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Official Maps and the Regulatory Takings Problem: A Legislative Solution

Trent Andrews

Official Maps and the Regulatory Takings Problem: A Legislative Solution

I. INTRODUCTION

Official map regulations generate much uncertainty in the court system. For example, in *Lomarch Corp. v. Mayor and Common Council of Englewood*, a city's official map prohibited a landowner from building on his property because part of his property was reserved to be a park in the future.[1] The landowner felt that the city had deprived him of use of his property and challenged the prohibition, claiming that a regulatory taking had occurred.[2] This is just one example of an official map restricting a landowner's use of property. What should be the remedy? The answer to this question depends on several factors: How much time does the city have to decide if it will condemn his property and pay just compensation? How much of the land is reserved? How much economic loss will result if the official map is upheld? What is the city's reason for freezing development?

Courts have struggled with these questions when deciding whether to strike down official map provisions.[3] When landowners have challenged the validity of official maps, courts have examined each set of facts on a case-by-case basis, and the result is usually unpredictable. Not only is the result unpredictable, but oftentimes landowners are deprived of the use of their property without compensation.

When official maps prohibit landowners from building on their property, the landowners often claim that a taking has occurred. Thus, many courts have looked to takings cases from the Supreme

1. 237 A.2d 881, 882 (N.J. 1968).

2. *Id.* at 883.

3. *See, e.g.*, Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993, 996–97 (1st Cir. 1983) (holding that fourteen years is an unreasonable reservation period, but suggesting that a period as short as five years may be constitutional); Headley v. City of Rochester, 5 N.E.2d 198, 203 (N.Y. 1936) (holding that a restriction on twenty-five feet of a 19,000-square-foot lot is constitutional); Rochester Bus. Inst., Inc. v. City of Rochester, 267 N.Y.S.2d 274, 281 (App. Div. 1966) (holding that a regulation increasing construction costs by six percent, or $150,000, is constitutional).

Court.[4] While these precedents have been, and may continue to be, helpful in a few cases, they have not been successful in resolving many other official map conflicts. This is partly because regulatory takings law is already muddled and examined on a case-by-case basis:

> Regulatory takings law combines the worst of two worlds—constitutional law's arid generalities and property law's substantive difficulties. To hear the Supreme Court tell it, this confusion is the best we can expect. In *Penn Central Transportation Co. v. New York City*, the leading regulatory takings case of our time, the Supreme Court complained that regulatory takings law "has proved to be a problem of considerable difficulty." "[Q]uite simply," the Court confessed, it "has been unable to develop any 'set formula' for determining" regulatory takings cases.[5]

This Comment will argue that official map adjudication should be a separate area of law from the Supreme Court's takings cases. While in rare situations it is helpful to borrow from Takings Clause jurisprudence, the Supreme Court's regulatory takings cases generally do not provide effective guidelines for official map cases.

State legislatures should take the initiative to provide rules for official map cases. This solution will not only increase predictability but will also promote justice and efficiency. State legislatures should require local governments to compensate landowners during official map regulation periods. This requirement will force governments to take the planning process more seriously when deciding to reserve a landowner's land. The requirement will also give governments the incentive to keep the time and amount of property reserved to a minimum, thus, limiting compensation. Although courts protect the property of private individuals by interpreting the Fifth Amendment and deciding whether certain regulations are constitutional, statutes can extend the protection of private individuals beyond constitutional protections by enacting specific rules that are governed by state policy.

Part II discusses the background of official maps, their main purposes, and case law highlighting several of the issues involved with official maps. It then discusses the development of regulatory

4. *See, e.g.*, Ward v. Bennett, 625 N.Y.S.2d 609, 612–13 (App. Div. 1995).

5. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1552 (2003) (footnotes omitted) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978)).

takings doctrine. Part III discusses how courts have looked to the Supreme Court cases for guidance, and how this method has proven ineffective. Part IV argues that the judicial system has been inadequate in protecting landowners' rights, and that statutes are a more appropriate means of protecting landowners affected by official maps. Part V discusses the general principles of compensation and why landowners regulated by official maps should be compensated. Part VI introduces a proposed method of compensation, followed by a discussion of some questions raised by the proposed statutory provisions. Part VII concludes the Comment.

II. BACKGROUND

A. Official Maps

An official map is a map of a city that precisely displays existing and future streets, highways, sewer systems, parks, and other public improvements. The main purpose of an official map is to preserve land for widening existing roadways or building future roadways.[6] An official map facilitates the expansion of the city and growth of its population.[7] It also allows the city to obtain the land at a reasonable rate.[8]

6. DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 226 (5th ed. 2008). Commentators have further explained the functions of an official map:

> In essence the official map is a simple device. It is one way, but not the only way, to fix building lines. The official map may plat future as well as existing streets. Where future streets are mapped, subdividers must conform to the mapped street lay-out, unless they can prevail upon the proper officials to amend the map. Public sewer and water will be installed only in the bed of the mapped streets. Even more important, a landowner who builds in the bed of the mapped street may be refused compensation for his building when the street is ultimately opened and the mapped land taken. . . .
>
> The official map of future streets has obvious advantages in terms of the public coffers. It assures that land needed for future streets will be available at bare land prices. Mapping of future streets also gives direction and pattern to future growth of the community, though some feel that the map casts the mold too inflexibly, especially if minor as well as major streets are mapped.
>
> Where existing streets have been officially mapped, the map will often set widening lines (set-backs) warning that new structures must be located in conformance with their lines, and these also have obvious advantages in cutting costs of street widening.

Joseph C. Kucirek & J. H. Beuscher, *Wisconsin's Official Map Law: Its Current Popularity and Implications for Conveyancing and Planning*, 1957 WIS. L. REV. 176, 177 (footnote omitted).

7. *See In re* Phila. Parkway, 95 A. 429, 430 (Pa. 1915).

8. *See, e.g.*, Kucirek & Beuscher, *supra* note 6, at 177.

The validity of official maps was first questioned in courts as early as 1836, when Brooklyn's official map was challenged in *In re Furman Street*.[9] The court in this case refused to compensate landowners that had built on the mapped street, reasoning that "[i]f the legislature did not intend that the streets should be opened at a future period without paying for improvements made upon them in the meantime, the provision [for mapping] was worse than useless."[10]

Thus, official map statutes began to prohibit improvements on mapped property, and landowners began to question the constitutionality of these statutes that deprived them the right to develop their property.[11] Courts have expressed various views as to whether this prohibition against improving property on mapped land is an unconstitutional taking of property.[12]

1. Florida cases

Even within a single state, official map case law can be confusing and contradictory. In the early 1990s, the Florida Supreme Court decided several mapping cases, and the court had to be creative to fit its various holdings together. First, in *Joint Ventures, Inc. v. Department of Transportation*, the court invalidated a Florida statute that authorized the filing of reservation maps by the state department of transportation.[13] The purpose of the reservation maps was to prohibit any development and freeze land values on property planned for future road use.[14] The court struck down the statute as an improper use of police power.[15]

9. 17 Wend. 649 (N.Y. 1836).

10. *Id.* at 657; *see also In re* Pittsburgh Dist., 2 Watts & Serg. 320, 324 (Pa. 1841) (upholding the validity of street mapping: "But then the mere laying of [streets] out cannot be said, of itself, to be a *taking* of the property of the individuals, upon which they are laid out, for public use at some future day, but rather a designation of what may be required for that purpose thereafter; so that the owners of the property may in due time be fully apprized of what is anticipated, and regulate the subsequent improvements, which they shall make thereon, accordingly.").

11. PATRICIA E. SALKIN, 3 AMERICAN LAW OF ZONING § 30.3 (5th ed. 2011). Others complain that an official map "casts the mold too inflexibly, especially if minor as well as major streets are mapped." Kucirek & Beuscher, *supra* note 6, at 177.

12. *See* sources cited *supra* note 3.

13. 563 So.2d 622, 623 (Fla. 1990).

14. *Id.*

15. *Id.* at 623, 626.

Although the Florida Supreme Court invalidated the reservation maps that reserved landowners' land, the court did not protect every affected landowner. In *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.,* the court held that landowners with land inside the boundaries of the invalidated maps of reservation were not entitled to receive compensation based on a per se taking.[16] Instead, each property owner would have to show that the reservation map resulted in a loss of substantially all of the economically beneficial or productive use of land.[17]

A few years later, the Florida Supreme Court again was faced with an official map question that required the court to analogize and distinguish its prior holdings. In *Palm Beach County v. Wright,* the court upheld an official map that provided for the acquisition of existing and future rights-of-way.[18] Owners of affected property claimed that the official map was unconstitutional and that it was indistinguishable from the invalidated maps in *Joint Ventures.*[19] But the court in *Wright* pointed out that the *A.G.W.S.* court had held that the map's restrictions did not constitute a per se taking; thus, the adoption of the Palm Beach County official map would not constitute a per se taking.[20] The court in *Wright* upheld the official map, recognizing the importance of planning for future growth.[21]

2. Time period

Courts examine several factors to determine whether an official map is reasonable and, therefore, constitutional. One of these factors is the amount of time that the municipality reserves the land before making the final decision on whether or not to use its eminent domain power and purchase the property. Courts, however, have been inconsistent in determining the duration required to make a reservation unconstitutional. In *Benenson v. United States*, the Court of Claims held that a five-year period of restricting landowners from selling their property or using it for an income-producing purpose was unreasonable.[22] In *Urbanizadora Versalles, Inc. v. Rivera Rios,*

16. 640 So.2d 54, 58 (Fla. 1994).
17. *Id.*
18. 641 So.2d 50, 53–54 (Fla. 1994).
19. *Id.* at 52.
20. *Id.*
21. *Id.* at 53–54.
22. 548 F.2d 939, 947–48 (Ct. Cl. 1977).

the First Circuit held that a reservation period of fourteen years was unreasonable and thus unconstitutional.[23] But the *Urbanizadora* court referred to *Benenson* and suggested that the *Urbanizadora* court might not have held a period as short as five years to be unreasonable.[24] Surprisingly, other courts have allowed reservation periods lasting more than twenty years.[25]

State courts could benefit greatly from some bright-line guidance in this area, given the striking disparity among states regarding what is unreasonable. Unfortunately, they are unlikely to get that kind of guidance from the Supreme Court because, as will be shown, takings jurisprudence invites ad hoc, case-by-case analysis rather than the drawing of hard and fast lines.[26]

3. Reasonable use of land

Another factor that courts examine in determining the reasonableness of an official map regulation is whether or not landowners retain reasonable use of their land. In examining this factor, courts look to the landowner's economic loss and the amount of land that is regulated. In *Headley v. City of Rochester*, the New York Court of Appeals upheld an official map that prohibited the issuance of building permits for property on mapped streets.[27] In this case, the official map restricted only 25 feet of the landowner's 19,000-square-foot plot of land.[28] Because the restriction affected such a small portion of the landowner's property, the court upheld the regulation without compensation.[29]

Thirty years later, the New York Supreme Court's Appellate Division upheld a set-back regulation for future street widening in

23. 701 F.2d 993, 997 (1st Cir. 1983).

24. *Id.* at 996–97; *see also* Md.-Nat'l Capital Park & Planning Comm'n v. Chadwick, 405 A.2d 241, 250 (Md. 1979) (holding that a three-year reservation period is excessive and an abuse of the police power); Ward v. Bennett, 625 N.Y.S.2d 609, 612–13 (App. Div. 1995) (holding that the refusal of a building permit for a fifty-year-old mapped street constitutes a taking of property where the law permitted a ten-year reservation period); MODEL LAND DEV. CODE §§ 3-105, 3-202 note (1975) (setting the maximum reservation period at five years and stating that anything beyond that would be "inequitable").

25. *E.g.*, Lord Calvert Theatre, Inc. v. Mayor of Balt., 119 A.2d 415 (Md. 1956); Rochester Bus. Inst., Inc. v. City of Rochester, 267 N.Y.S.2d 274 (App. Div. 1966).

26. *See* Part II.B *infra*.

27. 5 N.E.2d 198, 209–10 (N.Y. 1936).

28. *Id.* at 201.

29. *Id.* at 201–02.

the same city.[30] The official map required a fourteen-foot setback, which is the required distance of a structure from the edge of the lot, on the landowner's property.[31] The landowner claimed that this would amount to a taking because it would require him to replan the project, increasing costs by six percent.[32] The court determined that the constitutionality of the official map would depend on a balancing test weighing the amount of damage to the landowner against the effect upon the public purpose for the regulation and advancement of the general welfare.[33] The court held that the six percent increase in construction costs was trivial damage when compared to the great injury to the general welfare that would result if the city was unable to plan for the improvement of traffic conditions.[34]

Other courts have struck down official maps that excessively burden landowners. In *Grosso v. Board of Adjustment of Millburn*, the New Jersey Supreme Court found that restricting a landowner's entire property in the bed of a proposed street would be unconstitutional.[35] While the state may use its police power for the benefit of the public, it may not exceed constitutional boundaries.[36]

While the *Grosso* court easily concluded that an official map that restricts a landowner's entire property is unconstitutional, other courts have had to determine the constitutionality of official maps that burden the majority, but not all, of a landowner's property. In *Jensen v. City of New York*, seventy-eight percent of a landowner's property lay within the confines of a mapped street.[37] The court held the official map to be invalid because it denied the landowner the use

30. *Rochester*, 267 N.Y.S.2d at 274, 276, 281.

31. Id. at 277.

32. *Id*. at 277–78.

33. *Id*. at 279 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)).

34. *Id*. at 280 ("If the minimal damage to plaintiffs involved here by enforcement of the setback restriction renders the specific application of the Rochester Plan unconstitutional, then the public is in grave danger of being deprived of the very valuable tool of city planning for the future.").

35. 61 A.2d 167, 169 (N.J. 1948).

36. *See Mahon*, 260 U.S. at 415–16 ("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. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions.").

37. 369 N.E.2d 1179, 1180 (N.Y. 1977) (Cook, J., dissenting).

of her property.[38] Although the *Grosso* case involved a situation where *all* of the landowner's land was restricted, the court in *Jensen* ruled that seventy-eight percent deprivation of land use was enough to declare the official map unconstitutional. Thus, the *Jensen* case exemplifies the problem of unpredictability in official maps adjudication.

All of these individual issues hint at two overarching and competing goals: the courts' desire to be fair to landowners and the necessity of ensuring that the government and taxpayers are not required to pay for every land use change or government initiative. Courts have had extreme difficulty reconciling these goals.

B. Regulatory Takings Doctrine

Most states do not have comprehensive official maps legislation, and, as a result, courts have addressed most official map issues through the regulatory takings doctrine. The regulatory takings doctrine stems from the Fifth Amendment's declaration that private property will not be taken for public use without just compensation.[39] Courts have had difficulty examining fact patterns and determining when regulatory measures constitute takings: "For many, takings law is, or at least has been, at best, extraordinarily complex, and, at worst, hopelessly muddled."[40] One of the first cases involving regulatory takings was *Pennsylvania Coal Co. v. Mahon*.[41]

38. *Id*. at 1179–80 (majority opinion).

39. U.S. CONST. amend. V.

40. CALLIES ET AL., *supra* note 6, at 320. For more discussion on the confusion involved with the regulatory takings doctrine see *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (noting that the Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action" demand compensation); *see also* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977) (describing regulatory takings doctrine as "a chaos of confused argument"); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 102 (1995) (referring to regulatory takings doctrine as an "unworkable muddle" and noting that "regulatory takings doctrine has generated a plethora of inconsistent and open-ended formulations that have failed to make sense"); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1006–07 (2003) (describing regulatory takings law as a "jurisprudential mess"); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 (1984) (describing regulatory takings doctrine as a muddle: "[C]ommentators propose test after test to define 'takings,' while courts continue to reach ad hoc determinations rather than principled resolutions.").

41. 260 U.S. 393 (1922). Many legal scholars blame the *Mahon* case for causing most of the confusion about takings. *E.g.*, Byrne, *supra* note 40, at 97 (calling *Mahon* "a wretched decision, inadequately explained and having no foundation in precedent"); Rose, *supra* note

In the opinion, Justice Holmes pointed out that "[g]overnment 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."[42] But, he continued, "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."[43] Unfortunately, Justice Holmes did not explain when a regulation "goes too far."

The Supreme Court did not hear another regulatory takings case until *Penn Central*, more than fifty years after *Mahon*. And when the Court finally returned to the issue, it did not do much to make *Mahon*'s "goes too far" test any easier to apply than when it was announced by Justice Holmes. Aside from two narrow bright-line rules, regulatory takings law is currently dominated by the factors of the ad hoc *Penn Central* test. The following sections will discuss the regulatory takings cases that have shaped the law. These regulatory takings cases do not serve as effective guidelines to follow for official maps cases because (1) regulatory takings cases are already muddled and (2) official maps cases are distinguishable from the fact patterns involved in the takings cases decided by the Supreme Court.

1. Per se rules

The Supreme Court established two per se rules regarding the regulatory takings doctrine: (1) any permanent physical occupation qualifies as a regulatory taking and (2) any deprivation of all the economically beneficial use of the property also qualifies as a regulatory taking.

The Supreme Court established the first of the per se rules in *Loretto v. Teleprompter Manhattan CATV Corp.*[44] In *Loretto,* a New York statute permitted a television company to install its cable facilities on a landowner's apartment building.[45] The Court held that even though the cables occupied a small space, a permanent physical occupation qualifies as a regulatory taking.[46]

40, at 562.

42. *Mahon*, 260 U.S. at 413.

43. *Id*. at 415.

44. 458 U.S. 419 (1982).

45. *Id*. at 423.

46. *Id*. at 426.

The "deprivation of all economically beneficial use" rule was established in *Lucas v. South Carolina Coastal Council*.[47] In *Lucas*, the Court held that if landowners are deprived of all economically beneficial use of their property, such deprivation constitutes a taking.[48] This "deprivation of all economically beneficial use" rule has been heavily criticized because the rule will compensate a landowner only in the extremely rare instance of a total loss of value.[49] For example, in *Palazzolo v. Rhode Island*, a landowner's claim failed the *Lucas* test because the landowner's property diminished only 93.7% in value, as opposed to the necessary 100%.[50]

2. Penn Central *test*

In *Mahon,* Justice Holmes explained that when a regulation "goes too far," it is a taking.[51] This general rule, and Justice Holmes's reluctance to promulgate a standard for when a regulation "goes too far," initiated the inconsistency in regulatory takings cases[52] and led to the *Penn Central* balancing test. In *Penn Central Transportation Co. v. New York City,* the Supreme Court admitted that it had "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated."[53] Rather, the Court stated that it makes its determinations ad hoc after looking at the particular facts of each case.[54] In making these determinations, the Court created a balancing test in *Penn Central* that examines several significant factors: the economic impact of the regulation on the landowner, interference with the owner's investment-backed expectations, and the character of the governmental action.[55] As many commentators have argued, these factors create a bigger mess

47. 505 U.S. 1003, 1019 (1992).

48. *Id*. at 1016.

49. *Id*. at 1019 n.8 ("Justice Stevens criticizes the 'deprivation of all economically beneficial use' rule as 'wholly arbitrary,' in that '[the] landowner whose property is diminished in value 95% recovers nothing,' while the landowner who suffers a complete elimination of value 'recovers the land's full value.'" (quoting *id*. at 1064 (Stevens, J., dissenting))).

50. 533 U.S. 606, 630–31 (2001).

51. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

52. *See* Byrne, *supra* note 40, at 103.

53. 438 U.S. 104, 124 (1978).

54. *Id*.; *see also* United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958).

55. *Penn Cent.*, 438 U.S. at 124.

because each of the factors must be balanced by the facts of the case, forcing judges to make "open-ended value judgments."[56]

3. Temporary regulatory takings

The Supreme Court has also been faced with the constitutionality of temporary regulatory takings. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, a planning agency adopted regulations to limit land use in order to protect Lake Tahoe.[57] The agency enacted a moratorium that froze new development activity for a time while it created a long-term, permanent plan, and the landowners claimed this was a regulatory taking.[58] The Court held that the moratorium did not constitute a per se taking but should be analyzed by the *Penn Central* test.[59] The *Lucas* claim was rejected here because there was no permanent deprivation of all economically viable use.[60] Thus, a temporary restriction would not rise to the level required by *Lucas*.[61] The Court pointed out that with a moratorium there is a clear "reciprocity of advantage" because it will protect all affected landowners against immediate construction that may later be inconsistent with the adopted plan.[62] But, as the Court noted, "It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism."[63]

III. REGULATORY TAKINGS CASES ARE NOT HELPFUL IN SOLVING OFFICIAL MAPS CASES

Courts have typically applied takings precedent in official map cases because of the seeming similarity between the two. When an official map deprives landowners of the use of their property, the landowners typically challenge the regulation by claiming that the government has violated the Fifth Amendment's guarantee that "private property [shall not] be taken for public use, without just

56. Byrne, *supra* note 40, at 104.

57. 535 U.S. 302, 306, 310 (2002).

58. *Id*.

59. *Id*. at 321.

60. *Id*. at 331–32.

61. CALLIES ET AL., *supra* note 6, at 363.

62. *Tahoe-Sierra*, 535 U.S. at 341 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

63. *Id*.

compensation."[64] Because the claims are typically framed this way, courts confronted with official map issues have looked to regulatory takings cases for guidance.

A. Per Se Rules

The per se rules are not very helpful in determining official maps cases. First, the permanent physical occupation rule will generally not apply because official maps plot out *future* roadways. True, the official map regulations may prohibit the landowner from obtaining a building permit, but no actual physical occupation takes place until the property is condemned and paid for. In *Nollan v. California Coastal Commission*, the Court reasoned that an easement qualifies as a permanent physical occupation.[65] However, this view will not apply in official map cases. Even if a landowner owns property in the bed of a mapped street, the landowner still owns legal title; neither the government nor the public has the right to intrude on the landowner's property solely because it is plotted on the official map. Even though the owner's use of her land may be extremely limited by the official map, it is not until the government actually follows through on the map and takes the owner's land that she loses her right to exclude—and thereby finally gains a right to compensation.

Furthermore, the *Lucas* deprivation-of-all-beneficial-use rule will not be very helpful in official maps cases because seldom will landowners lose all beneficial use of their property when their land is mapped on the official map. Landowners can generally continue to use their property in the same manner it has been used before their property was mapped; they are only prohibited from building in the bed of a mapped street. Official map regulations usually reserve landowners' land for a specific time period, and at the end of the reservation period, either the restriction is revoked or the land is purchased by the government. Therefore, the official map will not render the property valueless, as required by *Lucas,* because the landowner "will recover value as soon as the prohibition is lifted."[66] To determine whether the land has any value, the Court examines the "parcel as a whole."[67] The "parcel as a whole" not only involves

64. U.S. CONST. amend. V.

65. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987).

66. *Tahoe-Sierra*, 535 U.S. at 332.

67. *Id.* at 331.

the physical aspects of the property but temporal aspects as well.[68] Therefore, a landowner's future interest in property, though restricted by an official map, still has value, and therefore the *Lucas* rule is generally inapplicable.

The *Lucas* rule, however, may be applicable in rare situations. In *Ward v. Bennett*, for example, a state court followed *Lucas* in determining that an official map was invalid because it deprived the owner of all economic beneficial use.[69] But this is one of the "extraordinary case[s]" for which the *Lucas* rule was carved out, and in most situations an owner will be left with at least some beneficial use.[70]

B. Penn Central *Balancing Test*

The *Penn Central* balancing test will not serve as an effective guideline to follow in official maps cases. The inconsistency and unpredictable nature of takings cases are largely a result of the *Penn Central* balancing test.[71] The unpredictability of the *Penn Central* test complicates official maps conflicts since most takings claims will have to be resolved under the *Penn Central* test because of the stringent standards of the *Loretto* and *Lucas* rules.[72]

Using an ad hoc test is more problematic in official maps cases than the average takings case. Official maps are a unique form of regulation because they are essentially intended as precursors to actual takings—the government is actually planning in most cases on paying just compensation for the land at some point in the future. This factor is missing from nearly every other type of regulation that is challenged as a taking. And it makes a balancing test extremely challenging. In evaluating the effect of the regulation on the owner's value and investment-backed expectations, for example, courts could understandably find it difficult to ignore the fact that the landowner will eventually be entitled to just compensation anyway. In addition,

68. *Id.* at 331–32.

69. Ward v. Bennett, 625 N.Y.S.2d 609, 613 (App. Div. 1995). In *Ward*, the landowner was denied the right to construct a single-family dwelling in the bed of a mapped street. *Id.* at 609–10.

70. *Tahoe-Sierra*, 535 U.S. at 332.

71. *See supra* Part II.B.2.

72. For example, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 630–32 (2001), the Court could not apply the *Lucas* rule because there was only a 93.7% diminution in value, and this did not qualify as deprivation of *all* economically viable use of property.

the temporary nature of an official map reservation distinguishes it from other regulations, which generally have no expiration date. So, while the attributes of the official map, if viewed in isolation, might tempt courts to reject takings challenges, the ultimate consequence of most official maps—complete deprivation of essentially all property rights—could easily counterbalance that temptation. And as state court rulings have shown, the result of this dichotomy has been a complete lack of uniformity when it comes to official maps jurisprudence.

C. Temporary Takings Cases

The *Tahoe-Sierra* case comes closest to the fact patterns of official map cases because it also involved temporary regulatory takings.[73] One distinguishing factor would be the time of the restriction. Most moratoria are relatively short, whereas official maps generally involve longer periods of time.[74] In fact, the Court in *Tahoe-Sierra* said that a moratorium lasting longer than one year should be viewed with skepticism.[75] Another distinguishing factor is that a moratorium is "the suspension of a specific activity";[76] the suspension will end, freeing the owner from a government-imposed burden. On the contrary, official map regulations usually end with actual takings; landowners cannot be certain whether they will ever again be able to use their land as they please.

The current state of regulatory takings law is too unpredictable. Official map regulations are similar to takings cases, and thus courts have tried to follow regulatory takings precedents; however, this has not proven effective. Takings law is so complicated in the context of official maps that it justifies a fresh solution, and one that does not follow the traditional tests. Part IV explains why legislatures can better provide predictability and fairness to landowners than courts can.

73. In *Tahoe-Sierra*, 535 U.S. at 306, a planning agency enacted a moratorium that froze new development while the agency established a long-term plan. *See supra* Part II.B.3.

74. *See* cases cited *supra* note 25.

75. *Tahoe-Sierra*, 535 U.S. at 341.

76. BLACK'S LAW DICTIONARY 1101 (9th ed. 2009).

IV. THE INADEQUACY OF THE JUDICIAL SYSTEM

The failure of the regulatory takings doctrine indicates a need for more legislation in this area. A major reason that courts have been largely unsuccessful is that courts do not have the freedom to do what legislatures can do—design specific rules that are governed by state policy. Courts can only outline the contours of what is or is not constitutional. Often there are constitutional values that extend beyond the actual rules that courts will enforce. Thus, many state legislatures have responded with statutes when they have disagreed with the courts.[77]

For example, in *Kelo v. City of New London*, the Supreme Court affirmed the city's use of its eminent domain power to promote economic development.[78] While many landowners complained that this was unjust, the Court pointed out that its only role was to decide whether promoting economic development serves a "public purpose," and the Court ultimately concluded that it does.[79] The Court added that any state may place more stringent standards on its takings power.[80] After *Kelo*, many states recognized that courts do not always create workable or fair standards, so many states have created their own standards to increase protection for landowners.[81]

Several movements have ensued to tighten regulatory takings standards developed in the courts. These efforts "impose procedural steps to be followed in the adoption and application of land use regulations or establish new causes of action for landowners requiring compensation for any reduction [or at least a more modest reduction than required by courts] in property value."[82] For example, the state of Oregon enacted a statute that required compensation when a land use regulation caused *any* reduction in

77. CALLIES ET AL., *supra* note 6, at 387–88.

78. 545 U.S. 469 (2005).

79. *Id.* at 484.

80. *Id.* at 489 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.").

81. CALLIES ET AL., *supra* note 6, at 305 (explaining that 34 states had either amended their constitutions or enacted legislation in the aftermath of *Kelo*).

82. *Id.* at 387.

fair market value.[83] This statute has since been amended to be less radical, but it still offers landowners much more protection than the courts will.[84]

These state-enacted statutes are beneficial because they protect landowners and provide predictability. Justice Antonin Scalia has stated that "uncertainty has been regarded as incompatible with the Rule of Law."[85] He has continued on to say that "[p]redictability . . . is a needful characteristic of any law worthy of the name."[86] A statute that provides a specific formula for providing compensation to landowners will increase predictability in the law. If the statute provides compensation to all landowners that are regulated by an official map, each landowner and the local government will know what to expect—the landowner will receive compensation and the government will pay compensation. The unpredictability of the *Penn Central* test will be avoided as courts will not have to determine which landowners' investment-backed expectations or economic losses are sufficient to amount to a taking. The following section discusses a similar statute already in existence and its implications.

A. The New Jersey Statute

New Jersey has already experimented with a compensation statute in the official map context. New Jersey case law and statutes provide a great example of a state protecting the property rights of its citizens. In *Lomarch Corp. v. Mayor and Common Council of City of Englewood*,[87] a landowner applied for subdivision approval of his property.[88] While the application was pending, the city placed the land on the official map and reserved it for use as a park.[89] Pursuant to a New Jersey state statute, the ordinance prohibited the landowner from developing the land for a one-year period.[90] Before the landowner's subdivision application was approved, the landowner challenged the constitutionality of the state statute that allowed for

83. OR. REV. STAT. ANN. § 197.305 (West 2009).

84. *Id*.

85. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

86. *Id*.

87. 237 A.2d 881 (N.J. 1968).

88. *Id*. at 882.

89. *Id*. at 883.

90. *Id*.

prohibiting development of the land for one year without compensation.[91] The court upheld the statute but also stated that the statute was enacted with the intent to compensate the landowner during the freezing period.[92] The court held that "[t]he landowner should receive the value of an 'option' to purchase the land for the year. The 'option' price should, among other features, reflect the amount of taxes accruing during the 'option' period."[93]

After *Lomarch* was decided, the New Jersey legislature amended the statute in accordance with the decision. The court would no longer have to presume the intent to compensate because the new statute included a compensation requirement for actual loss during a reservation period.[94] New Jersey Statute 40:55D–44 exemplifies justness and fairness to a landowner who is regulated by an official map:

> If . . . the official map provides for the reservation of designated streets, public drainageways, flood control basins, or public areas within the proposed development . . . [t]he planning board may reserve the location [of designated streets or public areas] . . . for a period of 1 year after the approval of the final plat or within such further time as may be agreed to by the developer . . . .
>
> The developer shall be entitled to just compensation for actual loss found to be caused by such temporary reservation and deprivation of use. In such instance, unless a lesser amount has previously been mutually agreed upon, just compensation shall be deemed to be the fair market value of an option to purchase the land reserved for the period of reservation . . . .[95]

This New Jersey statute provides landowners with a remedy when deprived of the use of their land. If all states adopted a similar statute, it would resolve the difficulty of trying to decipher the regulatory takings cases in court. State legislatures have the discretion to use their own provisions to align with their state policy. For example, the New Jersey statute allows the planning board to reserve the land mapped on the official map for one year after the approval of the final plat, or longer if agreed upon by the

91. *Id.*
92. *Id.* at 884.
93. *Id.*
94. *See* N.J. STAT. ANN. § 40:55D–44 (West 2011).
95. *Id.*

landowner.[96] Understandably, other states may not want to set a time limit on a reservation because it may be years before it is necessary to build a future roadway. Instead, states may decide to allow reservations lasting many years and pay for the reservation while the landowner is deprived use of the land.

V. THE COMPENSATION REQUIREMENT

Legislatures must determine whether they want to compensate landowners who have building restrictions imposed on them by official maps. Requiring compensation is important because it requires the government to take the planning process seriously and promotes justice by protecting private individuals' property rights. Further, a statute that specifies what qualifies for compensation will increase predictability. However, predictability should not be the only reason for implementing a compensation statute because a rule that provides no compensation to landowners would be equally predictable. But offering no compensation to burdened landowners weakens property rights, which are strongly protected in the Constitution. Therefore, this Comment recommends that restricted landowners should be compensated.

A. Landowners Should Receive Compensation

Landowners whose land is restricted by an official map should be compensated because it is just and fair to do so. The Fifth Amendment requires the government to pay compensation to landowners whose land is taken by the government.[97] One benefit of providing compensation is that it will encourage local governments to take the planning process more seriously.[98] Official maps are

96. *Id.*

97. U.S. CONST. amend. V.

98. *See* San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) ("After all, if a policeman must know the Constitution, then why not a planner?"); First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 321–22 ("We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulation. But such consequences necessarily flow from any decision upholding a claim . . . designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'"); *see also supra* text accompanying note

required to be "precise, accurate and legally binding."[99] Through the process of adopting an official map, the government should direct studies to ensure that the land will be necessary for future public use.

Additionally, requiring compensation for landowners regulated by official maps will deter the government from attempting to freeze land values in bad faith[100] because the government will have to pay for the property during the reservation period. The government must not place regulations on property with no other purpose than to keep land values low until the government is ready to purchase the property.[101]

Further, property rights have been protected since the founding of America. The Framers valued property ownership as an unalienable right that represented freedom.[102] To support this freedom, the Fifth Amendment of the United States Constitution stands as a bulwark to protect individuals' property from being taken for public use without just compensation.[103] This requires the government to compensate landowners who have been deprived use of their property, especially if they have been singled out to bear a burden for the benefit of the community.[104] Landowners who are affected by official map provisions fit this category. For example, landowners who are unable to build on a future street are singled out, while the rest of the community is not affected by the official map but will likely benefit when the road is built. Therefore, the government should compensate these landowners in order to offer private individuals more property protection.

25 (discussing local governments that have allowed extremely long reservation periods, and thus little planning).

99. Kucirek & Beuscher, *supra* note 6, at 178–79.

100. *See* Joint Ventures, Inc. v. Dep't of Transp., 563 So. 2d 622, 626 (Fla. 1990).

101. Alan Romero, *Reducing Just Compensation for Anticipated Condemnations*, 21 J. LAND USE & ENVTL. L. 153, 162–63 (2006) (explaining that the government is "taking" the property if the regulation serves no purpose other than reducing the compensation that must be paid when the property is actually condemned).

102. Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627, 637–38 (1988).

103. U.S. CONST. amend. V.

104. *See* Fee, *supra* note 40, at 1007 ("The default 'bundle of rights' inherent in private property includes an affirmative 'right to use' one's private assets, which may not be denied without compensation. This right to use, however, is inherently bounded by the government's power to restrict an owner's conduct through general laws. The proper role of the Takings Clause is to require compensation in those circumstances where the government legitimately targets merely one or a few owners to bear a unique legal burden for the benefit of the general community.").

On the other hand, if state legislatures decided that no landowner affected by an official map will receive compensation during a reservation period, it would increase predictability. It would save the government and taxpayers' money, as compensating all landowners who are deprived of building on their land could be quite expensive. If a local government adopts an official map that affects many landowners, it could cause many claims at once and financially burden the local government. The up-front cost could be too burdensome.

But, depending on the state's statute, requiring the government to pay during the temporary reservation period could actually decrease the lump sum that the government would have to pay later on when the land is actually acquired. When the city adopts the official map, the city is planning on purchasing the property anyway, so it would actually relieve the financial burden by spreading out the cost over time.

Some states may require compensation to all landowners during the reservation period and may not allow the payments during the reservation period to be subtracted from the cost when the land is purchased. Again, in these instances the compensation during the temporary reservation will be quite low, so it should not be a great burden on the government to pay this compensation.

In the end, protecting the property of private individuals outweighs the government's ability to reserve land without paying for it, even if it is expensive.

B. How to Compensate

Legal scholars have continually debated the question of what constitutes "just compensation." Generally, the owner should be put in as good of a position as he or she would have been in had the land never been taken.[105] The owner's loss, not the taker's gain, is the basic measure of just compensation.[106] The generally accepted measure of recovery is the fair market value, or what a willing buyer would pay to a willing seller.[107] Others argue that just compensation should exceed fair market value when the government requires the

105. Olson v. United States, 292 U.S. 246, 255 (1934).

106. United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 281 (1943).

107. United States v. Miller, 317 U.S. 369, 373–74 (1943).

taking of one's home.[108] These methods, however, will not work well for official maps, so this Comment will propose a new compensation method. But first, a number of compensation methods will be explored along with the reasons they will not work for official maps.

1. Temporary regulatory takings

Courts use a variety of methods to compute compensation for temporary regulatory takings.[109] Just compensation for temporary takings should reflect the value of the property's use for the time period that the land was taken.[110] But the value should be less than the fair market value required for a permanent taking, because after the temporary taking the property is returned to the landowner with full beneficial use.[111] The following sections will outline several methods that courts use to determine just compensation for temporary takings. Exploring these various methods is important because municipalities occasionally do not follow through with official map provisions, which essentially means that the land was temporarily taken.

a. Fair rental value. One measure that has been used is the land's fair rental value, where the compensation is calculated as the supposed rental value the landowner would have received during the temporary reservation.[112] This method is generally only useful when the property already has an existing use; in contrast, most takings cases, including official maps, involve restrictions on future use of property.[113] Thus, courts and commentators discourage using the fair rental value method for undeveloped property because of "[t]he speculation involved in assigning a rental value for unimproved land."[114]

108. *See* John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 785 (2006).

109. *See* Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 515 (2010).

110. First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 319 (1987).

111. *See* Siegel & Meltz, *supra* note 109, at 511.

112. *See* Yuba Natural Res., Inc. v. United States, 904 F.2d 1577 (Fed. Cir. 1990); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978).

113. Siegel & Meltz, *supra* note 109, at 513.

114. *Id.* at 514.

b. Lost use. Another measure is lost use, or the amount the landowner would have expected to earn if the land was available for use.[115] This method may be helpful because it will limit recovery in instances where a landowner has no plans during the temporary restriction period to develop the land.

c. Option price. In *Lomarch,* the court determined compensation as an option price, or the value of an option to purchase the land during the temporary taking.[116] The option price measure provides several advantages: it reflects the property interest taken from the landowner, and because there is a market for options to purchase undeveloped land, the value can be compared to those options.[117] But, like other methods, the option price method still can be speculative in nature.

d. Before and after valuation. Another method to determine just compensation for temporary takings is the before and after valuation of the property.[118] Courts and commentators have openly criticized this method of valuation: "A moment's thought reveals that this standard corresponds only loosely, if at all, to the Supreme Court's call for a criterion based on the value of use during the restriction period."[119] Thus, it is rarely used.

2. Official maps

While the various methods determining just compensation for temporary regulatory takings[120] appear helpful, the problem with choosing any one of the temporary takings methods is that it is uncertain whether the official map regulation will in fact be a temporary regulation. For example, in *Lomarch*, after a one-year reservation period, the court decided to allow the landowner to subdivide the property.[121] The court ordered the city to pay the landowner the market value of an option to buy the land during that

115. *See* 520 E. 81st St. Assocs. v. New York, 780 N.E.2d 518 (N.Y. 2002).

116. *See* Lomarch Corp. v. Mayor of Englewood, 237 A.2d 881 (N.J. 1968).

117. *See* Siegel & Meltz, *supra* note 109, at 515–16; Joseph P. Mikitish, Note, *Measuring Damages for Temporary Regulatory Takings: Against Undue Formalism*, 32 ARIZ. L. REV. 985, 1001 (1990).

118. *See* Wheeler v. City of Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990).

119. Siegel & Meltz, *supra* note 109, at 515; *see also Wheeler*, 896 F.2d at 1351.

120. *See supra* Part V.B.1.

121. *Lomarch*, 237 A.2d at 884.

one year period.[122] In *Lomarch*, it was *after* the reservation period had ended that the court determined the method of compensation.[123] Official map regulations are intended to last until the government condemns the land. Thus, often the regulation will not be temporary, but will last until the property is physically taken from the landowner. For this reason, this Comment proposes a new method to compensate landowners affected by official map reservations so that landowners will be fairly dealt with, whether the land is returned to them after the reservation period or whether the government buys the land, and so that landowners can receive compensation immediately instead of suing for compensation years later when the government decides not to purchase the property.

This Comment proposes a new possible compensation scenario that is tailored to official maps.[124] The proposed compensation method is essentially a hybrid of the temporary takings methods.[125]

VI. A PROPOSED SOLUTION

This section describes in detail a proposed solution for compensating landowners regulated by an official map. The proposed solution includes who will be compensated, how compensation will be decided, and other details that may limit the compensation requirement.

The best solution to protect landowners who cannot use their land as they desire because their land is plotted on an official map is to compensate them by statute for the property taken during the restriction period. This compensation will not be the entire value of the land, but rather a value far less than the actual purchase price. Compensation is necessary because local governments need to take the planning process seriously when adopting official maps. Obviously, it is of utmost importance to allow a community to plan for future growth, including future roadways, but conversely, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[126] Thus, state statutes

122. *Id.*

123. *Id.*

124. The solution proposed in this Comment is just that: a proposal. Each state has several alternatives to choose from in adopting its compensation statute.

125. *See infra* Part VI.B for a detailed analysis.

126. Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

can protect landowners by requiring municipalities to compensate landowners for official map regulation.

A. Who Will Be Compensated

In this proposed method of compensation, the local government will pay a low price to every landowner affected by the reservation—whether or not the landowner is burdened by the regulation. This will deter the government from reserving land in a haphazard manner, but at the same time the compensation will be low enough that the government will still be willing to pay the landowner and reserve the land.

A valid criticism of a state statute that requires the government to compensate any landowner whose land is restricted by an official map is that some landowners will continue to have beneficial use of their land even with the restriction in place. Some landowners might not plan on requesting a building permit for their land in the bed of a mapped street. An official map regulation merely restricts new development on land plotted on the official map; it does not restrict the owner from using the land for any other purpose.[127] For example, if the landowner lives in a house on the bed of a mapped street, this landowner will not be affected by the official map regulation because the house is already built and will be paid for when the government uses its eminent domain power to buy the property. The same result applies for land that is used for agriculture; the owner can continue to use the land for agriculture and will not be affected by the official map regulation. Each state can decide whether to compensate all landowners with property on the official map or only those who are burdened by the regulation. However, this Comment recommends that every landowner with restrictions on the use of her land be entitled to compensation.

This section now discusses two valid options to determine who should be compensated. The first option, which this Comment endorses, holds that regardless of whether landowners plan on building on their property, the official map regulation still deprives these landowners use of their property, and thus, these landowners should be compensated. The rationales behind this solution are that the government should take the planning process seriously and that private property deserves more protection. The compensation

127. *See* Kucirek & Beuscher, *supra* note 6.

offered to all landowners affected should be low enough that it will not greatly burden the government, but high enough to discourage governments from restricting landowners if they do not have a well-calculated plan.

The second option is based on the argument that it would be unreasonable to compensate landowners who are not negatively affected by the official map regulation. Thus, a state could choose to adopt a statute that requires the landowner to file a claim showing their proposed plans to use their land and how the regulation burdens them. Those landowners that are using their land for agriculture would not need compensation because they are still getting full use out of the land. They would still get paid fair-market value when the government condemns the land, but there would be no reason to pay them during the reservation period if they are not burdened. Either of the two options discussed above would be permissible and could be chosen based on the needs of the state; however, this Comment favors the first option.

B. How Compensation Will Be Paid

Several methods of compensation have been discussed in this Comment. There are generally two different compensation methods that this Comment proposes as valid: one method is for the landowner to show the actual damages (lost use) caused by a regulation, and the other method is a conceptual method where an appraiser provides an estimate for the market value of the property and pays the landowner a proportion of that estimate. While both of these methods are valid, this Comment proposes a hybrid method that is preferable.

The actual damages method is beneficial because it allows burdened landowners to take the initiative to protect their property rights. It puts the burden on the landowner to come forward with a claim; thus, it may reduce compensation, because not everyone will come forward with a claim of actual damages. But the actual damages method is also problematic because it sometimes leads to litigation.

The fair market value method is beneficial because it provides clarity: all landowners know they will be paid according to the market value of their property. This method is also fair because it protects all landowners whose land is restricted. But this method of compensation may be concerning because it will often

overcompensate a landowner. This Comment proposes a hybrid solution that captures the advantages from each of the methods.

This Comment proposes that the landowner should be compensated per year of reservation, and the compensation should be determined as one percent of the land value per year. The government would also be required to notify and offer compensation to the landowners whose properties are on the official map. After the government notifies the landowners, each landowner would carry the responsibility to file a claim with the city to receive compensation.

The state would be wise to adopt a statute that provides compensation only after the landowner comes forward with the claim, meaning that the compensation period would not start at the time the official map was adopted but rather when the landowner files the claim. In *Hernandez v. City of Lafayette*, the Fifth Circuit held that a regulation does not become a taking until the municipality has had reasonable time to review the regulation after the landowner's claim.[128] And the Supreme Court has held that "no constitutional violation occurs until just compensation has been denied."[129] Others have explained the benefits and policy behind delaying the date of a taking:

> Delaying the effective date of the taking until a landowner has sought and been denied administrative relief limits compensation awards and avoids rewarding landowners who are not diligent in protecting their rights: A landowner who waits until a year after the enactment of a regulation to challenge it should not be rewarded for waiting.[130]

The *Hernandez* court further reasoned that landowner delays in seeking compensation will increase the lump sum of the compensation award and subject the government to unforeseen financial liability.[131]

Further, the government should offer the initial estimate of the land value, but the landowner should be able to challenge this

128. 643 F.2d 1188 (5th Cir. Unit A May 1981).

129. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 n.13 (1985). *But see* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting) (arguing that a taking occurred at the time the statute was enacted).

130. J. Margaret Tretbar, Comment, *Calculating Compensation for Temporary Regulatory Takings*, 42 U. KAN. L. REV. 201, 214 (1993).

131. *Hernandez*, 643 F.2d at 1200–01.

estimate if the landowner believes it is too low. The burden should also be on the landowner to prove that the land value is higher than the value the government proposed. The ability of the landowner to litigate if the government is being unfair will likely keep the government honest, since the government also wants to avoid litigation costs.

While all landowners that file a claim will receive the low compensation amount of one percent of their land value, other landowners that feel particularly burdened by the reservation should be permitted to prove actual damages and receive greater compensation. Conversely, the government should have the opportunity to prove that the official map has increased the market value of the landowner's property, and thus take into consideration that benefit and reduce the amount of cash compensation accordingly.

In many instances, a proposed road or highway will increase the value of a landowner's property that abuts the road. The government should thus be permitted to prove that it increases the market value of the landowner's land, reducing the amount of compensation necessary. In *U.S. v. Miller,* the Court held that "if [a] taking [of a portion of a landowner's property] has in fact benefitted the remainder the benefit may be set off against the value of the land taken."[132] This applies to official maps because it is likely that the location of a future road or highway can increase land values via the future prospect of profits along that front.

C. Short-Term Reservations

The proposed solution also includes an exception for short-term reservation periods. After the *Lomarch* decision and the amendment to the New Jersey compensation statute, a New Jersey court held that a 120-day reservation period would not entitle a landowner to compensation.[133] Similarly, the Supreme Court in *First English* held that normal delays in administrative proceedings do not amount to a

132. United States. v. Miller, 317 U.S. 369, 376 (1943); *see also* 33 U.S.C. § 595 (2006) (explaining that those in charge of valuing compensation "shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement").

133. Kingston E. Realty Co. v. New Jersey *ex. rel.* Comm'r of Transp., 336 A.2d 40, 45 (N.J. Super. Ct. App. Div. 1975).

taking.[134] So the process of government decision-making, though it may decrease land value, can be viewed as an "incident[] of ownership . . . [and] cannot be considered as a 'taking' in the constitutional sense."[135]

For example, in *Ward v. Bennett,* the court declared that a city does have the power to temporarily restrict land use without compensation in order to conduct studies toward a comprehensive regulatory scheme as long as the duration of the temporary restriction is reasonable.[136] Though the court did not state what a reasonable duration would be, the Supreme Court in *Tahoe-Sierra* mentioned that a temporary restriction greater than one year should be examined with greater scrutiny.[137]

Thus, this Comment proposes that the city should have up to one year to reserve property, without compensation, on the official map as long as the city is actively planning during this time period. Once the one year period ends or if the city is merely sitting on the land, the compensation period would begin. The landowner would have the burden to ensure that the city is actively planning during the one year reservation period.

In summary, this proposed solution works to strike a fair balance between both the landowners and the government. The proposed statute tends to favor the landowners and property rights in general, in that *every* landowner with property on the official map can receive compensation. On the other hand, the proposal favors the government with the provision that allows the government one year of active planning without a compensation requirement.

134. First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 321 (1987).

135. Tretbar, *supra* note 130, at 206 (alterations in original) (internal quotation marks omitted). *But see id.* at 207 ("[T]he effect of an ultimately invalid regulation prohibiting development of property held for future use is often simply a delay in development or an impairment of the landowner's ability to plan for future development. This scenario presents the basis for some commentators' claims that compensation for temporary regulatory takings in general will result in 'windfalls' to affected landowners. Indeed, the temporary diminution in value of a parcel of property may be viewed as a mere fluctuation when viewed in retrospect after the regulation has been rescinded. This perspective is flawed, however, because it fails to take into account the position of the landowner when the regulation was enacted or when the landowner applied for a development permit." (citations omitted)).

136. 625 N.Y.S.2d 609, 613 (App. Div. 1995).

137. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 341 (2002).

D. Other Relevant Questions

The complexity of official maps may raise several other questions that have not yet been considered in this Comment. This section discusses these questions along with their implications and solutions.

1. Set-back regulations

Many official maps incorporate not only future streets, but also future widening of current streets as well. A set-back restriction requires the landowner to keep property a specified distance from the edge of the roadway. The Supreme Court upheld the constitutionality of set-back regulations in 1927.[138]

Similarly, in *Mayer v. Dade County,* the Supreme Court of Florida upheld a set-back provision that precluded the landowners from constructing a hospital on their property.[139] The set-back regulation in that case did not provide ample space for a hospital, but the court held that because there were many other profitable uses of the land, it would not amount to a taking.[140] On the other hand, the Florida Supreme Court has also held that a set-back regulation prohibiting the only use to which a property has been adapted is unconstitutional.[141]

Set-back ordinances serve many purposes, such as preserving visibility for traffic safety and providing room for fire-fighting access.[142] Set-back restrictions also create an aesthetically pleasing look for a neighborhood.[143] In *Mahon,* the Supreme Court held that to justify exercising the police power, there should be "'an average reciprocity of advantage' as between the owner of the property restricted and the rest of the community."[144] Clearly, a set-back restriction does not single a landowner out, but restricts all landowners on a street for the benefit of the landowners as a whole.

138. Gorieb v. Fox, 274 U.S. 603, 604 (1927).

139. 82 So. 2d 513, 519 (Fla. 1955).

140. *Id.*

141. *See* Ocean Villa Apartments, Inc. v. City of Fort Lauderdale, 70 So. 2d 901, 902–03 (Fla. 1954).

142. CALLIES ET AL., *supra* note 6, at 86.

143. *Id.*

144. Pa. Coal Co. v. Mahon, 260 U.S. 393, 422 (1922).

Further, many zoning ordinances already require landowners to abide by set-back restrictions.[145] A set-back restriction in an official map should not be any different. Therefore, set-back restrictions should be valid without a compensation requirement.

2. Unforeseen growth changes

Critics may argue that providing compensation to landowners regulated by an official map will not work because governments need the freedom to change their plans without incurring high costs in the meantime. Given the unpredictable nature of both urban growth and economic growth and decline, it is impossible for local governments to ever know for sure if they will actually follow through on their official map or not. To make the local government pay compensation every time they adopt an official map is akin to punishing them for not being able to see the future.

Others may argue that state statutes like New Jersey's will lock governments into their initial decisions, forcing them to stick with a plan that turned out to be less than ideal, even if they could change it to something much better later. Local governments will be reluctant to fix planning mistakes because they do not want the compensation paid in the meantime to be wasted.

While this is a valid criticism, it does not overcome the benefits of a compensation statute. Again, the local government will already be saving money from not having to litigate every case, and it has one year to actively plan without compensation, which should be sufficient time to decide whether the plan is feasible. Further, even if the government sticks with original planning decisions that later seem imperfect, a compensation statute will still be beneficial for several reasons. First, if the government thought the plan was a good enough idea to put it on the official map and start paying compensation, it is doubtful that circumstances will have changed so much that it would later become unworkable. Perhaps a new plan may be a little better for future growth patterns, but whatever slight advantages might be gained from allowing the government to change its plans haphazardly does not seem to outweigh the damage done to private property rights—which should be among the government's highest priorities, as demonstrated in the Declaration

145. Kucirek & Beuscher, *supra* note 6.

of Independence and the Fifth Amendment.[146] Second, it is likely that local land use decisions like those included in an official map will actually help shape development and growth. Telling the public where a road is going to be, for example, will likely influence developers' decisions about where to build businesses and homes, and those businesses and homes will be designed to take advantage of that road and help reinforce the government's decision.

VII. CONCLUSION

The unpredictability of official maps cases has been a problem for decades. Courts have had trouble, as they have examined the facts on a case-by-case basis, determining when an official map regulation qualifies as a regulatory taking. The Supreme Court takings cases have not served as helpful guidelines in determining official maps cases, so it is time to look for a new solution that can provide predictability and fairness.

State legislatures can help dissipate the trouble that courts have had in deciding official maps cases by adopting statutes that provide compensation to landowners affected by official map regulations. Several benefits will spring from a statute providing compensation: the government will take the planning process more seriously, there will be a reduction in litigation, private property will receive greater protection, and there will be more predictability in the law. State legislatures, therefore, should eliminate confusion and promote justice by enacting official map legislation.

Trent Andrews[*]

146. U.S. CONST. amend. V; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

* J.D. candidate, April 2012, J. Reuben Clark Law School, Brigham Young University.