmental body might well risk a landowner's challenge, since it would present little additional cost.

Judicial invalidation is a third possible outcome. Although Justice Brennan began his argument by asking whether invalidation is a sufficient remedy for a regulatory taking,[155] he neglected to define the compensation requirement applicable where a court ends the "taking" by voiding the ordinance. This situation is closest to that where regulation is later amended or rescinded. The same market value "rental" analysis should apply here for the period of the taking. Again, this is necessary to prevent the town from enjoying a no-risk position.[156]

The remaining alternative is where a court finds a regulatory taking, but the government entity has no present intention to rescind or amend the regulation. Justice Brennan noted that the same principles of just compensation are implicated where the government chooses "to continue the offending regulation."[157] Rental value, as a measure of compensation, could work equally well here. The owner would be put in a position comparable to that of a lessor. As long as the regulation continues, he would receive just compensation, qua rent. Should the regulation cease he would be restored in full to his original interest. Provided that the compensation is fixed fairly, the owner would continue to possess an immediately saleable piece of land.

Policy Implications. Justice Brennan's proposed remedy for a "regulatory taking" would highlight the constitutional backdrop against which building and zoning decisions are to be made. By providing a measure of certainty[158] and flexibility, it would rescue the constitutional law relating to zoning from a netherworld of unarticulated premises and unpredictable eventualities.

If a majority of the Court ultimately adopts the Brennan doctrine, property owners would enjoy a new assurance of a right of action for damages for unconstitutional zoning. It is arguable that landowners who stand so assured would be in less of a hurry to

155. *Id.* at 653.

156. *See* Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517 (1981).

157. *San Diego*, 450 U.S. at 660.

158. For further discussion of this point, see Shedd, *Inverse Condemnation: A Lingering Question When Challenging Zoning Regulations*, 17 LAW NOTES FOR THE GEN. PRAC. 107, 109-10 (1981).

develop undeveloped land, since they would be less subject to the risk of an uncompensated taking. On the other hand, experience indicates that developers build upon open-space in order to earn a profit, not merely to keep one step ahead of preservationists waving zoning amendments.

A benefit would inure to municipalities as well as to landowners. With the knowledge a town could predict the approximate extent of interim damages, its leaders could freely calculate whether or not a strict zoning control would "pay off." Since the price of the fair market rental value would not involve an immediate lump sum payment, government entities would not have to forbear from open space preservation because of short-term problems of financing. If a town's needs should change, or if the price is too high, the town would be free to rescind the regulation. In that event the owner would recover his former development prospects and would be compensated for his loss during the period of regulation. On the other hand, the town's information windfall might be of dubious value. It might make town officials overly cautious about the enactment of zoning controls for fear of unwanted judgments against the locality for damages. In any case, the Brennan rule would shift risk onto the localities: specifically, the risk of interim damages for injury between the time the taking is instituted and the judicial declaration of it. The owner would no longer forfeit beneficial use of the land between promulgation and invalidation.

Lastly, the Brennan rule would enhance the predictability of judicial decisions by clarifying a doctrinal ambiguity that has persisted since the 1922 decision in *Pennsylvania Coal*. It would make clear that the remedy for a regulatory taking is "just compensation," not invalidation.[159]

IV. CONCLUSION

San Diego presented the questions whether monetary compensation is constitutionally compelled for a zoning regulation that effects a taking, and whether invalidation of the offending regulation would preclude the remedy of just compensation. The questions remain unanswered because the majority dismissed the appeal for

159. For further discussion of *San Diego* and discussion of the possibility of bringing a civil rights action in similar fact situation under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976 & Supp. III 1979), see Cunningham, *supra* note 156, at 529-44.

want of a final judgment. Four justices reached the merits in their dissent, however, and their opinion, with Justice Rehnquist's implicit support, suggests that a consensus for the just compensation remedy is emerging.

Prior to *San Diego*, the Court had held a zoning regulation might effect a taking, but had in general applied the traditional due process remedy, invalidation, to ordinances running afoul of the takings clause. This paradox proved ripe for doctrinal consolidation in Justice Brennan's *San Diego* dissent.

Claimants in *San Diego* appealed to the United States Supreme Court after a California Court of Appeal on remand held that monetary damages were not an appropriate remedy for zoning which effected a taking. The four justices in the plurality rested their finding of nonfinality on the availability of other forms of relief, and on a finding that the court of appeal had not ruled whether there had been a taking. Justice Rehnquist concurred, apparently preferring a plain meaning reading of the final judgment statute. Justice Brennan found the decision below final because of its effective denial of just compensation as a matter of law. The dissenting opinion was persuasive because just compensation was effectively denied as a remedy and the question of the constitutionality of that denial would survive any outcome below as to other possible remedies.

After finding a final judgment, Justice Brennan reached the merits. He declared invalidation was insufficient as a remedy for a regulatory taking. The obligation to pay just compensation arose as soon as there was a taking. Compensation could be measured by rules evolved for temporary takings. The cases he cited suggested a "rent" measure of just compensation, regardless of whether or how the regulation might end.

Constitutional support for the Brennan doctrine is substantial, although perhaps not as much so as the dissenting opinion would suggest. For instance, the argument that invalidation is an inadequate remedy is circular, when in the first place the constitutional violation has been characterized as a "taking." In addition, some cited cases are inapposite to the facts of *San Diego*. In terms of jurisprudence, adoption of the Brennan rule would require more scrupulous judicial analysis than in the past of the "public purpose" (or lack thereof) served by a regulation: the "taking" remedy of compensation should only be awarded where such purpose is found, while the invalidation remedy under due process should arise only where a regulation *lacks* such a purpose.

All in all, however, the merits of Justice Brennan's proposed rule outweigh its flaws. The Brennan rule would clarify judicial analysis of a property owner's remedies for excessively burdensome regulation. It would increase predictability, which would enable landowners and government officials to plan rationally for the future. Finally, it would provide flexibility to government entities, by wiping out the onerous possibility of having to pay a large lump sum in "just compensation."

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