Dashed "Investment-Backed" Expectations: Will the Constitution Protect Property Owners from Excesses in Implementation of the Growth Management Act?

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The Growth Management Act of 1990 (GMA) mandated the most sweeping revisions to the regulation of real property rights in Washington State history.¹ Twenty-six counties and one hundred eighty cities are currently in the process of redrafting their comprehensive plans, adopting ordinances to protect the targeted values of resource lands and critical areas, and revising their zoning codes in order to comply with the GMA.²

Courts indulge in a "usual assumption that . . . [such changes are] simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned."³ Such "average reciprocity of advantage" occurs more easily in legal theory than in reality, however. It is inevitable that for some property owners, the result of all this "reregulation" will be that their land cannot be used as they had reasonably expected, and investments in land that they have reasonably made, in some instances over many years, will be rendered of little or no value. Thus, now more than ever, the issue will be tested of whether the constitutional rights to be free of uncompensated taking of property

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². WASHINGTON DEPARTMENT OF COMMUNITY DEVELOPMENT STATUS REPORT, HOW GROWTH MANAGEMENT IS WORKING (Feb. 1993).

and to substantive due process offer real-world protection to property owners.

Although the Fifth Amendment has traditionally barred a state's physical occupation of property and not merely a regulation of the property's use, the general rule is that if regulation goes too far, it will be recognized as a taking. Protection from regulation that goes too far will have real-life value only if the courts find a way to give meaning to the United States Supreme Court's statement that the Fifth Amendment Takings Clause protects a citizen's "distinct investment-backed expectations" from being frustrated for the public good.

As the courts have repeatedly said, takings cases are intensely factual and each case will turn on its own individual facts. Thus, the courts will continue to reject facial challenges to regulations on takings grounds unless it is clear from the face of a particular regulation that it deprives an owner of all viable economic use of its property or that the ordinance does not substantially advance legitimate state interests. That will rarely be the case. Furthermore, the courts will continue to require that all possible administrative remedies be exhausted. Thus, although broad classes of potentially injured parties can be identified, the prospects for challenging any zoning regulation on its face are so dismal that the right to be free from an uncompensated taking regulation must nearly always be vindicated, if at all, through individual litigation rather than by a class. The sheer cost of the litigation, added to the cost of meeting the judicial mandate of exhaustion of administrative remedies, will leave many plaintiffs with meritorious claims without a remedy.

6. Specifically, the Court has stated as follows:

[The Supreme] Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, [the Court has] frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case".

Id. (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)) (alteration in original; citations omitted).
In addition to interpreting the Fifth Amendment, Washington courts have increasingly looked to principles of substantive due process to protect private property rights. Although largely ignored by federal courts since the Depression, substantive due process has been a major alternative theory in five recent Washington Supreme Court cases, and it promises to figure significantly in the future.

Currently, Washington is far enough along in the implementation of the GMA that the factual outlines of many future cases can be identified. This Article examines some of the most frequent factual patterns of dashed expectations under the GMA and attempts to predict, in light of both the law as it has developed over the last fifteen years and the very recent cases, where the constitutional lines should be drawn. Section I briefly discusses the basic principles of takings law as enunciated by prior cases, as well as the United States Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*, and the Washington Supreme Court's recent decisions in *Sintra, Inc. v. Seattle* and *Robinson v. Seattle*. Although the *Lucas* decision has received considerable publicity, it advanced the state of the law rather little. The real guidance for future decisions arising out of the GMA will come from earlier United States Supreme Court decisions and the Washington Supreme Court's decisions in *Sintra, Robinson*, and *Lutheran Day Care v. Snohomish County*.

Section II introduces several hypothetical situations based on actual property owners with whom the Author is familiar. It examines how those hypothetical situations would be treated under an application of the law as it exists today. The Article concludes that although many truly injured parties will themselves be exhausted by the duty to exhaust administrative remedies, the law will protect the reasonable investment-backed expectations of those landowners who survive the administrative hurdles. It further concludes that public interest would be


better served by a greater recognition of property rights at the stage of ordinance development and permitting, as well as by legislation, to both reduce the burden of exhausting administrative remedies and the potential size of damage awards where a taking or a violation of substantive due process rights has occurred.

I. THE EXISTING CASE LAW: SUGGESTIONS OF THE FUTURE, BUT TOO LITTLE THAT IS CONCRETE

In most areas one can look to the case law and find reasonably clear guidance for future decisions. This is less true in the field of regulatory takings and property rights than in other fields for a number of reasons. First, the United States Supreme Court has sought every reason possible not to decide most of the cases it has even agreed to consider. Second, many of its pronouncements concerning what would violate the Constitution are found in dicta in cases holding against the property owner. Third, the only square holdings in favor of property owners have come in cases of either actual physical invasion or of complete loss of use of an entire property. This scenario is rare, and if it forms the only basis for constitu-

14. See Yee v. Escondido, 112 S. Ct. 1522 (1992) (stating that the issue was not properly presented in petition for writ of certiori); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) (holding that the property owner could have applied for a less dense development); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (holding that the property owner failed to exhaust administrative remedies); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) (holding that the decision appealed from was not a final judgment); Agins v. Tiburon, 447 U.S. 255 (1980) (stating that the owner had not obtained a final decision on the use of its property).

15. See Agins, 447 U.S. at 260 ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.") (citations omitted); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("Whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'") (quoting United States v. Central Eureka Mining Co., 337 U.S. 155, 168 (1958)) (alteration in original).

16. See Lucas v. Southern Carolina Coastal Council, 112 S. Ct. 2886 (1992) (holding that two residential lots rendered useable for nothing more than camping in a tent was a taking); First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987) (holding that prohibiting the use of the entire church camp was a taking).

17. See Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that imposing a beach access easement as a condition of construction of a house was a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that imposing obligation to permit cable TV wires to be strung on building was a taking); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding that imposing right of public access on privately created marina was a taking).
tional protection of property rights, the Fifth Amendment's protection from uncompensated taking is of little value in the regulatory context.

The United States Supreme Court handed down one regulatory takings case in its October 1991 term, *Lucas v. South Carolina Coastal Council.* In spite of the fanfare awaiting *Lucas*, it advanced the state of the law very little. Its principal value in predicting decisions under the GMA is found in dicta and by implication, with all the risks and uncertainties inherent in relying on dicta or implied decisions. Therefore, earlier cases such as *Penn Central Transportation Co. v. New York City,* Nolan v. California Coastal Commission, and *First English Evangelical Lutheran Church v. County of Los Angeles* remain the backbone of federal takings law.

Washington courts have been quite active in the area of takings law, and it may be that Washington State law has eclipsed federal law in the area of protection of property rights from excessive regulations. In May 1992, the Washington State Supreme Court decided three land use regulation cases raising both takings and substantive due process issues: *Sintra, Inc. v. Seattle,* Robinson v. Seattle, and *Lutheran Day Care v. Snohomish County.* These cases are more dramatic in their holdings than the *Lucas* case, and their analysis appears more significant because the Washington court was willing to examine market realities and the effects of delay in a way that the United States Supreme Court never has. Because Washington cases contain egregious and unusual facts, however, it remains to be seen whether they will have significant impact on more typical regulatory cases.

In many ways, *Penn Central* remains the quintessential case concerning the protection of investment-backed expectations. Penn Central Railroad opened Grand Central Terminal in New York in 1913. It is conceded to be a great building architecturally and from the standpoint of the engineering

solution it embodies. It is a fine railroad terminal, but by the mid-1960s it was an eight-story structure sandwiched between high-rise towers and a significant underutilization of its site. Penn Central was by then in bankruptcy with a serious need to maximize the value of all of its assets. To do so, in 1968 it entered into an agreement with a developer under which the developer agreed to pay Penn Central one million dollars annually during construction and at least three million dollars annually for fifty years thereafter, and, in exchange, the developer would construct a fifty-five-story office tower to be cantilevered over Grand Central Station. That agreement was quashed, however, by New York's Landmarks Preservation Commission, which found the plan to be aesthetically in conflict with the building's status as a historic landmark.

Penn Central claimed that its property had been "taken" in violation of the Fifth and Fourteenth Amendments. In a six to three decision, the United States Supreme Court disagreed. The Court pointed out that a material part of its inquiry in the case was "the extent to which the regulation has interfered with [the owner's] distinct investment-backed expectations." It found determinative the fact that Grand Central was conceded to still be a well-functioning train station—the use for which Penn Central purchased the land—upon which Penn Central would still make a reasonable return. The fact that one element of what Penn Central considered to be the value of its property was destroyed, or at least devalued, was viewed as being irrelevant, so long as the basic purpose for which the property had been purchased remained viable. The Court made clear, however, that a very different case would be presented if Penn Central were functionally or eco-

26. Id. at 116 n.16.
27. Id. at 115.
28. Id. at 116.
29. Id. at 117-18.
30. Id. at 107.
31. Then Associate Justice, now Chief Justice William Rehnquist, wrote the dissent, which remains one of the ringing calls for a broad and liberal interpretation of the Fifth Amendment to preserve property rights. Unfortunately, it was the dissent. Although Justice Rehnquist joined the majority in Lucas, there is no reason to believe that the majority would go so far as to overturn Penn Central if presented with the occasion today.
32. Penn Central, 438 U.S. at 124.
33. Id. at 129, 136, 138 n.36.
34. Id. at 130.
nomically no longer usable.\textsuperscript{35} If Penn Central could no longer utilize the property for the purpose of which it was acquired, the Court appeared willing to grant Penn Central relief.\textsuperscript{36}

In \textit{Lucas v. South Carolina Coastal Council},\textsuperscript{37} the United States Supreme Court reversed the South Carolina Supreme Court's decision, which had held that even if the state's coastal regulation deprived Lucas of all economically viable use of his property, it did not constitute a taking where Lucas had not shown that the regulations did not advance an important public purpose. In doing so, the Supreme Court seems to have once and for all put to rest one surprisingly recurring issue: whether a worthy public purpose is sufficient to insulate a regulation from being a taking.\textsuperscript{38} It held that where a property owner is deprived of all economically viable use of his land, a regulation is not insulated from the Takings Clause by a worthy public purpose, including the purpose of preventing harm to an important public resource.\textsuperscript{39} Only if the proposed use that the regulation seeks to prevent could have been prohibited under the state's common law of nuisance or similar doctrines, can it be prohibited without compensation where the owner is left with no viable economic use.\textsuperscript{40} The Court's

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\textsuperscript{35} \textit{Id.} at 138 n.36.
\textsuperscript{36} The Court's final comment was as follows:

We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief.

\textit{Id.} at 138 n.36. Although it was the city's "concession," not the Court's, there is no reason for the Court to have emphasized the point or reported the city's concession if the Court did not agree.

\textsuperscript{38} The Washington cases follow a similar vein. In \textit{Allingham v. Seattle}, 109 Wash. 2d 947, 749 P.2d 160 (1988), overruled in part by \\textit{Presbytery of Seattle v. King County}, 114 Wash. 2d 320, 787 P.2d 907 (1990), the City of Seattle argued that preservation of greenbelts was essential to the future well-being of the City of Seattle and therefore the City's Greenbelt Ordinance could not be a taking. The Washington Supreme Court conceded the virtue of preserving greenbelts but held that it did not justify taking them without compensation. In \textit{Sintra, Inc. v. Seattle}, 119 Wash. 2d 1, 829 P.2d 765, \textit{cert. denied}, 113 S. Ct. 676 (1992) and \textit{Robinson v. Seattle}, 119 Wash. 2d 34, 830 P.2d 318, \textit{cert. denied}, 113 S. Ct. 676 (1992), the City argued that preventing a loss of low-income housing was a worthy social goal, which should keep the City's actions from constituting a taking or a deprivation of substantive due process. The Washington Supreme Court, again, disagreed.

\textsuperscript{39} \textit{Lucas}, 112 S. Ct. at 2895.
\textsuperscript{40} \textit{Id.} at 2900. The Washington Supreme Court came to a somewhat similar conclusion in \textit{Sintra}, and in doing so backed away from language in \textit{Presbytery v. King
rationale was that where common law principles of nuisance could have prohibited the use of the property in question, that use was never part of the owner's title to the property and thus cannot logically now be "taken." 41

That this issue was even in question was surprising in light of the Court's prior decisions. As early as Pennsylvania Coal Co. v. Mahon, 42 Justice Holmes said in invalidating a Pennsylvania statute designed to prevent private homes from falling into pits created by subsidence (the prevention of a public harm at least as great as that in question in Lucas): "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . We are in danger of forgetting that a strong public desire to improve the

County, 114 Wash. 2d 320, 787 P.2d 907, cert. denied, 111 S. Ct. 284 (1990), which, if it ever were good law, quite clearly is good law no longer.

In Presbytery, the court set up a threshold inquiry for any takings claim: whether the measure merely safeguarded the public interest, or went further, to "enhance a publicly owned right in property." Id. at 329, 787 P.2d at 914. Only if it did the latter, said the court, could the measure constitute a taking, no matter what its economic impact might be. In Sintra, the court explained its analysis in Presbytery as really being only a way of saying that cities can prohibit "nuisance-like activity" without paying compensation. Sintra, 119 Wash. 2d at 15-16, 829 P.2d at 773. Conceptually, the notion that a measure could only be a taking if it "enhanced a publicly owned right in property" is far more limiting than simply not being a nuisance. There never was any decisional support for the court's formulations of its threshold inquiry in Presbytery. In Guimont v. Clarke, 121 Wash. 2d 586, 854 P.2d 1 (1993), the Washington court "reordered" its analysis in Presbytery to take Lucas into account. Id at 598-604, 854 P.2d at 8-11. But see Powers v. Skagit County, 67 Wash. App. 180, 835 P.2d 230 (1992), where the Washington State Court of Appeals attempted to reconcile Presbytery with Lucas by concluding that Lucas created a "pre-threshold" inquiry, to be followed by the full Presbytery analysis. Id. at 190, 835 P.2d at 236. The concurring decision was probably correct in suggesting that Lucas requires a complete rethinking of that portion of Presbytery, at least where the owner is left with no economically viable use of its land. Id. at 195-96, 835 P.2d at 239 (Grosse, C.J., concurring).

41. Lucas, 112 S. Ct. at 2901. The Court's reasoning is essentially identical to that used by the Washington Supreme Court in Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988) ("Orion II"), to limit the uses that could be "taken" from an owner of tidelands by the Shorelines Management Act to those uses that could not have been prescribed by the pre-existing public trust doctrine applicable to state shorelines and tidelands. "[O]rion had no right to make any use of its property that would substantially impair the public rights of navigation and fishing. . . . Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands. Since a 'property right must exist before it can be taken,' neither the SMA nor the SCSMMP effected a taking by prohibiting Orion's dredge and fill project." Id. at 641-42, 747 P.2d at 1073 (citations omitted). The U.S. Supreme Court would almost undoubtedly expand its exemption from takings liability to include the public trust doctrine as well as traditional nuisance doctrine. Thus, Lucas probably has no impact on the continuing validity of Orion.

42. 260 U.S. 393 (1922).
public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." In short, a worthy public purpose is presumed to be present any time the state takes property. If not, the state cannot take the property at all. The existence of a public purpose, however, does not excuse the obligation to pay for what it takes. There is no more justification for an uncompensated taking by regulation, just because the purpose is worthy, than there would be for an uncompensated taking of any other kind.

More recently, in Nolan v. California Coastal Commission, Justice Scalia made clear that to avoid a taking, a land use regulation must both substantially advance legitimate state interests and not deny an owner the economically viable use of his land. In light of those clear dual requirements, it is surprising that anyone thought that Lucas needed to show both that all viable use of his property was destroyed and that the law did not serve worthy purposes.

South Carolina's argument, however, was that there was a different rule when the worthy public purpose was preventing a public harm rather than promoting the public good. The "harm" in this case was ostensibly preventing beach erosion. In Lucas, Justice Scalia aptly pointed out that whether a proposal "prevents a public harm" or "creates a public benefit" depends mostly on the eye of the beholder. Virtually any proposal can be described as either. Were the Court to rule that a proposal that "prevented public harm" was exempt from takings analysis, the public attorneys charged with drafting such legislation would simply take care to include in the pre-

43. Id. at 415-416 (citations omitted; emphasis added).
44. See In re Seattle, 96 Wash. 2d 616, 638 P.2d 549 (1981) (holding that the City of Seattle could not condemn land for its proposed Westlake Mall project because the taking was not for a public use). "In order for a purposed condemnation to meet the requirement of Const. art. 1, § 16, the court must find (1) that the use is really public, (2) that the public interests require it, and (3) that the property appropriated is necessary for the purpose." Id. at 625, 638 P.2d at 555.
46. Id. at 834.
47. The Lucas majority dealt harshly with Justice Blackmun's dissenting argument that proof that a regulation does not deprive all economic use would defeat a taking claim, but proof that it does deprive all economic use would not alone establish a taking claim. Lucas, 112 S. Ct. at 2893 n.6.
48. Id. at 2896. Under that rationale, one wonders if a city could take property for a police or fire station without paying for it, where compensation would be required if the proposed use were for a school or a public library.
49. Id. at 2897.
amble of each such ordinance or statute a finding that the measure prevented public harm. As Justice Scalia bluntly put it, constitutional guarantees would depend on whether the public hired an inept staff.\textsuperscript{50}

At least by implication, \textit{Lucas} gave some definition to what is meant by an “economically viable use.” Justice Blackmun argued in dissent that the trial court’s finding that the property was rendered valueless was “almost certainly erroneous” because the property in fact had remaining uses: Lucas could “picnic, swim, camp in a tent, or live on the property in a moveable trailer,” and he “retained the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.”\textsuperscript{51} Almost undoubtedly the property had some remaining dollar value to someone for such uses, if only “salvage” value.\textsuperscript{52} Recognizing that the property had been purchased for $975,000 for the purpose of building two homes, the majority, however, was apparently not willing to accept such minimal or non-economic uses, or salvage value, as being sufficient to disregard the trial court’s finding that the property had been deprived of all value.\textsuperscript{53} The Supreme Court may, of course, have been doing nothing more than applying the rule that trial court findings of fact will not be reversed on appeal if supported by substantial evidence. But they were also holding, at least implicitly, that the facts relied on by Justice Blackmun were not adequate to compel a conclusion that the property had “value” or “economic use” for constitutional purposes. A contrary conclusion in \textit{Lucas} would have rendered the Taking Clause largely meaningless in the regulatory context, because property almost always has some remaining salvage value to someone.

In dicta, the Court also held open the prospect that something less than deprivation of \textit{all} economically viable use could

\textsuperscript{50} Id. at 2898 n.12.

\textsuperscript{51} Id. at 2908 (Blackmun, J., dissenting).

\textsuperscript{52} By the same reasoning, when no development is allowed on wetland property, it is sometimes argued that the property still has “value” because it can be sold to someone else seeking a wetland to enhance as mitigation for some other project. Also by the same reasoning, in \textit{Valley View Industrial Park v. Redmond}, 107 Wash. 2d 621, 733 P.2d 182 (1987), the City argued that the plaintiff’s land still had value after being downzoned from light industrial to agriculture zoning because it could be developed as a raspberry or blueberry farm. The trial court in \textit{Valley View}, as the Supreme Court in \textit{Lucas}, found that an unacceptable level of “use” given the owners’ original legitimate expectations.

\textsuperscript{53} \textit{Lucas}, 112 S. Ct. at 2896.
constitute a taking. It characterized the deprivation of all economically viable use as a "categorical" taking that did not require "case-specific inquiry into the public interest advanced in support of the restraint." It then pointed out that it was unclear how the Court would analyze a situation where only ninety or ninety-five percent of the use was denied. But, the Court said, it was an error to assume that such a plaintiff could not recover. Having dropped that comment, it gave absolutely no guidance as to how it would resolve any future case. The quality of the debate over constitutional takings would be improved if the Court would state more clearly that such far-fetched, minimal uses in comparison to the owner's reasonable expectations simply do not pass constitutional muster.

Lucas is unique among successful takings plaintiffs in that he had never applied for a permit and had failed to exhaust an available administrative remedy at the time his case was heard. The dissent made much of the fact that Lucas had held the lots as a speculative investment and had apparently never applied for a building permit. Lucas's plight in that regard is not uncommon. Most undeveloped property is held by individuals who have good reason not to develop their property at the moment, but who have held it and paid taxes on it

54. Id. at 2894 n.7.
55. Id. at 2893.
56. Id. at 2894-95 nn. 7 & 8.
57. Until the U.S. Supreme Court more firmly announces that common sense does prevail, landowners will have to continue to defend against claims that a developer's constitutional rights are protected if it can grow blueberries or camp in a tent on property for which it has made a major investment.

Valley View Industrial Park v. Redmond, 107 Wash. 2d 621, 733 P.2d 182 (1987), was decided as a taking case at the trial court level, although the Washington State Supreme Court avoided the taking issue by deciding the case on vested rights grounds. The plaintiff in Valley View, a developer, had acquired the last industrially zoned property in the Sammamish River Valley, at industrial land prices, only to have the land downzoned to agricultural use. Id. at 626, 733 P.2d at 186. The City of Redmond argued to the trial court that the land still had viable economic use because the developer could start a blueberry or raspberry farm on the property. Id. at 652, 733 P.2d at 201. The trial court summarily rejected that position. Id. at 652-53, 733 P.2d at 201. Trial courts seem generally unwilling to ignore common sense standards concerning what are reasonable landowner expectations.

58. The more typical fate is that demonstrated in MacDonald, Sommer & Frates v. Yolo County, 447 U.S. 340 (1986) (holding that the developer must apply for a less dense development after the first development proposal was turned down); Hamilton Bank in Williamson Co. Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (holding that a takings claim was not ripe because the developer had not sought variances); and Agins v. Tiburon, 447 U.S. 255 (1980) (holding that a takings claim was not ripe because the plaintiff never applied for a permit).

59. Lucas, 112 S. Ct. at 2908 n.5 (Blackmun, J., dissenting).
in the belief that at the proper time it could be developed. Those individuals are just as injured by a regulation that makes their investment valueless and their property useless, as is someone who is in the midst of an actual development. The Supreme Court majority resolved the problem by focusing on Lucas' claim for interim damages and by limiting this aspect of the case to the pleadings. On remand, however, the issue of whether the statute in fact injured Lucas remains open, particularly if South Carolina now grants Lucas administrative relief.

The dissent also stressed that Lucas had not pursued a statutorily provided administrative remedy to challenge the location of the setback line affecting his property. The majority relied on a stipulation that as of the time of trial no permit would have been granted had Lucas applied for one and on the fact that the South Carolina Supreme Court had declined to decide the case on exhaustion grounds and, instead, decided it on the merits. Therefore, a failure of the United States Supreme Court to reach the merits would foreclose any later opportunity for Lucas to have the merits of his claim considered.

Although Lucas touched on many issues, its precedential effect will be limited simply because it has simple, extreme facts. Less than two months before the Lucas decision, the Washington Supreme Court handed down three cases, Sintra, Inc. v. Seattle, Robinson v. Seattle, and Lutheran Day Care Center v. Snohomish County, each of which presented far more complex facts and required the court to consider market realities to an extent that the United States Supreme Court has never done. Sintra and Robinson each raised takings as well as substantive due process issues and demonstrated that these doctrines may have vitality in protecting property owner expectations in Washington. Furthermore, Lutheran Day Care breathed new life into substantive due process analysis. As with all property rights cases, however, the peculiar facts of

60. Id. at 2891 n.3.
61. Id. at 2907 (Blackmun, J., dissenting).
62. Id. at 2891 n.3.
63. Id. at 2891.
64. 119 Wash. 2d 1, 829 P.2d 765, cert. denied, 113 S. Ct. 676 (1992).
these three cases are important. Thus, the extent to which they will have precedential effect must be explored.

In *Sintra*, the Washington State Supreme Court engaged in a much more complex, aggressive, and subtle analysis of the facts that might constitute a taking than the analysis used by the United States Supreme Court in *Lucas* or in any other case. Cases before the United States Supreme Court have usually involved property owners who were told that they could not use their property for the purpose for which it was acquired. Sintra, by contrast, actually received the permit for which it had applied. Its takings claim was that improper city delays had caused it to lose the only market for its property because another developer had filled the market in the interim.

*Sintra* bought a decrepit single-room occupancy hotel near downtown Seattle in 1984, paying $670,000 and intending to renovate it for a bed and breakfast. Those plans were scuttled in 1985 when an adult entertainment business opened next door. Sintra tried to sell the building, but could find no buyer. It could find no one to develop low-income housing on the site. Eventually, Sintra concluded that the only profitable use that could be made of the building was to convert it into a ministorage warehouse and, in October 1985, Sintra applied for a permit to do so. At this point, Sintra was informed that it would have to pay a $219,840 housing demolition fee under the City of Seattle’s housing preservation ordinance (HPO) in order to proceed with its plans. Sintra applied for administrative relief from that requirement, and a series of admin-

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68. *Sintra*, 119 Wash. 2d at 6, 829 P.2d at 768.

69. Id.

70. Id.

71. Id. at 7, 829 P.2d at 768.

72. Id.

73. Id.

74. The HPO provided for relief from the fee requirements if “but for the strict and literal application of the housing requirement, the owner would be able to make profitable use of his property.” [SEATTLE, WA., ORDINANCE 112342 § 13 (1985)]. The burden was on the applicant to demonstrate entitlement to administrative relief. Relief was to be the minimum that would allow profitable use of the property. In that respect, the HPO was similar to the “reasonable use exceptions” included in numerous
trative appeals was initiated. Then, in July 1987, in a case brought by another developer, the Superior Court held the HPO to be invalid.\textsuperscript{75} Nonetheless, the City continued to seek at least limited application of the HPO to Sintra. Sintra continued its administrative appeals.\textsuperscript{76} Nine months later, the state supreme court affirmed that the HPO was invalid.\textsuperscript{77} Still, the saga continued. Not until June of 1987 did the City issue Sintra's Master Use Permit without the HPO fee attached.\textsuperscript{78}

By then, Sintra claimed that the market had changed so that a ministorage warehouse was no longer feasible and, it alleged, its property was left with no viable economic use.\textsuperscript{79} Sintra successfully sought rescission from its sellers on the grounds of misrepresentation.\textsuperscript{80} Sintra also sued the City and several of its employees for damages, alleging that its property had been taken and that it had been denied substantive due process.\textsuperscript{81}

Sintra claimed that the City's delay and the relative excess-

wetlands ordinances now being adopted around the state. Sintra's claim was essentially that the burden of administrative delays required to get through that administrative process deprived it of any realistic opportunity to salvage its investment. See Appellants' Brief at 12-16, \textit{Sintra} (No. 57029-9). Sintra's claim is greatly bolstered by the fact that the underlying fee from which it sought relief was ultimately declared invalid. Experience indicates that the administrative cost and delay of seeking a permit to develop wetlands where there is otherwise no viable use of the property may frequently exceed the value of the property.

Thus, \textit{Sintra} suggests that a "reasonable use provision" may not insulate a city from liability if the procedure for utilizing that provision is itself sufficiently burdensome, or if it permits such onerous mitigation to be imposed on a permitted development that the project remains non-viable. "Reasonable use exceptions" are only effective to prevent what would otherwise be a taking if (1) they are not in themselves unreasonably burdensome and (2) the administrators charged with applying them can evaluate the real world market factors that determine whether a project is viable. Frequently, neither of those conditions exist. Attorneys charged with drafting such provisions often assume that the presence of a "reasonable use exception" provision would insulate an ordinance from a takings claim, regardless of the facts in any particular case. It would seem from \textit{Sintra} that such provisions are not particularly effective.

\textsuperscript{75} \textit{Sintra}, 119 Wash. 2d at 8, 829 P.2d at 769.
\textsuperscript{76} Id.
\textsuperscript{78} The supreme court may have confused a "change of use permit" with a "master use permit." The court's decision says both were issued on June 22, 1987. The parties' briefs indicate that the City issued a "change of use" license without the HPO fee eight days after the state supreme court's \textit{San Telmo} decision. See Appellants' Brief at 18, and Respondents' Brief at 14, \textit{Sintra} (No. 57029-9).
\textsuperscript{79} \textit{Sintra}, 119 Wash. 2d at 9, 19, 829 P.2d at 769, 774.
\textsuperscript{80} Id. at 10, 829 P.2d at 770.
\textsuperscript{81} Id.
siveness of the City's fee constituted a taking. In this regard, Sintra's takings claim differs from the more common scenario in which the limitations placed by the City on property use are targeted as a taking. Indeed, in Sintra, it appeared that a wide range of uses might have been *legally* permitted—had they been economically feasible in that location with the fee. Sintra's claim thus required the court to look much more closely at market realities than it otherwise would most takings claims, where typically the property owner has been prevented from proceeding with the development for which the property is most suited.

*Sintra* came to the Washington State Supreme Court after the trial court granted the City's motion for summary judgment on all of Sintra's claims. The supreme court therefore did not need to decide whether a taking or a violation of Sintra's substantive due process rights had occurred. It only needed to decide whether Sintra was entitled to try to prove its allegations to a jury. The court held that in all respects, except for its claim of a federal civil rights violation for the taking, Sintra was entitled to go forward and to attempt to prove its case. Thus, by implication, it held that if a jury accepted Sintra's view of the facts and rejected the City's view, then Sintra was entitled to recover. In doing so, the Washington court may have suggested several things about what will constitute a taking in this state under the GMA.

The court first pointed out that in an earlier decision, *San Telmo Associates v. Seattle*, it had "noted, in dicta, that the high fees involved [in the HPO] could constitute a taking under the Washington Constitution." The only issue in *San Telmo* was whether the HPO fees were an unauthorized tax. Thus, the court's dicta about a taking in *San Telmo* might be viewed as gratuitous. On the other hand, when the court recalls that dicta in a case alleging a taking, one must assume that the court is entirely serious. If so, it suggests that exces-

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82. Id. at 17, 829 P.2d at 774.
83. Id. at 10, 829 P.2d at 770.
84. Id. at 29, 829 P.2d at 780-81.
85. Had the court concluded that even if a jury accepted Sintra's view of the facts Sintra had not stated a claim, or would be barred by one of the City's defenses, there would have been no reason to remand the case for trial.
87. Sintra, 119 Wash. 2d at 9, 829 P.2d at 769.
88. See *San Telmo*, 108 Wash. 2d 20, 735 P.2d 673.
sive impact fees imposed under the GMA may also constitute a taking in the right case.

Second, the court sent the case back to trial on the apparently hotly contested question of whether the City's actions in simply continuing to require Sintra to go through the administrative process, even after the superior court invalidated the HPO, had the effect of destroying Sintra's investment.\(^{89}\) When cities think of takings claims they usually think of a situation where an owner is, at the end of the process, denied the right to make use of his property. Sintra was eventually issued a permit. Sintra's claim was not that he was turned down, but that the process dragged on until his market was gone. Public bodies have made something of an art of creating burdensome and exhausting administrative remedies that must be pursued before a property owner can seek judicial relief.\(^ {90}\)

For instance, the staff responsible for issuing permits is frequently under pressure from opponents of a proposal to deny a project and staff members frequently see demanding more information as an appropriate way both to avoid making a decision that might anger one side or the other and to add weight to their decision, whichever way it is made.\(^ {91}\) Staff members are frequently oblivious to the cost and delay of such requests for information and to the impact that they have on the feasibility of the project. Thus, in most cases where a municipality or active citizens want to prevent development, property owners have had to abandon their projects and absorb their losses without remedy. If, however, Sintra means that a court can consider, as part of a takings claim, whether the process itself deprived an owner of viable use of its property, it may mean that municipalities will drag out the administrative process at their peril. If cities have to pay the cost of having "lost the market," they will share some of a developer's desire not to have the project rendered infeasible by the sheer passage of time.

Finally, the Sintra takings decision gives flesh to the right

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89. *Sintra*, 119 Wash. 2d at 17, 829 P.2d at 774.
91. In the case of a grocery store for which the Author was responsible for seeking permits, the city staff person charged with the ultimate decision received numerous phone calls and dozens of letters from citizen opponents long after all official comment periods had closed. City processing of the building permit for the project, which required no zoning change or design review or variances, took four and one-half years, including one complete redesign of the project.
to compensation even for a temporary regulatory taking. The HPO was eventually invalidated and the restrictions that it placed on Sintra’s property were eliminated. The court made clear that Sintra need not prove that the property remained useable after the HPO was invalidated. By the time Sintra’s claim reached the court, Sintra had obtained rescission of its purchase of the property—it didn’t even own the property anymore. Nonetheless, the court held open the possibility that Sintra was still entitled to recover for a temporary taking of its property while it was held.

The practical long-term effect of the Sintra decision will depend on how it is applied in later cases. To date, however, plaintiffs in takings cases have had to withstand every possible defense that their property never was buildable, that their project never was financable, that the delay while the offending ordinance was in effect caused no injury in fact, and that their damage was caused by the wrongful acts of their seller, buyer, bank or others, etc. The Sintra court did not guarantee that Sintra would survive such defenses at trial. It did, however, tell public bodies that such defenses may not allow them to avoid a trial.

Of at least as much significance as its takings analysis is the Sintra court’s substantive due process analysis. The court made clear that substantive due process is a viable alternative theory of recovery for excessive regulation and that substantive due process and takings theories are not mutually exclusive. Substantive due process may be used to invalidate an

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92. Sintra, 119 Wash. 2d at 15-16, 829 P.2d at 773.
93. The decisions in Lucas and Sintra may indicate that courts are coming to understand just how prescient Justice Brennan was in his dissent in San Diego Gas & Electric v. San Diego, 450 U.S. 621, 655 n.22 (1981). Justice Brennan warned that unless owners were compensated for temporary takings, property rights would be thwarted by endless city maneuvering. See, e.g., Pleas v. Seattle, 112 Wash. 2d 794, 774 P.2d 1158 (1989). There is at least some reason to be optimistic.
94. Sintra, 119 Wash. 2d at 18, 829 P.2d at 774.
95. Presbytery of Seattle v. King County, 114 Wash. 2d 320, 329, 787 P.2d 907, 912 (1990), suggested that its threshold inquiry was to determine which alternative theory, takings or due process, would be applicable to a regulation. The Presbytery court implied that only one theory would apply to any given regulation. Sintra, however, suggests that although a regulation that does not constitute a taking may nonetheless violate substantive due process, if it does constitute a taking, it may also violate substantive due process. Sintra, 119 Wash. 2d at 29, 829 P.2d at 780 (reversing and remanding for trial the summary judgment against Sintra on both its takings and its substantive due process claims). The Supreme Court in Guimont v. Clarke, 121 Wash. 2d 586, 854 P.2d 1 (1993), reiterated its statement in Presbytery that where both a takings claim and a substantive due process claim are made, the takings claim is
ordinance that fails to pass a judicial balancing test.\textsuperscript{96} In that
test, the court asks (1) whether the regulation is aimed at
achieving a legitimate public purpose; (2) whether it uses
means that are reasonably necessary to achieve that purpose;
and (3) whether it is unduly oppressive to the landowner.\textsuperscript{97}

Although described as a "balancing" test, suggesting that a
finding in favor of the regulation on one prong might outweigh
a finding against it on another, the court's analysis suggests
that an ordinance must pass both the first and third tests, if
not all three tests, to withstand a substantive due process chal-
allenge. The court found that the regulation in \textit{Sintra} met the
first prong of the test—it was clearly aimed at achieving a
legitimate public purpose.\textsuperscript{98} Yet, that fact was given no weight
when balanced against the court's doubts that it met the sec-
ond test and the court's conviction that it was unduly oppres-
sive and, therefore, failed to meet the third test.\textsuperscript{99}

\textit{Sintra} highlights the limitation of substantive due process
as a protection for overregulated property owners. It is much
more likely to be a grounds for invalidation of a regulation
than for recovery of damages.\textsuperscript{100} Invalidation of a regulation,
without being able to recover the cost of being burdened by its
enforcement and the need to bring a lawsuit to overturn the
ordinance, is in most cases a Pyrrhic victory for a landowner.
Only if a property owner can prove that the regulation or its
application was not only invalid on substantive due process

\textsuperscript{96} \textit{Sintra}, 119 Wash. 2d at 21, 829 P.2d at 776.
\textsuperscript{97} \textit{Id}. Whether the regulation is "unduly oppressive" also requires a balancing
test.
\textsuperscript{98} \textit{Id}.
\textsuperscript{99} Presumably, if a court found that a regulation \textit{failed} to achieve a legitimate
public purpose, the court would invalidate it even if the regulation's means were
relatively reasonable and its burden slight. Under \textit{Nolan v. California Coastal
Comm'n}, 483 U.S. 825 (1987), such an ordinance may also constitute a taking. One can
conceive of regulations aimed at legitimate public purposes that are not as drastically
aggressive as the HPO, but that clearly use means that go far beyond the minimum
necessary to achieve the stated ends. Whether the Washington court would invalidate
such an ordinance remains to be seen. Since the court-packing days of Franklin
Roosevelt, courts have generally refused to intervene when they disagree with the
means selected by a legislative body to achieve its ends. The \textit{Sintra} court's citation to
\textit{Lawton v. Steel}, 152 U.S. 133 (1894), to support its balancing test suggests that the
court may be willing to return to a more aggressive review of regulations that go too
far.
\textsuperscript{100} \textit{Sintra}, 119 Wash. 2d at 23, 829 P.2d at 777.
grounds, but was also arbitrary or irrational,\textsuperscript{101} can the property owner recover damages under 42 U.S.C. § 1983 for a substantive due process violation.\textsuperscript{102} Simple enforcement of an unconstitutional ordinance, before it has been ruled unconstitutional, does not create liability for damages.\textsuperscript{103} The City of Seattle's problem in 

\textit{Sintra} was that it continued to enforce its HPO after a superior court judge had ruled it illegal. The court indicated that a jury could be justified in finding such conduct arbitrary or irrational.\textsuperscript{104}

\textit{Sintra's} companion case, \textit{Robinson v. Seattle},\textsuperscript{105} is interesting for the purposes of this Article because of its balancing of the various factors that make a measure "unduly oppressive" and therefore a denial of substantive due process.\textsuperscript{106} \textit{Robinson} was a class action by all those who had actually paid the same HPO fee that was in issue in \textit{Sintra} both before and after the superior court first invalidated it.\textsuperscript{107} By definition, the class members were owners who had gone forward with projects that changed the use of low-income housing buildings, because that was the only reason one paid the HPO fee.

The Washington State Supreme Court found no taking had occurred because it could not find that the ordinance denied all viable economic use of all regulated properties.\textsuperscript{108} It did find, however, that the ordinance could have been invalidated as to all the plaintiffs on substantive due process grounds.\textsuperscript{109} The court followed the reasoning in \textit{Sintra}, but

\begin{itemize}
  \item[\textsuperscript{101}] \textit{Id.}
  \item[\textsuperscript{102}] If a property owner can prove that a regulation or its enforcement was arbitrary and capricious, then he or she can recover damages under \textsc{wash. rev. code} § 64.40.020 (1992). On the other hand, if the regulation or its enforcement is "merely" unlawful, the property owner must prove that the final decision-maker knew or should have known that the regulation or its enforcement was unlawful. Lutheran Day Care v. Snohomish County, 119 Wash. 91, 112, 829 P.2d 746, 756 (1992), cert. denied, 113 S. Ct. 1044 (1993).
  \item[\textsuperscript{103}] \textit{Lutheran Day Care}, 119 Wash. at 112, 829 P.2d at 756.
  \item[\textsuperscript{104}] \textit{Sintra}, 119 Wash. 2d at 29, 829 P.2d at 780.
  \item[\textsuperscript{105}] 119 Wash. 2d 34, 830 P.2d 318 (1992), cert. denied, 113 S. Ct. 1044 (1993).
  \item[\textsuperscript{106}] \textit{Id.} at 51, 830 P.2d at 329. A substantive due process analysis requires the court to engage in a three-part balancing test: first, is the regulation aimed at achieving a legitimate public purpose; second, are the means used reasonably necessary to achieve that purpose; and third, is the measure unduly oppressive. \textit{Id.}
  \item[\textsuperscript{107}] \textit{Id.} at 47, 830 P.2d at 326.
  \item[\textsuperscript{108}] \textit{Id.} at 54, 830 P.2d at 330. Robinson demonstrates, again, the impracticability of a facial challenge to an ordinance on takings grounds. Only if an ordinance creates a physical invasion of property or denies a "fundamental right," such as the right to exclude others, is there any prospect of challenging an ordinance on its face on takings grounds.
  \item[\textsuperscript{109}] \textit{Id.} at 54-56, 830 P.2d at 330-331.
\end{itemize}
elaborated on why the ordinance was "unduly oppressive." The Robinson court pointed out that although the public problem of homelessness was very serious, the extent to which any one parcel contributed to the overall problem was not particularly great. The lack of low-income housing was a function of how all Seattle landowners used their property. Therefore, it was unduly oppressive, particularly given the magnitude of the fees in question, to place the full responsibility on the few owners whose property came under the ordinance. The idea that a few individual parcels should not bear the full burden of correcting problems caused by many is one that may have substantial importance to the implementation of the GMA.

The cases decided to date by both the United States Supreme Court and the Washington State Supreme Court provide some hope for property owners that the Constitution can protect them from the excesses of government in the name of the public good. Each case, however, has turned on its own facts. The question is what vitality will the principles enunciated in the case law have when applied to some hypothetical plaintiffs who reflect actual fact patterns now developing across the state.

Exactly how much precedential value Sintra, Robinson, and their companion case, Lutheran Day Care v. Snohomish County, will have may depend on how much the court is influenced in those cases by a conviction that the public bodies involved are disregarding judicial orders. In Sintra and Robinson, the Washington State Supreme Court was clearly persuaded that the City's enforcement of the HPO after it was first invalidated by the superior court reflected disrespect for the law by the City. Any trial lawyer knows that there is

110. The court reiterated the list of factors to be considered in determining whether a provision is unduly oppressive:

On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Robinson, 119 Wash. 2d at 54-55, 830 P.2d at 331.

111. Id. at 55, 830 P.2d at 331.

112. Id.


114. In Sintra the court stated that: "Intentional violations for court orders
no more effective way to prejudice an entire case than to appear to disobey the court's orders.

_Lutheran Day Care_ was not as clear cut. This case was the plaintiff's second judicial appeal from a denial of its permit. The court held that the first denial was contrary to law and remanded the matter to the county. The county held a hearing and denied the permit again. The trial court in the second appeal specifically asked the county what in the record supported the second denial, but the county could point to nothing. Those facts, too, create an inference that the county was flaunting, ignoring, or being above the law. Presumably cities and counties will learn from _Sintra, Robinson, and Lutheran Day Care_ to be extremely cautious once they have lost one lawsuit on a subject. It remains to be seen whether a court will be willing to protect property rights as aggressively when the court's own dignity is not in question.

II. THE COMING CASES: WHO MIGHT THE POTENTIAL PLAINTIFFS BE?

Who are some of the likely plaintiffs that will be raising issues in the future and how are they likely to fare? This section describes hypothetical plaintiffs who feel aggrieved by the requirements of the GMA.

A. Those Who Are Left Outside of the Urban Growth Boundary

The GMA requires that each county determine areas within which urban density growth served by urban level services is to be encouraged and outside of which urban density growth will be prohibited. No decision will have as profound an impact on the value of the property as the decision of whether property is inside or outside of the urban growth boundary. Respect for the rule of law lies at the heart of due process, and disregard of that law by government can only be considered violative of that right. _Sintra_, 119 Wash. 2d at 24, 829 P.2d at 778. Similarly, the court stated in _Robinson_ that: "The city officials may very well have had the public welfare in mind in continuing enforcement of judicially invalidated HPO provisions, but intentional violations of court orders cannot be tolerated." _Robinson_, 119 Wash. 2d at 69, 830 P.2d at 338.

115. _Lutheran Day Care_, 119 Wash. 2d at 96, 829 P.2d at 748.
116. _Id._
117. _Id._
118. _Id._
boundary. People who fear being left out of the potential to develop their property to urban levels form a significant portion of the "property rights" lobby that has come before the state legislature. Unfortunately, most parties left outside of the urban growth boundary are unlikely to find much constitutional protection.

Probably the largest group of people who feel themselves aggrieved by the GMA are people who twenty years ago bought twenty or one hundred acres well outside of urban areas. In many cases, their property has been subject to some form of "general" zoning,\(^\text{120}\) which may in theory have allowed subdivisions as small as half-acre lots. Indeed, it was the scattered subdivision of similar land, beyond the range of efficient urban services, that helped motivate the legislature to pass the GMA.\(^\text{121}\) These property owners have lived on the property, enjoyed its rural character, raised their families there, and assumed that their retirement nest egg would be generated from selling the land for a subdivision. Although the property could be sold to someone seeking to use it for the same purpose it has always been used for, at a price well above what the owner originally paid, that price is a fraction of the price the property would command if it could be subdivided. Now, perhaps on the brink of that planned retirement, the owners' property is left outside of the urban growth boundary and the ability to subdivide is gone. The property's value plummets and eliminates their retirement income.

Should the owners bring a class action suit and claim that the down-zoning of their property and others similarly situated was a taking? Robinson set forth the standard for when a regulation, on its face, constitutes a taking. "For a facial challenge to succeed, the landowner must show that the regulation denies all economically viable use of any parcel of regulated property in order to constitute a taking."\(^\text{122}\) That standard is almost undoubtedly not provable in this area because the property retains value as a hobby farm. That value is less than

\(^{120}\) Various jurisdictions have had some form of general zoning. It typically was applied to largely undeveloped areas beyond the immediate path of development. It permitted a wide variety of uses, depending on the availability of water and sewage disposal. If an owner could succeed in providing water to the area, subdivisions with as small as one-acre lots were sometimes possible even without sewers. If a sewer line could be brought to the property, even higher densities were occasionally permitted.


\(^{122}\) Robinson, 119 Wash. 2d at 53, 830 P.2d at 328 (emphasis in original).
what the owners once imagined their land was worth, and perhaps much less than the property's value was before the urban growth boundary was set. But this devaluation does not rise to the level of the complete destruction standard required for a facial taking.

At first blush, a substantive due process challenge might appear to be a more viable remedy. The exhaustion of administrative remedies is not necessarily required. In a substantive due process claim, the court is asked to balance the public interest in the regulation against the hardship imposed on the property. It is improbable that a court would not be so shocked by the balance struck when someone is left outside of the urban growth boundary, no matter what the owner's personal expectations had been, than without more than is shown in our hypothetical it would invalidate the regulation.

Are the results any different in a takings challenge brought by an individual owner? Every case is fact dependent, but again, the outlook is unpromising. The owner's concern is not that he is forbidden from using the property as it has always been used, but that he has been denied the opportunity to profit from it in a way that for many years he had reasonably expected. These expectations, however, are not the sort of expectations that the courts have tended to constitutionally protect. These plaintiffs are, at best, in the same shoes as Penn Central Railroad was in the Penn Central case.

B. The Farm That Cannot Be Farmed Any More

A narrower question can be raised by a related hypothetical. In this second hypothetical, the property owner is missing

123. See Presbytery of Seattle v. King County, 114 Wash. 2d 320, 333, 787 P.2d 907, 914, cert. denied, 111 S. Ct. 284 (1990) (stating that only an "as applied" takings claim requires exhaustion); but see Sintra, 119 Wash. 2d at 18, 829 P.2d at 775 (stating that exhaustion is necessary before a court can properly consider a takings claim).
124. Robinson, 119 Wash. 2d at 54, 830 P.2d at 330.
125. An "as applied" challenge requires exhaustion of administrative remedies. Presbytery, 114 Wash. 2d at 333, 787 P.2d at 914. In the example posited, however, there may not be many administrative remedies to exhaust. If an owner is contending that his property would be taken even if he were permitted any use under the zoning code, there should be no need to go through the whole process before a takings claim can be brought. Cf. Allingham v. Seattle, 109 Wash. 2d 947, 749 P.2d 180 (1988), overruled in part on other grounds by Presbytery of Seattle v. King County, 114 Wash. 2d 320, 787 P.2d 907 (1990); Orion Corp. v. State, 103 Wash. 2d 441, 693 P.2d 1369 (1985) ("Orion I").
a critical ingredient that the Penn Central court stressed was central to its decision; namely, the historic use of the property is no longer economically viable because of changes that have resulted from other owners' permitted land development. This second hypothetical property owner is faced with the dilemma that if he is not permitted to develop his land as he had expected, his land has, essentially, no value.

For thirty years, Farmer Jones has been in the dairy business on eighty acres in a narrow valley a mile outside of what thirty years ago was a quiet western Washington town not far from Seattle. Thirty years ago, all of Farmer Jones' neighbors were farmers. Thirty years ago, traffic on the road by Farmer Jones' farm was as likely to include farmers riding tractors or kids riding horses as people driving cars. Over the years, though, the neighboring farms were sold. Between Farmer Jones and the town, farms have been converted to light industrial parks and warehouses. Further away, the land has been sold to speculators or investors who have held it waiting for the right time to develop. Although a few marginally economic "agricultural" uses have been started on scattered parcels, the majority of the land that has not been converted to urban use lies fallow. Most of Farmer Jones' neighbors made more money selling their land and retiring than they had ever made from raising cows. Farmer Jones equally expected that his retirement nest egg would come from selling his land to a new owner who would convert it to another use.

Less visible changes have also occurred. As one farmer after another sold out, the vegetable processing plants in the area moved north to the Skagit Valley. The feed dealer in town closed. The implement dealer that Farmer Jones relied on now sells and services only garden tractors. Residential development has been allowed on the hills overlooking the valley and the new neighbors do not particularly like the smell of cow manure. Occasionally, kids make sport of standing by Farmer Jones' fence and throwing stones or shooting BB's at his cows. As a result of the residential development, traffic on the road by his farm has increased with commuters driving to their jobs. It is now frightening and dangerous to drive a tractor on the road. In short, there is no longer an option to sell the farm to a next generation dairy farmer. Although Farmer Jones has hung on, no one else would consider beginning a

dairy business there. Nor is the land particularly suited to a "hobby farm." With old buildings, a busy road next to it, an industrial development next door, and no amenities, the property lacks the romance city dwellers fleeing the city expect to find.128

Now, seeking to fulfill the GMA's objectives of preserving resource lands and rural areas, the county draws the urban growth boundary between Farmer Jones and the industrial development next door, designating Farmer Jones' land "rural," while the land on each side of him is "urban." His land can no longer be converted to a higher use. Nor is it economically viable for the use to which he has put it. That use is no longer feasible or economically viable because of the very changes in use by other property that Farmer Jones now wishes to enjoy for himself.

No Washington case has squarely addressed Farmer Jones' predicament. Several cases have suggested in dicta, however, that in such a case a taking might be found. In Penn Central, the court emphasized that its decision was based on the record before it; namely, that there was no dispute that Grand Central Terminal was capable of earning a reasonable return on Penn Central's investment.129 The City of New York had "conceded at oral argument that if [Penn Central] can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable,' [it] may obtain relief."130 The Supreme Court's repeated reference to the facts in the record suggests that they were critical to the Court's decision,131 and had they been different, the Court's conclusion would have been different. Here that key ingredient in Penn Central is missing because Farmer Jones cannot earn a reasonable income from his property. Therefore, the court would probably offer Farmer Jones relief.

The language of Carlson v. Bellevue132—"adaptability . . . assumes not the most profitable use, but that some permitted

128. The Author is aware of several properties fitting the description of Farmer Jones in King County, Washington. In several instances, King County has addressed the issue by purchasing the farmer's development rights. The Consitution clearly favors this approach.

129. See Penn Central, 438 U.S. at 136, 138 n.36.
130. Id. at 138 n.36.
131. Id. at 129, 136, 138 n.36.
132. 73 Wash. 2d 41, 435 P.2d 957 (1968).
use can be profitable"—equally suggests that if circumstances change so that no permitted use is profitable, a zoning change may be required to allow the land to be put to profitable use.

A contrary idea may be suggested by the notion in Lucas that a state’s common law might have ruled out from the beginning any reasonable expectation that property could be put to certain uses. The Supreme Court emphasized, however, that any such prohibition must have been part of common law doctrines such as nuisance, which inhere in the title to the land itself. Although not spelling out the limits of such doctrines, the Court said that “the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition.” In the hypothetical, the use to which Farmer Jones wishes to put his property (an industrial park) and the fact that others around him have been permitted to do what he seeks to do, strongly suggest that no common law principles would prohibit such a use.

The GMA has a strong policy of preserving agriculture and other resource lands. The first obligation of all counties is to designate resource lands and critical areas, and every county and city that is required or that chooses to plan under the GMA is required to protect those lands. The drafters of the GMA recognized, however, that for some resource lands, the GMA came too late. Where surrounding uses are already urban in character, resource uses such as agricultural and forestry may no longer be possible or feasible. Where that urban-

133. Id. at 51, 435 P.2d at 963 (emphasis added) (quoting 8 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 25.45, at 117 (3d ed. rev. 1965)).
135. Id.
136. Id. at 2901.
137. An equally compelling and probably more frequently occurring hypothetical could be described for Forester Jones, whose 500 acres of private timberland has been surrounded by urban dwellers who object to slash disposal burns and aerial spraying, and who are aghast at clear-cuts. Modern economic forest management requires activities that many urban-dwellers find offensive. If those activities are forbidden, private forestry becomes economically impossible. Furthermore, public agencies are not as negatively impacted by such regulations because they can choose not to worry about the returns they make or don’t make on their forest investments.
139. Id. § 36.70A.060.
140. Id. § 36.70A.170(1)(a)-(c) (requiring designation of only those resource lands that are not “already characterized by urban growth and have long-term significance for commercial production”).
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ization has occurred, fundamental fairness requires that the lands be allowed to be converted to a higher use rather than be left with no viable use at all.

C. The Industrial "Wetland"

Not all frustrated expectations arise from property ownership outside the urban growth boundary. Inside the urban growth boundary the GMA requires protection of critical areas. In protecting critical areas, local governments will render unusable some properties that its owners had every reason to believe had substantial value. This is most frequently the case with wetlands. Our changing definition of what is a wetland now encompasses far more than marshes and swamps. It includes not only obviously wet property that has historically been filled and developed across Western Washington, but also property that no layman, and not many experienced developers, would recognize as a wetland.

The biggest hurdle for many property owners caught in the wetland trap is exhausting their administrative remedies. If they can overcome that hurdle, compensation should be awarded, in a proper case, if development is denied to protect a wetland.

To illustrate, Brand X Transport Company's business is located on the broad, flat river valley land in the industrial area of a Western Washington city. As with most Western Washington valleys, the soil on the property lies flat. Water sometimes stands for a few days after heavy rains in the winter and early spring. All summer long the land is dry. Fifteen years ago, when Brand X located there, it bought not only enough land for its immediate needs, but also five additional acres for future expansion. In the intervening years, most of the remaining industrial zoned land in the city was purchased and developed, including the land surrounding Brand X.

Brand X recently decided that it was time to expand. An engineer drew up plans for an additional warehouse and parking area. When Brand X applied for a permit, however, it was informed that half of its property was now considered a Class IV isolated wetland. With required buffers under the city's newly adopted wetlands ordinance, only a strip of land about thirty feet wide on the far side of the property was "available"
for development. Brand X was informed that before the city could consider its application, Brand X must prepare an environmental impact statement (EIS). It was further informed that under the city's ordinance, no development could be allowed, even under the ordinance's reasonable use exception, unless the developer mitigated the impacts by creating elsewhere a comparable sized wetland with full buffers. The city official made it clear, however, that no final decision could be made until an EIS had been completed. Brand X consulted with its engineer and other experts and determined that the cost of the EIS, acquiring land for mitigation, and actually creating the comparable wetland was likely to be greater than the value of the land itself.

Can Brand X claim its property has been taken or invalidate the regulation on substantive due process grounds?

Brand X's taking claim is almost certainly not ripe because it has not yet exhausted its administrative remedies and obtained a final decision as to what will be permitted. Division I of the Washington State Court of Appeals considered very similar facts in Bellevue 120th Associates v. Bellevue. The plaintiffs there concluded that the administrative process it was being asked to go through was "costly and useless" and asked "that they be allowed to cut through the . . . tangle." The plaintiffs were concerned that preparing an EIS and revising their plans would be a waste of time given the City's apparent position, but the court held that these circumstances did not excuse them from pursuing their administrative remedies to a final decision. The court cited Justice Stevens' concurrence in Williamson County Regional Planning Commission v. Hamilton Bank, where he said that such expense is the "inevitable cost of doing business in a highly regulated society." 146

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143. Id. at 601, 829 P.2d at 186.
144. Id.
146. Id. at 204. A landowner need not exhaust administrative remedies if it can persuade a court that they would be "futile." See Orion Corp. v. State, 103 Wash. 2d 441, 457, 693 P.2d 1369, 1379 (1985) ("Orion I"). The question of futility is for the court, not for the jury. Estate of Friedman v. Pierce County, 112 Wash. 2d 68, 77, 768 P.2d 462, 466 (1989). The landowner's burden of showing futility, however, is "substantial." Id. In fact, futility has not yet been established by anything less than a showing that even if every administrative remedy that could legally be granted was granted, the
Can Brand X be excused from the burden of exhausting its administrative remedies before pursuing a takings claim because the cost of exhausting those remedies, combined with the cost of mitigation, is greater than the value of the land? The court in Orion Corp. v. State\textsuperscript{147} said that there are exceptions to the doctrine of exhaustion "in circumstances in which these policies [favoring exhaustion] are outweighed by consideration of fairness or practicality."\textsuperscript{148} It then used the situation where exhaustion would be "futile" as but one example of such circumstances.\textsuperscript{149} Futility was found in Orion because there were no present, possible, and reasonably profitable uses to which the property was reasonably adapted and which could be permitted under Skagit County's shoreline master program. By contrast, in the hypothetical, some use may ultimately be allowed, although depending on how much use is allowed and the mitigation ultimately required, it may not be economically viable.

Distressed landowners would love to have the courts evaluate "fairness and practicability" with an eye toward protecting their property interests. Pretty clearly the courts do not. As of today, it requires a far more extreme set of facts for the courts to conclude that requiring further exhaustion would be unfair and impractical than it takes to persuade a reasonable developer or property owner that he cannot afford to proceed further with a project. As a result, a businessman faced with costs of exhausting administrative remedies and mitigating the loss of wetland that are equal to the value of the property itself will not continue to exhaust administrative remedies. Unfortunately, untold numbers of property owners simply abandon development of their property. As the courts establish more solid standards to be used when deciding the merits of the takings issues, they should closely examine the practical burdens that the current exhaustion doctrine has created and bring it more into line with practical realities.

Although a takings claim clearly requires exhaustion of administrative remedies, it is a little less clear whether, in a

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\textsuperscript{147} 103 Wash. 2d 441, 693 P.2d 1369 (1985) ("Orion I").

\textsuperscript{148} Id. at 457, 693 P.2d at 1378 (quoting South Hollywood Mill Citizens Ass'n v. King Co., 101 Wash. 2d 68, 74, 677 P.2d 114, 118 (1984)).

\textsuperscript{149} Id.
sufficiently egregious case, a substantive due process case might be allowed to go forward prior to the actual exhaustion of administrative remedies if it has been brought to invalidate overly burdensome requirements. Substantive due process claims do not necessarily present the same requirements of exhaustion and ripeness that takings claims present because, in a takings claim, the plaintiff need not show that no economically viable use will be allowed. The Washington court has twice now said that excessive fees may constitute a taking. It might be that the combination of excessive cost and delay in review, combined with a requirement of mitigation that would be excessively costly in the best case, would seem so unbalanced that the court would find a substantive due process violation before the owner actually spent the time and money to complete the administrative process. The issue in a suit to invalidate a regulation on substantive due process grounds is whether, considering the public purpose to be served, the alternate available means of achieving the purpose, and the degree to which the regulation is unduly oppressive, the regulation is unreasonable or arbitrary. Although protecting wetlands would probably be considered a public purpose, protecting an isolated Class IV wetland should not be given undue weight in the balancing test. There is no connectivity between an isolated Class IV wetland and any larger body of water. For instance, an isolated Class IV wetland has no role in filtering larger water bodies and protecting water quality. It also, by virtue of its isolation, provides no part of a larger ecosystem for animals. In short, its principal virtue is as a resting spot for migrating ducks, if any happen to be migrating when it is wet. When deciding the merits of a substantive due process claim, the courts should consider the individual facts. In this case, the public purpose side of the equation is very weak.

Suppose Brand X completes the administrative process and is allowed to build some reduced scale facility on the property. Further suppose that Brand X then concludes that, in spite of a finding by city staff to the contrary, it is not economically viable to proceed with the expansion because of the limi-

150. But see Presbytery, 114 Wash. 2d 320, 787 P.2d 907 (holding that exhaustion was necessary to determine whether the ordinance was unduly oppressive and, thus, violative of substantive due process).


152. Sintruf, 119 Wash. 2d at 20-21, 829 P.2d at 776.
tations imposed or the mitigation required. At this point, can Brand X prevail in a takings claim? Under the principles enunciated in Penn Central, and in a proper case, the answer should be "yes."

In this hypothetical, the answer will depend heavily on the specific facts, including just how defensible Brand X's conclusion is that development is not viable. The city will try to prove that what it has permitted is a viable use, just not the most viable use. It may also contend that even if the property no longer serves the expansion purposes for which Brand X acquired and held it, the land could be sold to someone else for a lesser development and, thus, it still has some value. Nonetheless, in a proper case, Brand X may well prevail.

The Washington State Supreme Court has once invalidated an ordinance on takings grounds in spite of the fact that, on its face, it permitted some use to be made of every parcel of land that it affected. In Allingham v. Seattle,153 the plaintiffs challenged the City of Seattle's Greenbelt Ordinance, which had been carefully drafted to ensure that a single family house could physically be built on every lot.154 Unfortunately, the remainder of the lot had to be left in either permanent greenbelt or restored greenbelt, thereby eliminating the possibility of normal yards, gardens, swing sets, RV storage, and other accoutrements of middle-American residential life.155 The plaintiffs persuaded the trial court, and apparently the supreme court, that in the middle-class, family neighborhoods where the greenbelt properties occurred, the denial of the right to have normal yards made the properties unacceptable to the market and not economically viable for any other purpose.156 The Supreme Court's language in affirming the trial court was very broad and has since been limited by Presbytery v. King County.157 There is no reason to believe, however, that the court would come to a different result on the same facts. Thus, the court has already rejected the notion that an ordi-

154. The ordinance permitted a 1500 square foot area to be developed on a 5,000 square foot lot, and further permitted a 30 by 40 foot house and 200 square feet for a driveway and sidewalks. On smaller lots, a variance could be granted to increase the percentage of the lot which could be developed. See id. at 951, 749 P.2d at 163.
155. Id. at 952, 749 P.2d at 163.
156. See Trial Court Findings of Fact 23, 33, 54, 55, 57, Allingham (No. 52877-2); Brief of Respondents, at 47-52, Allingham (No. 52877-2).
nance is insulated from a takings challenge so long as some building can be placed on a parcel of land.\textsuperscript{158}

\textit{Penn Central} suggested that whether or not a taking occurred should be determined in part by the extent to which a regulation frustrated the owner's distinct investment-backed expectations.\textsuperscript{159} There, the court found no taking because the purpose for which the property had been acquired—a train station—remained a viable use.\textsuperscript{160} If the court is going to use the yardstick of the owner's reasonable investment-backed expectations to measure regulations, it should not be with a one-way stick. Where, as in this hypothetical, the owner's reasonable and distinct investment-backed expectations have been destroyed, the fact that some hypothetical use of some value might be available to someone else should not necessarily defeat a taking claim, particularly if even the alternative use is largely speculative or only marginally viable.\textsuperscript{161}

Cities seem to fear that allowing investors like Brand X, who can prove that they have bought, held, and paid taxes on a property intending to put it to a use identical to the use which others similarly situated have been permitted, would suddenly require them to compensate all landowners that speculatively seek permission to develop in a manner that the city has never

\textsuperscript{158} The plaintiff in \textit{Presbytery} argued that the \textit{sheer} fact that it could not build on the wetland or wetland buffers on its property was a taking of that portion of its property, even though there was no proof that it could not build the church for which it had purchased the property on the remainder. \textit{Id.} at 325, 787 P.2d at 910. The Supreme Court held that \textit{Allingham} cannot be construed to go so far. \textit{Id.} at 334, 787 P.2d at 914-15. The proof in \textit{Allingham} went far beyond that in \textit{Presbytery}, and there is no suggestion that the court would not find a taking where the proof was, as occurred in \textit{Allingham}, that the taking of a portion rendered the entire property valueless.

\textsuperscript{159} \textit{See Penn Central,} 438 U.S. 104.

\textsuperscript{160} \textit{Id.} at 136. \textit{See also Presbytery,} 114 Wash. 2d at 339, 787 P.2d at 917, where the court was not so interested in the impact that the wetland regulation might have on a subdivision of the property as it was in the county's affidavit that a church might be permitted on the property.

\textsuperscript{161} Some case law would, however, indicate a contrary result. \textit{See} MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) (156 unit subdivision on currently agricultural land denied partially because of inadequate access and lack of sewer service); Department of Natural Resources v. Thurston County, 92 Wash. 2d 656, 601 P.2d 494 (1979), \textit{cert. denied}, 449 U.S. 830 (1980) (22 unit subdivision on 14 acre parcel denied because of inadequate buffer of bald eagle nest). These courts have refused to consider takings claims where a proposal was denied but a less dense project might be approved. Cases in which an owner is not allowed to do as much as he wanted, but is allowed to engage in a scaled-down project, is far different than cases in which the owner is completely prevented from putting the property to the use for which it was purchased.
permitted. The Court in *Penn Central*, however, had greater trust than that in the wisdom of trial judges. *Penn Central*’s focus on investment-backed expectations allows a trial court to disregard “hopes” or “possibilities,” such as *Penn Central*’s desire to build a multi-storied office tower cantilevered over the building it built as a train station.\footnote{162. *Penn Central*, 438 U.S. at 124.} The Court’s requirement that those expectations be “reasonable”\footnote{163. *Id.*} allows a trial court to disregard expectations that might more properly be described as “harebrained schemes.” Under the principles of *Penn Central*, trial judges are fully capable of determining when property owners have a right to have expected that they could put their property to a use for which they acquired it. In this hypothetical, *Brand X* had reasonable expectations, and if its property can no longer be used, it ought to be able to recover just compensation.

What if *Brand X* is so pressed for expansion space that it has no choice but to proceed with the minimal expansion that would be allowed, even though the costs of the mitigation requirements are so high that no one other than *Brand X* would consider it a reasonable investment to buy *Brand X*’s property for any purpose, and *Brand X* proceeds solely because it must have expansion space adjacent to its existing facility and it already has invested in the property. Does *Brand X* have any avenue of relief?

This case is more difficult, because the sheer fact that *Brand X* proceeds with some development is powerful evidence that the remaining use must have been viable. On the other hand, if the facts are sufficiently egregious, there may still be some hope for compensation. In *Lucas*, the Court held open the prospect that there may be a case where a regulatory taking occurs even though some slight remaining use exists.\footnote{164. *Lucas*, 112 S. Ct. at 2894 n.7, 2895 n.8.} But on a more promising front, a regulation or condition may be invalid under the Due Process Clause because it is unduly oppressive, even though some use of the property remains. Assuming *Brand X* has enough stamina, it might be successful in convincing a court on substantive due process grounds to ease either the restrictions on its development or the mitigation requirements.

\footnotetext[162]{162. *Penn Central*, 438 U.S. at 124.}  \footnotetext[163]{163. *Id.*}  \footnotetext[164]{164. *Lucas*, 112 S. Ct. at 2894 n.7, 2895 n.8.}
III. CONCLUSION

These are but a few of the scenarios that will present constitutional questions as cities and counties implement the GMA. Wildlife corridors, steep slope restrictions and other mapping issues are rife with the potential for undue burden being placed on single property owners for the supposed benefit of the entire community. In the most egregious cases, both the prohibition against taking without just compensation and the right to substantive due process will provide relief to aggrieved property owners.

Many of the meritorious claims could be avoided if city and county councils and planning staffs become more willing to consider the actual impact of their regulations on individual properties. Very often a regulation is not offensive as it applies to most properties, but is entirely unreasonable as it applies to a few.\textsuperscript{165} Too often in the past, public officials have been so focused on the public benefit that they believe a regulation will provide that they have not been willing to look closely at its impact on specific properties. A greater sensitivity to specific properties and a recognition that owners have \textit{protectable rights}, might lead to more decisions that protect the public interest at stake without exposing the public to liability. These protectable rights are at least the right to a viable use of their land, as set forth in \textit{Lucas}, to protection of distinct investment-backed expectations, as set forth in \textit{Penn Central}, to have the sheer delay of processing permits and unreasonable demands and excessive fees not destroy the viable use of their land, as set forth in \textit{Sintra}, and to substantive due process, as set forth in \textit{Sintra, Robinson, and Lutheran Day Care}. If public officials recognize that a denial of these rights can lead to damages being awarded against the public body, they may find more sensitive and constructive resolutions to the conflict between their desire to protect the public interest and a citizen's right to be compensated for his or her property if it is taken in the public interest.

The entire area also cries out for complete legislative revision or, at least, legislative improvement. Currently, the

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\textsuperscript{165} Although it is not apparent in the \textit{Lucas} decision, David Lucas' two lots were the only two parcels rendered unbuildable by South Carolina's coastal regulations. Interview with David Lucas in Spokane, Washington (Aug. 1992). One wonders what purpose was served by South Carolina's failure to reach an accommodation with Lucas by something short of litigation all the way to the United States Supreme Court.
extent to which valid property rights claims can be eliminated for all practical purposes by the burden of exhaustion of administrative process is unconscionable. As the court so precisely stated in Parkridge v. Seattle: “The State Environmental Policy Act of 1971 and the other statutes and ordinances administered by the building department serve legitimate functions, none of which is intended for use by a governmental agency to block the construction of projects, merely because they are unpopular.”166 The legislature could, and should, limit the time a public body can take and the costs it can impose to decide whether a project can go forward. Conversely, individuals possessing property interests should be willing to trade greater speed and certainty for some caps in the potential damages that can be awarded against the public body that is ultimately found to have gone too far. At the very least, public bodies should have a greater opportunity to either pay interim damages for a temporary taking and remove the restriction or decide to buy the property at fair market value and then resell it with whatever restrictive covenants the public body deems appropriate. No one’s legitimate interests are served at present, where most injured parties cannot pass over the pre-judicial hurdles necessary to bring a claim and where cities and counties and their officials must live in fear of windfall awards to an occasional survivor.