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Cover Page Footnote

This article is a revision of portions of a report to the Transportation Research Board, A. Kolis & D. Mandelker, Legal Techniques for Reserving Right of Way for Future Projects Including Corridor Protection (1987). The report was given the John Vance Award for the best paper of the year in transportation law. It is published for selected distribution in 2 Selected Studies in Highway Law, 936-N249 to 936-N337 (L. Thomas ed., Transportation Research Board, Washington, D.C.). The author would especially like to acknowledge the contribution of Ms. Kolis, who was primarily responsible for the preparation of the section in the report on which Part II of this article is based. The report is a revision of an earlier report on the same topic, Mandelker, Problems Under the Police Power 24-28, in D. Mandelker & G. Waite, A Study of the Future Acquisition and Reservation of Highway Rights-of-Way (1963). The earlier report was published in part as Mandelker, Planning the Freeway: Interim Controls in Highway Programs, 1964 Duke Law Journal 439. The author would like to acknowledge the assistance of Elizabeth Tepikian, second-year law student, Washington University, and Frank Moore, LL.M in Urban Studies, Washington University, 1987, for their research on highway reservation law legislation, and the patient assistance of his secretary, Mrs. Marcia Schweninger, in the typing and preparation of this manuscript.

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INTERIM DEVELOPMENT CONTROLS IN HIGHWAY PROGRAMS: The Taking Issue

DANIEL R. MANDELKER*

I. INTRODUCTION

Preventing the development of land reserved for future highways is a difficult city planning problem. Several years may elapse between the reservation of land by a state highway agency or on a local comprehensive plan and its acquisition for highway purposes.[1] The owners of reserved land may develop it during the interim period before it is acquired, which may increase its cost of acquisition or require the selection of a new highway route.

State and local governments reserve land for highways under high-

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The author would like to acknowledge the assistance of Elizabeth Tepikian, second-year law student, Washington University, and Frank Moore, LL.M in Urban Studies, Washington University, 1987, for their research on highway reservation law legislation, and the patient assistance of his secretary, Mrs. Marcia Schweninger, in the typing and preparation of this manuscript.

1. Delays occur in the acquisition of land for highways because of the substantial lead times common in the transportation planning process and in the programming and planning that occurs in the federal-aid highway program. *See generally* Rosenbloom, *Transportation Planning* in THE PRACTICE OF LOCAL GOVERNMENT PLANNING 139-72 (F. So & J. Getzels eds. 2d ed. 1988).

The term highway, when used in this article, includes streets as well as highways. Land can also be reserved for highway widening, the construction of highways on new locations, parks, and other public facilities. This article concentrates on the reservation of land for streets and highways, but the taking questions that arise in the reservation of land for other public facilities are similar.

way reservation laws that can control the problem of interim development. The most common highway reservation law authorizes local governments to adopt an official map[2] that precisely maps the right-of-way for a future highway.[3] The official map law may prohibit development in a mapped right-of-way during the interim period before it is acquired. Legislation in several states confers a similar authority to reserve land for highways on state highway agencies, and this legislation may also prohibit development on reserved land. Local governments also reserve land for highway rights-of-way through building setback ordinances and controls that apply to the approval of new subdivisions, and these controls may prohibit the development of reserved land.

The reservation of land for highways raises serious taking of property questions that lie on the borderland between the police power and eminent domain. A court could uphold a highway reservation law under the taking clause as a land use control that implements planning for the construction of highways. Yet, a highway reservation law is suspect under the taking clause as a form of zoning for public use if it prohibits the development of the reserved land during the reservation period.[4] A court could also hold that a highway reservation law is an

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2. 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. For an early analysis of official map acts, see American Soc'y of Planning Officials, Protecting Future Streets: Official Maps, Setbacks and Such (Planning Advisory Rept. No. 119, 1959)(now American Planning Ass'n). 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).

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. They are on file with the author. A number of the responding states do not have highway reservation legislation. Several states that do have legislation indicated it was not used frequently. A major reason given was 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 indicated considerable interest in highway reservation legislation. *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).

3. Because a comprehensive plan is highly generalized, it usually shows only the general route of a proposed highway corridor. This corridor is much wider than the right-of-way that ultimately will be acquired for the highway. The official map precisely maps the right-of-way that will be acquired.

4. *Cf.* Wedinger v. Goldberger, 71 N.Y.2d 428, 522 N.E.2d 25, 527 N.Y.S.2d 180 (1988), holding that the mere designation of land as a wetlands under the state wetlands law is not a taking. The court pointed out that designation of land as a wetland does not prohibit development nor convert ownership to public use. It merely requires owners of land in wetlands to obtain an administrative permit if they want to develop their land. *See also* United States v.

improper use of the police power to depress the value of property before it is acquired.

Part II of this article sets the stage for a discussion of the taking problems raised by highway reservation laws. It reviews the taking law courts apply to analogous land use restrictions and government actions that either assist the use of the eminent domain power to acquire land for public facilities or prohibit development when public facilities are inadequate. Some of these taking law analogies support the constitutionality of highway reservation laws, but some do not. In 1987 the Supreme Court decided an important trilogy of land use taking cases. Part III discusses the effect these cases may have on the constitutionality of highway reservation laws under the taking clause. Although the Court did not decide a taking problem similar to the one raised by highway reservation laws, the 1987 taking trilogy provides conflicting signals on the constitutionality of highway reservation laws.

Part IV reviews the cases that have decided the constitutionality of highway reservation laws under the taking clause.[5] The cases are mixed and some courts strike down highway reservation laws under the taking clause when their restrictions are unduly burdensome on landowners. These cases seem to indicate that a highway reservation law can survive a taking clause attack if it is carefully drafted to mitigate the burden it imposes on landowners during the reservation pe-

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Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (no taking under federal dredge and fill permit act until permit denied).

5. An important distinction in taking law affects the constitutionality of highway reservation laws. Courts that consider taking objections to regulatory laws, such as official maps, distinguish between facial takings and takings as applied. 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. *See* D. MANDELKER, J. GERARD & T. SULLIVAN, FEDERAL LAND USE LAW: LIMITATIONS/PROCEDURES/REMEDIES § 1.04 (1986).

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 as applied if the court finds a taking based on the way in which the law is administered. A court could 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.

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 utilize these remedies before bringing an as-applied taking claim against highway reservation law in federal court. Section III considers this requirement in more detail. State courts impose a similar requirement by requiring landowners to exhaust administrative remedies before they bring a taking claim against a local government.

riod. Part V suggests guidelines for drafting highway reservation laws that can avoid taking problems.

II. Taking Law Analogies That Apply to Highway Reservation Laws

A number of taking law doctrines that apply to other types of land use programs and regulations are relevant to the constitutionality of highway reservation laws under the takings clause. These doctrines provide conflicting signals on whether the courts will uphold highway reservation laws. This section discusses those doctines.

A. Planning as Compared With Oppressive Precondemnation Actions

The well-established rule is that planning for a highway, such as its designation by a highway agency or on a local comprehensive plan, is not a taking.[6] *Guinnane v. City & County of San Francisco*[7] extended

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6. *See generally* Smith v. State, 50 Cal. App. 3d 529, 123 Cal. Rptr. 745 (1975) (announcement to tentatively construct highway along tentative route); Lone Star Indus., Inc. v. Department of Transp., 234 Kan. 121, 671 P.2d 511 (1983) (the mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of the property affected); Marvin E. Neiberg Real Estate Co. v. St. Louis County, 488 S.W.2d 626 (Mo. 1973) (pre-condemnation procedure including planning). *See also* Gherini v. California Coastal Comm'n, 204 Cal. App. 3d 699 , 251 Cal. Rptr. 426 (1988) (holding that this rule is consistent with rule barring taking claims that are not ripe).

The rule applies to all public improvements. *See, e.g.*, Toso v. City of Santa Barbara, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210, *cert. denied*, 449 U.S. 910 (1980); Johnson v. State, 90 Cal. App. 3d 195, 153 Cal. Rptr. 185 (1979); Arnold v. Prince George's County, 270 Md. 285, 311 A.2d 223 (1973). *See* Annotation, *Plotting or Planning in Anticipation of Improvement as Taking or Damaging of Property Affected*, 37 A.L.R.3d 127 (1971).

See also Kingston East Realty Co. v. Commissioner of Transp., 133 N.J. Super. 234, 336 A.2d 40, 45 (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. Mayor and Common Council of Englewood, 51 N.J. 108, 237 A.2d 881 (1968) (official map act), and Beech Forest Hills, Inc. v. Morris Plains, 127 N.J. Super. 574, 18 A.2d 435 (App. Div. 1974) (park land reservation act).

But see Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619 (Ky. 1953) (invalidating amendment to comprehensive plan that designated a ponding area as a temporary storage basin for a flood control project); Suess Builders v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (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). *See also* Spaeth v. City of Plymouth, 344 N.W.2d 815, 820 n.4 (Minn. 1984).

7. 197 Cal. App. 3d 862, 241 Cal. Rptr. 787 (1987). *See also* City of Walnut Creek v. Leadership Hous. Sys., Inc., 73 Cal. App. 3d 611, 140 Cal. Rptr. 690 (1977) (taking not found when city refused to issue development permit for land shown on open space plan and filed action to condemn it). *Accord* Ochoa Realty Corp. v. Faria, 634 F. Supp. 723 (D.P.R. 1986) (planning for highway and denial of subdivision approval held not a taking), *aff'd on other grounds*, 815 F.2d 812 (1st Cir. 1987).

this rule. The court indicated that a government-imposed delay in the development of land designated for possible acquisition in its comprehensive plan is not a taking.[8] Plaintiff filed an application for a building permit for four single-family homes after the City included his land in an area the comprehensive plan designated for possible acquisition for a city park.[9] The City delayed the approval of plaintiff's permit during a year-long study of the park acquisition and then decided not to acquire the area in which plaintiff's land was located.[10] The City then amended the plan to allow construction projects in the deleted area.[11] Plaintiff's building permit was still pending at the time he filed suit and the City filed a motion for summary judgment.[12]

The court held that the City's delay in acting on plaintiff's application was not an unreasonable precondemnation activity that amounted to a taking because a planning designation is not equivalent to an announced intention to condemn. A temporary taking had not occurred because "the interim burden imposed on a landowner during the government's decision making process, absent unreasonable delay, does not constitute a taking."[13]

Guinnane relied on dictum in a Supreme Court case, *Agins v. City of Tiburon*.[14] A California city adopted a low density open space ordinance, began proceedings to acquire the plaintiff's land shortly after the ordinance was adopted and abandoned these proceedings the following year.[15] The Court rejected a facial attack on the ordinance and indicated that a taking does not occur if good faith planning does not result in the completion of eminent domain proceedings: "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' "[16] The Court added that the plaintiffs were free to sell their land when the eminent domain proceedings were abandoned.[17]

Guinnane and *Agins* provide important support for the constitutionality of highway reservation laws because they indicate that devel-

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8. 197 Cal. App. 3d at 869, 241 Cal. Rptr. at 791.
9. *Id.* at 865, 241 Cal. Rptr. at 788.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 869, 241 Cal. Rptr. at 791. Plaintiff based its temporary taking claim on First English Evangelical Church v. County of Los Angeles, 107 S. Ct. 2378 (1987), discussed *infra* notes 112-117 and accompanying text.
14. 447 U.S. 255 (1980).
15. *Id.* at 257 n.1.
16. *Id.* at 263 n.9 (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)).
17. *Id.*

opment delays and changes in land value that occur during the planning and precondemnation process are not a taking.[18] But the Supreme Court limited the *Agins* dictum in one of its 1987 taking cases, *First English Evangelical Lutheran Church v. County of Los Angeles*.[19] 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."[20] This restatement of the *Agins* dictum indicates it applies only to the valuation of property in eminent domain proceedings and is not a factor in determining whether precondemnation activities are a taking.

If a government entity engages in oppressive precondemnation activity that unreasonably affects the use of land, a court may find a de facto taking as an exception to the rule that planning activities alone are not a taking.[21] The courts do not agree on what is necessary to show a de facto taking based on precondemnation activities.[22] Some require a physical invasion or direct legal restraint, while others only require a substantial destruction of the use of the property or a loss in market value when the government agency acts unreasonably in delaying condemnation.[23] Unreasonable delay in acquiring land following

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18. Note that the City in *Agins* had gone beyond "mere" planning; it had started and then abandoned condemnation proceedings.

19. 107 S. Ct. 2378 (1987). *See infra* notes 112-117 and accompanying text. *Guinanne* was decided after the 1987 trilogy, but did not discuss this limitation.

20. *Id.* at 2388.

21. *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 884-N33 (L. Thomas ed., Transportation Research Board, Washington, D.C.); Note, *The Condemnor's Liability for Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings*, 1967 UTAH L. REV. 548.

22. Arnold v. Prince George's County, 270 Md. 285, 311 A.2d 223 (1973), indicates that the exhaustion of remedies rule can bar a claim that the designation of a highway on a comprehensive 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. *Id.* at 297, 311 A.2d at 229. The exhaustion of remedies rule applies to highway reservation laws that contain variance provisions.

23. 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

its designation for acquisition or an announcement that a taking will occur are important factors indicating that a taking has occurred. The courts may also require a finding that precondemnation activities have denied the property owner all use of his land.[24] The courts decide these cases on a case-by-case basis, with some courts holding that even harsh precondemnation behavior was not a taking.[25]

The Pennsylvania courts have decided a number of highway cases in which landowners claimed a de facto taking occurred because of oppressive precondemnation activities.[26] In a leading case,[27] the Pennsylvania Supreme Court held a de facto taking occurred where clearly a complete taking of plaintiff's property would occur when the state acquired the plaintiff's industrial buildings for a proposed highway interchange. Publicity over an extended period about the proposed condemnation caused a loss of plaintiff's tenants so that the property

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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., Transportation Research Board, Washington, D.C.) (emphasis in original).

Some of the cases reviewed by Mr. Vance arose out of urban renewal rather than highway projects. For a discussion of de facto taking urban renewal cases, *see* Comment, *De Facto Taking and Municipal Clearance Projects: City Plan or City Scheme?*, 9 URB. L. ANN. 317 (1975); Comment, *Condemnation Blight, De Facto Taking and Abandonment in Reliance—Compensation of Losses in Urban Development*, 1973 URB. L. ANN. 343.

24. *See* Howell Plaza, Inc. v. State Highway Comm'n (I), 66 Wis. 2d 20, 226 N.W.2d 185 (1975). 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. The court held, however, that the plaintiffs had not stated a cause of action under this rule. *See also* Howell Plaza, Inc. v. State Highway Comm'n (II), 92 Wis. 2d 74, 284 N.W.2d 887 (1979).

25. *E.g.*, Toso v. City of Santa Barbara, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (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), *cert. denied*, 449 U.S. 910 (1980).

26. The leading case is In re Philadelphia Parkway Between City Hall and Fairmont Park, 250 Pa. 257, 95 A. 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. *Id.* at 260, 95 A. at 430. 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. *Id.* at 265, 95 A. at 432. *Accord* Commonwealth, Dep't. of Transp. v. Levine, 3 Pa. Commw. 1, 281 A.2d 909 (1971).

27. Conroy-Pugh Glass Co. v. Commonwealth, 456 Pa. 384, 321 A.2d 598 (1974). *See also* Harris v. Commonwealth Liquor Control Board, 113 Pa. Commw. 467 , 537 A.2d 386 (1988) (following Conroy-Pugh); Commonwealth Dep't of Transp. v. Lawton, 50 Pa. Commw. 144, 412 A.2d 214 (1980).

no longer generated enough income to cover taxes and operating expenses.[28]

The distinction between a highway designation that affects an entire property and one that affects only part of the property is important in Pennsylvania, although some courts find a de facto taking even in the partial denial of use cases.[29] In one case,[30] the Pennsylvania Commonwealth Court refused to find a de facto taking when plans for a highway covered only a small part of the plaintiff's property and a total taking was not contemplated. It held that a decrease in the value of the property and marketing difficulties were not enough for a de facto taking.[31]

As the cases discussed above demonstrate, unreasonable precondemnation delay and the designation of an entire property for acquisition were important factors in the cases holding that precondemnation activities were a de facto taking. The courts believed that an unreasonable delay in condemnation when the use of a property was totally restricted was too oppressive a burden for a property owner to bear. The courts may take the same view when considering the constitutionality of highway reservation laws under the taking clause.

B. Zoning to Depress Property Values in Advance of Acquisition

Universally, the courts have held that zoning to depress the value of property before it is acquired is invalid.[32] 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."[33] A court could hold that prohibiting the develop-

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28. 456 Pa. at 386-87, 321 A.2d at 599.

29. *See* Vance, *supra* note 23.

30. Commonwealth Dep't of Transp. v. Steppler, 114 Pa. Commw. 300, 542 A.2d 175 (1988). *See also* Commonwealth Dep't of Transp. v. Kemp, 100 Pa. Commw. 436, 515 A.2d 68 (1986) (no taking when taking of only frontage of residence contemplated even though property made unmarketable), *aff'd per curiam*, 517 Pa. 309, 535 A.2d 1051 (1988).

31. 542 A.2d at 177.

32. D. MANDELKER, LAND USE LAW § 2.29 (2d ed. 1988) [hereinafter LAND USE LAW]; Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 67-78 (1988); Annotation, *Eminent Domain: Validity of "Freezing" or Statutes Preventing Prospective Condemnee From Improving, or Otherwise Changing, The Condition of His Property*, 36 A.L.R.3d 751 (1971).

33. San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 274 (Tex. App. 1975). *Accord* Klopping v. City of Whittier, 8 Cal. 3d 309, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). *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).

See also Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975),

ment on land reserved under a highway reservation law is analogous to zoning that depresses property values in advance of acquisition.

Peacock v. County of Sacramento[34] is a leading case invalidating the use of zoning to depress property values. The county decided to acquire a landowner's property as an approach zone for an airport and adopted restrictive height and agricultural zoning regulations for the property, designating it as an airport in a land use plan.[35] The county refused to allow the landowner to develop his property while these restrictions were in effect, stated it would ultimately acquire the property, and abandoned its condemnation plans five years after it adopted the restrictive controls.[36] The court held that these actions were intended to depress or prevent an increase in the value of plaintiff's property in advance of acquisition and awarded the plaintiff compensation for the full value of the property.[37]

The courts have invalidated zoning to depress property values even in the absence of oppressive precondemnation activity.[38] In *Hermanson v. Board of County Commissioners*,[39] the Colorado court awarded compensation when the county adopted regulations to hold down the value of property it expected to acquire for a flood control dam. A Maryland court invalidated the rezoning of a property to a

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vacated, 417 F. Supp. 1125 (N.D. Cal. 1976). The city downzoned plaintiff's property to vary 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). *Cf.* 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 ordinance and expressed desire to acquire property but did not do so; motion to dismiss denied). *See also* Harris v. Missouri Dep't of Conservation, 755 S.W.2d 726 (Mo. App. 1988) (owner forced to sell to state when state prevented owner from fishing on property).

34. 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).

35. *Id.* at 853, 77 Cal. Rptr. at 395.

36. *Id.*

37. *Id. See also* Taper v. City of Long Beach, 129 Cal. App. 3d 590, 181 Cal. Rptr. 169 (1982) (temporary damages awarded for extreme delay in condemnation proceeding).

See generally Eck v. City of Bismarck (I), 283 N.W.2d 193, 195 (N.D. 1979) ("[A]bsent a land-use regulation exceedingly onerous on its face, . . . or governmental precondemnation regulatory activity designed to facilitate subsequent eminent-domain proceeding, an action for inverse condemnation is inappropriate to challenge the validity of a zoning ordinance.") (footnotes omitted); Comment, *Delay, Abandonment of Condemnation, and Just Compensation*, 41 S. CAL. L. REV. 862, 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 its actual possession of the property before the trial.") (footnotes omitted).

38. *See, e.g.*, Sanderson v. City of Willmar, 282 Minn. 1, 162 N.W.2d 494 (1968). *See also* McShane v. City of Faribault, 292 N.W.2d 253, 257 n.2 (1980) (stating that no taking occurs if ordinance has legitimate comprehensive planning objective unless all reasonable uses of property are prohibited).

39. 42 Colo. App. 154, 595 P.2d 694 (1979).

more intensive use when the rezoning did not include a portion of the property that was scheduled for highway acquisition. The court held that the restrictive zoning's purpose was to depress property values.[40]

The courts have also held that the denial of a building or other land use permit to hold down the cost of land prior to its acquisition is a taking.[41] In *San Antonio River Authority v. Garrett Bros.*,[42] the plaintiff began to develop a subdivision but was denied necessary permits for utilities. Plaintiff presented evidence that the City legal department had advised City planning officials that they could not withhold approval of plaintiff's plat in order to keep down future costs of acquisition.[43] The City's director of planning nevertheless directed other City agencies to deny plaintiff additional permits necessary to complete the project.[44] The court held that a taking occurs when the purpose of a governmental action is to prevent the development of land that would increase its cost of acquisition.[45] Cases like *San Antonio*, and related decisions invalidating the use of zoning to depress property values prior to acquisition, indicate that a court could find a taking if a highway reservation law prohibits development during the reservation period.

C. *The Enterprise Theory and Zoning for Public Use*

A respectable theory of the taking clause proposed by Professor Joseph Sax[46] also casts doubt on the constitutionality of highway reservation laws. Professor Sax argued: "[t]he rule proposed here is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required."[47] A court could hold that a highway reservation law is a taking under the enterprise theory because the law imposes an economic loss to enhance government's resource position.

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40. Hoyert v. Board of County Comm'rs, 262 Md. 667, 278 A.2d 588 (1971); Carl M. Freeman Assoc's. v. State Roads Comm'n, 252 Md. 319, 250 A.2d 250 (1969).

41. 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, 59 Misc. 2d 768, 300 N.Y.S.2d 197 (Sup. Ct. 1969).

42. 528 S.W.2d 266 (Tex. Ct. App. 1975).

43. *Id.* at 270.

44. *Id.*

45. *Id.* at 274.

46. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter Sax 1964]. Not all courts accept this theory, see Maryland Port Admin. v. J.C. Corp., 308 Md. 627, 529 A.2d 829 (1987), and Professor Sax later qualified it: Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). The enterprise theory is still analytically useful as applied to land use regulations that assist the power of eminent domain.

47. Sax 1964, *supra*, at 63.

The Supreme Court rejected the enterprise theory in a case upholding the designation of Grand Central Terminal as a historic landmark,[48] but the theory has been followed by some state cases. Airport zoning is an example of a land use regulation that some state courts have held invalid under the enterprise theory.[49] Cities may create zones in the vicinity of airports to limit density or prohibit structural uses in order to protect the flight path for airplanes. The Minnesota Supreme Court held an ordinance of this type unconstitutional in a decision that relied on the Sax enterprise theory.[50] It pointed out that the ordinance was not like zoning, where there was a reciprocal benefit accruing to all affected landowners from the orderly development of land.[51]

Under a related taking doctrine, some courts hold that a land use regulation is a taking if it confers a public benefit instead of preventing the occurrence of a harm, such as the harm that would result from allowing a nonresidential use in a residential neighborhood.[52] The Supreme Court no longer applies the harm-benefit theory to invalidate land use regulations,[53] but some state cases apply the theory, especially when a zoning ordinance restricts land to a public use.[54] Because a highway reservation law restricts the development of land that will be acquired for a public purpose, a court could hold it is unconstitutional zoning for a public use.[55]

Some state courts have applied the harm-benefit theory to invalidate public use zoning for land a municipality expected to acquire for

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48. The Court held that the landmarks 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." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 135 (1978).

49. *See* LAND USE LAW, *supra* note 32, § 2.27 (courts divided on constitutionality of airport zoning).

50. McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980).

51. *Id. See also* Lutheran Church of America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974) (relying on *Sax* theory to invalidate designation of church headquarters building as historic landmark). *Contra* Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980). For discussion of the reciprocal benefit theory, *see infra* notes 94-95 and accompanying text.

52. *See* LAND USE LAW, *supra* note 32, § 2.08.

53. The Court's rejection of the harm-benefit theory is implicit in its broad definition of the benefits that can provide an average reciprocity of advantage that protects land use regulation under the taking clause. See *infra* notes 90-95 and accompanying text.

54. *See, e.g.*, Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y. S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976).

55. *See* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (invalidating zoning ordinance zoning private parks for public use), *appeal dismissed*, 429 U.S. 990 (1976). The court analyzed the constitutionality of the ordinance under the due process rather than the taking clause, but the court's decision would probably apply in states that apply the taking clause to ordinances of this type.

a public use; these courts also required the payment of compensation for the restriction. Some of these courts based their decisions on the state rather than the federal constitution. *Burrows v. City of Keene*[56] illustrates the analysis in these cases. The City intended to acquire plaintiffs' land as open space, but the plaintiffs rejected an offer which was less than its purchase price and its property tax assessment.[57] The City then placed the land in a restrictive conservation district.[58] 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.[59]

The Supreme Court of New Hampshire held that a taking had occurred.[60] Adopting the harm-benefit rule, the court held that land use regulations which deprive a landowner of the economically viable use of his property in order to confer a public benefit are a taking under the state constitution.[61] The court noted that the City had prohibited all "normal private development" of the property after it was unable to acquire the plaintiffs' land at half its value.[62] The court found that the City had attempted to obtain a public benefit by requiring the land to remain undeveloped without the payment of compensation.[63] It added that the City sought to enjoy this public benefit by prohibiting the economically feasible use of the land and by placing the entire burden of preserving the land as open space on the plaintiff.

Other courts have found an improper zoning for public use in similar cases.[64] These cases indicate that courts could hold that a prohibition on the development of property reserved for a highway is unconstitutional zoning for a public use. Like the zoning restriction in the *Burrows* case, the highway reservation prohibits development to obtain a public benefit by requiring the reserved land to remain undeveloped without the payment of compensation.

D. Development Moratoria

Like highway reservation laws, development moratoria impose temporary prohibitions on development to achieve land use planning and

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56. 121 N.H. 590, 432 A.2d 15 (1981). *But see* Claridge v. New Hampshire Wetlands Bd., 125 N.H. 745, 485 A.2d 287 (1984).

57. 121 N.H. at 594, 432 A.2d at 17.

58. *Id.*

59. *Id.* at 601, 432 A.2d at 21.

60. *Id.*, 432 A.2d at 22.

61. *Id.*

62. *Id.* at 600, 432 A.2d at 21.

63. *Id.*

64. *E.g.*, Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46 (Law 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).

related governmental objectives. Local governments adopt development moratoria to obtain time to revise comprehensive plans and zoning ordinances, to assess the impact of development on environmentally sensitive areas,[65] or to defer development until adequate public facilities are available.[66]

The constitutionality of development moratoria depends on whether they are reasonable in time and whether they implement proper public purposes. One case indicates that a court will uphold a moratorium that meets these requirements even if it prevents the development of land prior to its planned acquisition for a public facility. In *Carl Bolander & Sons v. City of Minneapolis*,[67] a city agency denied the plaintiff a building permit after the City Council adopted a sixty-day moratorium on building permits for plaintiff's and other land in an area it intended to acquire as a riverfront park.[68] Since the City formally acquired the property several years later, the plaintiff claimed a taking had occurred from the time she applied for the building permit to the time of acquisition.[69]

The plaintiff claimed the City had denied the permit so it could acquire the property more cheaply in condemnation proceedings; the court disagreed.[70] The court noted: "[a]t issue is a comprehensive planning objective to create a regional park . . . ."[71] The court added that the building permit moratorium 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.[72] The court concluded that the City had adopted a valid moratorium for planning purposes and had not attempted to freeze the price of the plaintiff's land in order to reduce the cost of acquisition.[73] This case clearly supports the constitutionality of interim prohibitions on development imposed under highway reservation laws.

Cases upholding moratoria that prohibit development until public facilities become available support the constitutionality of develop-

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

66. *See* D. MANDELKER & 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. DAVIS L. REV. 59 (1977); Annotation, *Eminent Domain: Validity of "Freezing" Ordinances or Statutes Preventing Prospective Condemnee From Improving, or Otherwise Changing, The Condition of His Property*, 36 A.L.R.3d 751 (1971).

67. 378 N.W.2d 826 (Minn. Ct. App. 1985).

68. *Id.* at 827.

69. *Id.* at 828.

70. *Id.* at 829.

71. *Id.*

72. *Id.* at 830.

73. *Id.*

ment prohibitions under highway reservation laws.[74] *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*[75] is a leading case. The court upheld a five-year ban on sewer hookups required by a state agency because sewage treatment facilities were inadequate.[76] It rejected a claim that the ban was an unconstitutional tacit no-growth policy, and noted that the state courts had held that municipalities could use sewage service restrictions to stage development.[77] The court held that the hookup ban was reasonable in duration and noted that the local governments had taken steps to improve service.[78]

Like the development moratorium in *Smoke Rise,*[79] development prohibition under a highway reservation law also delays development

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74. *See generally* LAND USE LAW, *supra* note 32, § 6.09.

75. 400 F. Supp. 1369 (D. Md. 1975).

76. *Id.* at 1380.

77. Also, the state agency had ordered the Commission to undertake remedial measures to provide the necessary facilities.

78. The court added:

> 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.

Id. at 1386; *accord* Cappture Realty Corp. v. Board of Adjustment, 126 N.J. Super. 200, 313 A.2d 624 (Law Div. 1973), *aff'd*, 133 N.J. Super. 216, 336 A.2d 30 (App. Div. 1975).

But see Charles v. Diamond, 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977). In *Diamond*, the plaintiff wanted to build a private sewer system because the public system was inadequate. 41 N.Y.2d at 329, 360 N.E.2d at 1303, 392 N.Y.S.2d at 602. An ordinance required hookup to the public system, and the municipality delayed in excusing the plaintiff from that requirement. *Id.* The appellate court stated that if the lower court found the delay "unreasonable," then the ordinance as applied to the plaintiff would be unconstitutional. *Id.* It indicated 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 necessary to provide necessary public facilities were of sufficient magnitude to require extensive preparations and preliminary funding and other activities. The court added that the municipality must be firmly committed to the provision of necessary public facilities.

79. The courts also uphold growth timing programs that defer development to implement a growth management program when planning for the program is adequate. 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, 173 Cal. App. 3d 798, 219 Cal. Rptr. 309 (Cal. App. 1985) (annual development quota held to satisfy requirements of statutes placing limitations on growth management programs); Sturges v. Town of Chilmark, 380 Mass. 246, 402 N.E.2d 1346 (1980) (growth quota ordinance for Martha's Vineyard upheld when studies were planned to assess growth impact); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (upholding phased growth control program adopted to implement growth management plan), *appeal dismissed*, 409 U.S. 1003 (1972).

The courts strike down growth timing programs of this type when planning for these programs is inadequate. 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. 5th DCA 1984) (density cap held invalid because unsupported by studies); City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154 (Fla. 4th DCA 1979) (development cap on number of units allowed invalid because unsupported by insufficient documentation), *cert. denied*, 381 So. 2d 765 (Fla. 1980); Rancourt v. Town of Barnstead, 129 N.H. 45, 523 A.2d 55 (1986) (growth staging ordinance unsupported by adequate studies).

until a public agency can proceed with the construction of a needed public facility. The only difference is that a landowner is allowed to develop her land once a development moratorium has expired. Acquisition of the land should provide an equivalent under a highway reservation law, unless a court finds that the public agency used the highway reservation to depress the value of the property.

III. THE SUPREME COURT'S 1987 LAND USE TAKING TRILOGY

Practically all of the cases discussed in the last section were decided before the Supreme Court's 1987 trilogy of land use cases. In this trilogy the Supreme Court modified land use taking doctrine. This could have an important impact on the constitutionality of highway reservation laws under the taking clause.

A. The Court's Revision of Taking Law Doctrine

Prior to its 1987 taking trilogy, the Court provided the most exhaustive explanation of its taking doctrine in *Penn Central Transportation Co. v. New York City*.[80] The owner of Grand Central Terminal claimed that the designation of the Terminal as a landmark under the City's Landmarks Preservation Law, coupled with a refusal to allow the construction of a high-rise office building over the Terminal, was a taking of property.[81] The City's Landmarks Preservation Commission denied permission to construct a multi-story office building over the Terminal because it found that the addition would destroy the Terminal's historic and aesthetic features.[82] In Justice Brennan's majority opinion, the Court held that the Landmarks Preservation Law and the denial of permission were not a taking.[83] As a preface to his decision, he noted that the Court had not adopted a "set formula" for deciding taking cases, but had applied a number of "taking factors" when it decided taking cases on an ad hoc basis.[84] These taking factors include: the economic impact of the regulation, the extent to which the regulation interferes with investment-backed expectations and the character of the governmental action.[85]

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80. 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978).

81. *Id.* at 119.

82. *Id.* at 118.

83. *Id.* at 138.

84. *Id.*

85. *Id.* at 124. The holding, that a court must consider an owner's "investment-backed expectations" in taking cases, added a new factor to the Supreme Court's taking law. *See* Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U.J. URB. & CONTEMP. L. 3 (1987).

The Court adopted a taking rule different from *Penn Central* in its first 1987 land use taking decision, *Keystone Bituminous Coal Association v. DeBenedictus.*[86] In a five-to-four decision written by Justice Stevens, the Court upheld a Pennsylvania mining law that was similar to a law the Court held unconstitutional in its landmark taking case, *Pennsylvania Coal Co. v. Mahon.*[87] The Court based its *Keystone* decision on a two-part taking test adopted in *Agins v. City of Tiburon*[88] which represented a significant departure from the three ad hoc taking factors adopted in *Penn Central.* The *Agins* two-part test holds that a land use regulation is not a taking if it substantially advances a legitimate governmental interest and does not deprive a landowner of the economically viable use of his property.[89]

Justice Stevens wrote the majority opinion, holding that, "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred" under the two-part test.[90] He concluded that the law protected important public interests in health, the environment and the fiscal integrity of the area.[91] He also applied a rule, first adopted by Justice Holmes in *Pennsylvania Coal*, that a land use regulation is not a taking if it confers an average reciprocity of advantage.[92] The rule is that a taking does not occur in this situa-

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86. 107 S. Ct. 1232 (1987); *see* Anderson, *A Fifth Amendment Taking Clause Analysis of Pennsylvania's Surface Mining Conservation and Reclamation Act*, 86 DICK. L. REV. 691 (1982); Note, *Constitutional Law: Keystone Bituminous Coal Assn. v. DeBenedictis. Pennsylvania Coal Revisited*, 56 UMKC L. REV. 153 (1987).

87. 260 U.S. 393 (1922). Plaintiffs brought a facial attack on the statute in *Keystone*, 107 S. Ct. 1232. Justice Stevens 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." *Id.* at 1247. The same comment would apply, of course, to a facial taking attack on a highway reservation law.

88. 447 U.S. 255 (1980). See *supra* notes 14-16 and accompanying text. The Court in *Agins* appeared to treat the two-part test as a balancing test that required a weighing of the public purpose against the public harm. At one point in his opinion, Justice Stevens quoted language from *Agins* indicating that balancing is required. 107 S. Ct. at 1246.

89. 447 U.S. at 260.

90. 107 S. Ct. at 1243. Justice Stevens also concluded that the statute did 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. *Id.* at 1248.

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. *Id.* The statute prevented the mining of only two per cent of the plaintiffs' coal. *Id.* at 1249. The burden on the support estate was not a taking because the plaintiffs retained the right to mine virtually all of their coal. *Id.* 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. *See infra* note 118.

91. *Id.* at 1242.

92. *Id.* at 1245.

tion because the benefits conferred by a land use regulation offset its burdens.[93] Justice Stevens interpreted average reciprocity broadly:

> 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." . . . 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," . . .[94]

This is an extremely broad reading of the reciprocity of advantage rule. Applied literally, the rule could mean that a land use regulation can never be a taking because landowners must accept the restrictions it imposes as part of the burden of common citizenship. Although this principle goes far to protect the constitutionality of highway reservation laws as well as other land use regulations under the taking clause, it is not yet clear whether the entire Court supports it or would apply it in this way.[95]

Nollan v. California Coastal Commission,[96] a case decided soon after *Keystone*, provides additional guidance on the legitimate governmental purposes that can support the constitutionality of land use regulations under the taking clause. In *Nollan* the Court held that a permit condition for a single beachfront house which required the dedication of a public easement to cross the beach was a taking of property.[97] The property owner was not compensated for the ease-

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93. *Id.*

94. *Id.* (quoting Mugler v. Kansas, 123 U.S. 623, 665 (1887) (upholding statute closing brewery against taking claim)). *Mugler* held that laws enacted under the police power were immune from a taking claim, a holding thought to have been qualified by *Pennsylvania Coal*, 107 S. Ct. at 1244.

The Court adopted a similar approach in *Penn Central*, where it rejected an argument by the Terminal owners that the landmarks 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." 438 U.S. at 133. The Court held that a taking does not occur simply because a law has "a more severe impact on some landowners than on others." *Id.* The Court also held that the Terminal owners benefited along with other residents of New York City from the designation of landmarks under the landmarks law, implying that this benefit offset any burdens the law imposed. *Id.* at 134-35.

95. *See* Mandelker, *Waiving the Taking Clause: Conflicting Signals from the Supreme Court*, 40 LAND USE L. & ZONING DIG. No.11, at 3 (1988).

96. 107 S. Ct. 3141 (1987). *See* Freilich & Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to Nollan*, 10 ZON. & PLAN. L. REP. 169 (1987); Lawrence, *Means, Motives, and Takings: the Nexus Test of Nollan v. California Coastal Commission*, 12 HARV. ENVTL. L. REV. 231 (1988).

97. 107 S. Ct. at 3150.

ment.[98] In a five-to-four decision written by Justice Scalia, the Court found a taking because it held that the Commission could not justify the easement requirement because it did not have legitimate reasons related to the protection of the coast.[99]

The *Nollan* case reaffirmed the two-part taking test adopted in *Keystone*, but qualified the first part of the test which required 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.[100] It added that it is not enough that the government entity "could rationally have decided" that the regulation might achieve a governmental objective.[101] 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 did not indicate how rigorous this review must be.

The Court's 1987 taking cases changed, and to some extent confused, the taking law applicable to land use regulation. One of the most important questions the Court has not settled is whether it will apply the three ad hoc taking factors adopted in *Penn Central* or the newer two-part taking test adopted in *Keystone*.[102] Whichever test it applies, it is clear that the Court would view two taking factors as critically important in cases raising taking objections to highway reservation laws.[103]

One of these factors is the purpose of the regulation. The Court has gone far to approve almost all land use regulations' purposes.[104] The governmental purpose inquiry is important as applied to highway reservation laws. A court could hold that a highway reservation law advances a legitimate governmental interest because it implements planning for highways, or that it does not advance a legitimate governmental interest because it zones property for public use and depresses its value before acquisition. The Court has not yet dealt with the de facto taking problem raised by land use regulations accompa-

98. *Id.*
99. *Id.* at 3149-50.
100. *Id.* at 3147 n.3.
101. *Id.*
102. *See* Hodel v. Irving, 107 S. Ct. 2076, 2082 (1987) (applying three-factor test).
103. The investment-backed expectations taking factor is not likely to be critically important in taking cases challenging highway reservation laws. Courts find a taking under this factor only when the landowner has what amounts to a vested right to develop his land or when a land use regulation interferes with a distinct property interest. *See generally* Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U.J. URB. & CONTEMP. L. 3 (1987).
104. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3147 (1987).

nied by the use of eminent domain. Yet, in dictum, the Court qualified the suggestion in *Agins* that a court should disregard the impact that governmental decisionmaking has on land values.[105] This dictum suggests that the Court might not look favorably upon a development prohibition imposed under a highway reservation law.

Another taking factor the Court considers important is whether a land use regulation leaves a landowner with an economically viable use of her property. The Court has not yet decided a case in which a land use regulation left a landowner without any reasonable use of her property, although *Penn Central* held that a mere diminution in value is not enough for a taking.[106] This holding may mean that the Court would uphold a highway reservation if it did not deprive a landowner of all use of her land, a result consistent with the de facto taking cases based on oppressive precondemnation activities in highway programs.[107]

B. *The Court's Requirement that Landowners Receive Compensation for Land Use Takings*

When a court holds that a land use regulation is a taking, the traditional judicial relief has been an invalidation of the regulation.[108] In an influential dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego,*[109] Justice Brennan argued that a court should award compensation for a temporary taking when it holds that a land

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105. *See supra* notes 14-16 and accompanying text.

106. 438 U.S. at 431.

107. *See supra* notes 21-30 and accompanying text.

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

109. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting). Plaintiff purchased property to build a power plant. The city then rezoned it, reduced the acreage for industrial use, and proposed that part of the property be preserved as open space. An eminent domain proceeding to acquire the property was abandoned because the bond issue required for acquisition failed. Plaintiffs did not make a development proposal prior to filing suit against the city for inverse condemnation, mandamus and declaratory relief. *Id.* at 625-26.

The majority held that the lower state court decision awarding compensation to the plaintiff was not a final judgment subject to Supreme Court appeal. *Id.* at 630. Justice Brennan believed that the state court had rendered a final judgment and considered the remedies courts should make available when they find a taking has occurred. *Id.* at 646. He stated that the remedy for a taking is not merely invalidation of the offending ordinance, for this would "hardly compensate" the owner for his loss. *Id.* at 655. 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.

Id. at 658.

use regulation is a taking of property. Although the critical reaction to Brennan's dissent was divided,[110] several state and lower federal courts adopted his view on the compensation issue.[111] The Supreme Court held in its final 1987 land use taking decision, *First English*,[112] that compensation is payable when a court holds that a land use regulation is a taking. The plaintiff challenged under the taking clause the constitutionality of a moratorium on development in a floodplain, but the Court did not decide whether the moratorium was a taking and remanded this issue to the state court for trial.[113]

On the compensation issue, Chief Justice Rehnquist wrote for the majority that compensation is required for the "temporary taking" that occurs while an invalidated ordinance is in effect.[114] The Court limited its holding "to the facts presented" and specifically noted that the complaint alleged that the ordinance denied the plaintiff "all use" of his property.[115] He added that the decision did not include a consideration of "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."[116]

First English could have an important effect on the constitutionality of highway reservation laws. The holding, that compensation is not payable for "normal delay" in obtaining building permits and rezoning, could apply to delays in acquisition that occur under these laws if

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110. 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 LOY. L.A.L. 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).

111. For cases adopting Justice Brennan's *San Diego* dissent, *see* Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983); Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402 (6th Cir. 1984), *rev'd and remanded*, 473 U.S. 172 (1985); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir.), *reh'g denied*, 649 F.2d 336 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd on remand*, 699 F.2d 734 (5th Cir. 1983); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46 (Law Div. 1982); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983). *Contra* Citadel Corp. v. Puerto Rico Highway Auth., 695 F.2d 31 (1st Cir. 1983).

112. 107 S. Ct. 2378 (1987); *see* Berger, *It's About Time: Compensation for a Regulatory Taking*, 39 LAND USE L. & ZONING DIG. 4 (1987); Callies, *Regulatory Takings Redux and the Compensation Issue*, 39 LAND USE L. & ZONING DIG. 5 (1987).

113. 107 S. Ct. at 2389.

114. *Id.* (Rehnquist indicated that invalidation of the ordinance would be enough to trigger the compensation remedy.).

115. *Id.*

116. *Id.*

the delay is "normal." This rule applies only to the compensation issue, but it is doubtful whether a court would hold that a normal delay in obtaining development approval is a taking.[117] If a court held that a development prohibition under a highway reservation law was a taking, the court could award compensation if it prohibited "all use" of the land for an unreasonable period of time. Some highway reservation laws do prohibit any development of the reserved land during the reservation period.

C. *Conclusion*

The Supreme Court's taking doctrine creates problems for the constitutionality of highway reservation laws under the taking clause, especially as modified by the 1987 taking trilogy. Whether the governmental purpose of these laws is legitimate is open to question. These laws may also deny a landowner the economically viable use of his land if they prohibit all development during the reservation period. Courts may examine the legitimacy of the governmental interests more closely now that the Court has indicated that a more stringent standard of judicial review will apply to this question.

The taking question shifts somewhat if a court applies the three ad hoc taking factors adopted in *Penn Central* rather than the two-part taking test adopted in *Keystone*. A court must still consider whether the purpose of the law is legitimate and whether a highway reservation denies a landowner the economically viable use of his land.[118] *First English* contains important signals that a lengthy reservation under a highway reservation law that prohibits all development on the reserved land during the reservation period is a taking. The next section reviews the cases that decided the constitutionality of highway reservation laws under the taking clause and their present vitality under the Supreme Court's taking doctrines.

IV. The Constitutionality of Legal Techniques for Reserving Right of Way Under The Taking Clause

This section first reviews the use of building setbacks to reserve highway rights-of-way and highway reservation requirements in subdi-

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117. *See* Guinanne v. City & County of San Francisco, *supra* notes 7-16 and accompanying text.

118. Under the doctrine adopted in *Penn Central* and confirmed in *Keystone*, a court could hold that a highway reservation does not prohibit the economically viable use of the reserved land if it does not include all of the land. This doctrine requires a court to decide the economically viable use question by examining the impact of a land use regulation on the entire tract covered by the regulation, not just that part of the tract that is affected. If a highway reservation covers only part of a landowner's property, and if he can make a reasonable use of his land on the part not covered, a court applying this doctrine could hold that the highway reservation is not a taking. *See supra* note 90.

vision control ordinances. It concludes by reviewing the constitutionality of highway reservations under municipal official map and state highway reservation laws.

A. *Building Setbacks*

Municipalities commonly require building setbacks from the lot line or from the edge of the highway or street right-of-way, either in a separately enacted ordinance or as part of the zoning ordinance. The constitutionality of setback regulations has been well-established since the early case of *Gorieb v. Fox*,[119] in which the Supreme Court upheld a setback requirement in a residential neighborhood. The Court decided that building setbacks serve a number of valid land use objectives, including: separating the building from the street's noise, enhancing the attractiveness of the residential environment and securing the availability of light and air.[120] Cases since *Gorieb* have held setback ordinances constitutional.[121]

An early classic work on setback ordinances stated that municipalities could use setback ordinances to reserve land for street widening.[122] The few cases that have decided this question disagree with that statement. *Gordon v. City of Warren Planning & Urban Renewal Commission*[123] is a leading case. The court held facially unconstitutional an ordinance that measured a building setback from the edge of a proposed right-of-way designated by the City's master thoroughfare plan. The court noted that the ordinance did not contain a time limit during which the City would have to determine whether it would acquire the plaintiff's land.[124] The court held that the ordinance required the dedication of a large part of the plaintiff's property for public purposes without any provision for compensation.[125] The court added that if condemnation occurred, the value of the property could be considerably depreciated because of the setback.[126] This case is consis-

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119. 274 U.S. 603 (1927).

120. *Id.* at 609.

121. *See* cases cited in 6 P. ROHAN, ZONING AND LAND USE CONTROLS § 42.04[1] n.6 (1987).

122. A. BLACK, BUILDING LINES AND RESERVATIONS FOR FUTURE STREETS 116 (1935). In J & B Dev. Co. v. King County, 29 Wash. App. 942, 631 P.2d 1002 (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, 100 Wash. 2d 299, 669 P.2d 468 (1983), and did not consider this question.

123. 388 Mich. 82, 199 N.W.2d 465 (1972).

124. *Id.* at 92, 199 N.W.2d at 470.

125. *Id.*

126. *Id. Accord* Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950). *See also* Arkansas State Highway Comm'n v. Anderson, 184 Ark. 763, 43 S.W.2d 356 (1931); Mayer v. Dade

tent with the taking doctrines which hold that land use restrictions that depress the value of property prior to acquisition or zone land for public use are unconstitutional.

Building setbacks are not an effective technique for reserving rights-of-way. An additional setback to reserve land for right-of-way acquisition is vulnerable to constitutional attack because it does not serve the purposes identified in *Gorieb*. Furthermore, an additional setback usually exceeds the municipality's normal requirement.[127]

Setback ordinances may provide for mitigation of the taking problem by authorizing a variance from a setback restriction which is imposing a hardship on the landowner, but these provisions undercut the use of setbacks for right-of-way reservation. A court would probably uphold the grant of a variance when a setback is used for this purpose.[128] A landowner would 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.[129] A setback imposed to reserve right-of-way may have this effect.

B. Highway Reservations in Subdivision Control Ordinances

Subdivision control is a local land use control authorized by state legislation[130] that regulates the division of land into lots and blocks on recorded plats. In practice, the subdivision control ordinance is usually applied only to residential subdivisions because industrial and commercial developments are seldom platted. A major purpose of subdivision control is to assure that lots and blocks in the subdivision plat, or roads and other facilities in the subdivision, meet standards contained in the ordinance.[131]

County, 82 So. 2d 513 (Fla. 1955); City of Miami v. Romer (II), 73 So. 2d 285 (Fla. 1954); Westchester Reform Temple v. Brown, 29 A.D.2d 677, 287 N.Y.S.2d 513, *aff'd*, 22 A.D.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968); Householder v. Town of Grand Island, 36 Misc. 2d 862, 114 N.Y.S.2d 852 (Sup. Ct. 1951), *aff'd*, 305 N.Y. 805, 113 N.E.2d 555 (1953); Annotation, *Eminent Domain: Validity of "Freezing" Ordinances or Statutes Preventing Prospective Condemnation from Improving, or Otherwise Changing, the Condition of His Property*, 36 A.L.R.3d 751, 802-07 (1971); *accord* O'Connor Dev. Co. v. State Dep't of Transp., 533 So. 2d 800 (Fla. 1st DCA 1988) (court applied the Supreme Court's *First English* case). For a discussion of *First English*, *see supra* notes 112-117 and accompanying text.

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

128. Stout v. Jenkins, 268 S.W.2d 643 (Ky. 1954).

129. Faucher v. Sherwood, 321 Mich. 193, 32 N.W.2d 440 (1948); Federal Realty Res. Corp. v. Zoning Bd. of Appeals, 7 A.D.2d 651, 180 N.Y.S.2d 241 (1958); Richards v. Zoning Bd. of Appeals, 285 A.D. 287, 137 N.Y.S.2d 603 (1955).

130. For a list of subdivision control enabling statutes, *see* Symposium, *Exactions: A Controversial Source of New Municipal Funds*, 50 LAW & CONTEMP. PROBS. 1, 191-94 (1987).

131. *See* LAND USE LAW, *supra* note 32, § 9.02.

Subdivision control ordinances commonly require the subdivider to construct internal streets without compensation. They may also require the subdivider to dedicate land for widening adjacent highways, again without compensation. Noncompensable construction and dedication requirements in subdivision control ordinances are known as exactions. The courts have upheld the constitutionality of subdivision exactions, including exactions which require the dedication of land for adjacent highway widening, under a number of tests.[132] These tests vary semantically but are essentially similar and are known collectively as the "nexus" test.[133] This test permits an exaction which is required for the widening of an adjacent highway due to the subdivision's generation of additional traffic. In contrast, requiring a subdivider to dedicate land for the widening of an adjacent highway to serve community needs rather than the needs of the subdivision is unconstitutional.[134]

In its 1987 *Nollan* decision, the Supreme Court invalidated an exaction imposed under the California Coastal Act that required an easement of access across a beachfront as a condition to the issuance of a coastal permit for a beachfront house.[135] The Court recognized and cited numerous cases in which the state courts applied the nexus test to subdivision exactions, apparently with approval.[136] It is unclear in *Nollan* whether the Court adopted a more stringent nexus test than the nexus test adopted by the state courts.

Instead of a land dedication for a highway, a subdivision control ordinance may require a subdivider to reserve land in the subdivision for a new highway or for the widening of an adjacent highway. The reservation may or may not be limited in time, and the state or municipality is required to compensate the subdivider for the reserved land when it is acquired for highway purposes. Some state subdivision con-

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132. *Id.*, §§ 9.11-9.19.

133. [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. Kayden & Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 1, 127-28 n.3 (1987) (citations omitted).

134. *See* Schwing v. City of Baton Rouge, 249 So. 2d 304 (La. Ct. App.) (extension of major road), *rev. denied*, 252 So. 2d 667 (La. 1971). *See also* Briar West, Inc. v. City of Lincoln, 206 Neb. 172, 291 N.W.2d 730 (1980) (court found statutory authority for such a dedication). The Supreme Court cited both cases with approval in Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3149 (1987).

135. *See supra* notes 96-101 and accompanying text.

136. *Nollan*, 107 S. Ct. at 3149.

trol legislation authorizes this kind of highway reservation,[137] which is similar in concept to an official map act. Only a few cases have decided the taking problems raised by subdivision reservations for highways,[138] which differ from subdivision exactions because compensation ultimately is paid for the reserved land.

A series of Maryland cases provide the most extended consideration of the taking problems raised by highway reservation requirements in subdivision control ordinances, but the cases are unclear. In the first case, *Krieger v. Planning Commission*,[139] the county's general highway plan indicated that a primary state road adjacent to a subdivision would be widened to a minimum width of 100 feet. The county refused to approve a subdivision because the subdivider did not provide the twenty-foot setback the county plan reserved for future acquisition for the road widening.[140] This setback was included in a wider fifty-foot setback required by a county ordinance.[141] The county did not place a time limit on the reservation when it denied approval.[142]

The court held that the record did not show a "present taking" as distinguished from a use regulation, or that the owner would not be paid when the land was taken for a road widening.[143] Nor was the

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137. *E.g.*, Ala. Code §§ 11-52-50 to 11-52-54 (1985). *See* Cottage Hill Land Corp. v. City of Mobile, 443 So. 2d 1201 (Ala. 1983) (reservation invalid because statutory procedures not followed).

138. *See, e.g.*, Arnett v. City of Mobile, 449 So. 2d 1222, 1225 (Ala. 1984) (dictum; not a taking because subdivider "receives compensation from the enhanced value of his property and other resultant advantages").

A Kansas case, Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979), is relevant to the constitutional problems raised by highway reservations under subdivision control ordinances. The City refused to approve a subdivision unless the subdivider reserved 13.17 of its 48 acres 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 supreme court confined its decision to the facts, holding that since a taking had occurred, an inverse condemnation action for compensation was proper. *Id.* at 713, 594 P.2d at 683. A taking had occurred because the subdivision was subject to a restriction that part of the land within the plat be reserved "in its undeveloped state for possible highway purposes at some indefinite date in the distant future." *Id. See also* Floreham Park Inv. Assocs. v. Planning Bd., 92 N.J. Super. 598, 224 A.2d 352 (Law Div. 1966) (invalidating municipality's denial of subdivision because road might be located through subdivision at some future time, but plans for road not certain).

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. v. Secretary of Kansas Dep't of Transp., 234 Kan. 121, 671 P.2d 511 (1983) (distinguishing *Ventures* as exception to rule that mere planning and platting in anticipation of public improvement is not a taking).

139. 224 Md. 320, 167 A.2d 885 (1961).

140. *Id.* at 322, 167 A.2d at 886.

141. *Id.*

142. *Id.* at 325, 167 A.2d at 888.

143. *Id.* at 324, 167 A.2d 887.

landowner prevented from putting the reserved twenty-foot strip "to whatever permissible use he pleases."[144] There was no change in the use classification, and the landowner was simply denied the right to include the reserved land in the area of the lots fronting on the road.[145] The subdivision denial was not intended to depress the value of the land before it was condemned, and the court noted that the wider fifty-foot setback requirement would prevent the development of the land in any case.[146] The court added that plaintiff did not show that the reservation diminished the present or future value of the land: "[i]t may well be that its value would be enhanced or that the developer could recoup any additional expense from prospective lot purchasers."[147]

Krieger is a confusing and unsatisfactory case.[148] Even though the use classification of the land remained the same, the highway reservation precluded the inclusion of the reserved land in the land available for development. This limitation raised a taking problem the court did not consider because it effectively prevented the subdivision of the reserved land and reduced the density of the development. The court also dodged the taking issue by assuming that the wider fifty-foot setback, which included the setback reserved for the highway widening, was constitutional. The court's additional assumptions—that the highway would enhance the value of the land and that the landowner could recoup the cost of complying with the highway reservation—also mitigate the taking objection, but are not necessarily correct.[149]

The court held that a highway reservation was a taking in the next case, *Maryland-National Capital Park & Planning Commission v. Chadwick*.[150] The county adopted a subdivision control ordinance un-

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. The court also rejected a claim that there were no assurances that the state would ever acquire the reserved land for the road widening. *Id.* at 325, 167 A.2d at 888. It found that the county was undergoing a major population explosion, so that the conditions imposed on the subdivision were "reasonably related to the traffic and other needs of the community at large." *Id. Cf.* Arnold v. Prince George's County, 270 Md. 285, 311 A.2d 223 (1973) (designation of highway on county plan not a taking because no intent to depress property values, no formal reservation of right-of-way, and landowner failed to exhaust remedies by appealing or filing subdivision plan). *See also* East Rutherford Indus. Park v. State, 119 N.J. Super. 352, 291 A.2d 588 (Law Div. 1972) (where a state agency denied approval of a subdivision because the property was planned for acquisition for a public facility, the court held that a taking had not occurred as condemnation of the property was imminent).
149. Whether subdividers can pass on the cost of exactions to homebuyers is not clear. *See* Elickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 399 n.34 (1977).
150. 286 Md. 1, 405 A.2d 241 (1979).

der a state enabling act that authorized three-year reservations for designated public facilities, including parks and recreational areas.[151] It denied approval of a subdivision and reserved the entire property for a period not to exceed three years for acquisition for a park and lake site on the county's master plan.[152]

The subdivision control ordinance required county approval of any use of land subject to a reservation.[153] The court interpreted this limitation to prohibit county permission for any use of reserved land "which conflicts with the flat prohibition contained in the ordinance against grading the land, erecting any structures thereon, or removing trees, top soil or other cover."[154] This interpretation led the court to conclude that the three-year reservation "stripped" the landowners for that "extended period of time" of all reasonable use of the property and was a taking without compensation.[155] 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."[156]

In the final case, *Howard County v. JJM, Inc.*,[157] the court relied on *Chadwick* to again hold that the reservation of land in a subdivision for a highway was a taking of property. The county's ordinance authorized the reservation of land for highways shown on the county's general plan but did not place a time limit on the reservation. The county refused to approve the 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 property.[158] The court distin-

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151. *Id.* at 4, 405 A.2d 242.

152. *Id.* at 6, 405 A.2d at 243.

153. *Id.* at 4, 405 A.2d at 242.

154. *Id.* at 13, 405 A.2d at 247.

155. *Id.* at 12, 405 A.2d at 247.

156. *Id.* at 15, 405 A.2d at 248. The court did not totally condemn 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.

Id. at 18, 405 A.2d at 249-50.

157. 301 Md. 256, 482 A.2d 908 (1984). The Supreme Court cited this case with approval in Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3149 (1987).

158. 301 Md. at 257, 482 A.2d at 909.

guished *Krieger* because this reservation ordinance restricted the use of reserved land to highway purposes.[159] The court also approved the trial judge's findings 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 property.[160]

The court also 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."[161] Why the court applied the nexus test of subdivision exactions to a highway reservation is not clear. Compensation is not paid for an exaction, but the government entity ultimately acquires land subject to a reservation and pays compensation to the landowner. The court did not recognize this distinction.[162]

The Maryland cases indicate that a highway reservation under subdivision controls is a taking if it precludes all use of the land for an unlimited period of time and if acquisition of the property is uncertain. This rule is consistent with Supreme Court taking doctrine and cases finding improper precondemnation activities when land use regulation prohibits all use of the land.[163] *Krieger* is the maverick case. The court upheld the reservation even though the ordinance effectively precluded any development of the reserved land and did not contain a time limit.[164] The court believed the landowner could make a

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159. 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.

Id. at 267, 482 A.2d at 913.

160. *Id.* at 282, 482 A.2d at 921.

161. *Id.* The court added that "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*." *Id.* at 281, 482 A.2d at 921.

162. Nor did the court 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.

163. 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 a provision. 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.

164. 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 author from Neil J. Pederson, Director, Office of Planning & Preliminary Engineering, State Highway Administration, Maryland Department of Transportation (Jan. 20,

beneficial use of the land during the reservation period and that growth in the county made ultimate acquisition likely.[165]

C. *Local Official Map and State Highway Reservation Laws*

Official maps adopted by local governments and the mapping of state highways under state highway reservation laws are land use controls explicitly designed to reserve land for highways before it is acquired. This section first discusses enabling legislation that authorizes the adoption of official maps by local governments and the mapping of highway rights-of-way by state highway agencies. It next discusses the ripeness and exhaustion of remedy rules that can bar a taking claim against a highway reservation law. The section concludes by discussing cases that decided the constitutionality of official map and state highway reservation laws under the taking clause.

1. Model Laws and State Enabling Legislation[166]

The mapping of future municipal streets is an old American practice that goes back to colonial days, when proprietors laid out land to be reserved for streets when they platted towns on land they owned. Some states then enacted legislation that enabled commissioners to plat towns and their streets when it became customary for several individuals to own land on town sites. The commissioners 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 laws 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,[167] but invalidated them as a taking when judicial attitudes toward the regulation of property changed at the end of the century.[168]

This change in judicial climate and the growth of the city planning movement led to substantial changes in official map laws early in the

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1987). Most of the counties that require reservations limit them to a period of one to three 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 author.

165. 224 Md. at 324, 162 A.2d at 887.

166. *See also* D. MANDELKER & G. WAITE, A STUDY OF FUTURE ACQUISITION AND RESERVATION OF HIGHWAY RIGHTS-OF-WAY 24-28 (1963).

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

168. *E.g.*, Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893).

twentieth century.[169] The old mapping laws were integrated with city planning enabling legislation as one of the legal techniques for implementing the local comprehensive plan. Three model official map laws published in this period heavily influenced the content of state official map legislation.[170] One was included in the Standard City Planning Enabling Act the U.S. Department of Commerce prepared in the 1920s.[171] 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.[172] The Standard 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.[173] Several states adopted the official map provisions in the Standard Act,[174] although the compensation prohibition probably makes it unconstitutional.[175]

Most states modeled their official map acts on one of two model planning acts based on the police power; the two model planning acts were included in a Harvard University planning publication published in 1935.[176] Legal pioneers in the planning movement drafted this legislation. Edward Bassett and Frank Williams drafted one model act based on a similar law they had drafted previously and New York had adopted in 1926.[177] Alfred Bettman drafted the other model act, which showed the influence of a police power model official map act appended as a footnote to the official map model in the Standard Planning Act.[178] Although substantially similar in concept, the Bassett-Williams and Bettman models differ significantly in detail.[179] They vary principally in whether they provide compensation for buildings constructed in a mapped street and authorize a variance from restric-

169. See the classic treatment of official map acts, Kucirek & 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.

170. The model legislation is reproduced in A. BLACK, BUILDING LINES AND RESERVATIONS FOR FUTURE STREETS 177-86 (1935).

171. U.S. DEPARTMENT OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT TITLE III (1928).

172. *Id* § 22.

173. *Id* § 25.

174. ALA. CODE §§ 11-52-50 to 11-52-54 (1985); COLO. REV. STAT. §§ 31-23-220 to 31-23-224 (1986); PA. STAT. ANN. tit. 53 §§ 22777 (1957) (cities of the second class).

175. *See, e.g.*, Appeal of Commonwealth, 422 Pa. 72, 221 A.2d 289 (1966).

176. E. BASSETT, F. WILLIAM, A. BASSETT & N. WHITTEN, MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES (1935).

177. *Id.*

178. *Id.*

179. For a detailed comparison of the Bassett-Williams and Bettman models, *see* A. BLACK, BUILDING LINES AND RESERVATIONS FOR FUTURE STREETS 18-22 (1935) (the model laws are reproduced at 177-86).

tions on development in a mapped street. A number of states have adopted enabling legislation for official maps, and much of this legislation contains provisions from one or the other model acts.[180]

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 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 prohibit compensation for buildings or structures built in a mapped street.

Both model acts authorize the issuance of variances based on a showing of hardship. They explicitly make variances available only for new buildings and do not authorize variances for additions to existing buildings, a problem that can arise in built-up areas. The model acts 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 interests of the landowner, it is justified by consider-

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180. Official map legislation in the following states contains provisions borrowed from one or both of these model acts: DEL. CODE ANN. Title 22, § 704-708 (1987); KY. REV. STAT. ANN. §§ 100.293-100.307 (Michie 1982); MD. ANN. CODE art 66B, §§ 6.01-6.02 (1988); MASS. GEN. LAWS ANN. ch. 41, §§ 81F, 81J (West 1983); MICH. COMP. LAWS ANN. §§ 125.51-125.55 (West 1986); MINN. STAT. ANN. § 462.359 (West Supp. 1988); N.H. REV. STAT. ANN. §§ 674:9-674:14 (1986); N.J. STAT. ANN. §§ 40:27-5, 40:27-6 (West 1967 & Supp. 1988) (counties); N.J. STAT. ANN. §§ 40:55D-32 to 40:55D-36 (West Supp. 1988) (municipalities); N.M. STAT. ANN. §§ 3-19-1 to 3-19-8 (1985); N.Y. GEN. MUN. LAW §§ 239(g)-239(k) (McKinney 1982) (counties); N.Y. GEN. CITY LAW §§ 26, 29, 33, 34, 35, 36 (McKinney 1980 & Supp. 1987) (cities); PA. STAT. ANN. tit. 53, §§ 10401-10408 (Purdon 1972) (municipalities); R.I. GEN. LAWS §§ 45-23.1-1 to 45-23.1-7 (1980 & Supp. 1987); UTAH CODE ANN. §§ 17-27-7, 17-27-7.10 (1987 & Supp. 1988) (counties); UTAH CODE ANN. §§ 10-9-23, 10-9-25 (1986) (municipalities); WYO. STAT. §§ 15-1-508 to 15-1-512 (1980).

Official map legislation in the following states is similar to but not based explicitly on the model acts: CONN. GEN. STAT. § 8-29 (1971); FLA. STAT. ANN. §§ 336.02, 380.031(4) (West 1988); IDAHO CODE § 67-6517 (1980); KAN. STAT. ANN. § 12-705c (1982); LA. REV. STAT. ANN. § 33:116 (West 1988); MO. ANN. STAT. § 64.080 (Vernon 1966) (counties); MO. ANN. STAT §§ 89.460-89.490 (Vernon 1971) (municipalities); NEB. REV. STAT. § 18-1721 (1987); N.D. CENT. CODE ANN. §§ 40-48-28 to 40-48-38 (1983); OKLA. STAT. ANN. tit. 11, §§ 47-121 to 47-123 (West 1978); OR. REV. STAT. §§ 215.110-215.190, 215.416 (1985); S.C. CODE ANN. §§ 6-7-1210 to 6-7-1280 (Law. Co-op. 1977); VT. STAT. ANN. tit. 24, §§ 4422-4425, 4469 (1975); WASH. REV. CODE ANN. §§ 36.70.010-36.70.580 (Supp. 1988) (counties and regional planning commissions); WIS. STAT. ANN. § 62.23(6) (West 1988).

ations of "justice and equity."[181] The Basset-Williams model authorizes a variance if the land "within" the mapped street cannot earn a fair return.[182] The drafters indicated that this criterion was more conservative than the similar criterion in the Bettman model because it requires the municipality to consider only the hardship to that part of a property which is affected by an official map reservation.

Both model acts 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.[183] The Bettman model authorizes conditions controlling the character and duration of the building. This provision assists the purpose of the official map because it should allow a condition requiring the removal of a building when the municipality acquires the land within a mapped street.

A number of states also have legislation that authorizes state highway agencies to map highways they intend to acquire in the future.[184] This legislation is similar to local official map legislation but usually does not contain a planning requirement or variance provision. Some of this legislation prohibits the payment of compensation for improvements built in the mapped right-of-way. Many of these laws require permission for development in the mapped right-of-way, and a few laws require the state highway agency to acquire the land included in a mapped right-of-way after the landowner serves notice of an intention to develop.

2. Barring Taking Claims Under the Ripeness and Exhaustion of Remedies Doctrines

The highway reservation laws often contain administrative remedies that landowners can use to modify or remove prohibitions on the development of land reserved for highways. Because of the ripeness doc-

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181. Bettman model, § 4, reproduced in A. Black, *supra* note 170, at 183.

182. Bassett-Williams models, § 10, reproduced in A. Black, *supra* note 170, at 181.

183. *Id.*

184. CAL STS. & HIGH. CODE §§ 740, 741 (West 1969); DEL. CODE ANN. tit. 17, § 145 (1983) (held unconstitutional by trial court); FLA. STAT. ANN. § 337.241 (West Supp. 1988); ILL. ANN. STAT. ch. 121, ¶ 4-510 (Smith-Hurd Supp. 1988); MICH. COMP. LAWS ANN. § 252.4 (West 1967) (intercounty highway commissions); MINN. STAT. ANN. § 160.085 (West 1986); MONT. CODE ANN. §§ 60-4-108, 60-2-209 (1985); NEB. REV. STAT. §§ 39-1311.00 to 39-1311.05 (1984); N.J. STAT. ANN. §§ 27:7-66 to 27:7-67 (West Supp. 1988); N.C. GEN. STAT. §§ 136-66.2, 136-93 (1986) (municipalities with cooperation of state transportation department); OHIO REV. CODE ANN. § 5511.01 (Anderson Supp. 1987); PA. STAT. ANN. tit. 36, §§ 670-206, 678-207 (Purdon 1961); TENN. CODE ANN. §§ 54-19-101 to 54-19-121 (1980) (municipal and county planning commissions with participation by state highway bureau); WIS. STAT. ANN. § 84.295(10) (West Supp. 1987).

trine the Supreme Court has adopted for land use taking cases, these statutory remedies create formidable obstacles for landowners who bring cases in federal court claiming a highway reservation is a taking of property. Comparable litigation barriers to taking cases brought against highway reservation laws are presented by the exhaustion of remedies doctrine the state courts apply in land use cases.

a. The ripeness doctrine in federal courts

The ripeness doctrine is a limitation on jurisdiction the Supreme Court applies to cases brought in federal court in which a landowner claims a land use regulation is a taking as applied to his property.[185] A landowner could claim, for example, that a highway reservation law was a taking of his property as applied if a reservation of land under the law prohibited the development of all of his property. The ripeness doctrine does not prevent a landowner from making a facial taking claim against a highway reservation law.[186]

The Court adopted one set of requirements imposed by the ripeness doctrine in *Williamson County Regional Planning Commission v. Hamilton Bank*,[187] where it remanded an award of compensation to a land developer when the Commission did not approve the completion of its subdivision development. The Court held that a landowner can bring an as-applied taking claim in federal court only after he obtains a final decision from the original decisionmaker, which is the local

185. *See* Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 ZONING & PLAN. L. REP. 49 (1988).

186. The ripeness rule derives from the case or controversy requirement of the UNITED STATES CONSTITUTION, art. III, § 2, cl. 1, and a federal statute which permits review only of "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had . . ." 28 U.S.C.A. § 1257 (West Supp. 1988). The purpose of the rule is to prevent federal courts from considering friendly or collusive suits and from rendering advisory opinions. The ripeness rule is distinct from two similar doctrines the federal courts rely on to decline jurisdiction; those other doctrines involve: 1) exhaustion of administrative remedies; and 2) abstention when significant state law questions exist that state courts should decide.

The Court distinguished the ripeness and exhaustion of remedies doctrines in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193 (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."). *See also* Patsy v. Florida Bd. of Regents, 457 U.S. 496, 512 (1982) (exhaustion of state administrative remedies is not a prerequisite to an action under 42 U.S.C. § 1983).

On the abstention doctrine in federal land use litigation, *see* D. MANDELKER, J. GERARD & T. SULLIVAN, FEDERAL LAND USE LAW § 5.03 (1988); 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).

187. 473 U.S. 172 (1985).

government agency charged with applying the regulation.[188] The plaintiff must obtain a final decision from the local agency authorized to grant variances, if they are available.[189] The plaintiff must also utilize any available state procedures to obtain just compensation, for "no constitutional violation occurs until just compensation has been denied."[190] The Court remanded the case because the developer had not applied for variances authorized by the subdivision ordinance and had not sued for compensation as authorized by state law.[191]

Some highway reservation laws require the public agency to acquire reserved land if the landowner serves notice that he wishes to develop his land and permission to develop is refused. 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. The Supreme Court has made it clear that this is another remedy landowners must utilize before bringing an action in federal court challenging a highway reservation as a taking of property.

In *Agins*,[192] for example, the Court held that an as-applied taking claim was not ripe for decision because the plaintiff filed suit prior to submitting a development proposal to the city council as required by its zoning ordinance.[193] The ordinance required submission of a proposal so the council could determine the residential density it would allow within the ordinance's range of densities.[194] *MacDonald, Sommer & Frates v. County of Yolo*[195] extended *Agins* to require a landowner whose application to develpp was rejected to reapply when the facts indicated that the local government would approve a less "grandiose" development than the initial development. In *McDonald*, the

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188. *Id.* at 194. Landowners are not required to seek a declaratory judgment on the validity of the planning commission's actions because these procedures "clearly are remedial." *Id.* at 193. The final decision rule should also apply to taking cases brought in state courts under the federal taking clause.

189. *Id.* at 193-94. The Court relied on Agins v. Tiburon, 447 U.S. 255 (1980) and Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). The plaintiff must apply for a variance to obtain a decision because "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.

190. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 n.13.

191. *Id.* at 200.

192. *See supra* notes 14-16 and accompanying text.

193. *Agins*, 447 U.S. 257-63. *See also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (judgment of trial court awarding compensation to plaintiff for land use restriction held not final).

194. *Id.* at 257.

195. 477 U.S. 340, 353 n.9 (1986).

county denied approval of a subdivision plan for a number of reasons, including inconsistency with its comprehensive plan and the inadequacy of necessary services.[196] Even though the plaintiff had submitted one development application, the Court relied on *Williamson* to hold that the plaintiff's taking claim was barred in federal court until the plaintiff obtained a "final decision" on the development application.[197] The Court added in an important concluding footnote that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[198]

The lower federal courts have applied the Supreme Court's ripeness doctrine in a number of cases in which the plaintiffs brought as-applied taking claims.[199] One court of appeals held that a taking claim filed against a reservation of land for a highway in Puerto Rico was not ripe.[200] The court noted 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.[201]

The ripeness doctrine, as noted earlier, does not bar a facial taking attack against a highway reservation law. The difficulty, as the *Keystone* case indicates,[202] is that the Court will seldom hold a land use regulation facially unconstitutional as a taking of property. An early federal district court's decision for the defendant in a facial taking challenge to a highway reservation law confirms this impression.[203]

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196. *Id.* at 344 n.2.

197. *Id.* at 349 (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985)).

198. *Id.* at 353 n.9. Landowners may find some relief in a futility exception, provided that the landowner has sought all possible permits for all feasible development. *See* Morgan, *Back to Yolo County*, 38 LAND USE L. & ZONING DIG. 6 (1986). As the Court implied in *MacDonald*, a landowner may avoid "further regulatory proceedings [which] would be fruitless" and may also avoid "fil[ing] further 'useless' applications to state a taking claim." 477 U.S. at 256 n.8. *See also* 477 U.S. at 353 (White, J., dissenting). 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. *See* Mandelker & Blaesser, *supra* note 185.

199. *E.g.*, Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) (right-of-way exaction); Four Seasons Apartment v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1985) (recision of building permit); HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (D. Va. 1985) (conspiracy to take property for private use).

200. Ochoa Realty Corp. v. Faria, 634 F. Supp. 723 (D.P.R. 1986), *aff'd on other grounds*, 815 F.2d 812, 816 (1st Cir. 1987).

201. 815 F.2d at 817.

202. *See supra* notes 86-95 and accompanying text.

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

b. Exhaustion of remedies in state courts

The doctrine 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.[204] This doctrine 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 doctrine in the federal courts, the exhaustion of remedies doctrine in state courts protects highway reservation laws from as-applied taking attacks because many of these laws contain variance and other procedures under which a landowner can secure administrative relief.[205]

3. The Constitutionality of Highway Reservation Laws Under the Taking Clause

Only a limited number of cases have considered the constitutionality of highway reservation laws under the taking clause. This section reviews these cases. Because the taking law that governs highway reservation laws is uneven, limited and erratic, the cases are grouped for discussion by states. The section begins with cases decided in New York and New Jersey, which have the greatest number of decisions, and then moves on to cases decided elsewhere. Throughout the discussion, the consistency of these decisions with the Supreme Court's 1987 land use taking trilogy is indicated. The cases are confusing and divided, and reflect the conflicting analogous taking doctrines courts

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204. LAND USE LAW, *supra* note 32, §§ 8.08-8.10.

205. Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936); State *ex rel.* Miller v. Manders, 2 Wis. 2d 365, 86 N.W.2d 469 (1957). Following *Headley*: Vangellow v. City of Rochester, 198 Misc. 128, 71 N.Y.S.2d 672 (Sup. Ct. 1947). *See also* Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 535 A.2d 512 (1987) (plaintiff did not use statutory procedures to obtain relief from highway reservation); Petosa v. City of New York, 135 A.D.2d 800, 522 N.Y.S.2d 904 (1987) (taking claim not ripe).

In the *Miller* case, 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." 2 Wis. 2d at 370-71, 86 N.W.2d at 472-73. 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. The court found no motive to depress property values in the official map act and noted that the zoning ordinance did not contain a variance provision. *Id.* at 376, 86 N.W.2d at 475.

A landowner may be excused from exhausting remedies under the rule's exceptions. 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. 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. *See* LAND USE LAW, *supra* note 32, § 8.10.

can apply to claims that a highway reservation law is a taking of property, either facially or as applied.[206]

a. The New York cases

Cases in which the highest state court, the Court of Appeals, has reached the merits, have held highway reservation laws unconstitutional. A late nineteenth century case, *Forster v. Scott*,[207] held unconstitutional an early version of the state's municipal official map act that denied compensation for improvements placed in a mapped street. This holding, which the Pennsylvania Supreme Court followed in dictum,[208] is consistent with the rule that a law violates the taking clause if it denies compensation for the value of land and its improvements when they are acquired.

After the New York Legislature amended the official map act to include a variance provision, the Court of Appeals refused to consider a challenge to the amended act because the landowner did not have present plans for the use of the property and had not applied for a variance.[209] In *Jensen v. City of New York*,[210] the court invalidated an official map reservation for streets in a brief memorandum opinion. The dissenting opinion indicated that seventy-eight percent of the plaintiff's property was covered by the official map reservation, but the majority opinion treated the case as if the official map included the entire property.[211] This led the majority to hold the official map reservation unconstitutional, even though the plaintiff had not applied for a variance.[212]

The court held that an application for a variance was unnecessary because the plaintiff was not interested in new construction.[213] She desired to sell the land, "[b]ut the mapping restrictions made the property virtually unsaleable, and made banks unwilling to provide financing for repairs."[214] 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.[215]

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206. *See supra* Section II.

207. 136 N.Y. 577, 32 N.E. 976 (1893).

208. Appeal of Commonwealth, 422 Pa. 72, 221 A.2d 289 (1966).

209. Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936). *See supra* note 205.

210. 42 N.Y.2d 1079, 369 N.E.2d 1179, 399 N.Y.S.2d 645 (1977).

211. *Id.* at 1081, 369 N.E.2d at 1180, 399 N.Y.S.2d at 647.

212. The court relied on Forster v. Scott, *supra* note 207, and a lower court case which invalidated an official map designation that applied to an entire property, Roer Constr. Corp. v. City of New Rochelle, 207 Misc. 46, 136 N.Y.S.2d 414 (Sup. Ct. 1954).

213. 42 N.Y.2d at 1080, 369 N.E.2d at 1180, 399 N.Y.S.2d at 646.

214. *Id.*

215. *Id.*

Jensen was wrongly decided. As the dissent pointed out, the case was premature because the plaintiff had not claimed that the law prevented her from erecting a structure on her land.[216] The dissent would have applied the rule that depreciation in property value resulting from project planning is not a taking and held that the plaintiff's inability to sell or mortgage the land because of its reduced value was not compensable.[217]

Earlier cases in the lower New York appellate courts upheld official map reservations when they did not deny a landowner the reasonable use of the reserved land. *Rochester Business Institute, Inc. v. City of Rochester*[218] is the leading case. The plaintiff planned to construct a new commercial building but had to modify its construction plans because of an additional setback required by the mapping of its frontage for a street widening.[219] This modification increased construction costs but did not reduce rental income because the modified building would have the same amount of rental space.[220]

The *Rochester* court upheld the official map reservation in a decision based on a taking analysis remarkably similar to the analysis later adopted by the United States Supreme Court in *Keystone*.[221] The court in *Rochester* adopted a balancing test which required a weighing of the benefit of the official map reservation to the public against the diminution in property value suffered by the landowner.[222] This test is similar to the *Keystone* two-part taking test.[223] *Rochester* also held that the landowner's share in the common benefit of the official map reservation offset any burden imposed on the use of his property by the official map.[224] The *Keystone* decision applied a similar doctrine.[225] The court concluded in *Rochester* that the reservation was constitutional because the plaintiff could make a reasonable and profitable use of its property.[226] The court stated in dictum that an official map reservation would be a taking if it "produce[d] such substantial damage as to render the property useless for any reasonable pur-

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216. 42 N.Y.2d at 1085, 369 N.E.2d at 1182, 399 N.Y.S.2d at 649.

217. *Id.* at 1082-83, 369 N.E.2d at 1183, 399 N.Y.S.2d at 649-50. *See supra* notes 14-16 and accompanying text.

218. 25 A.D.2d 97, 267 N.Y.S.2d 274 (1966).

219. *Id.* at 99, 267 N.Y.S.2d at 276.

220. *Id.* at 100, 267 N.Y.S.2d at 278.

221. *See supra* notes 86-95 and accompanying text.

222. 25 A.D.2d at 102, 267 N.Y.S.2d at 280.

223. *See supra* notes 86-95 and accompanying text.

224. 25 A.D.2d at 102, 267 N.Y.S.2d at 279.

225. *See supra* notes 90-95 and accompanying text.

226. 25 A.D.2d at 102, 267 N.Y.S.2d at 279.

pose . . . ."[227] Another lower court case adopted the *Rochester* holding, but indicated that a taking would occur if acquisition of the reserved land was unreasonably delayed.[228]

b. The New Jersey cases

In *Lomarch Corp. v. Mayor and Common Council of Englewood*,[229] the New Jersey Supreme Court considered the constitutionality of a municipal official map act which authorized a one-year reservation of land to be acquired for park and recreation purposes. The law provided that the land could be used for any purpose during the reservation period except for buildings and improvements.[230] The court held that the official map reservation was similar to zoning to preserve a wetland as a flood-retention basin, which it had previously held an unconstitutional taking because it did not prevent a private harm but conferred a benefit on the public.[231] This is an application of the harm-benefit rule to an official map reservation law.

To avoid holding that the official map act was a taking, the *Lomarch* court interpreted it as a grant to the municipality of an "option" to purchase the reserved land only on condition that the landowner receive compensation for the temporary taking of the land's use.[232] The court also agreed with the plaintiff that a variance provision in the law was inadequate and paid "but token service to the landowner's right to use his land and is of little practical value."[233]

Although *Lomarch* indicates that the New Jersey courts would also hold a highway reservation law unconstitutional, the decision is questionable. That court relied on the theory that a land use regulation is a taking if it confers a public benefit, a taking doctrine discredited by the United States Supreme Court.[234] Later New Jersey cases have also discredited the wetlands case upon which *Lomarch* relied.[235]

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227. *Id.*

228. Grisor v. City of New York, 83 Misc. 2d 1054, 374 N.Y.S.2d 549 (N.Y. Sup. Ct. 1975) (building could be constructed if moved out of mapped street). *See also* Vangellow v. City of Rochester, 198 Misc. 128, 71 N.Y.S.2d 672 (N.Y. Sup. Ct. 1947) (in dicta, the court found the official map constitutional because it did not materially diminish value or usefulness of property).

229. 51 N.J. 108, 237 A.2d 881 (1968).

230. *Id.* at 111, 237 A.2d at 883.

231. Morris County Land Improvement Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963).

232. 51 N.J. at 113, 237 A.2d at 884.

233. 51 N.J. at 112, 237 A.2d at 883. *See also* Beech Forest Hills, Inc. v. Borough of Morris Plains, 127 N.J. Super. 574, 318 A.2d 435 (App. Div. 1974) (follows *Lomarch*).

234. *See supra* notes 52-55 and accompanying text.

235. *See* New Jersey Builders Ass'n v. Department of Envtl. Protection, 169 N.J. Super. 76, 404 A.2d 320 (App. Div. 1979).

Later, the intermediate appellate division upheld a reservation for a state highway in *Kingston East Realty Co. v. State Commissioner of Transportation*.[236] The plaintiff wished to develop a research office laboratory project on land subject to a highway reservation.[237] The plaintiff applied to the municipality for a building permit, as required by the highway reservation law.[238] The municipality, as the law required, forwarded the permit application to the state transportation agency.[239] The law required the state agency to make its recommendation on the permit within forty-five days.[240] The state agency sent a letter to the plaintiff within this period indicating that it was preparing documents for land acquisition in the area.[241] A few days later the municipality denied the permit.[242] The state agency then had 120 days under the law to decide whether to acquire the property.[243] No permit could issue during this period, but the law mandated the issuance of a permit if the agency did not take any action to acquire the reserved property during this period.[244] The state agency did not take any action to acquire the plaintiff's property.[245]

Plaintiff claimed that the period of time during which the permit was withheld was a temporary taking that entitled him to compensation.[246] The court disagreed.[247] It held that none of the following acts prevented the plaintiff from using his land: the planning for the highway, the filing of the official map, the acquisition of a nearby property for the highway, or the state's failure to abandon plans to acquire the plaintiff's property.[248] The court added there was no implication that any delays or uncertainties suffered by the plaintiff were the result of official bad faith or unlawful conduct.[249] The court noted that the plaintiff would receive compensation for the land and any improvements when the state acquired the property.[250]

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236. 133 N.J. Super. 234, 336 A.2d 40 (App. Div. 1975). Following *Kingston*: Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 535 A.2d 512 (1987).

237. 133 N.J. at 236, 336 A.2d at 41.

238. *Id.* at 238, 336 A.2d at 42.

239. *Id.*

240. *Id.* at 241, 336 A.2d at 44.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. For the present form of the statute, see N.J. STAT. ANN. § 27:7-66-67 (West Supp. 1988).

246. 133 N.J. at 242, 336 A.2d at 44.

247. *Id.* at 244, 336 A.2d at 45.

248. *Id.* at 240, 336 A.2d at 43.

249. *Id.*

250. *Id.* at 241, 336 A.2d at 43.

The court also rejected the plaintiff's claim that there had been a temporary taking of his property under the holding in the *Lomarch* decision. The court held that the reservation in *Kingston* was for a considerably shorter period of time and was not a blanket reservation.[251] The law required a decision by the state agency either to acquire the land or allow the issuance of a building permit within a brief time period, which could not exceed 165 days.[252] 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."[253] The court noted that the highway reservation law was "reasonably designed to reduce the cost of public acquisition."[254]

Kingston upheld the highway reservation law facially and as applied to the plaintiff. It is an especially interesting case because it relies on the moratorium analogy and is consistent with the dictum in *First English*, that normal delays in obtaining building permits are not compensable.[255] 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 remedial provisions in the New Jersey law eliminate the claim that a 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.[256]

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251. *Id.* at 243, 336 A.2d 45.

252. *Id.* at 244, 336 A.2d at 45.

253. *Id.*

254. Id. at 243, 336 A.2d at 45.

255. *See supra* notes 112-117 and accompanying text. The Court's statement on a delay's effect applies only to the question of whether compensation is required for a taking. It does not affect a court's decision on whether a taking has occurred because of the delay. *See Guinnane*, discussed *supra* notes 7-13 and accompanying text.

256. A highway reservation law may be upheld against a taking claim even if its provision for the payment of compensation is constitutionally inadequate. In Joint Ventures, Inc. v. Department of Transp., 519 So. 2d 1069 (Fla. 1st DCA 1988), the plaintiff claimed that the remedial constitutional provision allowing the reservation of state highways was unconstitutional. This provision required compensation if the highway reservation was arbitrary and unreasonable, and if the reservation denied the landowner the beneficial use of his property. *Id.* at 1070. In this case, the plaintiff conceded that the highway reservation was not arbitrary or unreasonable. *Id.*

The court admitted that the statute was unconstitutional because compensation was not provided for when the beneficial use of the property was denied, even though relief would be available under "normal standards." *Id.* at 1071. The statute was constitutional despite this problem, because the U.S. Supreme Court in *First English* had held that compensation is available in an inverse condemnation action even though a statutory remedy is not available. The *Joint Ventures* holding should also apply if a state does not have a remedial compensation provision.

c. The Delaware cases

Lackman v. Hall,[257] is a trial court case in which the court held unconstitutional a state highway reservation law similar to the New Jersey law upheld in *Kingston*. The Delaware law allowed any use of the land that would not increase its cost of acquisition to the state and required state agency authorization of any temporary use that would increase acquisition cost.[258] The law also provided that a building permit must issue unless the state highway agency, within sixty days after notice from the landowner, declared that issuance of the permit would be detrimental to highway planning and construction and that the land was needed for future highway construction.[259] If the state agency made this declaration, it had to begin condemnation proceedings no more than 180 days after the landowner gave notice. The law also provided that the state agency had to begin condemnation if a court found that a reservation of land under the law was a taking.[260]

The court first pointed out that a reservation of land under the law was an admission that the state highway agency did not need the land immediately.[261] The court next noted that if the highway agency acquired land for a highway that was not needed immediately, it would be a taking for use at an indefinite future time, which a Delaware case had held invalid.[262] The highway reservation law was an improper attempt to avoid this limitation. The court also held that the law placed the owner of reserved land in a dilemma: if he attempted to obtain a building permit, 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.[263]

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257. 364 A.2d 1244 (Del. Ch. 1976).

258. *Id.* at 1247.

259. *Id.* at 1248.

260. *Id.* at 1247-48.

261. *Id.* at 1251.

262. *See* State v. 0.62033 Acres of Land, 10 Terry 174, 110 A.2d 1 (Del. 1954). The court believed that the highway reservation law was an attempt to do indirectly what the condemning authority could not do directly. 364 A.2d at 1251. This Delaware decision is not necessarily inconsistent with the law on advance acquisition of land for highways. As one eminent commentator has pointed out, "[i]n light of the holdings in a number of cases it would appear that the principle that future as well as present needs may be anticipated and considered in the condemnation of lands for public use (in the absence of statutory authorization) has been firmly established." Vance, *Advance Acquisition of Highway Rights-Of-Way* in 2 SELECTED STUDIES IN HIGHWAY LAW 903, 906-07 (L. Thomas ed., Transportation Research Board, Washington, D.C.). The condemning authority need only show that the condemnation of the land for future use is reasonably necessary, and this determination is reviewable only for an abuse of discretion. *Id. See also* Freilich & Chinn, *Transportation Corridors: Shaping and Financing Urbanization Through Integration of Eminent Domain, Zoning and Growth Management Techniques*, 55 UMKC L. REV. 153, 207-11 (1987).

263. The court concluded:

The court's decision is flawed because it assumed a landowner is entitled to withhold his property from condemnation by a public agency. This is incorrect. As the *Kingston* case illustrates, the acquisition of reserved property and the payment of compensation is clearly sufficient to avoid a taking objection. The court also tried to have it both ways. First, the court faulted the law as an indirect form of land acquisition for an indefinite future use.[264] Then, the court faulted the law for the elimination of uncertainty by requiring either the issuance of a building permit or the acquisition of the reserved land.[265] *Lackman*, in any event, applies only when a law has an involuntary condemnation provision. It does not apply to the typical official map act, which does not have such a provision and which contains a provision allowing a variance that authorizes the development of the reserved property.[266]

d. Highway reservation law held unconstitutional as applied

Urbanizadora Versalles, Inc. v. Rivera Rios[267] held unconstitutional a reservation of land on an official highway map that had continued

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> 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.

364 A.2d at 1252-53. The court stated that cases holding that the threat of condemnation does not require condemnation and those holding that zoning setbacks are constitutional do not apply to highway reservation laws.

264. *Id.* at 1251.

265. *Id.* at 1253.

266. Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), held unconstitutional a law that authorized cities to reserve land for parks and playgrounds for up to three 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 three years was clear. *Id.* at 194, 82 A.2d at 37. The city could decide not to acquire the land after the three-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 three-year reservation was "a taking of property by possibility, contingency, blockade and subterfuge." *Id.*

The court admitted that it had held official maps for the reservation of streets constitutional, but refused to extend these cases to parks. Streets were "narrow, well defined and absolutely necessary," while parks "may be very large and very desirable but not necessary." *Id.* at 193, 82 A.2d at 36.

Another factor in the case was that the law denied compensation for improvements on reserved land. At the time of the *Miller* decision, the Pennsylvania courts had upheld laws denying compensation for improvements in mapped streets. *See* Busch v. City of McKeesport, 106 Pa. 57, 30 Atl. 1023 (1895). The court may have considered this case inapplicable because it held that the street reservation cases were not controlling. For discussion of a later Pennsylvania case indicating it is unconstitutional to deny compensation for the development of reserved land, *see supra* notes 207-208 and accompanying text.

267. 701 F.2d 993 (1st Cir. 1983).

for fourteen years. The Puerto Rico planning board had placed the land in a "P" district, permitting the use of the land only for public facilities.[268] The court held that the P zoning was almost a "total freezing" because the owner could not use his land while it was in this classification.[269] The court added that the burden placed on the landowner during the precondemnation period and the reasonableness of the government action diminish over time, but did not decide whether it would hold a shorter reservation period constitutional.[270] This case is consistent with cases holding that unreasonable precondemnation delays are a de facto taking and that development moratoria are constitutional only if they are limited to a reasonable period of time.

V. GUIDELINES FOR DRAFTING HIGHWAY RESERVATION LAWS THAT WILL BE SAFE FROM ATTACK UNDER THE TAKING CLAUSE

The highway reservation law taking cases reflect the complicated taking problems that arise when governments regulate land to implement capital facility programs which require land acquisition. Careful legislative drafting can avoid these problems. Although some courts oppose any land use regulation that prohibits the development of land designated for acquisition at a later time, most of the cases take a more moderate position. They do not absolutely reject a land use regulation prohibiting development on land that will be acquired for highway purposes.

The following drafting guidelines are based on the cases that held development prohibitions in highway reservation laws constitutional. The guidelines accommodate the governmental need to prohibit development on land it will ultimately acquire for a highway and the need to avoid oppressive regulatory burdens on landowners that can result from a development prohibition during the reservation period. The guidelines apply to highway reservations under municipal official map legislation, laws conferring highway reservation powers on state highway agencies, and highway reservations under subdivision control ordinances.

First, a provision denying compensation for improvements in mapped streets is unconstitutional. This provision is not needed and should be removed from laws that include it. Second, the law should

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268. *Id.* at 995.

269. *Id.* at 996-97.

270. *Id. Cf.* Ochoa Realty Corp. v. Faria, 634 F. Supp. 723 (D.P.R. 1986), *aff'd on other grounds*, 815 F.2d 812 (1st Cir. 1987) (holding that mere planning for a highway and denial of subdivision approval did not constitute a taking when the property was not subject to an official map or "P" zoning).

specify the period of time during which a highway reservation remains in effect and the time period should be short. A highway reservation law can omit a limitation on the reservation period, but courts will then have to decide, on a case-by-case basis, whether a highway reservation is a taking of property as applied because the period is too long. This would introduce considerable uncertainty in the highway reservation process.

Just how short a reservation period must be is not clear, and one court held that even a one-year reservation period required compensation.[271] The courts have upheld zoning moratoria that lasted for several years, but would probably balk at a highway reservation that remained in effect for so long a time. A court might uphold a longer reservation period if the remedial techniques discussed later in this section were included in the law.

The courts' insistence on a short time period reflects their concern that indefinite land reservations for highways are unfair to landowners when the government entity is not committed to acquisition. This concern clearly influenced the Delaware 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 reserved land.

The uncertainty problem creates a dilemma that is difficult to resolve. There are no easy solutions. Planning means uncertainty, and the purpose of a highway reservation law is to withhold land from development for an uncertain period of time. 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. The inclusion of remedial provisions that mitigate the burden of a reservation on a landowner should help resolve the uncertainty problem and support the use of a highway reservation law early in the planning process.

Third, this discussion indicates that remedial provisions are important because 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.[272] The importance of this rule is emphasized by the United

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271. Lomarch Corp. v. Mayor & Common Council, 51 N.J. 108, 237 A.2d 881, *see supra* notes 231-236 and accompanying text.

272. An as-applied taking problem can also arise if a highway agency or local government engages in oppressive precondemnation activities. This as-applied taking problem can arise if a highway agency files proceedings to acquire the property, delays condemnation or abandons condemnation proceedings already started, and then reserves the landowner's property under a

States Supreme Court's 1987 land use taking trilogy. This problem is not as serious when a highway reservation is adopted for a highway widening because a 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.

Many municipal official map laws contain remedial variance provisions to avoid as-applied taking claims. 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. A local zoning agency would probably grant a variance if a reasonable use of the land was not feasible, and a court would probably reverse the variance's denial in that situation.

An alternative remedial provision contained in laws that confer highway reservation powers on state highway agencies is preferable. 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 law then requires the state highway agency either to consent to the issuance of the permit or to acquire the land within a limited period of time, usually no more than four months.[273] A remedial provision of this type resolves the taking problem by authorizing owners of land covered by highway reservations either to develop their land or to compel its acquisition. A New Jersey court relied on a provision of this type to hold a highway reservation law constitutional, but a Delaware court found a provision of this type objectionable.[274] The New Jersey decision is better reasoned.

A highway reservation law should provide a short time period during which the highway agency must decide either to approve a devel-

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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.

Courts will determine whether these activities constitute 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.

273. The New Jersey state highway reservation law has a provision of this type. The New Jersey survey respondent indicated that, "[t]he reasons for limiting the preservation period is 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 author from James V. Hyde, Jr., Director of Right of Way, New Jersey Department of Transportation (July 24, 1986).

274. *See supra* notes 236-266 and accompanying text.

opment on the reserved land or to acquire it. A short decision period would not undercut the effectiveness of the law. The time period would run only after the landowner filed an application for a building permit and many landowners whose property is covered by highway reservations would not have immediate building plans. A highway reservation under a law with a provision of this type would probably 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. For this rule, it cited a case where a thirty-year delay occurred between use and acquisition. This is extreme, as in most cases the construction of the highway will occur 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.[275]

This review of highway reservation laws indicates that courts are sensitive to the taking problems raised but will uphold a highway reservation law that is fair to landowners. Careful drafting based on the courts' decisions can eliminate taking objections and create a highway reservation law that effectively implements planning in highway programs.

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275. *See infra* note 262.