Volume 21
Issue 1 *Winter 1981*

Winter 1981

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Recommended Citation

Scott Hancock, *Supreme Court Fails to Reach Inverse Condemnation Issue*, 21 Nat. Resources J. 169 (1981).
Available at: https://digitalrepository.unm.edu/nrj/vol21/iss1/10

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SUPREME COURT FAILS TO REACH INVERSE CONDEMNATION ISSUE

LAND USE–EMINENT DOMAIN: California city zoning ordinances held not violative of Fifth Amendment proscription against taking of private property without compensation. The Supreme Court did not reach the issue presented: whether a state may refuse to allow the inverse condemnation remedy if a taking can be shown. *Agins v. City of Tiburon,* 100 S.Ct. 2138 (1980).

BACKGROUND

With expansion of the legislative police power to zoning and land use regulation,[1] the question of when the exercise of the power becomes an uncompensated taking has bewildered both municipalities and landowners. As an exercise of police power, a zoning ordinance properly restricts a property owner's rights in the interest of public health, safety, morals, and general welfare.[2] If the ordinance constitutes a taking, the government body has exercised the power of eminent domain. The Fifth Amendment of the U.S. Constitution, applicable to the states through the Fourteenth Amendment, demands compensation. To force compensation where no proceeding in eminent domain has been instituted, the remedy of inverse condemnation provides for compensation based on the premise that the authorities have effectively exercised the power of eminent domain.[3] In addition, the property owner can seek to challenge the constitutionality of the ordinance through equitable remedies of mandamus or declaratory relief.

As seen from the zoning municipalities' point of view, inverse condemnation poses an economic threat to zoning decisions. If a landowner may force a municipality to pay for diminution in value or loss of economic use, then the municipality must face each zoning change with anticipation of possible monetary liability. Public resources to

1. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

2. Village of Belle Terre v. Boraas, 416 U.S. 1 (1973); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

3. United States v. Clarke, 100 S.Ct. 1127 (1980). For a general discussion of inverse condemnation remedy as applied to zoning ordinances, see Fulham, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance,* 26 STAN. L. REV. 1439 (1974).

compensate landowners may not be available. In the opinion of some, this would have a chilling effect on land use controls, reduce effective allocation of financial resources, and shift compensation decisions in planning from municipalities to the judiciary.[4]

Landowners affected by zoning ordinances are concerned that equitable relief will not be full relief in all cases. Equitable remedies would not compensate an owner for lost use during litigation to invalidate an unconstitutional ordinance. Property taxes continue, as do mortgages and other private obligations. Inverse condemnation can redress these damages; equitable declarations and mandates do not.[5]

But courts must find that an applicable Fifth Amendment taking has occurred before either the legal or equitable remedies afford relief. Therefore, the criteria used to determine if a taking has occurred become crucial.

The U.S. Supreme Court has made no definitive statement applicable to all circumstances in which a taking may arise. The case law on this point remains confused and the Supreme Court maintains an essentially *ad hoc* approach.[6] Some vague guidelines have emerged, however.

First, the extent of diminution in value of the affected property is a factor.[7] Where it can be shown that a zoning ordinance does not substantially advance a legitimate state interest, a taking has occurred.[8] Further, if a regulation prohibits the reasonable economic use of the land, it may be deemed a taking.[9] Finally, an ordinance cannot extinguish a fundamental attribute of ownership.[10]

Once a taking is established, the property owner may find that a cause of action framed in inverse condemnation is unacceptable to the courts.

States that have considered the issue disagree as to the availability of the inverse condemnation remedy. For example, California denies the remedy to property owners.[11] Arizona agrees with California,[12]

4. Fulham, *supra* note 4, at 1450-51.

5. 68 CALIF. L. REV. 822, 826 (1980).

6. Kaiser Aetna v. United States, 444 U.S. 164 (1979). This case affirmed the Court commitment to an *ad hoc* approach. *See generally* Note, *Navigable Water Not Always Subject to Free Public Access, supra* at 161.

7. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

8. *See* Villege of Belle Terre v. Boraas, 416 U.S. 1 (1973); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

9. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138, n. 36 (1978).

10. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

11. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979); *aff'd in part* 100 S.Ct. 2138 (1980).

12. Davis v. Pima County, 590 P.2d 459 (Ariz. App. 1978), *cert. denied*, 442 U.S. 942 (1979).

while Georgia prefers inverse condemnation to other equitable remedies.[13] Other jurisdictions limit the remedy to specific types of takings.[14]

The U.S. Supreme Court has indicated some preference for inverse condemnation witout squarely acknowledging the preference as such. In *Hurley v. Kincaid,*[15] a property owner whose lands were threatened by a federal flood control project sued to enjoin the continuance of the project. The Court held injunction to be improper since no taking had yet occurred and stated that the property owner's remedy would be an action at law.[16] Carrying forward the *Hurley* principle, the Court again announced its preference in *Dugan v. Rank*[17] and its companion case *Fresno v. California,*[18] where injunctive relief was again sought. The Court said:

> In an appropriate proceeding there would be a determination of not only the extent of such a servitude but the value thereof based upon the difference between the value of respondents' property before and after the taking. Rather than a stoppage of the government project, this is the avenue of redress open to respondents.[19]

In *United States v. Gerlach Live Stock Co.,*[20] the federally constructed Friant Dam, part of the California Central Valley project, deprived some owners of the seasonal flooding of their land for which they sought compensation. The posture of the case precluded the landowners from seeking equitable relief because the project was an accomplished fact. Recognizing this, the Court saw compensation as the alternative.

> [W]ithholding equitable remedies, such as specific performance, mandatory orders or injunction, does not mean that no right exists. There may still be a right, invasion of which would call for indemnification. *In fact, adequacy of the latter remedy is usually grounds for denial of the former.*
>
> But the public welfare, which requires claimants to sacrifice their benefits to broader ones from a higher utilization, does not necessarily require that their loss be uncompensated any more than in other

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13. Clifton v. Berry, 259 S.E.2d 35 (Ga. 1979).
14. Hermanson v. Board of County Comm. 595 P.2d 694 (Colo. App. 1979); Eck v. City of Bismarck, 283 N.W.2d 193 (N.D. 1979); Village of Willoughby Hills v. Corrigan, 278 N.E.2d 658, 665 (Ohio 1972), *cert. denied;* Brazil v. City of Auburn, 610 P.2d 909 (Wash. 1980).
15. 285 U.S. 95 (1932).
16. *Id.* at 104.
17. 372 U.S. 609 (1963).
18. 372 U.S. 627 (1963).
19. Dugan v. Rank, 372 U.S. 609, 626 (1963).
20. 339 U.S. 725 (1950).

> takings where private rights are surrendered in the public interest. (emphasis added.)[21]

In passing on the availability of an action under the Tucker Act,[22] which allows suits for damages against the federal government, the Court in the *Regional Rail Reorganization Act Cases*[23] answered the proposition that a Tucker Act remedy for damages would be inadequate, by saying:

> We hold, to the contrary, that while the conveyance provisions of the Rail Act might raise serious constitutional questions if a Tucker Act suit were precluded, the availability of the Tucker Act *guarantees an adequate remedy* at law for any taking which might occur as a result of the final-conveyance provisions. (emphasis added.)[24]

A more recent indication of the availability of the remedy arose in *United States v. Clarke.*[25] Anchorage, Alaska claimed effective condemnation of certain Indian trust lands by its annexation and maintenance of a roadway previously constructed by another party. Anchorage sought authority under 25 U.S.C. § 357 (1976), which gives states and territories power to condemn lands allotted to Indians. Under these specific circumstances, the Court held that condemnation as contemplated by the statute does not authorize a municipality to physically seize property and pay for it afterwards in inverse condemnation proceedings brought by the United States as trustee. Although not an issue in this case, the use and availability of the inverse condemnation remedy was once again recognized in the federal courts.[26]

AGINS v. CITY OF TIBURON

The California Case

In this climate of opposing concerns and solutions, owners of five acres of unimproved ridgeland brought suit against the city of Tiburon, California. Several years after plaintiffs' initial acquisition, the city of Tiburon responded to a California law that required municipalities to prepare general plans for land use and development of open spaces[27] by adopting ordinances[28] which restricted plaintiffs'

21. *Id.* at 752.
22. 28 U.S.C. § 1491 (1976).
23. 419 U.S. 102 (1974).
24. *Id.* at 149.
25. 100 S.Ct. 1127 (1980).
26. *Id.* at 1129.
27. CAL. GOV'T. CODE § 65302(a) & (e) (Supp. 1979).
28. City of Tiburon, Cal., Ordinance Nos. 123 N.S. and 124 N.S. (June 28, 1973).

land to single family residential development or open space usage. These ordinances permitted plaintiffs to build between one and five single family dwellings on their property. They did not seek approval of any development plan, but rather filed suit in California Superior Court, stating two causes of action based on Fifth Amendment violations. The first cause was in inverse condemnation, seeking $2 million in damages. The second cause of action requested invalidation of the ordinance as an unconstitutional attempt to take property without just compensation. The city of Tiburon's demurrer was granted and plaintiffs appealed.

The California Supreme Court sustained the demurrer on two points. They first held that a landowner alleging deprivation of substantially all use of his land may not seek damages in inverse condemnation, but is restricted to declaratory relief or mandamus.[29] Basing this holding largely on policy arguments, the California court stated the landowner "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.[30]

On the taking issue, the court held that an ordinance may only be an unconstitutional taking and therefore invalid where it effectively deprives an owner of substantially all reasonable use of the property.[31] Here, reasonable use remained. Taking judicial notice that appellants would be allowed to build between one and five residences on the property, the California court concluded that no taking had occurred.[32]

The U.S. Supreme Court Review

As the Supreme Court received the case, the judicial notice taken by the California court restricted the review to the facial unconstitutionality of the ordinances. Appellants' alternate charge that, as applied to them, the ordinances were an unconstitutional taking was avoided.[33]

After narrowing the review, the Court proceeded in typical *ad hoc* fashion. Approaching the question as a balancing of public and private interests, the Court checked the facts against precedent, adding essentially nothing new to the primary question of when an ordinance

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29. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd in part*, 100 S.Ct. 2138 (1980).
30. *Id.* at 273, 598 P.2d at 28.
31. *Id.* at 277, 598 P.2d at 31.
32. *Id.*
33. Agins v. City of Tiburon, 100 S.Ct. 2138, 2141 (1980).

exceeds the police power and becomes a taking under the powers of eminent domain. In affirming the California Supreme Court, it found that the zoning ordinances "substantially advanced legitimate governmental goals."[34] California had determined that control of open space land was desirable and the City wanted "to prevent the residents of Tiburon from the ill-effects of urbanization."[35] Neither did the ordinances "prevent the best use of appellants' land,"[36] or "extinguish a fundamental attribute of ownership."[37] The latter points affirm the California holding that a down-zoning with corresponding diminution in value leaves the property owner with a reasonable use. Owners, left with the down-zoned land, are not deprived of substantially all reasonable use if any use remains.

Agins marginally added definition to the diminution in value that will be considered a taking. The Court noted that under the ordinances the property owners in *Agins* "will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that appellants might suffer."[38]

Presumably, protection of appellants' land from surrounding development inconsistent with the ordinances is considered a benefit. If such is the case, then the benefits due to down-zoning or other zoning restrictions will always offset the diminution in market value due to the same ordinance. A degree of diminution that would have shown unfairness before *Agins* will now be subject to the further offset of benefits. The burden, implicit in charging that an ordinance is facially unconstitutional, is thereby increased.

Since the Court found no taking in *Agins,* it avoided the issue of whether California could limit the inverse condemnation remedy.[39] Speaking to the problem would have cleared confusion prevalent in state court decisions; a confusion promoted by the apparent preference in the Court's own opinions for the remedy.

CONCLUSION

Agins should be well received by zoning authorities. It affirms the broad use of zoning in situations where land values will be adversely

34. *Id.*
35. Agins v. City of Tiburon, 100 S.Ct. 2138, 2142 (1980).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 2143.

affected. The use of their police power is once more extended and the need for costly eminent domain diminished.

As to both municipalities' and landowners' concerns over the availability of the inverse condemnation remedy, *Agins* unfortunately perpetuates uncertainty. The Court failed to reach the issue, as it felt constrained to pass upon it only when a clear taking has occurred.[40] After all, the remedy becomes relevant only where a violation of right is shown. California, however, did not feel so constrained, and so some doubt remains as to the Court's motivations.

Whatever the Court reasons, *Agins* leaves the states free to reject the inverse condemnation remedy. The policy decisions inherent in such a choice will be of primary importance in the decisions reached.

If nothing more than declaratory relief or mandamus is available to the aggrieved landowner, the zoning authority has no real incentive to assure the exercise of the police power is not excessive. An invalidated ordinance becomes an inconvenience; the municipality can start anew. But if the municipality knows it must compensate a property owner damaged by the ill-conceived or overreaching ordinance with funds it presumably has not allocated for such use, it would have to approach land use control with considerably more caution. The result might be the chilling effect feared by some. Alternatively, the result might be enactment of more balanced and well considered zoning ordinances.

Ultimately, the question of limiting remedies in cases of uncompensated taking requires familiar judicial balancing of public property rights against private property rights. The decision which lays to rest this confused area of the law will not be able to avoid determination of which rights are pre-eminent.

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40. *Id.* at 2143.