

Inverse Condemnation as a Remedy for "Regulatory Takings"

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I. Introduction: The Fourteenth Amendment and Regulatory Takings

The traditional recourse of landowners and land developers whose plans for profitable development of land are blocked by restrictive zoning or other land use regulations is a suit to invalidate the regulations on constitutional grounds. The constitutional challenge is almost always based on the Fourteenth Amendment's due process clause and/or the due process or "taking" provision in the constitution of the state where the land sought to be developed is situated. It is usually asserted that the challenged regulations amount to a *de facto* "taking" of the challenger's property for public use without payment of just compensation.¹ Although the due process clause of the Fourteenth Amendment does not expressly prohibit such takings, it has been well-settled since 1897 that the due process clause incorporates the Fifth Amendment's express prohibition of such takings and makes it applicable to state ac-

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1. This paper is not primarily concerned with the broad problem of constitutional standards for determining when, if ever, a land use regulation should be held to amount to a *de facto* taking of private property. Rather, it is concerned with the narrower question of whether compensation should be awarded when such a taking is found to have occurred. The modern literature on the broader question is extensive. See, e.g., B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (study for the Council on Environment Quality, 1973); *PLANNING WITHOUT PRICES* (B. Siegan ed. 1977) (papers from land use conference in San Diego, Oct. 4-6, 1975); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 149 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). See also W. STOEBUCK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN*, ch. 6 (1977).

tion.² On the other hand, although not all state constitutions contain a due process clause, all but three state constitutions expressly prohibit the taking of private property for public use without payment of just compensation,³ and those three have been judicially construed to require compensation when private property is taken for public use.⁴

Despite chronic confusion in judicial language in cases where zoning or other land use regulations are challenged under the due process clause of the Fourteenth Amendment, it is clear that such regulations may be held invalid on substantive due process grounds without a finding that they amount to a *de facto* taking, sometimes termed a "regulatory taking."⁵ A court may properly find that a landowner has been deprived of property without substantive due process, although the regulations are only moderately restrictive, if (1) the purpose of the regulations is found to be improper—*i.e.*, the purpose is not to protect public health, safety or welfare—or (2) the means chosen to effect a proper purpose are not rationally related to the end sought to be achieved.⁶ In such cases, courts tend to say that the regulations are invalid because they are "arbitrary," "capricious," "unreasonable" and/or "not substantially related to the public health, safety or welfare," not because the regulations amount to an uncompensated regulatory

2. *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226 (1897). Some writers conclude that in *Chicago*, the Court found an independent due process requirement that compensation be paid, rather than a literal incorporation of the Fifth Amendment's taking clause into the Fourteenth Amendment. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 412-15 (1978). Some confusion results from loose judicial statements that challenges to local land use regulations alleging a *de facto* taking are based on the Fifth Amendment.

3. 1 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 1.3, at 78-79 (3d ed. J. Sackman rev. 1979) [hereinafter cited as *EMINENT DOMAIN*]. The three states are Kansas, North Carolina and Virginia. The Kansas Constitution expressly requires compensation when private corporations acquire land for right of way use. KAN. CONST. art. 12, § 4.

4. *EMINENT DOMAIN*, *supra* note 3, at §§ 1.3, 4.8.

5. The pattern was set in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), where the Court held residential use zoning invalid under the Fourteenth Amendment because, according to the findings of a special master appointed by the trial court, this zoning classification did not promote "the health, safety, convenience and general welfare of the inhabitants of the part of the city affected." *Id.* at 188. The Court also noted that it was "pretty clear that because of the industrial and railroad purposes to which the immediately adjoining lands . . . have been developed and for which they are zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance," but the Court did not say that the residential use zoning amounted to a *de facto* taking. *Id.* at 187.

6. *E.g.*, *Katobimar Realty Co. v. Webster*, 20 N.J. 114, 118 A.2d 824 (1955).

taking. Cases of this kind are not very common.

In most of the cases where a landowner claims that land use regulations amount to an uncompensated *de facto* taking of property, the regulations have substantially restricted the uses to which the property may be put, and consequently have substantially reduced its value.⁷ In such cases, the United States Supreme Court has not established clear standards for determining when a land use regulation amounts to an uncompensated *de facto* taking. Prior to *Pennsylvania Coal Co. v. Mahon*,⁸ the Court seemingly would not invalidate a land use regulation as a taking, no matter how much financial loss it caused the landowner, provided the regulation had a proper purpose and employed means that were rationally related to the achievement of that purpose.⁹ But the Court's opinion in *Pennsylvania Coal Co.*, written by Justice Holmes, asserted that when diminution in "values incident to property . . .

7. Usually the challenger asserts both that the zoning is "arbitrary," "capricious," and/or "unreasonable," and that it is so restrictive as to amount to a *de facto* taking. *E.g.*, *Nectow v. City of Cambridge*, 277 U.S. at 183. In *Nectow*, the lower court stated that "the contention of plaintiff is that the zoning ordinance is unreasonable, an indefensible invasion of his rights, deprives him of equal protection of the laws, and takes his property without due process of law." *Nectow v. City of Cambridge*, 260 Mass. 441, 443, 157 N.E. 618, 619 (1927), *aff'd*, 277 U.S. 183 (1928).

8. 260 U.S. 393 (1922). The Court invalidated a Pennsylvania statute forbidding "the mining of anthracite coal in such a way as to cause the subsidence of . . . any structure used as a human habitation" except "where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person." *Id.* at 412-13. The plaintiff held title to the surface of a tract of land under a deed that expressly reserved to the grantor coal company the right to remove all the coal beneath the surface and waived all claims for damage that might arise from mining out all the coal.

9. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (ordinance prohibiting brick manufacturing upheld); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (ordinance prohibiting livery stable business upheld); *Mugler v. Kansas*, 123 U.S. 623 (1887) (law prohibiting the liquor business upheld). In *Hadacheck*, the plaintiff alleged that he owned a bed of clay worth about \$800,000 for brick-making, but only worth about \$60,000 for any other use; and that the ordinance prohibiting brick-making would completely preclude use of his clay for brick-making because he could no longer make bricks at the place where the clay was located and the clay could not economically be transported to another location. In holding the ordinance valid, the Court treated the plaintiff's inability to continue using his clay for brick-making as giving rise to a mere "consequential loss," not a "taking," because there was "no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks." 239 U.S. at 412. The *Hadacheck* opinion also said that the police power is "one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily." *Id.* at 410.

reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the [governmental] act,"¹⁰ and that "if regulation goes too far it will be recognized as a taking."¹¹ Unfortunately the Court did not, either in *Pennsylvania Coal Co.* or in later land use cases, clarify its standard for deciding whether a particular regulation "goes too far."¹²

10. 260 U.S. at 413.

11. *Id.* at 415. The majority opinion in *Pennsylvania Coal Co.*, by Justice Holmes, does not cite *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); or *Mugler v. Kansas*, 123 U.S. 623 (1887). In dissent, Justice Brandeis, citing *Mugler* and *Hadacheck*, asserted that the Pennsylvania statute was valid because its purpose was to protect the public, and the prohibition of mining so as to cause subsidence was an appropriate means of protecting the public. Brandeis further asserted that "restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can be profitably put." 260 U.S. at 418 (Brandeis, J., dissenting).

12. The majority opinion in *Pennsylvania Coal Co.* does not indicate how much of the defendant's coal would have to be left in place as a result of the Pennsylvania statute, what the value of that coal was, or the relative values of that coal and the defendant's total holdings of anthracite coal. In dissent, Justice Brandeis said:

"If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value . . . not of the coal alone, but with the value of the whole property. For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property [of the coal company], or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute." *Id.* at 419 (Brandeis, J., dissenting).

It should be noted that the Pennsylvania statute only prohibited "the mining of anthracite coal in such a way as to cause . . . subsidence." It did not expressly require owners of coal to leave any coal in place, but the cost of providing artificial supports would have exceeded the value of the coal that would otherwise have to be left in place. *Id.* at 395. This made it "commercially impracticable" to mine all the coal and substitute artificial supports to prevent subsidence. Thus it can be argued that, as in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the defendant's loss was only "consequential."

After *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court did not review another land use control case until 1962. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Court sustained an ordinance prohibiting sand and gravel excavations below the water table.

"If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional . . . This is not to say, however, that governmental action . . . cannot be so onerous as to constitute a taking which constitutionally requires compensation. [citations omitted] There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co. v. Mahon*, [260 U.S. 393 (1922)], it is by no means conclusive, see *Hadacheck v. Sebastian*, [239 U.S. 394 (1915)], where a diminution in value from \$800,000 to \$60,000 was upheld. How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." *Id.* at 594 (footnote omitted). In view of the Court's statement that nothing in the record "even remotely suggests that prohibition of further mining will reduce the value of the lot in question," one wonders why the Court reviewed the case at all.

The Court's most recent excursion into the field of land use regulations, *Penn Central Transportation Co. v. New York City*,¹³ resulted in an opinion that, as Professor Mandelker notes in his symposium article, "wavered between taking, equal protection and due process doctrine";¹⁴ but it seems at least to establish that, where the purpose of a very restrictive regulation is proper and the means employed are otherwise rational, it will not be held an uncompensated *de facto* taking if it leaves the landowner with "reasonable beneficial use" of the property¹⁵ and he is not "solely burdened and unbenefited" by the regulation.¹⁶

II. Inverse Condemnation and Regulatory Takings in California

Cases where the effect of zoning or other land use regulations is to preclude any "reasonable beneficial use" of the land and re-

On the issue of "reasonableness" (substantive due process), the Court decided for the municipality because the landowner had not met the burden of showing that the regulations were clearly unreasonable, although their effect was to require termination of a lawfully established nonconforming use.

13. 438 U.S. 104 (1978) (upholding New York City's Landmarks Preservation Law as applied to the Grand Central Terminal). The City Landmarks Commission refused to approve the plans of Penn Central to construct a multi-story office building over the Terminal building as destructive of the Terminal's historic and aesthetic features. Penn Central, without seeking judicial review of the Commission's decision, sued in state court claiming that the application of the Landmarks Law to the Terminal amounted to a taking of property without compensation in violation of the Fifth and Fourteenth Amendments and an arbitrary deprivation of property without due process of law in violation of the Fourteenth Amendment. Penn Central sought, in the alternative, compensation for the taking or declaratory and injunctive relief. The New York Court of Appeals sustained the Landmarks Law generally and its application to the Terminal specifically. *Penn Cent. Transp. Co. v. New York City*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914, *aff'd*, 438 U.S. 104 (1978).

14. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 500 (1981).

15. 438 U.S. at 138.

16. *Id.* at 134. In a detailed survey of its prior decisions the Court indicated that a *de facto* taking may be found when a regulation frustrates "distinct investment-backed expectations." *Id.* at 127 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)). The Court also stated that "Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'" *Id.* at 128 (citing *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Causby v. United States*, 328 U.S. 256 (1946); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922); and *United States v. Cress*, 243 U.S. 316 (1917)). None of the cases cited for the "acquisitory action" basis for finding a taking involved a land use regulation; they all involved either trespasses in private airspace plus serious interference with surface use (*Causby*, *Griggs* and *Portsmouth*) or flooding (*Cress*).

duce its value nearly to zero are rare, but are becoming more frequent as a result of attempts in recent years to use land use regulations to control urban expansion and to preserve wetlands, flood plains and coastal areas from environmentally harmful development.¹⁷ In California, where earlier court decisions uniformly rejected landowner challenges based on the regulatory taking argument, even in cases where land use regulations appeared to prohibit any reasonable use of property,¹⁸ landowners recently began suing for compensation on an inverse condemnation theory. This theory apparently was advanced to give the California courts an alternative to either upholding harsh land use regulations implementing important public policies or invalidating such regula-

17. There is great disparity in the state court cases as to exactly where the line between valid regulation and *de facto* taking should be drawn. Professors Krasnowiecki and Strong concluded in 1963, after an examination of cases where values were stated, that "the average breaking point between valid regulation and 'taking' is at a loss of two-thirds of the admitted value for some other use." Krasnowiecki & Strong, *Compensable Regulations for Open Space*, 29 J. AM. INST. PLANNERS 87, 89 (1963). Compare the conclusion of Professor Anderson in 1976:

"Examination of a representative group of cases in which the courts specifically mentioned proof of the value of the subject land if used for a permitted purpose, as compared with its value if used for a purpose outlawed by the ordinance, did not yield a precise formula for determining where regulation crosses the line and becomes confiscation. Of the cases examined, about half approved and half disapproved the ordinance as applied. Moreover, the loss of use value in cases where the ordinance was approved was about the same as in those where an opposite conclusion was reached. If any conclusion is warranted by this sampling, it is that financial loss is a relevant consideration, but not a single decisive one." 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 3.27 (2d ed. 1976).

Professor Berger suggests these two conclusions are not necessarily inconsistent:

"There obviously has to be a mathematical average breaking point between cases where compensation is and is not required. However, this figure is not necessarily meaningful. If, for example, compensation were required in three different cases where there were, respectively, a one-third loss, a two-thirds loss and a total loss, the average breaking point would be two-thirds. This figure would not mean much, particularly if there had been three other cases of similar losses where no compensation was allowed." Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 175 n.35 (1974).

18. *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962) (upholding prohibition of rock, sand and gravel mining on land found to have "economic value only for the excavation of rock, sand and gravel" and "no appreciable economic value for any of the uses permitted" by the zoning ordinance); *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954) (upholding zoning of privately owned beach land for "beach recreation" only); *Ex parte Hadacheck*, 165 Cal. 416, 132 P. 584 (1913), *aff'd sub nom.* *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). For a discussion of why California land use control decisions have "quite consistently been far rougher on the property rights of developers than those in any other state," see 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 6.03 (1974).

tions as regulatory takings, and the California intermediate appellate courts have accepted the inverse condemnation theory with enthusiasm. The most important cases, all involving open space zoning classifications imposed by local governments under the authority of the 1970 California "open space" legislation,¹⁹ are *Eldridge v. City of Palo Alto*,²⁰ *Beyer v. City of Palo Alto*,²¹ *Agins v. City of Tiburon*²² and *San Diego Gas & Electric Co. v. City of San Diego*.²³

In *Eldridge*,²⁴ plaintiff had purchased land in the Palo Alto foothills area when it was zoned for single-family residential use on one-acre lots; later, after the foothills area was designated as "open space" on the City's general plan, that area, including plaintiff's land, was rezoned as open space, which only permitted single-family residential use on ten-acre lots.²⁵ Plaintiff then brought an inverse condemnation action alleging that the open space zoning amounted to a *de facto* taking, but not alleging that the zoning

19. CAL. GOV'T CODE §§ 65560-65570, 65910-65912 (West Supp. 1979).

20. 124 Cal. Rptr. 547 (App. 1975), *vacated on remand*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

21. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976) (decided with *Eldridge* on remand).

22. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980).

23. 146 Cal. Rptr. 103 (App. 1978), *rev'd on remand without published opinion*, 4 Civ. No. 16277 (filed June 25, 1979), *dismissed for lack of jurisdiction*, 49 U.S.L.W. 4317 (1981).

24. 124 Cal. Rptr. 547 (App. 1975), *vacated on remand*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

25. This was one of the ultimate results of Palo Alto's annexation in 1959 of about 6,000 acres of virtually undeveloped rolling foothills, all privately owned, west of the city. The City later acquired some land in the upper foothills and established a public park there. During 1969 the City began land use studies of the foothills area and, on June 7, 1971, adopted an amendment to its General Plan reclassifying over 90% of the undeveloped foothills area (over 5,900 acres, including plaintiff's property) to an "Open Space and/or Conservation and Park" designation. Although there is no mention of the fact in the *Eldridge* opinions, city officials proceeded to plan for acquisition of the foothills area "below the Park" during the first six months of 1971, and on July 19, 1971, the City Council imposed a moratorium on development in the area "below the Park." In February 1972, the development moratorium was extended for another six months. Apparently the *Eldridge* property was subject to the moratoria, but it is not clear whether it was included in the land planned for acquisition by the City. However, on October 4, 1971, the City Planning Staff reported to the City Council that the receipt of federal funds to aid in the acquisition of land in the lower foothills was unlikely. Shortly after the extension of the development moratorium, the City Council apparently decided that acquisition with city funds would be too expensive. On June 5, 1972, while the second moratorium was still in effect, the City added a new "O-S" (Open Space) classification to its zoning ordinance, and on August 14, 1972, shortly before the moratorium expired, the plaintiff's 750 acre tract was rezoned to that classification. (Most of these facts are derived from *Arastra Ltd. Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976).

classification was invalid. The trial court sustained a demurrer to the complaint. The intermediate appellate court reversed, holding that plaintiff had stated a cause of action for recovery of compensation.²⁶ On further appeal to the California Supreme Court, the case was remanded for reconsideration in light of the supreme court's opinion in *HFH, Ltd. v. Superior Court*,²⁷ where the supreme court held that an inverse condemnation action could not be predicated on an allegation of "mere reduction in market value" of plaintiff's land resulting from its "downzoning" from a commercial to a single-family residential classification. A footnote in the *HFH* opinion, however, stated: "This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question. We leave the question for another day."²⁸ On remand, relying on this dictum, the intermediate appellate court again held that *Eldridge* had stated a cause of action in inverse condemnation.²⁹ And the court reached the same conclusion in *Beyer*,³⁰ which it disposed of, together with *Eldridge*, in a single opinion.

In *Beyer* the facts were the same as in *Eldridge*, but *Beyer*, unlike *Eldridge*, claimed that the Palo Alto open space zoning was invalid and sought, in the alternative, either compensation or a declaration of invalidity. The court was thus forced to articulate the rationale of its decision more clearly than it had in its first *Eldridge* opinion. The rationale was that the Palo Alto open space regulations "were valid exercises of the state's police power and beyond constitutional or other attack except . . . in proceedings for damages in inverse condemnation."³¹ Consequently, *Beyer*'s

26. 124 Cal. Rptr. 547 (App. 1975), *vacated on remand*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

27. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

28. 15 Cal. 3d at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16. *But cf. id.* at 521-22, 542 P.2d at 246-47, 125 Cal. Rptr. at 374-75, where the court indicated that it thought the responsibility for redefining constitutional standards for regulatory takings should rest with the legislature.

29. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

30. *Id.*

31. 57 Cal. App. 3d at 631, 129 Cal. Rptr. at 586. It is clear that the court shifted its position on the *Eldridge* remand. In its first opinion, the court quoted from *EMINENT DOMAIN*, *supra* note 3, at § 1.42:

"Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legis-

complaint stated a cause of action for compensation but not for invalidating the regulations.

The rationale of *Eldridge* and *Beyer* is startling, and certainly finds little support in the United States Supreme Court cases, the earlier California cases, or the lower federal court cases cited by the court—a fact that is demonstrated in considerable detail in the dissenting opinion by Judge Sims³² and by commentators in legal periodicals.³³ In all of the United States Supreme Court cases cited by the court, the issue was simply whether the challenged land use regulations were invalid under the Fourteenth Amendment as *de facto* takings, and none of these cases actually holds that a “particularly harsh” regulation may be held valid, and nevertheless “give rise to damages in inverse condemnation.”³⁴ Although compensation was either actually awarded or held to be recoverable in several California cases and in two United States District Court cases relied upon in the *Eldridge-Beyer* opinion, all of these cases are distinguishable on the ground that they involved either inequitable precondemnation activities—*e.g.*, long, unreasonable delays in the condemnation proceedings, or downzoning to depress the value of plaintiff’s property prior to its acquisition by defendant—or an actual public use of plaintiff’s property as a result of defendant’s actions. Moreover, none of these cases adopted the notion that compensation should be awarded because the plaintiff’s property was taken by means of a valid land use regulation.

Since the two United States District Court cases mentioned above, *Arastra Limited Partnership v. City of Palo Alto*³⁵ and *Dahl v. City of Palo Alto*,³⁶ were based on the same Palo Alto open

lation is so unreasonable or arbitrary as to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. *Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.*” 124 Cal. Rptr. at 554-55 (emphasis added). In its second opinion, however, the court omitted the last two sentences in the passage quoted above. 57 Cal. App. 3d at 627, 129 Cal. Rptr. at 583.

32. *Id.* at 635, 129 Cal. Rptr. at 588.

33. Bozung, *Judicially Created Zoning With Compensation: California’s Brief Experiment With Inverse Condemnation*, 10 ENVTL L. REV. 67, 77-85 (1979); Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law*, 28 HASTINGS L.J. 1569, 1574-94 (1977).

34. See notes 8-12 and accompanying text *supra*.

35. 401 F. Supp. 962 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976).

36. 372 F. Supp. 647 (N.D. Cal. 1974).

space zoning regulations involved in *Eldridge* and *Beyer*, the court may have felt that the same result was called for in *Eldridge* and *Beyer*. But in *Arastra*, where compensation was actually awarded, the court concluded that the open space zoning "was not a bona fide attempt to impose limitations on the use of the property of the plaintiff, but rather the final step in a program designed to acquire rights over the property for the enjoyment and use of the public in general."³⁷ And the plaintiff in *Dahl*, where the inverse condemnation complaint survived a motion to dismiss, alleged that Palo Alto had taken earlier action, in addition to downzoning her land to the open space classification, for the purpose of reducing the value of the land should it later be condemned.³⁸ In *Eldridge* and *Beyer*, however, there were no allegations of inequitable precondemnation activity by the City—indeed, the *Eldridge-Beyer* opinion does not even mention the City's abortive plan to acquire lands in the foothills area—and the decision rests simply on the theory that compensation is payable when a valid land use regulation deprives the landowners of "any reasonable or beneficial use of their land."³⁹

37. 401 F. Supp. at 978-79. The basis of the decision is summarized in the following passage:

"The basic question of law, then is this: If a city with power to do so, decides to acquire property to preserve scenic beauty, open space and the view from a public park and city roads, takes substantially all steps toward doing so, short of payment, leads the public and property owners to believe that the acquisition is inevitable, delays all development of the property while preparing for acquisition, and then, when it has determined that the cost is higher than hoped, on the pretense of protecting against non-existent hazards found to exist without substantial evidence, enacts a zoning ordinance, accomplishing all of the purposes of the acquisition, which purports to allow uses of property which are not economically realistic, with no inquiry as to the economic feasibility of the purported uses, is the resultant loss of value to the property affected compensable? The answer must be 'yes.'" *Id.* at 981. For some of the common factual background of *Eldridge*, *Beyer*, *Arastra* and *Dahl*, see note 25 *supra*. The *Arastra* Court held that Palo Alto must pay the full value of a fee simple estate in *Arastra's* land "on the effective date of the Open Space Ordinance," the amount to be determined by a jury. *Id.* Subsequently, before trial of the compensation issue, the City settled with *Arastra* for \$7,500,000.

38. The plaintiff alleged that the development moratoria imposed by the City were intended to reduce the value of her land prior to its acquisition. She also alleged that "authorized agents of the City induced her and other similarly situated property owners to allow annexation of their property by promising that the zoning would remain essentially the same (one-acre minimum lot size) and that development would be permitted as soon as utilities could be extended to their property," and that after annexation the plaintiff was assessed for the installation of sewer and water facilities on the basis of development at a density of one dwelling per acre. 372 F. Supp. at 648.

39. "Among the many factual issues to be resolved in the cases before us is whether the 10-acre homesites of plaintiffs' land are salable at all. This question would seem to be of particular significance, since the same homesites are designated by the ordinances for 'open

In *Agins v. City of Tiburon*,⁴⁰ the plaintiffs, like the plaintiff in *Beyer*, sued in the alternative for compensation on an inverse condemnation theory or to invalidate the "residential planned development and open space" classification to which their land had been rezoned pursuant to the open space element in the City's general plan. No doubt the plaintiffs were encouraged by the California Supreme Court's refusal to review *Eldridge* and *Beyer* after its remand of *Eldridge* to the intermediate appellate court. However, the plaintiffs in *Agins* did not argue that the open space zoning was invalid because it was "too harsh." Instead, they argued that, "by permitting single-family residential use," the zoning "is not sufficiently restrictive" to comply with the California open space legislation of 1970!⁴¹ The complaint was held insufficient on demurrer insofar as it alleged invalidity of the open space zoning on the ground just stated, but it was held sufficient insofar as it stated an inverse condemnation claim based on allegations that the residential planned development and open space zoning (which allowed single-family houses on lots of one to five acres) precluded

space use,' including public park and recreation purposes and 'wildlife habitat.' Other factual inquiries would concern: the extent, and impact, of the intrusion upon plaintiff's property by the 'paths and trails system' planned to allow 'public access through the Foothills lands'; whether there is any reasonable basis for the ordinances' declared aims of encouraging agricultural usage, preserving natural resources and creating wildlife sanctuaries on the land; and generally, the reasonableness of the ordinances' concept that although the foothills may be subdivided into 10-acre homesites, they must nevertheless without compensation therefor remain 'open space' according to the definitions and usages of Government Code section 65560." 57 Cal. App. 3d at 628, 129 Cal. Rptr. at 584.

Since neither the Palo Alto General Plan nor its zoning ordinance purported to authorize affirmative public use of the plaintiffs' land, the court's references to public park and recreational use of the plaintiffs' land, use for a "wildlife habitat," and the proposed "paths and trails system" must have been based on the court's assumption that the City would, in the future, renew its effort to acquire the foothills lands—or at least to acquire enough land for the "paths and trails system"—which might have a depressive effect on the present value of the plaintiffs' land. But these references do not seem to justify the suggestions in later cases that "[t]he spectre conjured up by the various Palo Alto regulations and planning statements that property owners might be required to maintain some kind of public outdoor zoo to be traversed by hikers and birdwatchers," rather than diminution in the value of the plaintiffs' land, was the real basis of the *Eldridge-Beyer* decisions. *Furey v. City of Sacramento*, 146 Cal. Rptr. 485, 493 (App. 1978), *vacated*, 85 Cal. App. 3d 464, 149 Cal. Rptr. 541 (1978). *See also Helix Land Co. v. City of San Diego*, 82 Cal. App. 3d 932, 147 Cal. Rptr. 683 (1978); *Pan Pac. Properties v. County of Santa Cruz*, 81 Cal. App. 3d 244, 146 Cal. Rptr. 428 (1978); *Agins v. City of Tiburon*, 145 Cal. Rptr. 476 (App. 1978), *rev'd*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

40. 145 Cal. Rptr. 476 (App. 1978), *rev'd*, 24 Cal. 3d 266, 598 P.2d 25, 153 Cal. Rptr. 224 (1979).

41. 145 Cal. Rptr. at 478-79.

any reasonable use of the plaintiff's property and that the City had engaged in "significant precondemnation activities" amounting to "unfair conduct." The intermediate appellate court relied on *Eldridge* as establishing that "a valid zoning ordinance could operate so oppressively as to deny any reasonable use to the owner" and thus entitle the owner to compensation.⁴²

When the *Agins* case was reviewed by the California Supreme Court, the decision of the intermediate appellate court was reversed.⁴³ The court said (1) that "a landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance," but "may not . . . elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid";⁴⁴ (2) that the rezoning of the plaintiffs' property to the residential planned development and open space classification "did not unconstitutionally interfere with plaintiffs' entire use of the land or impermissibly decrease its value";⁴⁵ and (3) that the City's "precondemnation activities" did not provide a separate basis for inverse condemnation.⁴⁶ With respect to the latter holding, the court pointed out that the plaintiffs' reliance on *Klopping v. City of Whittier*⁴⁷—where a plaintiff recovered for the decline in market value of his property as the result of an unreasonable delay in instituting eminent domain proceedings following announcement of intent to condemn and other unreasonable conduct—was misplaced. In *Agins*, the court noted, "there was no such delay or conduct."⁴⁸

The United States Supreme Court affirmed the judgment of the California Supreme Court in *Agins*,⁴⁹ holding that Tiburon's open space zoning ordinances "neither prevent the best use of appellant's land [single-family residential use] . . . nor extinguish a fundamental attribute of ownership," and leave appellants "free to

42. *Id.* at 481. The court noted "it can be argued that the actual 'taking' in *Eldridge* was not the downzoning but the path and trail system" *Id.* at 481 n.7. See note 39 *supra*.

43. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

44. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

45. *Id.* at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

46. *Id.* at 277-78, 598 P.2d at 31-32, 157 Cal. Rptr. at 378-79.

47. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

48. 24 Cal. 3d at 278, 598 P.2d at 31, 157 Cal. Rptr. at 378.

49. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

pursue their reasonable investment expectations by submitting a development plan to local officials.”⁵⁰ Moreover, the Court said, “[t]he zoning ordinances benefit the appellants as well as the public by serving the city’s interest in assuring careful and orderly development of residential property with provision for open space areas” and there was “no indication that the appellants’ 5-acre tract is the only property affected by the ordinances”; so this was not a case where the appellants were “solely burdened and unbenefited” by the land use regulations.⁵¹ Since no taking had occurred, the Court said that it need not consider “whether a State may limit the remedies available to a person whose land has been taken without just compensation.”⁵² And, in a footnote, the Court approved the California Supreme Court’s holding that Tiburon’s “good-faith planning activities, which did not result in successful prosecution of an eminent domain claim [because the proposed bond issue failed], [did not] so burden the appellants’ enjoyment of their property as to constitute a taking.”⁵³

*San Diego Gas & Electric Co. v. City of San Diego*⁵⁴ was an inverse condemnation suit instituted before the initial decision of the intermediate appellate court in *Eldridge* was handed down. The utility company sued the City to recover the value of land allegedly taken by virtue of its designation as open space on the City’s general plan, the downzoning of part of the land from an industrial to an agricultural (holding zone) classification, and certain precondemnation activities of the City.⁵⁵ In the alternative,

50. *Id.* at 262 (citations omitted).

51. *Id.*

52. *Id.* at 263.

53. *Id.* at 263 n. 9.

54. 146 Cal. Rptr. 103 (App. 1978), *rev’d on remand without published opinion*, 4 Civ. No. 16277 (filed June 25, 1979), *dismissed for lack of jurisdiction*, 49 U.S.L.W. 4317 (1981).

55. The utility company assembled a parcel of about 412 acres in 1966. In June 1973, the city adopted the open space element of its General Plan, which designated 228 acres of the 412-acre parcel as “open space.” These 228 acres were “at low elevation,” in “a drainage basin, tidal basin or flood plain . . . subject to standing water or ‘ponding’; part is subject to ocean tidal action and portions have been referred to as the Los Penasquitos Lagoon, an estuary and wildlife refuge; a portion is within the State Coastal Act zone.” 146 Cal. Rptr. at 109. Between 1966 and 1973, these 228 acres were zoned as follows: 116 acres as Industrial (M-1A) and 112 acres as Agricultural holding zone (A-1-1). In June 1973, two weeks before the open space element of the General Plan was adopted, the city downzoned 39 of the 116 acres previously zoned Industrial (M-1A) to Agricultural (A-1-10), and 50 of the 112 acres still zoned Agricultural holding zone (A-1-1) were designated as “to be considered for future industrial use.” In September 1973, the City adopted a staff report entitled “Park Reserve Systems,” which discussed the financing and acquisition of park lands and proposed a bond

the company sought mandamus and declaratory relief. The trial court dismissed the alternative claim before trial, but awarded plaintiff a judgment for \$3,169,996, representing the fee simple value of 228 acres of land plus severance damages and appraisal, engineering and attorneys' fees. This judgment was affirmed by the intermediate appellate court in an opinion handed down about two years after the final *Eldridge-Beyer* opinion was issued and about a month after the decision of the intermediate appellate court in *Agins*.

In *San Diego*, the intermediate appellate court accepted the plaintiff's argument that, regardless of the actual zoning of its land—about one-third of which remained zoned for industrial use after the downzoning occurred⁵⁶—designation of the land as "open space" on the City's general plan precluded use of any of the land for industrial development because—although San Diego, as a charter city, was not legally bound to make its zoning consistent with its general plan⁵⁷—the City had, in fact, adopted a policy of prohibiting land development inconsistent with its general plan.⁵⁸ Hence, the court held, industrial development of its land was foreclosed and, since the land was located in "a drainage basin, tidal basin or flood plain"⁵⁹ where nothing but industrial development was feasible, the City's actions, taken together, amounted to a taking of plaintiff's property.⁶⁰ Although the plaintiff had not tried to

issue to finance the acquisition of the open space lands, including the 228 acres owned by the utility company. The bond proposal failed to pass when submitted to the voters.

56. See note 55 *supra*.

57. The requirement of consistency between the zoning and the general plan, imposed by CAL. GOV'T CODE § 65860 (West 1979), did not apply to a charter city such as San Diego unless the city had adopted an ordinance requiring consistency. CAL. GOV'T CODE §§ 65700, 65803 (West 1979). *But see* 1979 CAL. STATS. ch. 304, § 1, *amending* CAL. GOV'T CODE § 65860. "Notwithstanding Section 65803, this section shall apply in a charter city of 2,000,000 or more population to a zoning ordinance adopted prior to January 1, 1979, which zoning ordinance shall be consistent with the general plan of such city by July 1, 1982." *Id.*

58. 146 Cal. Rptr. at 112. This finding by the court negated the City's argument that, "[b]ecause the general plan lacks definiteness and finality, there can be no inverse condemnation because land falls within a certain category on an adopted plan." *Id.* See *Selby Realty Co. v. City of Buena Ventura*, 10 Cal. 3d 110, 119-20, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 805 (1973).

59. 146 Cal. Rptr. at 109.

60. "Company presented expert witnesses who testified the land could not be used for agriculture because of the soil's high salt content; it could not be used for residences because the land is in a flood plan; it could not be used economically for grazing; it could not be used for a golf course because of poor drainage. In short, the only possible use of the land was for industrial. But, there was testimony by experts that City required zoning to be consistent

obtain a conditional use permit and apparently had not tried to get the City to rezone any part of its land for industrial use, the court held that, since the plaintiff "sought only to recover damages in inverse condemnation for a taking of its property," and "was not trying to enjoin City from enforcing the zoning applicable to the property," there was "no failure to exhaust any administrative remedy since none existed."⁶¹ Implicitly, therefore, the court accepted the *Eldridge-Beyer* doctrine that inverse condemnation is the proper remedy "if the zoning is valid but so harsh that it deprives the owner of all beneficial use of its land." Although the court mentioned that a bond proposal to secure the funds needed to acquire the lands designated as open space on the City's general plan failed to pass,⁶² this "precondemnation activity" was apparently not relied on by the court in reaching its decision.

After the California Supreme Court decided the *Agins* case, it remanded the *San Diego* case for reconsideration in light of the intervening decision in *Agins*. The intermediate appellate court then reversed the trial court's judgment with an unpublished opinion⁶³ which included the following cryptic statement:

[Appellant] complains it has been denied all use of its land which is zoned for agriculture and manufacturing but lies within the open space area of the general plan. It has not made application to use or improve the property nor has it asked [the] City what development might be permitted. Even assuming no use is acceptable to the City, [appellant's] complaint deals with the alleged overzealous use of the police power by [the] City. Its remedy is mandamus or declaratory relief, not inverse condemnation. [Appellant] did in its complaint seek these remedies asserting that [the] City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally. How-

with the general plan; the City's definitions of open space . . . give rise to the inference that industrial use would not be permitted in the open space area; the City's own expert testified that he had never seen an industrial development that would be consistent with open space although he did not rule out the possibility entirely. The clear inference is that City would deny any application for industrial development on this parcel because of the open space designation on the general plan. In addition, there was expert testimony that after the open space element was adopted, the land had no economic use and no one would buy it. This was substantial evidence to support the court's conclusion there was inverse condemnation." *Id.* at 113 (citations omitted).

61. *Id.* at 113-14.

62. See note 55 *supra*.

63. 4 Civ. No. 16277 (unpublished opinion filed June 25, 1979).

ever, on the present record these are disputed fact issues not covered by the trial court in its findings and conclusions. They can be dealt with anew should [appellant] elect to retry the case.⁶⁴

The California Supreme Court denied further review and the plaintiff appealed to the United States Supreme Court, asserting that the Fifth and Fourteenth Amendments require payment of just compensation whenever a land use regulation is found to amount to a taking of private property for public use. The United States Supreme Court noted probable jurisdiction of the *San Diego* appeal during the same week in which it decided the *Agins* case, reserving consideration of its jurisdiction until the *San Diego* case was heard on the merits.⁶⁵

III. The San Diego Case: New Supreme Court Doctrine on Regulatory Takings

The decision of the plaintiff to appeal the *San Diego* case to the United States Supreme Court was rather surprising, since the Court has only rarely held a local land use regulation invalid under the Fourteenth Amendment and has never held that a regulatory taking entitles the landowner to compensation, if he demands it, instead of a declaration of invalidity. The plaintiff's position in *San Diego* was supported only by dicta in *Pennsylvania Coal Co. v. Mahon*,⁶⁶ *Goldblatt v. Town of Hempstead*,⁶⁷ and *Penn Central Transportation Co. v. New York City*⁶⁸ to the effect that regulation, if carried too far, will be recognized as a taking.

It will be recalled that the plaintiff's argument when the *San Diego* case was first before the California intermediate appellate court was that San Diego's general plan and zoning ordinance were valid but nevertheless amounted to a taking of plaintiff's property for public use which constitutionally entitled it to compensation based on the full market value of its land. But the plaintiff seemed to change its position somewhat when it filed its appeal with the United States Supreme Court, for it then asserted that the restrictions imposed by the San Diego zoning ordinance and open space

64. *Id.*, quoted in *San Diego Gas & Elec. Co. v. City of San Diego*, 49 U.S.L.W. 4317, 4319 (1981).

65. 447 U.S. 919 (1980).

66. 260 U.S. 393 (1922). See notes 8-12 and accompanying text, *supra*.

67. 369 U.S. 590 (1962). See note 12, *supra*.

68. 438 U.S. 104 (1978). See notes 13-16 and accompanying text, *supra*.

designation were "arbitrary, excessive, and unconstitutional," in addition to asserting that the "purported invalidation remedy proffered by [the] California state courts" was not "constitutionally adequate to substitute for just compensation."⁶⁹ A further change in the plaintiff's position occurred when the *San Diego* case was orally argued on December 1, 1980. Plaintiff's counsel then indicated that plaintiff was "merely seeking interim damages for a deprivation of property without due process of law" rather than "asking full damages for a complete taking without just compensation."⁷⁰ Thus the plaintiff abandoned its claim for the full market value of its land as originally asserted in the trial court.

When the United States Supreme Court noted probable jurisdiction in the *San Diego* case, it seemed that (1) the Court might not reach the merits on the ground that the plaintiff failed to exhaust its administrative and legal remedies;⁷¹ (2) even if the Court reached the merits, it might find that the San Diego zoning ordinance and open space classification did not deprive the plaintiff of the "reasonable beneficial use" of its land, and thus might not reach the compensation issue;⁷² and that (3) even if the Court

69. 48 U.S.L.W. 3814 (1980).

70. 33 LAND USE L. & ZONING DIG., No. 1, p. 4 (1981).

71. At the oral argument, in answer to suggestions from the court that the plaintiff had failed to exhaust its administrative remedies because it never submitted a development plan to the city, counsel for the plaintiff argued that the trial court found that such submission would have been futile because "[t]he clear inference is that City would deny any application for industrial development on this parcel because of the open space designation." *San Diego Gas & Elec. Co. v. City of San Diego*, 146 Cal. Rptr. 103, 113 (App. 1978). But the trial court's finding was simply that "[n]o development could proceed on the property designated as open space unless it was consistent with open space," which does not necessitate the inference drawn by the California intermediate appellate court. Indeed, the City's expert witness testified that a project would not be denied approval simply because it was located within the open space zone and opined that a design for industrial use of the tract could be consistent with the open space designation, stating, "I haven't seen one, but I think that's possible." *Id.* at 113 n. 5.

72. In an *amicus curiae* brief, the Conservation Foundation and five other environmental groups argued that no taking occurred because the plaintiff (a) had never attempted to develop the tract during the seven years between its acquisition and its designation as open space, although the City's general plan and zoning regulations did not then preclude industrial development; and (b) had recouped nearly all of the \$3,500,000 it paid for the tract by selling off 40 acres and by including the entire tract in its rate base. 33 LAND USE L. & ZONING DIG., No. 1, p. 4 (1981). Moreover, only 228 acres (including the 77 acres zoned "industrial") of the plaintiff's 412-acre parcel were designated as "open space" on the general plan. In deciding whether the open space designation amounted to a taking, the Court would presumably consider the entire 412-acre parcel, since it held in *Penn Central*, 438 U.S. 104 (1978), that "[t]aking' jurisprudence does not divide a single parcel into discrete

found that the plaintiff was deprived of the "reasonable beneficial use" of its land, the Court was unlikely to hold that the Fourteenth Amendment requires compensation based on the full market value of the land.⁷³ In fact, however, the Court voted, five to four, to dismiss the *San Diego* case "because of the absence of a final judgment" in the California courts.⁷⁴ The majority reached this conclusion on the ground that the California intermediate appellate court intended the plaintiff to have an opportunity on remand to convince the trial court to resolve the disputed issues not covered by the trial court in its findings and conclusions.⁷⁵ The four dissenters disagreed, concluding that the second, unpublished opinion of the California intermediate appellate court constituted a "final judgment" and that the Court should therefore address the merits of the issue presented on the appeal.⁷⁶

This writer believes that the dissenters are correct in their conclusion that the judgment appealed in the *San Diego* case was a final judgment. But the fact that gives Justice Brennan's dissenting opinion major importance is that his conclusions on the merits were supported by the three justices who concurred in his opinion and that Justice Rehnquist, who voted with the majority on the "final judgment" issue, stated that if he had been satisfied that the appeal was from a final judgment he "would have had little difficulty in agreeing with much of what is said in the dissenting opinion of JUSTICE BRENNAN."⁷⁷ It therefore appears that Justice Brennan's conclusions on the compensation issue may have the support of a majority of the Court.

Briefly stated, Justice Brennan's conclusions are as follows:

(1) "[O]nce a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay

segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130. *But cf.* *American Sav. & Loan Ass'n v. County of Marin*, 637 F.2d 601 (9th Cir. 1980).

73. See discussion of earlier Supreme Court cases dealing with regulatory takings, notes 8-16 and accompanying text, *supra*.

74. 49 U.S.L.W. 4317 (1981). Justice Blackmun delivered the opinion of the Court, in which Burger, C.J., and White, Stevens & Rehnquist, JJ., joined. Justice Rehnquist filed a separate concurring opinion. Justice Brennan filed a dissenting opinion, in which Stewart, Marshall, and Powell, JJ., joined.

75. See opinion of Blackmun, J., 49 U.S.L.W. at 4317, and concurring opinion of Rehnquist, J., *id.* at 4320.

76. See dissenting opinion of Brennan, J., *id.* at 4321.

77. *Id.* at 4320 (Rehnquist, J., concurring).

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";⁷⁸ but

(2) "contrary to appellant's claim that San Diego must formally condemn its property and pay full fair market value, nothing in the Just Compensation Clause empowers a court to order a government entity to condemn the property and pay its full fair market value, where the 'taking' already effected is temporary and reversible and the government wants to halt the 'taking.' Just as the government may cancel condemnation proceedings before passage of title, . . . or abandon property it has temporarily occupied or invaded, . . . it must have the same power to rescind a regulatory 'taking.'"⁷⁹

The second conclusion should be slightly modified to make it clear that courts may terminate a "temporary" regulatory taking by declaring the regulation invalid, and that formal action by the local governing body to "rescind" or "amend" is not required. As thus modified, the rule stated by Justice Brennan should command wide support. Those who have advocated allowing the landowner to require a local government to pay the full market value of the land as compensation for a regulatory taking usually advance some or all of the following arguments:⁸⁰

(1) Land use regulations that result in a taking of private property should be subject to attack in the same manner as any other taking of private property for public use without payment of just compensation.

(2) As long as privately owned land can be drastically restricted in its uses without cost to the public when land use regulations are held invalid, the economic impact of such regulations is not likely to be seriously considered when the decision to adopt the regulations is made.

78. *Id.* at 4325 (Brennan, J., dissenting).

79. *Id.* at 4327 (Brennan, J., dissenting) (citations omitted).

80. See, e.g., Baumgardner, "Takings" Under the Police Power—*The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances*, 30 SW. L.J. 723, 736-38 (1976); Swank, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage*, 28 STAN. L. REV. 779 (1976); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1444-45 (1974).

(3) Invalidation of overly harsh land use regulations is not an adequate remedy because the local governing body can easily frustrate the "victorious" landowner by adopting slightly different regulations which still preclude any reasonable use of his property.

(4) Invalidation of overly harsh land use regulations often leaves the landowner with substantial uncompensated losses even if the ultimate result is to allow him a reasonable use of his land.

The first argument above is essentially an argument for logical symmetry of remedies in all kinds of taking cases, and has been persuasively refuted in Professor Mandelker's symposium article.⁸¹ The second argument—a policy argument—is more substantial, but it can be countered with other policy arguments, some of which are stated in the California Supreme Court's opinion in *Agins*.⁸² (a) the threat of inverse condemnation actions "would have a chilling effect upon the exercise of police regulatory powers at a local level" and "discourage the implementation of strict or innovative planning measures"; (b) it is unfair to treat what the local governing body thought was a police power regulation as an exercise of the power of eminent domain; (c) inverse condemnation judgments might impose excessive financial burdens on local governments and make annual budgeting difficult, especially where land use regulations are adopted by the people through direct initiative; (d) "it seems [an] usurpation of legislative power for a court to force [payment of] compensation"; and (e) determination of the property interest taken and the amount of compensation to be paid will often be difficult.

The third argument for the inverse condemnation remedy in regulatory taking cases is also substantial. The ability of local governments to play games with a plaintiff who has been successful in a suit to invalidate a zoning regulation⁸³ presents a problem for

81. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981).

82. 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377 (1979). See also Baumgardner, *supra* note 80, at 738. The *amicus curiae* briefs filed in *San Diego* argue that a constitutional damage remedy should not be implied since (1) injunctive relief would be adequate, (2) courts should not intervene in matters involving legislative prerogative, and (3) such a remedy would cause "wholesale disruption of government resources and greatly inhibit legitimate regulation, particularly, but not exclusively, in the land use area." 33 LAND USE L. & ZONING DIG. No. 1, p.5 (1981).

83. *Fiore v. City of Highland Park*, 93 Ill. App. 2d 24, 235 N.E.2d 23 (1968), *cert. denied*, 393 U.S. 1084 (1969); *Fiore v. City of Highland Park*, 76 Ill. App. 2d 62, 221 N.E.2d

which no completely satisfactory solution has yet been found. But recent judicial experiments in granting "definitive relief" to victorious plaintiffs in land use cases⁸⁴ suggest that satisfactory solutions are possible, and that it is not necessary, in order to deal with the problem, to compel local governments to pay the value of a fee simple or a restrictive easement in land they only intended to regulate.

The fourth argument for the inverse condemnation remedy originally sought by the plaintiff in *San Diego* may seem to be the strongest of all. But the problem of losses caused by harsh land use regulations while they are in force—that is, prior to judicial invalidation or legislative repeal or amendment—can be resolved by application of the rule stated in Justice Brennan's first conclusion, modified so as to make it clear that the courts may terminate a "temporary" regulatory taking by declaring the regulation invalid.⁸⁵ Alternatively, the federal courts might award the aggrieved

323 (1966).

84. See, e.g., *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960); *Brunette v. County of McHenry*, 48 Ill. App. 3d 396, 363 N.E.2d 112 (1977); *Aurora Nat'l Bank v. City of Aurora*, 41 Ill. App. 3d 239, 353 N.E.2d 61 (1976); *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 277 N.W.2d 475 (1979); *City of Richmond v. Randall*, 215 Va. 506, 211 S.E.2d 56 (1975) (cases where the zoning of a particular tract was held to be unreasonable). See also *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 548-52, 371 A.2d 1192, 1226-27 (1977); *Berenson v. Town of New Castle*, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979) (cases where the whole zoning ordinance was held to be unreasonably exclusionary). In Pennsylvania there is a statutory basis for granting definitive relief. PA. STAT. ANN. tit. 53, §§ 10609.1, 11004(1)(b), 11011(2) (Purdon 1980). See *Casey v. Zoning & Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974); *Appeal of Abcon, Inc.*, 35 Pa. Commw. Ct. 589, 387 A.2d 1303 (1978); *Board of Supervisors v. Barness*, 33 Pa. Commw. Ct. 364, 382 A.2d 140 (1978); *Board of Supervisors v. Walsh*, 20 Pa. Commw. Ct. 275, 341 A.2d 572 (1975); *Ellick v. Board of Supervisors*, 17 Pa. Commw. Ct. 404, 333 A.2d 239 (1975).

85. Justice Brennan's repeated reference to legislative repeal or amendment is mystifying, since a court will presumably invalidate any land use regulation it finds to be a "temporary" *de facto* taking, leaving it to the local governing body to decide whether to "choose formally to condemn the property" or to adopt a less restrictive land use regulation in the hope that it will be held valid if challenged as a *de facto* taking.

In some of the cases where physical invasions of plaintiff's property have been held to constitute a *de facto* taking, it is clear that the taking was only temporary. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946). For a case where a "temporary" regulatory taking was found, see *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978), where the court held that plaintiff had stated a cause of action directly under the Fourteenth Amendment for recovery of "damages resulting from a taking of private property for public use without just compensation" after the Michigan Supreme Court had invalidated the city ordinance found to constitute a taking. See also *Brault v. Town of Milton*, 527 F.2d 730 (2d Cir. 1975), where a three-judge panel initially held that plaintiffs had stated a cause of action directly under the

landowner damages under title 42 of the United States Code, section 1983,⁸⁶ after declaring the land use regulation invalid. In either case, it may be impossible to recover consequential damages, but it is at least possible that consequential damages could be recovered in a section 1983 action.

Although this writer in general approves the conclusions reached by Justice Brennan in the *San Diego* case, this writer does not share Justice Brennan's stated belief that these conclusions are dictated by prior decisions of the Supreme Court. None of the Supreme Court cases relied upon by Justice Brennan held that the Fourteenth Amendment requires that compensation be awarded to a landowner whenever the court finds that a regulatory taking has occurred; nor does any of these cases suggest that any remedy other than invalidation is constitutionally required, whether the regulatory taking is permanent or only temporary.⁸⁷ Since none of the cases relied upon involved an attempt by the landowner to invalidate the land use regulations applicable to his land, any judicial statements about compensation could only be dicta, in any event. On the whole, this writer is inclined to agree with those who assert that the word "taking" was used metaphorically in these cases to describe an invalid exercise of the police power—invalid because the land use regulations in question were too restrictive.⁸⁸ Consequently, this writer would prefer to see Justice Brennan's conclusions in *San Diego* justified on the basis of the policy considerations that support his interpretation of the Fourteenth Amend-

Fourteenth Amendment for recovery of damages for a "temporary" taking after the Vermont Supreme Court invalidated a zoning ordinance prohibiting use of their land for a trailer park. On rehearing *en banc*, however, the court held that the plaintiffs had failed to state a cause of action, even assuming that "a suit for damages can be founded directly on the Fourteenth Amendment." *Id.* at 738. In an action directly under the Fourteenth Amendment, it is clear that a plaintiff must satisfy the \$10,000 jurisdictional requirement of 28 U.S.C. § 1331 (1976).

86. This is the current codification of a portion of the Civil Rights Act of 1871 which provides as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1974). For further discussion of this statute see text at notes 97-99 *infra*.

87. See notes 8-16 and accompanying text, *supra*.

88. This view is rejected by Justice Brennan, who characterizes it as "tampering with the express language of the opinion" in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). 49 U.S.L.W. at 4324 n.14.

ment as applied to regulatory taking cases,⁸⁹ not on the theory that the proper interpretation of the Fourteenth Amendment as applied to such cases is perfectly clear—so clear as to dictate the conclusions reached by Justice Brennan. In fact, of course, even the application of the Fifth Amendment to formal eminent domain proceedings is often far from clear; for example, it was far from clear that the term “public use” in the taking clause of the Fifth Amendment really meant “public purpose,” as the Supreme Court held in *Berman v. Parker*.⁹⁰

IV. Regulatory Takings and Inverse Condemnation: Looking to the Future

How will the state courts deal with inverse condemnation claims based on allegations of regulatory taking, now that the Supreme Court has handed down its decision in *San Diego*? No doubt most state courts will accept Justice Brennan's views, as stated in *San Diego*, to be the best evidence of the Supreme Court's current interpretation of the Fourteenth Amendment as applied to regulatory taking cases. Hence no state court will find itself compelled to award the full market value of land as compensation whenever a regulatory taking is found and the aggrieved landowner demands compensation, and it is unlikely that many state courts will adopt a rule requiring payment of such compensation on the basis of their own state constitutional provisions as to taking or due process. Indeed, two of the most prestigious state courts have already held that compensation should not be awarded on the theory of a “permanent” taking even if land use regulations are found to deprive the landowner of any reasonable beneficial use of his land.⁹¹ But state courts will presumably apply the new

89. See text after note 80, *supra*. See also Justice Brennan's discussion of policy considerations, 49 U.S.L.W. at 4327 n.26. But he rejects such considerations as a basis for determining “the applicability of express constitutional guarantees.” 49 U.S.L.W. at 4327.

90. 348 U.S. 26 (1954).

91. See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979); *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976). In the *French* case, the New York court rejected the inverse condemnation remedy sought by the plaintiff on the ground that compensable takings, where there is “an actual appropriation . . . by title or governmental occupation” are different in kind from a purported exercise of the police power, even though the latter “may impose so onerous a burden on the property regulated that it has, in effect deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its

rule that deprivation of any reasonable beneficial use while very restrictive land use regulations are in force must be treated as a "temporary" taking for which compensation is required.⁹²

Both the state and the federal courts will have to work out, on a case by case basis, how "[o]rdinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary 'takings' involving formal condemnation proceedings, occupations, and physical invasions," can be adapted to provide principles for determining just compensation for "temporary" regulatory takings.⁹³ This is likely to be a difficult task. It is not very helpful to be told that, "[a]s a starting point, the value of the property taken may be ascertained as of the date of the 'taking.'"⁹⁴ In the *San Diego* case it is not clear that the plaintiff's land would have been reduced in value by a merely "temporary" regulatory taking, since the plaintiff had never applied for a development permit or a variance, had not sought to have the restrictive zoning and/or the open space designation of its land changed, and had not shown that any viable development plan was frustrated by the restrictive regulations alleged to amount to a regulatory taking. In such a case, it is possible that courts will find that no compensation is required after the restrictive regulation has been invalidated. On the other hand, a landowner may clearly suffer substantial consequential losses as a result of restrictive regulations that interfere with a viable development plan. But in jurisdictions

economic value." *Id.* at 593, 350 N.E.2d at 385, 385 N.Y.S.2d at 8. Hence, the New York court said, "[i]n all but exceptional cases . . . such a regulation does not constitute a 'taking,' . . . but amounts to a deprivation or frustration of property without due process of law and is therefore invalid." *Id.* This view was reiterated in *Penn Central Transp. Co. v. New York City*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977). When the United States Supreme Court reviewed *Penn Central*, it rejected the view that regulation can never amount to a "taking," but did not suggest that the Fourteenth Amendment requires payment of compensation rather than invalidation when a regulatory "taking" occurs. *See* 438 U.S. 104, 123 n. 25 (1978).

92. *See Lomarch Corp. v. Mayor of Englewood*, 51 N.J. 108, 237 A.2d 881 (1968), where the court upheld a statute authorizing a municipality, upon application for approval of a land subdivision, to reserve for one year, for future public use, any land within the proposed subdivision shown on the official map as a park or playground, but also held that the municipality must compensate the landowner for a temporary taking by paying the value of a one-year option to purchase the land reserved. The court said such compensation was required both by the New Jersey Constitution and by the Fourteenth Amendment. The compensation requirement is now codified in N.J. REV. STAT. ANN. § 40:55D-44 (West Supp. 1976).

93. 49 U.S.L.W. at 4327 (Brennan, J., dissenting).

94. *Id.*

where the eminent domain provision prohibits only a taking of private property for public use, consequential damages generally cannot be recovered.⁹⁵

Justice Brennan apparently assumes that in cases of "temporary" regulatory taking landowners may sue local governments directly under the Fourteenth Amendment in either the state or federal courts. Thus a landowner could sue, either in a state or federal court, (1) to invalidate unduly restrictive land use regulations and (2), at the same time, to recover compensation for a "temporary" taking during the time when the regulations were in force. Alternatively, it seems that a landowner could sue in a federal court for the same kinds of relief under title 42 of the United States Code, section 1983.⁹⁶ It is now settled that municipalities and other local government units are "persons" and may therefore be liable under section 1983,⁹⁷ that the good faith of local government officials whose actions deprive a "person" of federal constitutional or statutory rights does not immunize the local government from such liability,⁹⁸ and that there is a cause of action under section 1983 when one is deprived of property without due process of law.⁹⁹

It is true, as Professor Mandelker points out in his symposium article, that the federal courts have held that the section 1983 does not create a right to recover money damages in all circumstances.¹⁰⁰ But where invalidation of harsh land use regulations leaves the landowner with uncompensated losses caused by the invalid regulations, it seems likely that the federal courts will award damages under the Act. The existence of such a remedy is clearly implied in *Gordon v. City of Warren*.¹⁰¹ Although the damage rem-

95. With some exceptions, "consequential damages" are not recoverable under state constitutional provisions requiring compensation only when private property is "taken" for public use. But more than half the state constitutions contain provisions requiring compensation when private property is either "taken or damaged" for public use. Under the latter provisions, consequential damages may be recovered. EMINENT DOMAIN, *supra* note 3, at § 14.1(1). California has a "taken or damaged" clause in its constitution, and this may have been the basis for the trial judge's award of appraisal, engineering and attorneys' fees totaling \$122,559.07 in *San Diego*.

96. See note 86 *supra*.

97. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), *overruling*, *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Monroe v. Pape*, 365 U.S. 167 (1960).

98. *Owen v. City of Independence*, 445 U.S. 622 (1980).

99. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1978).

100. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981).

101. See note 86 *supra*.

edy was denied in *Jacobson v. Tahoe Regional Planning Agency*,¹⁰² the court's decision was based largely on the fact that the defendant had neither the power of eminent domain nor the power to levy and collect taxes, being dependent upon California and Nevada for funds.¹⁰³ In addition, the *Jacobson* Court adduced the same policy arguments summarized above for holding that "the landowner should not have an option to sue for damages *rather than* to attack the validity of a zoning regulation which allegedly has diminished the market value of the property."¹⁰⁴ In the more usual case where the defendant is a unit of local government with the power of eminent domain and the power to tax, however, a court may well be willing *both* to invalidate a regulation that amounts to a *de facto* taking and to award damages for losses caused by the regulation while it was in force.¹⁰⁵

It is possible that the federal courts will apply the federal abstention doctrine and refuse to consider actions for compensation for "temporary" regulatory takings, whether they are based directly on the Fourteenth Amendment or on section 1983. As Professor Mandelker points out in his symposium article, "[w]hile the United States Supreme Court has not yet considered the federal abstention doctrine in land use taking cases, several lower federal courts have applied federal abstention to decline jurisdiction in cases of this type."¹⁰⁶ But there are many regulatory taking cases where the lower federal courts have not declined jurisdiction,¹⁰⁷ including one case where the state courts first invalidated the chal-

102. 474 F. Supp. 901 (D. Nev. 1979).

103. *Id.* at 903.

104. *Id.* at 903-04. Although these arguments are persuasive when declaratory and injunctive relief will provide an adequate remedy, the *Jacobson* Court conceded that such relief was unavailable to the plaintiffs, "inasmuch as they owned no interest in the subject property at the time suit was commenced." *Id.* at 902. See also *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1366 (9th Cir. 1978).

105. Cf. Professor Mandelker's view of the *Jacobson* case, Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981).

106. See discussion of the doctrine in Professor Mandelker's symposium paper, *id.* at 514. Also see Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 YALE L.J. 1134 (1980).

107. *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978) (action brought under 14th Amendment and 42 U.S.C. § 1983 (1976)); *Arastra Ltd. Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976); *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1975); *Steel Hill Dev., Inc. v. Town of Sanbornton*, 335 F. Supp. 947 (D.N.H. 1971), *aff'd*, 469 F.2d 956 (1st Cir. 1972). See also *Construction Industry Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

lenged land use regulation and the federal court then held that the plaintiff had stated a cause of action under the Fourteenth Amendment for compensation on the basis of the temporary taking that occurred while the regulation was in force.¹⁰⁸ Although some federal courts may be disposed to decline jurisdiction when a landowner initially challenges the validity of local land use regulations, on the theory that “[f]ederal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems,”¹⁰⁹ it would seem that courts may be more willing to award compensation or damages for the temporary taking in cases where the local regulations are held invalid by state courts on taking grounds.

A landowner who seeks both to invalidate a harsh land use regulation as a *de facto* taking and to recover compensation for losses caused by the regulation while it was in force should be able to obtain substantially the same relief whether the action is based directly on the Fourteenth Amendment or on section 1983. A section 1983 action, however, would also, it seems, allow recovery of damages where the land use regulation is held invalid solely because its purpose is improper, or the means chosen to achieve its purpose is unreasonable, or the regulation denies the plaintiff equal protection of the laws—cases in which a court would ordinarily not find a *de facto* taking. And, since section 1983 has been said to create “a species of tort liability,”¹¹⁰ it may be possible for a landowner to recover for consequential losses not compensable under ordinary constitutional taking clauses.¹¹¹

To allow a landowner both to sue for invalidation of a harsh land use regulation *and* for compensation (or damages) for the losses caused by the regulation while it was in force would, to a considerable extent, reconcile the opposing policy arguments previously noted in connection with the question whether courts should *either* limit aggrieved landowners to the remedy of invalidation *or* award them compensation on the basis of a permanent regulatory taking. Such a solution of the problem would require local govern-

108. *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

109. *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 2d 1092, 1094 (9th Cir. 1976), *quoted in Sederquist v. City of Tiburon*, 590 F.2d 278, 281 (9th Cir. 1979). *Sederquist* contains a good discussion of criteria for applying the abstention doctrine in land use control cases.

110. *Carey v. Piphus*, 435 U.S. 247, 253 (1978).

111. *See note 95 supra*.

ment decisionmakers to consider more seriously the economic impact of proposed land use regulations on landowners, and would assure compensation for most losses suffered by landowners as a result of invalid regulations; but it would have a less chilling effect on "the implementation of strict or innovative planning measures" by "the exercise of police regulatory powers at a local level," would impose smaller financial burdens on local governments when their land use regulations are declared invalid, and would involve less "usurpation of legislative power" than a judicial rule mandating payment of compensation on the basis of a permanent regulatory taking.