Hastings Environmental Law Journal

Volume 7
Number 1 *Fall 2000*

Article 6

1-1-2000

Landgate, Inc. v. California Coastal Commission: Why Temporary Takings Law is "Screwed Up"

Jon Lycett

Landgate, Inc. v. California Coastal Commission:

Why Temporary Takings Law is "Screwed Up"

By Jon Lycett◔

I. Introduction

Most commentators agree that Supreme Court jurisprudence with respect to Fifth Amendment takings is a confusing area of law. In fact, one has gone so far as to call it "screwed up."[1] The topic of this paper is, perhaps, one of the most "screwed up" aspects of takings law, temporary takings.

In 1987 the United States Supreme Court decided *First English Lutheran Church v. County of Los Angeles*[2] holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which a taking was effective."[3] This language established the concept of a temporary taking. The Supreme Court, however, limited the *First English* decision by expressly excluding "normal delays in obtaining building permits, changes in zoning ordinances, and the like."[4] Unfortunately, the Court did not specify exactly what was meant by "normal" delay, leaving the issue open for the lower courts.

Later, in 1992, the Court decided *Lucas v. South Carolina Coastal Council*,[5] establishing the categorical rule that when a regulation deprives land of "all economically beneficial use," it is a taking per se.[6] Prior to *Lucas* the Supreme Court always used an ad hoc balancing analysis, primarily established in *Penn Central Transportation Co. v. New York City*,[7] to

◔ Jon Lycett graduated from the University of California, Hastings College of the Law in 2000. Jon was West-Northwest's Executive Editor during the 1999-2000 academic year. He is currently an associate in a San Francisco law firm.

1. JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT AND WHY YOU SHOULD CARE 282 (1997).

2. 482 U.S. 304 (1987).

3. *Id.* at 321.

4. *Id.*

5. 505 U.S. 1003 (1992).

6. *Id.* at 1015-19. Justice Scalia's formulation is derived from *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), and focuses on the use of the property. However, he seems to use this concept interchangeably with a "finding of no value." *See, e.g., id.* at 1020. These concepts are not the same, and some confusion has resulted which is nicely illustrated in *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal. 1998), *cert. denied* 119 S. Ct. 179 (1998) the subject of this paper. This problem will be explored more fully in *infra* Part IV.A.1.

7. 438 U.S. 104, 124 (1978).

decide regulatory takings cases. By establishing a categorical rule in *Lucas*, the Court intended to clarify takings law by eliminating the uncertainty of a balancing test in some cases.

Unfortunately, the result may have been quite different. For example, though cases where all economically beneficial use is denied were supposed to be "relatively rare,"[9] many landowners feel that all use has been taken whenever they are denied a permit. Furthermore, the categorical rule may have exacerbated the so-called "denominator problem."[10]

Thus, taken together, *Lucas* and *First English* may have caused more problems than they solved. Whenever a landowner is required to get a permit before developing her property, she can argue that the denial of that permit renders her property without economically beneficial use. Therefore, even if the permit is subsequently granted, when the delay goes beyond "normal," the period during which no development was allowed arguably requires compensation under *Lucas* and *First English*.[11] As a result, while *Lucas* and *First English* increase protection for important property rights by opening the courthouse door for many landowners who previously had no remedy for regulatory abuses and administrative stonewalling, they also create the possibility of contentious litigation and inconsistent lower court rulings that might significantly hinder the government's ability to regulate development for the long term protection of the environment.

The main problem is that the Supreme Court left at least two important questions unanswered. The first question has to do with the well-established concepts of finality and ripeness. At exactly what point does "normal" delay become unreasonable, and therefore compensable? If the delay was not normal, then when exactly did the taking occur so that the period of the taking can be calculated? The second question has to do with damages. What is the appropriate measure of damages for a temporary taking? The combination of these two unanswered questions allows landowners to argue that almost any delay is unreasonable, with the hope of a substantial damages award as incentive.

An interesting example is *Landgate, Inc. v. California Coastal Commission*.[12] In this 1998 case, the California Supreme Court was presented only with the issue of what constitutes "normal" delay. Specifically, does the mistaken denial of a permit, which a landowner must litigate to correct, require compensation under *Lucas* and *First English*?[13] The appellate court, however, because it held that there was a taking requiring compensation, reached the damages issue as well.[14] Thus, taken as a whole, the Landgate case is a nice illustration of both the finality/ripeness question and the damages question.

This paper will analyze both questions using the *Landgate* case as an example. Part II will be dedicated to a detailed review of the facts in *Landgate*, including the positions argued by both Landgate, Inc. and the Coastal Commission. Part III will then begin the dis-

8. *See Lucas*, 505 U.S. at 1015.

9. *Id.* at 1018.

10. *See id.* at 1016 n.7. One commentator summed up the denominator problem as follows: "If you own 100 acres and regulation makes 10 acres completely useless, have you lost 10 percent of 100 acres or 100 percent of 10 acres?" *See* DELONG, *supra* note 1, at 290. Ideally this question was answered by the "whole parcel" rule established in *Penn Central*, 438 U.S. at 130-31, and reinforced by *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 497 (1986). Unfortunately, the *Lucas* decision provides significant motivation for landowners to claim that they lost one hundred percent of some piece of property, because that would fit them within the categorical rule. In addition, property that has been subdivided and sold off in portions by developers may no longer make sense as a whole parcel. A variety of other issues can make the whole parcel rule problematic, so some lower courts have started to move away from it. *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994). The effect this situation has on temporary takings will be discussed in further detail in *infra* Part IV.A.2.

11. *See Landgate*, 953 P.2d at 1210 (Cal. 1998) (Brown, J., dissenting).

12. *Id.* at 1188 (Cal. 1998), *cert. denied* 119 S. Ct. 179 (1998).

13. *See id.* at 1190.

14. *See* Opening Brief for Appellant California Coastal Commission at 7-9, Landgate, Inc. v. California Coastal Commission, 61 Cal. Rptr. 2d 196 (Cal. Ct. App. 1997) (No. B084315). The Appellate Court's decision in this case was only certified for partial publication. Only the takings issue and a fees issue were published and can still be found in the California Reporter or on Westlaw. However, the damages issue was fully briefed by the parties and decided by the court. Telephone Interview with Joseph Barbieri, Deputy Attorney General, California Department of Justice (Dec. 2, 1998).

cussion with an analysis of finality and ripeness issues in order to determine exactly when a regulatory taking occurs, and what is "normal" delay. Part IV will analyze the appropriate remedies for temporary takings by discussing the various problems associated with the calculation of damages. Finally, Part V will conclude by suggesting some changes in takings law.

II. Facts

The L*andgate* case involves two pieces of property in Los Angeles County's Malibu Hills.[15] Originally, these properties were long, narrow lots running in a north-south direction, with the southern portion flat and the northern portion sloped.[16] In the mid-1980's Landgate's predecessor in interest agreed to allow the County to construct a road bisecting the two properties along the base of the slope.[18] In exchange, the County approved a lot line adjustment which created a northern, sloped 2.45 acre lot above the road and a southern, flat 1.56 acre lot below the road. There was already a house on the southern portion, but the lot line adjustment created a vacant lot on the sloped northern portion, which Landgate, Inc. purchased in October, 1990.[19] Though the County sought and received the Coastal Commission's approval for the road, it did not seek approval for the lot line adjustment.[20]

The County's failure to seek the Commission's approval for the lot line adjustment ended up causing problems for Landgate when it tried to build a home on the property.[21] The Coastal Commission has the authority to approve development projects in the coastal zone.[22] The Coastal Act defines "development" as "any . . . change in the density or intensity of use of land, including . . . lot splits."[23] Furthermore, the Attorney General had advised the Commission that this definition of "development" could include lot line adjustments because they were a type of "lot split."[24] As a result, the Commission denied Landgate's application because, among other things, it concluded that the county's failure to seek its approval for the lot line adjustment had created an illegal lot.[25]

Landgate sued the Coastal Commission for both a writ of mandate and a taking of property without just compensation.[26] The trial court severed the two aspects of the complaint and postponed the takings issue until after the lot line issue had been decided.[27] Landgate won a writ of mandate in the trial court, whose ruling was upheld by the court of appeal.[28] The court's ruling forced the Commission to recognize the lot line adjustment, but left them with the authority to approve the final development.[29] Upon reconsideration, the Commission approved the development with a few modifications.[30]

15. S*ee* L*andgate*, 953 P.2d 1188 at 1190.

16. S*ee id*. at 1190.

17. S*ee id*.

18. S*ee id*.

19. S*ee id*. at 1191.

20. S*ee id*. at 1193. S*ee also* Coastal Commission's Appellate Court Brief at 6, L*andgate* (No. B084315).

21. S*ee* L*andgate*, 953 P.2d at 1191-92.

22. S*ee* CAL. PUB. RES. CODE § 30519 (Deering 2000). Under § 30519 the Commission retains this authority until it approves a "Local Coastal Program" (LCP) created by the county. When Landgate was applying for a development permit, the Commission had not yet approved Los Angeles County's LCP, and so still had jurisdiction over the development. S*ee* L*andgate*, 953 P.2d at 1191.

23. CAL. PUB. RES. CODE § 30106 (Deering 2000).

24. S*ee* L*andgate*, 953 P.2d at 1192.

25. S*ee id*. This is the source of the "jurisdictional spat" referred to by the appellate court. S*ee id*. at 1194. This was not the first time the County of Los Angeles had failed to seek Commission approval for a lot line adjustment. S*ee id*. at 1199. In fact, one commissioner noted that it had happened "many times," and said that it was "really time to become extremely serious about this." S*ee id*. As a result, the commission essentially refused to consider any of Landgate's project modifications until the lot line issue had been litigated. S*ee id*. at 1193.

26. S*ee id*. at 1192.

27. S*ee id*.

28. S*ee id*. at 1193. Both courts made their ruling based on the facts of this case rather than the more general dispute over the County's failure to seek the Commissions approval for the lot line adjustment. S*ee id*. Essentially, the Commission had approved the construction of the road, which made the lot line adjustment necessary in the first place. S*ee id*. Later, Landgate had purchased the property with no knowledge of the lot line problems and with the intent to construct a house. S*ee id*. The trial and appellate courts therefore held that the Commission could not invalidate the lot line adjustment after an innocent purchaser had intervened. S*ee id*.

29. S*ee id*.

30. S*ee id*.

Once the Commission had granted a development permit, both parties moved for summary judgment on the takings claim.[31] Landgate argued that it was entitled to compensation because it had been denied all economically viable use of its property for a two year period.[32] The Commission countered that the two year delay was normal because it was the result of an erroneous interpretation of the law, and so compensation was not required.[33] Both the trial court and the court of appeal again ruled in favor of Landgate.[34]

The trial court found that Landgate had been temporarily denied all economically viable use of its property.[35] Thus, compensation was due under the *Lucas* and *First English* cases.[36] Consequently, the court held a bench trial on the issue of damages.[37]

Aside from the arguments for no damages advanced by the Commission, the trial court considered three methods of calculating damages for a temporary taking.[38] First, Landgate argued for damages based on the fair rental value of the house they were unable to construct.[39] Second, the Commission argued for damages based on a five percent rate of return on the difference between the value of the property before and after the taking.[40] Finally, the Commission also suggested a five percent rate of return on the lost opportunity for the entire initial investment of $675,000.[41] The trial court basically adopted the second line of reasoning concluding that, since the property was rendered worthless, the difference was the entire $675,000 market value.[42] After increasing the rate of return to ten percent, and adding property taxes paid during the taking period, the trial court awarded $155,657 in compensation.[43] In addition, the trial court awarded $122,395.73 in fees and costs, bringing the total award to $278,052.73.[44]

The court of appeal upheld both the takings decision and the trial court's award of damages.[45] While it accepted the Commission's argument that agencies are not liable for mistakes, it rejected the idea that the permit denial was mistaken.[46] The appellate court essentially accused the Commission of using Landgate as a pawn in an "ongoing jurisdictional spat" with the County of Los Angeles.[47] Following the appellate court's decision, the Commission petitioned for review in the California Supreme Court.[48]

In a 4-3 decision, the California Supreme Court reversed.[49] In the majority opinion, written by Justice Mosk, the Court acknowledged the force of the *Lucas* and *First English* decisions.[50] It avoided the impact of those decisions, however, by first emphasizing the "narrowness" of *First English* in that it did not apply to cases of "normal" delay.[51] Second, the Court concluded that the "mere assertion of regulatory jurisdiction . . . does not constitute a regulatory taking."[52] Even though the Commission's assertion of jurisdiction was erroneous and was later overturned, the Court placed it squarely in the category of "normal" delay because it was intended to advance a

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.* at 1193-94.

35. *See id.* at 1193.

36. *See id.*

37. *See id.*

38. *See* Coastal Commission's Appellate Court Brief at 7-9, *Landgate* (No. B084315).

39. *See id.* at 8-9. This method resulted in a proposed award of $744,155. *See id.* The fair market value of the property was only $675,000. *See id.*

40. *See id.* at 8.

41. *See id.*

42. *See id.* at 9. This ruling came in spite of the fact that experts for both sides appraised the property after the Commission's action at $337,500. *See id.* at 26.

43. *See id.* at 9. *See also Landgate*, 953 P.2d at 1193 (Cal. 1998).

44. *See* Coastal Commission's Appellate Court Brief at 9, Landgate (No. B084315).

45. *See Landgate v. California Coastal Commission*, 953 P.2d 1188, 1193-94 (Cal. 1998).

46. *See id.* at 1194.

47. *See id.*

48. *See id.*

49. *See id.* at 1190.

50. *See id.* 953 P.2d at 1194-95.

51. *See id.* at 1195.

52. *Id.* (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985)).

legitimate state interest and was not an unreasonable mistake.[53] Categorized as a mere "mistaken assertion of jurisdiction,"[54] therefore, the Commission's action did not require compensation.[55]

In dicta, the majority also responded to the argument, made by both Landgate and Justice Brown in dissent, that "the Commission's actions amount[ed] to a denial of all economically beneficial use of the land and thus [were] a categorical taking (citing *Lucas*) even if only temporary (citing *First English*)."[56] The majority distinguished both *Lucas* and *First English* by reasoning that the Commission's action in this case did not constitute a final decision denying development.[57] The Court, instead, characterized the Commission's action as a "postponement of development pending resolution of a threshold issue of the development approval process- whether the lot was legal."[58] Since *Lucas* and *First English* did not apply, the majority was free to evaluate whether or not the delay served a legitimate government purpose, and to declare that the delay was an "incident of property ownership."[60]

Justices Chin and Brown each wrote separate dissents, with Justice Baxter joining in both.[61] Justice Chin felt that "[w]hen a regulatory agency prohibits all use of . . . property, and the property owner is forced to sue the agency to get it to change its position, its stonewalling is not fairly characterized as a 'normal delay' in the permit approval process."[62] He observed that Justice Stevens' dissent in *First English* argued that litigation was normal delay, and was rejected by a majority of the Supreme Court.[63] He also rejected the majority's characterization of the Commission's action as "conditional," instead calling it a final denial of development "regardless of the circumstances."[64] Since there was a final denial of all use, Justice Chin would have held that the Commission was required to pay compensation under *First English*.[65]

Justice Brown agreed that the Commission's actions had deprived Landgate of all use of their property.[66] To Justice Brown, however, this fact ended the inquiry under *Lucas* and *First English*.[67] Justice Brown rejected the way in which the majority distinguished *Lucas* and *First English*, claiming that ripeness and finality concerns "have no bearing in this case."[68] She accused the Court of being "unwilling to come to terms with the true meaning of *Lucas* and *First* [*English*]."[69] Thus, she rejected the majority's argument that the Commission's action served a legitimate government purpose because it was "precluded by the categorical rule in *Lucas*."[70] Since Justice Brown decided that the Commission's actions denied Landgate all use of its property, she would have held that compensation was due under *Lucas* and *First English*.[71]

III. Finality/Ripeness

As the *Landgate* case suggests, finality and ripeness issues are a pivotal part of temporary takings law. In fact, the *Landgate* case turned, in part, on the majority's conclusion that the Commission had not made a final decision. The difficulty of this aspect of takings law, however, can be seen in the fact that all three dissenting justices rejected this aspect of the majority's opinion.

53. *See id.* at 1195-1200.

54. *Id.* at 1197.

55. *See id.*

56. *Id.* at 1200-01.

57. *See id.* at 1201-05. This brings up the finality/ripeness issue, and the Court cites *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), in support. Interestingly, the majority does not really use this issue as a basis for decision, but as a way of avoiding the necessary results of applying *Lucas* and *First English*.

58. *Id.* at 1202-03.

59. *See id.* at 1202.

60. *See id.* at 1204.

61. *See id.* at 1204-12.

62. *Id.* at 1205.

63. *See id.* at 1205-06 (citing *First English Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 334 (1987) (Stevens, J., dissenting)).

64. *Id.* at 1205.

65. *See id.* at 1206.

66. *See id.* at 1207-08.

67. *See id.* at 1209.

68. *Id.*

69. *Id.* at 1211.

70. *Id.* at 1210.

71. *See id.* at 1211-12.

The ultimate question is: when exactly did the taking begin? This question is especially important in temporary takings cases because it becomes necessary to know the exact period of the taking in order to calculate just compensation.[72] For example, the Supreme Court granted certiorari to four cases prior to *First English*, attempting each time to reach the issue of temporary takings, and failing each time because the cases were not ripe.[73]

A. Supreme Court Jurisprudence

In *Suitum v. Tahoe Regional Planning Agency*,[74] the Supreme Court outlined finality and ripeness law with respect to Fifth Amendment takings. The Court articulated two rules that come from a long line of cases: (1) the landowner must have a final decision from the governing agency concerning the application of the regulation at issue; and (2) the landowner must have sought compensation through the proper state procedures.[75] These rules have been called "administrative" and "procedural" ripeness, respectively.[76]

Administrative ripeness is more helpful in determining exactly when a taking begins and essentially requires a final decision regarding the allowable use of the property. Justice Oliver Wendell Holmes laid the foundation for the final decision requirement when he said that a regulation could take property if it "goes too far."[77] Since then, the Supreme Court has said that it cannot know if a regulation goes too far until it knows how far the regulation goes.[78] Thus, the governing agency must have "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[79]

Getting a final decision, however, is usually not easy. To begin with, as the Supreme Court has acknowledged, land use agencies have a high degree of discretion.[80] As a result, the Court requires that the agency be asked to use that discretion before it will consider the agency's decision final.[81] Therefore, if a procedure exists to do so, the landowner must request a variance or other administrative relief before her claim will be considered ripe.[82] In fact, the court has suggested that a landowner may have to submit multiple proposals if denials are based on overly "grandiose" development plans.[83] Unfortunately, the Court has left it for the lower courts to decide exactly how definitive a land use decision must be before a claim is ripe.[84]

On this point, however, a fairly obvious rule can be inferred from Supreme Court holdings that will probably become well accepted. The Ninth Circuit has called this rule the "futility exception."[85] The futility exception ripens a claim at the point when further submissions or requests for variances would be futile, regardless of how definitive an agency's decisions have been.[86] The Ninth Circuit has left to landowners the task of proving that further submissions would be futile, but several previous decisions do give some guidance.[87]

For example, the Ninth Circuit has held that landowners do not have to submit to piecemeal litigation or unfair procedures.[88] The Court has also suggested that the rejection of several proposals would ripen a claim,[89] and

72. The question does have relevance for permanent takings cases, primarily for the calculation of pre-judgment interest. *See* Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984).

73. *See First English Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310.

74. 520 U.S. 725 (1997).

75. *See id.* at 734 (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

76. *See* J. Margaret Tretbar, *Calculating Compensation for Temporary Regulatory Takings*, 42 U. KAN. L. REV. 201, 208-09 (1993).

77. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

78. *Suitum*, 520 U.S. at 734 (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986)).

79. *Id.* at 737 (quoting *Williamson County*, 473 U.S. at 193).

80. *See id.* at 738; *MacDonald*, 477 U.S. at 350.

81. *See Suitum*, 520 U.S. at 737 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297 (1981)).

82. *See id.*

83. *See id.* at 739 n.12; *MacDonald*, 477 U.S. at 353 n.9.

84. *Cf. Suitum*, 520 U.S. at 738.

85. *See* Del Monte Dunes v. City of Monterey, 920 F.2d 1496, 1501 (9th Cir. 1990).

86. *See id.* at 1501.

87. *See id.*

88. *See id.* (citing *MacDonald*, 477 U.S. at 350 n.7).

89. *See id.* (citing American Savings & Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981)).

that applying for a variance that the government had no power to grant would not be required.[90] Perhaps the most interesting formulation, however, was the statement that "futility could be shown by establishing that further pursuit of permission would cause such excessive delay that the property would lose its beneficial use."[91]

Of course, the finality and ripeness rules are more easily understood in light of their application. The best place to start is *Agins v. City of Tiburon*,[92] decided in 1980. *Agins* was a facial challenge to a city zoning ordinance that severely limited the density of development on plaintiff's property.[93] Though the ordinance did appear to allow construction of up to five homes on plaintiff's five acres, Agins never sought approval from the city for any development.[94] The Supreme Court held that the claim was unripe.[95]

Similarly, *Hodel v. Virginia Surface Mining & Reclamation Association*[96] was a facial challenge to the Surface Mining Act, a federal statute which, among other things, banned surface coal mining on some of plaintiff's property.[97] Unlike the ordinance at issue in *Agins*, the Surface Mining Act did not directly allow any level of coal mining on affected pieces of property; however, it did have procedures for seeking variances and waivers from the regulations.[98] In addition to pointing out that non-mining uses might still be available, the Court held that plaintiffs at least needed to seek a variance or waiver from the regulations in order to ripen their claim.[99]

Subsequently, the Supreme Court decided *Williamson County Planning Commission v. Hamilton Bank*[100] and *MacDonald, Sommer & Frates v. Yolo County*.[101] In each of these cases the plaintiffs went beyond the point held insufficient in *Agins* and submitted an application for development of their property. In each case, the government denied their applications.[105] The Supreme Court held that each case was unripe, however, because the plaintiff either had not sought a variance or had not submitted a second, less ambitious proposal.[104]

Finally, in *Suitum v. Tahoe Regional Planning Agency*[105] the Court found the plaintiff's taking claim ripe.[106] In the Lake Tahoe area, Suitum owned property in what was designated a Stream Environment Zone (SEZ).[107] As a result, when Suitum applied for a development permit it was denied because no "additional land coverage or other permanent land disturbance" was allowed in an SEZ.[108] Suitum, however, was allocated a certain number of transferable development rights (TDRs) whose value had yet to be determined.[109] The Court decided that the TDRs were irrelevant to the ripeness of the claim and held that Suitum's claim was ripe because "the agency [had] no discretion to exercise over Suitum's right to use her land."[110]

90. *See id.* (citing Herrington v. County of Sonoma, 857 F.2d 567, 570 (9th Cir. 1988)).

91. *Id.* at 1501 (citing Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454 (9th Cir. 1987), *modified on other grounds*, 830 F.2d 968 (9th Cir. 1987)). This formulation is interesting because it suggests an answer to the problem of unreasonable delay. Perhaps delay becomes unreasonable when it is so excessive that the property loses its beneficial use.

92. 447 U.S. 255 (1980).

93. *See id.* at 257-58. In general, the Court does not favor such facial challenges. In fact, the court has called facial challenges an "uphill battle." *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987). On the other hand, *First English* was a facial challenge that succeeded. *See* First English Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1997). Because of the unique procedural posture of *First English*, however, the court did not actually hold that a taking had occurred, only that, if a taking had occurred, compensation was required. *See id.*

94. *See Agins*, 447 U.S. at 257.

95. *See id.* at 262.

96. 452 U.S. 264 (1981).

97. *See id.* at 293-94.

98. *See id.* at 297.

99. *See id.* at 296-97.

100. 473 U.S. 172 (1985).

101. 477 U.S. 340 (1986).

102. *See Williamson County*, 473 U.S. at 187; *MacDonald*, 477 U.S. at 351.

103. *See Williamson County*, 473 U.S. at 187-88; *MacDonald*, 477 U.S. at 351.

104. *See Williamson County*, 473 U.S. at 193-94; MacDonald, 477 U.S. at 351.

105. 520 U.S. 725 (1997).

106. *See id.* at 739.

107. *See id.* at 731.

108. *Id at* 729. (citing TAHOE REGIONAL PLANNING AGENCY CODE § 20.4).

109. *See id.* at 741.

110. *Id.* at 739.

All of these cases help to determine what has been called the "effective moment"[111] of a taking—that is, the exact moment at which the taking occurs. One commentator has defined the effective moment as "the point at which the landowner's last required variance application is finally and improperly denied by the highest administrative body with the power to consent."[112] While this is probably the clearest and most concise definition which can be derived from Supreme Court holdings, the *Landgate* case illustrates that it is still inadequate.

B. The Landgate case: How does litigation affect the ripeness of a claim?

The *Landgate*[113] case illustrates how the complexity of real cases makes simple definitions of ripeness problematic. In *Landgate* the landowner had essentially received a final decision from the Coastal Commission,[114] but whether the Commission's decision denied development is less clear. No development would be allowed unless the original lot lines were reestablished, but the Commission was willing to consider development of the property as it was originally configured.[115] Since Landgate believed that this decision was erroneous, it was forced to litigate in order to challenge the Commission's decision.[116] After Landgate won the litigation, however, the Commission eventually approved construction of a suitable home.[117] Was the Commission's decision a final denial of all development? Does it matter that a court overturned this denial?

Unfortunately, Chief Justice Rehnquist's opinion in *First English* did little to answer the question of how litigation affects temporary takings. In fact, his cryptic statement concerning "normal" delay essentially created the problem.[118] On the other hand, the dissent in *Landgate* is correct to point out that the question was partially answered by the Court's implicit rejection of Justice Stevens' argument in dissent that litigation should be considered a "normal" delay.[119] Still, the Court's holding in *First English* says only that the government cannot avoid compensating a landowner by rescinding its action after a court holds that it has worked a taking.[120] The Court said nothing about the effect of collateral litigation over the legitimacy of a permit program, whether or not the governing agency followed proper procedure, or any other state or local law issue.

After *First English* the Supreme Court has not clarified how litigation affects the ripeness of a claim.[121] There is, however, at least one Federal Circuit case that deals directly with the issue. In *Tabb Lakes, Ltd. v. United States*,[122] the Army Corps of Engineers required a developer

111. *See* Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953, 957 (1995).

112. *See id.* at 970.

113. Landgate, Inc. v. California Coastal Commission, 953 P.2d 1188 (Cal. 1998).

114. *See id.* at 1192.

115. *See id.* at 1193.

116. *See id.* at 1192-93.

117. *See id.* at 1194.

118. *See* First English Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) ("We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.").

119. *See Landgate*, 953 P.2d at 1205-06 (Chin, J., dissenting) (quoting *First English*, 482 U.S. at 334 (Stevens, J., dissenting) ("In my opinion, . . . [l]itigation challenging the validity of a land use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan.")).

120. *See First English*, 482 U.S. at 321 ("We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

121. In a 1983 case the Court did suggest an answer to the problem. *See* Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1983). In a condemnation case the Court held that "[*Penn Central* balancing is] as applicable to . . . when . . . the taking occurs as [it is] to the problem of ascertaining whether a taking has been effected by a putative exercise of the police power." *Id.* at 14 (emphasis in original). Strictly speaking, this holding does not apply to regulatory takings cases, perhaps because the ripeness doctrine should stand in its place. That is, when a taking occurs in the regulatory context should depend on whether or not the landowner has received a final decision from government. On the other hand, the *Kirby* case does suggest that if the finality of a government decision is confused by intervening litigation, the Court might fall back on a balancing test. The *Kirby* opinion, however, precedes both *First English* and *Lucas* where the Court seems to be moving away from balancing in the Fifth Amendment context. Thus, the current applicability of *Kirby* is doubtful.

122. 10 F.3d 796 (Fed. Cir. 1993).

to obtain a section 404 permit before filling in a landlocked wetland.[123] After initial attempts to obtain a permit by negotiating with the Corps, the developer sued and won a ruling that the Corps' assertion of jurisdiction had failed to comply with the Administrative Procedure Act.[124]

As a result, Tabb Lakes sued the Corps claiming a temporary taking for the period during which the Corps would not allow it to develop without a permit.[125] The Federal Circuit held that since the Corps never actually denied Tabb Lakes a permit, the action was nothing more than a mistaken assertion of jurisdiction.[126] The Corps' actions were characterized as preliminary regulatory activity, which specifically allows the possibility of a permit.[127] The Court distinguished *First English* because the ordinance passed in that case completely banned development without the possibility of a permit.[128] Consequently, the Court held that the Corps' mistake in asserting jurisdiction did not result in a taking.[129]

The *Tabb Lakes* case is strikingly similar to *Landgate*. Clearly, the majority of the California Supreme Court found the Federal Circuit court's reasoning persuasive. On the other hand, the dissent did not necessarily disagree, but rather distinguished the *Tabb Lakes* holding.[130] Perhaps the difficulty in *Landgate* results from its unique fact pattern. Whether or not the Coastal Commission's decision was a final denial of development depends to an unusual extent on one's perspective.

If one views the Commission's denial as conditional, with the reestablishment of the original lot lines as a "pre-condition to development," then there was no final denial and the *Tabb Lakes* reasoning applies. On the other hand, the Commission's decision can also be seen as a final denial of development on Landgate, Inc.'s lot *as they bought it*.[131] From this point of view, as the dissent in *Landgate* points out, *Tabb Lakes* does not apply. Perhaps it was this unique fact pattern which led the United States Supreme Court to deny *certiorari*.

Even so, perhaps a neat conclusion can be drawn from the *Tabb Lakes* and *Landgate* cases. To begin with, the ripeness cases through *Suitum* indicate that the government must make a final decision regarding development, having been given every opportunity to exercise whatever discretion they have available. Until that decision is made, *Tabb Lakes* and *Landgate* suggest that whatever preliminary litigation ensues should not, by itself, result in a

123. *See id.* at 798. Section 404 of the Clean Water Act gives the Army Corps of Engineers jurisdiction to require permits for discharging fill material into the navigable waters. *See* 33 U.S.C.A. § 1344 (West 1998). The Corps has interpreted this statute to include wetlands. *See* 33 C.F.R. § 323.2 (1998).

124. *See Tabb Lakes*, 10 F.3d at 799.

125. *See id.*

126. *See id.* at 800-01 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985)).

127. *See id.* at 801.

128. *See id.*

129. *See id.* at 803 ("A mistake may give rise to a due process claim, not a taking claim.").

130. *See Landgate*, 953 P.2d at 1208 (Brown, J., dissenting). *See also id.* at 1210 ("Of course mere 'delay' in a 'process' resulting from an 'erroneous decision' does not qualify as a constitutional violation.").

131. From a practical point of view the dissent's position may be more reasonable. Apparently, reconfiguring the lot lines was highly undesirable because the original house straddled the two original lots. As a result, and because of the thinness of the original lots, building a house on one lot above the road was fairly unrealistic. Telephone interview with Joseph Barbieri, *supra* note 14.

132. Very few courts have ruled on the issue of extraordinary delay and when exactly that, by itself, causes a taking. Most courts that have ruled on the issue simply held that the delay was not extraordinary without much discussion. *See* 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 581 (1992). Those courts that have discussed the issue, however, have suggested evaluating the agency's action for necessity, diligence, and bad faith. *See* Anaheim Gardens v. United States, 33 Fed. Cl. 24, 37 (1995) (citing Dufau v. United States, 22 Cl. Ct. 156, 163-64 (1990)). The "futility exception," discussed above, is another way courts have dealt with such problems. *See supra* Part III.A.

It seems likely that by "extraordinary delay" the Supreme Court had in mind Justice Brennan's concerns, voiced in his *San Diego Gas & Electric v. San Diego* dissent, that agencies that lose preliminary litigation will make minor, bad faith changes to their decisions in order to stop development by keeping it tied up in court, while at the same time avoiding a takings judgment. *See* 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting). *See also* DELONG, *supra* note 1, at 296-302 (giving a detailed account of the problems that concerned Justice Brennan). At the time, Justice Brennan used this type of situation to argue strenuously for the establishment of a temporary takings doctrine, and the doctrine eventually established by *First English* was, no doubt, intended to address Justice Brennan's concerns. Furthermore, Justice Rehnquist's comment, in *First English*, regarding "extraordinary delay" was probably intended to catch whatever clever administrative abuses that were not deterred by the possibility of a temporary takings judgment.

taking except in extraordinary cases involving regulatory abuses and unusual delay.[132] Finally, F*irst E*n*glish* conveys the message that once a final decision is made, if there is a taking, then the landowner is entitled to compensation. Even if the agency prevails on some other aspect of the litigation, such as a procedural matter, compensation should still be due.

The temporary takings doctrine established by F*irst E*n*glish* has made the finality or ripeness doctrine especially important. Therefore, using the final decision point for temporary takings makes sense. Land use agencies cannot fairly operate if every preliminary decision they make, which has the effect of temporarily denying development, might result in a substantial damage award if it is overturned by a court.[133] On the other hand, once a final decision is made, it seems reasonable to force the agency to stand by it. Perhaps this will result in more careful decision making.

IV. Remedies

Once a court has determined that compensation is due for a temporary taking, it remains a challenge to calculate the appropriate damages. Again, the L*andgate* case illustrates how this can become a difficult problem. The trial court in L*andgate* was presented with at least four different theories on how to calculate damages.[134] At one extreme, Landgate, Inc.'s theory would have resulted in an award greater than the original market value of the property.[135] At the other extreme was the Commission's argument that no damages were due at all.[136]

As an initial matter, even permanent takings have various problems associated with calculating damages. One problem is defining the exact property which has been taken. Obviously, the amount of property taken can affect the amount of damages due. This is called the "denominator problem." A second problem arises with defining exactly what has been taken. Has the value of the property been taken, or has the property been deprived of all beneficial use? Though it is possible that both formulations might amount to the same thing, they are not the same and can result in substantially different damages awards. Both of these problems are exacerbated by the nature of temporary takings.

A. General Problems With Calculating Damages

1. Diminution in Value v. Economically Viable Use

A given piece of real estate[137] can produce a return on an investment in two ways: (1) various market forces can cause the market value of the property to increase faster than inflation; and (2) various uses of the property, such as mining or development, can independently produce a return. These two aspects of property value are highly dependent on each other and as a result, land use regulations, which primarily affect the uses of a piece of property, can have a dramatic affect on market value. When this happens, which aspect of the property's value has been taken? Which is compensable?

For eminent domain and other physical appropriations cases the government must pay the market value of the property which has been taken, no matter how small.[138] Regulatory takings cases present a problem, however, because the government cannot be forced to pay every time a land use regulation reduces the market value of a piece of property.[139] As a

133. S*ee* L*andgate*, 953 P.2d at 1204.

134. S*ee* Opening Brief for Appellant California Coastal Commission at 7-9, L*andgate*, (No. B084315).

135. S*ee id.* at 8-9.

136. S*ee id.* at 7.

137. This note's discussion of this topic focuses on real estate even though the Fifth Amendment protects all kinds of property. Though problems with the distinction between value and economically viable uses can affect many types of property, real estate creates the most problems because the two are so interconnected. In addition, temporary takings most often involve real estate, and therefore most of the cases that illustrate the problem deal with real estate.

138. S*ee, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (awarding compensation for a TV cable which a city ordinance required the landowner allow on her property).

139. S*ee* Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

result, the Court has repeatedly held that a "diminution in property value, standing alone." is not enough to establish a taking.[140] Even the most restrictive regulations, however, leave the affected property with some residual market value.[141] This fact, combined with the assumption that a regulatory taking required the transfer of the entire fee,[142] meant that finding a regulatory taking was rare.

Recently, the Court has moved toward a policy of looking to the use aspect of value to determine when a regulation works a taking. For example, the Court has established a categorical rule that when a property has been deprived of all "economically viable use" it has been taken *per se*.[143] This rule applies even though a property with no economically viable use may still hold substantial market value.[144] Unfortunately, some justices do not distinguish between market value and economically viable use, and as a consequence the Court's views on this subject have been less than consistent.[145]

A possible solution to this problem has been adopted by the Federal Circuit. The Federal Circuit has rejected any implicit focus on the use of property, arguing that physical appropriation and regulatory takings cases should be treated the same.[146] Furthermore, in order to solve problems with allowing for some land use regulation while also dealing with potentially significant residual property values, the Federal Circuit adopted "partial takings."[147] The Federal Circuit's test suggests that a court should use P*enn* C*entral* balancing to determine whether a given regulation works a taking, and then award compensation only for the reduction in market value caused by the regulation.[148] If any interest transfers to the government it should be only that interest taken, not the entire fee.[149]

Unfortunately, the conceptual difficulty between use and market value in regulatory takings has created problems for temporary takings. The difficulty arises when a regulatory restriction is lifted: the property returns to its original market value plus or minus any changes in the market that have occurred in the interim. As a result, using a straight market value approach such as that suggested by the Federal Circuit, leaves the landowner with virtually no compensation.

At the opposite extreme, the Supreme Court in F*irst* E*nglish* suggested using the use of the property to measure compensation in the same way that is done in temporary physical appropriations cases.[150] This means the government must pay a fair rental value for the interest taken for whatever time the regulation is in place. The problem with this method is that

140. S*ee* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978); Agins v. Tiburon, 447 U.S. 255, 263 n.9 (1980) ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay . . . cannot be considered as a 'taking'.").

141. S*ee, e.g.*, Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1565-68 (Fed. Cir. 1994) (even though the Army Corps of Engineers had prohibited any development by denying a section 404 permit to fill the wetland which made up the property, a highly speculative market still valued the property at approximately $4000 per acre).

142. S*ee id*. In F*lorida Rock* the majority argues that no takings require the transfer of an interest in the land taken, while the dissent argues that takings always require the transfer of the entire fee. S*ee also* San Diego Gas & Electric v. San Diego, 450 U.S. 621, 651-53 (1981) (Brennan, J., dissenting) (arguing that a regulatory taking does not require the transfer of the fee).

143. S*ee* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992). S*ee also* F*irst* E*nglish* L*utheran* C*hurch v. County of* L*os* A*ngeles*, 482 U.S. 304, 320-21 (acknowledging that fluctuations in value cannot work a taking, and then holding that compensation is required for a taking of "all use").

144. Arguably this was the case in L*ucas*. 505 U.S. at 1034 (Kennedy, J., concurring) (expressing doubt that Mr. Lucas' lot had lost all value); *id*. at 1043-45 (Blackmun, J., dissenting) (pointing out that no evidence had been heard on the property's value, and that the property retained a variety of uses). It was definitely the case in L*andgate*. S*ee* Coastal Commission's Appellate Court Brief at 26, L*andgate* (No. B08 4315).

145. S*ee, e.g.*, L*ucas*, 505 U.S. at 1034 (Kennedy, J., concurring) (characterizing the categorical rule as requiring a "finding of no value"). Justice Scalia was actually fairly consistent with his "no economically viable use" formulation. However, all four of the Justices who wrote separately, Justice Kennedy in concurrence and Justices Blackmun, Stevens and Souter in dissent, focused on the value of the property instead.

146. S*ee* F*lorida Rock*, 18 F.3d at 1569. A*ccord* S*an Diego Gas & Electric v. San Diego*, 450 U.S. at 651-53 (Brennan, J., dissenting). Justice Brennan's dissent has been widely followed because the bulk of his opinion had the support of five justices and was later implicitly adopted by the Court's opinion in F*irst* E*nglish*. S*ee, e.g.*, Nemmers v. City of Dubuque, 764 F.2d 502, 505 n.2 (8th Cir. 1985).

147. S*ee* F*lorida Rock*, 18 F.3d at 1568-73.

148. S*ee id*. at 1570-71.

149. S*ee id*. at 1571-72.

150. S*ee* First English Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987).

temporary regulatory takings usually involve undeveloped property for which there is no legitimate rental market. Consequently, landowners often try to charge the government for the fair rental value of the *proposed development*.[151] Thus, when using this method of calculating damages, compensation can quickly exceed the market value of the property.[152] This would result in an absurd award, given that the government could have permanently taken the entire fee and paid only the market value.

As a result, in temporary takings, calculating damages based on the market value does not work because it does not award enough damages to protect property rights sufficiently. Using the use value, or a fair rental value, is also inappropriate because it too often results in a windfall for landowners and provides too much incentive to claim a taking. Thus, a new type of calculation is required.

2. The Denominator Problem

The denominator problem was not at issue in *Landgate*, but it is an important problem and deserves a brief mention. The denominator problem arises when a regulation affects only a portion, or a particular aspect, of a piece of property.[153] For example, a regulation might affect only ten acres out of a hundred, or restrict coal mining while allowing other uses. Since the traditional Supreme Court balancing test evaluates takings, in part, by comparing the value taken from the property with the value that remains, the way in which a landowner characterizes her loss can make a big difference in the outcome.[154] The Court's move from a market value focus to economically viable use in *Agins*[155] and *Lucas* exacerbated the problem because a landowner can more easily prove that her property has lost all economically viable use than prove that it has lost all value.

Historically, the Supreme Court's answer to this problem has been the "whole parcel" rule.[156] The whole parcel rule eliminates the denominator problem by evaluating takings using the entire parcel, including all of the associated rights.[157] Using this doctrine, the Supreme Court has expressly disapproved of dividing an affected parcel in order to characterize a discrete segment as having lost all value.[158]

In spite of the whole parcel rule, the denominator problem creates a unique situation for temporary takings. Permanent regulatory takings created less incentive for creative maneuvering of property lines, because the government ended up purchasing the fee. Since regulations almost never render property entirely without a market value, it is often more worthwhile to hold on to the property for its speculative value.[159] This is true primarily because a lawsuit is likely to cost a landowner thousands of dollars in legal fees, and the government is likely to turn around and sell the property to someone else at a reduced price.[160]

Temporary takings completely remove this disincentive. If a landowner can characterize her property as having lost all economically viable use, she can potentially rake in a significant windfall. Since the government does not take the property, and ends up rescinding the regulation, the landowner could end up with both developable property and a substantial damages award. Many jurisdictions put icing on the cake by also awarding attorney's fees

151. *See* Tretbar, *supra* note 76, at 219-24.

152. This would have happened in the *Landgate* case, except that the trial court rejected this method of computing damages. *See* Coastal Commission's Appellate Court Brief at 8-9, *Landgate* (No. B084315). A similar situation happened in *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577 (Fed. Cir. 1990), where the court used the fair rental value to calculate damages, but rejected the enormous damages requested by the property owners for lost profits.

153. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (describing the denominator problem and considering what effect the categorical rule will have on it). *See also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

154. *See Keystone*, 480 U.S. at 496-97.

155. 447 U.S. 255, 260 (1980).

156. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978); Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 643-44 (1993).

157. *See Penn Central*, 438 U.S. at 130-31; *Concrete Pipe*, 508 U.S. at 644.

158. *See Concrete Pipe*, 508 U.S. at 644.

159. Perhaps down the road a new administration will change the regulations and allow development.

160. This is exactly what happened to Mr. Lucas. *See* DELONG, *supra* note 1, at 296.

and costs.[161] Since it is probably fair to assume that most landowners are legitimately harmed and not merely trying to rake in a windfall, this problem makes the way the court calculates damages especially important.

B. A Potential Solution

As a result of the above concerns, a few courts have tried to find a middle ground. Of course, the object is to secure adequate compensation for injured landowners, while also avoiding awards that are inappropriate windfalls. For the most part the specifics of damages calculation does not reach the appellate level very often. Those cases that have are mostly found in the state courts, and have produced inconsistent results. Two federal courts of appeals, however, have addressed the issue and are in essential agreement. Their approach has been called the "market rate of return" method.[163]

In W*heeler v. City of* P*leasant* G*rove* (Wheeler III)[164] the court began its discussion by deciding that in a temporary taking the landowner's injury is a loss of the income producing or profit potential of the property.[165] Though this suggests an economic use-based theory, the market rate of return method is based on market value.[166] Theoretically, any loss in use will be reflected in the change in market value, and so compensating landowners for the loss of use separately would amount to a double recovery.[167] Simply stated, the market rate of return method provides landowners with a return on the property's fair market value that was temporarily lost as a result of the regulation.[168] Therefore, an award using this method should be calculated by taking the property's market value prior to the regulation, subtracting the market value after the regulation, and then awarding a market rate of return on the difference computed over the period of the taking.[169]

One major criticism of this method is that it is too generalized.[170] It fails to take any peculiarities of the specific circumstances into account. In response, some courts have attempted to modify the market rate of return method to make it more case specific. For example, the Northern District of California modified the test by factoring in the probability that the landowner's development would be legitimately denied by the agency.[171] On a fourth appeal, the W*heeler* court actually calculated the damages itself, and modified its own test by factoring in the landowners' loan obligations and calculating damages using the remaining equity interest.[172] There are conceptual problems with both of these modifications, and neither has been widely accepted.[173]

Again, the L*andgate* case is a nice illustration of the market rate of return method and its pitfalls. First, the trial court valued Landgate's property at $675,000 before the Commission's permit denial.[174] Then, it decided that the Commission's denial of a development permit rendered Landgate's property without economically viable use, and thus valueless.[175] The difference between the two values, then, was the entire $675,000.[176] The trial court then used a ten percent rate of return over a two year period, added property taxes plus interest, and came up with $155,657.[177]

161. This was exactly the state of things when the L*andgate* case reached the California Supreme Court. S*ee* Coastal Commission's Appellate Court Brief at 9, L*andgate* (No. B084315); Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188, 1193 (Cal. 1998).

162. S*ee* Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987); Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985) (calculating damages for a temporary taking in a case which precedes F*irst* E*nglish* by relying on Justice Brennan's dissent in S*an* D*iego* G*as* & E*lectric*).

163. S*ee* Tretbar, *supra* note 76, at 227.

164. 833 F.2d 267. The W*heeler* case made its way to the Eleventh Circuit four times, but only the last two dealt with the calculation of damages.

165. S*ee id.* at 271.

166. S*ee id.*

167. S*ee id.*

168. S*ee id.*

169. S*ee id.*

170. S*ee* Herrington v. County of Sonoma, 790 F. Supp. 909, 915 (N.D. Cal. 1991).

171. S*ee id.* at 915; see also Tretbar, *supra* note 76, at 232-36.

172. S*ee* Wheeler v. City of Pleasant Grove, 896 F.2d 1347, 1351-52 (11th Cir. 1990).

173. S*ee* Tretbar, *supra* note 76, at 232, 236.

174. S*ee* Coastal Commission's Appellate Court Brief at 9, L*andgate* (No. B084315).

175. S*ee id.*

176. S*ee id.*

177. S*ee id.*; Landgate, Inc. v. California Coastal Commission, 953 P.2d 1188, 1193(Cal. 1998).

For the most part, the market rate of return method provides a good estimate of what a property owner loses in a temporary takings case. In L*andgate*, however, the trial court reached a result that was probably too high. This is because the court equated a taking of all economically viable use with the market value of the property. The categorical rule from L*ucas* should only be applied in deciding whether or not the regulation works a taking. Once that is decided, it is better to use the changes in market value as the measure of compensation. The Fifth Amendment provides compensation for the taking of property. The government does not owe compensation under that amendment because it has prohibited some behavior on a landowner's property. Rather, compensation is due when the government has prohibited so much behavior that it may as well have invaded the property outright. Thus, compensation is due for the value of the property, not the value of whatever behavior the regulation prohibited.

V. Conclusion

Research on this paper was begun with the assertion that temporary takings law is seriously flawed. As a practical matter, however, it appears that it would not be prudent to overrule F*irst* E*nglish* or eliminate the temporary takings concept. The regulatory abuses that the temporary takings doctrine is designed to address, no doubt, exist and cannot be ignored. The conclusion drawn is that temporary takings law is not *inherently* "screwed up," but rather it is flawed in its application. As a result, a few suggestions can be made.

First, ripeness doctrine with respect to temporary takings needs to be clarified. Preliminary litigation that comes before a final agency decision should not, by itself, result in a taking. Instead, the Court should explicitly approve and more clearly define the "futility exception." This clarity should be enough to prevent bad faith agency behavior, and keep hapless landowners from being subjected to repeated litigation or extraordinary delay. Once a final agency decision is made, or further application held to be futile, then compensation should be due for any property held to have been taken.

Secondly, the confusion between market value and economically beneficial use will continue to create inconsistent lower court rulings until it is clarified by the Supreme Court. The Court should either abandon L*ucas*' categorical rule, or alter it to require a finding of zero market value. This would make the rule more consistent with the rest of takings law and reduce confusion in damages awards.

There is no question that economically viable uses are an important part of property ownership, but the Fifth Amendment does not compensate for the loss of those uses. Thus, if the Court insists on keeping the formulation, it should drop the *per se* rule and add it as a factor to the P*enn C*e*ntral* balancing test. In so doing, it should then follow the Federal Circuit's lead and explicitly allow for partial regulatory takings. This approach would make regulatory takings more consistent with other types of takings and further reduce confusion in calculating compensation. Furthermore, it would allow the government to purchase only those property rights in which it has a legitimate interest, and leave the rest to private investment.

With such a system in place, temporary takings litigation would not be encouraged by a convenient categorical test, which practically every permit denial arguably satisfies. Instead, each situation could be evaluated using the temporary nature of the government action as one factor. Of course, this approach does nothing to eliminate the uncertainty in the Supreme Court's confused takings jurisprudence, but categorical rules will not do that either. Societal needs, interests, and views on property rights protection necessarily change over time. As a result, nice square categorical rule pegs are eventually confronted with a bunch of round holes. Inevitably, it is the rules which change to keep pace with society, not vice versa.