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Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases

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Comment: Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases

I. INTRODUCTION

Under their constitutionally granted police powers, individual states may regulate the use and development of privately owned land.[1] With this authority, state land use laws are often implemented at county and city government levels.[2] Local zoning ordinances of various types are used to control land development and preserve environmental integrity.[3]

A natural tension frequently exists between government land use objectives and landowner development goals. Community-wide develop-

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1. Generally, states have the power to implement land use policies:

> Broadly speaking, planning and zoning laws or regulations are based on, or constitute an application or exercise of, the police power to enact laws for the safety, health, morals, convenience, comfort, prosperity, or general welfare of the people, and they have been said to be authorized only under such power.

101A C.J.S. *Zoning and Land Planning* § 9 (1979).

> The police power is defined in BLACK'S LAW DICTIONARY 1041 (5th ed. 1979) as:
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> An authority conferred by the American constitutional system in the Tenth Amendment, U.S. Const., upon the individual states, and, in turn delegated to local governments. . . .
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> The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity.

2. The power of local governments to enact zoning regulations is not inherent, but must be derived from constitutional or statutory provisions:

> The original zoning power of the state resides in the state legislature, and that power may be delegated to governmental agencies and political subdivisions of the state. A municipality, county, town, or village has no inherent power to promulgate or enact zoning regulations; its power to accomplish zoning exists by virtue of authority delegated by the state, and such power may be exercised only when it is expressly conferred on the municipality. . . . So, it has been held that zoning regulations may not be adopted or enforced without specific legislative or constitutional authorization . . . .

101A C.J.S. *Zoning and Land Planning* § 8 (1979).

3. Land use ordinances are used for many purposes:

> Broadly stated, the purpose of a zoning ordinance is to limit, restrict, and regulate the use of land in the interest of the public welfare, or to control and regulate the utilization, growth, and development of land within a certain locality. . . . The essential object or purpose of zoning regulations is to stabilize the use or uses, or the occupancy, of property. In addition, the object of zoning is to stabilize a neighborhood or the property values in a neighborhood, to preserve the character of the community, and to preserve the character of neighborhoods by uniform and limited use thereof in the interest of the public generally.

101A C.J.S *Zoning and Land Planning* § 4 (1979).

ment plans in many instances impose environmental, aesthetic, and spacing requirements on land use and development. Though the purposes of most planning and zoning ordinances are beneficent towards the public as a whole, these purposes often directly conflict with profitable development of private land. As might be expected, landowners have launched numerous legal attacks on such land use laws and regulations.[4]

Many challenges to government action in the land use context allege that government regulations have resulted in uncompensated "takings" of private property prohibited by the fifth amendment to the United States Constitution.[5] Takings of property under the fifth amendment are typically associated with the power of eminent domain. The exercise of this power involves an actual passing of title from the private landowner to the government.[6] In contrast, when zoning or other governmental regulation deprives a landowner of the use and/or value of his land, no actual transfer of title occurs. In this circumstance, the landowner must allege that government regulation has had the *effect* of an actual taking, i.e., that government has so interfered with the use and enjoyment of property as to deprive its owner of any economic interest therein. This cause of action is commonly referred to as "in-

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4. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985); Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986); Hall v. City of Santa Barbara, 797 F.2d 1493 (9th Cir. 1986); Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); and Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984).

5. The fifth amendment to the United States Constitution states: "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V. This same provision is made applicable to the states by the fourteenth amendment. U.S. CONST. amend. XIV.

6. According to BLACK'S LAW DICTIONARY 470 (5th ed. 1979), eminent domain is defined as:

> The power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character. . . .
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> The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good. Thus, in time of war or insurrection, the proper authorities may possess and hold any part of the territory of the state for the common safety; and in time of peace the legislature may authorize the appropriation of the same to public purposes, such as the opening of roads, construction of defenses, or providing channels for trade or travel. Eminent domain is the highest and most exact idea of property remaining in the government, or in the aggregate body of the people in their sovereign capacity. It gives a right to resume the possession of the property in the manner directed by the constitution and the laws of the state, whenever the public interest requires it.

verse condemnation,"[7] and is specifically designed to challenge governmental actions that result in "regulatory takings."[8]

In one form or another, the question whether government has "taken" private property through the exercise of zoning laws or similar land use regulations has reached the United States Supreme Court several times in recent years.[9] In all but one of these cases, however, the Court failed to fully reach the merits of the taking question.[10] In two of

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7. Inverse condemnation is defined as "[a] cause of action against a government agency to recover the value of property taken by the agency, though no formal exercise of the power of eminent domain has been completed." BLACK'S LAW DICTIONARY 740 (5th ed. 1979).

8. Regulatory taking, or land use taking, are terms used to refer to the effective taking of some use or value in private property resulting from a government regulation. Land use taking specifically refers to regulatory impact on land use. The inquiry which accompanies any fifth amendment takings claim consists of two general questions: 1) has government effected a taking; and 2) did government provide just compensation?

9. Seven recent cases that have presented the land use takings issue in one form or another are Nollan v. California Coastal Comm'n., 86-133 (U.S. June 26, 1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 85-1199, Slip Op. (U.S. Supreme Court June 9, 1987); Keystone Bituminous Coal Assn. v. DeBenedictis, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987)(No. 85-1092); MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); and Agins v. City of Tiburon, 447 U.S. 255 (1980).

10. In Nollan v. California Coastal Comm'n, 86-133 (U.S. June 26, 1987) the Court recently found that the decision by California officials to grant a building permit to the appellant on the condition that they grant a public usage over their beachfront property was invalidated as an improper use of police power. The Court held that a condition placed on private development is unconstitutional if it "utterly fails" to further the end of the governmental action. Note that the Supreme Court did reach the takings issue in Agins v. City of Tiburon, 447 U.S. 255 (1980) insofar as the Court determined that the land use ordinance "on its face" did not effect a taking. The Court, however, did not determine the issue with respect to its applied effect upon the plaintiff, nor did it reach the issue of just compensation.

In *Agins,* an owner of extremely valuable property just north of San Francisco alleged that a change in the city zoning ordinance had the effect of taking his property without just compensation in violation of the fifth and fourteenth amendments to the U.S. Constitution. The change in the ordinance reduced the allowable density on the landowner's property to one unit per acre. The landowner alleged that this change adversely impacted upon his expectation interests. Because the ordinance still allowed the development of up to five residences on the five acre lot, the Court found that "on its face," the ordinance could not effect a taking.

The Court did not, however, consider the constitutionality of the ordinance as it applied to the landowner's expected use of the land. The Court stated that "because the [landowners] have not submitted a plan for development of their property as the ordinances permit, there is as yet not concrete controversy regarding the application of the specific zoning provisions." *Id.* at 260. Because it held that the issue was not ripe, the Court found it unnecessary to decide the constitutionality of the ordinance "as applied" to the land.

In *San Diego,* 450 U.S. at 621, the San Diego Gas and Electric Company alleged that the city had taken its property without just compensation in violation of the federal and state constitutions. It claimed that the city's rezoning and adoption of an open-space plan prevented it from constructing a nuclear power plant on the property thus depriving it of nearly all beneficial use of its property. Without reaching the merits, however, the Court determined that the trial court had failed to resolve all the factual disputes related to the takings issue. Consequently, the Court dismissed the appeal on jurisdictional grounds because a final judgment by the highest state court,

the cases,[11] the Court found the issue to be nonjusticiable on ripeness grounds.[12] As a consequence of the Court's decisions, many landowners have been unsuccessful in obtaining review of state and local land use ordinances.[13]

This comment identifies the unique relationship that exists be-

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as required by Title 28 U.S.C. § 1257 (1982) was lacking. Title 28 U.S.C. § 1257 (1982) grants jurisdiction to the United States Supreme Court only when "[f]inal judgments or decrees [are] rendered by the highest court of a State in which a decision could be had. . ."

The *San Diego* case is also of significance because of Justice Brennan's dissenting opinion, supported by three other justices, which addressed the takings issue on the merits. In his concurring opinion, Justice Rehnquist, who voted for the majority on the final judgment issue, stated "[i]f I were satisfied that this appeal was from a 'final judgment or decree' . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 634-35. Therefore, five of the justices at that time appear to have given their support for Justice Brennan's conclusion that just compensation is required "for the period commencing on the date the regulation first effected a 'taking', and ending on the date the government entity chooses to rescind or otherwise amend the regulation." *Id.* at 659. The dissenters' position in *San Diego* was recently affirmed by a majority of the courts in First English Evangelical Luthran Church of Glendale vs. County of Los Angeles, California, 85-1199, Slip Op. (U.S. Supreme Court June 9, 1987.) In *Lutheran Church*, the property owner (a church) alleged in state court that the county of Los Angeles had taken its property by means of a restrictive flood control ordinance. The Church sought damages as relief for the alleged regulatory taking. Relying on *Agins* the California courts held that regardless of the correctness of the Church's claim, the claim could not be heard because damages were unavailable to redress a temporary regulatory taking. The issue which reached the Supreme Court was thus not whether a taking had occurred but whether monetary damages were constitutionally required. The court held that this claim was sufficiently final and went on to hold that a state cannot deny damages that occur to a landowner prior to the ultimate judicial determination that a taking has occurred. However, Chief Justice Rehnquist, writing for the majority, was clear in limiting the holding of *Lutheran Church* to the facts of the case at hand and in distinguishing the *Lutheran Church* facts from "The Case of Normal Delays in Obtaining Building Permits, Changes in Zoning Ordinances, Variances, and the Like. . . ." (Slip Op. at 16.) *See* Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings"*, 8 HASTINGS CONST. L.Q. 517, 534 (1981).

In a modern day version of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Court in Keystone Bituminous Coal Assn. v. DeBenedictis, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987)(No. 85-1092) facially addressed the takings question. In a suit alleging that Section 4 of Pennsyvania's Bituminous Mine Subsidence and Land Conservation Act (Act), which prohibits coal mining that causes subsidence damage to surface structures, effected a taking of appellant's right to mine coal from part of his property, the Court found that no taking had occurred inasmuch as the Act on its face was constitutional. In language similar to that in *Agins,* 447 U.S. at 255, the Court quoted the District Court by stating that "because plaintiffs have not alleged any injury due to the enforcement of the statute, there is as yet no concrete controversy regarding the application of the specific provisions and regulations. Thus, the only question before this court is whether the mere enactment of the statutes and regulations constitutes a taking." *Id.* at 21.

11. *Williamson,* 105 S. Ct. at 3108; and *MacDonald,* 106 S. Ct. at 2561.

12. The ripeness doctrine generally requires that a case be sufficiently concrete in alleging an actual injury before it can be determined on the merits. If an injury has not occurred, the plaintiff's claim is said to be unripe. This is generally a constitutional requirement under article III which does not allow courts to make general advisory opinions in the absence of a real case or controversy. U.S. CONST. art. III, § 2. *See* Flast v. Cohen, 392 U.S. 83, 96 (1968).

13. *See, e.g.*, Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); and HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985).

tween the land use takings issue and the doctrine of ripeness, a relationship which makes land use takings cases especially vulnerable to ripeness attacks. It then shows how the Supreme Court applied the ripeness doctrine to the facts of two recent land use decisions, *Williamson County Regional Planning Comm'n. v. Hamilton Bank*[14] and *MacDonald, Sommer & Frates v. Yolo County.*[15] The comment also distinguishes these two cases and criticizes the Court for extending the *Williamson* ripeness approach to the substantially different facts of *MacDonald.* Finally, the comment looks at the practical problems of the current ripeness approach to land use takings cases as developed in the *MacDonald* case.

II. BACKGROUND

A. *The nature of the land use takings problem*

Regulatory takings involve government actions which diminish the usefulness or value of private property. How much detriment must a particular property owner suffer before his claim for fifth amendment compensation will be satisfied?[16] Since government, in exercising its police power, cannot be held liable for every impact on property values, the question whether a regulatory taking has occured becomes one of degree.[17] Resolution of this question requires a determination of the amount of impact a particular land use regulation has had on privately owned land.[18]

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14. 105 S. Ct. 3108 (1985).

15. 106 S. Ct. 2561 (1986).

16. This comment generally addresses land use takings claims resulting from the effect of regulations that are otherwise valid exercises of the state's police power. Certainly, if a regulation is confiscatory in nature and serves no legitimate state interest, the private landowner's right to receive compensation may be heightened in a balance between the public interest and the individual interests of the landowner. But the nature of the land use takings cases is such that, even in the event the state has some legitimate interest in enacting a land use ordinance based on the state's police power, there may be times when the impact is so severe that it would be proper to compensate a landowner for his losses.

17. Justice Holmes stated that:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts . . . .

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

18. Note that generally, in addition to the economic impact inquiry, the takings question involves a balancing of public and private interests:

> In determining the validity of zoning regulations, the public interest must be

The Court has faced the question of regulatory impact in several cases, but no truly helpful principle of law has emerged.[19] The general rule is that a taking occurs when a regulation has "gone too far" in limiting a landowner's use of his land.[20] The obvious difficulty with this approach is deciding when a regulation has "gone too far".[21] No formulas have been provided to help decide when a "regulation ends and a taking begins."[22] The Court has stressed that the inquiry must be factual in nature and therefore must be dealt with on a case-by-case basis.[23]

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weighed against the right of individual owners, and while the effect of a regulation on the land values is not controlling, it is a proper element to be considered, since no basis for the exercise of the zoning power exists if the public gain is small compared with individual hardships and loss.

101A C.J.S. *Zoning and Land Planning* § 47a (1979).

The Court in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), stated:

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests.

See also, Keystone Bituminous Coal Assn. v. DeBenedictis, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987)(No. 85-1092).

Despite the importance of balancing the interests, however, when the public interest is clearly legitimate, the severity of the economic harm should be given more emphasis. This is so because nearly all zoning ordinances are enacted for a legitimate purpose, and consequently, a straight balancing test would result in no cases where compensable damages could be awarded. Such an approach would never require compensation when a validly enacted ordinance lowers property values. Some writers advocate that the test for regulatory taking should be based on diminution in value (economic harm) alone. In Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage,* 28 STAN. L. REV. 779, 804 (1976), the author concludes that "[t]he key to rationalizing these disparate tests and to repairing past distortions is to establish diminution in value as the single test for determining the existence of 'damage' and for signaling the rise of the corresponding government duty to compensate the individual."

19. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Central Transportation Co. v. New York City, 438 U.S 104 (1978); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).

20. Justice Holmes stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See also* Agins v. City of Tiburon, 447 U.S. 255 (1980); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

21. Justice Holmes stated that "this is a question of degree and therefore cannot be disposed of by general propositions." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). This statement is also cited in *MacDonald,* 106 S. Ct. at 2566.

22. *See* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). Also, the Court stated that the inquiry "calls as much for the exercise of judgment as for the application of logic." Andrus v. Allard, 444 U.S. 51, 65 (1979). *See also* Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

23. *See* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); United States v. Central Eureka Mining Co. 357 U.S. 155, 168 (1958).

Although there is no generally applied standard, the Court has indicated several factors that may be helpful in the analysis. Two factors of particular significance are 1) the amount of diminution in value or economic impact caused by the challenged regulation, and 2) the regulation's effect upon the reasonable investment-backed expectations of the landowner.[24] These factors clearly indicate that land use takings cases require a determination of the economic harm caused by a regulation.[25] As yet, however, it is uncertain how they are to be applied or in what context they are most significant.

B. *The special problem of determining the allowable use of property in land use takings cases*

Unlike eminent domain proceedings where the government actually acquires fee title, land use regulations only limit actual or potential use and enjoyment of private property.[26] Consequently, when land use ordinances are challenged, courts must ascertain the remaining value of the regulated property to determine the amount of economic impact caused by the regulation. This is done largely by determining what remaining use of the property the ordinance permits. If substantial use remains, the amount of diminution in value or the effect upon the reasonable investment-backed expections of the landowner are normally not significant enough to warrant a takings judgment. If, on the other

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24. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

25. The Court also mentioned that the character of the regulation is an important factor to consider. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). For purposes of this comment, the character of the regulation can be typified as a land use regulation which does not physically invade private property.

26. Eminent domain involves the taking of private land through "actual" physical acquisition by the government. Inverse condemnation, on the other hand, involves an action initiated by the landowner alleging that the government "in effect" deprived the landowner of some value or use in the land. The difference is that no formal eminent domain proceedings are initiated because the government is not actually acquiring the property. The Court stated: "Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" Agins v. City of Tiburon, 447 U.S. 255, 258 (1980). *See generally* Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

Also, inverse condemnation should be distinguished from the term land use takings. Inverse condemnation refers to the procedure by which a landowner may seek compensation for a taking. Land use taking refers to a series of circumstances, beginning with the enactment of a government regulation, that affect a landowner's use of his land and give rise to an inverse condemnation action.

hand, nearly all uses are depleted, a taking under the fifth amendment may exist. The question thus becomes at what point, as determined by the allowable use, the impact becomes severe enough to constitute a taking.

C. *The inherent relationship between the land use takings question and the problem of ripeness*

Since knowing the allowable use of regulated private land is essential to the determination of whether a taking has occurred, it follows that the Court must be able to measure this use with some degree of certainty. Almost invariably, a court must look to state or local planning commissions or zoning boards before it can make such a determination. Ordinarily, only a final disposition by such authorized bodies will permit a court to know the allowable use remaining with the degree of certainty needed to determine the extent to which a regulation has interfered with the use and enjoyment of private land.[27]

In addition to being important to the takings question, a final determination by a city or county regarding how a land use regulation is to be applied to private property is an essential prerequisite to making a case ripe for adjudication.[28] This conclusion follows logically from the axiom that unless land value is actually diminished or depleted, the landowner has not sustained any determinable concrete injury. Without a final determination by government, courts cannot determine the severity of regulatory impact and consequently cannot determine whether any concrete injury occurred.[29] If no injury is alleged, a case does not merit adjudication.[30]

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27. The Court in *MacDonald,* 106 S. Ct. at 2566, citing *Williamson,* 105 S. Ct. at 3108, said:

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

28. *MacDonald,* 106 S. Ct. at 2566.

29. This is analogous to the "final order" doctrine where a final authoritative decision by an agency administrator is required before a claim is said to be ripe. *See* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) and Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

30. Although the ripeness doctrine stands for the proposition that a case is not worthy of adjudication if it is not sufficiently concrete, there are actually two bases for the doctrine. At the core of the doctrine is the case or controversy requirement which is constitutionally based and cannot be altered. Article III of the United States Constitution is generally known as providing that the judicial power shall extend only to such cases and controversies that are enumerated in the provisions of the Constitution. U.S. CONST. art. III, § 2. On the other hand, prudential concerns also provide the Court with discretionary powers which are not constitutionally mandated. *See* Poe v. Ullman, 367 U.S. 497, 503 (1961); and Ashwander v. TVA, 297 U.S. 288, 346 (1936).

III. Recent Land Use Cases and the Problem of Ripeness

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* the Supreme Court recently held that where a government has "taken" property by a land use regulation, the land owner may recover damages for the time before it is finally determined that the regulation constitutes a taking of the property.[31] Unlike previous cases, however, the question whether a taking had actually occurred was not at issue. Because the California courts had assumed that the complaint sought damages for an uncompensated taking of all use of the property involved, the question of compensation was isolated as the only issue for the Supreme Court to address. By contrast, in both *Williamson County Regional Planning Comm'n. v. Hamilton Bank,* and *MacDonald, Sommer & Frates v. Yolo County,* the Court found

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See generally Gunther, Constitutional Law, 1580 (1985).

The problem is that concreteness is not an easy threshold to define. There is no fine line between a case that is ripe and one that is not. For instance, in United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947), the Court held that the plaintiff's case was not ripe because the plaintiffs had merely sought to restrain the Civil Service Commission from enforcing a statute prohibiting federal employees from taking part in politics. The plaintiffs had not yet violated the alleged unconstitutional statute although they expressed a desire to do so. However, in Adler v. Board of Education, 342 U.S. 485 (1952), the Court implied that the plaintiff's case was ripe where plaintiff taxpayers attacked a law designed to eliminate subversive persons from the public school system. As in *Mitchell,* the plaintiffs had not violated the statute in question, but they also had not even expressed any desire to do so. On its face, then, it seems the two cases are not reconcilable. In fact, *Adler's* case appears to be less ripe than *Mitchell.* But *Mitchell* was the one dismissed.

A possible reconciliation suggested in Gunther, Constitutional Law 1584 (1985), is that both cases were actually ripe enough for adjudication under article III. But since *Adler* was a state court decision involving a determination on the constitutionality of a state statute, it fell within the Supreme Court's mandatory appellate jurisdiction. *Mitchell,* on the other hand, addressed the constitutionality of a federal statute and therefore fell within the federal court's right to exercise discretion in abstaining from matters within its jurisdiction. Therefore, the Court felt compelled to decide the *Adler* case but less inclined to decide *Mitchell.*

For a general discussion of the federal abstention doctrine in land use takings cases, *see* Mandelker, *Land Use Takings: The Compensation Issue,* 8 Hastings Const. L.Q. 491, 512 (1981). Mandelker believes that the federal courts are not likely to take jurisdiction in land use takings cases because they raise questions of state and local policy. He stated that the reason may lie in

> principles of judicial restraint that limit federal court intervention in matters of state and local competence, such as land use regulations. This self-imposed limitation on federal jurisdiction is important because plaintiffs are likely to seek a federal forum for inverse condemnation land use actions . . . .
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> . . . .
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> In federal courts, plaintiffs in inverse condemnation actions face a limitation on federal jurisdiction—the federal abstention doctrine—that reflects federal court reluctance to interfere in state and local concerns.

Id. at 512-13.

31. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 85-1199 (U.S. June 9, 1987).

that a final determination of the type and intensity of development permitted by respective land use laws had not been reached. The following review of the two cases demonstrates why the Supreme Court did not reach the merits of the takings question in either case.

A. Williamson County

In 1973, a landowner, planning to develop his 676 acre property into a residential subdivision, obtained approval from the Regional Planning Commission of Williamson County, Tennessee, of a preliminary plat for the cluster development[32] of a subdivision known as Temple Hills Country Club Estates (Temple Hills).[33] Four years later, after part of the subdivision had been completed,[34] the county enacted a more restrictive zoning ordinance.[35] In 1979, the Commission decided that any plats submitted requiring renewal for further development should be evaluated under the new zoning ordinance in effect at the time renewal was sought. In 1980, the Commission asked the developer to submit a revised preliminary plat for the remaining undeveloped portion of the subdivision and the Commission subsequently disapproved the plat because it did not comply with the newly enacted restrictions. The developer appealed the Commission's decision to the County Board of Zoning Appeals and the Board determined that the Commission should apply to Temple Hills the zoning ordinance and subdivision regulations that were in effect in 1973.

Due to a subsequent foreclosure, the Hamilton Bank, a prior mortgagee, took title to the undeveloped portion of the Temple Hills property. Desiring to develop the property, the Bank submitted two preliminary plats to the Commission—the plat that had been approved in 1973 and a plat similar to the plat submitted by the developer in 1980. The Commission subsequently refused to follow the decision of

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32. The Court referred to cluster zoning: "both the size and the width of individual residential lots in . . . [a] development may be reduced, provided . . . that the overall density of the entire tract remains constant—provided, that is, that an area equivalent to the total of the areas thus 'saved' from each individual lot is pooled and retained as common open space." *Williamson,* 105 S. Ct. at 3112.

33. *Williamson,* 105 S. Ct. at 3112.

34. Several sections of the plat, containing 212 units, were given final approval in 1979. The landowner had also begun building roads and installing utility lines. Further, he had spent approximately $3 million building an 18 hole golf course and another $500,000 installing sewer and water facilities. *Id.*

35. In 1977, the county "changed its zoning ordinance to require that calculations of allowable density exclude 10% of the total acreage to account for roads and utilities." *Id.* at 3113. Also, the number of allowable units was changed from 1.089 per acre allowed under the original ordinance to just one per acre. These changes had the effect of considerably reducing the total number of units that could be built on the property. *Id.* at 3113.

the Board of Zoning Appeals and disallowed further development by disapproving both plats.

The Bank filed suit against the Commission, its members and staff in federal district court pursuant to 42 U.S.C. § 1983,[36] alleging that "the commission had taken its property without just compensation"[37] in violation of the fifth amendment. After a three-week trial, a jury found that the Bank had been denied the 'economically viable' use of its property in violation of the just compensation clause. The jury awarded damages of $350,000 for the temporary taking of the Bank's property and the court entered a permanent injunction requiring the Commission to apply to Temple Hills the original zoning ordinance and subdivision regulations in effect in 1973. The district court, however, subsequently granted judgment notwithstanding the verdict in favor of the Commission on the taking claim, reasoning that a temporary deprivation, as a matter of law, cannot constitute a taking.

On appeal, the Sixth Circuit rejected the District Court's holding that the taking verdict could not stand, holding that a temporary denial of property could be a taking and was to be treated in the same manner as a permanent taking. The Supreme Court subsequently granted certiorari "to address the question whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations."[38] The Court did not reach the merits of this issue, however, concluding that the Bank's claim was "premature" and remanding the case to the district court for further consideration.

In reaching its conclusion to remand on ripeness grounds, the Court based its analysis on the following two factors: 1) Hamilton Bank's failure to seek variances from the zoning ordinance and subdivision regulations; and 2) the Bank's failure to seek compensation through a statutorily provided inverse condemnation scheme.

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36. *Id.* at 3114. The civil rights statute provides a civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1983 (1982).

37. *Williamson,* 105 S. Ct. at 3114.

38. *Id.* at 3116.

1. Failure to seek variances

In finding that the Hamilton Bank's claim was not ripe for adjudication, the Court observed that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[39] The Court noted that in this case the Bank had not sought any variances from either the Board of Zoning Appeals or from the Planning Commission.[40] Approval of the variances would have allowed it to develop the property according to its proposed plat. The Court held that "until the Commission determines that no variances will be granted, it is impossible for the jury to find . . . whether [the Bank] 'will be unable to derive economic benefit' from the land."[41]

2. Failure to seek compensation through the statutory scheme

In addition to finding that the Bank had failed to seek variances from the zoning ordinance and subdivision regulations, the Court also found that the developer did not exhaust all compensatory procedures available under Tennessee law. Noting that a state's "taking" action is not complete in the constitutional sense 'unless or until the state fails to provide an adequate postdeprivation remedy,'[42] the Court held that in this case the state's alleged "taking" could not be complete until the Bank had followed the inverse condemnation procedures established by state law.[43] Since the Bank failed to show that the inverse condemnation procedure was unavailable or inadequate, the Court dismissed the land use takings issue as premature.[44]

B. MacDonald

In 1975, MacDonald, Sommer & Frates (MacDonald) submitted a tentative subdivision map to the Planning Commission of Yolo County, California. Under MacDonald's proposal, the largely agricultural property was to be subdivided into 159 residential lots. The county planning commission and the county board of supervisors rejected the proposed subdivision plan on the grounds that it failed to provide 1) adequate public street access, 2) sewer services, 3) water

39. *Id.* at 3117.

40. The Court noted that the Board had power to grant certain variances from the zoning ordinance and that the Commission had power to grant variances from the subdivision regulations. *Williamson,* 105 S. Ct. at 3118.

41. *Id.* at 3119.

42. *Id.* at 3121.

43. *Id.* at 3122.

44. *Id.*

supplies and 4) police protection.[45] MacDonald subsequently filed an action in California Superior Court seeking declaratory and monetary relief. MacDonald alleged that the county's decision to reject the plan in effect restricted land zoned for residential use to agricultural use and thereby "appropriated the entire economic use"[46] of the property for the "sole purpose of providing a public, open-space buffer."[47] The trial court sustained a demurrer to the complaint, holding that MacDonald's factual allegations were insufficient to state a takings claim and that monetary damages were foreclosed by California law.[48]

On appeal, the California Court of Appeal affirmed and the California Supreme Court denied MacDonald's petition for hearing. MacDonald then perfected an appeal to the United States Supreme Court on the "question whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings . . . ."[49] Similar to its result in *Williamson* one year earlier, however, the Court again did not reach the merits of the takings issue because of ripeness problems. In a 5 to 4 decision, the court affirmed the demurrer to MacDonald's allegations.

Writing for the majority, Justice Stevens reasoned that a Court must first "know what use, if any, may be made of the affected property" before the constitutionality of the government action can be determined.[50] He articulated:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its [determination] is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A Court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.[51]

While noting that MacDonald had submitted a subdivision propo-

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45. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561, 2563 (1986).

46. *Id.* at 2563.

47. *Id.* at 2564.

48. In California, where the *MacDonald* case arose, there are no administrative or statutory remedies available to landowners. The California Supreme Court in Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), stated that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Id.* at 273, 28, 375. The U.S. Supreme Court in Agins v. City of Tiburon, 447 U.S. 255, 259 (1980), referring to the California Supreme Court decision, observed that "[t]he sole remedies for such a taking . . . are mandamus and declaratory judgment." Thus, landowners in states like California are especially burdened by the restrictive nature of land use regulations because of the limited availability of adequate remedies.

49. *MacDonald,* 106 S. Ct. at 2565.

50. *Id.* at 2567.

51. *Id.* at 2566.

sal and had received a negative response from the County Board of Supervisors, the majority remained unpersuaded that the Board had issued a " 'final, definitive position' "[52] regarding how it would apply the zoning regulations to the farmland in question. Consequently, the Court declined to reach the question whether the Constitution requires a monetary remedy to redress some regulatory takings because the Court was "uncertain whether the property at issue had been taken."[53] The Court stated "the holdings of both courts below leave open the possibility that *some* development [would have been] permitted . . . ."[54]

C. *Distinguishing the* Williamson *and* MacDonald *ripeness approaches to land use takings cases*

The *MacDonald* majority, in reaching its conclusion that a final determination of allowable use had not been made, relied in significant part on the analysis of the *Williamson* case. It is important to note that the Court also relied on two other fairly recent land use decisions.[55] While these cases are significant, however, they lack a distinctive feature present in both *Williamson* and *MacDonald* which makes comparison of these latter two cases especially appropriate.[56] *Williamson* and *MacDonald* also contain subtle factual and analytical differences as well. This comment highlights these differences to show that the Court improperly applied the ripeness analysis of *Williamson* to the critically different facts of *MacDonald*.

1. *In* MacDonald, *there was a final decision*

Justice Stevens, writing for the majority in *MacDonald,* cited language in *Williamson* recalling that a " '*final decision* regarding the application of the zoning ordinance and subdivision regulations' " to property is needed before the courts can " 'tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed.' "[57] He found that the landowner in

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52. *Id.* at 2568.

53. *Id.*

54. *Id.*

55. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); and Agins v. City of Tiburon, 447 U.S. 255 (1980).

56. In both *Agins*, 447 U.S. at 255, and *San Diego*, 450 U.S. at 621, the developer had not submitted a development plan for approval. Absent an application for development evidencing the landowner's expectation interests, no concrete controversy alleging an impact on that interest could exist. In *Williamson* and *MacDonald,* however, the developers did submit plans for approval giving rise to a different type of ripeness analysis unique to the two cases.

57. *MacDonald,* 106 S. Ct. at 2566.

MacDonald had "yet to receive the Board's final definitive position regarding how it [would] apply the regulation at issue to the particular land in question."[58] From this, he concluded quite summarily from the California Court of Appeal's holding and without considering the procedural significance of the demurrer sustained by the California Superior Court, that some development might have been permitted had the landowner submitted a meaningful development plan.[59]

In his dissent, Justice White points out that the Superior Court of California, in sustaining a demurrer to the landowner's complaint, had accepted the landowner's allegation that "all economically beneficial residential uses were foreclosed by the [government's] actions."[60] Although the Superior Court refused to accept the allegation that all "nonagricultural purposes explicitly allowed in agricultural zones under the county and city codes"[61] would be precluded from development, it did accept as true the "allegation that the property had effectively been rezoned agricultural. . . ."[62] Stated differently, while the landowner was free to seek nonagricultural uses "explicitly allowed in agricultural zones"[63] the Superior Court impliedly admitted that a final decision had been made with regard to the property's development as a residential subdivision. Because the city designated the property in question as an "Agricultural Preserve or Reserve,"[64] the land was effectively zoned agricultural preventing all residential development not consistent with agricultural zoning. Thus, the clear implication is that it would have been futile for the landowner to submit alternative residential plans.

2. *The question of variances*

In *Williamson,* the Court's unanimous decision required Hamilton Bank to seek all available variances from the zoning ordinance and subdivision regulations as a prerequisite to alleging a concrete controversy.[65] The Court assumed that had the variances been submitted, the Bank would have been allowed to develop its property according to its proposed plan. In *MacDonald,* on the other hand, the developer was effectively precluded from seeking any variances. Because the Superior

58. *Id.* at 2568.
59. *Id.*
60. *Id.* at 2570.
61. *Id.* at 2566.
62. *Id.* at 2569.
63. *Id.* at 2566.
64. *Id.* at 2568.
65. *Williamson,* 105 S. Ct. at 3117.

Court concluded that all residential uses would be "foreclosed,"[66] it follows that any attempts to seek variances would also have been futile.

It thus appears that in *Williamson,* the Bank's attempt to seek variances related to an *existing* residential plan would have satisfied the Court's requirement for a final land use determination.[67] Although the Bank faced the additional hurdle of exhausting all statutory remedies,[68] it appears that once variances were sought, the Court would have otherwise been able to address the takings question. In *MacDonald,* however, the Court required the developer to apply for meaningful alternatives to the existing plan and to search for other "less intensive"[69] uses even though there was little question that his proposed residential plan had been completely rejected by the local zoning authorities. Thus, the *MacDonald* result extends the ripeness approach beyond the need to exhaust existing remedies and acquire a final land use decision. Such an extension represents a considerable gloss on the *Williamson* analysis.[70] Taken to its extreme, the impact of the Court's holding in

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66. *MacDonald,* 106 S. Ct. at 2570.

67. *Williamson,* 105 S. Ct. at 3118.

68. As previously noted, in Tennessee, where the *Williamson* case arose, compensatory remedies were statutorily provided. In California, where the *MacDonald* case arose, they were not. The resulting difference in the analysis, in part, is that the Court in *Williamson* required that existing remedies be exhausted before the claim could be adjudicated. In *MacDonald,* on the other hand, the Court stated that even in the absence of statutory remedies, all possible alternatives, including the application of plans for alternative or less intensive development, must be sought to determine the allowable use of the land.

Another way to look at this distinction is that the Court in *Williamson* was concerned more or less with whether all remedies had been exhausted, whereas in *MacDonald,* the real question was whether the land use decision was a final one. Finality in this context means that a definitive land use decision concerning the allowable use of the land is required to determine whether any viable use remains. The finality requirement is "concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson,* 105 S. Ct. at 3120.

Note also that the question of finality was discussed in both *Williamson* and *MacDonald.* However, the need for exhaustion of statutory remedies was merely an additional factor weighing in favor of the decision in *Williamson* which was not a factor in *MacDonald.* Since the *Williamson* decision was unanimous, and the *MacDonald* decision was split 5 to 4, notwithstanding other factual differences, it seems clear that the landowner's failure to exhaust available statutory remedies was a dispositive factor in the Court's unanimous decision in *Williamson.*

69. Expressed in the Court's opinion in *MacDonald,* 106 S. Ct. at 2568, is the view that some development would have been allowed had the landowner submitted a less intensive but meaningful plan for development. The Court stated "the holdings of both courts below leave open the possibility that some development will be permitted. . ." and that a "meaningful application has not yet been made."

70. In *MacDonald,* 106 S. Ct. at 2561, the Court overlooked another factual difference between that case and *Williamson,* 105 S. Ct at 3108. In *MacDonald,* the dispute did not arise out of a change in zoning. Instead, the problem was that the county refused approval of a residential development plan on four specific grounds in spite of the property's residential zoning designation. The distinction is that, in *MacDonald,* the county's specific actions were attacked; whereas in *Williamson,* the general effect of an otherwise valid change in the zoning ordinance was

MacDonald would force landowners to submit repeated applications for development (applications which in many instances landowners would have no intention of pursuing or which they knew were futile) before isolating the exact uses allowable by local zoning authorities. This is clearly not the message of *Williamson*.[71]

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questioned.

This may be significant in explaining the result of the *MacDonald* case. It could be that the Court was unwilling to overturn a specific governmental exercise of its police power without substantial factual support. Because the lower court granted a demurrer, and because the plaintiff had not properly pleaded facts sufficient to establish a taking, the Court may not have had sufficient facts to decide the case. Thus it may be that the Court merely exercised its discretionary powers, not its article III powers, in concluding that the claim was not ripe. *See* Poe v. Ullman, 367 U.S. 497, 503 (1961); Ashwander v. TVA, 297 U.S. 288, 346 (1936). *See generally* GUNTHER, CONSTITUTIONAL LAW, 1580 (1985).

In support for this conclusion, it could be said that the case was sufficiently concrete under the article III case or controversy requirements because an actual controversy regarding the alleged rejection of the development plan did exist. The landowner submitted a plan for approval which was allegedly denied for the sole purpose of providing a public, open-space buffer. A final land use decision did exist. A controversy, however small or large, began once the plan was rejected, thereby reducing the value of the property and affecting the expectation interests of the landowner. Therefore, it could be argued that a real controversy existed in the *MacDonald* case.

Concededly, the question remained whether the plaintiff could show that the economic impact was severe enough to constitute a compensable taking. But this went towards the plaintiff's burden of proving the elements of the takings claim. The factors necessary to determine the amount of economic impact caused by the ordinance went to the merits of the takings claim, not to whether there was a controversy at all. An economic impact creating a real controversy exists whether or not the impact can be measured by the courts; the inability to measure the impact does not mean that no impact occurred.

Further, the Court obviously realized the significant impact any final decision may have had on landowners and local governments, and may have determined that a decision of this nature should be postponed until a case with better facts was presented. The importance of the issue was explained by the California Supreme Court in *Agins*. It stated that awarding compensation in land use takings cases may cause a chilling effect on land use regulation programs. The court stated that a monetary remedy "will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe." 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377, (quoting Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1597 (1977)). Additionally, the Court may be waiting for lower courts to decide the issue, or may want to look at this issue several more times before deciding it. Many landmark cases, such as Brown v. Board of Education, 347 U.S. 483 (1954), were not only argued twice, but before reaching the merits, the Court postponed deciding on the issue several times due to the potential impact the decision may have on the nation. The land use takings cases may fit comfortably into such a category.

71. In his objection to the majority decision in *MacDonald*, Justice White stated: "Nothing in our cases suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position." *MacDonald*, 106 S. Ct. at 2571. He also goes on to say "[a]lthough a landowner must pursue reasonably available avenues that might allow relief, it need not, I believe, take patently fruitless measures." *Id.* at 2572.

IV. Practical Problems With the Court's Ripeness Approach

MacDonald extends the ripeness approach of previous land use takings cases too far. Indeed, in the absence of any existing statutory remedies or possible resolution by variance, the Court required more than just a final decision. When a landowner applies to develop his land in a manner consistent with applicable zoning requirements, and the zoning authority subsequently denies the application, the *MacDonald* approach requires that the landowner must still submit other plans for less intensive use.[72] The decision, as precedence, creates practical problems which may effectively prevent all landowners from having their takings claims adjudicated at all.

By requiring landowners to submit less intensive development plans following the rejection of an otherwise legitimate proposal, the majority in *MacDonald* makes a radical departure from the Court's previous takings and ripeness analysis. The Court's new approach raises the following practical questions for landowners: 1) how will a court decide whether a land use decision is a final decision; 2) will a zoning authority's subsequent approval of a plan for less intensive use constitute a waiver of the right to appeal a previous unfavorable decision; and 3) what impact will the Court's holding have on landowners who have no incentive to apply for less intensive uses?

A. *The problem of finality*

In *MacDonald,* the Yolo County Planning Commission and the Board of Supervisors rejected a subdivision development plan submitted by the plaintiff for the building of 159 housing units. Nevertheless, the Court declared that the county's decision was not final because the county might have allowed some viable use had the landowner submitted alternative plans for approval.[73] The irony of this result is that the

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72. Citing a California Court of Appeal decision, the Court in *MacDonald,* 106 S. Ct. at 2565, stated "the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development. Accordingly, the complaint fails to state a cause of action." Although the Court mentioned that futile reapplications for development are not necessary, it also observed that "the holdings of both courts below leave open the possibility that some development will be permitted," and that the "the implication is not that future applications would be futile, but that a meaningful application has not yet been made." Id. at 2568, n.8.

73. The Court relied upon an interpretation of the lower court holdings to say that some meaningful use of the land would have been approved had the landowner submitted them for approval. But the Court did not indicate, or even consider, how much reasonable effort a landowner must put forth to get his plan approved, or how many times alternative plans must be submitted.

actual land use decision was a complete disposition of the original plan. If, however, rejection of the landowner's original plan by the county is not considered final, what is a final decision?

The Court states in *MacDonald* that the land use decision must be final, but it suggests the decision must be final with respect to the allowable use.[74] Although the Court states it must know how the regulation is to be applied, it seems that only a decision in favor of a plan will furnish the information the Court requires to determine the remaining allowable use of the land. Another rejected plan will merely duplicate the existing problem. Only by having the landowner submit and receive approval of an alternative plan may the approving commission rest on a concrete and final position regarding the applicant's allowed interest in using the land.[75] Thus, the implication in *MacDonald* is that a plan must be approved before the land use decision is deemed final.

Since the controversy in *MacDonald* was that the government had effectively taken the landowner's property by *denying* some potential use of the land, it seems odd that the Court would require an *approval* of some use to determine whether a taking has occurred. As mentioned, the Court implied that approval is necessary to determine the amount of use allowed. The resulting irony is that an approved plan, not a rejected plan, becomes the source of a legal claim. Yet, under the takings clause, a cause of action is one that alleges a *deprivation* of, not a successful application for, land use.

B. The waiver and mootness problem

In the event a less intensive plan is submitted by a landowner and subsequently approved, the landowner may still not be afforded an adjudication of the takings issue. Because the courts may assume the landowner is receiving exactly what he asked for by virtue of the approved plan, the courts may in effect waive the land use takings action com-

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74. The Court in *MacDonald,* 106 S. Ct. at 2566, quoting *Williamson,* 105 S. Ct. at 3124, stated:

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

75. The Supreme Court's actions in *MacDonald* can be defended, if not on its reasoning, then on its design. The Court needs a decision that will help it determine how much use is permissible under the city's restrictions. Only a decision in favor of a plan will help the Court determine the allowable use permitted by the regulation. A series of rejected plans may get closer to the allowable use, but only an approved plan will show what use is actually permissible with respect to the landowner's intentions to develop the property. *MacDonald,* 106 S. Ct. at 2561.

pletely. The presumption will be that no taking could occur since the landowner will get what he wants and be able to make use of his land.

Additionally, once a landowner's plan is approved, a concrete controversy alleging a taking of private property may no longer exist. In other words, the landowner's complaint may be moot. In contrast to the ripeness doctrine, the mootness doctrine holds that a case cannot be adjudicated once a controversy is over. Thus, if a plan is approved by the government, and the landowner is allowed to make use of his land, it would seem that the controversy has ended. Further, it may seem unreasonable for a landowner to allege that his property has been taken when in fact the government has just allowed him to make use of his property. The problem is that a landowner may cross the threshold of ripeness only to find himself in the realm of mootness.

Under the Court's reasoning, a claim would be unripe until a land use decision is final, but as soon as a decision is final with respect to the allowable use, the claim would immediately become moot. Therefore, a landowner alleging a substantial loss caused by the regulation, despite approval of a plan, may be denied a chance to have his case adjudicated at all.[76]

C. *A landowner may have no incentive to submit less intensive plans*

From a practical standpoint, the Court created a significant burden on landowners by requiring them to submit additional less intensive plans for approval. First, the landowner will have to hire more architects, engineers, and landscape architects to revise the existing development plans and to provide new building plans and specifications. In almost every instance, this process will be time consuming and expensive. Furthermore, with the original plan rejected, the landowner

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76. On the other hand, it can be argued that such a claim should not be ripe in some circumstances. For example, if a landowner, like *Agins,* was allowed to build five residences for a substantial profit, as was the actual case, he should not be able to recover under the takings clause. The argument is that no taking under the fifth amendment could have occurred if he was able to make valuable economic use of his land. Also, note that subsequent to the legal action in *Williamson,* 105 S. Ct. at 3108, the bank was also able to make use of its property for a profit.

But these cases raise the corollary question whether a partial taking is a taking under the fifth amendment. Since the original takings question is one of degree, it seems to follow that even a partial taking can be a taking if the degree of impact, or diminution in value, is severe enough. Also, since there will always be some value left in a property no matter how restrictive the land use ordinance may be, short of total acquisition, it seems inevitable that all land use takings claims will involve only a partial taking. Further, one can infer from the recent Supreme Court cases that a total deprivation of land use is not necessarily a prerequisite to a compensable taking because of their emphasis on the economic impact and reasonable investment-backed expectations. Therefore, it is possible that a landowner should be able to receive compensation even if he is allowed to make some viable use of his property. *Compare* Keystone Bituminous Coal Assn. v. DeBenedictis, 55 U.S.L.W. 4326 (U.S. Mar. 9, 1987)(No. 85-1092).

will be forced to revise his budget, re-evaluate his expectations, and alter his vision in developing his land.[77]

Secondly, there may be circumstances where landowners will not be able to profit by submitting and following through with an alternative plan. In fact, by changing development plans, a landowner may subject himself to potential bankruptcy. He may be forced to apply for some unwanted or hastily planned development just to satisfy the court's requirements. It seems unreasonable for a landowner to have to change the scope and size of development for the sole purpose of seeking a remedy under the law. A landowner may have no intention of pursuing an alternative development plan and it may be entirely against his interest to pursue such a course of action.

In *Williamson,* for example, the developer had already completed a tract of houses and installed an 18-hole golf course at the time the Hamilton Bank foreclosed on the mortgage.[78] During that time, the County revised the ordinances. But even had the developer maintained possession and rights to the land, a subsequent reduction in the number of housing units allowed may have reduced his profits, or may have caused him to incur a substantial loss. In such situations, requiring the landowner to apply for less intensive development would be against his interest altogether.

Furthermore, a developer desiring to invest in major construction, such as a nuclear power plant, may have no incentive to make use of his land in any other fashion.[79] Certainly, the San Diego Gas and Electric Company had no legitimate business interest in using the land for agricultural purposes. Yet, the Court would have the developer submit a radically different plan to conform with a subsequently enacted ordinance whether or not he has any intention of following through with the plan.[80]

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77. Although a landowner has no absolute right to build without approval by the appropriate land use authority, such efforts, in this case, are required merely to challenge the land use decision. These efforts are procedural in nature and are prerequisites to asserting a claim that satisfies the Court's ripeness approach.

78. 105 S. Ct. at 3112.

79. This was the case in San Diego Gas & Electric Company v. City of San Diego, 450 U.S. 621 (1981), *supra* note 10.

80. The paradox is that the case asserting the issue may remain nonjusticiable. Requiring a landowner to submit less intensive, meaningful plans after an existing plan has been rejected imposes a tremendous burden on landowners. Not only is the landowner faced with the uncertainty of not knowing at what point a land use decision will be deemed final, he is also burdened with additional costs and risks which will often discourage or prohibit him from seeking alternative development. To force a landowner to pursue an alternative development plan may result in postponing or preventing a judicial remedy altogether. Given that a landowner may find it against his interest to submit an alternative plan, he may be unable to satisfy the Court's requirements. Thus, a landowner who faces a potential loss in his expectation interests may never be able to

V. CONCLUSION

Land use takings cases require a determination of the economic harm caused by regulation. Economic harm is determined in large measure by knowing the allowable use remaining in the property after a particular land use restriction is applied. In two recent Supreme Court cases, *Williamson* and *MacDonald,* the question of economic harm in a land use takings context was presented. The Court, however, did not reach the merits of the takings issue in either case because no final decision regarding the allowable use had been made.

In finding the cases to be unripe for adjudication, the Court in *Williamson* required a final decision with respect to the allowable uses under an existing development plan, while in *MacDonald,* the Court in essence required a landowner to seek approval of less intensive uses even though a final decision effectively rejecting an existing development plan was made by the local land use authority.

The result in *MacDonald* inevitably creates practical problems for landowners affected by land use regulations. By requiring landowners to submit alternative development plans for approval, even though the costs and risks of pursuing such a new course of action may be great, the Court's approach unduly burdens private land development. The Court's approach also leaves landowners uncertain as to when a land use decision is to be considered final for appeal and imposes additional costs and risks. The effect of the Court's approach will be that many valid fifth amendment claims by landowners whose interest in land de-

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receive just compensation, whether the Constitution requires it or not.

A practical solution to these problems might be to shift the burden of showing the allowable use of property from the landowner to the government. The government is in the unique position to know what uses may be allowed under the ordinances since it presumably enacted them in accordance with some legitimate state interest in mind. The government has access to the records of the meetings in which it made the changes to the existing land use ordinances, and it can restate the purposes for which the ordinances were changed to help show the extent of the land use restrictions. Further, since the government represents the community's interests, it is in the position to discern the needs that were considered in enacting the regulations. With this information, the government can more or less accurately determine what uses were specifically intended to be allowed on the property by the ordinances to fulfill its land use objectives.

When a restrictive land use ordinance is enacted, it is frequently detrimental to landowners and beneficial to the community. Thus, it would be fair, once a plan is rejected and legal action is taken, for the Court to require the government, on behalf of the community, to show the use permitted by the ordinance. The landowner is already being subjected to potential hardship by virtue of the restrictive regulation and its impact upon the use of his land. He should not be required to face additional hardships in order to seek constitutionally mandated compensation. This is especially true where the government has not provided any administrative or statutory remedies, as in California. Most importantly, this would provide the Court with the information it needs to reach the merits of the takings issue.

velopment are impacted by government regulation may continue to be unjustly prohibited from adjudication by the ripeness doctrine.

Junji Shimazaki