

It's Not Just Compensation, It's a Theory of Valuation as Well: Valuing "Just Compensation" for Temporary Regulatory Takings

INTRODUCTION

The Supreme Court firmly decided that a state-imposed restriction depriving a property owner of "all beneficial use" of his property was a "taking" for Fifth Amendment purposes¹ in *First English Evangelical Lutheran Church v. Los Angeles County* ("*First English*").² Requiring Los Angeles County to pay "just compensation"³ in the event of a taking, the Court left the task of determining the value of the compensation to the lower court.⁴ This continues a trend prevalent in state courts that has led to inconsistency and confusion in valuation.

Since the legitimacy of temporary regulatory takings as compensable events was only recently established for federal courts in *First English*, there exist no standards or guidelines to aid the lower courts in determining the value of just compensation. After exploring valuation methods that have been put forward in case law and by commentators, this note suggests the adoption of a "Before-After Full Valuation Method" for measuring just compensation in regulatory cases.⁵ This method best promotes the

1. U.S. CONST. amend. V (1791) provides: "nor shall private property be taken for public use without just compensation," and applies to states through the Fourteenth Amendment. U.S. CONST. amend. XIV (1868). See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2383 (1987).

2. 107 S. Ct. 2378 (1987).

3. *Id.* at 2386. The Court cited the general rule articulated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

4. 107 S. Ct. at 2389.

5. Although, as one commentator has suggested, the United States Supreme Court may wait until several lower courts have grappled with the problems of valuation before clarifying a position on the issue, an exploration of the valuation issue at this time may enable land use planners to better evaluate their policies in light of the possibility of future liability. Note, *Just Compensation: The Constitutionally Required Remedy for Regulatory Takings*, 55 CINCINNATI L. REV. 1237, 1262-63 (1987).

goals of "just compensation" and can be easily applied to many different factual situations.

Part I examines the United States Supreme Court decisions in *San Diego Gas and Electric Co. v. San Diego* ("San Diego")⁶ and *First English*, which express the Court's current views in the area of regulatory taking. Part II proposes several methods of defining compensation in the regulatory context, discussing the effect that each theory might have on the type and amount of compensation required. Part III presents the three methods that the supreme courts of Arizona, Texas and New Jersey have chosen to value compensation for regulatory takings and discusses how these cases might have come out using the Before-After Full Valuation Method. This note concludes that the Before-After Full Valuation Method for measuring just compensation is appropriate for use in the federal courts.

PART I: THE CURRENT VIEWS OF THE SUPREME COURT

The Supreme Court's current stance on the constitutionality of taking by regulation is best evidenced by Justice Brennan's dissent in *San Diego*⁷ and the *First English* court's limited adoption of Brennan's viewpoint.

A. *Brennan's Dissent in San Diego*

In *San Diego*, a property owner challenged a zoning ordinance changing its land from a partially industrial, partially agricultural "holding" zone to an "open space" designation, a change that required the abandonment of the owner's plans to build a power plant.⁸ The Supreme Court of California reversed the trial court's award of money damages on the grounds that under California law the only remedy for a regulatory taking was invalidation of the statute.⁹

Because the majority in *San Diego* held that the case was not a proper appeal to the Supreme Court,¹⁰ it did not reach the substantive issue in the case, which was whether the sole remedy for

6. 450 U.S. 621 (1981).

7. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

8. 450 U.S. at 624-25.

9. *Id.* at 629.

10. The five member majority concluded that the state appellate court's decision was not a "final judgment or decree" under 28 U.S.C. § 1257. 450 U.S. at 632-33.

such a taking could be injunctive relief.¹¹ However, Justice Brennan's dissent would have held that the appeal was proper and discussed the merits of the case.¹²

In his dissent, Justice Brennan explored the Court's prior decisions holding that a state may create a compensable taking by regulation as well as by physical invasion.¹³ He argued that the holdings of these cases mandated that a state could not limit the remedy for a regulatory taking.¹⁴ He relied on two constitutional principles to support this conclusion.¹⁵ The first was the Supreme Court's consistent recognition that "the self-executing character of the constitutional provision with respect to compensation"¹⁶ requires compensation whenever a constitutional taking has been established.¹⁷ The second was the fact that the invalidation of the unconstitutional regulation alone fails to satisfy two of

11. The Supreme Court of California had previously held in *Agins v. Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980) that a property owner suing for money damages on the theory of inverse condemnation because his land has been allegedly taken by the enactment of a zoning ordinance which substantially limited the use of his property may challenge the constitutionality of the ordinance and its application to his property through the remedy of mandamus or declaratory relief. The court declared that "the use of inverse condemnation with its imposition of money damages upon the public entity would, in our view, unwisely inhibit the proper and necessary exercise of a valid police power." *Id.* at 278, 598 P.2d at 32, 157 Cal. Rptr. 379. On Appeal the United States Supreme Court affirmed the state court's decision that no taking had occurred. *Agins v. Tiburon*, 447 U.S. 255 (1980). The Supreme Court expressly refused to consider whether "a state may limit the remedies available to a person whose land has been taken without just compensation." *Id.* at 263.

12. Justice Rehnquist, in a separate concurrence with the majority's opinion, stated that if not for the procedural question he would have decided the merits of the case in a similar manner to that of Justice Brennan. 450 U.S. at 633-34. This pronouncement led to a great deal of scholarly speculation as to the future state of takings law. Some of these speculations were laid to rest with the decision in the *First English* case.

13. 450 U.S. at 646-53. See *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or [if it] denies an owner economically viable use of his land . . ."); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978) (The question before the Court was whether the restrictions imposed by New York's Landmark Preservation Law on Grand Central Station effected a taking of the property. The answer was no.); See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

14. 450 U.S. at 653-57.

15. *Id.*

16. 450 U.S. at 654 (citation to *United States v. Clarke*, 445 U.S. 253, 257 (1980) quoting 6 J. SACKMAN, *NICHOL'S LAW OF EMINENT DOMAIN* § 25.41 (rev. 3d ed. 1980)).

17. See *United States v. Clarke*, 445 U.S. 253 (1980); *Jacobs v. United States*, 290 U.S. 13 (1933) (A Government dam project created intermittent overflows onto the property of the plaintiff who sued in inverse condemnation. The Court awarded compensation for the

the primary purposes of the Just Compensation Clause, namely to compensate the property owner and to spread the costs associated with the taking among those that benefit. Invalidation fails to compensate a property owner for the economic loss suffered when the government, implicitly or explicitly, exercises its right of eminent domain.¹⁸ Furthermore, mere invalidation of the statute places all of the costs of the temporary taking on the regulated party while the benefits are spread over a large class of individuals. Thus invalidation also fails to promote the public policy of spreading the cost of public advancement over the entire class of individuals benefiting from the government's action.¹⁹ After Justice Brennan concluded that compensation should have been awarded,²⁰ he suggested that several of the Supreme Court's cases dealing with compensation awards for a temporary taking might provide guidance to lower courts in the case of a regulatory taking.²¹ This note advances his suggestion to develop a workable method of determining compensation for a temporary regulatory taking.

B. *First English Evangelical Lutheran Church*

The Supreme Court most recently confronted the issue of compensation for regulatory takings in *First English Evangelical Lutheran Church v. Los Angeles County*.²² In *First English*, a church had developed a twenty-one acre campground area which was par-

partial taking (of the servitude) observing that: "Such a promise was implied because of the duty to pay imposed by the Amendment."). *Id.* at 16.

18. 450 U.S. at 655 n.22. Justice Brennan recounts an anecdote in a footnote to his *San Diego* dissent in which a California City Attorney gave fellow City Attorneys the following advice showing that land use planners not only were aware of the invalidation remedy, but that they have even used it as a tactic in municipal planning: "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN . . . Sometimes you can lose the battle and still win the war." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations*, 38B MUN. L. REV. 192-93 (1975) (emphasis in original).

19. 450 U.S. at 658.

20. Justice Brennan also offered a suggested time period over which to measure the compensation. He proposed that the "government entity must pay just compensation for the period commencing on the date the regulation first became a taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation (footnote omitted)." 450 U.S. at 658.

21. 450 U.S. at 659-60. See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949); *United States v. Causby*, 328 U.S. 256, 258-59 (1946); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-80 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 380-84 (1945); *United States v. Miller*, 317 U.S. 369 (1943).

22. 107 S. Ct. 2378 (1987).

tially destroyed by flooding in 1978.²³ The following year, Los Angeles County enacted an interim ordinance which designated an area encompassing the campground as a "flood protection" zone and forbade any further development in the area.²⁴ Alleging that the ordinance had taken all beneficial use of its property, the church sued the county for money damages under the Just Compensation Clause. The California courts followed the California Supreme Court's holding that invalidation was the only remedy for a regulatory taking and dismissed the church's complaint.²⁵

Chief Justice Rehnquist, writing for the 6 to 3 majority, acknowledged that the Court had previously recognized the right of a landowner to pursue an action in inverse condemnation as a result of the self-executing and remedial nature of the Fifth Amendment constitutional guarantee.²⁶ The Chief Justice repeated the firmly established proposition that a regulation that "goes too far"²⁷ will be struck down as an unconstitutional taking.²⁸ Finally, Chief Justice Rehnquist examined several cases where government had temporarily taken the use of property²⁹ and the Court had decided the takings were compensable under the Fifth Amendment.³⁰

The *First English* majority accepted the view put forward by the dissent in *San Diego* when it declared that "[i]nvalidation of the ordinance . . . , though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."³¹ The purpose of the Just Compensation Clause, the court held, is to spread the costs of public advancement over as large a section of society as possible.³²

23. *Id.* at 2381.

24. *Id.* at 2381-82: This ordinance was subsequently made permanent. This did not affect the Court's decision. *Id.* at 2384 n.7.

25. 107 S. Ct. at 2382.

26. *Id.* at 2386, citing *United States v. Clarke*, 445 U.S. 253 (1980).

27. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

28. 107 S. Ct. at 2386-87.

29. *Id.*

30. See *Kimball Laundry Co.*, 338 U.S. at 4-21; *Petty Motor Co.*, 327 U.S. at 377-81; *General Motors Corp.*, 323 U.S. at 379-84. In each case the government took a leasehold interest and the right to physically use the property for a certain period of time.

31. 107 U.S. at 2388.

32. *Id.* ("It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' quoting *Armstrong v. United States*, 364 U.S. at 49.")

Writing for the majority, Chief Justice Rehnquist noted that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."³³ The Court concluded that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."³⁴ However, the Court specifically limited its holding to the situation where a regulation denied the property owner all "beneficial use" of the property.³⁵

The opinion in *First English* did not address the problem of determining an appropriate measure of compensation for the government's interference with the use of property. While the Court announced the broad principle that a taking of all the beneficial use of a property by temporary regulation was compensable under the Fifth Amendment, it did not provide the lower courts with any method to measure that compensation.³⁶

In the following sections, several proposed valuation methods will be reviewed in order to formulate a workable method of determining compensation for regulatory takings.

PART II: THEORETICAL PERSPECTIVES

A. *Application to Environmental Regulation*

When a court decides that a state action constitutes a regulatory taking, just compensation is constitutionally mandated.³⁷

33. 107 S. Ct. at 2389 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416).

34. 107 S. Ct. at 2389.

35. *Id.*

36. The Court suggested only that its cases involving World War II appropriations of leasehold and business interests for temporary periods might provide some guidance in choosing a valuation methodology. 107 S. Ct. at 2387-89.

37. *First English*, 107 S. Ct. at 2389. This note only discusses what might constitute a regulatory taking when it would alter the method chosen for determining compensation. Also beyond the scope of this inquiry is the standard that would be used to measure the time period of a regulatory taking. Justice Brennan offered the suggestion that the state must pay the compensation for "the period commencing on the date the regulation first effected the 'taking,' and ending on the date the [regulation is amended or rescinded]." *San Diego*, 450 U.S. at 658 (Brennan, J. dissenting). However, this begs the question of when the taking actually occurred. Additionally, it places the burden on the state to accurately predict its future conduct. In *First English*, Chief Justice Rehnquist commented that "the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . are not before us." 107 S. Ct. at 2389. The determination of

The method best suited for calculating the amount of compensation will depend on the property interest taken by the government's restrictions.³⁸ This Part describes the established valuation methods applied to regulatory takings resulting from environmental regulations. These governmental restrictions protect the environment by limiting a property's use, retaining a right to purchase the property or acquiring some interest in the property.³⁹

Since the judicial invalidation in these environmental regulation cases makes the taking a temporary one,⁴⁰ the government has not appropriated a "fee simple"⁴¹ interest in the property,⁴² as would be the case in a permanent, physical taking. The property interest that has been taken could be a term of years (such as a leasehold), or a negative covenant⁴³ (such as a use restriction).⁴⁴ The state may have limited the ability of the owner to put the land to a certain use,⁴⁵ to subdivide the property,⁴⁶ to develop it,⁴⁷ or to rent it.⁴⁸ Although the type of interest that has been taken in

when a regulatory taking begins will undoubtedly spark a great deal of controversy and litigation in future cases. One factor in that determination will be the type of interest taken.

38. Johnson, *Compensation for Invalid Land Use Regulations*, 15 GA. L. REV. 559, 594 (1981) ("the regulatory government is not being required to purchase a permanent interest. It is simply being required to pay for harm that it already has caused.")

39. See, e.g., *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987) where the state required that the Nollans grant it a public easement to the beach through its property as a condition of obtaining a building permit in order to provide for public access to the beach. The Court held this to be a taking of an easement and struck down the regulation. The Nollans had not asked for monetary relief.

40. Johnson, *supra* note 38, at 593.

41. "[A] fee simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life . . ." BLACK'S LAW DICTIONARY 554 (5th ed. 1979).

42. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

43. "[Negative covenants] are those in which the covenantor obliges himself *not* to do or perform some act." BLACK'S LAW DICTIONARY 327 (5th ed. 1979).

44. *General Motors Corp.*, 323 U.S. at 378.

45. *Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp.*, 40 N.J. 539, 193 A.2d 232 (1963) (zoning ordinance greatly restricted the use of swampland and prevented the owner from using the land as a land fill).

46. *Lomarch Corp. v. Englewood*, 51 N.J. 108, 237 A.2d 881 (1968).

47. *Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978) (city refused to issue certain water development permits to reroute streams crossing the property which, in effect, denied respondents the ability to develop their land).

48. *Washington Market Enterprises v. Trenton*, 68 N.J. 107, 343 A.2d 408 (1975) (The City's designation of the plaintiff's neighborhood as "blighted" and its subsequent abandonment of the redevelopment project reduced the rental value of the property to practically zero).

each case affects what factors must be examined to determine the value of compensation,⁴⁹ some general guidelines will apply throughout a wide range of cases.

B. *What must be compensated?*

There are two different views as to what kind of damages should be awarded in a regulatory taking case. Professor Corwin Johnson suggests that a property owner should only be compensated for losses that can be shown to have occurred as a result of the government's restriction.⁵⁰ This is the "Actual Loss" view. The second view, the "Assumed Loss" view, is that the government's actions have taken some property interest connected with the land for which the owner must be paid regardless of any actual loss incurred.⁵¹

1. Actual Loss

The Actual Loss view assumes that the government has not taken any permanent interest, but has instead delayed or restricted the use of the land for a temporary period.⁵² This approach treats compensation as money damages for a wrong committed against the landowner instead of as payment for a property interest expropriated by the government. Professor Johnson, a strong advocate of the Actual Loss view, argues that unless damages are restricted to the owner's actual loss, there is a strong possibility that the owner could receive either a windfall or less compensation than deserved.⁵³

Actual Loss damages for a government wrong are routinely awarded as compensation for violations of constitutional rights in actions under civil rights acts⁵⁴ and the Due Process or Equal Protection clauses.⁵⁵ However, the Actual Loss method ignores the

49. See, e.g., *Corrigan v. Scottsdale*, 149 Ariz. 538, 720 P.2d 513 (1986) (The Arizona Supreme Court decided to apply a case by case analysis of the proper compensation in the case of temporary regulatory takings).

50. Johnson, *supra* note 38, at 595-96 (1981) ("There should be no compensation without proof of actual loss").

51. Note, *Inverse Condemnation: Valuation of Compensation in Land Use Regulatory Cases*, 17 SUFFOLK U.L. REV. 621, 637-39 (1983).

52. Johnson, *supra* note 38, at 594.

53. *Id.* at 596.

54. See, e.g., 42 U.S.C. § 1983 (1981).

55. See *Sheerr v. Evesham Tp.*, 184 N.J. Super. 11, 35-36, 445 A.2d 46, 70-71 (1982) for a discussion of the application of § 1983 to a zoning context.

“self-executing” nature of the Fifth Amendment—which requires the government to pay for the *property interest* taken, not the actual loss incurred by the owner.⁵⁶ This requirement was re-emphasized by the Court’s decision in *First English*, in which the Court held that the test for a taking is a finding of the loss of all beneficial use of the property, not a finding of actual loss to the owner.⁵⁷

2. Assumed Loss

The Assumed Loss approach first assumes that the government has appropriated one of the owner’s interests in the property by taking the beneficial use of the land for a certain period of time.⁵⁸ Starting with this assumption, at least five methods for valuing compensation have been suggested by commentators. These methods include Rental Value, Lost Profits, Option Value and two variations of a “Before-After Valuation Method.”⁵⁹

a. Rental Value

Some courts have assumed that the state has constructively leased the property in question⁶⁰ awarding the “rental value” of the property as just compensation for a regulatory taking.⁶¹ The

56. 107 S. Ct. at 2386.

57. *Id.* at 2389.

58. Note, *supra* note 51, at 638 n.82 and accompanying text.

59. All of these methods are listed and then each is rejected as a general guideline because of a supposed lack of flexibility by the Supreme Court of Arizona in *Corrigan v. Scottsdale*, 149 Ariz. at 543-44, 702 P.2d at 518-519. Instead, the court chose to adopt the approach of determining actual loss on a case by case method. *Id.* For a fuller discussion of this case see below in Part III.

60. In *Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978), the Texas Supreme Court discussed the fact that although rental value of the property may be an appropriate remedy for the city’s unconstitutional taking of the beneficial use of the property the difficulties in proving the amount of damages in most cases (especially those involving undeveloped tracts of land) would likely result in the award of any actual damages that the property owner had sustained. *Id.* at 395. However, on remand to the lower court, witnesses came forward to testify that they would have leased the undeveloped property if not for the restrictions imposed by the state. The trial court awarded substantial damages, representing mostly the lost rentals, and this judgment was not appealed. Johnson, *supra* note 38, at 596. The availability of such witnesses does not appear to be commonplace. *Id.* See also Note, *Just Compensation: The Constitutionally Required Remedy for Regulatory Takings*, 55 U. CIN. L. REV. 1237, 1260 (1987) (“The Court allowed [rental value as compensation] because it realized that temporary takings involve compensable elements that are not present [in eminent domain cases]”).

61. In *Usdin v. New Jersey*, 173 N.J. Super. 311, 414 A.2d 881 (1968), the parties agreed that should a taking be found, lost rentals would be an appropriate measure of just

court then attempts to determine the "rent" at which the state has "leased" the property. In so doing, the court must account for numerous factors, such as market value, the condition of the land, the development prospects, the restriction imposed on its use and the length of the taking.

In the environmental context, however, the typical case involves land which has yet to be developed. The state has "rented" a vacant lot without acquiring any of the property rights associated with a leasehold interest.⁶² Professor Johnson noted that "[t]o award lost rents . . . ignores the fact . . . that the land was undeveloped and therefore probably had no rental value for any use denied by the challenged regulation."⁶³ Although this method has use in other takings situations, the difficulties of proving lost rentals to a reasonable certainty in cases involving undeveloped land makes this method unsuitable for general use in the context of a regulatory taking.⁶⁴

b. Lost Profits

The use of lost profits as a damage measure is similar to the use of rental value. The court determines the profits that could have been made from the property if not for the state's restrictions. Lost profits include the profit that could have been made from a sale of the property, its rental, or its development.

This method suffers from the same flaws as rental value. In the environmental context it is difficult to measure future profits when a property is undeveloped. The property's future income potential is purely speculative.⁶⁵ Because of the uncertainty in

compensation. The lost rentals would be calculated by multiplying a fair rate of return (10%) times the total value of the land for each year of the taking.

62. In the context of compensating interim as opposed to permanent interests Professor Johnson makes the argument that the government should only be required to "purchase" (or pay damages for) the interest that has been appropriated by the government. Johnson, *supra* note 38, at 597 ("There is no good reason and almost no authority for requiring regulating governments to pay for permanent interests that they do not wish to acquire.") This argument can be made equally well in the case of paying for more of a temporary interest than was actually taken. Justice Brennan also makes the point in his dissent in *San Diego* that the courts will not force the government to purchase more of an interest than it has taken. 450 U.S. at 657-58.

63. Johnson, *supra* note 38, at 596.

64. *Austin*, 570 S.W. 2d at 394-95 (discussing the use of rental value as a damage measure and the requirement of proving the damages to a reasonable certainty).

65. See the court's discussion of the problems of uncertainty of damages in *Austin v. Teague*, 570 S.W.2d at 394-95.

measurement the lost profits method does not have a general applicability to cases involving temporary regulatory takings.

c. Option Value

When using the Option Value Method, the court assumes that the state has taken an "option" to buy the property from the landowner. The court then attempts to determine what a freely bargained for option to buy that specific piece of land would cost on the market.

The courts of New Jersey have embraced the idea of requiring compensation for an option to buy the regulated land over the term of the taking.⁶⁶ The New Jersey courts have held that the state asserts a revocable option to buy a property through the imposition of a regulation taking all of that property's beneficial use.⁶⁷ If the state actually proceeds in eminent domain, the option to buy expires. Regardless of whether the state physically takes the property, therefore, it still must pay for the option.⁶⁸ Ultimately, the state has the choice to proceed against the landowner in eminent domain or to abandon the quest to control the property.

d. Two Variations of the Before-After Valuation Method

(1) Full Compensation

In general the goal of the Before-After Valuation Method is to compensate for the loss in value the property has suffered because of the regulation.⁶⁹ The Full Compensation version of the Before-After Valuation Method awards as compensation the difference between the value of the whole property before the taking and the value after the taking.⁷⁰ This method values the interest taken and not the loss to the owner. "Full" compensation also includes compensating the property owner for the loss in value of any property remaining if the government does not take the owner's entire parcel. Conversely, the government is allowed to

66. See the decisions of the New Jersey Supreme Court discussed in Part III.

67. As an example see *Sheerr v. Evesham Tp.* in Part III.

68. *Id.*

69. Note, *supra* note 51, at 646-48.

70. *Id.* at 646 n.119 ("Graphically the "before-and-after" formula would be as follows:

Value of property before taking	\$xxx.xx
Value of property after taking	- xx.xx
Difference (just compensation)	= \$xxx.xx").

set off any increase in value of related property from the final compensation award.⁷¹ As an example, assume the government has exercised its right of eminent domain over 50 acres of the owner's 100 acre parcel. If the owner's remaining 50 acres declines in value because the state will use the land as a nuclear waste dumping site, then the owner can receive that additional decline in market value as compensation. If the remaining 50 acres increases in value because the state will build a military installation, escalating the demand for housing, then the government can set off the increase in the market value of the remaining land against the final damage award for the taking of the first 50 acres. This is full compensation for the market value of the interest appropriated.⁷²

The dissent in *San Diego* approvingly cites two authors who advocate paying the landowner compensation equal to the full market value of an easement⁷³ prohibiting the highest use to which the property can be put.⁷⁴ The value of the negative easement is the difference in the value of a property without restriction⁷⁵ and the value of the property with an invalid restriction.⁷⁶ The market values needed to determine these amounts are verified by the use of expert testimony at trial.

(2) Fair Compensation

The Fair Compensation version of the Before-After Valuation Method relies on a Fair Compensation analysis.⁷⁷ This analysis assumes that land can, and will, be constitutionally regulated to a certain extent. The amount of Fair Compensation that must be paid is computed as the difference between the value of constitutionally regulated land and the value of the same land under an

71. *Id.* at 646.

72. *Id.*

73. "A right of use over the property of another." BLACK'S LAW DICTIONARY 457 (5th ed. 1979).

74. In *San Diego*, 450 U.S. 621, 659 n.25, Justice Brennan cites R. BABCOCK, *THE ZONING GAME*, 168-72 (1966) and Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 198-239 (1961) as examples of commentators who have addressed the issue of compensating regulatory takings in the past. See also Note, "Fair" is Fair: Valuing The Regulatory Taking, 15 U.C. DAVIS L. REV. 741, 754-55 (1982) for a further discussion of these three authors' methods.

75. It must be remembered that some restriction is part and parcel of owning real property.

76. R. BABCOCK, at 169; Krasnowiecki & Paul, *supra* note 74, at 199.

77. Note, *supra* note 74, at 755-56.

invalid regulation.⁷⁸ This differs from Full Compensation in that, rather than purchasing an easement which restricts development to a property's theoretically highest use, the government purchases an easement that restricts development beyond the property's constitutionally highest use. Therefore, the government would have to pay only for the difference in value of the land's theoretically highest use and the constitutionally highest use.⁷⁹

e. Analysis of the Five Methods

Both the Rental Value and Lost Profits methods of valuation have utility in other areas of takings law and may have some application in a minority of regulatory cases. But the assumptions that underlie these methods of valuation are not consistent with the circumstances present in the area of environmental regulation of undeveloped land. In those cases, the uncertainty and unpredictability of future profits or rentals will undoubtedly prevent courts from being able to determine adequate damages based on possible rentals or profits. This is not to say that there will never be a case in which these figures may be accurately determined and used as the basis for damages. But, their usefulness as general guidelines in the area of compensation for regulatory takings is limited.

The Option Value Method suffers from some of the same difficulties in measurement as the Lost Profits and Rental Value Methods. The determination of the market value for an option to purchase a particular piece of undeveloped property is haunted by speculation and inaccuracies. Instead of trying to determine the value of the option by using the decrease in market value of the property, the courts have engaged in a guessing game as to what a similarly bargained-for option would be worth. Its adoption in New Jersey is due to the interpretation of particular zoning statutes and state constitutional provisions.⁸⁰ Judicial support for this method is lacking in other jurisdictions.

A variation of the Before-After Valuation Method is helpful in formulating a general guideline for compensation in regulatory takings cases. Examining the Full Compensation Method from a

78. *Id.*

79. *Id.*

80. See the detailed discussion of New Jersey's solution to the regulatory taking problem in Part III of this note.

property law perspective, the property interest the state has taken is a negative covenant to eliminate or restrict the use of the property.⁸¹ This is a property interest for which the Fifth Amendment mandates compensation for its taking.⁸² The value of this negative covenant can be determined by market evidence as to what similar covenants, freely bargained for, are worth, or by an examination of the difference in value of the land before and after the invalid regulation was enacted.

In contrast, the difficulties in determining the amount of "fair" compensation include uncertainty and unpredictability of establishing the limit of constitutionally permitted regulation from which to measure the value of the taking. This should weigh against the use of that standard to value compensation. The Full Compensation Method is better suited to compensate the property owner for the taking of the restrictive covenant because both variables are capable of determination from unspeculative evidence.

PART III: THE SOLUTIONS OF THREE STATE SUPREME COURTS

The highest state courts of Arizona, Texas and New Jersey have used different methods to solve the problem of calculating just compensation for temporary regulatory takings. This part describes each court's solution and then examines how the use of the Before-After Full Valuation Method would have changed the actual result.

A. *Actual Loss in Arizona*

In *Corrigan v. Scottsdale*,⁸³ a property owner challenged the constitutionality of an environmental regulation which severely limited development on the owner's hillside property. The ordinance did grant transferable development rights which the owner could have applied to the development of other properties. The property owner never actually submitted a development plan

81. This is a slight reformulation of the concept put forward in the sixties by Babcock, Krosnowiecki and Paul. Although they did not specifically have modern environmental regulation in mind when they proposed this method, it does seem to fit very well into that context.

82. The covenant would have to be found to run with the land (or other type of property) in order to hold it compensable as a property interest within the Fifth Amendment's purview.

83. 149 Ariz. 538, 720 P.2d 513 (1986), *cert. denied*, 479 U.S. 986 (1986).

for either property. The Arizona Supreme Court held that the regulation caused a temporary taking of Ms. Corrigan's property and remanded the case to the lower court for a determination of just compensation.⁸⁴

The court followed the logic of Brennan's dissent in *San Diego* and overruled its own precedent.⁸⁵ A major factor in the decision to award compensation was the unique wording of Arizona's constitutional provision regarding governmental takings.⁸⁶ The provision specifically required the payment of monetary damages when a taking is found by the court.⁸⁷

The court addressed the question of determining the proper measure of compensation with a long discussion of several commentaries which have looked at the area of damages for temporary takings. The court rejected the application of any particular method of valuation for use in all regulatory taking cases, stating that "no one rule adequately fits each of the many factual situations that may be present in a particular case."⁸⁸ The court held that the proper measure of damages should be decided on a case by case basis.⁸⁹ The court's sole instruction to the lower court was that the damage award could only be for "the losses he has actually suffered by virtue of the taking."⁹⁰

84. *Id.* at 543-44, 720 P.2d at 518-19.

85. "We agree with the simple logic expressed by Justice Brennan in his [*San Diego*] dissent . . ." 149 *Ariz.* at 541, 720 P.2d at 516. In *Davis v. Pima County*, 121 *Ariz.* 343, 590 P.2d 459 (App. 1978), *cert. denied*, 442 U.S. 942 (1979) the Arizona Supreme Court held that the sole remedy for confiscatory zoning was invalidation of the ordinance and not money damages. In *Corrigan*, the court held "[s]tatements in *Davis* which prohibit any recovery of money damages for a regulatory taking, by a confiscatory zoning ordinance, are overruled." 149 *Ariz.* at 543, 720 P.2d at 518.

86. Article 2 section 17 of the Arizona Constitution provides in part: "No private property shall be taken or damaged for public or private use without just compensation having first been made . . . [and] until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury . . ." (emphasis added), quoted at 149 *Ariz.* at 540, 720 P.2d at 515.

87. 149 *Ariz.* at 543, 720 P.2d at 518 ("Therefore, under our constitutional provision requiring a payment of money for an unconstitutional taking of a person's property, we hold that invalidation is not the sole remedy, and the landowner is entitled to money damages from the time the regulation was protested or challenged").

88. *Id.* The court listed the problems of finding a correct damage remedy as: "whether the losses are speculative; when the taking actually occurred; whether it caused any damage; and whether it was an acquisitory or nonacquisitory setting."*Id.*

89. 149 *Ariz.* at 543-44, 720 P.2d at 518-19.

90. *Id.*

Requiring proof of "actual loss" before compensation can be awarded ignores the constitutional mandate of just compensation for the taking of the beneficial use of property. The majority opinion in *First English* held that in the event that a regulation took all the beneficial use of the property, loss is presumed and compensation must be awarded.

In order to use the Before-After Full Valuation Method the lower court would have to determine the market value of the hillside property without the use restriction and the market value of the land with the restriction. The difference between these two figures would be the amount awarded as compensation for the regulatory taking. These values can be easily determined in most cases, since the plaintiff has instituted the suit because of an alleged decrease in the value of the property. Also, objective means, such as the use of real estate experts, can be used to arrive at a judicial determination of these market values. In this manner, the owner can be compensated for the full value of the property interest taken by the regulation.

B. "Actual damages" in Texas

The Supreme Court of Texas has also recognized the right of property owners to be compensated for regulatory takings. In *Austin v. Teague*,⁹¹ the property owners had purchased land near a highway for the purpose of developing retail businesses. The owners were denied Water Development Permits which were needed to reroute two small streams and make the property ready for commercial development. The owners sued for injunctive relief and money damages. The lower court ordered the city to issue the permit, holding that its denial was unreasonable and arbitrary. This decision was not appealed by the City. However, the lower court's decision also denied money damages for the temporary taking of the property. This was the issue on appeal to the Texas Supreme Court.⁹²

The Texas Supreme Court reversed the denial of compensation and remanded the case for a retrial of the damage issue,⁹³ holding that the plaintiffs had not proven anticipated rentals with sufficient certainty to be awarded damages for their loss.⁹⁴ The court

91. 570 S.W.2d 389 (1978).

92. *Id.* at 390-91.

93. *Id.* at 395.

94. *Id.*

ordered the lower court to ascertain the actual damages sustained by the plaintiffs and award that amount as compensation for the regulatory taking.⁹⁵

In concluding that some property interest of the plaintiffs had been taken for a public purpose without just compensation, the Texas Supreme Court looked at the fact that the plaintiff had been singled out to bear all the cost for a benefit the entire community would receive.⁹⁶ The court held that the property interest taken by the state was a "servitude" on the property.⁹⁷ The court stated:

"that the plaintiff landowners in the present case have demonstrated . . . [that] by rejecting the third application for a Waterway Development Permit [the city] sought to impose a servitude upon the property to preserve 'the natural and traditional character of the land and waterway'—that is, the City wanted to use plaintiff's land as a scenic easement on the southern approach to the City of Austin."⁹⁸

The court held that the restriction imposed a servitude on plaintiffs' land which took all use of the land.⁹⁹ The servitude was the inability of the owners to move the streams.

In discussing the damage issue, the court reasoned that, although the use of lost or anticipated rentals to calculate damages would be appropriate in certain circumstances, where the land is undeveloped, lost or anticipated rentals would be too speculative and uncertain on which to base a damage award.¹⁰⁰ The court ordered that on remand the plaintiffs were to be entitled to damages for actual losses sustained in seeking and obtaining the required permit.¹⁰¹

As in the example of Arizona, requiring the proof of actual loss before compensation can be awarded ignores the rationale of *First English* that the finding of a taking presumes loss. Additionally, the Texas lower court would have to determine the before and after market values of the property in order to calculate compensation according to the Before-After Full Valuation Method. In

95. *Id.*

96. *Id.* at 394.

97. *Id.* A servitude is "[a] charge or burden resting upon one estate for the benefit or advantage of another . . ." BLACK'S LAW DICTIONARY 1229 (5th ed. 1979).

98. 570 S.W.2d at 394.

99. *Id.*

100. *Id.* at 395.

101. *Id.*

this case, the plaintiffs' real estate experts could be used to determine these market values. In this manner, the owner will be awarded the compensation mandated by the Just Compensation Clause.

C. *Option Value in New Jersey*

The New Jersey Supreme Court has also recognized that a taking may occur indirectly because of excessive police power regulation.¹⁰² The New Jersey Supreme Court has continually reiterated the position that an unconstitutional taking can be accomplished through regulation.¹⁰³ Over the years, the New Jersey courts have employed many different approaches to calculate damages for temporary regulatory takings.

*Washington Market Enterprises v. Trenton*¹⁰⁴ provides an example where the supreme court used the Before-After Full Valuation Method. The court determined the award of compensation by taking the difference between the value the property would have been worth had there been no declaration of blight and the value of the property after the date of the renewal project's abandonment.¹⁰⁵ The difference was considered the cost of a covenant to hold the property and wait for the government to decide to take the land by eminent domain. The court also awarded interest on the value of the property from the date of the taking until the date of abandonment. The final award was reduced by the excess of rental receipts over maintenance costs.¹⁰⁶

In *Lomarch v. Englewood*¹⁰⁷ the New Jersey Supreme Court determined that compensation for a regulatory taking would be the

102. In *Yara Engineering Corp. v. Newark*, 132 N.J.L. 370, 40 A.2d 559 (Sup.Ct. 1945) the court held that an airport zoning ordinance which restricted the height of nearby buildings worked an unconstitutional taking of property rights.

103. See *Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp.*, 40 N.J. 539, 193 A.2d 232 (1963); *Lomarch Corp. v. Englewood*, 51 N.J. 108, 237 A.2d 881 (1968); *Washington Market Enterprises v. Trenton*, 68 N.J. 107, 343 A.2d 408 (1975); *Lom-Ran Corp. v. Dept. of Environmental Protection*, 163 N.J. Super. 376, 394 A.2d 1233 (1978); *Usdin v. Dept. of Environmental Protection*, 179 N.J. Super. 113, 430 A.2d 949 (1981); *Sheerr v. Evesham Tp.*, 184 N.J. Super. 11, 445 A.2d 46 (1982); *In the Matter of Egg Harbor Associates (Bayshore Centre)*, 94 N.J. 358, 464 A.2d 1115 (1983); *Schiavone Construction Co. v. Hackensack Meadowlands Development Commission*, 98 N.J. 258, 486 A.2d 330 (1985).

104. 68 N.J. 107, 343 A.2d 408 (1975).

105. *Id.* at 123-24, 343 A.2d at 416-17.

106. *Id.*

107. 51 N.J. 108, 237 A.2d 881 (1968).

“value of an option to purchase the land for the year . . . [with the] sum [to] be established by expert advice and opinion.”¹⁰⁸ This decision relied on sections of the Official Map Act of New Jersey which allowed a municipality to designate property as park or preservation area and to limit its use.¹⁰⁹ This designation gave the state a one year option to exercise its power of eminent domain to take the property for park land after notice to the landowner.¹¹⁰ The Supreme Court of New Jersey read the duty of just compensation into the statutory language¹¹¹ in order to make the statute comply with the New Jersey Constitution.¹¹² The court reasoned that the imposition of the option destroyed all beneficial use of the property.

The trial court in *Sheerr v. Evesham Tp.*¹¹³ followed *Lomarch* and ordered that “the municipality pay the plaintiff the option value of the premises from the date of the enactment of [the regulation] to the date on which the municipality chooses to remove that designation [of the property].”¹¹⁴ The option value of the property would be established by expert opinion and based on the market value of the property without zoning.¹¹⁵ The court declared that it had given consideration to whether the plaintiff had suffered actual damages and commented “it is apparent that lost opportunity has value, however difficult it is to measure.”¹¹⁶

In *Schiavone Construction Co. v. Hackensack Meadowlands Comm.*¹¹⁷ the New Jersey Supreme Court also looked at the “extent of deprivation of the beneficial use and the adverse economic impact on property value” before it remanded the case to the trial court for a determination of the compensation award.

Although the New Jersey courts have called the property interest for which compensation is paid an “option value,” this value could also be considered the price of a negative covenant¹¹⁸ requiring the property owner to refrain from development. The

108. *Id.* at 114, 237 A.2d at 884.

109. N.J. STAT. ANN. § 40:55-1.32, 1.34 (1967).

110. *Lomarch*, 51 N.J. at 113, 237 A.2d at 884.

111. *Id.*

112. N.J. CONST. art. 1, par. 20 (1947); U.S. CONST. amend. XIV (1868).

113. 184 N.J. Super. 11, 445 A.2d 46 (1982).

114. *Id.* at 64, 445 A.2d at 74.

115. *Id.*

116. *Id.* at 65, 445 A.2d at 75.

117. 98 N.J. at 258, 486 A.2d at 330.

118. The Arizona Supreme Court has termed this interest a “servitude”.

market will reflect a decrease in the value of property that becomes subject to such a negative covenant. The price of the negative covenant will be equal to the difference in market value of the property before and after the imposition of the regulation.

In effect, the New Jersey courts' use of the Option Value Method provides the same results as would the use of the Before-After Full Valuation Method. Although the definitions used to describe the interest compensated differ, each method awards the decrease in market value because of the regulation as compensation. In addition, the New Jersey courts award Full Compensation for the taking because they use the market values of the property completely unzoned and unconstitutionally zoned. This is Full, as opposed to Fair, Compensation for the imposition of the negative covenant not to develop because the courts do not attempt to determine the constitutional limit of regulation.

CONCLUSION

The courts of Arizona, Texas, and New Jersey have provided examples of how the determination of compensation for regulatory takings has worked in actual practice. This note has examined the results of these state cases, the theories of commentators, and the suggestions of the United States Supreme Court in order to suggest a method of determining compensation that can be applied in the federal courts.

A synthesis of the materials suggests that the Before-After Valuation Method could be a general guideline in these regulatory cases because of its theoretical simplicity and easy applicability. Full Compensation should be given because it avoids the difficulties in establishing what would be constitutionally-permitted restrictions from which to calculate Fair Compensation. Under the Full Compensation Method, the property interest taken by the state is assumed to be a negative covenant restricting the use to which the property may be put. The value of this covenant can be determined by market evidence as to what similar covenants, freely bargained-for, are worth, or by an examination of the difference in the value of the land before and after the invalid regulation was enacted. The Before-After Full Valuation Method would provide an efficient and uniform means to determine just compensation for temporary regulatory takings.

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