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Joseph LaRusso

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"PAYING FOR THE CHANGE":† FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE
v. COUNTY OF LOS ANGELES AND THE CALCULATION OF INTERIM DAMAGES FOR
REGULATORY TAKINGS

Joseph LaRusso∗

I. INTRODUCTION

The Supreme Court’s validation of monetary damages for temporary regulatory takings in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles1 supplanted the gradual promulgation of such remedies by state and lower federal courts.2 Yet in spite of the Court’s authoritative affirmation of the constitutionality of such damages, First English provided little by way of guidance to assist in a determination of how the legal requirements of the fifth amendment just compensation clause can be reduced to practice in order to determine suitable damage awards for regulatory takings. In fact, the Court’s holding provided no guidance whatsoever, except to the extent that it specified that aggrieved property

† Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). The title for this Article is
taken from Justice Holmes’s familiar dictum in Mahon that “[w]e are in danger of forgetting
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.” Id.
∗ Associate, Palmer & Dodge, Boston, Mass. B.A. Boston University, 1980; M.A. North­western University, 1981; J.D. Northwestern University, 1989. The author wishes to thank Carol Rose, Professor of Law, Yale University, for the invaluable assistance she provided in the preparation of this Article during her tenure as Louis Ancell Professor of Law and Public Policy at Northwestern University. The author also wishes to thank Len Rubinowitz, Professor of Law, Northwestern University, for his thoughtful comments on an earlier draft of the Article, and Merle Jacobs, for her indefatigable support during the time this Article was being written. All errors of fact or interpretation are the author’s own.
2 See Williams, Smith, Siemon, Mandelker & Babcock, The White River Junction Manifesto,
owners must be compensated "for the period during which the taking was effective.""

The exclusive emphasis that the Court placed on the duration of temporary takings belies the fact that the calculation of interim damages ultimately must depend on a compensation formula comprised of three variables: the measure of the property interest or "use right" that must be compensated, the amount of property involved, and, finally, the duration of the taking. The most significant feature of these variables, with the exception of the amount of property involved, is that they are not derived according to any method that properly could be called empirical. The determination of which use rights are compensable and which are not, and the duration of the period during which a taking is "effective," are values that do not lend themselves to measurement by metes and bounds. Instead, the values assigned to these variables are entirely dependent on judicial discretion. The values are not merely quantitative, then, because they will depend ultimately on qualitative judgments encompassing a series of policy decisions that must be incorporated into the valuation of the constituent variables that make up the three-part damage formula. These policy decisions necessarily involve several considerations: a concern for ease of judicial administration and consistency of result, a concern for satisfying community expectations regarding equality of treatment, and a concern for the timely resolution of takings claims.

This Article will proceed on the assumption that monetary damages have a twofold purpose: to compensate victims and to deter future encroachments on private ownership that are unconstitutional. Considerations of fairness and efficiency, therefore, such as those mentioned above, will determine not whether, but how, these purposes are fulfilled. The discussion will not be restricted to a description of the various means by which compensation might be

3 "We merely hold 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." First English, 482 U.S. at 321.

4 These values correspond to the three-dimensional impact Justice Stevens attributed to land-use regulation in his dissenting opinion to First English. Id. at 330 (Stevens, J., dissenting). According to Justice Stevens, such regulations have "depth," "width," and "length." Id. (Stevens, J., dissenting). "As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally . . . regulations set forth the duration of the restrictions." Id. (Stevens, J., dissenting).

5 Id. at 321.
calculated. It will also include an evaluation of the incentives that each alternative provides to both property owners and municipalities, because it is on this basis that qualitative distinctions and qualitative judgments will be made concerning the calculation of interim damages for regulatory takings.

II. INTERIM DAMAGE CALCULATIONS FOR REGULATORY TAKINGS: MEASURES OF REGULATED PROPERTY INTERESTS IN ONE AND THREE DIMENSIONS

The holding of the First English Court, straightforward enough as a declaration of the constitutional necessity of awarding monetary damages as just compensation for regulatory takings, provided little guidance to assist in the calculation of those damages. Specifically, insofar as the calculation of damages is concerned, the Court merely admonished that, once a regulatory taking is held to have occurred, the responsible government must "provide compensation for the period during which the taking was effective."

The duration of a temporary taking provides a discrete linear measure for the calculation of damages, but this temporal component alone is insufficient to derive a compensation formula for regulatory takings. The inadequacy of employing this single parameter as an index of the economic harm caused by temporary takings is suggested by Justice Stevens' conception of the multi-dimensional impact of land-use regulation, provided in his dissenting opinion to First English. According to Justice Stevens, land-use regulation has some fixed "length" to the extent that it is of measurable duration, "depth" to the extent that it deprives owners of some increment

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6 In Agins v. City of Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378 (1979), aff'd on other grounds, 447 U.S. 255 (1980), the California Supreme Court held that declarative relief or a writ of mandamus were the sole remedies available to a property owner who successfully challenged the validity of a zoning ordinance. According to Chief Justice Rehnquist, the California Court of Appeal, in its consideration of First English below, "found itself obligated to follow Agins 'because the United States Supreme Court had not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief.'" First English, 482 U.S. at 309. The First English holding repaired this deficiency in the Court's takings jurisprudence, thus setting aside the basis for the California Court of Appeal's reliance upon the nonmonetary relief rule in Agins, and overruling its holding against the plaintiff on the applicability of damages. The Supreme Court's validation of monetary damages in First English notwithstanding, the California Court of Appeal subsequently held on remand that no monetary damages were due because the plaintiff had not sustained a temporary regulatory taking. First English Evangelical, Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989).

7 First English, 482 U.S. at 321.

8 See supra note 4 and accompanying text.
of the use rights they enjoyed prior to the enforcement of the regulation, and "width" to the extent that a limited amount of property is affected.\textsuperscript{9}

In contrast to this volumetric conception of the impact of land-use regulation, the holding of the \textit{First English} Court is notably one-dimensional in its outlook toward damages.\textsuperscript{10} To say that a property owner must be compensated, for example, for the three-month period during which a taking was effective is to say nothing at all about either the amount of property involved or the extent to which the invalid regulation infringed the aggrieved owner's use rights. The issue, strictly speaking, is not the extent to which a regulation is invalid; a regulation is either invalid or it is not. Rather, the issue is the proper calculation of an owner's economic injury because the severity of this injury will increase as the governmental restrictions on ownership increase.

It has long been recognized that diminutions in property value that accrue as the result of governmental regulation are legitimate public assessments against private ownership.\textsuperscript{11} Only those diminutions in value resulting from regulations that are held to be excessively restrictive, and thus invalid, will be compensated. The "general rule" that Justice Holmes identified in \textit{Pennsylvania Coal Co. v. Mahon},\textsuperscript{12} and that the \textit{First English} majority later cited, first set forth this threshold limitation on the proper scope of governmental regulation: "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."\textsuperscript{13}

Justice Holmes's "general rule" set forth the diminution-in-value test so often cited as the touchstone for establishing the validity or invalidity of governmental land-use regulation. Almost from the beginning, however, the diminution-in-value test has been applied with more authority than certainty. This tendency is evidenced by the considerable, if disparate, values so far approved by courts as diminutions in value that do not go "too far."\textsuperscript{14}

\textsuperscript{9} \textit{First English}, 482 U.S. at 330 (Stevens, J., dissenting).
\textsuperscript{10} \textit{Id.} at 321.
\textsuperscript{11} According to Justice Holmes in \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 413 (1922), "[a] government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."
\textsuperscript{12} 260 U.S. 393.
\textsuperscript{13} \textit{Id.} at 415, quoted in \textit{First English}, 482 U.S. at 314.
\textsuperscript{14} See, e.g., \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365 (1926) (75% diminution in
The reason for this inconsistency may be a simple lack of consensus on the threshold of the diminution-in-value takings limit. Another possible explanation could be a threshold limit for regulatory takings high enough to include the broad spectrum of lower values that courts have thus far approved, including losses up to ninety-five percent and higher. The latter explanation is supported by the holding in *First English*, which mandates compensation for regulations that constitute "a taking of all use of property." Moreover, the factual circumstances in *Mahon* suggest that a total deprivation of property rights may well have been the limitation that Justice Holmes had in mind when he promulgated the "general rule" regarding regulatory takings. For the purpose of evaluating compensatory damage formulae for regulatory takings, however, it is unnecessary to establish with any degree of precision, or imprecision, the extent to which property rights permissibly may be diminished before the takings limit will be exceeded. Rather, it is sufficient merely to point out that the vertical measure of property values—the measure of the extent to which regulation deprives property owners of the use of their land—has long been the principal feature of regulatory takings analysis. Such a vertical measure will be of corresponding importance in determining the amount of damages required to compensate aggrieved property owners. This insight seems fundamental, but it is one the *First English* majority overlooked, or neglected to develop. Nowhere in its opinion did the Court specify the measure of property rights that should properly be compensated in the event such a taking occurs.

value not a taking); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (80% diminution in value not a taking), cert. denied, 425 U.S. 904 (1976); Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla.) (administrative decision allegedly reducing plaintiff's building plans by half not a taking), cert. denied, 454 U.S. 1083 (1981).

15 William C. Haas & Co. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (95% diminution in value not a taking), cert. denied, 445 U.S. 929 (1980); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (valid restriction on excavation business deprived owner of virtually entire value of property), appeal dismissed, 371 U.S. 36 (1962).

16 *First English*, 482 U.S. at 321 (emphasis added).

17 See Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 566-67 (1984) (identification of the company's underground "support estate" as the property relevant to the takings claim the basis of Holmes's finding that a 100% diminution in value, and thus a taking, had occurred).

18 The vertical measure of property values discussed here corresponds to Justice Stevens' definition of "depth" associated with land-use regulation. See supra note 4 and accompanying text.
III. ASSESSMENT OF COMPENSABLE PROPERTY INTEREST

According to the "general rule" first established by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, regulation that goes "too far" will be recognized as a taking. Although judicial decisions specifying permissible levels of regulatory restrictions are characterized by a wide range of disparate values, the mechanism by which a regulatory taking occurs is rarely questioned: governmental regulation severe enough to diminish property values to an extent that is overly burdensome, and that does not afford a property owner any reciprocal benefit, will be held invalid.

For purposes of compensating landowners for temporary regulatory takings, however, it is unclear which increment of diminished property values must be compensated. The increment of compensable value may be measured in any of several different ways. An aggrieved owner could be compensated for (A) the market value that his or her property would have if it were entirely free of regulation. Alternatively, the owner could be compensated for (B) the value of the property interest improperly infringed—the difference between the fair market value of the land regulated to the permissible limit less its value subject to the invalid restrictions. Finally, the value of the owner's proposed but restricted use could be factored into the damage formula, and the owner could be compensated for (C) the value of the proposed use less the value that the parcel had before it was downzoned, or (D) the value of the proposed use less the value of the parcel with the invalid restrictions in place. The question

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20 Id. at 415.
21 See supra note 14 and accompanying text.
22 See *Mahon*, 260 U.S. at 415. The mechanism is a function of Justice Holmes's "general rule" regarding the diminution of property values, and what he called an "average reciprocity of advantage" to property owners subject to regulation. See infra note 103 and accompanying text.
23 This second property interest assessment is suggested by Justice Holmes's "general rule" that "if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. Holmes's *Mahon* opinion is frequently cited for the principle that some level of governmental regulation, and the diminution in property values associated with it, is indispensable. See supra note 11 and accompanying text. This permissible diminution in property value may accrue right up to the takings limit, at which point any further diminution will be held to have gone "too far." Thus, the abiding question that is central to all regulatory takings analysis—that is, "How far is 'too far'?"—would seem to have its logical counterpart in the determination of the compensable property interest once a taking is held to have occurred—"How far beyond the 'too far' point, the regulatory takings limit, did the invalid regulation diminish the owner's property interest?" It is this increment of value that is derived from the second property interest assessment.
of which restricted property interests to compensate involves considering the incentives and disincentives associated with each of the above alternatives, the ease with which each of the above property interest assessments can be administered judicially, and the degree to which each assessment satisfies community expectations concerning equal treatment.

A. Fair Market Value of “Unregulated” Parcel Less Its Value With Ordinance in Place

The first option, the fair market value the parcel would have if it were entirely unregulated less its value with the invalid ordinance in place, compensates the owner for the most profitable of all possible uses—regardless of whether such a use actually would be allowed. This level of compensation actually is based on a fiction, because the most profitable use, the “highest and best” use, is almost certainly one that would not be permitted.24

As stated earlier, this discussion assumes that the common purpose of this and the remaining three property interest assessments is twofold: to compensate the victim and prevent future misbehavior. To the extent that this first damage option takes into account the value of prohibited uses, it compensates victims above and beyond the value of their actual injuries. This damage option is not merely compensatory, then, but also punitive. It is chiefly intended to provide municipalities with the most compelling disincentive for future overregulation.

The frequency of successful takings claims notwithstanding, the imposition of this damage option would have an immediate deleterious effect on the disposition of municipal as well as private resources. Because the damage option provides successful plaintiffs with a windfall recovery, it encourages property owners to test the legal limits of municipal land-use regulation. The inevitable result would be an increase in the volume of litigation, and a coincidental increase in the total amount of public and private resources devoted to the conduct of these disputes. Furthermore, the absence of a clear rule of decision concerning the takings limit25 would fail to discourage

24 Suppose, for example, a brickworks operated in a residential neighborhood. See Hadacheck v. Sebastian, 239 U.S. 394 (1915).

25 The takings limit is that threshold that municipal regulation cannot exceed if it is to avoid going “too far” and being “recognized as a taking.” Mahon, 260 U.S. at 415; see infra note 78. In Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978), Justice Brennan characterized takings analysis as an “essentially ad hoc, factual inquir[y]” dependent
potential litigants, especially because litigation costs would pale in comparison to the value of the potential gain. Under such circumstances, litigation costs would be a reasonable investment in view of the potentially high rate of return.

This powerful incentive to litigate has an additional, secondary effect. In the absence of a well-defined takings limit, the only means by which municipalities could reduce the volume of litigation, and hence their total liability, would be to regulate property at a level well below the contestable limit. This first damage option, then, encourages municipalities to underregulate ownership rights.

Compensating aggrieved owners for the fair market value their land would have if it were entirely unregulated thus introduces dual inefficiencies: it results in an overexpenditure of public and private resources on litigation and encourages municipalities to regulate property ownership at a level that is less than optimal. This damage option compensates successful plaintiffs beyond what is constitutionally required, and it may also result in a deficient level of regulation that fails to prohibit uses that are detrimental to the community as a whole.

upon two separate factors: "[t]he economic impact of the regulation on the claimant" and the "character of the governmental action." Id.; see infra note 88 and accompanying text.

26 See Priest & Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1984). According to Priest and Klein, potential litigants form rational estimates of the probability of their success or failure and base their decision to settle or proceed to trial on that basis. Placing the entire range of potential outcomes on a standard bell curve, the authors identify a point, Y*, representing the threshold level of fault that will result in a verdict for the plaintiff. Id. at 8. For our purposes Y* is equivalent to the elusive takings limit. The authors then identify another point, Y', which represents the actual level of fault in a specific case. Id. at 9. In determining whether or not a particular dispute will result in liability for the defendant, the judge or jury need only determine whether Y' is above or below the threshold "fault" limit, Y*. The value of Y', accordingly, is of equal significance to the parties, since an accurate estimate of the Y' value will indicate whether or not the dispute will result in liability. Id. Priest and Klein's analysis suggests that the "ad hoc" determination of liability that characterizes regulatory takings cases will increase the parties' frequency of error, since it will be very difficult to determine whether or not Y', the diminution in property value associated with a particular regulation, is above or below Y*, the takings limit. The indeterminate takings limit therefore results in fewer rational decisions concerning whether or not to challenge municipal regulations.

27 See id. To correlate this conclusion to Priest and Klein's analysis, this municipality's decision to regulate property well below the contestable limit corresponds to reducing the value of Y' to a degree that would make it unmistakable to even the most litigious property owner that the regulation being enforced is well below the takings limit, Y*.

28 The fifth amendment "makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987) (emphasis in original).

29 1 P. NICHOLS, EMINENT DOMAIN § 1.42 (rev. 3d ed. 1979) ("What distinguishes eminent
B. Difference Between Fair Market Value of the Property Subject to the Most Stringent Regulation Permitted and Fair Market Value Subject to Invalid Restrictions

The second property interest assessment, the difference between the fair market value of the land regulated to the permissible limit less its value subject to the invalid restriction, suffers a significant disadvantage from the outset—one that would pose an insurmountable problem of administration for the courts. This option presumes that the takings limit and the permissible level of restrictions on property interest may be readily determined. Experience has long established, however, that this presumption is not true. The takings limit consistently has resisted precise calculation, and the determination of which restrictions on ownership are valid and which are invalid is dependent entirely on a process that is conceded to be an “essentially ad hoc, factual inquiry.”

Like the first property interest assessment, which compensated the owner for the value that the subject parcel would have if it were entirely unregulated, the value of the current assessment is based on the value of the alternative absolute, the aggregate depreciated value of the maximum permissible restriction on ownership allowed. Furthermore, just as the first damage option compensates aggrieved owners for the value of potential uses that probably could not be exploited, this second assessment, by factoring in the maximum diminution in property values allowed, would likely represent the depreciated value of a restriction on ownership unequaled by any regulation in effect at the time the taking occurred. This assessment is likely to be unrelated to the actual pattern of land-use regulation in the community, and it must be asked whether the absolute standard represented by the maximum permissible diminution in value is preferable to a standard based on patterns of allowed uses prevalent in the community at the time the taking occurred.

A “real world” standard based on regulation in effect prior to a taking has intrinsic appeal because it depends on regulatory norms from the police power is that the . . . latter involves the regulation of such property to prevent its use thereof in a manner that is detrimental to the public interest.”

31 Id.; see supra note 25.
32 In order for such a “maximized” restriction to be held valid, the diminution in property value resulting from its enforcement would have to be poised at the threshold of the takings limit. See supra note 23. Whether or not the takings limit may be so precisely reckoned, a step which is crucial to the success of this property interest assessment, is another matter. See supra note 25.
33 See supra note 24 and accompanying text.
established by the community, as opposed to the standard presently under discussion, which represents an assessment of the compensable property interest that is theoretical and that resists precise definition. Nevertheless, calculating damages according to a "real world" standard by deducting the diminished value of a property subject to an invalid regulation from its value prior to the taking presents a correlative issue of fairness.

For example, suppose Developer A owns a fifty-five acre parcel of land which is zoned L-1 (light industrial). After Developer A makes a significant initial investment in the construction of light industrial facilities, the land is subsequently downzoned and is designated R-3 (residential). The diminution in value between the original L-1 designation and the R-3 designation subsequently enforced is estimated to be $141,450. After the downzoning has been successfully challenged, and the R-3 zoning regulation invalidated, the court awards the plaintiff an amount equal to a market rate of interest on the $141,450 property interest assessment for the period during which the taking was effective. The stage is now set for the disparate result. Developer B owns a fifty-five acre parcel of land, also zoned L-1, which adjoins Developer A's parcel. Developer B's parcel is not downzoned to R-3, however, as was Developer A's, but instead it is zoned MU-4, a designation permitting the construction of multi-unit residences containing several apartments under a single roof. The diminution in the parcel's value as a result of the imposition of the MU-4 zoning regulation is estimated to be $70,000, roughly half of that incurred by Developer A and an amount that the court does not consider excessive. Developer B's claim challenging the validity of the MU-4 designation fails.

34 The example of Developer A is based on Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985). The sequence of events illustrated by the example of Developer B is purely hypothetical. In Nemmers, the plaintiff developer had invested in the development of a light industrial park on his 135-acre tract. Fifty-five acres of the parcel were subsequently annexed by the city and zoned for residential use. The plaintiff was ultimately found to have a vested, compensable interest in the parcel's development as a light industrial site. The district court awarded the plaintiff expert witness and attorneys' fees but declined to award damages, characterizing the damage estimates proposed by the parties as speculative. Citing Justice Brennan's dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 659 (1981), the Court of Appeals for the Eighth Circuit held on appeal that market value of the parcel should be determined as of the date of the taking and that the damages paid should be sufficient to compensate the owner for the interim period during which he was prevented from developing the site as he originally intended. Nemmers, 764 F.2d at 504. On this basis the Circuit Court determined that the proper method for assessing damages involved calculating a 15% rate of return on the difference between the parcel's original value zoned for light industrial development and its diminished value subject to the invalid zoning ordinance, for an interim period of three and one-half years. Id. at 505.
This result is inequitable not because of any discrepancy in the relative merit of the takings claims presented by developers A and B. Rather, the result is inequitable because the above damage calculation shifts the burdens of the restricted property interests disproportionately between the two developers: Developer A receives compensation in an amount equal to the loss of the entire diminution in value below the original L-1 designation, while Developer B is forced to sustain a $70,000 diminution in value for which she will receive no compensation. Developer A has been compensated for the incremental value of restrictions on ownership that do not exceed the takings limit, while Developer B has not been similarly compensated.

Presuming that the court is correct in its judgment and that the diminution in value caused by the MU-4 downzoning is not excessive, then the takings limit must lie somewhere between the permissible $70,000 diminution in value that Developer B sustained and the impermissible $141,450 diminution that Developer A sustained. If a court were to determine that the takings limit equalled a $100,000 diminution in value below the original L-1 zoning regulation, it would appear that Developer A should receive only $41,450 in damages, an amount equal to that incremental diminution in value in excess of the takings limit. The determination to be made is whether aggrieved owners like Developer A, the victims of regulatory takings, should be compensated for the incremental value of zoning restrictions that are enforced against neighboring property owners without the need for compensation.

One reason for compensating victims of regulatory takings may be to provide aggrieved owners with some measure of damages that in effect surpasses the amount required to compensate them. Damages in excess of the value of those use rights that impermissibly were infringed are imposed in order to provide municipalities with a more compelling disincentive to indulge in overregulation. Such a scheme, however, seems to provide municipalities with an incentive to maximize restrictions on ownership. Maximized restrictions, if pushed to the threshold of the takings limit, would guarantee that aggrieved owners would receive compensation only for those diminutions in value in excess of the takings limit.

The municipality in the example above would be imprudent to zone property L-1 and thus, risk having to pay the $70,000 difference in value between the L-1 and MU-4 zoning regulations in the event of a taking. Instead, it could eliminate the risk of that added potential loss, and more, by diminishing property values to the fullest extent allowed by the regulatory takings limit. However much this com-
pensation scheme might encourage municipalities to maximize restrictions on ownership, such a strategy is a practical impossibility. In order for the strategy to be successful, municipalities necessarily would have to gamble that their estimations of the regulatory taking limit uniformly are correct. This is a high-risk endeavor in view of the fact that regulatory takings analysis must be undertaken on an ad hoc, case-by-case basis. A mistake in the determination of the takings limit would mean that a municipality gambling on minimizing a potential liability would have incurred a very real one instead.

These observations anticipate the discussion of the fourth property interest assessment, but they effectively illustrate the fundamental dilemma of formulating a property interest assessment that yields results that are equitable and that also may be readily and effectively administered by the courts. The second property interest assessment—the difference between the fair market value of the land regulated to the permissible limit less its value subject to the invalid restrictions—seems a fair means of compensating owners because it shifts the burdens of restricted property interests equally among all property owners by compensating only those property interests that are improperly infringed. It does not compensate aggrieved owners for the incremental value of those restrictions on ownership that do not exceed the taking limit.

Still, whatever advantage the second assessment may have in terms of fairness it lacks in terms of efficiency. Because it requires courts to determine the precise value of the regulatory takings limit, the administration of the assessment is certain to prove unduly burdensome. A property interest assessment that relies instead on the value of an owner's proposed use, such as assessments (C) and (D), would allow courts to circumvent this administrative stumbling block by incorporating values introduced by the parties themselves. It remains to be determined, however, whether the relative fairness of property interest assessments derived in this way equals the advantage they provide in terms of ease of administration.

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36 See infra notes 57–61 and accompanying text.
37 See Penn Cent., 438 U.S. at 124; see also infra note 78.
38 See infra notes 40–56 and accompanying text.
39 See infra notes 57–61 and accompanying text.
C. Fair Market Value of Proposed Use Less Fair Market Value Subject to Prior Regulation

The inherent appeal of the final two property interest assessments is that they take into account the actual value of the owner's proposed use. Whereas the first two formulations depend for their calculation on values representing opposite extremes of minimum and maximum restrictions on ownership, the emphasis on the owner's proposed use shifts the focus of the inquiry away from the value of uses that may properly be restricted to the value of uses that must be allowed—or compensated if they are not.

The third damage option compensates for the difference between the value of the owner's proposed use and the value the property would have subject to the level of regulation that was in effect prior to the downzoning. The difference in values between the owner's proposed use and the parcel subject to the regulation formerly in effect, however, may in fact be no difference at all. If the owner developed plans for the proposed use in reliance upon the former regulation, then the value of the proposed use may be exactly equivalent to the temporary use value of the land subject to the previous zoning restrictions. For example, if an owner proposed constructing a multi-unit residence on property zoned for that purpose, and the municipality subsequently improperly designated the property as open space, the aggrieved owner would receive compensation for the temporary use value of the property zoned, as it had been, for multi-family housing. The third property interest assessment would therefore be equal to the temporary use value of the property subject to the previous level of regulation "for the period during which the taking was effective."42

There are two reasons for calculating the property interest assessment in this way. First, the value of the owner's proposed use and the value of the property subject to the regulation in effect prior to the downzoning may not, in every case, be equal. Secondly, in

40 See supra notes 24–39 and accompanying text.
41 See supra notes 22–23 and accompanying text.
43 The assessment would yield an incremental difference in values in cases in which plans for a proposed use were developed in reliance upon a promised "upzoning" that is later denied. In such a case the value of the proposed use would exceed the value of the land subject to the regulation in effect before the repudiation of the promised rezoning. Presuming that the promised upzoning had been improperly denied, the aggrieved owner would thus receive damages equal to the temporary use value of the property zoned at the promised level.
cases in which these values are equal, compensating aggrieved owners merely for the temporary use value of their property appears to be in accord with the compensatory formula favored by the First English majority.

Though the First English holding provides little guidance as to how compensation should be calculated,44 the majority opinion endorses the value of leasehold interests as an appropriate measure of the amount of compensation owed victims of temporary takings. Specifically, the First English majority cited with approval the Court’s opinion in United States v. Dow that “[i]n such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily.”45 As examples of cases in which the “principles normally governing” the compensation of temporary takings were at work, the Dow Court cited three World War II-era cases, Kimball Laundry Co. v. United States,46 United States v. Petty Motor Co.,47 and United States v. General Motors.48 In all three cases, the Court approved the measure of leasehold interests as the basis for compensating owners whose property had been temporarily taken in support of the nation’s war effort.49

This discussion has assumed that monetary damages have a two-fold purpose: to compensate victims and to deter future misbehavior. It is apparent that the third property interest assessment would compensate victims for that period of time during which the invalid regulations prevented them from enjoying their property in the manner they had proposed, but it is unclear whether the assessment sufficiently deters future municipal misbehavior. Specifically, this method of calculating the property interest assessment is pegged not to the diminished value of the property subject to the invalid regulation, but to the leasehold value of the property when the prior, valid regulation was in effect. This property interest assessment therefore has nothing to do with the effect of the challenged regu-

44 See First English, 482 U.S. at 321. See supra note 3 and accompanying text.
45 First English, 482 U.S. at 318 (quoting United States v. Dow, 357 U.S. 17, 26 (1958)).
46 338 U.S. 1 (1949).
47 327 U.S. 372 (1946).
48 323 U.S. 373 (1945).
49 In Kimball Laundry the Court held that “the proper measure of compensation is the rental that probably could have been obtained, and so this Court has held in [General Motors and Petty Motor].” 338 U.S. at 7. In Petty Motor the Court determined that the proper amount of compensation equaled “the value of the use and occupancy of the leasehold for the remainder of the tenant’s term, plus the value of the right to renew [the lease].” 327 U.S. at 381. In General Motors the Court determined that just compensation equaled the market rental value of the property taken. 323 U.S. at 381.
lation, and although it compensates the property owner for the temporary use value of the property for the period during which the taking was effective, the magnitude of the damage award is not contingent upon the degree of municipal overregulation. If it were contingent, the deterrent effect of the property interest assessment would be dynamic, increasing as the restriction imposed by the invalid regulation increased in severity. This suggestion anticipates, however, the discussion of the fourth property interest assessment to follow.

The only justification that can be offered for not providing municipalities with a more potent disincentive is that the unsettled state of the takings question is apt to operate as a trap for the wary and the unwary alike. If the Supreme Court has acknowledged that it cannot with any degree of certainty resolve the question of what constitutes a taking, it is unrealistic to expect municipalities to be any more certain. The Supreme Court's imposition of monetary damages for temporary regulatory takings seems to suggest that municipalities are indeed able, with some degree of confidence, to discriminate between restrictions on ownership that are valid and those that are not.

The argument that municipalities are best placed to determine the propriety as well as the legality of zoning restrictions is one that has been made consistently from the time of the State Zoning Enabling Act (SZEA) to the present. Local governmental control presumes a ready access to information and expertise regarding community land use that would be impossible for any larger governmental unit to achieve. Local control also allows active community participation in decisions that are primarily of local concern, thus providing residents with a mechanism for consensus-building, and some measure of control over subjective values such as "quality of life." All of

50 First English, 482 U.S. at 321.
51 See infra notes 55–61 and accompanying text.
53 The SZEA emphasized the supremacy of local governments in formulating and administering land-use regulation:

Sec. 1. Grant of Power. For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate . . . .

54 But see Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (illustrating the broad social implications of local land-use decisions and their, at times biased, role in the formation of regional obligations), appeal dismissed and cert. denied, 423 U.S. 808 (1975).
these factors can be presumed to give local municipalities an advantage over the courts when it comes to determining the validity of regulations. The issue, however, may not be whether local municipalities are better equipped than the courts, but whether they are equally as well equipped to recognize when a proposed ordinance will fail to distribute the burdens of regulation fairly. The imposition of monetary damages for regulatory takings encourages local governments to fully evaluate the effects of their regulation ex ante, by forcing municipalities to internalize the costs associated with invalid regulations. If municipalities are thus compelled to be less cavalier about the effects of regulation, even if they cannot be completely confident concerning the validity of whatever regulation is finally enacted, injuries to property owners are at least that much more likely to be avoided altogether. The one sure advantage that municipalities possess over the courts is that they are in a position to prevent economic harms before they occur.

D. Fair Market Value of the Proposed Use Less Fair Market Value of Land Subject to the Invalid Regulation

The fourth property interest assessment, which provides compensation for the difference between the value of an owner's proposed use and the value of the property subject to the invalid regulation, would appear to strike a balance between owners and municipalities. The difference between the value of the proposed use and the value of the downzoned property clearly defines the increment of monetary loss that the aggrieved owner sustained. To the extent that the fourth property interest assessment defines the extent to which an aggrieved owner's property interest has been infringed, it shares at least one important characteristic with the wartime physical invasion cases cited by the First English Court: certainty. The current property interest assessment, however, may be more aptly illustrated by physical invasions that are partial, such as the partial flooding of land as the result of some governmental action. Such an analogy presumes that the extent of the encroachment onto the

56 See infra note 85 and accompanying text.
owner's land—or use rights, as is the case in the regulatory context—can be measured precisely. Just as the physical encroachment can be measured to within fractions of an acre, the extent of the owner's monetary loss can be precisely measured according to the difference between the fair market value of the proposed use and the value of the parcel subject to the invalid regulation.

Like the first and second property interest assessments above, the fourth property interest assessment deducts the value of the parcel subject to the invalid regulation. Unlike the first two property interest assessments, however, this figure is deducted from a value that, in effect, defines the outer "boundary" of the owner's compensable property right—the value of the proposed use that the owner thought legal under the existing regulation.\(^{59}\) It remains to be seen, then, how the fourth property interest assessment differs from the "real world" standard introduced earlier as an alternative to the second property assessment. The "real world" standard deducted the value of the property subject to the invalid regulation from its value prior to the taking. The fourth property interest assessment deducts the value of the property subject to the invalid regulation from the value of the owner's proposed use. In the majority of cases, however, owners propose uses in reliance upon existing regulations. In such cases there is no difference between the two property interests,\(^{60}\) at least no monetary difference.

If there is any difference at all between the two assessments, then it is a difference in emphasis. The fourth property interest assessment places the emphasis on individual property owners by acknowledging implicitly that each is differently situated. For example, the parcels owned by two adjoining property owners, Developer A and Developer B, are subject to the same L-1 (light industrial) regulation. Developer A has invested in the development of a light industrial park, having so far incurred such expenses as architects' fees and site preparation costs. Developer B has not invested in the development of a light industrial park or any other use, and her parcel remains "raw" land. Subsequently, both parcels are downzoned and given an R-3 (residential) designation. Because Developer A has established an "investment-backed expectation," the down-

\(^{59}\) "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 320 (1987) (quoting United States v. Causby, 328 U.S. 256, 261 (1946)).

\(^{60}\) In cases in which owners propose uses in reliance upon a promised upzoning the result would be different. See supra note 43.
zoning may be held to be a taking with respect to his parcel, while the downzoning may be held a valid exercise of municipal regulatory authority with respect to Developer B's parcel.\(^{61}\)

This distinction in emphasis between the two property assessments may seem subtle. The fourth property assessment, however, recognizes that takings may not necessarily depend exclusively on some quantum diminution in value, but may also depend on those uses that are being planned, or are being constructed, or are currently being operated in reliance upon existing regulation. The fourth property interest assessment thus provides municipalities with practical criteria by which to undertake an *ex ante* analysis of proposed restrictive regulation by encouraging the review of existing permits and licenses. By contrast, a property interest assessment that takes into account the value of property prior to a proposed downzoning encourages a gross analysis that does not distinguish among a broad range of allowed uses. Nevertheless, in the event that a municipality enacts a regulation that is so onerous that it deprives even owners of undeveloped land of any use of their property, the presumption must be that the use that they would have developed would have been the most lucrative allowed by the superceded regulation. In fact, taking into account the value of property prior to a taking presumes that an owner would have maximized its value by proposing the most intensive use then allowed. In this sense, the "real world" assessment is a subcategory of the fourth property assessment, since employing the value of property subject to superceded regulation is really a presumption concerning the value of an owner's proposed use.

In terms of calculating damages in the event a taking is held to have occurred, the fourth property interest assessment simultaneously comprehends the extent of the injury to the owner, since it is based on the value of a proposed use, and the magnitude of the governmental infraction—the greater the restriction on property rights, the more severe the damages award. For this reason, the fourth property assessment encourages municipalities to examine most closely those regulations that are the most severe, since the difference between the value of the proposed use and the invalid regulation will increase as the severity of the regulation is increased.

\(^{61}\) See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985); see infra note 72. But see Nemmers v. City of Dubuque, 764 F.2d 502, 503 (8th Cir. 1985) (owner held to have a vested right in the zoned status of his land after investing "heavily" in its development).
The fourth property assessment thus satisfies the dual purpose of compensating victims for the harms that they have sustained and deterring future misbehavior. Furthermore, because the fourth property assessment depends on values that have been provided by the parties themselves, it satisfies another primary goal of compensatory damage formulae—ease of administration by the courts. For example, unlike the second property interest assessment, the fourth assessment makes it unnecessary for courts to scrutinize such imponderables as the precise value of the regulatory takings limit, and relieves courts of the responsibility of determining the extent, and thus the value, of the property interest improperly infringed.

IV. THE DURATION OF THE TAKING

The First English holding specified that compensation for temporary regulatory takings must be paid "for the period during which the taking was effective." This definition of the duration of the taking period coincides with that first advocated by Justice Brennan six years before in his dissenting opinion to San Diego Gas & Electric Co. v. City of San Diego. At least with respect to his advocacy of monetary damages for temporary regulatory takings, Justice Brennan's opinion in San Diego was in fact a "majority" dissent. Although the Court determined in a five-to-four vote that it could not reach the taking and compensation claims that the case presented because of the absence of a final judgment below, Justice Rehnquist's concurring opinion supported Justice Brennan's view that the Constitution required compensation for regulatory takings. San Diego was the first indication that a consensus in favor of compensating regulatory takings had coalesced among the members of the Court.

62 See supra notes 30–39.
63 First English, 482 U.S. at 321.
65 San Diego, 450 U.S. at 630.
66 Id. at 633–34. "If I were satisfied that this appeal was from a 'final judgment or decree' of the California Court of Appeal, . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." Id.
67 See id. at 633–34, 653. Specifically, the plaintiff in San Diego attacked the rule promulgated in Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), aff'd on
The *First English* holding confirmed that a majority of the Court still approved of Justice Brennan’s position regarding damages for temporary takings, including his definition of the compensable interim period as the interval during which the taking was effective. Neither *First English* nor Justice Brennan’s dissenting opinion in *San Diego*, however, identified an event that would initiate the period during which a taking is effective, in effect leaving open the entire question of when, precisely, a taking becomes “effective.” If Justice Brennan and the *First English* majority intended that the interim takings period should be initiated by a municipality’s adoption of an invalid regulation, or should begin on the date a regulation is originally enforced, both of these definitions of the compensation period have not been without their detractors. These critics suggest, for example, that equity would be better served if the compensation period were initiated upon the filing of a complaint, so as to discourage plaintiffs from “sandbagging” municipalities by filing just before the termination of the statutory limitations period in order to maximize their claims.68 Similarly, the filing of an application for administrative relief has also been proposed as the proper event by which to initiate the compensation period.69 Other possible inaugural “events” include notification that an application for administrative relief has been denied, or a judicial determination that a regulatory taking has occurred.70 Each of these takings “events” represents a different value for the duration of the compensation period. In the order of their increasing magnitude, the initiating events of a proposed takings period could be listed as follows: the judicial determination that a taking has occurred; the filing by the plaintiff of a complaint; the denial of the plaintiff’s application for administrative review; the date on which the regulation had first been adopted or enforced.71

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68 | Williams, *supra* note 2, at 223.
70 | Williams, *supra* note 2, at 223.
71 | First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987). It is unclear whether the compensation period specified in the *First
It should be noted that this chronology is by no means the only one possible. In cases in which the municipality does not afford an opportunity for administrative review, or in cases in which the plaintiff complains that it would be futile to file a petition for administrative review, a complaint will be the first formal indication that a regulation has imposed an invalid restriction on the plaintiff's property. It is logical to assume, however, that because the First English Court failed to mention any of the preceding alternative inaugural events, it did not intend prior applications for administrative review or previous adjudications of a takings claim to have an effect on the period for which compensation is required. Compensation would be required for the period beginning on the date the taking became "effective," presumably either the date of enactment or original enforcement, and ending on the date that the municipality either condemned the property or rescinded the measure.

In the four regulatory takings cases that the Court considered in the years preceding First English, concerns regarding the ripeness and exhaustion doctrines prevented the Court from reaching the issue of whether damages were constitutionally required to compensate regulatory takings. But the Court's concern in the earlier cases

_English_ holding would begin on the date the regulation became effective (that is, enforceable), if such a date were specified in the ordinance, or if the taking would become effective on the date the ordinance was enacted. If Justice Brennan's formulation is any indication, one of these two "events" would seem to initiate the takings period. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting). Critics of Justice Brennan's definition of the compensation period have argued that the "effective" period of the taking would begin with the adoption of the invalid regulation. See Williams, _supra_ note 2, at 223; Freilich, _supra_ note 69, at 473; Morgan, Exhaustion of Administrative Remedies as a Municipal Defense to Inverse Condemnation Actions, 1985 INST. ON PLAN. ZONING & EMINENT DOMAIN 9-1, 9-33 n.6 (1985). If the _First English_ holding requires that the compensation period begin either on the date an invalid regulation is adopted, or a subsequent date when it is first enforced, the "effective" taking period thus specified would be maximized relative to interim periods initiated by other proposed taking events.

_First English_, 482 U.S. at 321. The ripeness doctrine requires that the property owner determine whether or not the regulation has been applied finally to his or her property. The exhaustion doctrine requires that the property owner use specified administrative procedures for review to discover whether or not the effect of the regulation can be mitigated. _See_ Morgan, _supra_ note 71, at 9-2. The purpose of both doctrines is to determine the final disposition of the governmental regulation as it affects the subject property.

_This Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question._

with whether or not the plaintiffs had submitted a plan for the
development of their property;\textsuperscript{73} or whether further proceedings
were necessary in the court below to determine if a taking had indeed
been effected;\textsuperscript{74} or whether the plaintiff had sought variances to
develop the subject property according to a proposed plan;\textsuperscript{75} or
whether the appropriate governmental unit had given its "final de-
finite position" concerning how the regulation will affect the plain-
tiff's property\textsuperscript{76} had to do with whether the Court properly had
jurisdiction to review the lower court decisions. In none of the earlier
cases did the Court consider the effect that a petition for adminis-
trative review or the filing of a complaint would have on the duration
of the compensation period for regulatory takings. On this point the
First English holding is the most authoritative expression of the
Court's judgment concerning the proper measure of the takings
period, though in the absence of a Court-specified takings event, the
precise duration of the effective takings period remains less than
certain. Still, if a court determines that a property owner has sus-
tained a regulatory taking, after first determining that the claim is
ripe for review and that all administrative means to mitigate the
effect of the regulation have been exhausted, the compensation pe-
riod must be measured according to the direction of First English—
a direction that arguably may require compensation for the period
retroactive to the date that the regulation was originally enacted or
enforced. Measuring the compensation period according to this di-
rection maximizes the duration of the period during which a taking
is "effective," and maximizes municipal liability to a corresponding
degree. The First English holding thus appears to provide the most
powerful disincentive to municipal overregulation of property own-
iership.

Given the unpredictable, "essentially ad hoc, factual inquiry" that
regulatory takings analysis is conceded to be,\textsuperscript{77} municipalities nec-
essarily find themselves in a precarious position each time they
attempt to evaluate the validity of their land-use regulation, some-
thing they must be able to do with some measure of confidence if
they are to avoid potentially large liabilities. Yet, if the Supreme
Court has itself withdrawn and resigned the field where the takings

\textsuperscript{73} Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
\textsuperscript{75} Williamson County, 473 U.S. at 187.
\textsuperscript{76} MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 349 (1986) (quoting
Williamson County, 473 U.S. at 191).
limit is concerned, it is doubtful that municipalities will be any more successful in determining which regulations are excessive and which are not. As helpless as the Supreme Court when it comes to fixing the takings limit with any degree of certainty, municipalities will tend toward overprecaution when drafting regulations in order to avoid liability. In effect, monetary damages for regulatory takings compel municipalities to assume the burden of an uncertain limit upon takings. The inherent hazard of such an arrangement is that it will result in some level of underregulation. By the same token, prior to First English, the burden of the uncertain limit upon takings had been internalized by property owners who were subject to invalid land-use regulations without benefit of compensation. The inherent hazard of this arrangement was that it provided governments with an incentive to overregulate.

Insofar as the durational component of the tripartite taking formula is concerned, the ripeness and exhaustion doctrines point the way toward a more efficient and equitable result. The very purpose of these doctrines, to engage landowners in the local decisionmaking process, depends upon established means by which municipalities and individuals may define their opposing interests and attempt to reach an accommodation. If municipalities have been left to discover for themselves the boundary line of the takings limit, as it appears they have, the participation of aggrieved property owners in administrative procedures is crucial.

While property owners and developers have always been accorded a role in local land-use decisions, these administrative processes tend

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78 Id. at 123–24.

The question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . [T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by a public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.


79 Lawrence Blume and Daniel Rubinfeld refer to governmental failure to pay compensation as “fiscal illusion.” According to the authors, “[f]iscal illusion arises because the costs of governmental actions are generally discounted by the decision-making body unless they explicitly appear as a budgetary expense. Compensation removes fiscal illusion because it requires a budgetary outlay. It can thus serve as a corrective device for governmental failure.” Blume & Rubinfeld, Compensation for Takings: An Economic Analysis, 10 RES. IN LAW AND ECON. 53, 84 (1987) (citations omitted).


81 Morgan, supra note 71, at 9-8.
to center around dealmaking activities. In accordance with section 3 of the SZEA, municipalities develop plans for future community development. In practice, however, restrictive “plan” zoning merely served as the basis for municipal negotiations with landowners and developers whose projects invariably involved more intensive uses than those permitted by the initial regulation. If negotiations were unsuccessful, or if antidevelopment, political forces prevailed, or if municipalities sought to downzone property to an even more restrictive level, there was little incentive prior to *First English* for municipalities to further involve affected property owners. When injunctive relief was the only remedy for which property owners could hope, municipalities would leave to the courts the determination of the validity or invalidity of imposed regulations. If a court held a regulation invalid, then the municipality could merely redraft the ordinance according to the court’s findings and either exhaust the property owner’s resources or proceed with another round of litigation.

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Sec. 3. *Purposes in View*. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements . . . .

*Id.*

84 See Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 849–50 (1983) (anticipated stabilizing influence of land-use plans as independent controls on municipal regulation vitiated by piecemeal zoning changes bargained for by individual developers); see also R. Ellickson & D. Tarlock, *supra* note 82, at 58–59 (characterizing zoning maps as “first offers” and negotiated land-use controls as “final offers”).

85 Justice Brennan took note of this now foreclosed strategy in his dissenting opinion to *San Diego* and quoted the following excerpt from an address given at the 1974 annual conference of the National Institute of Municipal Law Officers:

*If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don’t worry about it. All is not lost. One of the extra “goodies” contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 Cal. 3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts all over again. . . .

See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.*
The post-First English regime, by comparison, requires municipalities to consider the effects of regulation ex ante, not ex post after a court has established that the scheme is excessive and invalid. There is a limit, however, on the extent to which municipalities will be able to anticipate the effects of proposed regulations before the fact. This limitation in inherent in takings analysis undertaken ex ante. In Penn Central Transportation Co. v. New York City, the Supreme Court stated that the evaluation of a challenged regulation "depends largely upon the particular circumstances [in that] case," including: "[t]he economic impact of the regulation on the claimant . . . particularly, the extent to which regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action." The impediment to any ex ante analysis of the impact of a regulation is the determination of the extent to which it interferes with "investment-backed expectations." If municipal governments are to be successful in determining which regulations are excessive and thus illegal, they must necessarily have a means of gauging the frustration of owner expectations.

Proof of a diminution in value as the result of a downzoning will, in itself, be insufficient to establish a taking, unless that diminution can be shown to have exceeded the regulatory takings limit. The notion of an excessive deprivation of the right to use and enjoy property thus incorporates particularized analyses of individual expectations. For example, land that is originally zoned light industrial and which is subsequently zoned residential retains market value as residential property, and perhaps may not be adjudicated a taking.
for that reason. But if an owner purchased land in the light industrial zone prior to the downzoning, intending to develop it specifically for that purpose, and invested money in preparation for the development of light industrial uses, a court may find that the owner has formed an "investment-backed expectation" to develop the parcel as he or she originally planned. In practice, then, a complete deprivation of property value may not be necessary in order for a regulation to rise to the level of a taking. Alternatively, where an investment has been made in the development of a property, it may be sufficient that a regulation has deprived a property owner of the value of his or her investment and anticipated profits. The determination will depend, of course, on the degree to which the expectation is investment-backed.

The evaluation of the amount and types of investments that have been made suggests an analysis similar to that undertaken when claimants assert a "vested right" in a development project. When claimants allege vested rights, the following factors are generally considered: whether the developer had received governmental approval for the project; the amount of nonrecoverable expenses the developer had incurred; and the "subcategories of development costs" in which the developer had invested. It is apparent that, if a landowner has not yet applied for a permit or otherwise secured approval for a project, a municipality will have no way of knowing what expectation the landowner entertains for the parcel. Such landowners, those who expect to put their land to the most intensive use allowed prior to rezoning but who have not yet sought approval for their projects, are situated in a "blind spot" in any ex ante evaluation of the impact of proposed regulation.

See, e.g., Nemmers v. City of Dubuque, 764 F.2d 502, 503-04 (8th Cir. 1985) (developer who invested in the development of a light industrial park held to have a vested right in the zoned status of his land and awarded compensation for municipal downzoning of property for residential use).

Neither permits or governmental approvals are required to vest right. See, e.g., American Nat’l Bank & Trust Co. of Chicago v. City of Chicago, 19 Ill. App. 3d 30, 34-35, 311 N.E.2d 325, 328-29 (1974) (expenditures of $213,000 on development plans sufficient to vest rights).

The risk of having to compensate these unforeseen takings claims (claims that will be filed by owners who have not yet applied for the appropriate permits) is inherent in a municipality’s original decision to enact less restrictive zoning regulation. A municipality assumes the risk of these unforeseen claims when it decides to supercede existing regulation with regulation that is more restrictive. The question remains, however, whether municipalities should be compelled to compensate these claims in every case, or whether municipalities should be afforded an opportunity to review them in order to permit individual adjustments in some cases, such as variances.
The ripeness and exhaustion doctrines are intended, in part, to reveal investment-backed expectations, and to establish the extent to which they are thwarted by municipal regulation. Controversies must be ripe for review, or administrative procedures exhausted, before courts will adjudicate the validity of land-use regulation.\footnote{Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985). The Court stated that “the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations . . . cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.” \textit{Id.} at 191 (citations omitted).}

The \textit{ex ante} analysis of the impact of municipal land-use regulation is limited because it is impossible to detect and account for investment-backed expectations. These effects can only be gauged \textit{ex post}, after the regulation is in place and property owners have had an opportunity to file petitions for administrative review. In such cases, a petition for review will be a municipality’s first notice that a regulation may be excessive and invalid as it applies to a particular landowner.

The necessity of carrying on the evaluative process after the regulation has become effective should be reflected in the duration assigned to the compensation period for temporary regulatory takings. The compensation period and the \textit{“event”} that initiates it should encourage owners to seek administrative review as soon as possible after the regulation has been imposed, requiring them to present proof of their investment-backed expectations, possibly in the form of development plans for the site. In addition, the compensation period should encourage municipalities to expedite a thorough review process.

The duration of the interim takings period according to the \textit{First English} holding is by no means clear. But in the absence of an explicit statement concerning which procedural \textit{“event”} should inaugurate the takings period, the holding certainly does not provide owners with an incentive to file petitions for review early, because it is arguable that the \textit{First English} Court intended that compensation be paid retroactive to the date a regulation was either enacted or first enforced.\footnote{See supra notes 64–70 and accompanying text.}

If this argument accurately reflects the majority’s view, \textit{First English} gives municipalities an incentive to expedite the review of an owner’s claim, perhaps at the expense of thoroughness. For example, wealthy developers could wait for some time before the expiration of the limitations period in order to maximize the duration.
of the compensation period, and increase the stakes for the municipality. The municipality, already faced with substantial liability, would be encouraged to take as little time as possible to review the developer's claim in order to minimize the duration of the compensation period. The municipality also would be encouraged to evaluate the impact of the regulation on the developer's property conservatively. The existence of a potentially large liability, incurred as the result of a developer's delay in filing a petition for review, would encourage overprecaution on the part of the regulatory authorities. Furthermore, the larger the proposed project, the greater the liability, and the greater the incentive for the municipality to err on the side of overprecaution. Projects that would have the greatest community impact conceivably could receive the least thorough, and the least balanced, municipal review. In short, a compensation period retroactive to the date a regulation was enacted or first enforced encourages property owners and developers to use the processes of administrative review strategically.

The tendency toward overprecaution and underregulation inherent in the maximized compensation period suggested by First English would be alleviated if the date the property owner filed a petition for review was used as the inaugural "event" of the interim period. The principal benefit of such a rule is that it would encourage landowners to file their petitions for administrative review as soon as possible after the regulation becomes effective. The incentive for the municipality to expedite the review of landowner petitions would remain unchanged, because any delay merely would add to the total liability should a court later hold that the final administrative disposition of an owner's claim effected a taking. Duration measured from the time of filing for a petition for review, by encouraging property owners to file petitions early, would also have the added benefit of reducing administrative costs by allowing the regulating authority to resolve associated claims simultaneously rather than in fits and starts.

The drawback of measuring the duration of the compensation period from the time that applications for administrative review are filed is the same drawback that besets the longer compensation period suggested by the First English holding: the time a municipality will be willing to take to review claims is in inverse proportion to the size of the project. As a result, owners who wish to undertake smaller projects that will have only localized effects may wait disproportionately longer for a final ruling than owners who wish to
proceed with larger projects that will have an impact on the community as a whole. Larger projects will tend to be scrutinized less thoroughly than smaller projects. Initiating the compensation period with an application for administrative review removes the incentive for owners and developers to use the administrative process strategically, but it leaves in place the inequality of treatment accorded large and small claimants. To the extent that it encourages municipalities to accelerate administrative review of large projects, the shorter compensation period may also fail to root out overprecaution and underregulation.

One solution to this problem would be a fixed “interim” period after the filing of a petition for review during which the compensation period would be tolled. Such a fixed period would guarantee that larger projects receive the close review that they merit and would also allow municipalities to prioritize pending petitions so that smaller claimants would not be forced to wait longer than claimants whose projects represent larger potential liabilities for municipalities.

Another solution to the problems of inequality of treatment among claimants and rash evaluation may be one that is unrelated to interim damages. Specifically, penalties for undue delay would promote thorough and fair administrative review of proposed uses. This solution would require the creation of a category of “large projects” separate from those smaller projects that would be compensated with interim damages. This “large project” category could include proposed uses whose value exceeded a specified percentage of the annual municipal budget.

The duration of the compensation period for temporary regulatory takings should incorporate incentives promoting the timely, fair, and thorough review of grievances. Those incentives accord with the purpose of the compensation scheme overall: to certify that the burdens and benefits of land-use regulation are distributed fairly among all members of the community. This presumes that the compensation scheme itself will not skew administrative processes to the extent that it encourages some level of underregulation or overregulation. Such inefficiencies, however, are inherent in the compensation period suggested in *First English*, which appears to require that damages be paid retroactive to the date an invalid regulation was enacted or first enforced. A slightly foreshortened compensation period, retroactive to the date the landowner files a petition for administrative review, encourages the earliest possible
resolution of takings claims, deprives owners and developers of the opportunity to use the review process strategically, and promotes fair and equal treatment of claims and claimants.

V. FAIRNESS AND PREDICTABILITY

In Penn Central Transportation Co. v. New York City,88 Justice Brennan conceded that fifty-six years had elapsed since Pennsylvania Coal Co. v. Mahon, and the Supreme Court was no closer to developing a "set formula" by which to determine the validity of municipal land-use regulation.99 The lack of a "set formula" notwithstanding, Justice Brennan discovered in the Court's previous opinions several factors that have particular significance:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are of course relevant considerations. So too is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.100

Justice Brennan's reference to the difference in the character of governmental action discloses an anti-redistributive rationale for regulatory takings jurisprudence, which is consistent with takings jurisprudence generally. Specifically, Justice Brennan remarked that a taking will "more readily be found" when property is subject to physical invasion, suggesting that a regulatory taking would be a redistributive transaction different in quality but identical in effect with governmental interference that is physically intrusive. The analogy further suggests how the two qualitatively different types of intrusions on ownership are alike fundamentally. Just as the owner whose land is physically invaded, the victim of a regulatory taking suffers the injury alone, or is a member of a minority that is damaged similarly.101 And like the owner subjected to physical invasion, the

99 Id. at 124.
100 Id. (citations omitted).
101 "[T]he Fifth Amendment's [guarantee 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.'" First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 320 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
victim of a regulatory taking receives no reciprocal benefit as a result of the government's restriction on ownership. Alternatively, an ordinance that offsets regulatory burdens with reciprocal benefits certifies the non-redistributive purpose of the regulation.

The other component in Justice Brennan's review of takings criteria, "the economic impact of the regulation on the claimant," is a clear reference to Mahon and a restatement of the diminution-in-value test. Not only must the regulation single the victim out, it must single him or her out for particularly harsh treatment. Most representative of the idiosyncratic nature of the aggrieved owner's deprivation of property values, according to Justice Brennan, is "the extent to which the regulation has interfered with distinct investment-backed expectations."

The notion of investment-backed expectations introduces the issues of fairness and predictability. Expectations are formed and investments are planned in reliance upon current zoning and the promise of municipal approval that it represents, or alternatively, upon the very real promise of rezoning to accommodate a proposed use. The reliance, then, is upon the political and administrative processes of municipal government, which are presumed to secure by means of due process and administrative review the integrity of the investments they encourage. Fairness and predictability thus are implicated simultaneously in the creation of owner expectations concerning the value of property, which represents the full range of uses allowed under a specific regulation.

Predictability sustains public confidence in the values associated with each separate zoning regulation, both within the community, on the part of owners, and outside of it, on the part of potential investors who may wish to trade on those values. Predictability also involves public confidence in the processes of municipal land-use management—that they will be well-ordered, and allow some

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103 See Rose, supra note 84, at 902.
104 Penn Central, 438 U.S. at 124.
105 See supra notes 11–13 and accompanying text.
108 See Rose, supra note 84, at 908–09 (likelihood of exit from unpredictable municipality acts as a check on unreasonable municipal behavior because local governments wish to discourage developers from investing in other communities).
degree of participation in matters that will tend to affect the value of an owner's property.

While predictability involves confidence in both the property values associated with various levels of zoning restrictions, and the regulatory processes by which they are created and administered, fairness has to do with the preservation of those values, within certain limits. A regulation that is fair guarantees that individuals who have traded in reliance upon the market values represented by previous levels of restrictions on use will not suffer, according to Justice Brennan's formulation, too severe an interference with their distinct investment-backed expectations. In the alternative, if a regulation interferes with such investments to a degree that is excessive, fairness, not to mention the Constitution, demands that their value be compensated.

VI. CONCLUSION

It is apparent that the principles of predictability and fairness must be incorporated into any damage formulation that is devised to compensate regulatory takings. To the extent that a damage formulation for regulatory takings can inspire the confidence of aggrieved property owners, it must hold forth some assurance of providing an effective resort when there is failure in administrative process. Public confidence therefore will extend beyond the predictability of administrative processes that are merely well-ordered, to confidence in fair settlements when they are not.

The discussion of the duration of the compensation period and the measure of the compensable property interest in the preceding sections of this Article point the way toward a damage formulation that embodies the principles of fairness and predictability. In terms of predictability, the initiation of the compensation period with the filing of an owner's petition for review would provide municipalities with an opportunity to respond to owner complaints soon after regulations are put into effect. This would serve to consolidate municipal action in cases when more than one complaint has been received, and would assist in focusing municipal attention on problems that may not have been apparent before the regulation became effective.

Concerns with fairness, on the other hand, will depend to a greater extent on the measure of compensation for the injury an owner has

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109 Michelman, *supra* note 107, at 1172.
110 See *supra* note 15 and accompanying text.
111 U.S. Const. amend. V.
sustained. Basing this calculation on the value of the owner's proposed use, as well as the degree to which the invalid municipal restrictions deprived the owner of that value, would seem to yield an accurate measure of the owner's injury. Furthermore, such a calculation is fair to the owner in the additional sense that it provides municipalities with a disincentive to attempt future redistributions of value, because it makes municipalities fully liable for the invalid restrictions they impose. The more severely an invalid restriction diminishes the value of an owner's property, the greater would be the municipal liability.

Finally, a damage formulation that successfully compensates regulatory takings should favor neither the property owner nor the municipality. Compensation that fails to restore to the victim the value of property improperly restricted will fail to provide municipalities with a sufficient disincentive to prohibit regulation that is redistributive in effect. The result will be some measure of overregulation. Similarly, a damage formula that favors victims by compensating them beyond the measure of the harm they sustained, and which thus maximizes municipal liability, will result in overprecaution on the part of the regulating authorities, and some degree of underregulation. Concerns with fairness and predictability require cancelling the redistributive effects of regulatory takings. A damage formulation that simultaneously compensates victims for the economic harms they sustain, and that provides municipalities with an effective disincentive to prevent future redistributions, would successfully satisfy both of these concerns.