National Cooperative Highway Research Program

RESEARCH RESULTS DIGEST

DIGEST 165 - NOVEMBER 1987

Areas of Interest: 12 planning, 15 socioeconomics, 70 transportation law (01 highway transportation) **Price $6.00**

Legal Techniques For Reserving Right-of-Way For Future Projects Including Corridor Protection

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs" for which The Transportation Research Board is the Agency conducting the Research. The report was prepared by Annette B. Kolis and Daniel R. Mandelker. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Activities Division of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report presents a general outline of highway reservation laws, discusses the constitutionality of related legal techniques, and describes some of the associated NEPA (National Environmental Policy Act) problems.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979; a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981; and a third addendum, consisting of eight new papers, seven supplements, and an expandable

binder for Volume 4, was distributed early in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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INTRODUCTION[1]

Background

An important objective of the early city planning movement was the adoption of plans for public facilities such as streets. Because the drafters of early planning legislation recognized that streets take time to construct, they included authority in this legislation for the adoption of official maps by cities and counties. Although model official map legislation varied,[2] it generally conferred the authority to prohibit any new development in rights-of-way included in a mapped street. Its purpose was to implement planning for streets by preventing development that would complicate the acquisition of land for street purposes. Although the official map was an important component of early planning legislation, public agencies have not used it as much as the early drafters of this legislation expected.[3]

A number of states do not have highway reservation legislation.[4] Several states that do have legislation indicate it is not used frequently. A major reason given is doubt about the constitutionality of these laws. The concern is that laws reserving land for future street and highway acquisition are an unconstitutional taking of property because they do not compensate the landowner for the temporary prohibition on development they require.

Despite this concern, a number of states indicate considerable interest in highway reservation legislation.[5] This paper is intended to assist the states in administering and adopting highway reservation laws. It reviews the taking of property problems created by the temporary reservation of land without compensation for streets and highways and suggests guidelines for drafting highway reservation legislation.[6]

What a Highway Reservation Law Is

Local governments and state highway agencies typically designate highway corridors in which they plan the construction of future highways. They have a number of techniques available if they want to prohibit development in a proposed highway corridor. One is the denial of rezonings, variances or special uses or building permits for development proposed in a highway corridor. Another is to rezone land in the corridor for a restrictive use, such as low density residential development. This technique may effectively prevent all development and will keep down the value of the property prior to its acquisition.

These are informal techniques for the reservation of land for streets and highways and, as this paper will show, they present taking of property problems. State and local governments may also reserve land for future acquisition for streets and highways under highway reservation laws.

One type of highway reservation law that local governments can use is the zoning setback. A setback is a requirement that buildings be set back a designated distance from a street. A local government can use a setback to reserve land for future street acquisition by increasing the setback distance to include land needed for a street widening.

Another type of highway reservation law a local government can use is the subdivision control ordinance. This ordinance controls the approval of new subdivisions for residential development. Some subdivision control legislation and ordinances authorize local governments to reserve land in a subdivision for acquisition later for a highway.

The most common highway reservation law authorizes official maps. The nature and purpose of an official map were described earlier. More recently, state legislation has conferred similar reservation authority on state highway agencies. This type of legislation is also considered a highway reservation law in this paper.

THE TAKING OF PROPERTY PROBLEM IN HIGHWAY RESERVATION LAWS

The taking of property problem raised by highway reservation laws springs from provisions in the federal and in state constitutions. The fifth amendment to the Constitution of the United States, applicable to the federal government, provides:

> No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[7]

Most state constitutions have taking of property clauses similar to the taking of property clause in the federal constitution, except that some state constitutions require the payment of compensation for the "damaging" as well as the "taking" of property. The addition of the prohibition on "damaging" property has not made a difference in the case law.

Highway reservation laws are subject to challenge under the federal taking clause because the fourteenth amendment to the federal constitution made the fifth amendment applicable to the states. The fourteenth amendment provides in part:

> Section 1 . . . No State shall make or enforce any law which shall abridge

> the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[8]

The U.S. Supreme Court interpreted the fourteenth amendment in early cases to mean that the fifth amendment, as applied through the fourteenth amendment, requires the states to pay compensation when a state takes land for public purposes.[9]

A taking clearly occurs when a state uses its power of eminent domain to acquire a land for a highway.[10] In this situation a *de jure* taking has occurred and compensation must be paid. States and municipalities may also use their police powers to regulate the use of land, either under state enabling acts granting this power or constitutional home rule clauses. A regulation of land use may be a *de facto* taking of property if, as Justice Holmes stated, it goes too far.[11] A land use regulation such as a highway reservation law that absolutely prohibits the development of land may be a *de facto* taking because it goes "too far."

Highway reservation laws present a difficult *de facto* taking problem. They regulate land use based on the police power, but they also implement the eminent domain power by prohibiting development in a reserved right-of-way until a government entity decides to acquire the reserved land. For this reason, a highway reservation law could be held to be a *de facto* taking of property that violates the taking of property clause.

The governmental purposes advanced by highway reservation laws are especially important under the taking of property clause under recent U.S. Supreme Court decisions discussed in the following section. These cases hold that land use regulations must "substantially" advance legitimate governmental purposes. Because highway reservation laws implement government planning for highways, a court could hold that they substantially advance a legitimate governmental purpose. Highway reservation laws also hold down the cost of land for acquisition for highway purposes. A court could hold that this governmental purpose is not legitimate.

The usual remedy for a land use regulation that is a taking of property is invalidation of the regulation. A government entity can also be required to pay compensation for an invalid regulation. The reservation of land under a highway reservation law could require the payment of compensation because the law prohibits all use of the land for a temporary period of time. Landowners can compel the payment of compensation through an action known as "inverse condemnation.[12]

The late land use lawyer, Marlin Smith, identified six categories of governmental actions affecting land use that may constitute a *de facto* taking.[13] Some of these categories, such as a physical invasion of land[14] or a permanent taking of some economic use,[15] do not apply to highway reservation laws.

Highway reservation laws can fall in taking categories identified by Marlin Smith in which the courts usually find that a taking has occurred. These categories include the acquisitory intent category in which "[t]he governmental body has acquisition on its mind and has said so, *and* has engaged in other conduct designed to or having the effect of depreciating the value of the land so that if an acquisition does take place it will be at something close to distress prices."[16] The courts also find a taking in cases in which a municipality abandons acquisition and substitutes severely restrictive zoning regulations.[17]

The courts do not find a taking in two of Marlin Smith's categories that may also apply to highway reservation laws. These categories include cases in which the government entity designates land for possible future acquisition but does not engage in oppressive acquisitory conduct.[18] They also include cases in which a government entity adopts a moratorium or similar ordinance that temporarily prohibits all development.[19]

A highway reservation law does not fit easily into any of these categories. It enacts a temporary but severe restriction on the use of land. A court could hold that the reservation of land under such a law is evidence of an acquisitory intent. A court could also characterize a reservation of land under such a law as a mere designation of land for a future taking. The next section considers the taking doctrines that apply to these taking categories in more detail and indicates how they might apply to highway reservation laws.

Another important distinction in taking law affects the constitutionality of highway reservation laws. Courts that consider taking objections to regulatory ordinances distinguish between facial takings and takings "as applied."[20] A law is facially unconstitutional if a court can determine its constitutionality from its terms. A law is unconstitutional "as applied" if the court cannot determine its constitutionality simply by reading its terms but must consider the manner in which it has been administered.

As applied to highway reservation laws, this distinction means that the law is facially unconstitutional as a taking of property if a court determines that the temporary restriction on development imposed by the law is a taking no matter how it is applied. A highway reservation law is a taking property "as applied" if the court finds a taking based on the way in which the law is administered. A court might find that a highway reservation law is a taking of property as applied if all of the property of a landowner is restricted by an official map adopted under the law. A court might find that a highway reservation law is not a taking as applied if only a small part of the property is restricted by an official map adopted under the law. A court might not find an as-applied taking in this case because the landowner may still make a reasonably beneficial use of most of his property.

The distinction between facial and as-applied takings is important. Federal courts will not consider as-applied taking claims until the landowner has utilized all available state and local remedies to secure permission to develop or to obtain compensation. This rule is especially applicable to highway reservation laws. Under some highway reservation laws a landowner may secure permission to develop by obtaining a variance. Other highway reservation laws require the government entity to acquire the land and pay compensation after a designated period of time. Landowners must use these remedies before bringing an as applied taking

claim against highway reservation law in federal court. The following section considers this requirement in more detail.

As also indicated in that section taking law in federal and state courts is far from settled. The U.S. Supreme Court has not developed a "set formula" that determines when a taking has occurred,[21] and state court taking law is also conflicting.[22] Justice Holmes' landmark opinion in *Pennsylvania Coal Co. v. Mahon*[23] best expressed the delicate balance the taking clause must strike when deciding whether government regulation is a taking of property:

> 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. But obviously the implied limitation must have its limits, or the contract and due process clause are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.[24]

A GENERAL OUTLINE OF TAKING LAW

A landowner who wishes to challenge a highway reservation law as an unconstitutional taking of property can bring an action in the state or federal courts. Until recently, most actions claiming a highway reservation law was a taking were brought in the state courts. An action may now be brought under § 1983 of the Federal Civil Rights Act of 1871 against states and municipalities claiming a violation of the taking clause in the federal constitution.[25] For this reason, an understanding of taking doctrine as it applies to highway reservation laws requires an understanding of both federal and state taking law.

This section first discusses the general outlines of federal taking law as developed in the U.S. Supreme Court. It then discusses the taking law principles the state courts have adopted. Also discussed here is taking law applicable to a variety of taking problems, such as zoning to depress property values, that provides additional guidelines for determining whether highway reservation laws are a taking of property.

Taking Law in The U.S. Supreme Court

The Supreme Court's taking law provides the basis for reviewing the constitutionality of highway reservation laws under the taking clause in the federal constitution but is difficult to apply to highway reservation laws for a number of reasons. One is that the Supreme Court has never decided a case claiming that a highway reservation law was a taking of property. Neither has the Supreme Court decided a case claiming that a land use regulation similar to a highway reservation law, such as zoning to depress property values, was a taking. Supreme Court doctrine still provides the starting point for analyzing the constitutionality of highway reservation laws under the taking clause of the federal constitution.

What Constitutes a Taking: Early Supreme Court Cases

The seminal Supreme Court taking law case is *Pennsylvania Coal Co. v. Mahon*,[26] an opinion written by Justice Holmes. Although the Supreme Court has substantially qualified this decision,[27] it still provides the starting point for an analysis of Supreme Court taking law. In *Pennsylvania Coal* the Court held unconstitutional a statute that prohibited the mining of coal that might cause a dwelling unit to subside. This statute effectively destroyed property and contract rights of the coal company, which had conveyed surface property while retaining the right to mine the underlying coal.

Justice Holmes adopted a number of taking law principles that the Court still applies in taking cases. He first considered the impact of the statute on the value of the property held by the plaintiff. He held that a taking occurs when the extent of the diminution in property value reaches "a certain magnitude,"[28] but did not further indicate when a diminution in property value would be a taking. The effect of a land use regulation on the value of the regulated property is one important factor the courts consider in cases considering the constitutionality of highway reservation laws under the taking clause.

Justice Holmes also applied what has been called a "balancing test" to the taking claim. He noted that the case involved only a single private house, that damage to a single house was not a public nuisance, and that the extent of the taking was great. The inference is that a taking claim is decided by balancing the purposes of a land use regulation against the extent to which it affects the value of the regulated property. Recent Supreme Court cases have resurrected the balancing test as a basis for determining whether a land use regulation is a taking of property.

Justice Holmes then considered the "general validity" of the statute. He held that the statute made the mining of coal commercially impracticable and that the statute had appropriated or destroyed the coal. He distinguished a statute the Court had held constitutional that required a pillar of coal to be left on an adjoining property line to secure public safety. This statute was held constitutional, Justice Holmes said, because it secured "an average reciprocity of advantage."[29] The inference is that a burden placed on a coal company by the pillar of coal requirement was offset by the benefit it received from pillars of coal left in place by adjoining mines. The Supreme Court has recently applied the balancing test as a basis for determining whether a land use regulation is a taking of property.

Four years after *Pennsylvania Coal* the Court upheld the constitutionality of a comprehensive zoning ordinance in *Village of Euclid v. Ambler Realty Co.*[30] The landowner in *Euclid* claimed that a restriction in the ordinance prohibiting the industrial development of his property was a taking but did not pursue this claim in the Supreme Court. The Court dismissed equal protection and substantive due process objections to the ordinance, and held that a land use regulation would be consti-

tutional unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[31] This holding established the rule of judicial deference to legislative judgment in land use regulation.[32]

What Constitutes a Taking: Later Supreme Court Cases

The Court did not seriously attempt to reformulate its taking doctrine until it decided the 1978 case of *Penn Central Transportation Co. v. City of New York.*[33] The owner of Grand Central Terminal claimed that the application of New York City's Landmarks Preservation Law to the Terminal was a taking of property. The city's Landmarks Preservation Commission denied permission to construct a multi-story office building over the Terminal because it found that the building would destroy the Terminal's historic and aesthetic features.[34]

Justice Brennan, writing for the majority in *Penn Central,* held that the Landmarks Preservation Law and the denial of permission to construct the high-rise office building were not a taking. He provided a summary of the "taking factors" the Court applies in taking cases. After noting that the Court decides taking cases on an ad hoc basis, Justice Brennan held that

> the Court's decisions have identified 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 public good.[35]

The holding that a court must consider an owner's "investment-backed expectations" in taking cases adds a new factor to the Supreme Court's taking law.[36] Justice Brennan used *Pennsylvania Coal* to illustrate the investment-backed expectations taking factor. He read that decision as holding that a taking occurred because the statute made it commercially impracticable to mine the coal and so "had nearly the same effect as the complete destruction of the property rights" the coal company reserved.[37]

Justice Brennan did not extend the protection of the investment-backed expectations taking factor to divisible property interests unprotected by a legal reservation:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.[38]

This holding answered a claim by the owners of Grand Central Terminal that the taking clause protected their property rights in the airspace over the Terminal. It established the rule that a taking does not occur just because a regulation prohibits the use of one of the property rights in the bundle of property rights a landowner has. A taking does not occur if the landowner still has property rights he can put to a reasonable use.[39]

Several other holdings in *Penn Central* also are relevant to the constitutionality of highway reservation laws under the taking clause. The Court reaffirmed the rule that diminution in value alone does not constitute a "taking."[40] It rejected an argument by the Terminal owners that the Preservation Law was "inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws and historic-district legislation."[41] This appears to be an argument that the Law did not satisfy the "average reciprocity of advantage" rule. The Court held that a taking does not occur simply because a law has "a more severe impact on some landowners than on others."[42] The court also held that the Law did provide benefits to the landmark owner because the law benefited all New York citizens, both economically and by improving the quality of life in the city.

Finally, the Court rejected an argument that the Preservation Law was an instance in which government, acting in an "enterprise capacity," had appropriated part of the Terminal property for a "strictly governmental purpose."[43] The Court held that the Preservation Law

> has in nowise impaired the present use of the Terminal, ... [and] neither exploits appellant's parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city.[44]

This holding contains the implication that a law like a highway reservation law, which does implement a government's entrepreneurial purposes, may be a taking.[45]

The Court considered a land use regulation raising an acquisitory intent problem in *Agins v. City of Tiburon.*[46] The city adopted a low density open space ordinance, began proceedings to acquire the plaintiff's land shortly after the ordinance was adopted, and then abandoned these proceedings the following year. The Court rejected a facial attack on the ordinance. It held that an as-applied attack was not ripe for decision because the property owners had not filed a development plan required by the ordinance to obtain a determination of the density the city would allow.

The facts raised an acquisitory intent problem, but the Court accepted the state supreme court's holding that a taking does not occur if good faith planning does not result in the completion of eminent domain proceedings:

> Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."[47]

The Court added that the plaintiffs were free to sell their land when the eminent domain proceedings were abandoned.

This holding provides some support for the constitutionality of highway reservation laws. A court could hold that any changes in the value of land imposed by development prohibitions under these laws were

"fluctuations in value during the process of governmental decisionmaking." But the Court limited this holding in a recent case, *First English Evangelical Lutheran Church v. County of Los Angeles.*[48] It held that *Agins* and a similar case

> merely stand for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and that depreciation in the value of the property by reason of preliminary activity is not chargeable to the government.[49]

Agins also applied a balancing test to taking claims:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land, . . . [T]he question necessarily requires a weighing of private and public interests.[50]

Most recently, in *Keystone Bituminous Coal Ass'n v. DeBenedictus,*[51] the Supreme Court upheld a statute similar to the statute held unconstitutional in *Pennsylvania Coal* and restated its taking rules in a manner favorable to the constitutionality of governmental regulation. The Court in *Keystone* distinguished the *Pennsylvania Coal* decision and held that a new statute prohibiting mining that caused subsidence implemented public purposes not present in the earlier statute.

Plaintiffs brought a facial attack on the statute in *Keystone.*[52] This posture of the case is important because, as the next section indicates, the Supreme Court has instructed lower federal courts not to consider as-applied taking challenges to land use regulation until they have used all state and local remedies that are available. Justice Stevens, who wrote the majority opinion, relied heavily on the facial nature of the taking challenge in dismissing the taking claim. He noted that plaintiffs "face an uphill battle in making a facial attack on the Act as a taking."[53] This holding indicates that the Supreme Court may also be unwilling to hold a highway reservation law unconstitutional if it is facially attacked as a taking of property.

Justice Stevens based his decision in *Keystone* on the two-part balancing test adopted in *Agins.* He held that the statute prohibiting subsidence protected important public interests in health and the environment and in the fiscal integrity of the area. He concluded that "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred."[54] Justice Stevens held that the statute prevented a public nuisance, and that regulations prohibiting public nuisances are consistent with the reciprocity of advantage rule adopted by Justice Holmes in *Pennsylvania Coal:*

> While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . These restrictions are "properly treated as part of the burden of common citizenship." [citation omitted] Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," . . .[55]

Justice Stevens concluded that the statute does not impose an unconstitutional diminution of value or interfere with plaintiffs' investment-backed expectations. He noted that the plaintiffs claimed that the statute denied them the economically viable use of narrow segments of their property because it prohibited them from mining some of their coal and destroyed the "support estate" in land above the coal.

Justice Stevens rejected this claim by relying on the holding in *Penn Central* that the taking clause does not divide single parcels of land into discrete segments. The statute prevented the mining of only 2 percent of the plaintiffs' coal. The burden on the support estate was not a taking because the plaintiffs retained the right to mine virtually all of their coal. This holding supports the constitutionality of highway reservations that allow a landowner a reasonable use of the land that is not covered by the reservation.

Nollan v. California Coastal Commission,[56] a case decided soon after *Keystone,* provides additional guidance on the legitimate governmental purposes that are required to uphold the constitutionality of land use regulation under the taking clause. In *Nollan* the Court held that a permit condition for a single beach front house that required the dedication of a public easement to cross the beach was a taking of property. The property owner was not compensated for the easement. The Court found a taking because it held that the Commission did not have legitimate reasons related to the protection of the coast that justified the easement requirement.

The *Nollan* case reaffirmed the two-part test for the taking clause adopted in *Keystone* but qualified the first part of the test that requires a legitimate governmental interest for land use regulations. In an important footnote the Court stated that a regulation must "substantially" advance a legitimate governmental interest. The Court added that it is not enough that the government entity "could rationally have decided" that the regulation might achieve a governmental objective.[57]

This footnote means that a court can no longer apply the "reasonably debatable" rule when it decides whether a land use regulation advances a legitimate governmental interest. More careful judicial scrutiny is required, although the Court in *Nollan* did not indicate how rigorous a court must be when it reviews this question.

Nollan could apply to a highway reservation under a highway reservation law. The easement required in *Nollan* effectively prohibited the development of the property without compensation. A reservation of land under a highway reservation law prohibits the development of the reserved land without compensation. The only difference is that the easement required in *Nollan* was permanent while a highway reservation is temporary.

Nollan may allow courts to question the purposes of a highway reservation more closely if it is challenged under the taking clause. A court could hold that a highway reservation "substantially" advanced a legitimate governmental interest if it decided it was an appropriate measure for implementing highway planning. A court could reach a contrary conclusion if it found that the reservation, to use the language from *Penn Central* quoted earlier, facilitated the "entrepreneurial opera-

tions" of the highway agency. A court could reach this conclusion if it found that the only purpose of the reservation was to hold down the cost of acquiring the reserved land.

The Ripeness Rule

The ripeness rule is a limitation the Supreme Court has recently applied to cases in which a landowner claims that a land use regulation is a taking as applied to his property. A landowner could claim, for example, that a highway reservation law was an as-applied taking of his property if a reservation of land under the law prohibited development on all but a small part of his property. As the discussion of the Supreme Court ripeness cases will show, an as-applied taking claim against a highway reservation law is not likely to succeed if the law has a variance provision unless the landowner has applied for and has been denied a variance. Many highway reservation laws contain variance provisions. The ripeness cases do not prevent a landowner from making a facial taking claim against highway reservation law.

The ripeness rule derives from the case or controversy requirement of the United States Constitution[58] and a federal statute which permits review only of "final judgments or decrees rendered by the highest court of a state in which a decision could be had."[59] The purpose of the rule is to prevent federal courts from considering friendly or collusive suits and from rendering advisory opinions.[60] The ripeness rule is distinct from two similar doctrines often relied upon by reviewing courts in land use cases to decline jurisdiction: (1) exhaustion of administrative remedies;[61] and (2) abstention when significant state law questions exist that state courts should decide.[62]

Many of the Supreme Court's most recent land use decisions were decided on the ripeness issue. In *Agins*, for example, the Court held the suit not ripe because the plaintiff filed suit prior to submitting a development proposal to the city council as required by the ordinance.[63] In *Williamson County Regional Plan Comm'n v. Hamilton Bank*,[64] the Court remanded an award of compensation to a land developer whose subdivision was not approved by the Commission because he did not apply for variances authorized by the subdivision ordinance. Neither had he applied to the state courts for just compensation[65] for what he claimed was an inverse condemnation:

> Because respondent has not yet obtained final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.[66]

The ripeness rules adopted by the *Williamson* decision mean that before bringing an as-applied taking claim in federal court a plaintiff must obtain a final decision from the original decision-maker. This is the government entity charged with applying the regulation, such as the planning commission in that case. The plaintiff need not obtain appellate review of the original decision.[67] The plaintiff must also obtain a final decision from the agency charged with granting variances.[68] The plaintiff must also utilize state procedures, if "reasonable and adequate," to obtain just compensation, for "no constitutional violation occurs until just compensation has been denied."[69]

The Court closed its decision by stating the reason for the ripeness rule:

> [R]esolution of ... [the taking] question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.[70]

The Court again applied the ripeness rule to dismiss a taking claim in *MacDonald, Sommer & Frates v. Yolo County*.[71] The county denied approval of a subdivision plan for a number of reasons, including inconsistency with its comprehensive plan and the inadequacy of necessary services. Citing *Williamson* the Court stated:

> Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectations interests ha[ve] been destroyed."[72]

The Court added in a concluding footnote that "[r]ejection of exceedingly grandiose plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[73]

The lower federal courts have applied the Supreme Court's ripeness doctrine in a number of cases raising as-applied taking claims.[74] One court dismissed a taking claim filed against a reservation of land for a highway in Puerto Rico.[75] It held that the Puerto Rico Supreme Court had strongly indicated it was prepared to recognize an inverse condemnation remedy for regulatory takings, and that the plaintiff had not pursued this remedy in a local court.

What burdens does the ripeness rule impose on plaintiffs who wish to file taking cases in federal court? One commentator has analyzed the impact of the *MacDonald* and *Williamson* doctrines as follows:

> If the owner seeks initial zoning for his property or to rezone it to a more intensive use, ... [he] faces a nearly insurmountable burden to show that the requested designation is the only economically feasible use for the property. If the property is already zoned, he would be required to show that every permitted or conditionally permitted use in the district could not yield a reasonable return on investment.
>
> The same logic applies to conditional use applications .... To the extent that the municipal decision makers retain discretion to attach conditions to particular uses, a landowner should not be permitted to claim a taking for the denial or an application to establish such use without further efforts to obtain development approval under existing regulations. Similarly, a landowner is not automatically entitled to develop property to the most intensive use permitted in a zoning district or under a comprehensive plan designation.[76]

A narrow exception may apply to the requirement that the landowner seek all possible permits for all feasible development is the futility exception.[77] As the Court suggested in *MacDonald,* a landowner may avoid "further regulatory proceedings [which] would be fruitless" and "fil[ing] further 'useless' applications to state a taking claim."[78] The burden of showing futility is likely to be exceptionally difficult. It may require not only denial of all economically feasible development but also a showing of legislative or administrative intent to disapprove all future applications. Because the ripeness rule limits access to federal courts to make as-applied taking claims, and because facial taking claims are difficult to establish as *Keystone* indicates, opportunities to successfully challenge highway reservation laws in federal courts are limited.

Is Compensation Required for a Taking?

When a court holds that a land use regulation is a taking the usual judicial relief is invalidation of the law or ordinance.[79] An influential dissenting opinion by Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego,*[80] argued that a court should award compensation for a temporary taking when it declared a land use regulation unconstitutional under the taking clause.

Plaintiffs in *San Diego* purchased their property expecting to build a nuclear power plant. Following plaintiff's purchase of the property the city rezoned it reducing the acreage for industrial use and proposed that part of the property be preserved open space. An eminent domain proceeding to acquire this parkland was finally abandoned due to the failure of a bond issue necessary to acquire it.[81] Plaintiffs did not make a development proposal prior to filing suit against the city, but the city was aware of plaintiff's possible intention. Plaintiffs sought damages for inverse condemnation, mandamus and declaratory relief.[82]

The majority in *San Diego* held quite simply that it lacked jurisdiction in the case under a federal statute that only permits review of "final judgments or decrees" of a state court.[83] The Court so held because although the state Court of Appeals held that monetary damages were inappropriate for such a claim, it had not decided whether another remedy was available because it had not decided whether a taking had in fact occurred.[84]

Justice Brennan, dissenting, disagreed that no final judgment had been rendered by the state court[85] and proceeded to the merits of plaintiff's claim. The dissent posed the issues as follows:

> [1] "[W]hether a government entity must pay just compensation when a police power regulation has effected a "taking" of "private property" for "public use" within the meaning of . . . [the taking clause]. Implicit in this question is the corollary issue [2] whether a government entity's exercise of its regulatory police power can ever effect a "taking" within the meaning of the Just Compensation Clause.[86]

The dissent answered the first issue in the affirmative and held that a "taking" occurs without the government conducting a formal condemnation proceeding or transfer of title. The dissent refused to hide behind formal declarations of governmental purpose, when the effect of a governmental action is complete deprivation of a property owner's beneficial or economic use of his property.

> It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.[87]

The remedy for such a taking is not merely invalidation of the offending ordinance for this would "hardly compensate" the owner for his loss.[88] Instead, Justice Brennan proposed a new constitutional rule for remedies in land use taking cases.

> [O]nce a court finds that a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[89]

What is the consequence of such a rule? As the California Supreme Court noted in *Agins v. City of Tiburon,*[90] requiring government to pay damages for temporary takings would inhibit the freedom necessary for the land use planning function.[91] This inhibition, according to the dissent in *San Diego,* is irrelevant when express constitutional guarantees are denied: "After all, if a policeman must know the Constitution, then why not a planner?"[92]

Although the critical reaction to Brennan's dissent was divided,[93] several state and lower federal courts adopted his position.[94] The Supreme Court has now held in *First Evangelical Lutheran Church v. County of Los Angeles,*[95] that compensation is payable when a court holds that a land use regulation is a taking. The Court did not decide whether the floodplain development moratorium challenged in the case was a taking but remanded this issue to the state court.

On the compensation issue Justice Rehnquist, who wrote the majority opinion, held:

> [The taking clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This . . . [clause] is designed not to limit the governmental interference with property rights *per se,* but is rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.[96]

Justice Rehnquist added that compensation would be payable for the "temporary taking" that occurred while the invalidated ordinance was in effect:

> We merely hold that where the government's activities have already worked a taking of all use of the 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.[97]

Justice Rehnquist did not adopt Justice Brennan's specification in *San Diego* of the time period during which the temporary taking would run,

although he indicated that invalidation of the ordinance would be enough to trigger the compensation remedy.

Justice Rehnquist limited his holding that compensation is payable for temporary takings by land use regulation "to the facts presented" and specifically noted that the complaint alleged that the ordinance denied the plaintiff "all use" of his property. He added that the decision did not

> deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.[98]

A highway reservation could trigger the payment of compensation under *First English*.[99] A highway reservation temporarily prohibits the development of the reserved land until it is acquired for highway purposes. Compensation would be payable in federal court under *First English* if a court held that a highway reservation is a temporary taking of property.[100]

Conclusion

This, then, is the state of federal taking law. At what point governmental regulation goes so far that it is a taking remains unclear. The recent Supreme Court cases provide more clarity in taking doctrine. They also shift taking analysis by applying the two-part balancing test for takings that emphasizes the purpose of the governmental regulation and by resurrecting the average reciprocity of advantage test. These taking rules could support the constitutionality of highway reservation laws. A court could hold that the purpose of these laws is legitimate and that the benefits they confer on the landowner as a citizen of the general public offset the burdens they impose.

Problems still remain under Supreme Court taking doctrine. The Court since *Pennsylvania Coal* has emphasized the impact of a land use regulation on the value of the restricted property. The two-part balancing test adopted in *Keystone* makes the diminution in value suffered by the landowner the second part of the test. *Keystone* did not find an unconstitutional diminution in value because it held that the impact of the law on the coal owned by the coal mine operators was minimal. Because highway reservation laws prohibit any use of the property covered by the highway reservation, the diminution in value problem raised by these laws is more serious.

A court could still hold that a development prohibition imposed by a highway reservation law is not a taking by relying on the rule adopted in *Penn Central* and confirmed in *Keystone*. This rule requires a court to decide the diminution in value question by examining the impact of the regulation on the entire tract covered by the regulation, not just that part affected. If a development prohibition imposed under a highway reservation laws covers only part of the landowner's property and if he can make a reasonable use of his land on the part not covered, a court applying this rule could hold that the prohibition is not a taking.

Taking Law in the State Courts

All state constitutions but three expressly prohibit the governmental taking of property for public use without just compensation. Even in those states without such a constitutional provision the courts hold that governmental takings require just compensation.[101] Neither do state constitutions have a "case and controversy" clause that could form the basis for a ripeness rule that would allow state courts to decline jurisdiction of taking suits.[102]

State courts have developed a substantial body of taking law that is applicable to land use regulations. Most of the state court land use taking cases reviewed the constitutionality of land use regulations as applied, although the state courts have also decided a number of facial land use taking cases.

The state courts vary considerably in the extent to which they apply taking law to invalidate land use regulations.[103] California is an example of a state that traditionally has upheld highly restrictive land use controls even when no beneficial economic use of the land remains.[104] At the opposite extreme are the Illinois courts, where judicial review is "alive, well, and living" and where the courts are "roving commission[s] to overturn local land use decisions that they simply think are wrong."[105] Recent cases in New Hampshire have fluctuated in their application of the taking clause to land use regulation.[106] Like the U.S. Supreme Court in the *Keystone* case, some state courts also apply a balancing test in which they balance the public purposes of the regulation against the loss it imposes on the property owner.[107]

In most state land use taking cases the question is whether restrictions on the private development of land imposed by a land use regulation are so severe that they are a taking of property. In these cases the state courts focus on the economic loss the regulation places on the property owner. Some state courts will find a taking if the regulation substantially diminishes the value of the property, while other state courts will find a taking only if the regulation allows no reasonable use of the land.[108] In cases of this type a state court will usually defer to the legislative judgment of the government entity and apply a presumption of constitutionality.[109]

Cases of this type are not very helpful as a basis for determining whether highway reservation laws are a taking of property. These laws prohibit any development of land within a mapped street or highway, usually for a limited period of time. The question is whether a total restriction on development for a limited period of time is a taking. The answer to this question is additionally complicated because a public agency will eventually acquire the land restricted from development within a mapped street for highway purposes. These laws thus raise the question whether the use of land regulation powers to assist the land acquisition function is a taking of property.

Taking Doctrines Applicable to Highway Reservation Laws

Both the state and lower federal courts have adopted a number of

taking doctrines that are applicable in determining whether highway reservation laws are a taking of property. These cases fall in several categories. They can be arranged on a taking spectrum, beginning with a category in which courts do not find a taking and ending with a category in which the courts hold that a taking has occurred.

1. *Mere Planning*—At the beginning of the taking spectrum the courts usually hold that the mere designation of land in a comprehensive plan for future public acquisition is not a taking.[110] This doctrine supports the constitutionality of highway reservation laws, which apply restrictions on development on mapped streets to implement planning for streets and highways. The problem is that a highway reservation law is more than "mere planning" because it also restricts the development of land.

2. *Moratoria*—A moratorium is a temporary restriction on the use and development of property, usually imposed through the zoning ordinance. Municipalities adopt moratoria to provide time to revise their comprehensive plan or zoning ordinance.[111] They also adopt moratoria to prohibit development because public facilities are inadequate. Courts have upheld moratoria adopted for either of these reasons.[112]

3. *Land Use Regulation that Confers a Benefit on a Government Entity*—As the U.S. Supreme Court's *Keystone* case indicates, courts hold that a land use regulation that prevents a harm is not a taking. Some state courts apply the corollary of this rule and hold that a land use regulation that confers a benefit on the general public but does not prevent a harm is a taking.[113] An example is a case in which a municipality prohibited all reasonable development of a tract of privately owned land in order to convert it to public use.[114]

Although state courts have applied the benefit theory to hold that a land use regulation was a taking,[115] some state cases have not applied it,[116] and this theory is discredited in the U.S. Supreme Court.[117] Some state courts might still decide that a highway reservation law is a taking because it temporarily prohibits the development of land to confer the public benefit of reserving the land for future highway use.

4. *Land Use Regulation That Assists the Power of Eminent Domain*—At the end of the taking spectrum, courts find a taking when land use regulation assists the governmental land acquisition powers. One example is the use of zoning to depress property values prior the acquisition of the property. Another example is an exception to the rule that mere planning for a public facility is not a taking. The courts find a taking if planning is associated with other oppressive precondemnation activities, such as an excessive delay in the filing of a condemnation action.

The prohibition on development pending condemnation contained in highway reservation laws is planning if it is based on a highway designation contained in a plan, but it also holds down the cost of acquiring the restricted property. For this reason, a court could hold that these laws are a taking of property because they restrict the development of land to confer a benefit on a government entity or because they improperly assist the exercise of the power of eminent domain.

The rest of this section examines these taking doctrines in more detail. Courts are likely to rely on the these taking doctrines when they review the constitutionality of highway reservation laws.

Planning and Other Precondemnation Actions

The well-established rule is that planning for a highway, such as the designation of a highway on a highway agency or local comprehensive plan,[118] is not a taking.[119] There are occasional exceptions to this rule. One court invalidated an amendment to a comprehensive plan that designated a pending area as a temporary storage basin for use in a flood protection project. The court held that the designation transferred "rights in property" that should have been acquired by purchase or eminent domain.[120]

City of Walnut Creek v. Leadership Housing Systems, Inc.,[121] illustrates the cases holding that "mere planning" for a public facility is not a taking. A property owner took an option on land designated as open space in the city's plan knowing that a bond issue election was contemplated to provide funds for the purchase of the land. The bond issue passed and the city filed an action to condemn the land and refused to grant a permit to develop the land. The court did not find a taking, noting that "[t]he right of a governmental body to plan for the acquisition of property is unquestioned."[122]

Another court did not find a taking when the government entity refused to approve plans for development on property designated for acquisition for a highway.[123] The court distinguished cases in which a taking was found when land was placed on an official map or subjected to highly restrictive zoning.[124] It held that the landowner could not establish a taking simply by showing that the mere design of a highway frustrated the sale of the property at profitable prices when buyers learned that part of the land might be taken for highway purposes.[125]

A leading Pennsylvania case[126] held that the mere filing of plans for a highway under an official map law was not a taking. In this case the state highway department notified affected landowners that "the Commonwealth has signified its intention to construct [a] highway at some future time, probably within five (5) years," but that the notice was not a condemnation.

The state highway department acted under an official map law that prohibited any building or improvements within an area designated for highway acquisition and that denied compensation for any building or improvements when the land was acquired. The court noted that the landowners could make any use of their property subject only to the provision denying compensation for buildings or improvements. It added that the provision denying compensation for improvements was unconstitutional. The court thus concluded that the highway department "accomplished nothing" by filing the notice and that plaintiffs "were in no way deprived of the use or enjoyment of their property."[127]

If the government entity engages in oppressive precondemnation activity that unreasonably affects the use of land, a court may find a taking as an exception to the rule that planning activities alone are not a taking.[128] Unreasonable delay in acquiring land following its designation

or an announcement that a taking will occur is an important factor in these cases. In *Howell Plaza, Inc., v. State Highway Commission*[129] the court stated that a taking would occur if the Commission's announcement of its plans to acquire a highway, in conjunction with long delays in completing acquisition, resulted in the deprivation of practically or substantially all reasonable use of the property.[130] The court held, however, that the plaintiffs had not stated the cause of action under this rule.[131]

The California court has summarized the rules that apply to determine when precondemnation activities associated with planning are a taking:

> To allow recovery in every instance in which a public authority announces its intention to condemn some unspecified portion of a larger area in which an individual's land is located would be to severely hamper long range planning by such authorities. . . . On the other hand, it would be manifestly unfair and violate the constitutional requirement of just compensation to allow a condemning agency to depress land values in a general geographical area prior to making its decision to take a particular parcel located in that area. . . . The length of time between the original announcement and the date of actual condemnation may be a relevant factor in determining whether recovery should be allowed for blight or for other oppressive acts by the public authority designed to depress market value. . . .[132]

The Pennsylvania courts have found a taking because of oppressive precondemnation activities in a number of cases.[133] In a leading case,[134] the Supreme Court found a taking of industrial buildings located at the end of a bridge to which the state planned to build connecting ramps from a proposed highway. The court held that the location of the ramps had become so fixed that condemnation of the property was inevitable and that publicity over an extended period about the imminence of condemnation had caused a loss of tenants so that the property no longer generated enough income to cover taxes and operating expenses.[135]

Whether precondemnation activities are sufficient to amount to a taking is decided by the courts on a case-by-case basis. Some courts are more lenient than others.[136] In one case,[137] for example, the court found no taking when a city held a public hearing on the acquisition of the property, placed a proposition on the ballot concerning the acquisition of the property, and refused to upzone the property to a more intensive use.

Arnold v. Prince George's County[138] indicates that the exhaustion of remedies rule[139] can bar a claim that the designation of a highway on a plan is a taking. The court held that a landowner could not attack a designation of a highway in a comprehensive plan as a taking because it had not applied for a variance as authorized by a local ordinance. The exhaustion of remedies rule applies to highway reservation laws that contain variance provisions.

The precondemnation activity cases establish the proposition that planning or other designations of land for acquisition as a highway may be a taking if there is unreasonable delay in acquisition or if there are other oppressive precondemnation activities. One common precondemnation oppressive activity is the zoning of land to depress its value prior to its acquisition by a government entity.

Zoning to Depress Property Values in Advance of Acquisition

The courts universally hold that zoning to depress the value of land in advance of its acquisition is unconstitutional.[140] As one court stated, "government . . . [should] be discouraged from giving itself, under the guise of governing, an economic advantage over those whom it is pretending to govern."[141] The California Supreme Court stated the general rule:

> [B]efore a de facto taking results there must be a 'physical invasion or direct legal restraint.' . . . One example of a 'legal restraint' discussed in several California cases has been a particularly harsh zoning regulation, often calculatingly designed to decrease any future condemnation award.[142]

The reservation of land under a highway reservation law may depress its value indirectly in advance of condemnation. The value of land reflects in part the value of any development on it, so by prohibiting any development during the reservation period a highway reservation indirectly depresses the value of the reserved land.

Courts have held in a number of cases that zoning to depress the value of land in advance of condemnation in conjunction with other precondemnation activities was a taking. In a California intermediate appellate court case, *Peacock v. County of Sacramento,*[143] the county decided that a landowner's property would be acquired as an approach zone for an airport, adopted restrictive height and agricultural zoning regulations for it and a land use plan that designated it as an airport.[144] The county did not allow the landowner to develop his property while these restrictions were in effect and stated it would ultimately acquire it. The county abandoned its condemnation plans five years after it adopted the restrictive controls. The court held that these actions were intended to depress or prevent an increase of value in plaintiff's property in advance of acquisition.[145] The court awarded the plaintiff compensation for the full value of the property.[146]

The California Supreme Court held that precondemnation activities were intended to depress the value of property prior to acquisition and awarded compensation for a taking in *Klopping v. City of Whittier.*[147] The city adopted a resolution to condemn the property, initiated condemnation proceedings and abandoned them about one year later. The court admitted that some time must elapse between public announcement of intent to condemn and final condemnation in order to permit public input.[148] The court held:

> [W]hen the condemnor acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated.[149]

In this case, the government's actions were "performed for the purpose of depressing the fair market value and preventing plaintiffs from using their land"[150] and violated that taking clause.[151]

The courts have invalidated zoning to depress property values even in

the absence of oppressive precondemnation activity.[152] In *Hermanson v. Board of County Commissioners*[153], for example, the court awarded compensation when the county imposed a series of regulations intended to hold down the value of property so that a nearby flood control dam could be acquired at a lower cost. The Maryland court invalidated rezonings to more intensive uses that retained a less intensive use for part of the property scheduled later for acquisition for a highway. The court held that the retention of the less intensive zoning on the excluded portion was an invalid zoning to depress property values.[154]

The courts have also held that the denial of a building or other land use permit in order to hold down the cost of land prior to its acquisition is invalid.[155] In *San Antonio River Authority v. Garrett Bros.*,[156] the plaintiff began the development of a subdivision but was denied necessary permits for utilities. Plaintiff presented evidence that the city legal department advised city planning officials that they could not withhold approval of plaintiff's plat in order to keep down future costs of acquisition.[157] The city's director of planning nevertheless directed other city agencies to deny plaintiff additional permits necessary to complete the project.[158]

Defendant in *San Antonio* asserted that the city officials' actions were *ultra vires* actions for which the city could not be held liable.[159] The court rejected this claim.[160] It found that a governmental agency must be held liable for the uncompensated taking

> [w]here the purpose of the governmental action is the prevention of development of land that would increase the cost of a planned future acquisition of such land by government. . . .[161]

Zoning Moratoria

Local governments often use zoning moratoria, or bans on development, to obtain time to plan for new development, to assess the impact of development on environmentally sensitive areas,[162] or to defer development until adequate public facilities are available.[163] The courts have usually held moratoria constitutional. The constitutionality of moratoria depends on whether they are reasonable in time and whether they implement appropriate public purposes or are merely a subterfuge to keep out "undesirables" or to depress property values to reduce future costs of acquisition.[164]

One case indicates that a court will uphold a moratorium that meets these requirements even if it is imposed to prevent the development of land prior to its acquisition for a public facility. In *Carl Bolander & Sons v. City of Minneapolis*[165] a city agency denied the plaintiff a building permit after the city council adopted a 60-day moratorium on building permits for plaintiff's and other land in an area it intended to acquire as a riverfront park. The city later acquired the property and the plaintiff alleged a taking had occurred from the time it filed for its building permit to the time of condemnation.

The plaintiff claimed that the city denied the permit so that it could acquire the property more cheaply in condemnation proceedings, but the court disagreed. It noted that "[a]t issue is a comprehensive planning objective to create a regional park."[166] The court added that the moratorium on building permits was adopted in good faith, was for a limited time, and was applied equally to all applications for building permits in the area covered by the moratorium. The court concluded that

> the City enacted a valid moratorium for planning purposes and was not attempting to freeze land prices to insure lower acquisition costs. We conclude that the City's moratorium was a legitimate act of the City's police power, and constituted a reasonable freeze of the status quo pending a clarification of the park plans.[167]

Cases upholding moratoria prohibiting development until public facilities became available also support the constitutionality of temporary prohibitions on development imposed under highway reservation laws.[168] *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*[169] is a typical case. The court upheld a 5-year ban on sewer hookups a state agency imposed because sewerage treatment facilities were inadequate.

The court rejected a contention that the ban was an unconstitutional tacit no-growth policy, noting that the state courts had held that municipalities could use sewerage service restrictions to stage development. It held that the hook-up ban was reasonable in duration and noted that the local governments had taken steps to improve service:[170]

> While a police power moratorium must be reasonably limited as to time, it is clear that the reasonableness of the duration of the moratorium must be measured by the scope of the problem which is being addressed.[171]

Timed or phased growth control programs also raise taking issues similar to the taking issues raised by highway reservation laws. The following description indicates what these programs do:

> Staged growth controls can take a variety of forms. One alternative is a quota on the amount of new development to be allowed, either annually or as a permanent limit on growth. Another alternative is to link new development with the availability of public services and facilities, and to allow new development only when services and facilities are adequate. . . . Public facility-linked staged controls are simply a belated recognition of one of the early aims of planning, which was to achieve service efficiencies by securing the provision of necessary services before growth occurred.[172]

Golden v. Planning Board of Ramapo[173] is a leading case upholding a temporary restriction on development adopted to manage growth. To manage its future growth, the town adopted a comprehensive plan including a capital budget for capital improvements followed by the adoption of a comprehensive zoning ordinance. The plans covered a period of 18 years and contemplated that the town would be fully developed at the end of this period. The zoning ordinance required a permit for any new development during this period, except for single-family residences. An applicant could receive a permit only if he had acquired sufficient points based on the availability and adequacy of specified public services and facilities. The ordinance thus provided for a delay in development in some areas of the Town for periods of up to 18 years.

Plaintiffs brought an action challenging the constitutionality of the growth management plan. The court held that securing the orderly development of the community through the growth management program was a legitimate zoning objective unless the program was used for exclusionary purposes. The next question for the court was whether the temporary restriction on development was a taking of property. The court answered this question negatively. It found that the restriction on development was "substantial in nature and duration" but not "absolute" and concluded:

> [The program] contemplate[s] a definite term, as the development points are designed to operate for a maximum period of 18 years and during that period, the Town is committed to the construction and installation of capital improvements. . . . [I]ndividual parcels may be committed to a residential development use prior to the expiration of the maximum period. Similarly, property owners . . . may . . . accelerate the date of development by installing, at their own expense, the necessary public services. . . . In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for "phased growth" and hence, the challenged ordinance is not violative of the Federal and State constitutions.[174]

Other cases upheld growth control staging and quota programs when planning for these programs was adequate.[175] They struck down these programs when planning was inadequate.[176]

The temporary restriction on development upheld in the *Ramapo* case is similar to the temporary restriction on development imposed under highway reservation laws. Like highway reservation laws, the *Ramapo* ordinance temporarily prohibited development on land to implement planning for public facilities. Because the development restriction was limited by the 18-year plan period, and because development could occur when public facilities became available at the end of this period, the court held that the temporary restriction on development was not a taking of property. A similar constitutional analysis would uphold the constitutionality of highway reservation laws. The restriction on development also is limited under some of these laws. The landowner cannot develop his land at the end of the reservation period, but he does receive an equivalent because the highway agency compensates him for his land when it acquires it for highway purposes.

One important limitation on growth control plans that is relevant to the constitutionality of highway reservation laws is the requirement that the municipality must be firmly committed to providing the necessary public facilities. The New York Court of Appeals made this point clear in *Charles v. Diamond,*[177] a case decided after *Ramapo.* In *Charles v. Diamond* the court held unconstitutional a refusal to allow a developer to connect to a village sewer system because the system was inadequate. The court held that temporary restrictions on development because of service difficulties are justifiable but that permanent restrictions are not. The court would uphold an extensive delay

> only if the remedial steps [to provide the necessary public facilities] are of sufficient magnitude to require extensive preparations, including preliminary studies, applications for assistance to other governmental entities, the raising of large amounts of capital, and the letting of work contracts.[178]

The court added that the municipality "must be committed firmly to the construction and installation of the necessary improvements.[179]

The court no doubt adopted this requirement to prevent municipalities from using development moratoria as a subterfuge for permanent restrictions on development. A court would probably also impose the same requirement on development prohibitions under highway reservation laws. It would require a firm commitment to acquisition of the land after a reasonable period of time so that the highway reservation would not be a subterfuge for a permanent restriction on its development.

Zoning for Public Use and Benefit

Because a development prohibition under a highway reservation law is adopted to facilitate the acquisition of land for a public purpose, a court could hold it is unconstitutional zoning for a public use. *Fred F. French Investing Co., Inc. v. City of New York*[180] is a leading case holding that a permanent zoning of land for a public use was unconstitutional as a taking of property.[181] The city rezoned two private parks in a residential complex exclusively for public use. The court held:

> The ultimate evil of a deprivation of property, . . . under the guise of the exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. . . . In this case, the zoning amendment is unreasonable and, therefore, unconstitutional because, without due process of law, it deprives the owner of all his property rights, except the bare title and a dubious future reversion of full use.[182]

The *French* case applied the harm-benefit theory of the taking clause, which holds that a land use ordinance that restricts land to confer a public benefit is a taking. U.S. Supreme Court decisions discussed earlier in this report, such as the *Penn Central* and *Keystone* decision, indicate that the Supreme Court no longer applies the harm-benefit theory in its taking clause cases.[183] The Supreme Court might still have held that the zoning restriction held unconstitutional the *French* case was a taking because it deprived the landowner of all use of his property.

Some state courts applied the harm-benefit theory to invalidate zoning for a public use when a municipality adopted the zoning to hold land for later public acquisition. The courts in these cases also held the municipalities were required to pay compensation for the restriction. Some of these courts based their decision on the state rather than the federal constitution.

Burrows v. City of Keene[184] illustrates these cases. The city intended to acquire plaintiffs' land as open space, but the plaintiffs rejected an offer for the purchase of the land which was less than its purchase price

and its assessment for tax purposes. The city then placed the land in a restrictive conservation district. The trial court found that the uses permitted in the district were so restrictive that they were economically impracticable and resulted in a substantial diminution in the value of the land. The supreme court held that a taking had occurred and that plaintiffs were entitled to compensation for a temporary taking under the rule proposed by Justice Brennan in *San Diego Gas.*

The court adopted the harm-benefit rule by holding that, under the state constitution, land use regulations that deprive a landowner of the economically viable use of his property to confer a benefit are a taking. It held that the conservation district zoning fell in this category. It noted that after the city was unable to acquire the plaintiff's land at half its value it prohibited all "normal private development" of the property:

> It is plain that the city and its officials were attempting to obtain for the public the benefit of having this land remain undeveloped without paying for that benefit in a constitutional manner. The city sought to enjoy that public benefit by forcing the plaintiffs to devote their land to a particular purpose and prohibiting all other economically feasible uses of the land, thus placing the entire burden of preserving the land as open space upon the plaintiffs.[185]

Other courts have found an improper zoning for public use in similar cases.[186]

Cases like *Burrows* indicate that the courts could hold that a temporary development prohibition on development on property imposed by a highway reservation law is zoning for public use that is a taking of property. A court could also find a taking by relying on cases like *French,* where the public use zoning was permanent. A court could rely on this case to hold that the temporary prohibition on development under a highway reservation law is in fact a permanent restriction on the development of the property.

Conclusion

This discussion of taking law applicable to development moratoria and precondemnation activities provides a range of doctrines courts can rely on when they consider the constitutionality of highway reservation laws. A court could uphold a development prohibition in a highway reservation law if it found that the prohibition was a limited temporary restriction on development that assisted planning for highways.

A court could hold that a prohibition on development under a highway reservation law was a taking if it was excessive in time or was intended to depress property values in advance of acquisition or if the government agency engaged in oppressive precondemnation activities. The next section discusses the cases that considered whether prohibitions on development under highway reservation laws were a taking of property.

THE CONSTITUTIONALITY OF LEGAL TECHNIQUES FOR RESERVING RIGHT-OF-WAY

This section considers the constitutionality of legal techniques for reserving highway and street right-of-way. The section first reviews the constitutionality of setbacks and highway reservation requirements in subdivision control ordinances as highway reservation techniques. These reservation techniques are usually available only to local governments. The section concludes by reviewing the constitutionality of highway reservations under municipal official map and state highway reservation laws.

Building Setbacks

Municipalities commonly require building setbacks from the lot line or from the edge of the street right-of-way, either in a separately enacted ordinance or as part of a zoning ordinance. The constitutionality of setback regulations is well-established. The U.S. Supreme Court upheld a setback requirement in a residential area in the early case of *Gorieb v. Fox.*[187] The Court held that setback requirements implement a number of valid regulatory purposes, including a greater separation from the noise of the street, improving the attractiveness of residential environments and securing the availability of light and air. The state and federal courts have followed *Gorieb* and hold setback ordinances constitutional.[188]

An early classic work on setbacks stated that municipalities could use setback ordinances to reserve land for street widenings.[189] The cases have not confirmed this prediction. The few cases that considered the question all held that a municipality may not use a setback ordinance to reserve land for future acquisition for street widenings.[190]

In *Gordon v. City of Warren Planning & Urban Renewal Commission*[191] the court held unconstitutional on its face an ordinance that required setbacks to be measured from a proposed right-of-way established by the city's master thoroughfare plan. The court stated:

> The ordinance contains no time limit for resolution of the question of whether the land will ever be condemned. The ordinance, in effect, requires the dedication by plaintiffs of a large part of their property for public purposes without any provision for compensation, and, if a condemnation authority does eventually condemn the land, it could very well be considerably depreciated from its present worth.[192]

Galt v. Cook County[193] is a leading case disapproving the use of building setbacks to reserve right-of-way for future acquisition. The county imposed a setback requirement on a number of properties that was more excessive than the setback it had normally imposed adjacent to highways. To support the validity of the excessive setback restriction the county relied on plans to widen an adjacent highway. The chairman of the commission that drafted the setback also testified that it was "in the interest of the public" because it would prevent the county from

paying "excessively" to remove improvements that were "in the way of ultimate highway improvement."[194] The court held that

> the record makes it abundantly clear that the primary purpose of the special setback restriction was to hold down the cost of acquiring additional land for the widening of North avenue and that this was to be accomplished at the expense of a few individual landowners. In both purpose and extent the restriction involved bears no perceptible relation to the public health, safety, comfort and general welfare. It destroys, rather than conserves, land values, and being designed to conserve public funds in the purchase of land, has, at the most, only a remote and incidental effect upon the reduction of traffic congestion.[195]

Setback restrictions are not an effective technique for reserving right-of-way because their purpose is to provide open space on building lots that will secure the availability of light and air and implement the other regulatory purposes held constitutional in *Gorieb v. Fox.* An additional setback to reserve land for right-of-way acquisition does not serve these regulatory purposes. It is also subject to a successful constitutional attack because, as in *Galt,* it is usually in excess of the setback the municipality normally requires.[196]

Setback ordinances may contain variance provisions that allow a variance from the setback restriction if it imposes hardship on the landowner, but these provisions undercut the use of setbacks for right-of-way reservation. A court may uphold the grant of a variance when a setback is used for this purpose.[197] A landowner will also be able to obtain a variance if a setback used to reserve highway right-of-way reduces the buildable area of his lot below a usable size.[198] A setback imposed to reserve right-of-way may have this effect.

Highway Reservations in Subdivision Control Ordinances

Subdivision control is a land use control that authorizes local governments to approve the division of land into lots and blocks on recorded plats. State-enabling legislation authorizes local governments to enact subdivision control ordinances.[199] The primary purpose of subdivision control is to assure that lots and blocks in the subdivision plat and roads and other facilities in the subdivision meet standards provided by the ordinance.[200] In practice, the subdivision control ordinance is usually applied only to residential subdivisions. Industrial and commercial developments are not platted.

Subdivision control ordinances usually require the subdivider to construct internal streets. They may also require the subdivider to dedicate land for the widening of adjacent streets. The subdivider does not receive compensation for a dedication. A dedication of this type is known as a subdivision "exaction."

The courts have upheld the constitutionality of dedications for adjacent street widenings under a number of tests.[201] The tests used by the courts to determine the constitutionality of dedications vary:

> [The] courts have used a variety of phrases to describe the required tests, including "reasonable relationship," ... "rational nexus," ... "reasonably attributable," ... "reasonable connection," ... and "rational basis,".... As a matter of dictionary definition, it is difficult to see any differences between them.[202]

These rules authorize the dedication of land for streets and street widenings when additional traffic generated by the subdivision creates the need for the street. Under these rules, requiring a subdivider to dedicate land for the widening of an adjacent street to serve community needs rather than the needs of the subdivision is unconstitutional.[203]

An alternative technique sometimes used in subdivision control ordinances is to require the subdivider to reserve land in the subdivision for a new street or highway or for the widening of an adjacent street or highway. The state or municipality must compensate the subdivider for the reserved land when it is acquired for highway purposes. The reservation may or may not be limited in time. Some state subdivision control legislation authorizes this kind of highway reservation.[204] It is similar in concept to an official map act.

A Kansas case, *Ventures in Property I v. City of Wichita*[205], indicates that a city may not deny approval of a subdivision when a subdivider refuses to reserve land for a highway that is not planned and when its construction is uncertain. Although the case did not consider a formal reservation of land under a subdivision control reservation ordinance, it is relevant to the constitutional problems raised by these ordinances.

The city refused to approve a subdivision unless the subdivider reserved 13.17 acres of a proposed 48-acre development for a proposed circumferential highway. The city did not place a time limit on the reservation. No right-of-way planning had been done for the highway and the highway was not scheduled for funding in the current state program. The subdivider brought an action in inverse condemnation claiming the subdivision denial for this reason was a taking of property for which it was entitled to compensation.

The supreme court confined its decision "to the factual situation presented" and held that a taking had occurred and that an inverse condemnation action for compensation was proper. It held that a taking had occurred because the subdivision was subject to

> the sole restriction that a portion of the land in a defined highway corridor within the proposed plat be reserved in its undeveloped state for possible highway purposes at some indefinite date in the distant future....[206]

One court has indicated that requiring a reservation of land for highway purposes in a subdivision is constitutional.[207] A series of Maryland cases provide more explicit guidance on the constitutionality of highway reservation requirements in subdivision control ordinances.

The first case, *Krieger v. Planning Comm'n,*[208] is similar to *Ventures in Property.* The county's general highway plan showed a state road adjacent to a subdivision as a primary road with a minimum ultimate width of 100 ft. The county denied approval of a subdivision because the subdivider did not provide a 50-ft setback from the road. The setback

included a 20-ft setback reserved for future acquisition for the road widening. The county did not place a time limit on the reservation when it denied approval of the subdivision.

> The court held that a taking had not occurred:
> There is nothing in the record to show a present taking, as distinguished from a regulation of use, or to indicate that if, or when, the strip of land adjacent to the existing highway is condemned for purposes of widening, the owner will not be paid the full value thereof. Nor is the appellant [landowner] precluded from putting the twenty-foot strip to whatever permissible uses he pleases. There is no change in the use classifications. He is simply denied a right to include it in computing the area of lots fronting on the road so that in the event of future widening in conformity to the master plan the lots will still comply with the applicable area requirements. The action of the Commission is not designed to keep the strip in an unimproved condition so that the cost of condemnation would be less. The setback provisions would prevent development in any case. Moreover, it is not shown that the present or future value of the land would be diminished by compliance with the master plan and [subdivision] regulations. It may well be that its value would be enhanced or that the developer could recoup any additional expense from prospective land purchasers.[209]

This holding is confusing. Even though the use classification of the land remained the same the highway reservation precluded consideration of the reserved land in computing the land available for development. These limitations effectively precluded its use. The court also noted that the reserved setback was part of a wider setback which it assumed was constitutional. Note also that the court found no evidence that the setback for highway widening was intended to depress property values in advance of acquisition.

The court also rejected a claim that there were no assurances that the state would ever acquire the reserved land for the road widening. It found that the county was undergoing a major population explosion and that the conditions imposed on the subdivision were "reasonably related to the traffic and other needs of the community at large."[210]

In *Maryland-National Capital Park & Planning Comm'n v. Chadwick,*[211] the county denied approval of a subdivision and placed the entire property in a reservation for a period not to exceed 3 years for a park and lake site shown on the county's master plan. A state enabling act and the county's subdivision regulations adopted to implement the act authorized 3-year reservations for designated public facilities, including parks and recreational areas. The court held the reservation unconstitutional.

The ordinance prohibited any use of land subject to a reservation without the county's approval. The court interpreted this limitation to prohibit permission from the county for any use of reserved land "which conflicts with the flat prohibition contained in the ordinances against grading the land, erecting any structures thereon, or removing trees, top soil or other cover."[212]

The court held that the 3-year reservation "stripped" the landowners for that "extended period of time" of all reasonable use of the property and was a taking without compensation.[213] The court added that the reservation inhibited all beneficial use of the property "without any guarantee that the property will be acquired in the future."[214]

The court's holding was not a blanket condemnation of the highway reservation technique. After discussing cases from other states that had upheld official maps, the court stated:

> The facts of the present case clearly distinguish it from the cited cases involving the reservation of street locations. As in those cases, we recognize the need to promote intelligent planning by placing reasonable restrictions on the improvement of land scheduled to be acquired for public use. We do not, therefore, condemn as beyond the police power the enactment of reservation statutes which are reasonable in their application both as to duration and severity. Our holding today is a narrow one, limited to the facts before us. We conclude only that the Commission's resolution . . . , placing appellee's land in reservation for up to three years, without any reasonable uses permitted as of right, was tantamount to a "taking" in the constitutional sense. Because the Commission's resolution did not provide for the payment of just compensation, it was unconstitutional as applied to the appellee's property and was thus of no effect.[215]

The court affirmed the trial court's order invalidating the reservation and ordering the county to approve the subdivision.

In *Howard County v. JJM, Inc.,*[216] the court relied on *Chadwick* to hold that a reservation of land in a subdivision for a highway was a taking of property. The county required the reservation under a county ordinance that authorized the reservation of land for highways shown on the county's general plan. The ordinance did not place a time limit on the reservation. The county refused to approve a subdivision because it did not include a reservation of land for a highway shown on the general plan that "cut a wide swath" through the subdivision.

The court distinguished the highway reservation in this case from the highway reservation in *Krieger.* Unlike in *Krieger,* the reservation in this case required the landowner to hold the land for highway purposes:

> Although the county suggests that the reserved land could be farmed, such a use would not be for highway purposes: the clear language of the [county] statute provides that reserved land may be used for "no other use" than that for which it is intended.[217]

The court also approved the finding of the trial judge that the reservation did not permit any "effective use" of the property, that the duration of the reservation was unlimited, and that the state was not required by law to acquire the reserved property.[218]

The court discussed cases from other jurisdictions that considered the constitutionality of subdivision exactions and scholarly commentary on these cases. Exactions include the dedication of land without compensation for public purposes, such as a highway. The court held the reservation unconstitutional because there was no "reasonable nexus between the exaction and the proposed subdivision. . . . In this case the landowner has been deprived of all use of his land."[219] The court added that

> a reservation, which has many positive features ... does not necessarily have to be as restrictive as the provision here. It was not, for example, so restrictive in *Krieger*.[220]

Why the court applied the nexus test of subdivision exactions to a highway reservation is not clear. The exaction cases are distinguishable because compensation is not paid for an exaction. The government entity ultimately acquires land subject to a reservation and pays compensation to the landowner. The court did not recognize this distinction. Neither did it recognize that a highway reservation will always fail the exaction test unless it is for a highway required by additional traffic created by the subdivision.

The Maryland cases on the constitutionality of reservations of land in subdivisions for highways are not clear. The court apparently requires the subdivision ordinance to allow some beneficial use of the reserved land. Prohibiting any beneficial private use of the land by limiting its use to highway purposes is unconstitutional. The court believes that the reservation upheld in the *Krieger* case is not this restrictive even though the ordinance effectively precluded any development of the reserved land.[221]

The Maryland court did not consider the effect a variance provision would have on the taking question because none of the ordinances the court considered had such provisions. Inclusion of a variance provision allowing development of the reserved land if hardship can be shown might lead the court to hold a reservation constitutional even if it limits the use of the reserved land to highway purposes.

The Maryland cases also seem to require a time limit on reservations, even though the county in *Krieger* did not place a time limit on the reservation when it denied approval of the subdivision in that case. Perhaps the court believed it was enough in *Krieger* that the landowner could make a beneficial use of the land during the reservation period. Certainty of acquisition also is an important factor in the Maryland cases, although the court in *Krieger* was willing to rely on a finding that growth in the county made the ultimate acquisition of the land likely. The uncertainty of planning for the highway in *Ventures in Property* also was an important factor in the decision holding the subdivision denial in that case unconstitutional.

The cases considering the constitutionality of highway reservations in subdivision control ordinances reflect the taking doctrines discussed in an earlier section under "A General Outline of Taking Law." The courts recognize in the subdivision control reservation cases that "mere planning" for a highway is not a taking. They strike down highway reservations if they find that the reservation prohibits any beneficial use of the reserved land for an indefinite time. This holding is consistent with the cases holding that a moratorium on development is unconstitutional if it is for an excessive period of time. It also is consistent with decisions holding that restrictive zoning for public purposes is a taking of property.

In sum, the cases support the constitutionality of a carefully drawn highway reservation requirement in subdivision control ordinances. The one difficulty with the Maryland cases is their holding that the reservation law cannot limit the use of the land to highway purposes. Yet, the Maryland court approved the highway reservation in *Krieger* even though the reserved land could not be included in the land available for development.

Local Official Map and State Highway Reservation Laws

Local official map and state highway reservation laws are a land use control technique specifically designed to reserve highway and street rights-of-way in advance of acquisition. This section discusses the model laws on which this legislation is based. Charts indicating the principal features of official map and state highway reservation legislation and the model laws on which this legislation is based are included in the appendixes to this report. The section concludes by discussing cases that considered the constitutionality of this legislation.

Model Laws and State Enabling Legislation[222]

The mapping of future municipal streets is an old American practice that goes back to colonial days, when a colonial proprietor owned all of the land on which he planned to build a town. He simply laid out the land to be reserved for streets on the town plat. It later became customary for several individuals to own land on town sites. The states then enacted legislation that enabled commissioners to plat the town and its streets. They then took deeds of trust from the private owners in which they consented to the street dedications.

When the growth of cities made these primitive mapping methods cumbersome, states at the beginning of the nineteenth century adopted legislation that authorized the mapping of future streets. These statutes did not have enforcement provisions, did not authorize variances, and prohibited compensation for any building that encroached on the mapped right-of-way. The courts initially upheld these laws,[223] but changing judicial attitudes at the end of the century led to decisions invalidating them.[224]

This change in judicial climate and the growth of the city planning movement led to substantial changes in official map legislation early in the twentieth century.[225] The old mapping statutes were fitted with a hardship provision and integrated with the planning enabling acts as one of the legal techniques for implementing the local comprehensive plan. This legislation was intended for the mapping of streets in cities.

Model laws made available in this period heavily influenced the content of official map legislation.[226] There were three model laws. One was included in the Standard City Planning Enabling Act the U.S. Department of Commerce prepared in the 1920s.[227] The Standard Act based its official map provisions on the eminent domain power and required the payment of compensation to landowners whose land was reserved for future streets. The Act permitted any use within a reserved street, including the erection of buildings, but prohibited the payment of compensation for any building or structure built within a mapped street. The compensation prohibition makes this law unconstitutional in some states.[228]

A few states have adopted the Standard Act, but most states modeled their official map acts on one of two models based on police power contained in a Harvard University planning publication issued in 1935.[229] Early leading legal pioneers in the planning movement drafted this legislation. Edward Bassett and Frank Williams drafted one model act, the Bassett-Williams model. They based this model act on a similar statute they drafted earlier and that New York adopted in 1926. Alfred Bettman drafted the other model act, the Bettman model, that was influenced by a police power model act appended as a footnote to the Standard Planning Act. Although substantially similar in concept, the Bassett-Williams and Bettman models differ significantly in detail and state enabling legislation reflects the influence of one or the other.[230]

Both the Standard Act and the Bettman model require the adoption of a comprehensive street plan as a prerequisite to the adoption of an official map. In the Bassett-Williams model the official map enabling provisions are part of an enabling act that authorizes a comprehensive plan, but the plan is not explicitly made a requirement for the official map. The Standard Act contemplates a series of individual street reservations to be shown on plats. The Bassett-Williams and Bettman models authorize a single map, which may be amended.

Neither the Bassett-Williams nor the Bettman model prohibits compensation for buildings or structures built in a mapped street. They authorize the issuance of variances based on a showing of hardship. Variances are explicitly made available only for new buildings. The model acts do not address the problem of variances for additions to existing buildings, a problem that can arise in built-up areas.

The two models define hardship differently. The Bettman model authorizes a hardship variance under two criteria. Under the first criterion, a variance is authorized if the property covered by a mapped street is not capable of earning a reasonable return. Under the second criterion, a variance is authorized if, after balancing the interests of the municipality against the interest of the landowner, it is justified by considerations of "justice and equity." The Bassett-Williams model authorizes a variance if the land "within" the mapped street cannot earn a fair return. The drafters indicated that this criterion for a variance was more conservative than the similar criterion in the Bettman model because the municipality is to consider only the hardship on land actually affected by the official map.

Both models authorize the adoption of conditions for variances. The Bassett-Williams model authorizes "reasonable conditions" designed to promote the health, safety, and welfare of the community. The Bettman model authorizes conditions controlling the character and duration of the building. This provision assists the purpose of the official map law because it should allow a condition requiring the removal of a building when the municipality acquires the land within a mapped street.

The charts in the appendixes indicate the principal provisions of state official map legislation. The statutes vary principally in whether they provide compensation for buildings constructed in a mapped street and in whether they authorize a variance from the restrictions on development in a mapped street.

State legislation also authorizes state highway agencies to map highways for future acquisition. The appendix charts indicate the principal provisions of this legislation. The state highway agency official map acts differ from the local official map acts principally in the absence of a variance provision. These acts also may not require a plan as a condition to the adoption of an official map. The absence of a plan requirement is understandable because the planning function is conferred on local rather than state governments.

The Constitutionality of Local Official Map and State Highway Reservation Laws

This section discusses the constitutionality of local official map and state highway reservation laws. It first discusses the limitations placed on judicial consideration of taking of property problems by the ripeness rule in federal courts and the exhaustion of remedies rule in state courts. It then discusses cases that have considered taking of property objections to highway reservation laws on their merits.

The Ripeness and Exhaustion of Remedies Rules. As the discussion of U.S. Supreme Court taking doctrine indicated, the federal courts will not consider a taking objection to a land use regulation until the landowner has utilized all state and local remedies available that may allow his development. This ripeness rule is especially applicable to highway reservation laws. Many of these laws contain a variance provision. The Supreme Court has clearly indicated that a landowner must attempt to obtain a variance when it is available before bringing suit in federal court claiming that a land use regulation is a taking of property. A landowner can challenge a highway reservation law as a taking of property "as applied" if he does not obtain approval to develop his property through a variance.

Some highway reservation laws also contain a provision requiring the government entity to begin proceedings to acquire the reserved land after a period of time. The reservation lapses under some of these laws if the public agency does not begin acquisition proceedings. A landowner whose land is reserved under a law of this type can then develop his land. This is another remedy landowners must use before bringing an action in federal court challenging the highway reservation law as a taking of property.

A landowner can bring a facial taking attack against a highway reservation law without utilizing available state and local remedies. The difficulty, as the Supreme Court's *Keystone* case indicates, is that the Court will seldom hold a land use regulation facially unconstitutional as a taking of property. An early federal lower court dismissing a facial taking challenge to a highway reservation law confirms this impression.[231]

The rule is well-established in the state courts that a landowner must exhaust all available remedies under a land use ordinance before challenging the ordinance as a taking of property.[232] The rule is applicable to highway reservation laws because, as noted earlier, many of these laws authorize a variance from a prohibition on the development of land reserved for a highway. Like the ripeness rule in the federal courts, the

exhaustion of remedies rule in state courts also protects highway reservation laws from constitutional attack, although some state courts have held highway reservation laws facially unconstitutional. Two early New York and Wisconsin cases dismissed taking claims against official map laws because the landowners challenged these laws before applying for a variance.[233]

A landowner is excused from exhausting remedies under exceptions to the exhaustion of remedies rule. One exception commonly applied by the state courts is a claim that an application for a variance is futile because public officials have indicated that they would not grant one.[234] A landowner challenging a highway reservation law without exhausting available remedies still takes the risk that the court will decide that an exception does not apply.

Cases Considering the Constitutionality of Highway Reservation Laws On the Merits. A number of cases have considered the constitutionality of highway reservation laws on their merits. The cases are divided and they emphasize different aspects of taking law doctrine. Although some cases held highway reservation laws facially invalid, other cases emphasize that the constitutionality of these laws depends on the way in which they are drafted and applied.

This section reviews these cases. It begins with cases decided in New York, which has the greatest number of cases, and in New Jersey, where the courts have reached differing results on the constitutionality of laws reserving land for public facilities. The section then discusses cases in other states that considered the facial constitutionality of highway reservation laws. It concludes with a discussion of a case where special factors, such as the public use zoning of the reserved property, influenced the decision.

1. *The New York Cases*—Cases decided by the highest New York court are divided on the constitutionality of highway reservation laws. A late nineteenth century case, *Forster v. Scott,*[235] held unconstitutional an earlier version of the state's municipal map act that denied compensation for improvements placed in the mapped street. This holding, which the Pennsylvania Supreme Court also followed in dictum,[236] is consistent with the rule that a statute violates the just compensation clause when it denies compensation for the full value of land and improvements when they are taken.

The New York legislature later amended the official map act to include a variance provision. In the *Headley* case, discussed in the last section, the court held that a challenge to the revised official map law was not ripe because the landowner had no present plans for the use of the property and had not applied for a variance.

The court invalidated an official map reservation for streets in *Jensen v. City of New York*[237] in a brief memorandum opinion. The dissenting opinion indicated that 78 percent of the plantiff's property was covered by the official map reservation, but the majority opinion treated the case as if the entire property were included. This led the court to hold the official map reservation unconstitutional, even though the plaintiff had not applied for a variance.[238]

The court held that an application for a variance was unnecessary because the plaintiff had no interest in new construction. She desired to sell the land, "[b]ut the mapping restrictions made the property virtually unsalable, and made banks unwilling to provide financing for repairs."[239] The court held that this was "no less a deprivation of the use and enjoyment" of the property than if she had applied for and had been denied a building permit.

Jensen was wrongly decided. As the dissent pointed out, the case was premature because the plaintiff did not claim that the law prevented her from erecting a structure on her land. Her inability to sell or mortgage the land because of its reduced value was not compensable. The dissent would have applied the rule that depreciation in property value resulting from project planning is not a taking.

Earlier cases in the lower appellate courts upheld official map reservations when they did not deny a landowner the reasonable use of the reserved land. *Rochester Business Institute v. City of Rochester*[240] is the leading case. The plaintiff planned to construct a new commercial building but had to modify its construction plans to accommodate an additional setback required by the mapping of its land frontage for a street widening. The modification increased construction costs but did not reduce rental income because the modified building would have the same amount of rental space.

The court upheld the official map reservation in a decision remarkably foreshadowing the U.S. Supreme Court's decision in *Keystone.* It adopted the *Keystone* balancing test that requires weighing the benefit to the public against the diminution in property value suffered by the landowner. It also adopted the rule later adopted in *Keystone,* that the landowner's share in the common benefit of the official map reservation provided compensation for the interference with the use of his land. The court concluded, applying these tests, that the official map reservation was constitutional because the plaintiff could still make a reasonable and profitable use of its property. The court stated, in dictum, that an official map reservation would be a taking if it "produces such substantial damage as to render the property useless for any reasonable use."[241] Another lower court case followed *Rochester,*[242] although this case indicated a taking would occur if the acquisition of the reserved land was unreasonably delayed.

The New York cases concentrate on the effect of the official map act reservation on the use of the reserved land. They indicate that an official map reservation is a taking only if the use or marketability of the reserved land is unreasonably restricted.

2. *The New Jersey Cases*—In *Lomarch Corp. v. Mayor & Common Council,*[243] the supreme court held facially unconstitutional as a taking of property a municipal official map act providing a one-year reservation of land to be acquired for park and recreation purposes. The statute provided that the land could be used for any purpose except for buildings and improvements. The court relied on an earlier New Jersey case holding that zoning to preserve a wetland as a flood retention basin was a taking because it conferred a public benefit rather than preventing a private harm.[244]

The court held that the official map act granted the municipality an "opinion" to purchase the reserved land only on condition that the landowner receive compensation for the temporary taking of the use of the land. The court also agreed with the plaintiff that a variance provision in the statute was inadequate and paid "but token service to the landowner's right to use his land and is of little practical value."[245]

Lomarch is a questionable decision. It relied on the theory that a land use regulation is a taking if it confers a public benefit. The U.S. Supreme Court has discredited this theory of the taking clause. Later New Jersey cases have also held the wetlands case on which *Lomarch* relied to its facts,[246] so the vitality of that case also is in doubt.

The intermediate appellate division later upheld a reservation for a state highway under the state highway reservation law in *Kingston East Realty Co. v. State, Commissioner of Transportation.*[247] Plaintiff planned to develop its land for a research office laboratory complex. Following the statutory procedure, the plaintiff applied to the municipality in which the land was located for a building permit. The municipality, again following the statutory procedure, forwarded the permit application to the state highway agency. The statute requires the state agency to make its recommendation on the permit within 45 days. The agency sent a letter to the plaintiff within this period indicating it was preparing documents for land acquisition in its area. A few days later the municipality denied the permit. The state agency then had 120 days under the statute to decide whether to acquire the property. No permit could issue during this period, but if the agency took no action to acquire the reserved property during this period the statute mandated the issuance of a permit. The state agency took no action to acquire the plaintiff's property.[248]

Plaintiff claimed that the period of time during which the permit was withheld under the statute was a temporary taking entitling it to compensation. The court disagreed. It held that planning for the highway, the filing of the official map, the acquisition of a nearby property for the highway and the state's failure to abandon plans to acquire the plaintiff's property did not prevent the plaintiff from using its land. The court added:

> There is no implication in the facts asserted that any delays or uncertainties in connection with the proposed development of plaintiff's property were the result of official bad faith or knowing unlawful conduct.[249]

This holding clearly implies there were no oppressive precondemnation activities that amounted to a taking. The court noted that the plaintiff would receive compensation for the land and any improvements when the state acquired the property.

The court also rejected the plaintiff's claim that there had been a temporary taking of its property under the holding in *Lomarch.* It held that the reservation in this case was for a considerably shorter period of time and was not a blanket reservation. The statute required a decision by the state agency on whether to acquire the land or allow the issuance of a building permit within a brief time period, which could not exceed 165 days. Citing decisions upholding zoning moratoria, the court also held that "[s]imilar measures, designed to restrain temporarily the inimical utilization of land, have been recognized under narrow circumstances as reasonable regulations in the exercise of governmental police powers."[250] The court noted that the highway reservation law was "reasonably designed to reduce the cost of public acquisition."[251]

Kingston upheld the highway reservation law facially and also upheld it as applied to the plaintiff. The case indicates that a court will uphold a highway reservation law if the reservation period is short, if it contains remedial provisions that protect the landowner, and if there is no evidence of oppressive precondemnation activity. The case is an important holding that highway reservations laws serve legitimate governmental purposes, as required by recent Supreme Court taking cases. It is consistent with the moratorium cases, which indicate that a temporary restriction on development for legitimate governmental purposes is constitutional.

The remedial provisions in the New Jersey statute also deserve attention. They eliminate the claim that the landowner will be denied any reasonable use of his land or compensation for its value by requiring either the development of the property or a decision by the state agency to begin acquisition. The court also held by implication that a highway reservation law is constitutional only if the reservation period is limited. The reservation period in this case was 165 days.

3. *Other Cases Holding Laws Reserving Land for Public Facilities Facially Unconstitutional*—In addition to *Lomarch,* two other cases held reservation laws for public facilities facially unconstitutional. One of these cases, *Lackman v. Hall,*[252] is a highway reservation law case decided by the Delaware Chancery Court, a trial court of original jurisdiction. The court held unconstitutional a law conferring highway reservation powers on state agencies that was similar to the New Jersey law considered in *Kingston.* The statute prohibited development in a reserved highway. It also provided that a building permit must issue unless the state highway agency, within 60 days after notification of the permit application, declared that issuance of the permit would be detrimental to highway planning and construction. If the state agency makes this declaration it must begin condemnation proceedings no more than 180 days after the notice.

The statute allowed the owners of reserved land to make any use of the land they wanted if this did not increase the potential cost of the land to the state. The law also provided that the state agency must begin condemnation if a court found that reservation of land under the law was a taking. The New Jersey law upheld in *Kingston* did not contain similar provisions.

The court in *Lackman* held that the reservation of property for future acquisition was an admission that the property was not immediately needed. If the highway agency had acquired the plaintiff's property it would have been a taking for use at an indefinite future time, which a Delaware case had held was improper. The statute also placed the owner of reserved land on the horns of a dilemma. If he attempted to obtain

a building permit under the law he might not obtain it and he would lose his property if the state agency decided to acquire it. Yet, he could develop his land without a permit only if the development did not increase the cost of acquisition.

The state defended the law by relying on cases holding that the threat of condemnation does not require condemnation and on cases holding zoning setbacks constitutional. The court distinguished these cases. It held that the laws upheld in the condemnation threat of condemnation cases did not contain restrictions on the right to use the affected property and that the zoning cases did not apply to highway reservation laws. The court concluded:

> The flaw in its overall administrative goal is that portion of it which would enable the State to lawfully accelerate the taking of presently unneeded property as a virtual punishment to a private owner who dared to improve his land or use it in any manner which would increase its value.[253]

The court's decision also is flawed. The court assumes that a landowner is entitled to withhold his property from involuntary condemnation. Such is not the case. Acquisition of reserved property and the payment of compensation, as the *Kingston* case held, is clearly sufficient to avoid a taking objection. *Lackman,* in any event, applies only when a law has an involuntary condemnation provision. The case does not apply to the typical official map act, which does not have such a provision and which also contains a provision allowing a variance that authorizes the development of the reserved property.

Miller v. City of Beaver Falls[254] held unconstitutional a law that authorized cities to reserve land for parks and playgrounds for up to 3 years. The law prohibited the payment of compensation for any buildings or improvements on reserved land. The court held that the injustice to the landowner in tying up the land for 3 years was clear. The city could decide not to acquire the land after the 3-year period. Meanwhile, the landowner could not build on the land because if he did he would not receive compensation. The court held that the 3-year reservation was "a taking of property by possibility, contingency, blockade and subterfuge.[255]

The court in *Miller* might have reached a different result if the law had not denied compensation for improvements on reserved land. A later Pennsylvania Supreme Court case held that the mere filing of plans for a highway under an official map law was not a taking.[256] It indicated that a provision in that law prohibiting compensation for improvements in the area designated was unconstitutional.

4. *Highway Reservation Law Held Unconstitutional As Applied—Urbanizadora Versalles, Inc. v. Rivera Rios*[257] held unconstitutional a reservation of land on a Puerto Rico highway official map that had continued for 14 years. The planning board had placed the land in a "P" district that permitted the use of the land only for public facilities. The court accepted the finding of the district court that the freezing of the land for such a lengthy period was a taking:

> A P zoning "constitutes almost a total freezing. The owner cannot use it during the time it is classified thus."[258] The burden placed on the owner by this peculiar precondemnation status increases, and the reasonableness of the government action diminishes, over time.[259]

The court added that it would not decide whether a shorter reservation period would be constitutional.[260]

Conclusion

Although the cases have disapproved highway reservations imposed through zoning setbacks, they have indicated that highway reservations imposed in subdivision controls and by official maps need not be a taking of property. A subsequent section provides guidelines for the drafting of a highway reservation law that can withstand constitutional attack. The immediately following section discusses another problem, the application of the National Environmental Policy Act to highway reservation laws.

PROBLEMS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to prepare a "detailed statement" on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."[261] The "detailed statement" is called an environmental impact statement. The question is whether the reservation of land for a highway under a highway reservation law is a proposal for a major federal action that requires an environmental impact statement.[262]

How NEPA May Apply

NEPA applies only to federal agencies. It does not apply to actions by state and local agencies unless there is some participation by a federal agency in the state or local action.[263] An early leading NEPA case, *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,*[264] indicated when federal participation would federalize a state or local action:

> [T]here is "federal action" within the meaning of the statute not only when an agency proposes to build a facility itself, but also when an agency makes a decision which permits actions by other parties which will affect the quality of the environment. NEPA's impact statement procedure has been held to apply where a federal agency . . . funds state highway projects.[265]

This holding would also apply to local government projects.

NEPA clearly applies when the federal government funds the construction of a state or local highway. It could apply to an official map or highway reservation if its adoption was federally funded. The only federal highway program under which this type of funding could occur is the program for funding regional highway transportation planning in urban areas.[266] Official maps in many states must be based on a com-

prehensive plan. This plan could be developed and adopted as part of the regional comprehensive planning process.[267]

NEPA could also apply to an official map or highway reservation if a court found that federal funding was committed to the highway for which the land was reserved. This is unlikely in most cases because highway reservations usually are imposed in the highway planning stage before federal funds are committed.

Does NEPA Apply?

A leading case on the application of NEPA to federally funded transportation planning indicates that NEPA does not apply to official maps and highway reservations adopted as part of the regional highway planning process. In *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission,*[268] the Commission adopted a regional development plan (RDP) that included a long-term transportation systems guide and land use plan for the Atlanta metropolitan area. The RDP was federally funded. The provision of the federal highway law that authorizes funding for regional highway planning provides that the Federal Highway Administration may approve transportation projects for federal assistance only if they are included in a regional transportation plan, such as the RDP.[269] The court held that NEPA did not apply to the RDP.

The key to understanding the *Atlanta Coalition* case is an earlier U.S. Supreme Court NEPA case, *Kleppe v. Sierra Club.*[270] *Kleppe* concentrated on a term in NEPA that had not received much attention from the courts up to that time. Recall that NEPA requires an environmental impact statement on a report or recommendation on a "proposal" for a federal action. In *Kleppe* the plaintiffs claimed that federal agency studies of coal development in five Great Plains states was a report or recommendation on a proposal that required an impact statement.

The Supreme Court disagreed. It found that the studies were not a regional plan and that no regional plan was contemplated. It admitted that a comprehensive impact statement would be required on related proposals within a region but held that this requirement did not apply to coal projects within these states. The Court added in a footnote that NEPA did not require an impact statement on projects that were only "contemplated" because these projects were not "actual proposals."[271]

Atlanta Coalition rejected an argument that the RDP was a regional plan for which an impact statement was required under *Kleppe:*

> In *Kleppe,* the plan (had there been one) would have been a federal plan, whereas here the plan was prepared by state and local authorities without substantive federal supervision or control, will never be reviewed or approved by a federal agency, and does not commit a federal agency to any action, now or in the future.[272]

The court then noted that the only federal action was federal funding and certification of the regional planning process. It held that neither of these actions brought the regional planning process under NEPA because they did not entail "the exercise of significant discretion."[273]

The court also rejected an argument that the federal presence in urban transportation planning and development was so pervasive because of the necessity for federal funding that the RDP should be treated as a federal plan. The court pointed out that the RDP was developed by the Atlanta Regional Commission together with state and local authorities and that the federal agency did not determine or make any decision concerning its substantive content:

> [W]here, as here, state and local agencies are solely responsible for the contents of the plan, the projects proposed, and the improvements recommended, and the adoption of the plan in no way obligates the federal government, the plan cannot be said to be "federal" for the purposes of NEPA.[274]

The court added that the possibility of federal funding for a future project did not make the project a "major federal action" that requires an impact statement under NEPA:

> [F]ederal financial assistance to the planning process in no way implies a commitment by any federal agency to fund any transportation project or projects or to undertake, fund, or approve any action that directly affects the human environment.[275]

The *Atlanta Coalition* case may be incorrectly decided. Development and adoption of a regional transportation plan is necessary under the federal statute as a basis for the approval of federally funded transportation projects. A federally funded highway project is a federal action that requires an impact statement under NEPA. A federally funded plan should not be treated differently.[276] The case may be supportable if it is viewed as holding that the regional plan was not a "proposal" that required an impact statement because the plan did not commit the federal agency to the funding of any transportation projects. The courts hold in NEPA cases that a federal agency need not prepare an impact statement that it is committed to funding a state or local government project.[277]

Atlanta Coalition clearly means that an impact statement is not required for the reservation of a highway under a highway reservation law, even when the reservation is part of a regional planning process that is federally funded. Neither would NEPA apply because an official map or highway reservation designates the right-of-way for a highway that might eventually be constructed in part with federal funds. State and local agencies are not committed to construct highways or streets designated under either of these techniques. Neither does the federal highway agency commit funding for highway projects at a planning stage as early as the designation of a highway on an official map or in a highway reservation.[278]

SOME GUIDELINES FOR DRAFTING HIGHWAY RESERVATION LAWS

This review of the taking problems raised by highway reservation laws suggests some drafting guidelines that can help avoid constitutional

attack under the taking clause. These guidelines apply to highway reservations under municipal official map legislation, laws conferring highway reservation powers on state highway agencies, and to highway reservations under subdivision control ordinances:

1. A provision denying compensation for improvements in mapped streets is unconstitutional. This provision should be removed from laws that include it.

2. The period of time during which a highway reservation is in effect should be short. Just how short a reservation period must be is not clear. One court held that even a one-year reservation period required compensation. A court might uphold a longer reservation period if the remedial techniques discussed later in this section are included in the law. Cases upholding zoning moratoria have accepted development prohibitions of several years be it courts would probably balk at a highway reservation imposed for so substantial a period of time. If a highway reservation law does not have a time period for reservations, the courts will decide, on a case-by-case basis, whether the highway reservation is a taking of property as applied because it is too long. This would introduce considerable uncertainty in the highway reservation process.

The courts' insistence on a short time period is related to their concern that indefinite reservations of land for highways when the government entity is not committed to the acquisition of the land are unfair to landowners. This concern clearly influenced the Delaware court decision holding a highway reservation law unconstitutional. It also influenced the Maryland cases that invalidated subdivision denials based on highway reservations when the agency was not definitely committed to the acquisition of the land.

The uncertainty problem creates a dilemma that is difficult to resolve. Planning means uncertainty, and the purpose of a highway reservation law is to withhold land from development during this uncertain period. Keeping the time period of the reservation short helps resolve the uncertainty problem but undercuts the usefulness of highway reservations as a technique for implementing highway planning. There are no easy solutions to this dilemma. The inclusion of remedial provisions that will mitigate the burden of the law on the landowner should help resolve the uncertainty problem and may support a highway reservation adopted early in the planning process.

3. The courts make it clear that a highway reservation law is unconstitutional as applied if it denies a landowner any reasonable use of his land. The problem is not as serious when a highway reservation is adopted for a highway widening. The landowner may be able to make a reasonable use of his land on that part of his property not covered by the reservation.

The taking problem is more serious if the highway reservation is adopted for a highway on a new location. In this situation the reservation may include a substantial part of the property owner's land. A remedial provision can help in this situation, but it may result in a ruling lifting the reservation to avoid a claim that the landowner cannot make a reasonable use of his property. This would defeat the purpose of the law.

4. This discussion indicates that remedial provisions are important. Many municipal official map laws contain a remedial variance provision. These provisions authorize the development of land in a mapped street if hardship is shown. The problem is that granting variances undermines the effectiveness of a highway reservation. Local zoning agencies would probably grant a variance if no reasonable use of the land is possible, and a court would probably reverse if a variance is denied in this situation. An alternative remedial provision is preferable.

The highway reservation laws conferring highway reservation powers on state highway agencies do not usually contain a variance provision. Some of these laws authorize the landowner whose land is covered by a highway reservation to file an application for a building permit with the local government in which his land is located. The statute then requires the state highway agency either to consent to the issuance of the permit or acquire the land. The statutory procedure requires a decision by the statutory highway agency after a limited period of time, usually no more than 4 months.[279]

A New Jersey court relied on a provision of this type to hold a highway reservation law constitutional. A Delaware court found a provision of this type objectionable. For reasons stated earlier, the New Jersey decision is better reasoned. Inclusion of a remedial provision of this type in a highway reservation law is recommended. It resolves the uncertainty problem by authorizing owners of land covered by reservations to compel a decision either to allow the development of their land or to acquire their land and pay compensation.

Highway reservation laws provide (and should provide) a short time period in which the highway agency must decide whether to consent to a building permit or acquire reserved land. The short time period does not undercut the effectiveness of a highway reservation because it runs only after the landowner files an application for a building permit. Many landowners whose land is covered by a highway reservation will not have immediate building plans. If this is true, a highway reservation under a highway reservation law with a provision of this type may not be disturbed for a substantial period of time.

At worst, the highway agency may have to engage in the selective acquisition of parcels within the highway reservation corridor if applications for permits are made. The Delaware court suggested that advance highway acquisitions of this type are invalid, but in the case the court relied on the acquisition was for land not to be used for 30 years. This is extreme as in most cases the construction of the highway will be contemplated in a much shorter period of time. The courts will uphold acquisitions which are reasonably in advance of the time the highway will be constructed.

5. Some final comments are in order on the danger that a highway reservation law will be attacked constitutionally as applied to a particular property. The as-applied taking problem can arise when a landowner whose land is covered by a highway reservation claims the reservation does not allow him a reasonable use of his land.

The as-applied taking problem also can arise if the highway agency or the local government engages in oppressive precondemnation activities. This as-applied taking problem can arise if a highway agency files pro-

ceedings to acquire the property, delays condemnation or abandons condemnation proceedings already started, and then places the landowner's property in a highway reservation under a highway reservation law. The same problem can occur at the local government level. It will be aggravated if the local government applies restrictive zoning to the property to depress its value in advance of acquisition, such as a public use zoning classification. The *Versalles* case discussed earlier, under "The Constitutionality of Legal Techniques for Reserving Right-of-Way," is an example of a decision invalidating a highway reservation in a fact situation of this type.

As the discussion of oppressive precondemnation activities in section headed, "A General Outline of Taking Law," indicated, courts will determine whether these activities are a taking of property on a case-by-case basis. Drafting cannot handle oppressive precondemnation activity problems. A highway agency or a local government can avoid these problems only through the fair administration of highway reservation powers in highway reservation laws.

This review of highway reservation laws does not mean they should never be used to reserve land in advance of its acquisition. It does indicate that the courts are sensitive to the plight of property owners when their land is withheld from development for an unreasonable period of time with no certainty that the highway agency will ever acquire it. Careful drafting can remove much of this concern. It should produce a highway reservation law that can be a useful technique to implement planning for the future acquisition of highways.

APPENDIX A

MODEL LAWS FOR CITY AND COUNTY OFFICIAL MAP ACTS

	STANDARD ACT
Authority Given to	Municipalities
Master Plan Required	Major street plan
Rights-of-Way Protected	Plats showing "exact location of the lines of a street"
Time Limit	Council shall fix
Permission Required for Improvements in Right-of-Way	No provision
Compensation Denied to Structure Illegally in Right-of-Way	Yes
Compensation Payable for Restriction	Required
Standard for Variance	No provision

	BASSETT WILLIAMS MODEL
Authority Given to	Municipalities
Master Plan Required	Not explicit; planning board to report on proposed rights-of-way
Rights-of-Way Protected	New or widened streets, highways, and freeways
Time Limit	No
Permission Required for Improvements in Right-of-Way	"[B]uilding in the bed of any street, highway or freeway," as variance
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	(a) Land within mapped street is not yielding fair return; (b) building shall little as practicable increase cost of street or change map; (c) permit refused if applicant not substantially damaged
Conditions Imposed	Reasonable requirements to promote health, safety, and welfare of community
Comments	Similar statute proposed for counties

	BETTMAN MODEL
Authority Given to	Municipalities
Master Plan Required	Major street plan as part of master plan
Rights-of-Way Protected	New, extended, widened or narrowed streets
Time Limit	No
Permission Required for Improvements in Right-of-Way	"[A]ny building or structure or part thereof ... between the mapped lines of any street," as variance
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	(a) Property of which mapped street is part does not yield reasonable return or (b) balancing interests of municipality against interests of owner, permit required by considerations of justice and equity
Conditions Imposed	Location, ground area, height, duration and other details of extent and character of building or structure
Comments	Similar statute proposed for county and regional plan commissions

APPENDIX B

STATE ENABLING LEGISLATION FOR CITY AND COUNTY OFFICIAL MAP ACTS

STATE/YEAR ADOPTED: ALABAMA/1935	
Authority Given to	Municipalities
Master Plan Required	Standard Act
Rights-of-Way Protected	Standard Act
Time Limit	Standard Act
Permission Required for Improvements in Right-of-Way	Standard Act
Compensation Denied to Structure Illegally in Right-of-Way	Standard Act
Compensation Payable for Restriction	Standard Act
Standard for Variance	Standard Act
Conditions Imposed	Standard Act
Statutory Citation	Ala. Code § 5-54
Comments	

STATE/YEAR ADOPTED: ARKANSAS/1987	
Authority Given to	Cities and towns
Master Plan Required	Yes
Rights-of-Way Protected	"general locations of streets and highways"
Time Limit	1 year
Permission Required for Improvements in Right-of-Way	"Developer" must conform to "plan or plans currently in effect"
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Not specified
Conditions Imposed	Not specified
Statutory Citation	Ark. Stat. Ann. §§ 19-2828, 19-2829
Comments	"[L]egislative body may enjoin any . . . property owner in violation of a planning ordinance to prevent or correct such violation." Violation is a misdemeanor

STATE/YEAR ADOPTED: COLORADO/1959	
Authority Given to	Municipalities
Master Plan Required	Standard Act
Rights-of-Way Protected	Standard Act
Time Limit	Standard Act
Permission Required for Improvements in Right-of-Way	Standard Act
Compensation Denied to Structure Illegally in Right-of-Way	Standard Act
Compensation Payable for Restriction	Standard Act
Standard for Variance	Standard Act
Conditions Imposed	Standard Act
Statutory Citation	Colo. Rev. Stat. §§ 31-23-220 to 31-23-224
Comments	

STATE/YEAR ADOPTED: CONNECTICUT/1951	
Authority Given to	Municipalities
Master Plan Required	Not explicit; plan commissioner prepares map
Rights-of-Way Protected	"Proposed highways, streets, sidewalks, or the relocation, grade, widening or improvement of existing highways, streets, etc.
Time Limit	No
Permission Required for Improvements in Right-of-Way	No provision
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	Benefits and damages may be assessed
Standard for Variance	No provision
Conditions Imposed	
Statutory Citation	Conn. Gen. Stat. § 8-29
Comments	Map may take an easement for public use

STATE/YEAR ADOPTED: DELAWARE/1953	
Authority Given to	Cities and towns
Master Plan Required	Approximately Basset-Williams model
Rights-of-Way Protected	Proposed "new or widened" public ways
Time Limit	No
Permission Required for Improvements in Right-of-Way	No provision
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Implies that legislative body may grant variance by 2/3 vote
Conditions Imposed	No provision

Statutory Citation	Del. Code Ann. Title 22 § 704-708
Comments	No explicit control over encroaching development, but statute authorizes reference of any "class of matters" to planning commission

STATE/YEAR ADOPTED: FLORIDA/1984

Authority Given to	Counties
Master Plan Required	No
Rights-of-Way Protected	"area of proposed road construction"
Time Limit	5 years with possible 5-year extension
Permission Required for Improvements in Right-of-Way	Yes
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Right of way reservation is "unreasonable or arbitrary and that its effect is to deny a substantial portion of the beneficial use of such property"
Conditions Imposed	Not specified
Statutory Citation	Fla Stat Ann §§ 336.02, 380.031(4)
Comments	

STATE/YEAR ADOPTED: IDAHO/1975

Authority Given to	Cities and counties
Master Plan Required	No
Rights-of-Way Protected	Streets, roads, other public ways, or transportation facilities proposed for construction or alteration
Time Limit	6 years
Permission Required for Improvements in Right-of-Way	Yes
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	No provision
Conditions Imposed	No provision
Statutory Citation	Idaho Code § 67-6517
Comments	If person requests a building permit for an area indicated on map, public agency must purchase the land

STATE/YEAR ADOPTED: INDIANA/1981

Authority Given to	Local governments
Master Plan Required	Yes
Rights-of-Way Protected	"Publicways"
Time Limit	None
Permission Required for Improvements in Right-of-Way	Improvement location permit required
Compensation Denied to Structure Illegally in Right-of-Way	No—fines may be imposed
Compensation Payable for Restriction	No
Standard for Variance	No provision
Conditions Imposed	No provision
Statutory Citation	Ind. Code. Ann. §§ 36-7-4-801 to 36-7-4-804
Comments	Improvement location permits will not be issued for erection, alteration or repair unless structure complies with zoning ordinance

STATE/YEAR ADOPTED: KANSAS/1965

Authority Given to	Cities
Master Plan Required	"major street or highway system" plan as part of comprehensive plan
Rights-of-Way Protected	"proposed major streets or highways"
Time Limit	No
Permission Required for Improvements in Right-of-Way	Yes
Compensation Denied to Structure Illegally in Right-of-Way	"governing body of the city shall provide for the method of enforcement"
Compensation Payable for Restriction	
Standard for Variance	Restriction "constitutes a complete deprivation of use as distinguished from merely granting a privilege"
Conditions Imposed	"intended purpose of regulations shall be strictly observed & welfare protected"
Statutory Citation	Kan Stat Ann § 12-705(c)
Comments	

STATE/YEAR ADOPTED: KENTUCKY/1966

Authority Given to	Cities and Counties
Master Plan Required	Yes
Rights-of-Way Protected	"proposed streets, including right-of-way, watercourses, parks & playgrounds, public schools or other public building sites"
Time Limit	No
Permission Required for Improvements in Right-of-Way	Construction or material alteration of a building "in the lines of any proposed facility shown on official map"
Compensation Denied to Structure Illegally in Right-of-Way	Yes

Compensation Payable for Restriction	No
Standard for Variance	Bassett-Williams
Conditions Imposed	No provision
Statutory Citation	Ky. Rev. Stat. § 100.293-307
Comments	

STATE/YEAR ADOPTED: LOUISIANA/1946

Authority Given to	Parishes and municipalities
Master Plan Required	Major street plan
Rights-of-Way Protected	"affected area" of major street plan
Time Limit	No
Permission Required for Improvements in Right-of-Way	No provision (permit required)
Compensation Denied to Structure Illegally in Right-of-Way	No provision—municipality can bring suit for mandatory injunction to compel removal; parish legislative body can bring action to remove
Compensation Payable for Restriction	No
Standard for Variance	No provision
Conditions Imposed	No provision
Statutory Citation	La. Rev. Stat. Ann. § 33:116
Comments	Map may include area outside city limits over which approval of subdivision plats is required. See also § 33:140.26 (Shreveport)

STATE/YEAR ADOPTED: MARYLAND/1957

Authority Given to	Municipalities
Master Plan Required	"Transportation element" of plan required
Rights-of-Way Protected	"surveys for the exact location of the lines of a street or streets and any other part of the transportation element"
Time Limit	No
Permission Required for Improvements in Right-of-Way	"Development on any part of the land between the lines of proposed street" as variance
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Bettman Model
Conditions Imposed	Combines Bettman and Bassett-Williams
Statutory Citation	Md. Code Ann. Art 66B, §§ 6.01, 6.02
Comments	

STATE/YEAR ADOPTED: MASSACHUSETTS/1936

Authority Given to	Cities and towns
Master Plan Required	Bassett-Williams Model
Rights-of-Way Protected	New or widened public ways
Time Limit	No
Permission Required for Improvements in Right-of-Way	If exterior lines of public ways established, no structures permitted between such lines
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	Damages allowable under eminent domain chapter for (1) changes in official map and (2) establishment of exterior lines of way
Standard for Variance	No provision
Conditions Imposed	No provision
Statutory Citation	Mass. Gen. Laws Ann. Ch. 41 §§ 81F, 81J
Comments	Existing buildings may be maintained within exterior lines, under conditions described by planning board

STATE/YEAR ADOPTED: MICHIGAN/1943

Authority Given to	Cities and villages
Master Plan Required	Yes
Rights-of-Way Protected	"[N]ew, extended or widened streets, avenues, places or other public ways"
Time Limit	No, but planning commission to estimate time of acquisition
Permission Required for Improvements in Right-of-Way	Bettman Model
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Bettman Model
Conditions Imposed	Bettman Model
Statutory Citation	Mich. Stat. Ann. § 5.3007(1)-(4)
Comments	

STATE/YEAR ADOPTED: MINNESOTA/1965

Authority Given to	Municipalities
Master Plan Required	Major thoroughfare and community facilities plans required
Rights-of-Way Protected	Area "within the limits of the mapped street or outside of any building line that may have been established upon the existing street or within any area thus identified for public purposes."
Time Limit	No
Permission Required for Improvements in Right-of-Way	Yes
Compensation Denied to Structure Illegally in Right-of-Way	Yes—also denied where in violation of conditions of permit

Compensation Payable for Restriction	No
Standard for Variance	Bettman Model
Conditions Imposed	Bettman Model
Statutory Citation	Minn. Stat. Ann. § 462.359
Comments	

STATE/YEAR ADOPTED: MISSOURI/1941,1951

Authority Given to	Counties
Master Plan Required	Plan for major highways
Rights-of-Way Protected	May establish "building or setback lines" on major highways shown
Time Limit	No
Permission Required for Improvements in Right-of-Way	New buildings prohibited within setback lines
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	"unwarranted hardship, which constitutes an unreasonable deprivation of use as distinguished from the mere grant of a privilege
Conditions Imposed	No provision
Statutory Citation	Mo. Ann. Stat. § 64.080
Comments	For a similar provision see § 62.251

STATE/YEAR ADOPTED: MISSOURI/1963

Authority Given to	Municipalities
Master Plan Required	"major street plan or subdivision plat required"
Rights-of-Way Protected	"lot within the territorial jurisdiction of the [planning] commission"
Time Limit	No
Permission Required for Improvements in Right-of-Way	Yes
Compensation Denied to Structure Illegally in Right-of-Way	No provision for fine or sentence imposed for violation
Compensation Payable for Restriction	No
Standard for Variance	"[U]nwarranted hardship which constitutes an unreasonable deprivation of use as distinguished from the mere grant of privilege"
Conditions Imposed	No provision
Statutory Citation	Mo. Ann. Stat §§ 89.460 to § 89.490
Comments	§§ 89.210 to § 89.250 provide for establishment of building lines by cities over 500,000 population; requires all buildings not in conformance to conform within 25 years; no building or substantial repair allowed within 25-year period

STATE/YEAR ADOPTED: NEBRASKA/1969

Authority Given to	Cities and villages
Master Plan Required	Comprehensive zoning ordinance required
Rights-of-Way Protected	"the half of the street adjacent to the lot [which has not] been dedicated to its comprehensive plan width"
Time Limit	No
Permission Required for Improvements in Right-of-Way	Yes
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Restriction would cause "unreasonable hardship"
Conditions Imposed	No provision
Statutory Citation	Neb. Rev. Stat. § 18-1721
Comments	Requires dedication of a maximum of 25% of the lot for streets on comprehensive plan

STATE/YEAR ADOPTED: NEW HAMPSHIRE/1983

Authority Given to	Municipalities
Master Plan Required	Master plan or "progress in master planning to stage of the making & adoption of a map street plan"
Rights-of-Way Protected	"planned or mapped lines of future streets, street extensions, street widenings, or on street narrowings"
Time Limit	No
Permission Required for Improvements in Right-of-Way	Yes—Bettman Model
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Bettman Model
Conditions Imposed	Combines Bettman & Bassett-Williams
Statutory Citation	N. H. Rev. Stat. Ann. §§ 674:9 to 674:14
Comments	

STATE/YEAR ADOPTED: NEW JERSEY/1935

Authority Given to	Counties
Master Plan Required	Advice of planning board required for adoption and amendment
Rights-of-Way Protected	Highways and roadways under county jurisdiction or when county participation anticipated
Time Limit	No

Permission Required for Improvements in Right-of-Way	Approximately Bassett-Williams; fine imposed for construction without permit
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Part (b) Bassett-Williams
Conditions Imposed	Bassett-Williams
Statutory Citation	N. J. Stat. Ann. §§ 40:27-5, 40:27-6
Comments	1968 amendment requires municipalities to notify counties and allow to review & report on municipal official map

STATE/YEAR ADOPTED: NEW JERSEY/1976 (1953)

Authority Given to	Municipalities
Master Plan Required	Yes, but official map can be inconsistent with plan by majority of governing body
Rights-of-Way Protected	"location & width of streets . . . whether or not such . . . are improved or unimproved or are in actual physical existence"
Time Limit	No
Permission Required for Improvements in Right-of-Way	Yes, approximately Bassett-Williams Model
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Part (a) Bettman Model; Part (b) Bassett-Williams
Conditions Imposed	Yes, Bassett-Williams
Statutory Citation	N.J. Stat. Ann. §§ 40:55D-32 to 40:55D-36
Comments	40:55D-35 forbids erection of any building unless the lot abuts a street giving access; street must be on official map, be in existence, or on a plat

STATE/YEAR ADOPTED: NEW MEXICO/1953

Authority Given to	Municipalities
Master Plan Required	Master plan or major street plan required
Rights-of-Way Protected	Bettman Model
Time Limit	No
Permission Required for Improvements in Right-of-Way	No provision
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	None
Conditions Imposed	None
Statutory Citation	N. M. Stat. Ann. §§ 3-19-1 to 3-19-8
Comments	Statute provides only for certification and survey of new or altered streets by planning commission; statute allows determinations of planning commission to be set aside if "unlawful or unreasonable."

STATE/YEAR ADOPTED: NEW YORK/1926

Authority Given to	Cities
Master Plan Required	Bassett-Williams
Rights-of-Way Protected	New streets and highways; widen or close existing streets and highways
Time Limit	Yes—if city has not acquired title within 10 years, permit can be granted for construction within right-of-way
Permission Required for Improvements in Right-of-Way	Approximate Bassett-Williams Model
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Bassett-Williams
Conditions Imposed	Approximate Bassett-Williams
Statutory Citation	Gen. City Law §§ 26, 29, 33, 34, 35, 36
Comments	Cities over 1 million—no public improvements allowed unless public way has been opened for 10 years

STATE/YEAR ADOPTED: NEW YORK/1958

Authority Given to	Counties
Master Plan Required	Bassett-Williams
Rights-of-Way Protected	New county roads; widen, realign or close existing country roads
Time Limit	No
Permission Required for Improvements in Right-of-Way	(a) Bassett-Williams Model, permission also req'd where building or subdivision has frontage on, access to, or directly related to proposed road; consideration to be given to character of development traffic, road design and frequency of access
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	a & b—Bassett-Williams; requirements can be varied where unnecessary hardship or practical difficulties result
Conditions Imposed	Approximate, Bassett-Williams
Statutory Citation	Gen. Mun. Law §§ 239(g) to 239(k)
Comments	County map controls if city has no official map

STATE/YEAR ADOPTED: NORTH DAKOTA/1943	
Authority Given to	Municipalities
Master Plan Required	Yes
Rights-of-Way Protected	"land . . . to be reserved for future acquisition for public streets"
Time Limit	No
Permission Required for Improvements in Right-of-Way	Construction of "any building, fence or other structure" as variance
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	Yes
Standard for Variance	Within 3 months of adoption of map, owner must claim that the map or the refusal of the city to issue a building permit is a taking; if claim not filed, it is waived; if claim is filed, city must modify map or compensate him for his right to construct
Conditions Imposed	No provision
Statutory Citation	N. D. Cent. Code Ann. §§ 40-48-28 to 40-48-38
Comments	

STATE/YEAR ADOPTED: OKLAHOMA/1947	
Authority Given to	Municipalities over 200,000
Master Plan Required	Major street plan or portion thereof required
Rights-of-Way Protected	Setback lines on major streets which appear to include streets on master plan
Time Limit	No
Permission Required for Improvements in Right-of-Way	"[A]ny new building within the setback line, as variance
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Missouri 1941 statutory standard and purpose of regulation must be preserved and public welfare and safety protected
Conditions Imposed	No provision
Statutory Citation	Okla. Stat. Ann. tit. 11 §§ 47-121 to 47-123
Comments	

STATE/YEAR ADOPTED: OREGON	
Authority Given to	Counties
Master Plan Required	Official map as part of comprehensive plan
Rights-of-Way Protected	"existing and proposed thoroughfares, easements & property needed for public purposes"
Time Limit	No
Permission Required for Improvements in Right-of-Way	Not explicit; locations, construction, maintenance, repair, alteration or use of a building in violation of map prohibited
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	No variance allowed if use in conflict with comprehensive plan
Conditions Imposed	No provision
Statutory Citation	Or. Rev. Stat. §§ 215.110 to § 215.190; 215.416
Comments	

STATE/YEAR ADOPTED: PENNSYLVANIA/1927	
Authority Given to	Cities of the second class
Master Plan Required	Standard Act
Rights-of-Way Protected	Standard Act
Time Limit	Standard Act
Permission Required for Improvements in Right-of-Way	Standard Act
Compensation Denied to Structure Illegally in Right-of-Way	Standard Act
Compensation Payable for Restriction	Standard Act
Standard for Variance	Standard Act
Conditions Imposed	Standard Act
Statutory Citation	Pa. Stat. Ann. tit. 53 §§ 22777 to 22779
Comments	Compensation provisions are much simplified

STATE/YEAR ADOPTED: PENNSYLVANIA/1968	
Authority Given to	Municipalities
Master Plan Required	Bassett-Williams
Rights-of-Way Protected	Standard Act
Time Limit	Governing body may fix
Permission Required for Improvements in Right-of-Way	Building or improvement within the lines of any street shown on map as variance
Compensation Denied to Structure Illegally in Right-of-Way	Yes and building or improvement shall be removed at expense of owner
Compensation Payable for Restriction	No, but municipality must acquire intention within one year if owner has intention to build; reservation void if municipality does not purchase
Standard for Variance	"Property of which the reserved location forms a part, cannot yield a reasonable return to the owner."

Conditions Imposed	No provision
Statutory Citation	Pa. Stat. Ann. tit. 53 §§ 10401 to § 10408
Comments	With regard to Philadelphia, see tit. 53 § 16401

STATE/YEAR ADOPTED: RHODE ISLAND/1962

Authority Given to	Cities and towns
Master Plan Required	Bassett-Williams Model
Rights-of-Way Protected	"proposed streets deemed necessary . . . for sound physical development"
Time Limit	No
Permission Required for Improvements in Right-of-Way	"building in the bed of any street shown on official map" as variance"
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Bassett-Williams Model
Conditions Imposed	Bassett-Williams Model
Statutory Citation	R. I. Gen. Laws §§ 45-23.1-1 to 45-23.1-7
Comments	

STATE/YEAR ADOPTED: SOUTH CAROLINA/1941

Authority Given to	Municipalities over 34,000
Master Plan Required	Yes
Rights-of-Way Protected	"proposed major streets or highways"
Time Limit	No
Permission Required for Improvements in Right-of-Way	"Any new building as variance"
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Same as Missouri 1941 statute; the purpose of the regulations must be preserved and public safety and welfare protected
Conditions Imposed	No provision
Statutory Citation	S.C. Code Ann. §§ 5-23-570; 6-7-1210 to § 6-7-1280
Comments	

STATE/YEAR ADOPTED: SOUTH CAROLINA/1955

Authority Given to	Counties
Master Plan Required	Yes
Rights-of-Way Protected	"Existing or proposed streets or highways as are proposed for widening"
Time Limit	No
Permission Required for Improvements in Right-of-Way	"Any new building as variance"
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Undue hardship; improvement to increase cost of widening or opening "as little as practicable"
Conditions Imposed	"Reasonable requirements"
Statutory Citation	S. C. Code Ann. § 4-27-190
Comments	

STATE/YEAR ADOPTED: SOUTH CAROLINA/1967

Authority Given to	Counties and municipalities
Master Plan Required	Comprehensive plan or major street plan or portion of such plan
Rights-of-Way Protected	Rights-of-way and highways and for future extensions, widenings and other improvements
Time Limit	No
Permission Required for Improvements in Right-of-Way	"Construction, improvement repair or moving of any building or structure" or any change in land use within mapped lines of any street or highway"
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Not specified; specifies only procedure for exemption
Conditions Imposed	None specified—requires planning commission review and recommendation
Statutory Citation	S. C. Code Ann. §§ 6-7-1210 to 6-7-1280
Comments	If permit applied for, governing body must give variance, reach an agreement with owner to acquire or institute condemnation proceedings

STATE/YEAR ADOPTED: TENNESSEE/1959

Authority Given to	Nashville
Master Plan Required	Bettman Model
Rights-of-Way Protected	Bettman Model
Time Limit	No
Permission Required for Improvements in Right-of-Way	Bettman Model, with building or street defined to include its "erection, construction, reconstruction or alteration"
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No

Standard for Variance	Bettman Model and (a) failure to yield reasonable return due to "relation of the property to the mapped street" or "specific and unique character of the property;" (b) permit will not injure surrounding property or alter essential character of neighborhood
Conditions Imposed	Bettman and Bassett-Williams Models combined and minimum easing of map and costs not to be increased any more than necessary
Statutory Citation	Tenn. Private Acts, 1959, Ch. 356
Comments	Similar law for Davidson County (Nashville); Private Acts, Ch. 338; property must be purchased if variance denied or condition unacceptable to property owner

STATE/YEAR ADOPTED: TEXAS/1953

Authority Given to	Adjacent counties of 350,000 or more
Master Plan Required	Major highway plan appears to be required
Rights-of-Way Protected	Appears to apply to "the improvement or widening" of major highways or . . . roads
Time Limit	4 years
Permission Required for Improvements in Right-of-Way	Improvements or structures allowed as variance
Compensation Denied to Structure Illegally in Right-of-Way	Yes, although improvements authorized as variance
Compensation Payable for Restriction	No
Standard for Variance	Generally, exceptional and extraordinary conditions, applicable to a specific property, which cause exceptional difficulties or hardship, the intent & purpose of building line to be preserved
Conditions Imposed	"Such conditions as Board of Adjustment may impose"; "appropriate safeguards"
Statutory Citation	Texas Rev. Civ. Stat. Art. 6812c
Comments	

STATE/YEAR ADOPTED: UTAH/1945

Authority Given to	Municipalities
Master Plan Required	Standard Act
Rights-of-Way Protected	Bettman Model
Time Limit	No
Permission Required for Improvements in Right-of-Way	Bettman Model
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	Bettman Model
Conditions Imposed	Bettman Model
Statutory Citation	Utah Code Ann. §§ 10-9-23, 10-9-25
Comments	

STATE/YEAR ADOPTED: UTAH/1941

Authority Given to	Counties
Master Plan Required	Advice of planning commission
Rights-of-Way Protected	Bettman Model
Time Limit	No
Permission Required for Improvements in Right-of-Way	Bettman Model
Compensation Denied to Structure Illegally in Right-of-Way	Yes, if permit for variance issued within 1 year of recording of map
Compensation Payable for Restriction	No
Standard for Variance	(a) Bettman Part (b), if official map recorded for less than 1 year; (b) if for more than 1 year see comment
Conditions Imposed	No provision
Statutory Citation	Utah Code Ann. §§ 17-27-7, 17-27-7.10 (1973)
Comments	Variance allowed after one year if demand to buy made on county and it does not buy at reasonable price or begin condemnation proceedings

STATE/YEAR ADOPTED: VERMONT/1967

Authority Given to	Municipalities
Master Plan Required	No
Rights-of-Way Protected	"existing or proposed streets"
Time Limit	No
Permission Required for Improvements in Right-of-Way	"structure within mapped lines of any street as variance"
Compensation Denied to Structure Illegally in Right-of-Way	Yes
Compensation Payable for Restriction	If building permit denied, land must be acquired by municipality
Standard for Variance	No provision
Conditions Imposed	No provision
Statutory Citation	Vt. Stat. Ann. tit. 24, §§ 4422-4425, § 4469
Comments	

STATE/YEAR ADOPTED: WASHINGTON/1959

Authority Given to	Counties and regional plan commissions
Master Plan Required	Yes
Rights-of-Way Protected	Future rights-of-way
Time Limit	No

Permission Required for Improvements in Right-of-Way	"Official controls" may be adopted to protect future rights-of-way "against encroachments by buildings or other physical structures or facilities"
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No
Standard for Variance	No provision, but county board may establish procedure for enforcement and application of official controls
Conditions Imposed	No provision
Statutory Citation	Wash. Rev. Code Ann. §§ 36.70.010-36.70.580
Comments	

STATE/YEAR ADOPTED: WISCONSIN/1941

Authority Given to	Cities and villages
Master Plan Required	Not explicit
Rights-of-Way Protected	New, widened, extended streets, highways, parkways
Time Limit	No
Permission Required for Improvements in Right-of-Way	Construction or enlargement of any building within the limits of any street or highway as variance
Compensation Denied to Structure Illegally in Right-of-Way	Yes
Compensation Payable for Restriction	No
Standard for Variance	Bassett-Williams, (a) and (b)—(c) permit refused if applicant not substantially "affected"
Conditions Imposed	Bassett-Williams Model
Statutory Citation	Wis. Stat. Ann. § 62.23(6)
Comments	§ 80.64 authorizes counties to establish new and widened streets or highways with consent of municipality in which they lie, but contains no enforcement powers

STATE/YEAR ADOPTED: WYOMING/1961

Authority Given to	Municipalities
Master Plan Required	Standard Act
Rights-of-Way Protected	Bettman Model
Time Limit	No
Permission Required for Improvements in Right-of-Way	Bettman Model
Compensation Denied to Structure Illegally in Right-of-Way	No, but municipality can bring action for injunction or removal
Compensation Payable for Restriction	No
Standard for Variance	Bettman Model
Conditions Imposed	Bettman Model
Statutory Citation	Wyo. Comp. Stat. Ann. §§ 15-1-508 to 15-1-512
Comments	

APPENDIX C

STATE HIGHWAY RESERVATION LAWS

STATE/YEAR ADOPTED: CALIFORNIA/1947

Authority Given to	Department of Transportation
Map or Plan Required	Map
Rights-of-Way Protected	Proposed state highway which has been laid out, surveyed and delineated on map.
Time Limit	No
Permission Required for Improvements in Right-of-Way	No person shall erect structure other than temporary structure costing less than $500, without permit; any person aggrieved by the refusal of a building permit may request a hearing
Compensation Denied to Structure Illegally in Right-of-Way	N/A
Compensation Payable for Restriction	No; mapped highway requirement is not "a condition precedent to the acquisition of rights-of-way by purchase or by proceedings in eminent domain."
Statutory Citation	Cal. Sts. & Hy. Code §§ 740, 741
Comments	Hardship provision: A permit may be granted if: (a) the owner will be substantially damaged by a refusal; (b) the property will not earn fair return on the owner's investment unless construction is allowed; (c) interest of the owner in using his property outweighs the interest of the public in preserving the integrity of the officially mapped highway

STATE/YEAR ADOPTED: DELAWARE/1953

Authority Given to	Department of Transportation
Map or Plan Required	Future right-of-way map
Rights-of-Way Protected	Corridor routes of future needs for rights-of-way; Department must develop a "Future Right-of-Way Map — tentative" for review and hearings; a "Future Right-of-Way Map — Final" shall be utilized by local governing bodies in determination of future land use, development or improvement
Time Limit	No
Permission Required for Improvements in Right-of-Way	Department may authorize temporary use of land for non-highway purposes which will not interfere with highway planning or construction; Department authorization for temporary use shall be required only where Department determines that use would increase the cost to the state in the future procurement of land for highway purposes; nothing in this section shall preclude owner from uti-

	lizing land as desired, prior to procurement, provided such utilization of land does not increase the potential cost to the state at the future date of negotiations
Compensation Denied to Structure Illegally in Right-of-Way	No provision
Compensation Payable for Restriction	The adoption of the Future Right-of-Way Map shall not constitute the establishment of any highway or acceptance of any land for highway purposes and shall not constitute a taking or application for public use
Statutory Citation	Del. Code Ann. tit. 17, § 145
Comments	

STATE/YEAR ADOPTED: FLORIDA/1984

Authority Given to	State Highway Department or any Expressway Authority
Map or Plan Required	Map of Reservation
Rights-of-Way Protected	Proposed rights-of-way for eventual widening of any existing roads or for initial construction of any proposed roads
Time Limit	5 years with additional 5 years extension period for restriction within area
Permission Required for Improvements in Right-of-Way	A map of reservation establishes a building setback line from the center line of any existing road and right-of-way for any proposed road construction; no development permits shall be granted by any governmental entity for new construction or renovation of commercial structures that exceed 20 percent of the appraised value of the existing structure within right-of-way of existing roads; no restriction is placed on renovation or improvement of existing residential structures; no development permits shall be issued for a 5-year period within right-of-way of proposed roads
Compensation Denied to Structure Illegally in Right-of-Way	No provision
Compensation Payable for Restriction	No provision
Statutory Citation	Fla. Stat. Ann. § 337.241
Comments	Hardship provision: owner of affected property may file a petition for administrative hearing alleging hardship — regulations are unreasonable or arbitrary and deny substantial portion of the beneficial use of the property; if the hardship exists, the department or expressway department have 180 days to acquire or condemn property before permit may be issued

STATE/YEAR ADOPTED: ILLINOIS/1967

Authority Given to	Department of Transportation
Map or Plan Required	Map
Rights-of-Way Protected	Rights-of-way needed for future additions to highway system
Time Limit	No
Permission Required for Improvements in Right-of-Way	No one shall incur development costs or make improvements within right-of-way without first giving 60 days notice to the Department. Normal emergency repairs to structures are exempted; once notice is given, the Dep't has 45 days to inform owner of its intent to purchase and an additional 120 days to acquire by purchase or eminent domain
Compensation Denied to Structure Illegally in Right-of-Way	When a right-of-way is acquired, no damages shall be allowed for any construction or improvement in violation of this provision unless the Dep't has failed to purchase the property or has abandoned an eminent domain proceeding
Compensation Payable for Restriction	The property is valued at the date of purchase or the date of condemnation rather than the date of which the map for the proposed right-of-way was filed
Statutory Citation	Ill. Ann. Stat. ch. 121, § 4-510
Comments	

STATE/YEAR ADOPTED: MICHIGAN/1955

Authority Given to	Intercounty Highway Commission
Map or Plan Required	Plan of proposed highways
Rights-of-Way Protected	Proposed highways or additional right-of-way requirements of existing highways
Time Limit	
Permission Required for Improvements in Right-of-Way	
Compensation Denied to Structure Illegally in Right-of-Way	
Compensation Payable for Restriction	
Statutory Citation	Mich. Stat. Ann. § 9.1084
Comments	

STATE/YEAR ADOPTED: MINNESOTA/1969

Authority Given to	State and county road authorities
Map or Plan Required	Map
Rights-of-Way Protected	Right-of-way of proposed acquisition
Time Limit	No
Permission Required for Improvements in Right-of-Way	No
Compensation Denied to Structure Illegally in Right-of-Way	No provision
Compensation Payable for Restriction	No; maps or plats filed for record under this section shall not operate of themselves to transfer title to property described, but shall be for delineation purposes only
Statutory Citation	Minn. Stat. Ann. §§ 160.085
Comments	

STATE/YEAR ADOPTED: MONTANA/1965	
Authority Given to	Department of Highways
Map or Plan Required	Description and plan of proposed highway
Rights-of-Way Protected	Center line and established width of proposed highway
Time Limit	1 year
Permission Required for Improvements in Right-of-Way	No provision
Compensation Denied to Structure Illegally in Right-of-Way	Whenever the department files a description and plan, no consideration or compensation shall be made in the purchase or condemnation of buildings or improvements or subdivisions placed or erected on the land covered by the plan after the filing
Compensation Payable for Restriction	No provision
Statutory Citation	Mont. Code Ann. §§ 60-4-108, 60-2-209
Comments	

STATE/YEAR ADOPTED: NEBRASKA/1974	
Authority Given to	Department of Roads
Map or Plan Required	Corridor map must show location of corridor on each parcel traversed
Rights-of-Way Protected	Corridor location for proposed highways
Time Limit	6 months after negotiations initiated for purchase
Permission Required for Improvements in Right-of-Way	Department must notify county official responsible for issuing building permits or owner of property if no official exists; building permits are required for all structures within an approved corridor if the actual construction exceeds $1000; upon application for permit, county shall notify Department and stay any action for 60 days, during which time Department may file a statement of intent to negotiate for land and involved Department will then have 6 months to complete its negotiations for acquisition
Compensation Denied to Structure Illegally in Right-of-Way	No
Compensation Payable for Restriction	No; section is not to be construed as a condition precedent to the acquisition of rights-of-way by purchase or eminent domain
Statutory Citation	Neb. Rev. Stat. §§ 39-1311 to 39-1311.05
Comments	Code Section 39-1364 requires Department to make full disclosure about proposed highway construction, but not of right-of-way for proposed highway until such information is made available to the general public

STATE/YEAR ADOPTED: NEW JERSEY/1968	
Authority Given to	State Highway Commissioner
Map or Plan Required	Certified copy of map, plan or report
Rights-of-Way Protected	Proposed line of any new state highway
Time Limit	No
Permission Required for Improvements in Right-of-Way	Municipal approving authority may not issue building permit or approve site plan for subdivision without Commissioner's recommendation. Municipal authority must refer site plans or permit applications to Commissioner for review and recommendation. If no recommendation is made within 45 days, municipal authority may issue permit or approve site plan. During 45-day period, Commissioner may give notice of intent to acquire property, recommend that permit or approval be granted subject to certain modifications, or give notice that he has no objection to permit or approval. If Commissioner gives notice of intent to acquire, municipal authority may not grant permit or approve site plan for additional 120 days during which Highway Dept. may acquire property. If either municipal authority or applicant objects to recommended modifications, Commissioner has 20 days to give notice of intent to acquire and additional 120 days to acquire applicant's property.
Compensation Denied to Structure Illegally in Right-of-Way	No provision
Compensation Payable for Restriction	No provision
Statutory Citation	N.J. Stat. Ann. §§ 27:7-66 to 27:7-67
Comments	

STATE/YEAR ADOPTED: NORTH CAROLINA/1959	
Authority Given to	Municipality with cooperation of Department of Transportation
Map or Plan Required	Municipality must develop comprehensive plan
Rights-of-Way Protected	Proposed streets and highways within municipalities which are part of state highway system
Time Limit	No
Permission Required for Improvements in Right-of-Way	Prohibits interference with and construction on state road or highway without permit from Department; violation is a misdemeanor
Compensation Denied to Structure Illegally in Right-of-Way	Department may remove structure and charge cost to responsible parties
Compensation Payable for Restriction	No
Statutory Citation	N.C. Gen. Stat. §§ 136-66.2, 136-93
Comments	Code Section 136-66.2 requires municipalities to develop comprehensive plan for street system; Department of Transportation may adopt the plan and agree as to which streets will be part of state highway system; those so designated will be subject to Code Section 136-93.

STATE/YEAR ADOPTED: OHIO/1985	
Authority Given to	Department of Transportation
Map or Plan Required	Map

Rights-of-Way Protected	Proposed highway during period of public hearings, certification to interested agencies and acquisition
Time Limit	120 days after notice
Permission Required for Improvements in Right-of-Way	Statute prohibits zoning change or subdivision approval or issuance of building permit within 300 feet of center line of proposed highway; local agency must notify Dep't of application affecting property and stay any action for 120 days, during which time Dep't may acquire property
Compensation Denied to Structure Illegally in Right-of-Way	
Compensation Payable for Restriction	
Statutory Citation	Ohio Rev. Code Ann. § 5511.01
Comments	

STATE/YEAR ADOPTED: PENNSYLVANIA/1945

Authority Given to	Department of Highways
Map or Plan Required	Map
Rights-of-Way Protected	Ultimate width and lines of state highways for future construction
Time Limit	No
Permission Required for Improvements in Right-of-Way	
Compensation Denied to Structure Illegally in Right-of-Way	No damage allowed by reason of plan or future construction of highway for property within path of highway
Compensation Payable for Restriction	
Statutory Citation	Pa. Stat. Ann. tit. 36, §§ 670-206, 678-207
Comments	

STATE/YEAR ADOPTED: TENNESSEE/1965

Authority Given to	Planning commission of municipality or county
Map or Plan Required	Map
Rights-of-Way Protected	Future highways within jurisdiction of municipalities and counties
Time Limit	
Permission Required for Improvements in Right-of-Way	After adoption of official map, no building may be constructed within boundaries of a mapped highway
Compensation Denied to Structure Illegally in Right-of-Way	
Compensation Payable for Restriction	
Statutory Citation	Tenn. Code Ann. §§ 54-19-101 to 54-19-121
Comments	Tenn. Code Ann. §§ 54-18-101 to 104 provides participation of Bureau of Highways in local planning process

STATE/YEAR ADOPTED: WASHINGTON/1961

Authority Given to	Department of Transportation
Map or Plan Required	Description and plan of new highway planned for construction
Rights-of-Way Protected	Location, width and lines of any new highway or limited access facility
Time Limit	1 year
Permission Required for Improvements in Right-of-Way	No owner or occupier may erect any bldg. or make any improvements within limits of proposal; no permits for improvements within limits may be issued by any authority; until the Dep't causes a plan to be properly recorded, nothing in law will prohibit any improvement or development of land or buildings within the limits of the proposal
Compensation Denied to Structure Illegally in Right-of-Way	If any erections or improvements are made, no allowances may be had therefor by the assessment of damages
Compensation Payable for Restriction	
Statutory Citation	Wash. Rev. Code Ann. §§ 47.05.025, 47.05.026
Comments	

STATE/YEAR ADOPTED: WISCONSIN/1983

Authority Given to	Department of Transportation
Map or Plan Required	Map must show location and approximate width of future highway right-of-way
Rights-of-Way Protected	Location and width of future freeways and expressways, interchanges, frontage roads, grade separations, other incidental facilities and relocation of highways
Time Limit	No
Permission Required for Improvements in Right-of-Way	No one shall erect structures or improve existing structures without notifying Dep't; prohibition does not apply to normal emergency repairs to existing structures or facilities
Compensation Denied to Structure Illegally in Right-of-Way	When right-of-way is acquired, no damages shall be allowed for any construction or improvements in violation of this section
Compensation Payable for Restriction	No
Statutory Citation	Wis. Stat. Ann. § 84.295(10)
Comments	

[1] This report is an update of the legal analysis in an earlier report on this subject, Mandelker, "Problems Under the Police Power" in D. Mandelker and G. Waite, *Future Acquisition and Reservation of Highway Rights of Way* (1963), a study prepared for the former Bureau of Public Roads in the U.S. Department of Commerce. For an article based on this study see Mandelker, *Planning the Freeway: Interim Controls in Highway Programs*, 1964 DUKE L.J. 439.

[2] See the charts of the model city and county official map acts in Appendix A.

[3] For an early analysis of official map acts see American Soc'y of Planning Offi-

cials (now American Planning Ass'n), "Protecting Future Streets: Official Maps, Setbacks and Such" (Planning Advisory Rept. No. 119, 1959). For an early unpublished survey of the use of official map acts see Davis, Official Maps and Mapped Streets in the United States (1960, on file in Georgia Institute of Technology Library).

[4] As part of this study, a questionnaire was sent to all state highway or transportation agencies to determine whether they had legislation authorizing the reservation of highway right-of-way in advance of acquisition. Thirty-five responses were received. The responses are on file with the authors.

[5] *See, e.g.,* Report of the Transportation Task Force, North Carolina Highway Needs for Growth, Opportunity, and Progress 16 (1986) (recommending adoption of state and local official map legislation).

[6] A highway reservation law can be used to reserve land for either a street or highway. A reference to both streets and highways is intended when the text refers to either of these facilities.

[7] U.S. CONST. amend. V.

[8] U.S. CONST. amend. XIV.

[9] Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 (1905); Chicago B. & O. R.R. Co. v. Chicago, 166 U.S. 226 (1897). *See also,* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).

[10] *See, e.g.,* N.D. Cent. Code § 24-01-18 ("The Commissioner ... on behalf of the state ... may purchase, acquire, take over, or condemn under the right and power of eminent domain for the state, and all lands ... or such easements ... thereof which he shall deem necessary for present public use ... or ... for reasonable future use...."). See also Nev. Rev. Stat. §§ 408.487, § 408.489.

[11] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[12] For a description of the distinction between eminent domain and inverse condemnation or de facto takings, *see,* Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980) ("Eminent domain refers to the legal proceeding in which government asserts its authority to condemn property."); United States v. Clarke, 445 U.S. 253, 257 (1980) (inverse condemnation is "a shorthand description in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted").

[13] Smith, "The Aftermath of the Brennan Dissent in San Diego Gas & Electric," APA Planning & Law Division Newsletter, Vol. 8, No. 1, at 1 (1984), reproduced in part in D. Mandelker and R. Cunningham, *Planning and Control of Land Development,* 97-98 (2d Ed. 1985).

[14] *See,* Loretto v. Teleprompter Manhattan CATV Corp., 458 (U.S. 419 (1982), where the Court held that a minor, but permanent, physical occupation of an owner's property by state authorization of cable television wire placement on an apartment building was a taking.

[15] *See,* William C. Haas Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979); HFH Ltd. v. Superior Court, 542 P.2d 237 (Cal. 1975); Gold Run Ltd. v. Board of County Comm'rs, 554 P.2d 317 (Colo. App. 1976).

[16] Smith, *supra* note 7, at 2. Examples of such activity are considered in Urbanizadora Versalles, Inc. v. Rivera Risa, 701 F2d 993 (1st Cir. 1983); Drakes Bay Land Co. v. U.S., 424 F2d 574 (Ct. Cl. 1970); and Jensen v. City of N.Y., 363 N.E.2d 1179 (N.Y. 1979).

[17] *See,* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 982 (N.D. Cal. 1975), *vacated by stip.,* 475 F. Supp. 1125 (N.D. Cal. 1976); Fred F. French Investing Co. v. City of N.Y., 350 N.E. 2d 381 (N.Y. 1976); Morris County Land Dev. Co. v. Parsippany—Troy Hills, 193 A.2d 232 (N.J. 1963) (qualified by later New Jersey cases).

[18] *See,* Selby Realty Co. v. City of San Buena Ventura, 514 P.2d 111 (Cal. 1973).

[19] *See,* Donohoe Constr. Co. v. Montgomery County, 567 F.2d 603 (4th Cir. 1977); Candlestick Properties, Inc. v. San Francisco Bay Conservation Dev. Comm'n, 89 Cal. Rptr. 897 (Cal. App. 1970).

[20] This discussion is based on D. Mandelker, J. Gerard, and T. Sullivan, FEDERAL LAND USE LAW § 1.04.

[21] *See,* Tarlock, *Regulatory Takings,* 60 CHI-KENT. L. REV. 23 (1984) (confusion surrounding what constitutes a taking continues because of the United States "Supreme Court's inability to develop a coherent taking jurisprudence" and provides confusing, often contradictory judicial results).

[22] *See,* D. Mandelker, LAND USE LAW §§ 2.21–2.29 (1982).

[23] 260 U.S. 393 (1922).

[24] *Id.* at 413.

[25] *See* D. Mandelker, J. Gerard, and T. Sullivan, FEDERAL LAND USE LAW § 4.03. For an analysis of actions against states under § 1983 *see* M. Schwartz and J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees Ch. 6 (1986).

[26] 260 U.S. 397 (1922).

[27] *See* the *Keystone* case, which is discussed *supra.*

[28] Id. at 413.

[29] Id. at 415.

[30] 272 U.S. 365 (1926).

[31] 272 U.S. at 395.

[32] *See generally,* D. Mandelker, LAND USE LAW 18–21 (1982); Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue,* 58 N.Y.U.L. REV. 465 (1983); Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity,* 8 HASTINGS CONST. L.Q. 585 (1981); Tarlock, *Regulatory Takings,* 60 CHI-KENT L. REV. 23 (1984).

[33] 438 U.S. 104 (1978).

[34] *Id.* at 116–118.

[35] *Id.* at 124.

[36] *See* Mandelker, *Investment-Backed Expectations: Is There a Taking,* 31 WASH. U.J. URB. & CONTEMP. L. 3 (1987).

[37] 438 U.S. at 127.

[38] Id. at 130.

[39] *See also* Andrus v. Allard, 444 U.S. 51 (1979) (federal statute prohibiting sale of bird artifacts not a taking because owners could display them).

[40] 438 U.S. at 131.

[41] *Id.* at 133.

[42] *Id.* at 133. The Court also held that the Terminal owners benefited along with other residents of New York City from the designation of landmarks under the Preservation Law, implying that this benefit offset any burdens the Law imposed. *Id.* at 134–135.

[43] *Id.* at 135. Some courts have held that airport zoning that restrictively zones land around an airport is unconstitutional as zoning in an enterprise capacity. See McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980). See generally D. Mandelker, LAND USE LAW § 2.23 (1982).

[44] *Id.* at 135.

[45] The notion that a law that assists the enterprise function of government is a taking was first advanced by Professor Sax. *See* Sax, *Takings and the Police Power,* 74 YALE L.J. 36 (1964).

[46] 447 U.S. 255 (1980).

[47] *Id.* at 263, n.9, quoting Danforth v. United States, 308 U.S. 271, 285 (1939).

[48] 107 S. Ct. 2378 (1987).

[49] *Id.* at 2388.

[50] 447 U.S. at 260–61.

[51] 107 S.Ct. 1232 (1987).

[52] *Id.* at 1246.

[53] *Id.* at 1247.

[54] *Id.* at 1243.

[55] *Id.* at 1245, citing Mugler v. Kansas 123 U.S. 623, 665 (1987) (upholding statute closing brewery against taking claim). This case held that laws enacted under the police power were immune from a taking claim, a holding thought to have been qualified by *Pennsylvania Coal.*

[56] 107 S.Ct. 3141 (1987).

[57] Id. at 3147 n. 3.

[58] Art. III § 2, cl. 1.

[59] 28 U.S.C. § 1257.

[60] For a statement of the finality rule as applied to agency actions, see Federal Trade Comm'n v. Standard Oil Co., 449 U.S. 232 (1980) (agency action must be definitive, have a direct effect on day-to-day business, have the status of law with immediate compliance expected and present legal issues fit for judicial resolution).

[61] *See generally* Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S.Ct. 3108, 3120 (1985) ("[T]he finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."); Patsy v. Florida Bd. of Regents, 457 U.S. 496, 512 (1982) (Court held that exhaustion of state administrative remedies is not a prerequisite to an action under 42 U.S.C. § 1983 because it was not so intended by Congress. The Court noted policy considerations which may require exhaustion in other cases: lessen perceived burden on federal courts; further goal of community and improve federal-state relations; enable expert agency to enlighten federal court's ultimate decision); Bethlehem Steel Corp. v. Environmental Protection Agency, 669 F.2d 903, 908, 910 (3rd Cir. 1982) ("Finality and exhaustion are not identical .... [E]xhaustion refers to the steps which the litigant must take, whereas finality refers to the conclusion of activity by the agency .... Undue hardship is a narrow exception to the exhaustion requirement.").

[62] *See generally* Hicks v. Miranda, 422 U.S. 332 (1975); Younger v. Harris, 401 U.S. 37 (1971); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); Kollsman v. City of Los Angeles, 737 F.2d 830 (9th Cir. 1984); Caleb Stone Assocs. v. County of Albermarle, 724 F.2d 1079 (4th Cir. 1984); C-4 Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983); Ryckman, *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 CALIF. L. REV. 377 (1981); note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 YALE L.J. 1134 (1980).

[63] 447 U.S. at 267. See also San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 261 (1981) (judgment of trial court awarding compensation to plaintiff for land use restriction held not final).

[64] 105 S.Ct. 3108 (1985).

[65] *Id.* at 3120–3121.

[66] *Id.* at 3117.

[67] *Id.* at 3117.

[68] *Id.* at 3117–3118. The Court relied on Agins and Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc. 452 U.S. 264 (1981). The plaintiff must apply for a variance to obtain a decision whether "a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." *Hodel*, at 297.

[69] *Id.* at 3121 n. 13, 3122.

[70] *Id.* at 3122, 3124.

[71] 106 S.Ct. 2561 (1986).

[72] *Id.* at 2566.

[73] *Id.* at 2569 n. 9.

[74] *E.g.*, Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) (right-of-way exaction); Four Seasons Apartments v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985) (recision of building permit); Ciolemis v. Kirby, 623 F. Supp. 1057 (D.R.I. 1986) (establishment of fire lane); HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (D. Va. 1985) (conspiracy to take property for private use).

[75] Ochoa Realty Corp. v. Faria, 815 F.2d 812 (1st Cir. 1987).

[76] Morgan, *Back to Yolo County*, LAND USE LAW & ZONING DIG., Vol. 38, No. 9, at 6–7 (1986). *See also* Callies, "The 'Full Bore' Application of *Hamilton Bank*"; *Id.*, at 4, 5 ("[T]he majority [in *MacDonald*] confirms it is going to be deemed difficult for a landowner to come before a federal court on a regulatory taking/compensation theory without having sought and been denied a lot of permits. . . . A landowner is required to show that he or she has applied for government permits to undertake virtually all potentially economic uses (not just the most 'grandiose') before federal courts will even consider whether there has been a taking prohibited by the Fifth Amendment.")

[77] *See* Morgan, *Back to Yolo County*, LAND USE LAW & ZONING DIG., Vol. 38, No. 9, at 6–7 (1986).

[78] 106 S.Ct. at 2568 n.8. *See also, Id.* at 2571 (White, J., dissenting) ("Nothing in our cases . . . suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position.").

[79] *See* Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981).

[80] 450 U.S. 621, 636 (1981).

[81] *Id.* 624–625.

[82] *Id.* at 625–626.

[83] *Id.* at 633. *See* 28 U.S.C. § 1257.

[84] *Id.*

[85] *Id.* at 637.

[86] *Id.* at 646–647.

[87] *Id.* at 653.

[88] *Id.* at 655.

[89] *Id.* at 658.

[90] 598 P.2d 25, 29 (Cal. 1979).

[91] *See generally* Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981); Cunningham, *Inverse Condemnation as a Remedy for Regulatory Takings*, 8 HASTINGS CONST. L.Q. 517 (1981).

[92] 450 U.S. at 661 n. 26.

[93] For criticism of Justice Brennan's dissent *see* Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984). For a reply to the Manifesto and a defense of Justice Brennan's dissent see Berger & Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOYOLA L.A. REV. 685 (1986). For another defense of Justice Brennan's dissent *see* Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15 (1983).

[94] For cases following Justice Brennan's *San Diego* rule see Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir. 1983), *cert. denied*, 464 U.S. 847 (1984); (Hamilton Bank of Johnson v. Williamson County Regional Planning Comm'n, 729 F.2d 402 (6th Cir. 1984), *rev'd and remanded* 105 S.Ct. 3108 (1985); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981); Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981); Scheer v. Township of Evesham, 445 A.2d 46 (N.J. App. Div. 1982); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); Zinn v. State, 335 N.W.2d 67 (Wis. 1983). For a case *contra*, see Citadel Corp. v. Puerto Rico Hwy. Auth. 695 F.2d 31 (1st Cir. 1983).

[95] 107 S. Ct. 2378 (1987)

[96] *Id.* at 2385, 2386 (emphasis in original).

[97] *Id.* at 2389.

[98] *Id.*

[99] Compensation would not be payable under *First English* for the "normal delay" in acquisition that highway reservation laws create. Compensation is payable only if a court holds the law is a taking.

[100] Compensation would not be payable in state court in a state, like California, that does not recognize the compensation remedy. See D. Mandelker, LAND USE LAW § 8.20 (1982). A state court could award compensation under the federal constitution under the *First English* holding.

[101] Cunningham, *Inverse Condemnation as a Remedy for Regulatory Takings*, 8 HASTINGS CONST. L.Q. 517, 518 (1981) (the three states are Kansas, North Carolina, and Virginia).

[102] The state courts do apply their standing rules to refuse jurisdiction of cases that do not present justiciable controversies. For an enlightening discussion of these rules see Jenkins v. Swan, 675 P.2d 1145 (Utah 1983). State courts are not likely to deny standing to landowners who file taking suits.

[103] For an exhaustive review of the differences between the states in their application of taking and other constitutional restrictions to land use regulation *see* N. Williams, 1 AMERICAN LAND PLANNING LAW, Ch. 6 (1974 & Supp. 1986).

[104] *See* 1 N. Williams, AMERICAN LAND PLANNING LAW § 6.03 (1974) (California courts have "quite consistently been far rougher on the property rights of developers than those in any other state.") See generally *Comment*, "The Timeliness of Filing Inverse Condemnation Claims for Continuous or Repeated Injury to Land," 11 URBAN L. ANN. 309 (1976).

[105] Smith, *The Uncertain State of Zoning Law in Illinois*, 60 CHI-KENT L. REV. 93, 97 (1984). *See also* Tarlock, *Regulatory Takings*, 60 CHI-KENT L. REV. 23, 25 (1984). Professor Tarlock describes the Illinois approach as "straight substantive due process because the courts use judicial review of zoning ordinances to second guess the planning and zoning job done by the municipality. Basically, Illinois law allows cities in the early stages of development to have some say in how the city is developed, but as more development occurs it becomes harder to make regulatory decisions that buck the market." He especially discusses Harris Trust & Sav. Bank v. Duggan, 435 N.E.2d 130 (Ill. App. 1981), *aff'd*, 449 N.E.2d 69 (1983).

[106] Compare State of New Hampshire Wetlands Bd. v. Marshall, 500 A.2d 685 (N.H. 1985) (no taking), with Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981) (taking found).

[107] *See, e.g.*, State v. Pacesetter Constr. Co., 571 P.2d 196 (Wash. 1977).

[108] D. Mandelker § 2.28 (1982).

[109] *See generally* Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutionality*, 8 HASTINGS CONST. L.Q. 585 (1981).

[110] *See, e.g.*, Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111 (Cal. 1973). For a federal case taking this position see Allen Family Corp. v. City of Kansas City, 525 F. Supp. 38 (W.D. Mo. 1981) (designation of farmland for possible parkland did not, without more, constitute a taking even though market value was adversely affected). See also B. Gailey, 1984 ZONING AND PLANNING LAW HANDBOOK §§ 5.01–5.06 (1984). These cases reflect the view adopted by the U.S. Supreme Court that mere fluctuations in value caused by government decision-making are not a taking. Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980). See also Danforth v. United States, 308 U.S. 271 (1939); Thomas v. St. Louis, 596 F.2d 784 (8th Cir.), *cert. denied*, 444 U.S. 899 (1979); Virgins Islands v. 50.05 Acres of Land, 185 F. Supp. 495 (D.V.I. 1960).

[111] *See generally* Greenbaum, "Land Use Interim Zoning Controls and Planning Moratoria," An Analysis Update," 18 URB. LAW. 247, 250 (1986) ("The question

underlying all of the cases seems to be: Is the governmental entity using its zoning power legitimately to protect its zoning scheme while moving forward with the establishment of a new set of regulations, or is the governmental entity simply seeking to discourage development through delay? Conversely, the question arises: Is the challenger seeking in good faith to develop land as set forth in the existing regulations and does the challenge perceive the potential for a sudden change in zoning which he hastens to prevent?") See also D. Mandelker, LAND USE LAW §§ 6.5–6.10 (1982).

[112] D. Mandelker, LAND USE LAW §§ 6.7–6.10 (1982).

[113] This theory of the taking clause was stated in two well-known commentaries, Dunham, *A Legal and Economic Basis for City Planning,* 58 COLUM. L. REV. 650 (1958), and E. Freund, The Police Power 546–47 (1904). As one commentator has noted, the benefit conferment problem arises when "the burdens of regulation are physically disconnected from its benefits." Mandelker, *Land Use Takings: The Compensation Issue,* 8 HASTINGS CONST. L.Q. 491, 499 (1981).

[114] Kraft v. Malone, 313 N.W.2d 758 (N.D. 1981) (drainage ditch).

[115] *E.g.,* Fred F. French Inv. Co. v. City of New York, 350 N.E.2d 381 (N.Y.), *appeal dismissed,* 429 U.S. 990 (1976) (use of zoning to create public park).

[116] *E.g.,* Just v. Marinette County, 201 N.W.2d 761 (Wis. 1971) (upholding ordinance prohibiting development in wetland).

[117] In *Penn Central,* for example, the Court characterized an historic preservation law as a law preventing a harm even though it could be characterized as a law imposing a burden of preservation on an historic landmark owner for the benefit of the general public.

[118] *See generally* Smith v. State, 123 Cal. Rptr. 745 (Cal. App. 1975) (announcement to tentatively construct highway along tentative route); Lone Star Industries, Inc. v. Department of Transportation, 671 P.2d 511 (Kan. 1983) (the mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of the property affected); Martin H. Neiberg Real Estate Co. v. St. Louis County, 488 S.W.2d 626 (Mo. 1973) (precondemnation procedure including planning). *See also* Kingston East Realty Co. v. Commissioner of Transportation, 336 A.2d 40, 45 (N.J. App Div. 1975) (no taking for "mere plotting and planning in anticipation of condemnation" where building delayed only 120 days). The court distinguished this case from those in which compensation is required by one year delays see Lomarch Corp. v. Englewood Mayor and Common Council, 237 A.2d 881 (N.J. 1968) (official map act), and Beech Forest Hills Inc. v. Morris Plains, 18 A.2d 435 (N.J. App. Div. 1974) (park land reservation act). But see Suess Builders Co. v. City of Beaverton, 656 P.2d 306 (Ore. 1982) (suggesting that adoption of plan could be taking until government decides to buy or release it if legal effect of plan is to freeze land with no possibility for economic use).

[119] *Annot.,* 37 A.L.R.3d 127 (1971). The rule applies to all public improvements. See, e.g., Toso v. City of Santa Barbara, 162 Cal. Rptr. 210 (Cal. App. 1980); Johnson v. State, 153 Cal. Rptr. 185 (Cal. App. 1979); Arnold v. Prince George's County, 311 A.2d 223 (Md. 1973).

[120] Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619 (Ky. 1953). Some courts also apply the enterprise theory to invalidate zoning restrictions on land adjacent to airports that restrict land uses in the flight path of airplanes. See McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980). Other courts do not invalidate airport zoning of this type. *E.g.,* Baggett v. City of Montgomery, 160 So.2d 6 (Ala. 1963).

[121] 140 Cal. Rptr. 690 (Cal. App. 1977).

[122] *Id.* at 696. The court noted that in other California cases in which the court had found a *de facto* taking based on condemnation delay "there was a change in zoning which arguably was designed to obtain ends which the regulating governmental body was only entitled to obtain through paying fair compensation." *Id.* at 694.

[123] Ochoa Realty Corp. v. Faria, 634 F. Supp. 723 (D.P.R. 1986).

[124] *Id.* at 726–27.

[125] *Id.*

[126] *Commonwealth Appeal,* 221 A.2d 289 (Pa. 1966).

[127] *Id.* at 189.

[128] *E.g.,* Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir.), *cert. denied,* 464 U.S. 847 (1983). The court found a taking when landowners were told they could not develop their land until they made dedications for a flood control project. The district had not initiated condemnation proceedings. The court held the landowners were entitled to prove a taking had occurred because of unreasonable delay or other unreasonable conduct by the District in the condemnation process. *See generally* Vance, "Recovery for Condemnation Blight Under Inverse Law" in 2 *Selected Studies in Highway Law,* p. 884-N33; note, *The Condemnor's Liability for Damages Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings,* 1967 UTAH L. REV. 548.

[129] 226 N.W.2d 185 (Wis. 1975).

[130] *Id.* at 188. The court noted that the Wisconsin constitution prohibited only the taking of property, unlike other state constitutions that also prohibited the damaging of property. *Id.*

[131] *Id.* at 189.

[132] Klopping v. City of Whittier, 500 P.2d 1345, 1350 n. 1 (Cal. 1972).

[133] The leading case is *In re Philadelphia Parkway,* 95 Atl. 429 (1915). Twelve years before the filing of an action alleging a *de facto* taking the city had adopted an ordinance to lay out a parkway and had designated the parkway on the city plan. The city had also acquired title to a number of properties within the parkway right-of-way, had torn down some buildings and had done some work on parts of the parkway. The court found that a taking had occurred. See also, *accord, In re Crosstown Expressway,* 281 A.2d 909 (Pa. 1971).

[134] Conroy-Pugh Glass Co. v. Commonwealth, 321 A.2d 598 (Pa. 1974). See also Commonwealth, Dep't of Transp. v. Lawton, 412 A.2d 214 (Pa. Cmwlth. 1980) (applying *Pugh*).

[135] Whether a *de facto* taking has occurred depends on the nature of the property affected. See Commonwealth, Dep't of Transp. v. Kemp., 515 A.2d 68 (Pa. Cmwlth. 1986) (no taking when taking of only frontage of residence contemplated even though property made unmarketable; appeal pending).

[136] Transportation law expert John Vance has summarized the rules various states apply:

> New York requires as a condition of relief a showing of physical invasion or direct legal restraint; New Jersey does not require physical invasion or direct legal restraint but demands a showing of the substantial destruction of the beneficial use and enjoyment of property; Oregon permits recovery for a mere diminution in value where substantial interference with the use and enjoyment of property can be shown; California grants recovery for loss in market value where it can be established that the public authority acted unreasonably in delaying condemnation; and Wisconsin opens the door to wide recovery by abolishing the rule making consequential injuries *damnum absque injuria* in eminent domain proceedings.

Vance, "Recovery for Condemnation Blight Under Inverse Law," in 2 *Selected Studies in Highway Law* 884-N33, 884-N49 (L. Thomas ed.) (emphasis in original). Some of cases reviewed by Mr. Vance arose out of urban renewal rather than highway projects.

[137] Toso v. City of Santa Barbara, 162 Cal. Rptr. 210 (Cal. App. 1980).

[138] 311 A.2d 223 (Md. 1973).

[139] *See* D. Mandelker, LAND USE LAW § 8.8–8.10 (1982). The exhaustion of remedies rule is similar to but different from the ripeness rule applied to taking cases by the Supreme Court. See note 33, *supra.*

[140] D. Mandelker, LAND USE LAW § 2.25 (1982); *Annot.,* 36 A.L.R.3d 751 (1971).

[141] San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 274 (Tex. App. 1975). *See generally* 5 P. Rohan, *Zoning & Land Use Controls* § 34.04 [3] (1982); 4 NICHOLS, THE LAW OF EMINENT DOMAIN, § 12.315[2] (3d ed. 1971).

[142] Klopping v. City of Whittier, 500 P.2d 1345, 1351 (Cal. 1972). See also Arastra Limited Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated by stipulation after settlement,* 475 F. Supp. 125 (N.D. Cal. 1976). The city downzoned property to very restrictive residential densities to implement an open space plan. The court found a taking because it held that the city adopted the open space zoning as an alternative to acquisition. See also Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1975) (same case; motion to dismiss denied). *Compare* Barbaccia v. County of Santa Clara, 451 F. Supp. 260 (N.D. Cal. 1978) (plan designated a property as open space; county failed to adopt pre-annexation zoning or-

dinance and expressed desire to acquire property but did not do so; motion to dismiss denied).

[143] 77 Cal. Rptr. 391 (Cal. App. 1969).

[144] *Id.* at 394–395.

[145] *Id.*

[146] *Id.* at 393, 405. See also Taper v. City of Long Beach, 181 Cal. Reptr. 169 (Cal. App. 1982) (temporary damages awarded for extreme delay in condemnation proceeding). See generally Eck v. City of Bismarck, 283 N.W.2d 193, 195, (N.D. 1979) ("[A]bsent a land use regulation exceedingly onerous on its face, ... or governmental regulatory activity designed to facilitate subsequent eminent domain proceeding, an action for inverse condemnation is inappropriate to challenge the validity of a zoning ordinance."); comment, *Delay, Abandonment of Condemnation, and Just Compensation,* 41 So. CAL. L. REV. 862 (1968) ("Most courts find that such injury is not compensable upon abandonment, and unless there is a showing of bad faith or unreasonable delay, the condemnor need compensate only for damages caused by his actual possession of the property before the trial.")

[147] 500 P.2d 1345 (Cal. 1972).

[148] *Id.* at 1354.

[149] *Id.* at 1355. Compensation was assessed as of the date of the original announcement to condemn and could include, if appropriate, "anticipated rental income to be received throughout the lifetime of the property." *Id.* at 1356.

[150] *Id.* at 1357.

[151] *Id.* at 1349.

[152] *See, e.g.,* Sanderson v. City of Willmar, 162 N.W.2d 494 (Minn. 1968).

[153] 595 P.2d 694 (Colo. App. 1979).

[154] Hoyert v. Board of County Comm'rs, 278 A.2d 588 (Md. 1971); Carl M. Freeman Assocs., Ind. v. State Roads Comm'n, 250 A.2d 250 (Md. 1969).

[155] State ex rel. Senior Estates of Kansas City, Inc., v. Clarke, 530 S.W.2d 30 (Mo. App. 1975) (highway); Winepol v. Town of Hempstead, 300 N.Y.S.2d 197 (Sup. Ct. 1969).

[156] 528 S.W.2d 266 (Tex. App. 1975).

[157] *Id.* at 269.

[158] *Id.* at 270.

[159] *Id.* at 270. Defendant also asserted that the action was a governmental action for which the city could not be liable and that plaintiff failed to give written notice of his claim as required by the city charter. *Id.*

[160] *Id.* at 271.

[161] 528 S.W.2d at 274.

[162] *See* Ocean Acres Ltd. Partnership v. Dare County Bd. of Health, 707 F.2d 103 (4th Cir. 1983) (upholding moratorium on septic tank development to preserve water supply).

[163] *See* D. Mandelker and R. Cunningham, *Planning and Control of Land Development,* 551–605 (2d ed. 1985); Arneson, *Municipal Services Moratoria: Tools or Weapons in the Growth-Services Squeeze?,* 10 U.C.D.L. REV. 59 (1977); Annot., 36 A.L.R.3d 751 (1971).

[164] The improper use of zoning to depress property values is discussed in a previous section.

[165] 378 N.W.2d 826 (Minn. App. 1985).

[166] *Id.* at 829.

[167] *Id.* at 830. The court also based its holding on the Minnesota rule that denies damages for the denial of a building permit and indicated that the plaintiff's proper remedy was a writ of mandamus.

[168] *See generally* D. Mandelker, LAND USE LAW § 6.9 (1982).

[169] 400 F. Supp. 1369 (D. Md. 1975).

[170] The state agency had also ordered the Commission to undertake remedial measures to provide the necessary facilities.

[171] *Id.* at 1386. *Accord,* Cappture Realty Corp. v. Board of Adjustment, 313 A.2d 624 (N.J.L. Div. 1973), *aff'd,* 336 A.2d 30 (N.J. App. Div. 1975).

[172] D. Mandelker and R. Cunningham, *Planning and Control of Land Development,* 565–66 (2d ed. 1985).

[173] 285 N.E.2d 291 (N.Y.), *appeal dismissed,* 409 U.S. 1003 (1972).

[174] 285 N.E.2d at 304.

[175] Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (upholding annual quota on new development), *cert. denied,* 424 U.S. 934 (1976); Lee v. City of Monterey Park, 219 Cal. Rptr. 309 (Cal. App. 1986) (annual development quota held to satisfy requirements of statutes placing limitations on growth management programs); Sturges v. Town of Chilmark, 402 N.E.2d 1346 (Mass. 1980) (growth quota ordinance for Martha's Vineyard upheld when studies were planned to assess growth impact).

[176] Q.C. Constr. Co., Inc. v. Gallo, 649 F. Supp. 1331 (D.R.I. 1986) (planning for public facilities inadequate); Innkeepers Motor Lodge, Inc. v. City of New Smyrna Beach, 460 So. 2d 379 (Fla. App. 1984) (density cap held invalid because unsupported by studies); City of Boca Raton v. Boca Villas Corp., 371 So.2d 154 (Fla. App. 1979) (development cap on number of units allowed invalid because unsupported by insufficient documentation), *cert. denied,* 381 So.2d 765 (Fla. 1980); Peterson v. City of Decorah, 259 N.W.2d 553 (Iowa App. 1977) (agricultural zoning adopted as growth staging measure unsupported by suitability of land for agriculture); Rancourt v. Town of Barnstead, 523 A.2d 55 (N.H. 1986) (growth staging ordinance unsupported by adequate studies). See also Beck v. Town of Raymond, 394 A.2d 847 (N.H. 1978), and Stoney-Brook Dev. Corp. v. Town of Fremont, 474 A.2d 561 (N.H. 1984) (growth controls must not be exclusionary and must be based on careful study).

For some informative articles on growth controls see Bosselman, *Can the Town of Ramapoi Pass a Law to Bind the Whole World?,* 1 FLA. ST. U.L. REV. 234 (1973); Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues,* 43 LAW & CONTEMP. PROB. 5 (1979); Brower & Pannabecker, *Growth Management Update: An Assessment Status Report,* 19 NAT. RESOURCES J. 16 (1979); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis,* 86 YALE L. J. 385 (1977); note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development,* 26 STAN. L. REV. 585 (1977).

[177] 360 N.E.2d 1295 (N.Y. 1977).

[178] *Id.* at 1301.

[179] *Id.*

[180] 350 N.E.2d 381 (N.Y.), *appeal dismissed,* 429 U.S. 990 (1976).

[181] The court in *French* analyzed the constitutionality of the ordinance under the due process rather than the taking clause, but the court's decision applies in states that would apply the taking clause to ordinances of this type.

[182] 350 N.E.2d at 387.

[183] In *Penn Central* and more particularly in *Keystone* the Court implicitly rejected the harm-benefit theory. It found a "reciprocity of advantage" in land use regulation because the restricted landowner benefits as a member of the general public from "restrictions placed on others." A land use regulation cannot solely confer a public benefit under this theory because a private benefit to the restricted landowner is assumed. The harm-benefit theory is related to the enterprise theory of the taking clause. Under the enterprise theory a land use regulation is a taking if it assists the entrepreneurial function of government. An example is zoning that restricts the development of land adjacent to an airport. Zoning can confer a public benefit under the harm-benefit theory even though it does not assist an entrepreneurial government function. An example is a zoning ordinance that requires the use of privately-owned land as open space available to the general public, as in the *French* case.

[184] 432 A.2d 15 (N.H. 1981).

[185] *Id.* at 21.

[186] Scheer v. Township of Evesham, 445 A.2d 46 (N.J.L. Div. 1982) (zoning for park and recreation uses); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983) (zoning for public use; city intended to acquire land for public facilities).

[187] 274 U.S. 603 (1926).

[188] *See* cases cited in 6 P. Rohan, *Zoning and Land Use Controls* § 42.04[1] n. 6.

[189] A. Black, *Building Lines and Reservations for Future Streets* 116 (1935).

[190] In J & B. Dev. Co., Inc. v. King County, 631 P.2d 1002 (Wash. App. 1981), the court held that the county could impose a setback to reserve land for a street widening but the supreme court affirmed this case on other grounds, 669 P.2d 468 (Wash. 1983), and did not consider this question.

[191] 199 N.W.2d 465 (Mich. 1972).

[192] *Id.* at 470.

[193] 91 N.E.2d 395 (Ill. 1950). See also Arkansas State Highway Comm'n v. Anderson, 43 S.W.2d 356 (Ark. 1931); Mayer v. Dade County, 82 So.2d 513 (Fla. 1955); City of Miami v. Romer (II), 73 So.2d 285 (Fla. 1954); Westchester Reform Temple v. Brown, 287 N.Y.S.2d 513 (App. Div.), *aff'd,* 239 N.E.2d 891 (N.Y. 1968); Householder v. Town of Grand Island, 114 N.Y.S.2d 852 (Sup. Ct. 1951), *aff'd,* 113 N.E.2d 555 (N.Y. 1953); annot., 36 A.L.R.3d 751, § 9 (1971).

[194] 91 N.E.2d at 399.

[195] *Id.* at 400–01.

[196] *See, e.g.,* Mayer v. Dade County, 82 So.2d 513 (Fla. 1955) (invalidating setback for street widening wider than setbacks required for existing adjacent buildings).

[197] Stout v. Jenkins, 268 S.W.2d 643 (Ky. 1954).

[198] Faucher v. Sherwood, 32 N.W.2d 440 (Mich. 1948); Federal Realty Research

Corp. v. Zoning Bd. of Appeals, 180 N.Y.S.2d 241 (App. Div. 1958); Richards v. Zoning Bd. of Appeal, 137 N.Y.S.2d 603 (App. Div. 1955).

[199] For a list of subdivision control enabling statutes see Symposium: *Exactions: A Controversial Source of New Municipal Funds,* 50 LAW & CONTEMP. PROB. 1, 191–94 (1987).

[200] *See* D. Mandelker, LAND USE LAW §§ 9.2–9.14 (1982).

[201] D. Mandelker, LAND USE LAW § 9.12 (1982).

[202] Kayden and Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing,* 50 LAW & CONTEMP. PROB. 127, 128 n.3 (1987) (citations omitted).

[203] *See* Schwing v. City of Baton Rouge, 249 So.2d 304 (La. App.) (extension of major road), *review den,* 252 So.2d 667 (La. 1971). The Supreme Court cited *Schwing* with approval in Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3149 (1987). See also Briar West, Inc. v. City of Lincoln, 291 N.W.2d 730 (Neb. 1980) (court found statutory authority for such a dedication).

[204] E.g., ALA. CODE §§ 11-52-50 to 11-52-54. See Cottage Hill Land Corp. v. City of Mobile, 443 So.2d 1201 (Ala. 1983) (reservation invalid because statutory procedures not followed).

[205] 594 P.2d 671 (Kan. 1979).

[206] *Id.* at 683. A later Kansas case followed the general rule that planning and the announcement of intent to take land for a highway is not a taking. Lone Star Indus., Inc. v. Secretary of Kansas Dep't of Transp., 671 P.2d 511 (Kan. 1983). The court distinguished *Ventures* as "an exception to the general rule that mere planning and platting in anticipation of a public improvement does not constitute a taking. . . ." *Id.* at 519. See also Floreham Park Inv. Assocs. v. Planning Bd., 224 A.2d 352 (N.J.L. Div. 1966) (invalidating subdivision denial when municipality denied subdivision because road might be located through subdivision at some future time but plans for road not certain).

[207] Arnett v. City of Mobile, 449 So.2d 1222, 1224 (Ala. 1984) (dictum; not a taking because subdivider "receives compensation from the enhanced value of his property and other resultant advantages.")

[208] 167 A.2d 885 (Md. 1961).

[209] *Id.* at 887.

[210] *Id.* at 888. *See Arnold v. Prince George's County,* 311 A.2d 223 (Md. 1973) (no taking from designation of highway on county plan because no intent to depress property values, no formal reservation of right-of-way, and landowner did not exhaust remedies by appealing or filing subdivision plan). See also East Rutherford Industrial Park, Inc. v. State, 291 A.2d 588 (N.J.L. Div. 1972). A state agency denied approval of a subdivision because the property was planned for acquisition for a public facility. The court did not find a taking because condemnation of the property was imminent.

[211] 405 A.2d 241 (Md. 1979).

[212] *Id.* at 247.

[213] *Id.*

[214] *Id.* at 248.

[215] *Id.* at 249–50.

[216] 482 A.2d 908 (Md. 1984). The Supreme Court cited this case with approval in Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3149 (1987).

[217] *Id.* at 913.

[218] *Id.* at 920–21.

[219] *Id.* at 921.

[220] *Id.*

[221] "Twelve of Maryland's twenty-three counties, excluding Baltimore City, have some provision for reserving future highway right-of-way for State and/or county roads. Two of these do not have written policies and the other ten address the issue for county roads primarily on an informal, short term basis, backed by county subdivision regulations." Letter to the authors from Neil J. Pederson, Director, Office of Planning & Preliminary Engineering, State Highway Administration, Maryland Department of Transportation, January 20, 1987. Most of the counties that require reservations limit them to a period of 1 to 3 years. *Id.* A matrix chart showing the key provisions of dedication and reservation provisions in the ordinances of each county and copies of the salient provisions of the ordinances are on file with the authors.

[222] This section is adapted from D. Mandelker, "Problems Under the Police Power," 24–28 in D. Mandelker and G. Waite, *A Study of Future Acquisition and Reservation of Highway Rights-of-Way* (1963).

[223] E.g., *In re Furman Street,* 17 Wend. *649 (N.Y. 1836).

[224] E.g., Forster v. Scott, 32 N.E. 976 (N.Y. 1893).

[225] See the classic treatment of official map acts, Kucirek and Beuscher, *Wisconsin's Official Map Law: Its Current Popularity and Implications for Conveyancing and Platting,* 1957 WIS. L. REV. 176, for a discussion of this history.

[226] The model legislation is reproduced in A. Black, *Building Lines and Reservations for Future Streets* (1935).

[227] U.S. Department of Commerce, A Standard City Planning Enabling Act Tit. III (1928).

[228] See, e.g., *Commonwealth Appeal,* 221 A.2d 289 (Pa. 1966), discussed in Ch. 3, § C.1.

[229] E. Bassett, F. William, A. Bassett, and N. Whitten, *Model Laws for Planning Cities, Counties, and States* (1935).

[230] For a detailed comparison of the Bassett-Williams and Bettman models see A. Black, *Building Lines and Reservations for Future Streets,* 18–22 (1935).

[231] Symonds v. Bucklin, 197 F. Supp. 682 (D. Md. 1961) (upholding Bettman model official map act incorporated in zoning ordinance).

[232] D. Mandelker, LAND USE LAW §§ 8.8–8.10 (1982).

[233] Headley v. City of Rochester, 5 N.E.2d 198 (N.Y. 1936); State ex rel. Miller v. Manders, 86 N.W.2d 469 (1957). Following Headley: Vangellow v. City of Rochester, 71 N.Y.S.2d 672 (Sup. Ct. 1947). The Wisconsin court approved the objectives of the official map act, noting that "the constitution will accommodate a wide range of community planning devices to meet the pressing problems of community growth, deterioration, and change." 86 N.W.2d at 472, 473. The court distinguished an earlier case, which had struck down a zoning ordinance enacted to depress property values prior to the acquisition of land for a new boulevard. *Id.* at 475. It found no motive to depress property values in the official map act and noted that the zoning ordinance did not contain a variance provision.

[234] D. Mandelker, LAND USE LAW § 8.10 (1982).

[235] 32 N.E. 976 (N.Y. 1893).

[236] *Appeal of Commonwealth,* 221 A.2d 289 (Pa. 1966).

[237] 369 N.E.2d 1179 (N.Y. 1979).

[238] The court relied on Forster v. Scott and on a lower court case also invalidating an official map designation that applied to an entire property, Roer Constr. Corp. v. City of New Rochelle, 136 N.Y.S.2d 414 (Sup. Ct. 1954).

[239] 369 N.E.2d at 1180.

[240] 267 N.Y.S.2d 274 (App. Div. 1966).

[241] *Id.* at 279.

[242] Grisor, S.A. v. City of New York, 374 N.Y.S.2d 549 (Sup. Ct. 1975) (building could be constructed if moved out of mapped street). See also Vangellow v. City of Rochester, 71 N.Y.S.2d 672 (Sup. Ct. 1972) (dictum; official map constitutional if does not materially diminish value or usefulness of property).

[243] 237 A.2d 881 (N.J. 1968).

[244] Morris County Land Imp. Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232 (N.J. 1963).

[245] *Id.* at 883. Following Lomarch: Beech Forest Hills, Inc. v. Borough of Morris Plains, 318 A.2d 435 (N.J. App. Div. 1974).

[246] *See* New Jersey Builders Ass'n v. Department of Envt'l Protection, 404 A.2d 320 (N.J. App. Div. 1979).

[247] 330 A.2d 40 (N.J. App. Div. 1975).

[248] The statutory provisions are summarized in the Appendix C chart.

[249] *Id.* at 43.

[250] *Id.* at 45.

[251] *Id.*

[252] 365 A.2d 1244 (Del. Ch. 1976).

[253] *Id.* at 1253.

[254] 82 A.2d 34 (Pa. 1951).

[255] *Id.* at 37.

[256] At the time of the *Miller* decision the Pennsylvania cases had upheld laws denying compensation for improvements in mapped streets. See Busch v. City of McKeesport, 30 Atl. 1023 (Pa. 1895).

[257] 701 F.2d 993 (1st Cir. 1983).

[258] Quoting Heftler International, Inc. v. Planning Bd., 99 P.R.R. 454, 461 (1978).

[259] 701 F.2d at 996.

[260] Compare another Puerto Rico case, Ochoa Realty Corp. v. Faria, 634 F. Supp. 723 (D.P.R. 1986), *aff'd,* 815 F.2d 812 (1st Cir. 1987), holding that mere planning for a highway and the denial of subdivision approval were not a taking when the property was not subject to an official map or "P" zoning.

[261] § 102(2)(c), 42 U.S.C. § 4332(2)(C). For the full text of NEPA *see* 42 U.S.C. §§ 4321, 4331–4335. The standard treatise on NEPA is D. Mandelker, NEPA LAW AND LITIGATION (1984 & Supp.), hereinafter cited as NEPA LAW AND LITIGATION.

[262] A number of states have laws modeled after NEPA that require the preparation

of impact statements on state and local actions. See NEPA LAW AND LITIGATION Ch. 12. Some of this state legislation is identical to NEPA but in other states, such as California, the statute uses slightly different language to describe the governmental actions for which an impact statement is required. Laws in some of these states, including California and Washington, apply to actions taken in the land use control process. Although no case has yet considered the question, these laws would require an impact statement on a highway reservation under a highway reservation law. NEPA LAW AND LITIGATION § 12:12. Courts in these states have held that impact statements are required on comprehensive plans, including transportation plans. See Edna Valley Ass'n v. San Luis Obispo County & Cities Area Planning Coordinating Council, 136 Cal. Rptr. 665 (Cal. App. 1977) (regional transportation plan); Barrie v. Kitsap County, 613 P.2d 1148 (Wash. 1980) (concurrent adoption of comprehensive plan and zoning amendment).

[263] NEPA LAW AND LITIGATION § 1.04.

[264] 481 F.2d 1079 (D.C. Cir. 1973).

[265] *Id.* at 1088.

[266] 23 U.S.C. § 134.

[267] NEPA LAW AND LITIGATION § 8:18.

[268] 599 F.2d 1333 (5th Cir. 1979).

[269] 23 U.S.C. § 134(a).

[270] 427 U.S. 390 (1976).

[271] *Id.* at 410 n.20.

[272] *Id.* at 1343.

[273] 599 F.2d at 1345.

[274] *Id.* at 1347.

[275] *Id.* at 1347.

[276] NEPA LAW AND LITIGATION § 8:18.

[277] *Id.* § 8:19.

[278] Compare City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972) (impact statement not required on tentative allocation of funds by federal agency for airport improvement), with Silva v. Romney, 473 F.2d 287 (1st Cir. 1973) (impact statement required when federal agency approved housing project and issued commitment to developer). Additional problems of NEPA coverage would remain even if the designation of a highway on an official map or in a highway reservation were a proposal for a federal action under NEPA. A court would have to find that the designated highway is a "major" federal action and that it "significantly" affects the environment. See generally NEPA LAW AND LITIGATION Ch. 8. Whether a court would make this finding would depend on its size, its location, whether it is a new highway or an enlargement or improvement of an existing highway. Another problem that would arise is whether a group of highways designated on an official map or in a highway reservation would have to be considered together in one impact statement. On this issue, see generally NEPA LAW AND LITIGATION Ch. 9.

[279] The New Jersey state highway reservation law has a provision of this type. For discussion of a New Jersey case upholding this law see section under "The Constitutionality of Legal Techniques for Reserving Right-of-Way." The New Jersey survey respondent indicated that "[t]he reasons for limiting the preservation period [are] to avoid the constitutional issue of a constructive taking and, in turn, an inverse condemnation suit which would likely occur were the term 'preservation period' either indefinite or of very substantial length." Letter to the authors from James V. Hyde, Jr., Director of Right of Way, Transportation, New Jersey Department of Transportation, July 24, 1986.

APPLICATIONS

This paper should be useful to highway administrators and right-of-way officials, their legal counsel, and others involved in the reservation of property for future highway purposes. The general guidelines provided for drafting highway reservation laws may be of particular interest.

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