

**REDUCING JUST COMPENSATION FOR ANTICIPATED  
CONDEMNATIONS**

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I. INTRODUCTION

Governments, and those they represent, generally prefer to spend as little as possible on acquiring property interests. If they can get the desired property interest for free, even better. Regulation of land often may satisfy the public's need for an interest in property without requiring any condemnation. For example, if the government can prohibit coastal development by regulation without paying compensation, it can save the expense of buying a negative easement or fee simple title to the coastal land.<sup>1</sup>

But sometimes the public interest requires an easement or fee simple title by condemnation. In those cases, the government

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<sup>1</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1003 (1992) (“[T]he state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels.”).

generally cannot hope to acquire the necessary property interest for free. Of course, sometimes the government can provide incentives that will induce some owners to voluntarily grant the needed property interests to the public.<sup>2</sup> But otherwise the government is going to have to pay.

Even then, the government would generally like to save as much money as it can. Sometimes political interests motivate the government to be more generous to landowners. But many cases evidence the government's desire to reduce the just compensation bill as much as possible.<sup>3</sup>

The government often tries to save money by arguing that the "just compensation" required by the Fifth Amendment does not require as much money as the landowner asserts. Payment of fair market value for the interest condemned is generally considered to be just compensation. So the government may argue that fair market value is less than the landowner believes.<sup>4</sup>

Another way that the government might save money, though, is to actively reduce the fair market value of properties it plans to condemn. If the government can plan what lands it may want to acquire in the future, it can also plan ways to reduce the costs of acquiring those lands.

This article discusses various ways in which governments may reduce the cost of condemning property interests by using their regulatory and police power to reduce property's market value in advance. It is not hard for the government to do. But regulating to reduce just compensation may sometimes unconstitutionally abuse the regulatory power. So besides describing and illustrating ways that government may reduce just compensation by regulation and other precondemnation activities, I discuss the constitutional boundaries to such strategies. The government's precondemnation activities may themselves take property or deny

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<sup>2</sup> Cf. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 625, 626 n.1 (1961) (observing that a property owner gave the government a flowage easement over 1840 acres in exchange for only one dollar because the owner expected the rest of her property to be more valuable as a wild game preserve if the government created an artificial lake on the property).

<sup>3</sup> See, e.g., *Amen v. City of Dearborn*, 363 F. Supp. 1267 (E.D. Mich. 1973) (recounting a city's various efforts to buy properties in a redevelopment area at the cheapest prices possible), *rev'd*, 532 F.2d 554 (6th Cir. 1976); *Roth v. State Highway Comm'n*, 688 S.W.2d 775, 776 (Mo. Ct. App. 1984) (noting that the State Highway Commission offered \$465,000 for property that its own agent found would require \$2,250,000 in just compensation).

<sup>4</sup> For example, the National Park Service (NPS) condemned hundreds of private tracts of land in assembling the land for Voyageurs National Park. The NPS indicated to landowners its intention to acquire land for 30% of market value. Condemnation suits evidenced the NPS strategy: the judicially determined fair market value on average exceeded NPS's offers of compensation by 785%. See *Althaus v. United States*, 7 Cl. Ct. 688, 691 (1985).

substantive due process if they deprive the owner of too much of the property's value or if they do not further a legitimate state interest — some interest other than saving money in eminent domain proceedings. And even if precondemnation activities do not take property or deny substantive due process, the Just Compensation Clause sometimes will require the government to pay for the resulting market value losses if the government does ultimately condemn the property.

## II. DETERMINING JUST COMPENSATION

The Fifth Amendment prohibits governments from taking private property unless they pay owners “just compensation.”<sup>5</sup> To be just, compensation ordinarily must at least equal the fair market value of the property taken by the government.<sup>6</sup> But fair market value is not constant, of course. Property values as a whole may fluctuate, but changes in a particular property or its neighborhood may also cause changes in market value. Such changes in market value can contribute to disagreements about what compensation the government must pay the owner of condemned property. The usual rule, however, is that the government must pay the market value at the moment it actually exercises its eminent domain power, the moment it actually takes the property from the owner.<sup>7</sup>

But before that moment, the market may already have anticipated the condemnation by the government. That anticipation sometimes may make the property worth less on the market than it was worth before the market had reason to anticipate condemnation. The government's preparation for condemnation may also lead to changes in permitted uses of the property or changes in the surrounding area that reduce the market value of the subject property.

Ordinarily, the property owner cannot complain. Changes in market value are one of the risks, as well as one of the rewards, of property ownership. But if the government has caused the loss in market value in preparing to condemn the land, the property owner may object that the government simply took part of her property in advance. Yet the law generally has been on the gov-

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<sup>5</sup> U.S. CONST. amend. V; *see also* *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (holding that the Fourteenth Amendment requires states to provide just compensation when taking private property for public use).

<sup>6</sup> *See, e.g.*, *United States v. Miller*, 317 U.S. 369, 374 (1943) (stating that just compensation usually equals market value).

<sup>7</sup> *See, e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320 (1987); *Miller*, 317 U.S. at 374.

ernment's side: the government pays only the value on the day title changes from owner to government.

### III. GOVERNMENT ACTIONS REDUCING MARKET VALUE TO BE COMPENSATED

Whether purposeful or not, there are many ways the government can cause the market value of future condemnation acquisitions to decline before actually beginning condemnation proceedings. This section categorizes the types of government actions that reduce the market value of properties that are ultimately condemned.

#### *A. Planning*

Merely planning to condemn a particular property may reduce the property's market value, or at least slow the property's appreciation in value.<sup>8</sup> For example, property designated as the possible site of a hazardous waste facility may have a reduced market value because it is no longer an attractive or feasible site for homes or for farming.<sup>9</sup> Therefore, when the time comes to actually condemn the property and use it for a hazardous waste facility, the government pays only the depressed market value, not the value it would have if the property were being used for say a mobile home park, or even if the market were still anticipating such a use.

One might reason that the mere possibility of condemnation should not depress the market value because the property owner who starts farming or builds a mobile home park will still be fully compensated for that value if the government does eventually con-

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<sup>8</sup> See, e.g., *Smith v. State*, 123 Cal. Rptr. 745, 746 (Ct. App. 1975) (reciting allegations that a resolution concerning development of state highway substantially decreased the value of plaintiff's property); 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN 12-415 (rev. 3d ed. 1985) ("If the projected public work will be injurious to the neighborhood through which it will pass, the fact that it is hanging like a sword of Damocles over the heads of the land owners in the vicinity cannot but fail to have a depressing effect upon values."); Joseph C. Rust, Note, *The Condemnor's Liability for Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings*, 1967 UTAH L. REV. 548, 549 (listing ways in which government plans to condemn may cause decline in market value). Declarations of urban blight, prerequisite to urban renewal projects, can dramatically impair market value of properties long before property is condemned. See, e.g., *Washington Mkt. Enters. v. City of Trenton*, 343 A.2d 408, 414-15 (N.J. 1975) ("From the time it becomes generally known that an area has been selected as the site of an urban renewal project . . . there ceases to be a ready market for premises within the area. It becomes difficult to find tenants and impossible to enter into long-term leases. Upkeep, maintenance and renovation cease; the value of the property tends constantly to diminish.")

<sup>9</sup> See, e.g., *Littman v. Gimello*, 557 A.2d 314, 319 (N.J. 1989).

demn the property.<sup>10</sup> But the government only pays for the property it condemns. It does not pay the costs of relocating a business, lost goodwill, lost opportunity costs as time passes without the development proceeding, and so on. A developer who wants to build a mobile home park will undoubtedly sharply discount the value of a parcel that the government plans to condemn, even though the developer may still be willing to pay more than the value it would have if the government's intended use were the only possible use.<sup>11</sup>

In *Althaus v. United States*,<sup>12</sup> for example, the National Park Service frequently discussed in public meetings its intention to acquire all private lands within Voyageurs National Park.<sup>13</sup> The Park Service prepared land acquisition maps and otherwise planned to acquire those private lands for as little as possible.<sup>14</sup> As a result, there was virtually no market for buying those private lands, and even the Park Service argued that speculators might only offer twenty-five to fifty percent of their market value.<sup>15</sup>

Similarly, plans to condemn may impair market value by impairing access to credit for developing the property. In *Mesa Ranch Partnership v. United States*,<sup>16</sup> for example, certain property was included within a Department of Interior Land Acquisition Plan for Point Reyes National Seashore. But since the government had not yet initiated condemnation proceedings, the property owner tried to proceed with developing a residential subdivision. Lenders would not finance the development, however, because they anticipated the future condemnation, but could not be sure that the property would be condemned and that the government would pay sufficient compensation to pay off a development loan.<sup>17</sup>

### B. Publicity

Besides formally planning to acquire certain property, government agencies and officials may publicly discuss the possibility.

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<sup>10</sup> See *id.* ("Plaintiffs' allegations concerning harm to potential farming operations are also comprised of nothing more than uncertainty caused by governmental planning and possible forgone economic opportunities. They can still use their land for farming and if it is eventually condemned, they will get a fair price for it. If it is not condemned, they can go on farming.")

<sup>11</sup> See *id.* at 320 ("Realistically no one will invest in their property while there is still a risk that it will be condemned.")

<sup>12</sup> 7 Cl. Ct. 688 (1985).

<sup>13</sup> *Id.* at 691.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 695.

<sup>16</sup> 2 Cl. Ct. 700 (1983).

<sup>17</sup> *Id.* at 705-06.

Regardless of how definite those plans may be, the result for the property owner may be the same: the property's value is depressed because the market anticipates the possible condemnation.<sup>18</sup>

### C. Delay

The government may also save some condemnation expense by simply delaying regulatory action on property that it anticipates condemning. Delay can save money in two ways. First, if a building permit or zoning action would permit some development on the property, delaying such actions prevents the property from becoming more valuable as a result of the planned development.<sup>19</sup> Second, delaying regulatory action may actually reduce the value of the property. For example, in *Citino v. Redevelopment Agency*,<sup>20</sup> the plaintiff's land lost all market value during a nine-year period in which the redevelopment agency never implemented a redevelopment plan for the plaintiff's property and surrounding property.<sup>21</sup>

### D. Zoning

On the other hand, timely regulatory action may decrease, rather than increase, market value. So sometimes the government may promptly take regulatory action on a property it plans to condemn. The simplest strategy is simply downzoning property that the government may desire to condemn. If the government wants to condemn land for an airport, for example, downzoning prospective acquisitions from industrial land to agricultural land would significantly reduce the property's market value. Then, when the time comes to exercise its eminent domain power, the government would save a substantial amount of money by paying less just compensation to the owners.<sup>22</sup> In *Grand Trunk Western Railroad*

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<sup>18</sup> See, e.g., *Commonwealth v. Levine*, 281 A.2d 909, 910 (Pa. Commw. Ct. 1971) (finding sufficient plaintiff's allegations that public proclamations of a proposed highway route and imminent condemnation, among other things, caused loss of tenants and impaired market value of his property); *Maxey v. Redev. Auth.*, 288 N.W.2d 794, 802 (Wis. 1980) (concluding that statements to press that property would be taken, among other things, constituted a taking even before property was legally restrained).

<sup>19</sup> See, e.g., *Amen v. City of Dearborn*, 363 F. Supp. 1267, 1272 (E.D. Mich. 1973) (finding that a city had delayed building permits, occupancy permits, and repair permits in campaign to reduce the expense of acquiring desired properties), *rev'd*, 532 F.2d 554 (6th Cir. 1976).

<sup>20</sup> 721 A.2d 1197 (Conn. App. Ct. 1998).

<sup>21</sup> See *id.* at 1203-04, 1209.

<sup>22</sup> See, e.g., *Kissinger v. City of Los Angeles*, 327 P.2d 10, 14 (Cal. Ct. App. 1958) (noting that the government had changed zoning of property in an airport area from multi-family

*Co. v. City of Detroit*,<sup>23</sup> the city apparently zoned blighted property along a railway to permit only multi-family residential buildings, knowing that it could not feasibly be used for such purposes, but anticipating that at some point the city would condemn the land for housing development.<sup>24</sup>

Rather than downzoning the anticipated acquisition, the government may instead establish buffer zones that can reduce the property's market value, or at least slow its increase in value. If neighboring property is zoned industrial rather than agricultural, for example, the market value of residential property will be less.

Finally, the government may target future acquisitions directly with zoning changes. The government could, for example, designate an airport zone that permits only lower value uses. Then, when the day comes to actually acquire the land and build an airport, the land will be worth less than if it had been developed industrially. A special zone like this may even prevent the land from being developed altogether. And the market value of land that may only be used for a governmental use will surely be less than the value of land that could be used for private development.

### *E. Building and Safety Regulations*

Other regulatory actions can also depress or restrain market value. The government can use building or safety regulations to prevent or obstruct private development on land that the government plans or hopes to condemn.<sup>25</sup> For example, the district court in *Amen v. City of Dearborn*<sup>26</sup> found that the city had denied building permits, repair permits, and occupancy permits in an effort to acquire certain properties for less.<sup>27</sup> In *Roth v. State High-*

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residential to single-family residential, thus reducing market value from \$114,000 to \$48,000); *State ex rel. Tingley v. Gurda*, 243 N.W. 317, 320 (Wis. 1932) (considering the possibility that the city unlawfully zoned property residential to depress its value in anticipation of condemning it for a future road); Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 REAL ESTATE L.J. 47, 60 (1998) (“[Z]oning may be changed so as to lower property values in anticipation of condemnation.”).

<sup>23</sup> 40 N.W.2d 195 (Mich. 1949).

<sup>24</sup> *See id.* at 198-99.

<sup>25</sup> *See Cambria Spring Co. v. City of Pico Rivera*, 217 Cal. Rptr. 772, 775 (Ct. App. 1985) (describing a city's plan to issue no permits for improvements inconsistent with its redevelopment plan for the project area); *Sproul Homes v. State ex rel. Dep't of Highways*, 611 P.2d 620, 621 (Nev. 1980) (reciting plaintiff's allegation that city denied building permits in an effort to coerce plaintiff to sell land for less than fair market value); Kanner, *supra* note 22, at 60 (“[I]t is common that building permits are withheld causing the targeted properties to fall into disrepair, so that cities can acquire them cheaply.”).

<sup>26</sup> 363 F. Supp. 1267 (E.D. Mich. 1973), *rev'd*, 532 F.2d 554 (6th Cir. 1976).

<sup>27</sup> *See id.* at 1272 (holding that the city took plaintiffs' property as a result of various efforts to depress the value of properties in an acquisition area).

*way Commission*,<sup>28</sup> the court found that the State Highway Commission had asked several times that local governments not issue building permits for any property within an area planned for a highway, and the city consequently refused to issue a building permit to the plaintiff.<sup>29</sup>

#### *F. Restricting Improvement and Rehabilitation*

Another regulatory device to prevent future acquisitions from appreciating in value is to limit or prohibit improvement and rehabilitation of specified properties. If the government plans to condemn a blighted area, for example, preventing rehabilitation in the meantime would ensure that the market value of the land does not substantially increase. In fact, it almost ensures that the market value will decrease, because the property will likely continue to deteriorate.

For example, in *In re Elmwood Park Project Section 1, Group B*,<sup>30</sup> the city notified owners in an urban renewal area that it would be initiating condemnation proceedings. But during the next ten years, the plaintiff alleged, the city delayed the proceedings and deliberately caused the value of the properties to decline by, among other things, refusing to issue building permits to improve the properties.<sup>31</sup> Then, twelve years after beginning the process, the city discontinued the original proceedings and began new condemnation proceedings, using appraisals based on the now blighted, vandalized, and depressed market values of the properties.<sup>32</sup>

State law may permit cities to freeze development of property for a specified period of time while the city decides whether to acquire or condemn the land.<sup>33</sup> Governments also have commonly restricted improvement of properties while they make planning decisions about what regulatory restrictions are appropriate for the properties.<sup>34</sup> This sort of a moratorium on development, how-

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<sup>28</sup> 688 S.W.2d 775 (Mo. Ct. App. 1984).

<sup>29</sup> *See id.* at 776.

<sup>30</sup> 136 N.W.2d 896 (Mich. 1965).

<sup>31</sup> *See id.* at 900.

<sup>32</sup> *See id.*

<sup>33</sup> *See* *Lomarch Corp. v. Mayor of Englewood*, 237 A.2d 881, 882-83 (N.J. 1968) (upholding the Official Map Act that permitted a city ordinance prohibiting development of part of the plaintiff's property for one year while the city decided whether to purchase or condemn the land for parks, but holding that the city must pay just compensation for temporarily taken land).

<sup>34</sup> *See* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337-38 (2002) ("[M]oratoria . . . are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consen-

ever, is not overtly connected to a decision about whether to condemn properties, and therefore is less likely to reduce the compensation to be paid when property is condemned. Still, even this sort of a moratorium for regulatory decision-making will keep the property undeveloped or unimproved, and if the government ultimately decides to condemn some property subject to the moratorium rather than just regulate it, the property will be worth less when condemned.

Even if the government does not formally prohibit or restrain development, the government may still try to prevent improvement and rehabilitation informally. In one case, for example, the landowners alleged that the government told owners that they would not receive compensation for improvements and discouraged them in various ways from making improvements.<sup>35</sup> If these informal means work, they too will reduce the compensation the government will have to pay when it eventually condemns the property.

### *G. Government Improvements and Conduct Offsite*

Finally, the government may depress or restrain the market value of land by developing government improvements nearby. Some improvements may increase the value of nearby land, like roads, parks and infrastructure, but other improvements may decrease the value of neighboring land. If the government intends to acquire land in an area for some government development, acquiring some of the land and beginning development thereon may reduce the cost of acquiring the rest of the land.

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sus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development." (footnotes omitted); Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, LAND USE L. & ZONING DIG., June 1996, at 3 ("With the planning so protected, there is no need for hasty adoption of permanent controls in order to avoid the establishment of nonconforming uses, or to respond in an ad hoc fashion to specific problems. Instead, the planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view."). See generally Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URB. L. 65 (1971) (advocating use of interim development controls to aid good planning).

<sup>35</sup> See *Foster v. City of Detroit*, 254 F. Supp. 655, 662 & n.17 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968) (noting that a city advised a property owner only to "keep the roof on and the water running" and, as a condition to obtaining a building permit, required him to sign a waiver of any claim to the increased value of the property as a result of the proposed improvements).

For example, in *Merkur Steel Supply, Inc. v. City of Detroit*,<sup>36</sup> the City of Detroit planned to acquire plaintiff's land for an airport expansion. For years, however, the city did not actually condemn the land, but obstructed plaintiff's efforts to expand its business on its land. Plaintiff eventually sued in inverse condemnation, alleging among other things that the city tried to reduce the cost of acquiring plaintiff's land by condemning much of the surrounding property in order to prevent plaintiff's expansion.<sup>37</sup>

A related but different claim, also suggested in *Merkur Steel*, is that the government intentionally let neighboring properties deteriorate.<sup>38</sup> The result, of course, is that the subject property declines in value along with the neighboring properties.<sup>39</sup> Similarly, the government may not only allow neighboring properties to deteriorate, it may even demolish them in the process of redevelopment. When a building is surrounded by debris and vacant lots, it is much less valuable than when surrounded by other valuable uses.<sup>40</sup>

#### IV. CONSTITUTIONAL LIMITS

The government could acquire land for very little if it could use all of these strategies freely. If there were no limits, the government could simply prohibit use of a parcel for any purpose and make it useless, then condemn it and pay no compensation at all. But of course there are limits. This section discusses three constitutional limitations on reducing just compensation for anticipated condemnations. First, the government's precondemnation conduct may itself amount to a taking by depriving the owner of the use or value of her property. Second, the government may take property, or deny substantive due process, if the regulation does not serve a purpose other than reducing the compensation to be paid when the

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<sup>36</sup> 680 N.W.2d 485 (Mich. Ct. App. 2004).

<sup>37</sup> See *id.* at 493.

<sup>38</sup> See *id.* at 499 n.3 ("Some evidence in the record indicates that the city stopped services such as trash pickup around the area and also began dumping trash on property the city acquired. Further, plaintiff suggested that through condemnation, the city acquired some of the residential properties around the area, but let those properties become run down.").

<sup>39</sup> See *Amen v. City of Dearborn*, 363 F. Supp. 1267, 1273 (E.D. Mich. 1973) (finding that city's efforts to reduce cost of acquiring property included selling property in the area to polluting industries), *rev'd*, 532 F.2d 554 (6th Cir. 1976).

<sup>40</sup> See, e.g., *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 786 (8th Cir. 1979) (recounting plaintiff's allegations that the city had acquired surrounding properties for redevelopment, demolished them, but abandoned the redevelopment, thereby taking plaintiff's property); *Foster v. City of Detroit*, 254 F. Supp. 655, 660 (E.D. Mich. 1966) (describing deterioration of a neighborhood planned for urban renewal, and effects on plaintiff's property), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

property is eventually condemned. Finally, even when the regulation does not take property or deny due process, if the government does ultimately condemn the property, the Fifth Amendment may require the government to pay the higher market value of the property before its regulatory activities depressed the value.

### *A. Regulatory Taking by Denying Economically Viable Use*

If regulation goes too far, it will be treated as a taking of private property requiring just compensation, even though the government may not have intended to take the property.<sup>41</sup> The compensation-reducing strategies discussed in Part II may sometimes go too far.

Government land-use regulation that deprives the owner of economically viable use of her land is a taking of private property requiring just compensation.<sup>42</sup> In rare cases, the government may make a property useless for any purpose other than its own planned use. But even if the property is not useless, the restraint on use and the resulting loss of value may be so extreme that the government has effectively taken the owner's property. The court will consider "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" in deciding whether the regulation is constitutionally equivalent to a taking.<sup>43</sup> In this section, I consider possibilities that the precondemnation activities discussed in Part II will amount to a taking in this way by reducing the property's value so much that it is equivalent to taking the property away from the owner.

#### *1. Planning and Publicity*

Ordinarily, planning and publicity will not themselves impair the market value so severely that they effectively take the property from the owner. Planning a condemnation, or even passing legislation authorizing a condemnation, obviously does not ac-

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<sup>41</sup> See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

<sup>42</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-18 (1992) (stating that and explaining why government must pay just compensation when "regulation denies all economically beneficial or productive use of land"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land.").

<sup>43</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); see also *Lucas*, 505 U.S. at 1019 n.8 (observing that even if an owner is not deprived of all economically beneficial use, the owner may still establish a taking in particular cases).

tually take the property from the owner, nor does it make the property useless. Plans may change, of course, and the property may never actually be condemned by the government.<sup>44</sup> If courts grant just compensation for merely planned takings, inverse condemnation suits can subvert the legislative power to decide if and when to condemn.<sup>45</sup> In the meantime, the owner is still legally free to use or transfer her property as she wishes until the government actually condemns it. “[I]n the absence of an interference with an owner’s legal right to dispose of his land, even a substantial reduction in the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment.”<sup>46</sup> Many cases have held that planning a condemnation therefore does not take the property until the condemnation actually occurs.<sup>47</sup>

But sometimes planning or publicity may actually deny an owner all economically viable use of her land, or nearly so.<sup>48</sup> For example, if the property’s present use is not economically viable, planning and publicizing condemnation for the property may make it practically impossible to rehabilitate the land or sell it to another who would develop it in an economically useful way.<sup>49</sup> A

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<sup>44</sup> *Danforth v. United States*, 308 U.S. 271, 286 (1939) (“The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail.”).

<sup>45</sup> *See Howell Plaza, Inc. v. State Highway Comm’n*, 226 N.W.2d 185, 189 (Wis. 1975) (“If this court countenances suits for inverse condemnation and permits the award of damages - - in effect by decree transfers property to a condemning authority before the project is finally decided on - - private citizens claiming they have been damaged by a threatened taking will in effect have preempted the legislative function.”).

<sup>46</sup> *Kirby Forest Indus. v. United States*, 467 U.S. 1, 15 (1984); *see also Agins*, 447 U.S. at 263 n.9 (“Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are ‘incidents of ownership.’” (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939))).

<sup>47</sup> *See, e.g., Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 131 (2d Cir. 2003) (reasoning that a siting declaration did not take property because property still had some use and value); *Barthelemy v. Orange County Flood Control Dist.*, 76 Cal. Rptr. 2d 575, 579 (Ct. App. 1998) (“[M]ere designation of property for public acquisition, even though it may affect the marketability of the property, is not sufficient. ‘The right of a governmental body to plan for the acquisition of property is unquestioned. In the absence of special circumstances it does not give rise to an action for inverse condemnation.’” (quoting *City of Walnut Creek v. Leadership Hous. Sys., Inc.*, 140 Cal. Rptr. 690, 696 (Ct. App. 1977))); *Far-Gold Constr. Co. v. Chatham*, 357 A.2d 765, 768 (N.J. Super. Ct. App. Div. 1976) (holding that a municipality’s resolution expressing desire to acquire property for a park did not take property); *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992) (holding that the government’s proposal to condemn property was not a taking).

<sup>48</sup> *See Washington Mkt. Enters., Inc. v. City of Trenton*, 343 A.2d 408, 416 (N.J. 1975) (when “the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, then there has been a taking of property within the meaning of the Constitution.”).

<sup>49</sup> *See Drakes Bay Land Co. v. United States*, 424 F.2d 574, 586 (Ct. Cl. 1970) (holding that the federal government took land never condemned for Point Reyes National Seashore

number of cases have held that urban blight declarations can destroy substantially all the value of property in the blighted area. If the property is not ultimately condemned, some courts have correctly held that the government has nonetheless taken the owner's property.<sup>50</sup>

## 2. Delay

When the government delays giving permission for property use or development, the delay may be a taking of this sort if, during the period of delay, the property cannot be used productively. Obviously, if the property is already developed and valuable, even a very long delay in permitting some more valuable use will not deprive the owner of all or nearly all value — just the extra increment of value that the owner sought, however substantial that may be. But if the property is undeveloped or otherwise useless in its present condition and the owner is unable to use or sell her property while the government delays decisions about permits, zoning or condemnation, the owner has been deprived of all value of her property during that period of delay.<sup>51</sup>

In *Ehrlander v. State Department of Transportation & Public Facilities*,<sup>52</sup> for example, the developer, Ehrlander, bought undeveloped land for residential development. Ehrlander sought subdivision plat approval, but the city denied approval for part of his property because the Department of Transportation (DOT) intended to acquire an unspecified part of the property for a highway.<sup>53</sup> Ehrlander alleged that DOT unreasonably delayed the condemnation of his land for three years, thus taking his property because he could not subdivide his property as long as the city was waiting for DOT to decide what land it was going to condemn for

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by officially declaring its intent to take the land and otherwise preventing subdivision and development of plaintiff's land).

<sup>50</sup> See, e.g., *Foster v. City of Detroit*, 254 F. Supp. 655, 665-66 (E.D. Mich. 1966) (holding that abandoned condemnation proceedings in urban renewal zone took plaintiff's property because it substantially destroyed its value), *aff'd*, 405 F.2d 138 (6th Cir. 1968). But see *Washington Mkt. Enters.*, 343 A.2d at 411 ("One of the arguments advanced was that the very act of filing a declaration of blight was a 'taking of property' because it seriously impaired land values. We held that this was not a taking, saying: 'It is akin to the result which flows from municipal zoning. If some diminution in market value can be said to follow from a finding of blight inspired by the valid exercise of police power, it is *Damnum absque injuria*.'" (citation omitted)).

<sup>51</sup> See *City of Los Angeles v. Titem*, 191 Cal. Rptr. 229, 235 (Ct. App. 1983) (holding that a city took land during a three-year period when pending condemnation for road widening "rendered the real estate virtually useless" and prevented sale).

<sup>52</sup> 797 P.2d 629 (Alaska 1990).

<sup>53</sup> See *id.* at 631.

the highway.<sup>54</sup> The Alaska Supreme Court held that Ehrlander had properly alleged a taking, because he was “deprived of the most important incidents of ownership, the rights to use and alienate property.”<sup>55</sup> The owner was deprived of the right to use the property because it was unimproved and he could not improve it while the planned condemnation prevented subdivision approval. Additionally, his ability to market the property was allegedly “substantially impaired” by the planned, but uncertain, condemnation.<sup>56</sup>

But even if the owner is deprived of all value during a period of delay, the delay may not last forever. The government may eventually issue the permit or otherwise allow the property to be used again. The delay itself will only be a taking if, in light of all the circumstances, the burden on the owner is unfair and should be borne by the public.<sup>57</sup> As the Supreme Court put it in *Penn Central Transportation Co. v. City of New York*,<sup>58</sup> these are “essentially ad hoc, factual inquiries.”<sup>59</sup> Of course, “the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim.”<sup>60</sup> But in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court said that “with respect to that factor as with respect to other factors, the ‘temptation to adopt what amount to *per se* rules in either direction must be resisted.”<sup>61</sup> Other considerations include the “landowners’ investment-backed expectations, the actual impact of the regulation on any individual, the importance

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<sup>54</sup> *See id.* at 633.

<sup>55</sup> *Id.* at 635 (quoting *Lange v. State*, 547 P.2d 282, 288 (Wash. 1976)).

<sup>56</sup> *Id.* at 634 (quoting *Lange*, 547 P.2d at 288); *see also Lange*, 547 P.2d at 287-88 (explaining that a developer whose land is to be condemned loses all use of the property, because he can neither develop nor sell the land, and thus is in a different position than other property owners who may “continue to use the property, derive some income or benefit from it, and thus moderate the market decline”).

<sup>57</sup> *See Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 131 (2d Cir. 2003) (holding that a siting announcement was not a taking, in part because the declaration was temporary and the property recovered some of its value after the announcement was withdrawn).

<sup>58</sup> 438 U.S. 104 (1978).

<sup>59</sup> *Id.* at 124.

<sup>60</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002); *see also* Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 474 (2004) (“However, the fact that the duration of a moratorium significantly exceeds the duration customary under similar circumstances would greatly enhance the possibility that the moratorium was compensable under the *Tahoe-Sierra* fairness test.”).

<sup>61</sup> *Tahoe-Sierra*, 535 U.S. at 342 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

of the public interest served by the regulation, [and] the reasons for imposing the temporary restriction.”<sup>62</sup>

So if the government’s delay has a major economic impact on the owner’s investment-backed expectations, as in *Ehrlander*, and the government does not have a good reason for the delay, it is likely to be a taking. But if the government does have a good reason for the delay, it is less likely to be a taking. In fact, while *Tahoe-Sierra Preservation Council* resists categorical rules, most other courts that have considered the issue have suggested that normal and reasonable delays can never be takings.<sup>63</sup> The Supreme Court in *First English Evangelical Lutheran Church v. County of Los Angeles*<sup>64</sup> stressed that it was not holding that the government must pay compensation for “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.”<sup>65</sup> Many cases have held that normal delays do not take property, even if the property is useless during the period of delay.<sup>66</sup> In *Agins v. City of Tiburon*,<sup>67</sup> for example, a pending condemnation limited the owners’ ability to sell their property, but they were free to sell or develop when the proceeding ended. The Court stated that “[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are ‘incidents of ownership. They cannot be considered as a ‘taking’ in the constitutional sense.”<sup>68</sup>

The emphasis on ad hoc determinations in *Tahoe-Sierra Preservation Council* seems to leave open at least a hypothetical possibility that consideration of all the circumstances might find a temporary regulatory taking based on other factors, even though the delay was normal. And some courts have suggested that even normal delays may take property. The Alaska Supreme Court, for

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<sup>62</sup> *Id.* at 320; see also *Penn Central*, 438 U.S. at 124 (“The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” (citations omitted)).

<sup>63</sup> See *Roth v. State Highway Comm’n*, 688 S.W.2d 775, 777-78 (Mo. Ct. App. 1984) (holding that a jury had substantial evidence of “aggravated delay” of seven years and “un-toward activity” in obstructing building permits and demanding that plaintiff settle another case before highway commission would file a condemnation petition).

<sup>64</sup> 482 U.S. 304 (1987).

<sup>65</sup> *Id.* at 321.

<sup>66</sup> See, e.g., *Roth*, 688 S.W.2d at 777 (“It has been recognized that some delay prior to and during the pendency of condemnation proceedings is unavoidable and that, where it is a natural consequence of the proper exercise of the right of eminent domain, it does not give rise to a cause of action . . .”).

<sup>67</sup> 447 U.S. 255 (1980).

<sup>68</sup> *Id.* at 263 n.9 (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)).

one, reversed summary judgment for a condemning authority even though the plaintiff had not alleged that the authority's delay was extraordinary.<sup>69</sup> If the property is useless for a substantial period, and the government is depriving the owner of that value, it might seem that the public as a whole should bear the burden of lost property value resulting from public deliberations about condemnation and the like.<sup>70</sup> But that argument seems obviously to go too far, because it would require the government to pay compensation for delay incident to even normal permitting processes. As the Court observed in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*:

[T]he extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners' broad submission would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee.<sup>71</sup>

The Court reasoned that a "rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."<sup>72</sup>

Besides this practical fear that the government would have to abandon or pay compensation for "numerous practices that have long been considered permissible exercises of the police power,"<sup>73</sup> there is a good theoretical reason to conclude that normal delays

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<sup>69</sup> See *Ehrlander v. State Dep't of Transp. & Pub. Facilities*, 797 P.2d 629, 635 (Alaska 1990).

<sup>70</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (reasoning that the Just Compensation Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

<sup>71</sup> 535 U.S. 302, 334-35 (2002) (citation omitted).

<sup>72</sup> *Id.* at 335. The Court further stated that:

[S]uch a rule would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power. As Justice Holmes warned in *Mahon*, "[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." *Id.* (omitted citation)

<sup>73</sup> *Id.*

do not take property. While even normal delays may very well deny the owner use of her property for a time, all properties are equally subject to such delays and enjoy the benefits of other properties being subject to such decision-making processes as well. This “average reciprocity of advantage”<sup>74</sup> means that the owner does not unfairly bear a burden to benefit the public in its efforts to regulate land uses because all other owners are likewise subject to the same burden, which benefits the owner in return.<sup>75</sup>

When delays are extraordinary, however, the owner is subjected to a burden to which others are not subject. Furthermore, that burden cannot even be justified by the importance of the government’s activity because it is not important for the government to delay extraordinarily, beyond what the normal and reasonable process requires. Depriving the owner of all economically viable use because of extraordinary delay therefore should generally be considered a taking, although some such cases might still not be takings because the temporary burden on the owner is so small in relation to the value of the property as a whole over time.<sup>76</sup>

Delay may also constitute a taking when the property has some value to begin with, but during the period of delay it becomes useless. In such a case, the taking is not just temporary. The government has not just deprived the owner of the use of valuable property for a time, but has instead made the property worthless by its conduct. In *Citino v. Redevelopment Agency*,<sup>77</sup> for example, the redevelopment agency designated plaintiff’s apartment building for condemnation and redevelopment, but agreed that plaintiff could redevelop the property himself on certain conditions. Plaintiff improved the property under the threat of fines from the Agency. But even though the Agency acquired the neighboring properties, for nine years the Agency did not follow through with its redevelopment plan and allowed the area to deteriorate so

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<sup>74</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (justifying and distinguishing a land-use restriction that “secured an average reciprocity of advantage”).

<sup>75</sup> See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 n.4 (1987) (“If the Nollans were being singled out to bear the burden of California’s attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State’s action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” (citation omitted)); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 (1987) (“While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.”).

<sup>76</sup> See *Tahoe-Sierra Preservation Council*, 535 U.S. at 303 (“A permanent deprivation of all use is a taking of the parcel as a whole, but a temporary restriction causing a diminution in value is not, for the property will recover value when the prohibition is lifted.”).

<sup>77</sup> 721 A.2d 1197 (Conn. App. Ct. 1998).

much that plaintiff's building was practically useless.<sup>78</sup> The court therefore held "that the defendant's actions in failing to implement its redevelopment plan for the area in a reasonable amount of time, although not formally abandoning the plan, and in permitting the overall deterioration of the property within the area, amounts to a taking of the plaintiff's property without just compensation."<sup>79</sup>

If the delay is a taking under the circumstances, the government must pay just compensation for the taking period even if the government later permits development. In *First English*, the county's ordinance allegedly denied the property owner all use of its property for several years. The Supreme Court held that invalidating the ordinance in such a case, and thereby allowing the owner to use its property again, was "a constitutionally insufficient remedy" and that the county must pay just compensation for the period during which it deprived the owner of all use of its land.<sup>80</sup> The Court reasoned that "temporary use and occupation" takes property from an owner just as permanent occupation does.<sup>81</sup>

### *3. Zoning, Permits, and Other Regulatory Restraints on Use or Improvement*

If the government downzones, denies building permits, or otherwise restrains the use and development of the land to keep it more affordable for eventual condemnation, this inverse condemnation theory will generally find the government's regulatory action to be a taking only if the property cannot practically be used for any permitted purpose.<sup>82</sup> The land-use regulation may be unconstitutional because of the government's illegitimate purpose, but that's a different theory discussed in the next section.<sup>83</sup> As far as this theory goes, the regulatory act will generally be a taking only if the property is undeveloped, or maybe if somehow its cur-

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<sup>78</sup> See *id.* at 1202-04, 1209.

<sup>79</sup> *Id.* at 1209-10; see also *Howell Plaza, Inc. v. State Highway Comm'n*, 226 N.W.2d 185, 189 (Wis. 1975) ("Long delays in actually acquiring property after the public improvements have been announced can result in substantial hardship to property owners, for which they ought in justice to receive compensation. We have no doubt that there can be a cause of action for inverse condemnation if . . . property owners so situated have been deprived of all, or substantially all, of the beneficial use of their property.").

<sup>80</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 322 (1987).

<sup>81</sup> *Id.* at 318-19 (quoting *United States v. Dow*, 357 U.S. 17, 26 (1958)).

<sup>82</sup> See *HFH, Ltd. v. Superior Court*, 542 P.2d 237, 244 (Cal. 1975) (en banc) ("[A] zoning action which merely decreases the market value of property does not violate the constitutional provisions . . ."); cases cited *supra* note 42.

<sup>83</sup> See *infra* Part III.A.2.

rently permitted use has become completely unfeasible.<sup>84</sup> Even then, if the zoning action, development moratorium, or other regulatory action is only temporary while the government considers condemnation or appropriate land uses or whatever, and the period of deliberation is normal or reasonable, the regulatory act still will not be considered a taking under this theory.<sup>85</sup>

#### *4. Government Development and Conduct Offsite*

This kind of precondemnation activity will never be a taking solely because of its effect on an owner's property. If the government condemns other land in the area, or allows the surrounding area to deteriorate, or otherwise uses or affects neighboring land in a way that depresses the market value of property to be condemned, the government has not even restrained the owner's use and enjoyment of her property, let alone taken it from her. Government conduct offsite can certainly affect a property's value, but mere injury to market value does not amount to a taking.<sup>86</sup> Neighbors, public or private, can always affect a property's value by what they do with their own property. That is one of the risks of property ownership.

However, if the government's offsite conduct causes actual damage to the property, rather than merely making it worth less because of how it changes the surrounding area, the government may have to pay just compensation. "A property owner may be required to bear without compensation incidental damages which are suffered alike by the public in general, but he is entitled to compensation for special and peculiar damage inflicted upon him."<sup>87</sup>

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<sup>84</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-18 (1992) (holding that government must pay just compensation when "regulation denies all economically beneficial or productive use of land").

<sup>85</sup> See, e.g., *Williams v. City of Central*, 907 P.2d 701 (Colo. Ct. App. 1995) (holding that a ten-month moratorium did not take property even if the owner could not use the property for any purpose during those ten months); *Woodbury Place Partners v. Woodbury*, 492 N.W.2d 258, 263 (Minn. Ct. App. 1992) (holding that a two-year moratorium pending review of a plan for land adjacent to an interstate highway was not a taking because it did not deprive the owner of all economically beneficial use of the land).

<sup>86</sup> See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978) (stating that "diminution in property value, standing alone," cannot establish a taking); *Hurst v. Starr*, 607 N.E.2d 1155, 1158-59 (Ohio Ct. App. 1992) ("Properties located in the vicinity of the highway, even those where there is no actual take of the property, may suffer a loss of market value to some extent. However, if there has been no taking of a person's property, there is no right to compensation or damages. Under such circumstances, the loss suffered by the owner has been described as *damnum absque injuria*.").

<sup>87</sup> *Aaron v. City of Los Angeles*, 115 Cal. Rptr. 162, 170 (Ct. App. 1974) (affirming an inverse condemnation award in favor of landowners whose property was worth less because of jet noise from airport nearby); see also *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 557 (1914) (holding that special damage from smoke and gas, not common to other owners along the railroad, required payment of just compensation); *Perron v. Telecable Assocs.*, 784 So.

This may be especially true under state constitutions that require compensation for property “taken or damaged.”<sup>88</sup> So if the government builds an airport runway and the runway causes a nuisance on property not yet condemned, the government may have to pay just compensation for the lost market value of the uncondemned property.<sup>89</sup> But if the property is simply worth less because the government’s conduct has made the area less desirable for development, changed traffic patterns, and so on, then the government does not have to pay just compensation.<sup>90</sup>

### B. *Illegitimate Purpose*

Government regulation may also deny the owner substantive due process of law if the regulation does not further a legitimate public purpose. In *Village of Euclid v. Ambler Realty Co.*,<sup>91</sup> the Supreme Court held that a zoning ordinance does not violate the Due Process Clause unless it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>92</sup> Then, in *Nectow v. City of Cambridge*,<sup>93</sup> the Supreme Court held that the application of a zoning law to a particular property did violate the Due Process Clause because it did not “bear a substantial relation to the public health, safety, morals, or general welfare.”<sup>94</sup> For twenty-five years, the Supreme Court also maintained that “[t]he application of a general zoning law to particular property” may similarly be a taking if it “does not substantially advance legitimate state interests.”<sup>95</sup> But

2d 852, 853 (La. Ct. App. 2001) (“[I]t must be determined ‘whether that damage is not suffered by those in the general neighborhood—that is, whether the damage is peculiar to the individual who complains.’ Therefore, this Court has concluded that damages such as the noise of traffic, a less pleasant view, and a circuitous or more inconvenient route to petitioner’s property, even when these factors resulted in an actual diminution of market value of the property, were not in themselves special damages and were not recoverable.” (citation omitted)).

<sup>88</sup> See, e.g., CAL. CONST. art. I, § 19 (“Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner.”); *Albers v. County of Los Angeles*, 398 P.2d 129, 137 (Cal. 1965) (“[A]ny actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable . . .”).

<sup>89</sup> See *Aaron*, 115 Cal. Rptr. at 170.

<sup>90</sup> See, e.g., *Village of Round Lake v. Amann*, 725 N.E.2d 35, 48 (Ill. App. Ct. 2000) (“A decreased market value is compensable only if it results from loss of access or other damage caused by the public improvement; otherwise, it is *damnum absque injuria*.”).

<sup>91</sup> 272 U.S. 365 (1926).

<sup>92</sup> *Id.* at 395.

<sup>93</sup> 277 U.S. 183 (1928).

<sup>94</sup> *Id.* at 188.

<sup>95</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); see also *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987) (“We have long recognized that land-use regulation does

the Court recently decided in *Lingle v. Chevron*<sup>96</sup> that the purpose served by a regulation does not affect whether the regulation is a taking.<sup>97</sup> Still, the Court reaffirmed that a regulation may violate the Due Process Clause if it does not serve a legitimate governmental purpose.<sup>98</sup>

### 1. Takings

Despite the *Lingle* decision that failure to substantially advance a legitimate state interest does not make a regulation a taking, the regulation's purpose may still result in a taking in one way that *Lingle* acknowledges. That is, it may be a taking not because it doesn't serve a legitimate purpose, but because the purpose it serves is unfairly or uniquely accomplished at the expense of the individual property owner. The Court in *Lingle* emphasized again that the Takings Clause does not prevent any conduct by the government, but simply requires the government to pay compensation when it would otherwise "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>99</sup> The Court explained that the "substantially advances" test "cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation."<sup>100</sup> The test ensures that the regulation is doing something legitimate and useful, but:

[t]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has

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not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ."); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose.").

<sup>96</sup> 125 S. Ct. 2074 (2005).

<sup>97</sup> *See id.* at 2083-84 ("But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment.").

<sup>98</sup> *See id.* at 2083 ("An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."); *id.* at 2087 (Kennedy, J., concurring) (noting that the Court's decision "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process," but explaining that the property owner had voluntarily dismissed its due process claim).

<sup>99</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960), *quoted in Lingle*, 125 S. Ct. at 2080.

<sup>100</sup> *Lingle*, 125 S. Ct. at 2084.

not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless “takes” private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.<sup>101</sup>

The Court thus seems to have indicated that a regulation may be a taking not because of the magnitude of the burden on the owner, but because of “how any regulatory burden is *distributed* among property owners.”<sup>102</sup> Even if inequality alone cannot create a taking, the distribution of the burden is certainly relevant to the takings determination, at least.

A regulation, then, might be a taking because its purpose is by its nature achieved at the expense of individual property owners rather than being fairly distributed among property owners.<sup>103</sup> The typical regulatory purposes are naturally accomplished without unfairly unequal burdens on property owners. Zoning regulations are naturally reciprocal, in that all landowners are generally subject to such regulations and all, including the subject property owner, enjoy the benefit of the general regulatory approach.<sup>104</sup> And some regulations that burden smaller groups of landowners are still constitutional without compensation because of their gen-

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> I have argued elsewhere that this is how the Court’s now-rejected “substantially advances” test should be understood in the takings context. See Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 365-68 (1999). In short, substantive due process sets outer limits to the government’s power to act, while the Takings Clause divides all permissible government actions into two groups: those that require compensation and those that don’t. The Takings Clause tries to avoid unfair burdens on individual property owners. So in the takings context, a regulation that does not advance “legitimate state interests” would be a taking not because the government does not have the power to take such an action, but because it is unfair to take such an action at the individual owner’s expense, rather than the public’s expense. But even though the Court has rejected the verbal formulation — that a regulation is a taking if it doesn’t substantially advance a legitimate state interest — the Court clearly still recognizes the principle that a regulation may be a taking because of the inequality of the regulatory burden.

<sup>104</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 133-36 (1978) (declaring that landmark preservation law, like zoning laws generally, did not unfairly burden a landmark owner because the owner enjoyed reciprocal benefits along with the rest of the public, even though many owners were not subject to landmark restrictions); *Landgate, Inc. v. Cal. Coastal Comm’n*, 953 P.2d 1188, 1195 (Cal. 1998) (“[W]hereas ‘the Fifth Amendment’s just compensation provision is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” a rational permit regulation scheme is imposed on the public as a whole to ensure the orderly development of real property, benefiting as well as burdening property owners.’(citation omitted)); Romero, *supra* note 103, at 366-68.

eral public benefit. In some early takings cases, the Supreme Court held that even if regulation burdened only one or a few landowners, the government need not pay compensation when the regulation was prohibiting “harmful or noxious uses.”<sup>105</sup> Such regulation is not unfair, despite its unequal burden, because it simply mitigates or prevents harms or burdens caused by the property owners themselves. But in *Penn Central*, the Supreme Court said that those earlier cases are “better understood as resting not on any supposed ‘noxious’ quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property.”<sup>106</sup> And in *Lucas v. South Carolina Coastal Council*,<sup>107</sup> the Court said that this principle “was . . . the progenitor of our more contemporary statements that ‘land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests.’”<sup>108</sup> While the Court has now rejected the broader-sounding “substantially advances” test for takings, *Lingle* reaffirms this narrower understanding of the test — that a regulation may be a taking if it burdens a single landowner or a small group of landowners, but does not apply to all similarly situated property, or does not produce a widespread public benefit. That is, it may be a taking if the regulatory burden is unfairly distributed.

So if a regulation furthers a purpose that naturally requires unfairly unequal burdens, then the regulation could be a taking for that reason. Some courts have found takings, for example, when “land use restrictions . . . are clearly imposed to support or subsidize some distinct Government function or enterprise (such as the provision of public parks, schools, playgrounds, roads, airports, or flood control projects, etc.), where the burdens imposed are based largely on the accident of ownership of land at a particular location.”<sup>109</sup> In such cases:

[T]here is no approximation of equal sharing of cost or of sharing according to capacity to pay as there is where a public benefit is obtained by subsidy or expenditure of public funds. The accident of ownership

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<sup>105</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022 (1992) (“[M]any of our prior opinions have suggested that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation.”).

<sup>106</sup> *Penn Central*, 438 U.S. at 133 n.30.

<sup>107</sup> 505 U.S. 1003 (1992).

<sup>108</sup> *Id.* at 1023-24 (citation omitted).

<sup>109</sup> 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 6:60 (4th ed. 2004) (citations omitted).

of a particular location determines the persons in the community bearing the cost of increasing the general welfare.<sup>110</sup>

While the benefit of the government improvement may be widespread, the regulatory burden is not “applicable to all similarly situated property,”<sup>111</sup> but only those properties that happen to be in the location selected for the government’s project.

Similarly, if the government restrains property development only because it anticipates condemning the property and wants to save money, the government imposes a unique burden on the property owner simply because of the accident that the owner has property the government wants. Property owners generally are not subject to such restraints. Even similar types of property are not subject to such restraints — only those properties that the government has happened to select for acquisition. So if the only reason for a precondemnation development restraint is to save money when the property is ultimately condemned, the restraint is by its nature unequal and takes property because, in fairness, the public as a whole should bear the burden of land acquisition for public projects.

*Penn Central* also says that one factor to consider in deciding whether a regulation is a taking is “the character of the governmental action.”<sup>112</sup> The Federal Circuit has recently held that the government’s bad faith is a relevant part of the character of the government’s action. In *Cooley v. United States*,<sup>113</sup> the court considered a takings claim based on the Army Corps of Engineers’ denial of a wetlands fill permit under the Clean Water Act. In discussing the issues on remand, the court said:

Accordingly, those agencies receive appropriate deference in acquiring technical information. However, in the instant case the agency admits its requests for additional information were not necessary for issuing a permit. The trial court previously discounted the credibility of the Corps’ argument that the permit denial letter requested additional information in an altruistic effort to issue a permit. In conducting a *Penn Central* analysis, the trial court may weigh

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<sup>110</sup> Allison Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 665 (1958).

<sup>111</sup> *Penn Central*, 438 U.S. at 133 n.30.

<sup>112</sup> *Id.* at 124.

<sup>113</sup> 324 F.3d 1297 (Fed. Cir. 2003).

whether the Corps' conduct evinces elements of bad faith. A combination of extraordinary delay and intimidated bad faith, under the third prong of the *Penn Central* analysis, influence the character of the governmental action.<sup>114</sup>

So in this way, too, the purpose of the government's precondemnation activity is relevant to deciding whether that activity amounts to a taking of property requiring just compensation.

Finally, regardless of how the Supreme Court construes the federal Takings Clause, state takings clauses may still be construed to require just compensation when government regulation restrains property use without a legitimate reason. In *Johnson v. City of Minneapolis*,<sup>115</sup> for example, the Minnesota Supreme Court recently declined to decide a federal takings claim under the *Penn Central* test and instead found a taking under the state constitution. The court said that, under the Minnesota constitution, "an abuse of the power of eminent domain may be tantamount to a regulatory control, constituting a de facto taking 'when that abuse is specifically directed against a particular parcel.'"<sup>116</sup> The city had misled the property owners into thinking that their properties would certainly be acquired for redevelopment and had acted in bad faith in causing the redevelopment deal to fail.<sup>117</sup> The court held that the city had thus taken some of the value of the properties that were designated for acquisition but never condemned.<sup>118</sup> The court ended with the caution that its decision does not mean "property owners are entitled to compensation for any diminishment in value or loss of income caused by the prospect that their property will be condemned at some future date," but *Johnson* certainly indicates the possibility that state constitutions will grant just compensation when the government restrains development of specific properties in bad faith and thereby impairs the properties' value.<sup>119</sup>

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<sup>114</sup> *Id.* at 1307 (citation omitted); see also *In re Elmwood Park Project Section 1, Group B*, 136 N.W.2d 896, 900 (Mich. 1965) ("The principle is firmly established in Michigan law . . . that a city may not by deliberate action reduce the value of private property and thereby deprive the owner of just compensation . . . . [M]any of the acts alleged by appellant, if so performed,—such as sending letters to tenants, filing lis pendens, intense building department inspection and citations against owners for any violations of the building code, and, finally, refusal to permit a long established business to continue in a building because it was going to be condemned—would . . . constitute a taking.").

<sup>115</sup> 667 N.W.2d 109 (Minn. 2003).

<sup>116</sup> *Id.* at 115 (quoting *Orfield v. Hous. & Redev. Auth.*, 232 N.W.2d 923, 927 (Minn. 1975)).

<sup>117</sup> See *id.* at 116.

<sup>118</sup> See *id.*

<sup>119</sup> *Id.*

## 2. Substantive Due Process

Precondemnation activity that serves no purpose other than saving money on condemnation is also a deprivation of substantive due process. The Supreme Court “[has] not elaborated on the standards for determining what constitutes a ‘legitimate state interest,’” but has said in the takings context that the term includes a “broad range of governmental purposes.”<sup>120</sup> Ordinarily, of course, land-use regulations further state interests in planning communities, protecting health and safety, and harmonizing land uses, although they could certainly further other legitimate purposes as well. But if the government’s precondemnation activity does not further a legitimate purpose, then it does not matter how much of the owner’s property is taken. The government’s action is invalid under the Due Process Clause.

Whatever the range of “legitimate” state interests, the Supreme Court has identified one illegitimate interest: obtaining a property interest without paying compensation. In *Nollan v. California Coastal Commission*, the Court held that conditioning a building permit on the surrender of a lateral easement across the beach was unconstitutional. The Court explained:

Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of “legitimate state interests” in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but “an out-and-out plan of extortion.”<sup>121</sup>

As the Court noted, the government has a legitimate interest in obtaining property, like easements. The government likewise has a legitimate interest in saving money in acquiring property for public uses. But it is not legitimate to circumvent the Just Compensation Clause and try to obtain that property for free by

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<sup>120</sup> *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834-35 (1987).

<sup>121</sup> *Id.* at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

using the regulatory power as leverage to extort the property from the owner. Similarly, it is not legitimate to try to obtain property for less by using the regulatory power to depress market values, rather than to further good-faith planning goals.<sup>122</sup> In the exactions situation, the government seeks to obtain a property interest for free, whereas in the precondemnation regulation situation, the government merely seeks to pay less for an interest it may eventually condemn. But that is a difference only of degree. In both cases, the government is not regulating to reduce public burdens or injuries resulting from a land use, to harmonize conflicting land uses, or to further any other such legitimate purpose. The government is regulating simply to save money in acquiring land.<sup>123</sup>

There is another, more significant difference between exactions and precondemnation regulation, however. When the government demands that the property owner convey some property interest in exchange for permission to develop her property, the government's own conduct objectively reveals the illegitimate reason for the property regulation. The government conditionally denies permission to develop the property, but tells the owner it will grant permission if the owner conveys the property interest. So the government will permit development if the owner conveys the interest, but will restrain development if the owner does not convey the interest. At that point, the only reason why the regulation

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<sup>122</sup> See *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 626 (Fla. 1990) ("We do not question the reasonableness of the state's goal to facilitate the general welfare. Rather we are concerned here with the means by which the legislature attempts to achieve that goal . . . . [T]he state may [not] deliberately restrict land use under its police power *before* the commencement of condemnation proceedings without the duty of compensation."); cf. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[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.")

<sup>123</sup> The court described this sort of regulatory abuse in *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 273-74 (Tex. Ct. App. 1975):

[I]n exercising the police power, the governmental agency is acting as an arbiter of disputes among groups and individuals for the purpose of resolving conflicts among competing interests. This is the role in which government acts when it adopts zoning ordinances, enacts health measures, adopts building codes, abates nuisances, or adopts a host of other regulations. . . . But where the purpose of the governmental action is the prevention of development of land that would increase the cost of a planned future acquisition of such land by government, the situation is patently different. Where government acts in this context, it can no longer pretend to be acting as a neutral arbiter. It is no longer an impartial weigher of the merits of competing interest among its citizens. Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one, or more, of its citizens, the scales will tip in its own favor. . . . To permit government, as a prospective purchaser of land, to give itself such an advantage is clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among members of the community.

is still restraining development is that the owner hasn't given the government some of her property. That is not a legitimate reason to restrain development.<sup>124</sup>

The objective reasons for precondemnation regulation, on the other hand, are less clear. Even if the regulation or other precondemnation activity does depress the property's value, thus reducing just compensation to be paid, the precondemnation activity may also have furthered other purposes that are legitimate. If the government could have rationally thought that its precondemnation activity would further some legitimate purpose — some purpose other than reducing the amount to be paid in just compensation later — then the government has not denied the property owner substantive due process.<sup>125</sup> So courts should be deferential and only find a substantive due process violation when there is clearly no possible purpose for precondemnation activity other than saving condemnation expenses in the future.<sup>126</sup>

This is true even if the government regulators did not actually intend to further any purpose other than saving money on later condemnations. As long as the precondemnation activity could have been thought to further some legitimate purpose, it should not matter that the regulators were primarily or even entirely motivated by the desire to save money on condemnation.<sup>127</sup> As the California Supreme Court observed in *Landgate, Inc. v. California Coastal Commission*:<sup>128</sup>

The Court of Appeal erred in its attempt to divine  
. . . the “true,” illegitimate, motive for the Commis-

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<sup>124</sup> See Romero, *supra* note 103, at 359.

<sup>125</sup> See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976) (“It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.”); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

<sup>126</sup> Courts continue to disagree about how egregious land use regulation must be to violate substantive due process. See Parna A. Mehrbani, Comment, *Substantive Due Process Claims in the Land-Use Context: The Need for a Simple and Intelligent Standard of Review*, 35 ENVTL. L. 209, 229-36 (Winter 2005). But regardless of the verbal standard, everyone agrees that the courts should be deferential and that a regulation will deny substantive due process if it does not serve any legitimate purpose.

<sup>127</sup> See, e.g., *Pinheiro v. County of Marin*, 131 Cal. Rptr. 633, 636 (Ct. App. 1976) (“[T]he general rule is that ‘the purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance . . . . If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence.’” (citation omitted)); *Eagle*, *supra* note 60, at 483 (“[T]he general rule is that the presence of bad faith does not, in itself, invalidate an otherwise reasonable land-use regulation.”).

<sup>128</sup> 953 P.2d 1188 (Cal. 1998).

sion's decision to deny Landgate's development permit. The proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter. This type of objective inquiry is consistent with the principle that courts do not delve into the individual purposes of decisionmakers in a quasi-adjudicative proceeding, but rather look to the findings made by the government agency and determine whether these are based on substantial evidence. Thus, we must determine not whether a sinister purpose lurked behind the Commission's decision, but rather whether the development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit.<sup>129</sup>

However, some courts have relied upon evidence of actual illicit intent in deciding substantive due process challenges to land use regulation.<sup>130</sup> For example, in *Blanche Road Corp. v. Bensalem Township*,<sup>131</sup> the Third Circuit held that evidence of intentional delaying of permits to prevent a subdivision development would establish a substantive due process violation.<sup>132</sup> Considering such evidence makes more sense if a court is trying to decide if an executive official was acting so arbitrarily, or with such bad faith, that it "shocks the conscience," a substantive due process standard adopted by the Supreme Court in reviewing executive actions like police conduct in pursuing a motorcyclist.<sup>133</sup> The Third Circuit has held that this standard should apply to executive ac-

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<sup>129</sup> *Id.* at 1198 (citations omitted).

<sup>130</sup> *See, e.g., In re Elmwood Park Project Section 1, Group B*, 136 N.W.2d 896, 900 (Mich. 1965) ("The principle is firmly established in Michigan law . . . that a city may not by deliberate action reduce the value of private property and thereby deprive the owner of just compensation.").

<sup>131</sup> 57 F.3d 253 (3d Cir. 1995).

<sup>132</sup> *Id.* at 268-69; *see also* *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 124-26 (3d Cir. 2000) (holding that evidence of intentional delaying of subdivision approval to prevent financing of subdivision would support finding a substantive due process violation).

<sup>133</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) ("[T]he substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992))).

tion concerning regulation of land as much as it applies to other executive action.<sup>134</sup>

But I don't need to get into the debate about whether land-use regulatory actions are legislative or executive, a debate which may have little practical significance in resolving substantive due process cases anyway.<sup>135</sup> The substantive due process theory of *Nollan* is clearly based on an objective fact about the purposes served by the government regulation, not an assessment of how egregiously the regulators acted.<sup>136</sup> Still, evidence of actual intent may not be entirely irrelevant to this particular inquiry. This substantive due process theory requires a court to examine the relationship between the means chosen by the government and the ends served thereby. Courts generally should defer to government decisionmakers, as long as there is any apparently rational purpose for their action. But if the evidence shows that the government was actually motivated by illegitimate purposes, a court does not have the same reason to defer to the government's judgment. There is not as much of a reason to assume the government was acting in good faith to achieve some legitimate purpose when the court can see what the government actually intended to achieve. The actual illegitimate motive itself may not thus make the action a due process violation, but it may justify the court in more closely scrutinizing whether the action did objectively advance some legitimate purpose despite the actual illegitimate purpose.<sup>137</sup>

Some courts have held that if property owners are not entitled to receive development permission, the Due Process Clause does not protect them at all because denying permission does not deprive them of any property right.<sup>138</sup> This "entitlement" require-

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<sup>134</sup> See *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 401-02 (3d Cir. 2003).

<sup>135</sup> See Mehrbani, *supra* note 126, at 238.

<sup>136</sup> *Nollan* and the Court's subsequent decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), do not say they are substantive due process cases, but I think that is the best way to understand them. See Romero, *supra* note 103, at 358-61, 370-73. In any event, they certainly discuss what interests are legitimate and illegitimate in the land-use context.

<sup>137</sup> I previously made a similar argument to justify the Supreme Court's requirement in *Dolan* that the city make an "individualized determination" showing a proportional relationship between a requested land-use permit and an exaction imposed by the permitting authority. See Romero, *supra* note 103, at 383-84.

<sup>138</sup> See, e.g., *Norton v. Village of Corrales*, 103 F.3d 928, 932 (10th Cir. 1996) (stating that if the zoning commission's decision on plat approval was discretionary, the owner had no constitutional right to due process concerning that decision); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (holding that property owners did not have a property interest in a temporary certificate of occupancy); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-19 (2d Cir. 1989) (holding that the property owner had no protected property right because the zoning board's decision was discretionary); Mehrbani, *supra* note 126, at 233.

ment comes from the Supreme Court's decision in *Board of Regents v. Roth*,<sup>139</sup> which involved neither land-use regulation nor substantive due process.<sup>140</sup> I have previously argued that this reasoning is inconsistent with the Supreme Court's original approval of zoning in *Euclid v. Ambler Realty Co.*<sup>141</sup> The ordinance in *Euclid* did not entitle the owners to develop their property, but the Court did not say that they therefore had no due process rights in developing their property. Instead, the Court reasoned that the public benefits of zoning outweighed the individual's right to use her property as she pleased.<sup>142</sup> Even while applying its "entitlement" precedents, the Second Circuit acknowledged that:

It is not readily apparent why land regulation cases that involve applications to local regulators have applied the . . . entitlement test to inquire whether an entitlement exists in what has been applied for . . . instead of simply recognizing the owner's indisputable property interest in the land he owns and asking whether local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously.<sup>143</sup>

Regardless of whether an owner has a "right" to a certain sort of development approval, the owner clearly owns her property. She has the right to use her property any way she chooses within the boundaries of the common law, such as nuisance law. Any further restraint of her property use by the government takes away some of her property rights, and must be consistent with the limitations of the Due Process Clause as well as the Takings Clause.<sup>144</sup>

In summary, government's precondemnation activities may take property, and deny the owner substantive due process, if they deprive the owner of some part of her property rights with no objective purpose other than obtaining the property for less, because such property restraints are not fairly and equally distributed and do not further a legitimate public purpose. The rest of this section discusses the circumstances in which particular compensation-

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<sup>139</sup> 408 U.S. 564 (1972).

<sup>140</sup> *See id.* at 576-78.

<sup>141</sup> *See Romero, supra* note 103, at 372-73.

<sup>142</sup> *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

<sup>143</sup> *RRI Realty Corp.*, 870 F.2d at 917.

<sup>144</sup> *See Mehrbani, supra* note 126, at 238-39 (arguing that courts should not apply the entitlement rule to land-use cases).

reducing practices may take property or deny substantive due process in this way.

### 3. *Planning*

The government certainly has good reasons to plan its acquisitions well in advance. Advance planning promotes deliberate consideration of government projects. Planning future acquisitions is also necessary so that the government can plan funding for those acquisitions, which often requires years of preparation. And planning future acquisitions helps prevent the economic waste that would result from incompatible development on or near the planned government development. Planning future condemnations therefore will consistently serve a legitimate state interest.

### 4. *Publicity*

Publicizing government plans also generally has a legitimate purpose. The public has an interest in such plans and should have an opportunity to discuss, comment, and object.<sup>145</sup> “[T]o allow recovery under all circumstances for decreases in the market value caused by precondemnation announcements might deter public agencies from announcing sufficiently in advance their intention to condemn.”<sup>146</sup>

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<sup>145</sup> See *Merced Irrigation Dist. v. Woolstenhulme*, 483 P.2d 1, 13 n.9 (Cal. 1971) (en banc) (indicating the desirability of “afford[ing] the public some direct participation in the planning and placement of [government] projects”); *Westgate Ltd. v. State*, 843 S.W.2d 448, 453 (Tex. 1992) (“Construction of public-works projects would be severely impeded if the government could incur inverse-condemnation liability merely by announcing plans to condemn property in the future. Such a rule would encourage the government to maintain the secrecy of proposed projects as long as possible, hindering public debate and increasing waste and inefficiency. After announcing a project, the government would be under pressure to acquire the needed property as quickly as possible to avoid or minimize liability. This likewise would limit public input, and forestall any meaningful review of the project’s environmental consequences. The government also would be reluctant to publicly suggest alternative locations, for fear that it might incur inverse condemnation liability to multiple landowners arising out of a single proposed project. Failing to consider available alternatives is not only inefficient, but is at odds with proper environmental review.” (citation omitted)); *Littman v. Gimello*, 557 A.2d 314, 319 (N.J. 1989) (noting the public’s interest in location of hazardous waste facilities).

<sup>146</sup> *Klopping v. City of Whittier*, 500 P.2d 1345, 1354 (Cal. 1972) (en banc); see also *City of Buffalo v. J.W. Clement Co.*, 269 N.E.2d 895, 904 (N.Y. 1971) (“To hold the date of the Announcement of the impending condemnation, whether directly to the condemnee or by the news media, constitutes a De facto taking at that time, would be to impose an ‘oppressive’ and ‘unwarranted’ burden upon the condemning authority. At the very least, it would serve to penalize the condemnor for providing appropriate advance notice to a property owner. And to so impede the actions of the municipality in preparing and publicizing plans for the good of the community, would be to encourage a converse policy of secrecy which

Statutes may even require such an opportunity for the public to comment.<sup>147</sup>

But sometimes the government publicizes before it plans. That is, sometimes the government may indicate to the public that it may condemn certain land in the future, even though the government has not actually gone through the applicable planning process to arrive at that conclusion. In such cases, the government cannot justify publicity on the same grounds. Statutes and due process would not require the publicity. Still, the government might reason that public awareness and input, even before the planning process, will help ensure planning that is sensitive to public concerns and reduce the severity of potential citizen reaction. Sometimes, though, a plaintiff might establish a substantive due process violation if the only purpose of early publicity, without any procedural need to publicize, is to prevent land from being developed in the meantime in a way that would increase the ultimate cost to the condemning authority.

### 5. Delay

As discussed above, extraordinary delay may be a taking when it deprives the owner of all use and enjoyment of her property for a time.<sup>148</sup> But even if it deprives the owner of some, but not all use, or deprives the owner of all use for a period not long enough to amount to a taking, it should still be a substantive due process violation if it does not serve a legitimate state interest. Delay that results from good faith deliberation always serves a legitimate state interest, even if the government is doing a poor job of deliberating. But in some cases it seems the government's only reason for delay is not to deliberate further, but to stall while it considers condemning the property. If so, the government's reason is not legitimate.<sup>149</sup> Sure, the government wants time to consider a condemnation decision. But it is not a legitimate reason to prevent development that otherwise is consistent with land use regulations and policies. The only reason for the delay is that the government does not want the owner to develop the property, or receive build-

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'would but raise (greater) havoc with an owner's rights.'" (quoting *City of Buffalo v. J.W. Clement Co.*, 311 N.Y.S.2d 98, 114 (App. Div. 1970) (Gabrielli, J., dissenting)).

<sup>147</sup> See, e.g., R.I. GEN. LAWS § 23-19-10.2(b)(2) (2001) (requiring a Rhode Island resource recovery corporation to give public notice of condemnation plans and accept public comments in a public forum).

<sup>148</sup> See *supra* part III.A.

<sup>149</sup> Cf. *Cooley v. United States*, 324 F.3d 1297, 1306-07 (Fed. Cir. 2003) (stating that "extraordinary delay in decision-making may constitute a taking," but it is very rare for delay to be a taking "without a concomitant showing of bad faith").

ing or zoning permissions for the property, in a way that increases the cost of condemning the property. Saving money in this way is not a legitimate public purpose.

### 6. Zoning and Other General Regulation

If the government zones a property in order to assure compatibility with neighboring uses, to promote orderly development, or for other normal planning purposes, the zoning itself is not a substantive due process violation regardless of whether the zoning depresses market value, although it may still be a taking if it makes the property useless, of course.

But if the government downzones a particular area because it anticipates condemning the land, the downzoning should be treated as a substantive due process violation because the government's purpose is not legitimate. The government legitimately desires to reduce the costs of land acquisition, but it cannot legitimately restrain land use just to save itself money.<sup>150</sup>

Some courts have recognized this possible unconstitutional abuse of the zoning power. For example, in *State ex rel. Tingley v. Gurda*,<sup>151</sup> the Wisconsin Supreme Court found that:

[T]he city planning commission contemplates some time in the future a boulevard along Mud creek, and, with that in view, a zoning regulation has been promulgated destroying the value of the property which will later have to be taken for that purpose, so that the city may be able to carry out the boulevarding project with less expense to itself.<sup>152</sup>

The court held that the city had exceeded the authority of the zoning law when it used the zoning power to zone "a block in the heart of an industrial section to residential purposes only" in order to reduce the cost of later condemnation.<sup>153</sup>

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<sup>150</sup> See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 146 Cal. Rptr. 103,110 (Ct. App. 1978) ("[I]f the state downzones a property to decrease its value as a prelude to later acquiring the property, the zoning may be found to have been a condemnation."); *Grand Trunk W. R. Co. v. City of Detroit*, 40 N.W.2d 195, 200 (Mich. 1949) (holding a zoning ordinance "unreasonable and confiscatory" because it zoned property residential when the only way it could be developed residentially was if the government condemned the property).

<sup>151</sup> 243 N.W. 317 (Wis. 1932).

<sup>152</sup> *Id.* at 320.

<sup>153</sup> *Id.*

### *7. Restraints on Rehabilitation or Development Generally*

On the other hand, the government may have a legitimate reason to directly prevent development of property that it is considering condemning. The government does not want the owner to develop the property wastefully. Even if the government fully compensates the owner for the increased market value, the owner's investment was still economically wasteful. The government ends up undoing valuable improvements that it does not need, and having to pay for the privilege. It may seem that the government is simply saving itself some money, but it is doing more than that. It is preventing waste. So a moratorium on development while condemnation is being considered should not be considered a taking for failure to advance a legitimate state interest.

But if the regulatory restraint is not preventing waste, then it seems to clearly be a taking. For example, in the unlikely case that a moratorium prevented rehabilitation of an improvement that the government would keep and use after condemnation, the moratorium would not prevent waste in the same way as when the improvements would not long be useful. The government's only other purpose is to keep the value of the property down, which is an illegitimate purpose.

### *8. Government Development and Conduct Offsite*

The biggest problem for the landowner claiming a substantive due process violation based on this kind of precondemnation activity is that the government has not interfered with any recognized property right. A property owner may have an expectation, but not a property right, to a good or compatible neighborhood around her. If the government has not taken away any of the owner's property rights at all, it doesn't matter what purposes the government has advanced.<sup>154</sup> The property owner has no due process claim.

One way the government may try to reduce the market value of properties it plans to condemn is by acquiring other properties in the area first.<sup>155</sup> Although reducing compensation may be one purpose, government condemnation and development nearby will also surely serve a legitimate interest in advancing whatever

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<sup>154</sup> See cases cited *supra* note 138.

<sup>155</sup> See, e.g., *Merkur Steel Supply, Inc. v. City of Detroit*, 680 N.W.2d 485, 493 (Mich. Ct. App. 2004) (noting plaintiff's allegation that the city tried to reduce the cost of acquiring plaintiff's land by condemning much of the surrounding property in order to prevent plaintiff's expansion).

project the government has in mind. But even if in an unusual case the evidence showed that the government really had no need of certain property condemned nearby and had no plans to make use of it, and also showed that the effect was to depress the market value of necessary properties, the owner of later-acquired property could not claim that the earlier condemnations denied her substantive due process, because she had no property interest in what happened on the neighboring land. As for those whose land was taken, they would have no reason to claim a taking or due process violation because the government in fact formally took their land and paid them just compensation for it.

In some cases the government allegedly neglected, demolished, or otherwise affected neighboring properties in order to reduce the value of property in the area before acquiring it.<sup>156</sup> Doing so might further a legitimate state interest in using public resources wisely by not maintaining or rehabilitating properties that the government intends to demolish anyway. And again, the affected property owner cannot really claim that the government has taken her property by allowing the area to deteriorate. However substantial the impact on her use and enjoyment of the property, the government has not taken away any recognized property right, regardless of the interests advanced by its actions.

### *C. Figuring Just Compensation*

Most of the time the government's precondemnation activities will not themselves amount to a taking. If the government were to stop there and never condemn the property, it would need to pay no compensation to the owner at all, even though the owner may have suffered some actual loss during that anticipated condemnation period. That is simply one of many risks that come with ownership: the government and private owners alike may make decisions that affect the use and value of any particular

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<sup>156</sup> See *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 786 (8th Cir. 1979) (recounting plaintiff's allegations that the city had acquired surrounding properties for redevelopment, demolished them, but abandoned the redevelopment, thereby taking plaintiff's property); *Amen v. City of Dearborn*, 363 F. Supp. 1267, 1273 (E.D. Mich. 1973) (finding that the city's efforts to reduce the cost of acquiring property included selling property in the area to polluting industries), *rev'd*, 532 F.2d 554 (6th Cir. 1976); *Merkur Steel Supply*, 680 N.W.2d at 499 n.3 ("Some evidence in the record indicates that the city stopped services such as trash pickup around the area and also began dumping trash on property the city acquired. Further, plaintiff suggested that through condemnation, the city acquired some of the residential properties around the area, but let those properties become run down.").

property, and the value of the property will rise and fall because of those decisions, and in anticipation of those decisions.<sup>157</sup>

But when the government does ultimately take the property in formal condemnation proceedings, there is a second constitutional question: how much must the government pay for the condemned property? What compensation is “just”? The usual rule is that the government must pay the market value at the moment it actually takes title from the owner.<sup>158</sup> But a property’s real market value might have been significantly higher if the government had not already started depressing the value by its regulatory or other precondemnation activities.

In general, the government should compensate owners for their full loss. “The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.”<sup>159</sup> Taking property is not an instantaneous action. After making the decision to condemn, planning, funding, negotiating, and litigating a taking can take a long time. If the property declines in value because of that process, or because of other precondemnation activities, the owner has suffered a loss solely because of the taking, and the government should make her whole.<sup>160</sup>

Of course, we cannot determine actual market values very precisely to begin with.<sup>161</sup> And then isolating different causes of

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<sup>157</sup> See *Danforth v. United States*, 308 U.S. 271, 285 (1939) (“A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a ‘taking’ in the constitutional sense.”).

<sup>158</sup> See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320 (1987); *United States v. Miller*, 317 U.S. 369, 374 (1943).

<sup>159</sup> *United States v. Reynolds*, 397 U.S. 14, 16 (1970); see also *Olson v. United States*, 292 U.S. 246, 255 (1934); *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (“[T]he question is, What has the owner lost? not, What has the taker gained?”).

<sup>160</sup> See H. Dixon Montague, *Market Value and All that Jazz: The Proof of the Pudding Is in the Eating*, 30 URB. LAW. 631, 650 (1998) (“[T]he government should not be permitted to artificially influence a market by various value depressing acts so that the property it must acquire in that market will come at a cheaper price. An owner whose property is the type traded in the marketplace is entitled to compensation in a condemnation case based on free market transactions uninfluenced by such governmental activity.”); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 696-97 (2005). Similarly, if the government’s precondemnation conduct, or anticipation of the condemnation, makes the property worth more, the government is not required to pay the higher market value in compensation for the taken property. See, e.g., *United States v. Cors*, 337 U.S. 325, 333-34 (1949) (holding that the government need not pay higher market value for condemned tugs because the government’s own war-time demand for tugs increased their market value); *Miller*, 317 U.S. at 376-77 (“If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.”).

<sup>161</sup> See Serkin, *supra* note 160, at 683-84 (describing difficulties with determining “market value” as a measure of just compensation).

market value declines is even harder. So sometimes it may be too speculative to determine how much the property would be worth were it not for the government's precondemnation activities.<sup>162</sup> But the owner should be able to offer such proof and should be able to recover such value if she can sufficiently prove it.<sup>163</sup>

Proof of just compensation is even harder when there are multiple causes of market decline, or when market values generally increase, but the pending condemnation slows the increase in market value of the subject property. When the precondemnation activities themselves constitute a taking, as discussed above, the government must pay the entire market value at that earlier time. There is no need to isolate different effects on market value in such a case. But when the precondemnation activities themselves are not a taking, and the question is simply what compensation is required upon eventual condemnation, the government usually should not have to pay the owner for declines in value due to market changes generally, only those declines specifically due to the government's precondemnation activities.<sup>164</sup> Somehow the evidence must establish how much loss was due to the precondemnation activities and not other market influences.

In some cases, however, just compensation should include lost market value even if due to general market decline rather than anticipation of condemnation. If the government has indicated its intent to condemn or otherwise begun the condemnation process in some way, the market value may decline, but it also may be practically impossible to find a real buyer at all. If the owner is unable to sell the land because of the market's antipa-

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<sup>162</sup> See *Atchison, Topeka & Santa Fe Ry. Co. v. S. Pac. Co.*, 57 P.2d 575, 581 (Cal. Ct. App. 1936) (“[T]he trial court would have permitted an indulgence in unfathomable speculation had it opened the road to the examination of witnesses . . . to determine whether there was a slump in the market in this area, and, if so, what it was due to, during that period [between announcement and commencement of an eminent domain action].”).

<sup>163</sup> See, e.g., *Klopping v. City of Whittier*, 500 P.2d 1345, 1353 (Cal. 1972) (en banc) (“Since the condemnee has the burden of proving damages, requiring the condemnee to lay a proper foundation in these matters and properly instructing the jury should adequately circumscribe speculation and render unnecessary a rule of exclusion created from apprehension of speculation.” (citations omitted)).

<sup>164</sup> See *id.* at 1351 (“In [a de facto taking claim], the owner claims his property has been Taken on the earlier date; thus all decline in value after that date is chargeable to the condemner. This would include damages wholly unrelated to the precondemnation activity of the public agency. For example, losses due to a general decline in market value in the area or to the adverse consequences of a natural disaster would be borne by the condemner since the Taking of the property is said to have occurred at the earlier date. In the instant case, however, plaintiffs do not contend that the subject properties should be treated as if they were actually condemned [earlier] . . . . Rather plaintiffs submit that any decrease in the market value caused by the precondemnation announcements should be disregarded and that the property should be valued without regard to the effect of the announcements on the property.”).

tion of the condemnation, the owner not only loses the discounted market value because of the pending condemnation, but also may lose additional value as the market declines but she is unable to sell. The Supreme Court of Washington recognized this problem in *Lange v. State*, finding that:

Once the State manifested its unequivocal intent to appropriate the Lange property, appellants were precluded from exercising their business judgment and selling the property before the market fell further. Moreover, appellants were precluded from taking any steps to counteract the market decline by making improvements on the land or otherwise changing its use. Thus, appellants were deprived of the most important incidents of ownership, the rights to use and alienate property. In addition, because the condemnation did in fact take place, appellants were prevented from holding their property, as other owners would be able to do, until economic conditions improved and market values rose again.<sup>165</sup>

The court therefore held that just compensation would require valuing the property at the time the highway location was first announced, even though the court had not found that the announcement itself constituted a taking.<sup>166</sup>

If an owner would not have sold the property but for the pending condemnation, however, the just compensation principle does not require compensating her for a general decline in market value during the time she was unable to sell. The government need only put the owner in the position she would have been in had there been no condemnation — and in such a case, had there been no condemnation, the owner would have suffered the same general decline in market value, as owners often do. In general, then, this additional compensation for general market declines while condemnation was looming should be paid only to owners who acquired the property for development and have demonstrated by at least some preliminary steps that they were going to develop the property when the precondemnation activities got in the way

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<sup>165</sup> *Lange v. State*, 547 P.2d 282, 288 (Wash. 1976) (en banc).

<sup>166</sup> *See id.* (“Under these circumstances the loss suffered is so closely connected to the condemnation itself that our constitutional concern for truly just compensation requires valuation in an eminent domain proceeding at a time earlier than the date of trial. This conclusion is necessary if the condemnee is to be placed in the same position monetarily as he would have occupied had his property not been taken.”).

and practically prevented them from developing and selling the property.<sup>167</sup>

The rest of this section discusses the different types of pre-condemnation activities and how they can affect the measure of just compensation.

### 1. *Planning and Publicity*

The government certainly may have legitimate, important reasons to plan and publicize future land acquisitions. The government shouldn't pay more for the property as a result of such public planning. But the government shouldn't pay less either. If the planning and publicity also depressed the market value, that publicity is really just part of the condemnation process. The market has simply already discounted the property's value by some probability of eventual condemnation. The government shouldn't avoid paying a bill just because the market sees it coming.<sup>168</sup> Similarly, lenders will almost certainly refuse to finance development of property that is targeted for condemnation, even though the owner is free to proceed with such development until the government actually condemns the land, if it ever does.<sup>169</sup> Lack of avail-

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<sup>167</sup> See *id.* ("The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. Further, the owner must have taken active steps to accomplish this purpose. A property owner who purchased land or took steps to market it in contemplation of the condemnation could not insulate himself from a later general decline in market values and benefit from the holding in this case.")

<sup>168</sup> See, e.g., *Jersey City Redev. Agency v. Kugler*, 277 A.2d 873, 875 (N.J. 1971) ("The rule supported by the weight of authority in the ordinary condemnation case is that the proper basis of compensation is the value of the property as it would be at the time of the taking (or at the time fixed by the statute, such as the date of commencement of the condemnation proceedings) disregarding either the depreciating threat of or the inflationary reaction to the proposed public project."); *Lange*, 547 P.2d at 286 ("It is similarly widely recognized that any decrease in property value attributable to the project for which the eminent domain proceeding is instituted is to be disregarded in computing just compensation. This rule also applies to situations in which the condemnation activities themselves have depreciated property prior to the institution of formal eminent domain proceedings." (citations omitted)); John Lewis, *LAW OF EMINENT DOMAIN* § 745 (3d ed. 1909) ("If the proposed improvement had depreciated the value of the property, it would be very unjust that the condemning party should get it at its depreciated value, . . . the correct rule would seem to be that the value should be estimated irrespective of any effect produced by the proposed work."). But see *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 636 (1961) (stating that just compensation "must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project" (citation omitted)).

<sup>169</sup> See, e.g., *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 370 (E.D. Mich. 1970) (noting that pending condemnation, and government condemnations in the surrounding area, prevented plaintiffs from borrowing money to improve property); Kanner, *supra* note 22, at 49 n.7 ("Needless to say, these decisions are unsound, indeed absurd, because they ignore the realities of a landowner having to secure the necessary permits and financing to create a substantial improvement, in the face of municipal plans to tear it down shortly after it is built, when the public project eventually materializes. No rational lender

able financing will likewise reduce the value of the land even before the government formally condemns the land, yet is the direct result of the condemnation decision.

The government therefore should pay the market value the land would have had if the government had never targeted the land for acquisition. Some condemnation statutes expressly direct that market value must be determined without depreciation resulting from the condemnation project itself.<sup>170</sup> But it can be especially difficult to determine how much the property would have been worth if the government had never begun to plan and publicize the condemnation. Sometimes particular events may logically provide a date on which to measure the market value of the ultimately condemned property. For example, a government declaration that an urban area is blighted will surely impair the market value of properties in that area. But it may be years before the government actually condemns the property. If so, the government should pay as just compensation at least the market value of the property on the date of the blight declaration.<sup>171</sup>

## 2. Delay

Condemnation takes time. Once the government begins planning a condemnation, passes a resolution to condemn, or oth-

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would lend money for such a venture. Still, if the courts insist that this is the law, no reason appears why the landowners should not be able to enjoy the benefit of that law when they are able to improve land slated for public acquisition.”)

<sup>170</sup> See, e.g., MD. CODE ANN., REAL PROP. §12-105 (2003) (“[F]air market value includes any amount by which the price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of the property and the date of actual taking if the trier of facts finds that the diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning the public project, and was beyond the reasonable control of the property owner.”); 26 PA. STAT. ANN. §1-604 (1997) (“Any change in the fair market value prior to the date of condemnation which . . . was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.”); WASH. REV. CODE § 8.26.180 (2004) (“Any decrease or increase in the fair market value of the real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired or by the likelihood that the property would be acquired for such improvement . . . will be disregarded in determining the compensation for the property.”).

<sup>171</sup> See *Washington Mkt. Enters., Inc. v. City of Trenton*, 343 A.2d 408, 411 (N.J. 1975) (citing a New Jersey statute and discussing just compensation for blighted property); *City of Buffalo v. J. W. Clement Co.*, 269 N.E.2d 895, 903 (N.Y. 1971) (explaining that when “condemnation blight” reduces the value of later condemned property, “compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation”); *City of Cleveland v. Carcione*, 190 N.E.2d 52, 56-57 (Ohio Ct. App. 1963) (holding that just compensation had to be determined at a time before the renewal project caused neighborhood decline).

erwise begins the process of condemnation, the property may immediately become less valuable. The market recognizes that it will not be privately useable much longer, and many otherwise valuable uses are no longer feasible. If the government pays only the market value on the date of actual condemnation,<sup>172</sup> it will not actually “put [the owner] in the same position monetarily as he would have occupied if his property had not been taken.”<sup>173</sup>

Some courts have recognized this problem, however, and held that “any decrease in property value attributable to the project for which the eminent domain proceeding is instituted is to be disregarded in computing just compensation.”<sup>174</sup> So if the delay is in actually carrying out a planned condemnation, it doesn’t matter whether the delay was reasonable or unreasonable. The market value is figured as if the condemnation proceeding never began, because that is how much the owner has lost.

On the other hand, some have reasoned that some delay is unavoidable, and the law should not discourage governments from announcing their intentions to condemn before formally commencing the condemnation. Therefore, the government will be required to pay market value lost during anticipation of condemnation only if the government “acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation.”<sup>175</sup> But such a rule leaves open the possibility that the owner will have suffered some of the real loss from the condemnation, but not be compensated for it, simply because the government had a good reason for causing the loss. It doesn’t matter how good the reason; if the government causes the loss in taking property for the benefit of the public, the government should compensate the owner for the loss.<sup>176</sup>

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<sup>172</sup> See, e.g., *Lange v. State*, 547 P.2d 282, 285 (Wash. 1976) (en banc) (noting the usual rule and the potential unfairness of determining market value on date of trial).

<sup>173</sup> *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

<sup>174</sup> *Lange*, 547 P.2d at 286.

<sup>175</sup> *Klopping v. City of Whittier*, 500 P.2d 1345, 1355 (Cal. 1972) (en banc); see also *State ex rel. Dep’t of Transp. v. Barys*, 941 P.2d 971, 976 (Nev. 1997) (following the rule from *Klopping*); Eric Kades, *Avoiding Takings “Accidents”: A Tort Perspective on Takings Law*, 28 U. RICH. L. REV. 1235, 1274-77 (1994) (citing examples of courts using reasonableness tests to determine whether just compensation is required for precondemnation delay); Kanner, *supra* note 22, at 61 (“[T]o serve a broader public purpose, the prospective condemnees may have to suffer some minor incidental losses, as the public decision-making process progresses and knowledge of prospective public land acquisitions spreads, affecting market values at the targeted owners’ expense.”).

<sup>176</sup> Cf. Kanner, *supra* note 22, at 62 (“[T]he burdens of substantial delays in the implementation of public projects must fall somewhere, and given the constitutional doctrine that protects individual property owners from having to shoulder a disproportionate share of the cost of public improvements, it is only fair that it fall on the government that (1) is best

### 3. Zoning and Other General Regulation

As discussed in the previous section, the government may take property when it depresses the market value of targeted property by downzoning or denying permits and the like. If the loss is great enough to amount to a taking, or if the government does not have a legitimate reason for the regulatory action, then the government action will require compensation or be invalid under substantive due process. But if the loss is not substantial enough to amount to a taking, and the government has a legitimate reason for the regulatory action, then there is no reason that just compensation should be the greater market value the property would have had but for the permissible regulatory action. For example, if the government had a legitimate reason for downzoning a property from industrial to open space-agricultural, when it eventually condemned the property it should pay the property's market value as open space-agricultural land at that time, not the earlier industrial value. That's the general rule, and there is no reason to do differently if the government had a legitimate reason for the downzoning. On the other hand, if the government denied a permit necessary to properly maintain the property because it anticipated condemning the land, just compensation should be the market value the property would have had if the owner had been permitted to properly maintain it.<sup>177</sup> So the market value of condemned property should be determined based on the present condition and currently permitted uses, unless the owner can show that the government's regulatory decisions were themselves unconstitutional because they had no legitimate purpose.

### 4. Restraints on Rehabilitation or Development

Sometimes the government temporarily prohibits development while it decides whether to condemn particular properties. During the temporary prohibition, the property may decline in value because of market anticipation of the condemnation. Such

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situated to expedite the process, (2) is the effective cause of the loss, (3) has superior cost-spreading ability, (4) has superior resources that it can use until the cost of the project can be fairly spread on society that benefits from it.”).

<sup>177</sup> See *id.* at 66-67 (“[I]f the local municipality refuses to issue the permits necessary to make repairs, that should be fully documented because if the poor condition of the property at the time of trial is attributable to the municipality's interference with proper maintenance, the negative impact of it will then be disregarded because the fair market value may not reflect any diminution caused by the imminence of the condemnation, or any preliminary acts taken in anticipation of it.”).

losses in value should be compensated in the same way as any loss due to market anticipation of condemnation, as discussed above.

The property owner also loses some of the value of her property during the temporary prohibition if she can't use it as she wants to. The government has a legitimate reason for the temporary prohibition, however, and the owner will rarely be deprived of all beneficial use of the land, so that temporary loss itself will not be a taking. But if the government ultimately condemns the land, just compensation should be measured on the date that the owner was denied the right to use and enjoy her property. The Alaska condemnation statute, for example, recognizes this principle. The statute prohibits making improvements on land after a summons has been issued in a condemnation proceeding, and therefore requires the court to determine the market value of the property on the date the summons was issued.<sup>178</sup>

The government might temporarily prohibit development for other reasons, however, such as planning land uses for an area. In such cases the government has not prohibited development to avoid wasteful development of land the government is going to take anyway. Instead, the government has prohibited development because it is not yet sure whether any particular development will be consistent with other uses, the city's needs, and so on. Again, such a temporary prohibition for a reasonable purpose and time will not be a taking. If the government then at some point decides to condemn a particular property that is subject to the temporary prohibition, the government should pay the market value at the time of the taking, according to the general rule. Even if the temporary prohibition affected the property's market value, that lost value wasn't due to anticipation of condemnation.

##### *5. Government Improvements and Conduct Offsite*

If the government plans to condemn multiple properties for a project, later-acquired properties may be worth less than they were worth at the start of the project because of the market's reaction to the government project. Just compensation should be measured by the market value when the project first began. In *Becos v. Masheter*,<sup>179</sup> for example, the acquisition of properties for a highway caused the neighborhood to deteriorate and reduced the market value of a later-condemned parcel. The court held that valuation should be made on a date "reasonably related to events

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<sup>178</sup> ALASKA STAT. § 09.55.330 (2000).

<sup>179</sup> 238 N.E.2d 548 (Ohio 1968).

in the vicinity of the property taken whereby the appropriating authority's activity contributed to or caused substantial depreciation of the property taken."<sup>180</sup> Similarly, in *Uvodich v. Arizona Board of Regents*,<sup>181</sup> a university announced an expansion program and for ten years acquired residential properties in implementing that program. The court held that the university did not thereby take properties that were yet to be acquired, but did suggest that just compensation should be measured at a time that would compensate the owners for the depreciation they had already experienced due to the expansion program.<sup>182</sup>

On the other hand, if the government has caused a property's value to decline by letting neighboring areas deteriorate or be developed in certain ways, the loss in value is compensable only if the owner can show that the government conduct itself amounted to a taking. That is the only reason to grant compensation for such losses, whether the property is ever condemned or not. An owner whose property is condemned cannot demand compensation for market value her property would have had if the government had maintained the area better or the neighborhood had been developed in a different way. The owner has to show that those actions themselves were takings, or otherwise wrongful, in order to recover for such losses in value.<sup>183</sup>

## V. CONCLUSION

Governments can easily be tempted to save money in eminent domain proceedings by doing what they can to depress the market value of properties they hope to condemn. They may even feel it is their duty to save money in this way, if the law allows it. And even if a government doesn't mean to depress market value, often its precondemnation activities will have that effect.

Those activities include planning possible condemnations well in advance, at least when the planned governmental use will

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<sup>180</sup> *Id.* at 551.

<sup>181</sup> 453 P.2d 229 (Ariz. Ct. App. 1969).

<sup>182</sup> *See id.* at 234 ("[P]roperty cannot be charged with a lesser value at the time of taking when the decrease in value is occasioned by reason of the taking itself."). The court also noted that "[o]ther jurisdictions which have had occasion to consider the question of depreciated value resulting from a general plan of condemnation do not permit depreciation in value caused by the condemnor to inure to its benefit." *Id.* at 235 (citations omitted).

<sup>183</sup> *See, e.g.,* *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 370-71 (E.D. Mich. 1970) (holding that city took property three years before formal condemnation because by then city had made the property "a complete financial loss" by, among other things, "failing to safeguard said property so as to prevent its deterioration, in making impractical almost impossible plaintiff's protection of the property, in removing from the vicinity all indicia of a residential area, [and] in preventing the continued use and enjoyment of the property as a residential building by making said property inaccessible . . .").

cause the property to decline in value rather than increase in value; publicizing the intention to acquire land and thereby discouraging private investment in the land; zoning the land in a way that will keep its value down; denying building and other permits, whether expressly because of the possible condemnation or for other reasons; prohibiting development temporarily while the government decides whether to condemn property and what property to condemn; acquiring other properties in the area; allowing the neighboring area to decline in value by not maintaining it or by permitting lower value uses; and delaying at any stage of the process while the property declines in value.

These compensation-reducing activities generally will not impair so much of the property's value that they themselves are takings, independent of any eventual formal exercise of the eminent domain power. Their effects generally are temporary, so that even if the property is useless for a time, the property still retains substantial value once it becomes useable again — assuming the government does not ultimately condemn the land. But sometimes the government may actually destroy a property's entire value, such as by planning to condemn land for a project, changing the area around it, and making the land practically useless for any other purpose. If so, the government should pay compensation even if it does not ultimately condemn the land formally.

The government's precondemnation activities are more likely to deny substantive due process, or be a taking, for failure to substantially advance a legitimate state interest. The government has no legitimate purpose for taking a property interest from the owner if the only objective purpose is to reduce just compensation to be paid when the government might later condemn her land. Usually planning and publicizing condemnations will further legitimate interests in public decision-making, even if they also further the illegitimate purpose of reducing just compensation to be paid. Temporary development prohibitions or permit denials will generally serve a legitimate interest in avoiding waste. But the government denies substantive due process, or should pay just compensation for a taking, if it delays at any stage of the regulatory or condemnation process, and the delay is unreasonable and serves no purpose other than to cause the value of property to decline while the government considers condemnation.

Even if precondemnation activities do not themselves take property, they may still affect the amount of compensation the government should justly pay if it does eventually condemn the land. In principle, the government should pay the owner the value the property would have had at the time of taking if the govern-

ment had never begun the process of condemning the land, including planning and publicizing the condemnation. If the condemnation is part of a larger project, market value should be determined as if the government had not begun work on any of the project, even on land other than the subject property. And if, in anticipation of condemnation, the government previously prevented the owner from using and enjoying the land, the property should be valued on that earlier date rather than the date of actual taking.

As even this concluding summary demonstrates, these constitutional limitations on government's precondemnation activities do not prevent all compensation-reducing strategies. But any government conduct that is intended only to reduce compensation paid to owners of condemned property is inconsistent with the underlying principle of the Just Compensation Clause, that the government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>184</sup> The true cost of the government's project includes the full market value of the necessary property, without any governmental intervention to alter that market value. The property owners have not done anything wrong to justify making them bear some of the costs of the public use on their own. Governments therefore should avoid and resist the temptation to hide some of the costs of public projects by making private owners bear such costs. And condemnation statutes should define the compensation to be paid in ways that help prevent government abuse of the regulatory power in a way that unfairly burdens private owners of land to be condemned.

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<sup>184</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).