CALCULATION OF DAMAGES IN TEMPORARY TAKINGS

By

Alan T. Ackerman
Darius W. Dynkowski

www.ackerman-ackerman.com

The calculation of damages is of greater relevance with the recognition that damages must be paid when there are temporary takings. This article will cover the early Supreme Court precedent, then move forward to some of the issues as defined by the Federal courts. Next, the "flexible" and at other times rigorous restrictions on the compensation calculation in the State courts will be discussed. A separate portion of the article is broken out for "reserve" or "natural resource cases; temporary takings of oil and gas drilling rights or the misregulation of waste disposal rights.

I. SUPREME COURT PRECEDENT.

U.S. v. General Motors

Temporary takings were grounded in the fee and leasehold takings of properties on year-to-year possession or for the remainder of the war during World War II. Even then, the judiciary recognized the difficulty in the compensation process.

In United States v. General Motors Corp., 323 U.S. 373 (1945), the tenant-defendant maintained a leasehold interest running from 1928 through 1948. The United States entered their property during the war, claiming a year-to-year leasehold. In the U.S. Court of Appeals, a 2-1 decision held that the items of actual loss, such as

additional salary costs, removal of contents and retention of watchmen should be included as elements to be considered in arriving at just compensation.

The Supreme Court held that compensation for the leasehold interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, and the loss of other good-will which inheres in the location of the land, or other like consequential losses which would ensue upon a sale of the property to a third party other than the sovereign. No doubt all of these elements would be considered by an owner in determining whether, and at what price, to sell.

The GM court simply asks: Should a different rule apply when there is a temporary occupancy of a building equipped for the condemnee's business?

The General Motors Supreme Court panel recognized that long-term rental values may not apply at all to a short-term take. The effects may have a substantial impact and the owner should be made whole. The parties should look at what affects the market price. Included in this process were reasonable costs of moving the property stored and preparing the space for occupancy by the sub-tenant. This would include the storage of goods against their sale. Loss of the value of the goodwill or injury to the business were to be excluded. 323 U.S. at 383.

The reality is that fair rental value for a temporary taking is something other than the market value of the leasehold alone. A vanilla space is not what is being offered or taken, but rather the

cost of dislocating for temporary storage where required, along with the loss of the rental differential.

U.S. v. Petty Motor -- Lease Take for Remainder of Term

In United States v. Petty Motor Co., 327 U.S. 372, 378 (1946), the Supreme Court applied a restrictive standard to the compensation process.

The Petty court truly was dealing with only the taking of the total lease interest. It saw the situation in Petty as distinct from General Motors.

> There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease which is not taken rests upon the lessee. This was brought out in the *General Motors* decision. Because of that continuing obligation in all taking of temporary occupancy of leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal.

The Petty court also included very restrictive language on compensation.

> It is said the unfairness comes from the fact that there is really no market for leaseholds; that their value is something peculiarly personal to the lessee. The same thing is true as to incidental and consequential damages to the owner of a fee. We think the sounder rule under the federal statutes is to treat the condemnation of all interests in a leasehold like the condemnation of all

> interests in the fee. In neither situation should evidence of the cost of removal or relocation be admitted. Such costs are apart from the value of the thing taken.

The harshness of the Petty decision is due to the leasehold was being taken for the remaining term of the lease, thereby putting the tenant in the position of losing no more than the benefit of the bargain given that the tenant would be moving only a few years later.

***Kimball Laundry v. United States* --**
Temporary Taking, Permanent Destruction

In Kimball Laundry v. United States, 338 U.S. 1 (1949), the United States condemned a laundry plant for military use on a year-to-year basis. This completely destroyed the laundry operation as a viable going concern. Possibly, in recognition that going concerns were part of the valuation process in tax cases, the Kimball Supreme Court panel majority recognized that the routes maintained by the laundry simply could not be moved. A four-Justice dissent held that no compensation should be paid for the temporary loss of the routes. The majority maintained that what was being taken should be paid for. The irony is the majority concluded that the taking for a temporary use would make it unfair to deny compensation for a demonstrative loss of going concern value upon the assumption that an even more remote possibility -- temporary transfer of the going concern -- might have been realized. The conclusion was premised upon what a potential purchaser would look at as the value of these going concern routes which were to be taken. The dissent considered the claim one as a

study of economics which should not apply.

The court outright denied the notion of a partial taking analogy of what the value of the business was before the temporary take and what it is after. The court was concerned that if inflation created less damage, it would otherwise be possible that the owner would not be paid for a loss which had occurred because of a rise in price.

One of the problems that apparently concerned at least part of the Court was the sense that there is a question of why pay for damages to the business for a temporary taking when there is no need for a payment for a permanent take. 338 U.S. 11-12.

The Kimball court distinguished the normal non-payment rule for a permanent take in those situations where a business is being taken for the government to run the same business. Under those circumstances, a going concern is to be paid for. Omaha v. Omaha Water Company, 218 U.S. 180, Denver v. Denver Union Water Company, 246 U.S. 178, 191, Orgel Valuation ' 214 (1936). Arguably, the government taking destroyed the trade routes.

The Kimball Court held that the factual setting is more akin to Boston Chamber. While the court noted that the laundry might have moved its accounts elsewhere in the City of Omaha, an investment remained in the property. Further, the court may have recognized that there was no place to move given the wartime economy.

Frequently described in condemnation cases is the notion that there should be no artificiality to the rule and that fairness and

equities must be applied. Yet, this rule is abridged if one were to use only fair rental value. In Kimball Laundry, there is a recognition that the routes becoming unmarketable at the time is a fact to be considered. If this is correct, it is more than just a rental loss that is involved in the temporary taking.

The Kimball court concludes that the narrow range of choice plays a role in its determination:

> . . . it would be unfair to deny compensation for a demonstrable loss of going-concern value upon the assumption that an even more remote possibility -- the temporary transfer of going-concern value -- might have been realized. The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result. 338 U.S. 15.

The opinion in the following paragraph states:

> Though we do not mean to foreclose the consideration of other types of evidence or the application of other techniques of appraisal, it may shed some light on the problem to indicate as briefly as possible the relevance of the evidence rejected at the trial to the determination of the presence and amount of this value.

The Supreme Court then noted there were all sorts of claims that one could theoretically utilize to determine damages from excess earnings, to the net income, to the expense of obtaining new customers. 338 U.S. 18. In what later opinions may view as a liberal analysis, the Supreme Court opened the calculation up to require one to look at the character of the business and the experience of those who are familiar with it.

The court recognized the problem in allowing a government to take what it wants and leave what it wants.

When there is a leasehold and there is a temporary interference with the leasehold, U.S. v. Petty Motor, 327 U.S. at 379, relies upon General Motors in holding that "because of that continuing obligation in all takings of temporary occupancy or leaseholds, the value of the rights of the lessees which are taken may be affected by evidence of the cost of temporary removal." The concurring opinion holds that when looking at these intangible interests, there is no technical definition and one will look for the trial court to allow the "empirical testing of these approaches".

The four-Justice dissent maintained that the trade routes were useless to the government, yet the U.S. was forced to pay on what was called a "new constitutional doctrine" that was forged for the case. 338 U.S. at 22.

The dissent aptly noted that the loss of the trade routes upon a permanent taking of the plant not being compensated is contradicted by a payment for the same loss of business in a temporary taking.

In this case, using the rental approach, the amount of money paid is about half the value of the entire operation, plus there is an allowance to restore the plant to its original condition. The dissent maintained that the Court should not be sitting as a "Committee on Claims of the Congress.

Kimball Laundry recognized that rental value for the temporary taking plus diminutions created by the taking must be paid for. However, the difference in the market value on the date of taking

and the value on the date of the property's return should not serve as the basis for compensation because in a market of increasing values, the true loss would not be fully recompensed to an owner.

U.S. v. Pewee Coal -- Strike Avoidance

In Pewee Coal, 341 U.S. 114 (1951), the Federal government temporarily acquired a coal mine under the wartime emergency powers. The Supreme Court relied upon the Kimball comment that "fair compensation for temporary possession of a business enterprise was the reasonable value of the property as used." The Pewee court recognized the difficulty in the analysis when, but for the intervention and taking of the property by the Federal government on the temporary basis, a strike would have allowed for no profit whatsoever to the owner.

II. FEDERAL APPLICATION TO SPECIFIC ISSUES.

A. Damage Calculation Methodology.

There is no single measure of damage methodology which is determinative of the payment method for compensation of a temporary taking. Frequently relied upon is the Justice Brennan quote in his dissent in San Diego Gas & Electric Co. v. City of San Diego that:

> the Constitution does not embody any specific procedure or form of remedy that the states must adopt: "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding `causes of action' -- when they are born, whether they proliferate, and when they die." U.S. v. Dickinson, 748, 67 S.Ct. 1382, 1384, 91 L.Ed. 1789, 1794 (1947). Cf. U.S. v. Memphis Cotton Oil Co., 67-69, 53 S.Ct. 278, 280, 77 L.Ed. 619, 622-23 (1933). The States should be free to experiment in the implementation of this rule, provided that their chosen procedures and remedies comport with the fundamental constitutional command.

B. Moratoria on Developments.

Cooley v. U.S., 324 F3d 1297 (Fed. Cir. 2003), is illustrative of the balancing problem associated with the pervasive moratorium on developments. The compensability for improper moratoria is premised upon the analysis provided by Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978), in the determination of whether there has been a taking of the property. Because Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465, 1483 (2002), maintained that "anything less than a complete elimination of value or a total loss would require the kind of analysis applied in Penn Central, moratoria are not per se takings in which compensation is to be paid. The Cooley court then went on to determine that:

> Thus, if a claimant survives a Penn Central analysis, temporary moratoria can qualify as compensable takings. Under the Supreme Court's decision in Tahoe, reasonable delays incident to the permitting process are not compensable. `Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense.' Tahoe, slip op. at 32 (internal quotations and citations omitted). Only an `extraordinary' delay leads to compensation. Boise Cascade, 296 F3d at 1349-50; Wyatt v. United States, 1098 (Fed. Cir. 2001).

C. Temporary Reversible Takings

Yuba Natural Resources, Inc. v. U.S., 821 F2d 638 (1987), relied upon San Diego Gas & Electric v. San Diego, 450 U.S. at 657, in holding that temporary reversible takings should be analyzed in the same constitutional framework applied to permanent irreversible takings to determine the appropriate remedies.

Relying upon Kimball Laundry, Yuba posited that the before and

after values do not matter in temporary takings. Yuba applies "rental value" as the measure used by at least two of the cases prior to Kimball Laundry, being General Motors and U.S. v. Petty Motor Co. The Court also relied upon R.J. Widen Co. v. United States, 357 F2d 988, in concluding that the Appellate Court has recognized the distinction and held that the measure of compensation in temporary taking cases as rental value.

Clearly, there is more than rental value being awarded in both General Motors and Kimball. Either Yuba was lost or just did not see a reason to discuss the issue of the uncertainties of determination of compensation in temporary takings and therefore set forth limitations on the calculation.

Again, one is faced with the conflict of compensating for something that has not as yet been built to its highest and best use. The uncertainty of a result conflicts with the notion that the court must determine the factual setting in each specific circumstance, leaving evidentiary issues of value to the factfinder after a reasonable presentation. Yet, the "liberal" attitude giving wide breadth to the determination of damages conflicts with the underlying principles of compensation.

In relying on R.J. Widen Co. v. United States, 357 F2d 988, at 993-4, the Yuba court concluded that destruction of personal property is not to be compensated if the government did not intend to take it. These are "unintended incidents" of the taking. Citing the old navigational servitude decision of Monongahela Navigation Co. v. United States, the court relies upon the Supreme

Court decision that the sovereign is not taking these other incidental or consequential losses and therefore does not have to pay.

D. Temporary Taking -- Delay in Development

In Portland Nat. Gas T.S. v. 19.2 Acres, Land, 318 F.3d 279 (2003), the 1st Circuit Court of Appeals relied upon Nichols in holding a wider basis for compensability of a temporary taking.

> Compensation for a temporary taking is generally determined by `(1) ascertaining the value of the property for the period it is held by the condemnor; (2) ascertaining the difference in the value of the property before and after the taking; or (3) looking at the fair market rental value of the property during the time it was taken.' Nichols on Eminent Domain ' 12E.01.

Of great interest in the 19.2 Acres case is the recognition that while the construction was ongoing, the development would likely not begin until the end of the temporary easement. Given this, "a potential buyer would wait until six months after the temporary taking had begun before purchasing the property, or would adjust his offer to reflect this waiting time".

E. Temporary or Permanent

In almost all of the reported Federal cases, one will find the initial question of whether the taking is of a permanent or temporary nature. If permanent, the normal rules of condemnation apply. If temporary, the balancing test and issues of various highest and best uses of the property but for the temporary taking have to be considered in a different light.

In Florida Rock Industries v. United States, 791 F2d 893 (1986), the court held the Army Corps of Engineers may determine at

a later date that the damages are not worth what is being taken. Under such circumstances, the Corps would have the right "preserved" to consider whether it desired to continue the protection provided by the regulatory taking. In other words, the court left it to the governmental agency determination whether it desired to pay for a total or temporary taking.

In the Bass case, infra, the original Court of Claims determination had considered the take to be permanent. A constant issue was whether the taking was temporary or permanent in nature. The judiciary has been consistent in maintaining that a taking can be made temporary if an improper regulation is removed, thereby eliminating a potential for a substantial limitation of damages. The original Bass decision was therefore reversed by Bass Enterprise Production v. U.S., 133 F3d 893 (Fed. Ci. 1998). In Yuba, relied upon in Bass, the United States Court of Appeals reversed the Federal Court of Claims in holding that, at best, rights were temporarily taken.

Factually, it is difficult to understand the case in which the Federal Government stated that it did not know when the limitation on rights would end. A denial of the right to drill despite the exemption was provided by the EPA. The court found that it was simply a decision to delay a final determination. Yet, the Court of Appeals noted that Bass continued to pursue his claim in court. It is difficult to fathom how one can provide a decision to delay a final determination for an indefinite duration to be anything but a permanent taking. Further, the question of whether it is

temporary or permanent creates economic chaos because of the uncertainty in the process. The Bass court then went on to state that whether a taking is permanent is a question of law, relying on Yuba Natural Resources, Inc. v. United States, 821 F2d 638 (1987).

Again, the court goes through this question of whether there is a bright line rule in the process. The government apparently took the position that it is not supported by precedent. In response, Bass stated that when the regulation termination is unknown it is at best speculative. Bass claimed that the permanent denial was simply that, a denial, while the government claimed it was a "regulatory delay". The court simply concluded that this is not a permanent taking. It states that:

> Congress has expressly established a mechanism for condemning the leases at issue if deemed necessary to ensure the integrity of the WIPP facility. Such events are statutorily mandated to occur. Thus, in the interim, the denial of the permits is at best a temporary taking. The statutorily mandated end to the regulatory process will result in a decision whether or not to condemn the leases. Although the precise date is unknown, it is clear that such a decision is required to be made. Thus, we conclude that the denial of the drilling permits at this time does not constitute a permanent taking.

Apparently the Court of Appeals maintained that as the Court of Federal Claims declined to hear evidence of a temporary taking, it therefore remanded the action for hearing. Further, the court noted that whether it was a temporary taking would not be determined until further proceedings in the trial court.

III. STATE CASES:

Because so many governmental agencies that have interim needs

for property misregulate via zoning or other police powers or simply make mistakes which temporarily take properties, there is precedent, frequently relying upon the Federal case law, which allows for damages to be paid upon temporary takings.

ARIZONA -- Open View for Total Compensability

In Corrigan v. City of Scottsdale, 720 P2d 513, a case which is frequently relied upon as providing a breadth to compensation for temporary takings, the Arizona Supreme Court held that a confiscatory zoning ordinance would give rise to payment of money damages. The Corrigan court reviewed the timing for payment premised upon the San Diego Gas & Electric Company v. City of San Diego dissent of Justice Brennan. 45 U.S. at 659, which held that:

> [O]nce a court establishes that there was a regulatory "taking", the Constitution demands regulatory that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

The Corrigan court notes the five basic rules written by D. Hagman in *Temporary or Interim Damages Awards in Land Use Control Cases*. In Wright on Damages or Compensation for Unconstitutional *Land Use Regulations*, there are five basic rules for measuring damages; (1) rental return; (2) option price; (3) interest on alleged profit; (4) before/after valuation and two alternatives; and (5) benefit to the government. See D. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases* (1982), *Zoning and Planning Law Handbook* at 218-27. Discussed in the problem are issues such as "whether the losses are speculative; when the taking

actually occurred; whether it caused any damage; and whether it was an acquisitory or nonacquisitory setting combined to make each measure of damages, in some cases a "guessing game" between too little compensation on the one hand and providing a windfall on the other. The court concluded that the best approach was not to require any particular damage rule for all temporary taking cases. Again the policy of having an "approach" will compensate for losses actually suffered without the threat of windfalls at the expense of substantial government liability.

MICHIGAN -- Flexible Approach

In Poirier v. Grand Blanc Twp., 192 Mich App 539, 543, the Appellate panel held that there was no formula or artificial measure of damages is applicable, "the amount to be recovered is generally left to the discretion of the trier of fact."

In Poirier, the township improperly limited the zoning so a mobile home community could not be expanded. The trial court awarded the increased construction costs because of construction delay as well as compensation for lost income. However, the trial court denied the Plaintiff's request for lost profits.

The defendants claimed that the calculation should be premised upon a fair market rate of return theory rather than this tort based theory of Corrigan v. Scottsdale, cert den 479 U.S. 986 (1986). The Poirier court acknowledged that the owner should be placed in as good a position as if the taking had not occurred. The amount of damages to be recovered is generally within the discretion of the trier of fact.

The Poirier court held that Corrigan maintained five basic rules for Michigan damages in cases involving a temporary taking. (1) rental return; (2) option price; (3) interest on lost profit; (4) before-and-after calculation; and (5) benefit to the government.

Poirier quoted the public policy of Corrigan, which stated:

> Each of these damage measure works well in some "taking" cases and inequitably, if at all, in others. This is because no one rule adequately fits each of the many factual situations that may be present in a particular case. Such problems as" whether the losses are speculative; when the taking actually occurred; whether it caused any damage; and whether it was an acquisitory or nonacquisitory setting combine to make each measure of damages, in some cases, a "guessing game" between too little compensation on the one hand and providing a windfall on the other.
>
> Recognizing this problem, we feel the best approach is not to require the application of any particular damage rule to all temporary taking cases. Instead we hold that the proper measure of damages in a particular case is an issue to be decided on the facts of each individual case. It is our intent to compensate a person for the losses he has actually suffered by virtue of the taking. Either the parties may agree to an appropriate damage measure or each may present evidence as to the actual damages in the case and its correct method of determination. The damages awarded and the way to measure those damages thus may be adapted to compensate the party whose land has been taken for his actual losses.
>
> We emphasize, however, that no matter what measure of damages is appropriate in a given case, the award must only be for actual damages. Such actual damages must be provable to a reasonable certainty similar to common law tort damages. See Carey v. Piphus, 98 S Ct 1042; 55 L Ed 2d 252 (1978). This approach will compensate for losses actually suffered while avoiding the threat of windfalls to plaintiffs at the expense of substantial government liability. Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark L R at 637-39; City of Austin v. Teague, 570 S.W.2d [389, 395 (Tex, 1978)].

In Miller Bros. v. DNR, 513 N.W.2d 217 (1994), the trial court properly determined the market value of the rights taken by referring to the property's potential for oil and gas production. The Court of Appeals maintained the trial court appropriately "adopted the approach, and we agree that it appears to be the best way to determine a cash estimate of the property's market value in this case." 203 Mich App at 684.

Both Miller and Poirier were relied upon in K & K Construction v. DNR, 217 Mich App 56 (1996). The court noted that:

> Courts should engage in a flexible approach in determining compensation for a temporary taking. Some factors to consider are: rental return, option price, interest on lost profit, before and after valuation, and benefit to the government. Relying upon Poirier at 544-545.

TEXAS -- A Less "Flexible" Approach

In Austin v. Teague, 570 SW2d 389 (1978), the community temporarily destroyed the opportunity to develop property. The court looked to the 7 A.L.R.2d 1297 article and cited 76 C.J.S. Rental at 1168, which stated that rental value is:

> that amount which, in the ordinary course of business, the premises would bring or for which they could be rented, or the value, as ascertained by proof of what the premises would rent for, and not the probable profit which might accrue. (Citing 76 C.J.S. Rental at 1168 (1952).)

The court looked to what the history was and premised the determination of the rental value should not look at the land as if developed.

The interesting quote is:

> Anticipated rentals from land that is presently

> undeveloped is just as speculative and uncertain as measuring anticipated profits from a presently unestablished business. Plaintiffs testified to no kind of plan for the land. The evidence shows that plaintiffs owned the adjacent four-acre tract of land, acreage which had originally been a part of the tract now in issue. Plaintiffs obtained a permit to relocate the creek bed on that tract in August 1974. Plaintiffs testified that they had planned to erect a three-story office building on the tract, but at the time of the trial of this case in October 1976, construction had not begun and the tract was still vacant and nothing had been earned.

Yet, the historical Texas perspective as stated in Shropshire v. Adams, 89 S.W.2d 448, 450 (1905):

> Future profits as an element of damage are in no case excluded merely because they are profits but because they are uncertain. In any case when by reason of the nature of the situation they may be established with reasonable certainty they are allowed.

In Harlingen v. State of Sharboneau, 48 SW3d 177, the Texas Supreme Court rejected the utilization of a subdivision approach unless the subdivision was platted and well on its way to being developed. Possibly in recognition that the discounted cash flow is not the best approach when one has other raw and vacant land available, the court distinguished situations in which the approach has been permitted.

> Still other courts have permitted subdivision development method evidence when the particular analysis and the facts of the case demonstrate that the method can produce a useful estimate of market value. Travis Cent. Appraisal Dist., 947 S.W.2d at 728-32 (approving subdivision development appraisal for land that was already being subdivided and sold, which made the underlying estimates more reliable.

OHIO -- Moratoria and Date Initiating Calculation

In State Ex Rel. Shemo v. Mayfield Hts., 775 NE2d 493 (2002), the Ohio Appellate panel carefully distinguished the improper

regulation under a zoning ordinance from Tahoe-Sierra. The panel noted that the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim. However, Tahoe-Sierra did not take into consideration the first part of the regulatory takings under Agins v. Tiburon, that the application of the land use regulations to property constitutes a compensable taking "if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land". In Tahoe-Sierra, the owners made a claim that the moratoria did not substantially advance a legitimate state interest.

A second issue dealt with in the Shemo reconsideration hearing related to the determination of the beginning point of the length of the period for a compensable taking. The court noted:

> The date of a regulatory taking may begin on the date the challenged regulation was either enacted or applied to the subject property. See, generally, 8A Rohan & Reskin, Nichols on Eminent Domain (3d Ed. 2001) 24-36, Section 24.04[3], fn. 34; First English Evangelical Lutheran Church of Glendale v. Los Angeles, 96 L.Ed.2d 250 (1987).

NEW YORK -- Development Cost Differentials

The New York Court of Claims has given great deference in the findings of facts of what is appropriately to be paid for. For example, in 520 East 81st Street Associates v. State, 99 NY2d 43, 750 NYS2d 833, 780 NE2d 518 (2002), it was held that:

> the key factor in arriving at just compensation for a

> temporary taking is a determination of how the property would have been used by its owner over the course of the takings period; thus, when the best use for the property over the period of temporary taking would be as rental property, just compensation consists of lost rental value, plus any diminution in value to the fee over the period of the taking.

If this statement accurately reflects the Court's intent, does this not mean the State should look at what it has done with what could have been done during the time period involved?

In Keystone v. State of New York, 433 N.Y.S.2d 695, the court effectively allowed a present valuation for the diminution in the value of the property as developed to its highest and best use created by the delay in the taking.

In the New York Court of Claims case of Clough v. State of New York, 144 N.Y.S.2d 392, the water interference was of a temporary nature over a two-year period of time. The court stated:

> No fixed rule of damages, unvarying according to circumstances, is available. The court must take into consideration the usable value of the water of which claimants were deprived, the effect of the interference with the operation of claimants' business as a going concern, its production schedule, its loss of profits and the expenses necessarily incurred due to shutdowns. (National Cellulose Corp. v. State of New York, 292 N.Y. 438, 446-447.)

In an interesting manner of avoiding the "speculation" issue, the court noted:

> "where the State is adjudged as the wrong-doer, and this wrong has rendered it impossible for the claimants to prove their damages with more certainty, it cannot complain of the alleged uncertainty. (Spitz v. Lesser, 302 N.Y. 490).

In the water cases, we have a situation in which the notion of a condemnor not at fault is extinguished. Arguably, this is the

reason for payment of the damages.

VIRGINIA -- Bridge Company Franchise

As so frequently happens, governments often feel it imperative to temporarily take businesses because of potential impending strikes. Examples are the coal strike cases (Peewee Coal and Anderson v. Chesapeake Ferry Co., 43 S.E.2d 10 (1947)). In Chesapeake Ferry, the court held:

> That fair rental value to which the ferry company was entitled was to be determined with reference to the value of its properties at the time of the taking, and their earning capacity under all the facts and circumstances existing at the time of the taking.

As in Pugh (supra), there is a problem in the ferry valuation when there would be no going concern because of the strike. Yet, the owner was to be paid for what was lost.

Interestingly, the profits to the taker in Anderson also were not a basis for compensation. The Virginia Supreme Court looked to the Boston Chamber of Commerce rule which maintained that it is what the owner has lost and not what the taker has gained.

The value of the franchise must be paid for because it is a "substantial element in the value of the property taken".

NEBRASKA -- Lost Crops

Populist sentiment may modify the determination of whether pure lost profits or going concern or some other element of damage is to be paid in a temporary taking case. For example, the lost profits of the crop itself were allowed in Nebraska. See Kula v. Prososki, 424 N.W.2d 117 (1988). The language very liberally describes the State Constitution as having a measure of

compensation not based upon market value, but the value of the use for the period damaged. This is analogous to an owner who cannot utilize the property for the development, yet is paid for it. The certainty of the profitability of the crop is anything but a certainty. Arguing that a development of real estate is speculative without any similar recognition of the speculative risks in farm produce is difficult to distinguish.

WISCONSIN -- Delay of Development

In W.H. Pugh Coal Co. v. State, 460 N.W.2d 787 (1990), the court noted that "just compensation" in permanent takings cases is "fair market value". However, where there is a temporary taking there may be a different situation.

> In certain instances, however, compensation based solely on market value is inadequate and lost rent and other consequential damages may be awarded. Luber v. Milwaukee County, 47 Wis.2d 271, 280-81, 177 N.W.2d 380, 385 (1970). Temporary takings in particular pose unique valuation considerations. See United States v. Pewee Coal Co., 341 U.S. 114, 119-20 (1951) (Reed, J., concurring); see also Kimball Laundry Co. v. United States, 338 U.S. 1, 21-22 (1949) (Rutledge, J., concurring). With a temporary taking, "the proper measure of compensation is the rental that probably could have been obtained," Kimball Laundry, 338 U.S. at 7; in other words, "the reasonable value of the property's use." Pewee Coal Co., 341 U.S. at 117. Thus, evidence of lost income, shown to a reasonable degree of certainty, may be considered when determining just compensation. See Kimball Laundry, 338 U.S. at 16; see also Pierce v. Platte Valley Public Power & Irrig. Dist., 11 N.W.2d 813, 816 (Neb. 1943).
>
> Valuation is not necessarily dependent on the use to which the property was being put by its owner at the time of the taking but may be determined by the highest and best use, present or prospective, for which it is adapted and to which it reasonably might be applied. Bembinster v. State, 57 Wis.2d 277, 283, 203 N.W.2d 897, 900 (1973).

In Pugh, the potential income which could be made in the future and the potential to redevelop the property as a consideration were both allowed.

V. NATURAL RESOURCE CASES

In the ever continuing debate over how to calculate damages, a Federal case involving the temporary taking of mineral rights and State case involving the temporary taking of disposal storage rights could be perceived to set the limit on the outside parameters of limited compensability. However, a close reading of the cases could well justify a result in which a specific and precise calculation of damages are premised upon what can be perceived to be lost by a rational attempt to avoid "windfalls", yet make owners whole.

Bass Enterprises v. United States

In Bass Enterprises v. United States, 821 F.2d 638, the owner of an oil and gas lease was prohibited from initiating an exploration project because the area was contemplated for future nuclear waste storage. At the Federal Court of Claims level, the Judge determined that it would be a windfall or double recovery if monies were received simply because of the delay. After all, the gas would remain in the ground and the delay did not serve as a loss of future income. However, the court recognized that under Yuba Natural Resources, 904 F.2d 1577, 1581, and Kimball Laundry, 338 U.S. 1, 7, that fair rental value of the property for the period of the taking is the usual method of compensating for

temporary takings. In this situation, given that mineral rights remained, it was truly a loss of the opportunity to develop creating a delay of the income flow.

The court noted that fair market value was the proper method of determining just compensation for a permanent taking. However, the "temporary takings valuation is not a derivative of permanent taking value". The "interest on the fair market value of the property does not provide a method that accurately reflects the reasonable value of the property's use."

Relying on Kimball, the court refused to allow a calculation to include the difference in the market value of the property at the time of the taking and when the property was returned four years later. The Bass court viewed the situation as different than in Kimball because in Kimball what was lost was time, and no oil or gas was lost in the Bass situation. Further, the court concluded that it would be unrealistic and unfair to look at the profits during the startup because there would be no profit during the initial period of the project. Therefore, the court calculated just compensation on the basis of the difference in interest on the cash flows would approximate the fair rental value. The limit of the damage was the difference between the interest on the present value of the cash flows with and without the delay.

The owners presented alternative methods of calculating damages because the original start-up costs meant there would be little or no profit in the early years of a project; thereby meaning that no award would be required. The first alternative is

what is called a "no hindsight" approach. Relying on United States v. Pewee Coal Co. (citing Kimball Laundry, the Bass IV court stated: "The Supreme Court has held that `fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use'." The court simply noted that plaintiff showed no case support for the contention that interest on the fair market value of the property does not provide a method that alternatively reflects the reasonable value of the property's use. The owner/plaintiff also contended that in addition to the monthly rental, the owner should be compensated for the missed interest and the depreciation of the value of the asset. This is premised upon the value of the property at the end of the taking period. Relying upon Yuba, which held "[j]ust compensation for a temporary taking does not take into account the fair market value of the property either before or after it is taken." The court held this approach by the plaintiff was incorrect.

The defendant's expert claimed that the "risk and uncertainties as of the date of taking would then determine what someone would pay for those cash flows." The defendant expert therefore employed a method called a "calculation of the interest on properties due to the delay", by a determination of the present worth of cash flows as of the date of the temporary taking.

The court then went on to distinguish the difference between the Yuba situation and a fair rental value in Kimball where there is a taking of the whole business which cannot be recovered. There is a distinction in the loss of resources because it is simply one

in which the owner has lost time, although not losing any of the oil or gas.

The conclusion of the court is that the fair rental value in this case "approximates the difference in interest on the cash flows." The court concluded that the loss was limited to the difference between the interest and the present value of the cash flows with and without the delay.

Statute of Limitations

The Bass court addressed the statute of limitations for a temporary taking claim. It relied upon First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 320 (1987), in holding that: "It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid." The court then relied upon Corn v. City of Lauderdale Lakes, 95 F3d 1066, 1073 (1996), that when the terms of the temporary taking are indefinite, it would expire only if declared unconstitutional or repealed. Reliance on the calculation is premised upon the Yuba comment that: "[T]emporary reversible takings should be analyzed in the same constitutional framework applied to permanent irreversible takings . . . ." Finally, the court noted that the distinction between permanent and temporary is one of intrusion and not its temporal duration.

Damage Calculation

In natural resource cases, courts have extreme difficulty in finding what is a "fair" approach which will leave an owner whole

and yet not allow the owner to obtain the windfall. The series of Bass cases elucidate the concern of resources which are not depleted, rather the source of income is simply delayed. On the one hand, one could just seek lost profits, but this would not be fair to an owner when there are no profits at the initial investment phases of a project.

In Bass, the fair rental value is considered to be the difference in the interest on the cash flows over the period of time. Bass limited the difference between the interest on the present value of the cash flows with and without delay. The Court then went on to reveal that it would not determine the cash flows or the interest factor at the time, but leave the issue to the Court of Federal Claims.

SDDS v. State

In South Dakota Disposal Services (SDDS, Inc.) v. State, 650 NW2d 1, property was purchased by an owner expecting to store 7.75 million tons of municipal solid waste. After a permit for waste storage was granted, a public interest group intervened, with the South Dakota Supreme Court upholding a trial court finding that the agency providing the permit should have made specific findings as to the public interest and the environmental safety of the plan. However, prior to the Supreme Court decision, a petition for an initiative barring more than 200,000 tons per year to be processed at a site after Legislative approval was initiated. The second State Supreme Court decision stated any proceedings by the agency for the project until the referendum was voted upon. At the same

time, a Federal court action was initiated in the Eighth Circuit claiming the referendum was an improper State protection violating the dormant aspects of the Commerce Clause.

Finally, the company brought an inverse condemnation action against the State. The Eighth Circuit effectively reversed the third State Supreme Court decision holding that there was no property interest because the permit was void ab initio. The Federal Court of Appeals held that comity, res judicata and collateral estoppel bound the judgment of the Eighth Circuit. 569 NW2d 293-295. Upon the remand to the original award, some of the issues discussed in the Federal cases were also discussed by the Supreme Court on the final appeal. 650 NW2d 1.

Dates For Which Damage Calculation Applies.

It was held that the period for the taking would be from July 1, 1991, being the date that the bill was effective had there been no referendum and the date the Federal Circuit Court found the referendum to be unconstitutional.

Damage Calculation.

Citing Yuba Natural Resources, Inc. v. United States, 904 F2d 1577, 1581, the Court held:

> It is a well-settled principle of Fifth Amendment taking law . . . that the measure of just compensation is the fair value of what was taken, and not the consequential damages the owner suffers as a result of the taking.

Relying upon the Justice Brennan dissent in San Diego Gas & Electric Co. v. City of San Diego that "The States should be free to experiment in the implementation of this rule, provided that

their chosen procedures and remedies comport with the fundamental constitutional command", 450 U.S. 621, 660, the SDDS court held that there was no single measure for damages to be paid as compensation for a temporary taking. From this simple dissent, the court then relied upon the part of Bass Enterprises Production Company v. United States, 133 F3d 893, 895, which stated:

> The just compensation for a permanent taking is generally the fair market value of the property taken, whereas the recovery for a temporary taking is generally the rental value of the property. Citing Yuba.

Bass was also cited for the proposition; "Just compensation for a temporary taking does not take into account the fair market value of the property either before or after it is taken."

In determining that the jury instruction provided was completely incorrect, the court noted that:

> Various methods for calculating compensation for temporary takings have been created: fair rental value, option value, interest on lost profit, before-and-after valuation (two methods), market rate of return, the equity interest approach, the Herrington standard, and the public benefits approach. *Tretbar, Calculating Compensation*, 42 U.Kan.L.Rev. at 217-18. (citations omitted). Some courts suggest that any of these measures may be appropriate, depending on the facts of the specific case. Corrigan v. City of Scottsdale, 720 P2d 513, 518-19 (Ariz 1986) (en banc). Nonetheless, regardless of the method used, compensation must be limited to the property owner's actual loss, *id. at 519*, as calculated with "reasonable certainty." City of Austin v. Teague, 570 SW2d 389, 395 (Tex 1978).
>
> One problem that pervades these various damage measures is the "speculativeness" inherent in deciding what level of use owners might have made of their property but for the temporary taking. Herrington v. County of Sonoma, 790 F. Supp. 909, 915 (ND.Cal. 1991). The danger is the

possibility of allowing a landowner to receive the full "investment portfolio" return on merely its delayed use of the property. *Id.* at 923.

Because of (a) the unsettled nature of temporary takings law, (b) the wide divergence in the various damage measures, and (c) the inherent speculativeness of many of these, courts are free to craft new measures in accordance with the fact-specific inquiries that almost all temporary takings demand. Thus the Herrington court created an entirely new probability model, and the Bass IV court substantially modified the model it had initially proposed in Bass III. Bass Enterprises Production Co. v. United States, 45 Fed Cl 120 (1999) (Bass III).

All that having been said, the fact remains that, "the recovery for a temporary taking is generally the rental value of the property." Bass II, 133 F3d at 895. Our task, then, is to fit this general rule to the specific facts of the case at hand.

The SDDS court then noted:

The Supreme Court has held that "fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use." United States v. Peewee Coal Co., 341 U.S. 114, 117, 71 S.Ct. 670, 672, 95 L.Ed. 809, 813 (1951) (citing Kimball Laundry Co. v. United States, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949)) (emphasis added). But, "[i]nterest on the fair market value of the property does not provide a method that accurately reflects the reasonable value of the property's use." Bass IV, 48 Fed.C. at 623 (emphasis added). The insistence on use, both by the Supreme Court and by the U.S. Court of Federal Claims in the recent Bass IV decision (2001) is crucial. In a market economy, risk is a key factor in any investment decision: investors have the option of safely putting their money away into a bank at a relatively modest rate of interest or of trying to beat the bank rate by putting their money into ventures more or less risky. The use of the Bass drilling rights and the use of SDDS's dumping rights could be expected to produce income different from (perhaps greater than, perhaps less than) mere interest on the market value of the property in either case.

Is the Taking Permanent or Temporary?

In its determination of whether there is a permanent or

temporary taking, the SDDS court held:

> Generally, the U.S. Supreme Court has avoided a formulaic answer to this question, opting instead for "essentially *ad hoc*, factual inquiries." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978).

The definition seems to again follow the same route as in Bass in holding that the suffering is contemplated on the postponement for an indefinite period of time, but invalidated for the foreseeable future. Skip Kirchdorfer, Inc. v. United States, 6 F3d 1573, 1582 (1993), is again relied upon in noting that "the distinction between `permanent' and `temporary' takings refers to the nature of the intrusion and not its temporal duration."

Destruction of Operation

In SDDS, even though the appellate court held that South Dakota could not relitigate the issue of "whether the referendum was the proximate cause of SDDS's dissolution", the court held that it rejected SDDS's argument that there was an appropriate finding that the facility had been unconstitionally destroyed and no longer existed.

The South Dakota Supreme Court held the Eighth Circuit concluded that SDDS could simply reapply for the permit and proceed to construction. Then, the court noted that Bass did not go out of business as a result of an even longer temporary taking of its property rights and that this is "evidence of the reverse. Therefore, we hold that SDDS suffered a temporary, not a permanent, taking of its right to construct and operate a landfill on a Lonetree site." 650 NW2d at 13.

In holding that SDDS was similar to Bass, the court found that because the Bass owners were financially strong enough to survive and SDDS was not, that SDDS should not be paid in a more favorable fashion than Bass because of its own financial incapabilities. However, one should recognize that the delay in equipping the gas project is a far different cost than the delay in obtaining the licensing of a disposal site, for which the legal cost is in and of itself a major portion of the project expense. Unlike the expense of a gas and storage royalty lease, the expense of real estate ownership and maintenance and litigation are far greater than the oil/gas royalty agreement. Possibly the intervening Tahoe-Sierra decision put both Bass and SDDS in separate gloves, but the facts may have more properly provided for different hand sizes.

> Both Bass and SDDS were forced to wait and should recoup damages that resulted from having to wait. The fact that Bass was a sufficiently strong company to survive the wait is as irrelevant as the fact that SDDS was insufficiently strong to survive similarly. Such are the market breaks. "Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. they cannot be considered as a taking in the constitutional sense." Tahoe-Sierra, cited at 650 NW2d at 17.

Further, given that no profits were made, lost profits would not be awarded in any event. This is premised on the fact that in the earlier years that startup costs would create a negative income.

Finally, the court concluded that a fair rental value model is the most equitable method. Yet, the South Dakota Supreme Court recognized that no participant in the marketplace would rent the

property for the limited 43-month period of the temporary taking.

The Bass loss was limited to the difference between interest on the present value of the cash flows with and without the delay.

The SDDS court held that the Bass analysis would apply for disposal of tonnage being brought in as easily as gas being removed because each has a "reserve".

The SDDS Conundrums

The problem underlying SDDS is the simple conclusion that the unforeseeability or incalculability of damages means that no damages should be paid. Compounding the problem of the decision is the notion that the damages are, at best, not foreseeable because they have not yet occurred. Further ascertaining the rate of utilization for years into the future and then capitalizing the interest differential into a present value is frequently more speculative than a direct calculation of the "rental value" created by the immediate loss.

On one hand, one could claim that other than in the subdivision cases in condemnation settings, courts will regularly allows an application of damages premised upon reasonable calculations. The difference in Bass is that the potential to remove the minerals is simply delayed. This may not fairly lead to the same result in SDDS. The realities of the disposal licensing process are one in which if the license cannot be obtained an owner will look to other property, likely in other states, because other states may recognize the effect of the dormant aspects of the Commerce Clause. In the alternative, the waste site developer may

simply not have enough money to continue the legal and economic challenges and give up on the project.

At 650 NW2d, 14-15, the South Dakota Supreme Court concluded that the final limitation on the compensation that may be paid SDDS was a limitation of any permit existing only for five years. This process cut off the damages to a simple five-year period without recognition of the least aspect that there was a potential that the license could be renewed or continued in such a fashion that the operation would continue on until the site was fully utilized.

CONCLUSION

This Bass calculation method of discounted future earnings differential simply does not take into consideration the fact of risk created by the delay. What would one pay if the person knew that he could not begin drilling for 45 months, but would have the same leasehold interest and then start drilling 45 months hence without any assurance that there was a drastic modification in the market pricing? Only if the analysis includes a risk and uncertainty factor increasing the fair rental value or allowing the factor to increase the present value of the loss.

In reading SDDS, one can understand how the court desires to look at the five different methods of payment. However, each of these methods must include factors which, in all likelihood, will be excluded. Examples of the factors are costs to close down and start up, entrepreneurial profit, payment for risk outside of entrepreneurial profit, and those risks inherent in a process of an

uncertain take, and computation of those costs to account for the fiscal uncertainty of not knowing when the operation would start again. These costs may not only exist in the South Dakota case setting, but also in many of the other possibilities, such as the value of an option approach. However, this notion that the capitalization of the delay in the payment of income over the years of removal in the case of oil and gas or deposits in the case of disposal probably is most realistic for the specific factual setting involved.

One of the problems with the analysis is that the market rates fluctuate so greatly that when there is a large capital investment required in disposal storage as compared to the oil and gas claim, that the operation will be more fragile. Simply because the owner of the disposal company is not a multi millionaire like the Bass family should not serve as reason for denial of fair payment.

The flip side of this is when we have so many direct condemnations in which compensation for the going concern or lost business interests are uncompensated. Why should these risks and uncertainties be paid on the inverse other than that there is a claim that it can be grounded in tort while no such payment is made for direct condemnations?

The determination of the value of temporary occupancy can be approached only on the supposition that the free bargaining between petitioner and a hypothetical lessee of that temporary interest would have been place. See Kimball and Olson vs U.S., 78 L.Ed. 1236 (1934). The problem with many of the analyses utilized to

limit compensation is that there is not a freely bargained arrangement.

By example, if one were told that a person could buy a vacant piece of land today anywhere or, in the alternative, buy another piece of land which could not be used for an indefinite number of years in the future, would the individual simply discount on an interest rate based analysis? Surely not. The person who did not know when the land would be available would not want to take the uncertainty of a risk of never knowing when the land could be developed.

The argument limiting compensation to contract fair rental value also flies directly in the face of the whole "investment-backed expectation" part of Takings Law from Penn Central.

Another problem with the process is that there is no consideration of the risk of decreasing value as part of the calculation because all the cases effectively contemplate that no before-and-after analysis is available due to the likelihood that the after value at a later date will be higher than a before value even with the damage. To simply conclude that the delay in the income should not take into consideration the risk of increasing "decreasing values" as part of the process of the "lost rental" denies the basic right to the arms-length negotiation described in Kimball Laundry. The discounted cash flow analysis simply does not take into consideration the risk factors inherent in the process.

A final part of the problem as it applies to the disposal operations throughout this country over the last ten years is that

when licensed the operations have a very different and higher value and allow the owner the opportunity to sell the property interest. A limitation on the right of validly and legally operating the property delays the potential to sell the property. A great example is the disposal businesses in the last 12 years. From 1992 through 1995, the businesses simply sold premised upon a multiple of their gross proceeds. If not operating, there were no proceeds to multiply to receive a commensurate purchase price. By the late 1990s, when the South Dakota operation was finally licensed, the demand for disposal storage had severely diminished and the companies seeking merged storage facilities throughout the country no longer existed. The SCAs and Waste Managements simply no longer were purchasing locations.

In GM, the conclusion is that those additional costs which include labor, materials, and transportation also must include storage of goods against their sale and the cost of their return to the leased premises. However, these are arguably not independent items of damage but an aid determination of the fair rental value. This is anything but a limitation of the calculation for the contract fair rental value approach.

The conclusion of the Kimball court is premised on one of "transferability", whether for a non-transferable liquor license, grandfathered use, or other special benefit. The Kimball court noted that the transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for

public use. 338 U.S. at page 5.

Reading the Kimball case, one can easily recognize the contrast in attempting to determine the reality of the damage created by the temporary taking versus the inherent risk of speculative, overreaching, or double-dipping claims.

Arguably, Kimball stated much more than the simple reasonable valuation of the property's use is the sole basis for compensation. Between General Motors and Kimball, the breadth of payment would allow compensation for moving costs, depreciation in the asset outside the ordinary wear and tear, and market losses when properly measurable. The limitations of Pewee are, in major part, premised upon the fact that with a strike, the coal company simply would not have been in business.

One of the difficulties in the analysis is the premise that the value before and after the taking should not necessarily be utilized because, in a market of ever increasing values, the diminution is not properly accounted for. The result of this rule, intended to protect the owner, creates a harshness of a "no hindsight" type of analysis as the result.

There is an inherent risk in the resolution of the conflict that windfalls should not occur, yet all damages should be paid for because there is no bright line test providing a procedure for the determination of the damage calculation. Frequently cited is the U.S. v. Miller comment, 317 U.S. 369, 373-4, which states:

> It is conceivable that an owner=s indemnity should be measured in various ways depending upon the circumstances

of each case and that no general formula should be used for the purpose.

One could complain that Corrigan is 180 degrees from the "reserve" cases. However, the Corrigan and Bass/SDDS courts recognized that the "approach" to be taken is one in which it is intended to fully compensate an owner without a windfall.

The basis for Teague is that almost every jurisdiction maintains that the subdivision approach may not be utilized for the determination of damages in the condemnation setting.

Effectively, in Bass Enterprises Production Company v. United States, there is to be no end to the regulation nor for a temporary taking to occur. While some courts may maintain that the claim for compensation is tolled until the challenge to an ordinance has successfully prevailed in the court, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 42 US 304, 320 (1987), maintains "it would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid." This is a problem!

Yet we have Yuba Natural Resources v. United States, 821 F2d 638, which maintains that the "temporary reversible takings should be analyzed and the same constitutional framework applied to irreversible takings." 821 F2d at 638. See also, First English, 482 U.S. at 318.

Possibly the conflict of what is rental value creates an underlying problem in and of itself. These are situations in which

governmental over-regulation allows the government a greater breadth of decision making. Yuba cites First English Evangelical Lutheran Church v. Los Angeles County, 107 S.Ct. 2378, 2387, which maintains that the government may elect to abandon its intrusion or discontinue regulations, while the owner has no right to make a temporary taking into a permanent one. See, e.g., Kirby Forest Industries, Inc. v. United States, 467 U.S. 1.

Possibly, the distinction of what is rental value is best noted in Pugh, where the court relied upon precedent maintaining that temporary takings offer "unique" valuation considerations. In defining the Kimball Laundry statement that "the rental probably could have been obtained" is noted at Pewee as the reasonable value of the property's use. The two "fair rentals" are not necessarily the same.

Another of the issues at hand relates to the reliance on the Petty line of decisions which provide for restrictive standards of compensation. The problem with Petty is that this is a case where there is a total destruction of the lease. The standards of compensation approach for "total (permanent) taking" described as a different standard from temporary takings.

A compelling article on calculating compensation for temporary regulatory takings has been provided by J. Margaret Tretbar in the University of Kansas Law Review, cited at 42 U.Kan.L.Rev. 201. In her conclusion, Ms. Tretbar notes: "The primary policy arguments against compensation for temporary regulatory takings are premised on the fear that a mudslide levy will be heaped on local governing

bodies, and thereby "share" the legitimate attempts at land use control. Limiting a landlowner's recovery in inverse condemnation to actual loss helps eliminate the threat of such liability." It is noteworthy that the "reserve" cases of Bass and SDDS cite the article at great length. The question to be dealt with in the future is whether other courts will apply the same "protection" of "actual" losses when there is other reasonably basis of calculation by the experts and the simple discounted future income interest payments are not enough.

Article\TempTake\Memo.126