CHAPTER 13

JUST COMPENSATION

I. Introduction

The trial of a regulatory takings claim is divided into two phases. First, the court determines whether the agency is liable for a regulatory taking. Second, if the agency is liable, the court must decide what amount of compensation is "just." In most states, the question of liability is tried to a judge, unless the government agrees to a jury. *See* Chapter 12. In contrast, in virtually every state, the plaintiff has a right to have a jury determine the amount of damages.

To this point, this Handbook has focused exclusively on explaining why regulatory takings claims usually do not proceed beyond the liability

phase. This chapter turns to the myriad issues raised in the unlikely event that the government is found liable for a taking. The chapter begins with the Supreme Court's ruling in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), that money damages are the appropriate remedy for regulatory takings. The bulk of the chapter discusses the measure of damages for temporary and permanent takings. The discussion places special emphasis on techniques to avoid an excessive award of damages against the agency.

We place an important caveat on this discussion. Liability in regulatory takings cases is still quite rare, and settlements are often reached in those cases in which liability is found. Thus, the law of regulatory takings damages, particularly damages for so-called temporary takings, is quite unsettled. *See Lopes v. City of Peabody*, 718 N.E.2d. 846, (Mass. 1999) ("[T]he law surrounding the basic measure of damages for temporary regulatory takings is relatively new and far from settled."). Research into local case law on damages and creativity in legal argument is particularly important in this area of the law.

II. *First English* and the Money Damages Remedy

First English is the fundamental Supreme Court decision regarding damages for regulatory takings. Before *First English*, certain courts, including the California Supreme Court, ruled that money damages were not available for violations of the Takings Clause. *See Agins v. Tiburon*, 598 P.2d 25, 30-31 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980). The property owner's only legal recourse in these jurisdictions was to ask a court to invalidate the government action.

In *First English*, the Supreme Court overruled the California Supreme Court, holding that if a regulation effects a taking of property, then the government may either rescind the regulation or leave it in place. If the government elects to rescind the regulation, then the government must pay just compensation for the temporary taking of the property from the date the government imposed the regulation until its removal. *See First English*, 482 U.S. at 318-20 & n.10; *Lucas v. South Carolina Coastal Council*, 505 U.S.

1003, 1031 n.17 (1992). If the government chooses to leave the regulation in place, then it must pay the owner just compensation for the permanent taking of the property, measured by the full market value at the time the regulation was first imposed. *See First English*, 482 U.S. at 318-20.

Two holdings of *First English* are crucially important in analyzing a regulatory takings damages claim. First, if a court concludes that the government action has taken private property by regulation, then money damages are mandatory. *See id.* Mere invalidation of the regulation is not a constitutionally adequate remedy, and, indeed, is not a remedy typically available to the plaintiff. *See id.* at 321; *see also* Text Block 13.1. The *First English* decision raised the stakes in regulatory takings cases.

Second, the expiration of the regulation, the agency's repeal of legislation, or its rescission of an administrative action limits the government's liability for damages to the period during which the regulation was effective. *See First English*, 482 U.S. at 317. Where the "taking" already effected is reversible, the Takings Clause does not empower a court to order the government to condemn property and pay its full fair market value. *See id.* The agency retains sole authority to elect whether to rescind the unconstitutional regulation and pay damages for a temporary taking, or leave the regulation in place and pay damages for a permanent taking. *See id.; see also Yuba Natural Resources, Inc. v. United States*, 821 F.2d 638, 642 (Fed. Cir. 1987); *Tahoe-Sierra Preservation Council Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1247 (D. Nev. 1999) (on appeal).

The right of the government to elect to rescind the offending regulation raises an interesting procedural issue. If the court finds that a regulation effects a taking in the liability phase of a trial, the court should consider adjourning the trial to allow the agency sufficient time to enact legislation repealing the regulation, or to reconsider the application in an adjudicatory proceeding.[189] Once this process is completed, the trial presumably would be reconvened to determine whether the taking is temporary or permanent in light of the agency's action, and the amount of just compensation. The time necessary for the agency to determine whether to repeal the regulation

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[189] Of course, the government should make any legislative repeal or adjudicative decision subject to its right to appeal the takings verdict.

Text Block 13.1

The Availability of Equitable Remedies

As discussed above, courts may not require a state or local government to exercise their power of eminent domain. Thus, when a court finds a taking, the government has a choice to either exercise eminent domain and acquire the property, or repeal the offending statute and pay temporary damages. Here we address the other side of this equation: May a court order invalidation and thereby prevent a local government from exercising eminent domain?

The answer is no. Where the government action serves a public purpose and money damages are available, the Supreme Court has consistently held that money damages is the only remedy for a taking of real estate. The Court stated this point most clearly in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (citations omitted), where it held: "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." The Court reiterated the point two years later in *First English*, stating that: The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English*, 482 U.S. at 814; *see also Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990).

The only exception involves cases where money damages are unavailable. In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538 (1998), Eastern Enterprises challenged provisions of the Coal Industry Retiree Health Benefit Act ("the Coal Act"), which required coal companies to pay money into a fund operated by a

could consume several months or even longer. Although this process follows logically from *First English*, there is no specific precedent to guide the practitioner.

Because damages and interest mount during the period an agency keeps in place a regulation deemed a taking, an agency should act quickly once it decides that it will respond to a takings verdict by repealing the challenged regulation. *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1200 (8th Cir. 1983) ("*Nemmers I*"), illustrates the dangers of unnecessary delay. In that case, the Eighth Circuit found that the plaintiff had a vested right to an industrial zoning classification that was taken by the city. On remand,

private entity to fund the pensions of former employees, some of whom had not been employed by the companies for more than 10 years. *See id.* at 503. A four-justice plurality concluded that the Act caused a taking. In searching for the proper remedy, the plurality recognized that prior cases had found money damages to be the exclusive remedy under the Takings Clause. *See id.* The plurality concluded, however, that because the Coal Act required the coal companies to pay money into a fund operated by a private entity, money damages would make no sense and thus were unavailable under the Tucker Act (the statute that generally authorizes damage claims against the United States). *See id.* at 521-22. The plurality thus approved declaratory relief and an injunction relieving the plaintiffs of the duty to pay money into the fund. *See id.*[190]

This exception should be largely irrelevant in takings challenges to land use restrictions. As pointed out in Chapter 4, after *First English*, every state now appears to afford a property owner a monetary remedy for a taking under the state constitution or state statute. The availability of monetary damages for a regulatory taking by a state or local government should preclude equitable relief in most land use cases. Under *Eastern Enterprises*, injunctive relief might be appropriate if a court determines that an impact fee or other monetary assessment constitutes a taking.

In cases involving a permit condition requiring a dedication of land, the government might readily accept invalidation as a remedy if the condition is deemed to be a taking, but even here the government should have the right to pay compensation and retain the dedication if it so chooses. Under no circumstances should the court order that the permit be issued without the offending condition, for this would deprive the government of its right to deny the permit altogether.

the parties stipulated that the city would rezone the land to industrial upon entry of judgment in the district court. *See Nemmers v. City of Dubuque*, 764 F.2d 502, 503-04 & n.1 (8th Cir. 1985) ("*Nemmers II*"). The opinion offers no explanation as to why the city waited until judgment in the district

[190] *See also* Hodel v. Irving, 481 U.S. 704 (1987) (invalidating a federal statute on takings clause grounds without even discussing the availability of money damages); Babbitt v. Youpee, 519 U.S. 234, 239-45 (1997) (same). *But see* Bay View, Inc. v. Ahtna, Inc., 105 F.3d 1281, 1286 (9th Cir. 1997) (acknowledging U.S. Supreme Court decisions awarding equitable relief for takings, but concluding that exclusive form of relief for takings against federal government is monetary damages).

court to rezone the property, when the city could have reduced the period of the temporary taking and the amount of damages by rezoning the property immediately after the Eighth Circuit's decision had become final.

III. Just Compensation for Permanent Takings

After declaring that a regulation constitutes a taking, the court is obligated to put the landowner in "the same position monetarily as he would have occupied if his property had not been taken." *United States v. Reynolds*, 397 U.S. 14, 15-16 (1970). The measure of just compensation for a permanent taking is the fair market value of the property immediately prior to the imposition of the confiscatory regulation, plus interest from the date of the taking to the date of payment, minus any rents or profits the owner has obtained from the property since the time of its taking.[191]

A finding that a regulation has effected a permanent regulatory taking should be premised on the conclusion that the property has been rendered virtually without market value. *See* Chapter 7. As a result, the fair market value of the property before and after the imposition of the regulation should be litigated as part of the liability phase. This finding by the Court may also supply the answer to the question of the amount of compensation. *See Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 156-61 (1990) (the difference between the before ($2,658,000) and after ($12,500) values constituted "drastic economic impact," leading to finding of liability for a taking; same values adopted as measure of damages for permanent taking), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). However, some courts may find a taking without a careful assessment of the diminution in value resulting from the regulation. And, in other cases, government counsel will take issue with the methods or results of the plaintiff's value determinations in the liability phase. In either case, government counsel should be prepared to litigate the issue of fair market value in the damages phase.

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[191] *See* Kirby Forest Indus. v. United States, 467 U.S. 1, 10 (1984); United States v. 131.68 Acres of Land, 695 F.2d 872, 874-75 (5th Cir. 1983); *see also* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 12.02[1] (Matther Bender ed. 1989).

A. What Is and Is Not "Fair Market Value"

Fair market value is the price that would be paid for the property at issue by a willing, informed, but unpressured buyer to an unpressured and informed seller. *United States v. Miller*, 317 U.S. 369, 374-75 (1943). The question of what is fair market value has been litigated extensively in eminent domain cases. These cases establish several important rules to guide government counsel:

- Lost profits, lost opportunities, lost business goodwill, and other consequential damages are speculative and generally not recoverable in an inverse condemnation action.[192]

- The amount of compensation awarded must be "just" to both the property owner and the public.[193]

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[192] United States v. General Motors Corp., 323 U.S. 373, 380 (1945) ("That which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage."); *see also* Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990) (where regulation allegedly took mineral rights, cost of moving mining machinery not recoverable); Hellenic Ctr., Inc. v. Washington Metro Area Transit Auth., 815 F.2d 982, 984 (4th Cir. 1987) ("ordinarily, indirect costs to the owner resulting from the taking . . . are not part of the just compensation which the owner is entitled to recover."); United States v. 1735 N. Lynn St., 676 F. Supp. 693, 701 (E.D. Va. 1987) (damages for frustration of renovation and rental plans not recoverable because "the Fifth Amendment allows only fair market value, it does not guarantee a return on investment."); Florida v. Mid-Florida Growers, Inc., 541 So.2d 1243, 1250 (Fla. Dist. Ct. App. 1989) ("The constitutional right to receive full compensation under eminent domain is not a right to receive general damages.").

Although consequential damages are generally not recoverable, they may be recoverable in certain circumstances. *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 10-12 (1949) (where the government intends to carry on the claimant's business and the claimant could not continue his business in another location, goodwill and other damages are recoverable); Hillman v. DOT, 359 S.E.2d 637, 639 (Ga. 1987) (only consequential damages that are special to the condemnee and not suffered by the public in general are recoverable); In re Grand Haven Highway, 97 N.W.2d 748, 757 (Mich. 1959) (allowing compensation for the costs of removing fixtures from a building after a government taking); W.H. Pugh Coal Co. v. Wisconsin, 460 N.W.2d 787, 791 (Wis. Ct. App. 1990) ("In certain instances . . . compensation based solely on market value is inadequate and lost rent and other consequential damages may be awarded.").

[193] *See* United States v. Miller, 317 U.S. 369, 374-75 (1943).

- The special value of the property to the government is irrelevant.[194]

- The special value of the property to the owner is also irrelevant, and thus there is no allowance for the payment of the unique replacement value of the land.[195]

- The property owner bears the burden of proving the value of the parcel taken.[196]

A determination of the fair market value of land is usually based on an appraisal. An appraisal is a subjective "opinion of value;" it is not a mechanical or scientific process. Thus, the agency's case will stand or fall with the credibility of its appraisal. The public agency should therefore take great care in the selection of an appraiser and supporting experts. We have included important practice tips on (1) obtaining a fair and accurate appraisal, and (2) cross-examining an opponent's appraiser in two appendices that follow Chapter 9.

B. Transfer of Title

Payment of just compensation for a permanent taking should be accompanied by a transfer of title from the property owner to the government. Unless the property is contaminated or increases the agency's exposure to liability, the agency should demand that the owner

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[194] *See* United States v. Cors, 337 U.S. 325, 332-33 (1949).

[195] *See* United States v. 50 Acres of Land, 469 U.S. 24, 33-36 (1984); United States v. 564.54 Acres of Land, More or Less Situated in Monroe and Pike Counties, 441 U.S. 506, 514 (1979) ("It is not at all unusual that property uniquely adapted to the owner's use has a market value on condemnation which falls far short of enabling the owner to preserve that use").

[196] *See* United States ex rel. Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 273-74 (1943).

convey title to the property to the agency at the time just compensation for the taking is paid.[197]

C. Punitive Damages and Attorneys' Fees

Punitive damages for regulatory takings are not recoverable against local public agencies under either 42 U.S.C. § 1983 or state law. *See* CAL. GOV'T CODE § 818 (West 1999) (punitive damages are not recoverable against California public entities); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (punitive damages are not available under 42 U.S.C. § 1983). Section 1983 does permit recovery of punitive damages against local government officials, however, for conduct involving "evil motive or intent." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *see also Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir. 1991).

The rare plaintiff that prevails in a regulatory takings case brought under § 1983 may recover attorneys' fees under 42 U.S.C. § 1988. *See* 42 U.S.C. § 1988(b) (1994). Some states also allow prevailing parties in inverse condemnation cases to recover attorneys' fees. *See* CAL. CODE CIV. PRO. § 1036 (West 1999).

D. Transferable Development Credits and Government Benefits

Government regulatory agencies sometimes grant transferable development credits ("TDCs") to property owners as part of a land use regulatory program. As discussed in Chapter 7, there is some controversy as to whether a grant of TDCs will prevent a regulation that otherwise renders property valueless from constituting a regulatory taking. There is little doubt, however, that TDCs and other non-monetary forms of compensation can constitute just compensation and that the value of these

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[197] For example, following the Supreme Court's remand of Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997), the Tahoe Regional Planning Agency entered into a settlement with Suitum providing that the Agency pay Suitum just compensation, and that Suitum transfer title to her property to the Agency. The source for this information is J. Matthew Rodrigues, Senior Assistant Attorney General, Land Law Section, of the California Department of Justice.

benefits should be deducted from the property owner's damages in the event that the owner establishes liability for a taking.[198] This principle applies to permanent and temporary takings.

IV. Just Compensation for Temporary Takings

The goal in the damages phase of a temporary taking case is to ascertain the value of the lost use of the property during the period in which the regulation was in effect. *First English*, 482 U.S. at 319. Such damages start to accumulate from the date that the regulation is imposed on the property; for legislation, the date on which the law prevents development of the property, *see Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1559 (Fed. Cir. 1985); for an administrative decision, the date the decision denying a development application is final. *See First English*, 482 U.S. at 317-19; *see also Lucas*, 505 U.S. at 1014; *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1985). The taking ends when the government repeals the legislation, rescinds the administrative decision, or grants a permit. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting); *Corn v. City of Lauderdale Lakes*, 771 F. Supp. 1557, 1572 (S.D. Fla. 1991).

For temporary physical takings the measure of damages is usually the fair rental value of the property during the period of the taking.[199] A series

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[198] *See* Douglas T. Kendall & James E. Ryan, *"Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan*, 81 VA. L. REV. 1801, 1837-1843 (1995); *see also* Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 748-49 (1997) (Scalia, J., concurring) (recognizing that TDCs can provide just compensation); *see also* Hendler v. United States, 175 F.3d 1374, 1381 (Fed. Cir. 1999) (special benefits received by property owner must be deducted from award of compensation). *See* Chapter 10, Section IV above for a more detailed discussion of *Hendler* and damages in physical occupation takings cases.

[199] *See Kimball*, 338 U.S. at 7; *General Motors Corp.*, 323 U.S. at 383; Yuba Natural Resources v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990); Heydt v. United States, 38 Fed. Cl. 286, 314 (1997); Sintra, Inc. v. City of Seattle, 935 P.2d 555, 584 (Wash. 1997); W.H. Pugh Coal Co. v. Wisconsin, 460 N.W.2d 787, 791 (Wis. Ct. App. 1990).

of post-World War II cases dealing with temporary physical takings provide some guidance for applying the fair rental value test.[200]

Unfortunately, these cases have little application to temporary regulatory takings. To prevail in a regulatory takings case, a landowner must generally show that its land is unused and rendered useless by a regulatory measure. There is generally not a rental market in existence for vacant land, and courts and commentators have rejected the rental value method of estimating damages for such properties, deeming it too speculative or too favorable to landowners. *See City of Austin v. Teague*, 570 S.W.2d 389, 395 (Tex. 1978); J. Margaret Tretbar, *Calculating Compensation for Temporary Regulatory Takings,* 42 KAN. L. REV. 201, 221-225 (1993). Courts have thus employed a variety of different approaches for measuring temporary takings damages.

Some of the approaches adopted by courts around the country include calculating: (1) the difference between the fair market value of the property before the regulation was enacted and the fair market value as of the date the regulation was rescinded or invalidated;[201] (2) the difference between the fair market value of the property just before the regulation's enactment and just after its enactment, multiplied by an annual rate of return;[202] (3) the fair market value of a fictional option to purchase the property during the period of the temporary taking;[203] or (4) the benefit to the government of the

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[200] *See Kimball*, 338 U.S. 1; *General Motors Corp.*, 323 U.S. at 381-83 (1946); United States v. Petty Motor Co., 327 U.S. 372, 373-79 (1946).

[201] *See* Washington Mkt. Enters., Inc. v. City of Trenton, 343 A.2d 408, 416-17 (N.J. 1975). *But see Kimball*,, 338 U.S. at 7 (rejecting this method in the context of a temporary physical taking); Wheeler v. City of Pleasant Grove, 833 F.2d. 267, 271 n.5 (11th Cir. 1987) (rejecting this method for temporary regulatory taking).

[202] *See* Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985); Herrington v. County of Sonoma, 790 F. Supp. 909, 915-16 (N.D. Cal. 1991), *aff'd*, 12 F.3d 901 (9th Cir. 1993) ("*Herrington II*").

[203] *See* Lomarch Corp. v. Mayor of Englewood, 237 A.2d 881, 884 (N.J. 1968).

restriction expressed in monetary terms.[204] Some courts have refused to limit the measure of damages for temporary takings to any one test, adopting what is called the flexible approach based on the circumstances of the property on a case-by-case basis.[205]

We leave a detailed discussion of each of these potential methods to other commentators.[206] Government counsel facing a damages trial in a temporary regulatory takings case should consider each possible approach and if, based on the individual circumstances of a particular case, one of these approaches would be more appropriate, the agency lawyer should request that the agency's expert witnesses conduct a valuation analysis of damages using this chosen method.

We want to highlight, however, the district court's application of the "rate of return" method in *Herrington v. County of Sonoma,* 790 F.Supp. 909, 915-16 (N.D. Cal. 1991), *aff'd*, 12 F.3d 901 (9th Cir. 1993) (*"Herrington II"*). While perhaps not the final word on calculating damages for temporary takings, *Herrington* provides the most detailed and thoughtful analysis of the issue to date.

A. The Rate of Return Approach

The rate of return approach is perhaps the most commonly used approach for computing damages for a temporary regulatory taking. Courts employing the method estimate "the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction." *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th

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[204] Corrigan v. City of Scottsdale, 720 P.2d 513, 518 (Ariz. 1986) (citing Donald G. Hagman *Temporary or Interim Damages Awards in Land Use Control Cases* in 1982 ZONING & PLANNING LAW HANDBOOK, at 218-27; *see also* Poirier v. Grand Blanc Township, 481 N.W.2d 762, 766 (Mich. Ct. App. 1992).

[205] Poirier v. Grand Blanc Township, 481 N.W.2d 762, 766 (Mich. Ct. App. 1992) (recognizing multiple tests to measure temporary takings damages); Corrigan v. City of Scottsdale, 720 P.2d 513, 518 (Ariz. 1986) (same).

[206] *See* J. Margaret Tretbar, *Calculating Compensation for Temporary Regulatory Takings*, 42 KAN. L. REV. 201 (1993).

Cir. 1987). The test takes into account the "injury to the property's potential for producing income or an expected profit." *Id.* at 271; *see also Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (1994) (market value, by definition, reflects estimation of future profits and development costs).

The rate of return approach was first applied by the Eighth Circuit in *Nemmers II*. In *Nemmers*, the City of Dubuque annexed 55 acres of Nemmers' 135-acre parcel and downzoned that portion from industrial use to agricultural and residential use. *See Nemmers II*, 764 F.2d at 503. Before finalization of the annexation, Nemmers invested in the development of an industrial park on the annexed portion of the property, and the Court of Appeals held that Nemmers had a vested right to the industrial zoning. *See Nemmers I*, 716 F.2d at 1200. Following remand and a second appeal, the Eighth Circuit held in *Nemmers II* that damages should be measured by the interest at the then prevailing rate of 15% per year on the difference in market value of the property zoned industrial (the before value) and zoned agricultural and residential (the after value) from the date the city downzoned the property to the date the district court entered judgment for Nemmers. *See Nemmers II*, 764 F.2d at 504-05.

B. *Herrington v. County of Sonoma*

Herrington I, 790 F. Supp. 909, a due process case, illustrates how a court should properly apply the rate of return method. In *Herrington*, the plaintiffs contended that the highest and best use of their vacant property was for a 32-lot subdivision. *See id.* at 911, 914. They attempted to secure approval for that density in 1979, but the county denied the application, finding that it was inconsistent with the county's general plan. *See id.* at 914. Then, in 1980, the county downzoned the property, limiting any subdivision to a maximum of seven lots. Subsequently, the county upzoned the property to allow a maximum of 10 lots. *See id.* The plaintiffs contended that a subdivision of fewer than 10 lots would not have been economically feasible. *See id.* Accordingly, the plaintiffs demanded damages for the period between the downzoning to seven lots and the upzoning to 10 lots. *See id.* at 914, 922.

Text Block 13.2

Vested Rights and Compensation

The *Nemmers* case raises an interesting question about whether a finding that the government has infringed a state law vested right to continue a development project gives a landowner a federal constitutional right to compensation. *Cf. Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 & n.12 (1985) (leaving open the question of how to properly proceed "when the taking claim is based upon such a theory of 'vested rights' or 'expectation interest'"). The answer is that the remedy for interference with vested rights is dependant upon state law, and where state law authorizes only equitable relief, no compensation is available under state or federal law. In other words, the federal Constitution does not protect a state law vested right in a way that goes beyond the relief available under state law.

Nemmers and the Eleventh Circuit's opinion in *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996), illustrate the point. In *Nemmers,* the Eighth Circuit found that Nemmers had a vested right under Iowa law to continue the construction of an industrial park. *See Nemmers I,* 716 F.2d at 1199. Turning to the question of the appropriate remedy, the Eighth Circuit quoted the Iowa Supreme Court for the proposition that a vested property right "cannot be arbitrarily interfered with or taken away without just compensation." *Id.* (quoting *Kasparek v. Johnson County Bd. of Health*, 288 N.W. 2d 511, 518 (Iowa 1980). Finding that Iowa courts could award compensation for interference with vested rights, the *Nemmers* court found that Nemmers was entitled to damages for the period during which its vested right was infringed. *See id.* at 1200-01.

The court analyzed the plaintiffs' due process claim as it would a temporary taking based on regulatory delay:[207] The district court applied a customized version of the rate of return test applied in *Nemmers II,*

[207] The plaintiffs in *Herrington II* had withdrawn their takings claim prior to trial and prevailed only on a substantive due process theory. *See Herrington II*, 790 F. Supp. at 914. However, the court treated Herrington's damages claim as a temporary takings damages claim and the court's analysis is fully applicable to temporary takings cases. *See id.* at 912-14 ("The Circuit's decision which is central to this retrial is that the harm to plaintiffs from the County's conduct was a temporary taking of their ability to use or develop the property (citing Herrington v. County of Sonoma, 834 F.2d 1488, 1505-06 (9th Cir. 1988)).

In *Corn*, the property owner first went to state court and received an injunction prohibiting interference with Corn's vested rights. *See City of Lauderdale Lakes v. Corn*, 427 So.2d 239, 241, 244 (Fla. Dist. Ct. App. 1983). Corn then went to federal court and argued in essence: "the state court judgment is a coupon entitling him to a just compensation award when presented to a federal court. All the federal court has to do is determine the amount of compensation due." *Corn*, 95 F.3d at 1071. The court rejected this argument finding that "regardless of what vested rights Corn may have had in the Project under Florida law, a denial of permission to build a particular development project does not, by itself, state a just compensation claim." *Id.* at 1074.

The rule in Florida, granting only equitable relief for interference with a vested right, appears to be the majority rule. *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW, pp. 227-28 (1998) (the vested rights doctrine "was developed from the Due Process Clause and generally has been viewed as giving rise to equitable relief."); *Lakeview Dev. Corp. v. City of South Lake Tahoe,* 915 F.2d 1290, 1295 (9th Cir. 1990) (a vested right is "a species of governmental estoppel."); *Valley View Indus. Park v. City of Redmond*, 733 P.2d. 182, 196 (Wash. 1987) (finding vested right and granting equitable relief, but finding no taking and rejecting interim damages). *But see Hale v. Colorado River Mun. Water Dist.*, 818 S.W.2d 537, 540 (Tex. Ct. App. 1991) ("Even a temporary taking of a vested right must be compensated.")

factoring in the likelihood that, absent the confiscatory downzoning, the government agency would have approved the developer's proposed use. *See id.* at 915-16. Thus, the court started with the value of the land with 32 units ($1.3 million) and subtracted the value of the land with no development ($490,000), for a difference of $810,000. Next, it multiplied $810,000 by 33%, the court's estimated probability that the landowner would have been able to subdivide the property into 32 units in absence of the challenged regulation. Third, it multiplied the result ($267,300) by the

rate of return (13% a year) for the period of the taking (1.5 years)[208] for damages of $52,123.50. Finally, it added prejudgment interest.

The most important aspect of *Herrington* is the recognition by the court that a plaintiff's proposed development frequently represents a departure from the intensity of development that stands a reasonable probability of approval and construction absent the confiscatory regulation. It points out an important practice point: where the plaintiff contends that the before value is based on a projected development of its land that has not yet been approved by the relevant regulatory agencies, the agency lawyer should urge the court to rigorously scrutinize the assumptions of the plaintiff's valuation experts. The value of the property in the before condition should be limited by the development of the property that has a reasonable probability of approval.[209] The agency lawyer should be prepared to show that obtaining the necessary permits for a more intensive use is not reasonably probable based on: (1) legal restrictions other than the challenged regulation; (2) the historical treatment of similar development proposals in the jurisdiction;[210] (3) the physical limitations of the property; (4) political factors, including the degree of community opposition to the proposed development and the responsiveness of public decision-makers to such opposition; (5) the cost of the proposed development; (6) the difficulty of supplying water and utilities to the

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[208] The interest on the difference between the before and after values is compounded annually, similar to the compounding of interest applicable to judgments under 28 U.S.C. § 1961. *See* 28 U.S.C. § 1961 (1994); *Nemmers II*, 764 F.2d at 505.

[209] *See, e.g.*, City of Los Angeles v. Decker, 558 P.2d 545, 549 (Cal. 1977) (market value may be based on use not allowed by applicable law if the proponent demonstrates that there exists a reasonable probability of a change in the law in the near future); *see also* The Appraisal Foundation, Uniform Standards of Professional Appraisal Practice (1999 ed.) ("USPAP"), Standards Rule 1-2(g), at 15 (appraiser must have a reasonable basis for an extraordinary assumption regarding an uncertain event); *id.* Standards Rule 1-3(a), at 15 (appraiser must "identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic demand, the physical adaptability of the real estate, and market area trends").

[210] *But see* Corn v. City of Lauderdale Lakes, 771 F. Supp. 1557, 1562 (S.D. Fla. 1991) (rejecting consideration of the effect of the decision-maker's alleged hostility to development on the market value of the property).

property; (7) the quality of the access to the property; and (8) any other factors that may influence the approval of the development on which the valuation opinion is based.

Another important aspect of *Herrington* is its adoption of the rate of interest applicable to money judgments in federal court[211] as the appropriate "rate of return." *See Herrington II*, 790 F.Supp. at 923; *cf. Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1352 (11th Cir. 1990) (applying a market rate based on the testimony of expert economists); *Nemmers II*, 764 F.2d at 505 (applying a 15% rate of return, based on the high interest rates prevailing in 1985). The court rejected the plaintiffs' proposed interest rate of 15.7%, which was based on the rate of return of the plaintiffs' other investments. Noting that the value of the property had increased since the damages period ended, the court decided that the plaintiffs would receive an unfair double recovery if the court awarded both the appreciation (assuming the plaintiffs had retained the property) and the return (assuming that the plaintiffs had liquidated the property and invested the proceeds). *See Herrington II,* 790 F.Supp. at 923

Finally, the *Herrington* court held that an allowance for prejudgment interest is subject to the discretion of the trial court. *See id.* at *924.* In exercising this discretion, the court is guided by basic notions of fairness. *See id.* Deciding that prejudgment interest was justified in that individual case, the *Herrington II* court applied the U.S. Treasury Bills rate once again by averaging the rate over the period from 1981 until the judgment in 1991. *See id.*

Of the methods adopted thus far by courts, the *Herrington* method is the best and fairest measure of just compensation. *Herrington* is grounded in the market, is less likely to overstate the value of the property in the before condition, and is the most accurate measure of the actual monetary loss to the takings claimant. Any government lawyer confronted with liability for a temporary taking should consider invoking *Herrington*.

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[211] Pursuant to 42 U.S.C.§ 1961 (1994), this rate is calculated using the rate paid on 52-week U.S. Treasury Bills. In 1980-81, this rate was 13%. The rate as of December 1999 is 5.670%. *See Post Judgment Interest Rates* (visited Dec. 10, 1999) <http://www.uscourts.gov/postjud/postjudhtml>.

Text Block 13.3

The Misguided Approach of *Wheeler IV*

Counsel should strongly resist the application of the distorted rate of return approach used by the Eleventh Circuit in *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1350 (11th Cir. 1990) (because this was the fourth time this case was reviewed in the Eleventh Circuit, the case is called "*Wheeler IV*"). In an earlier decision, the court had ruled that the correct test for damages for temporary takings was the before and after test from *Nemmers II*. *See Wheeler IV*, 896 F.2d at 1350. But remarkably, instead of valuing the property in its unimproved state to determine the before condition, the court concluded that the before value would be the fair market value of the "[apartment] complex which appellants had the right to construct," *without deducting the cost to build that complex*, and without postulating any development of the property in the after condition, even though a more profitable use of the property remained after the regulation had been imposed. *Id.* at 1350, 1351. To account for the fact that the plaintiffs received credit for a building that did not exist on the property, the court assumed that the plaintiffs would pay cash for 25% of the cost of the apartment building and would finance the rest. *See id.* Thus, the court concluded that the before value would be 25% of the fair market value of the property *as improved*, and the after value would be 25% of the value of the land vacant. *See id.*

It is hard to conceive of a more twisted application of the before and after test. The flaws in the *Wheeler IV* formulation are manifest. First, in determining the before value, the developer receives a windfall because it is awarded damages based on the value of improvements that the developer did not have to pay for. Second, because the improvements do not exist, the appraiser must speculate as to the cost, design, size, and other features of the improvements that contribute to its value.

Third, although the regulation in *Wheeler IV* prevented the construction of an apartment complex, there was evidence that rental apartments were not the most profitable use of the property. *See id.* at 1350. Thus, if the before value was calculated based on the assumption that the property was improved to its highest and best use, the same assumption should have been applied to the after value. Based on the highest and best use of the property, the after value should have equaled or exceeded the before value.

The modified before and after method for just compensation used in *Wheeler IV* is fatally flawed. Indeed, the Eleventh Circuit ignored *Wheeler IV* in *Resolution Trust Corp. v. Town of Highland Beach,* 18 F.3d 1536 (11th Cir. 1994), *vacated on other grounds and reh'g granted*, 42 F.3d 626 (11th Cir. 1994). And *Wheeler IV* has been criticized by a district court in the Eleventh Circuit. *Corn v. City of Lauderdale Lakes*, 771 F. Supp. 1557, 1570-71 (S.D. Fla. 1991).

Recommended Reading

Karena C. Anderson, *Strategic Litigating in Land Use Cases: Del Monte Dunes v. City of Monterey*, 25 ECOLOGY L.Q. 465 (1998).

THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (11th ed. 1996).

DONALD G. HAGMAN & DEAN J. MISCZNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978).

Timothy D. Searchinger, *Some Key Questions Raised by the Recent Focus of Takings Cases on "Reduction in Value"* (paper delivered at a Georgetown University Law Center Continuing Legal Education seminar entitled "Successfully Litigating Regulatory Takings Claims" held in San Francisco, California, Sept. 24-25, 1998).

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