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Private Property Rights and Local Government Land Use Control: 42 U.S.C. § 1983 as a Remedy Against Unconstitutional Deprivations of Property

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PRIVATE PROPERTY RIGHTS AND LOCAL GOVERNMENT LAND USE CONTROL: 42 U.S.C. § 1983 AS A REMEDY AGAINST UNCONSTITUTIONAL DEPRIVATIONS OF PROPERTY

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I. INTRODUCTION

"That rights in property are basic civil rights has long been recognized."[1]

Although constitutionally protected, property rights are not inviolate. Property is always subject to the controls of "the laws of the land."[2] Often the laws of the land take the form of local land use controls which result in substantial impairment of the uses of real property. In such situations, aggrieved property owners increasingly have been turning to the broad civil remedies found in the Civil Rights Act of 1871, 42 U.S.C. section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.[3]

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1. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

2. BLACKSTONE, COMMENTARIES 138 (1782). The U.S. Supreme Court noted, in Parratt v. Taylor, 451 U.S. 527, 529 n. 1 (1981), that "property interests 'are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' " (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). *See also*, CUNNINGHAM, STOEBUCK & WHITMAN, THE LAW OF PROPERTY ch. 1 (1984); RATCLIFFE, LAND POLICY: AN EXPLANATION OF LAND IN SOCIETY ch. 1 (1976).

3. The jurisdictional grant which applies to section 1983 is found in 18 U.S.C. § 1343(3), which provides for original, but not exclusive, jurisdiction in the federal district courts. *See* Martinez v. California, 444 U.S. 277 (1980). Jurisdiction may also be grounded on the existence of a general federal question. 18 U.S.C. § 1331(a). A plaintiff need not bring an action in state court to vindicate his rights before bringing a § 1983 action in federal court. Monroe v. Pape, 365 U.S. 167 (1961). Nor must he exhaust administrative remedies, Ellis v. Dyson, 421 U.S. 426 (1975), except under certain limited circumstances. Patsy v. Bd. of Regents, 457 U.S. 496 (1982). However, exhaustion of remedies must be distinguished from ripeness

Section 1983 is authorized by the fourteenth amendment,[4] which prohibits state infringement of civil rights.[5] The basic elements of a cause of action under the statute were restated by the Supreme Court in *Parratt v. Taylor*:[6]

> [I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.[7]

II. "Persons"

The statute creates a cause of action for any "citizen" or "person" within the jurisdiction of the United States. Assuming that the individual plaintiff can plead direct injury to a personal, federally-created right, standing under section 1983 should exist.[8] Corporations are also considered "persons" and are protected by section 1983 against violations of the fourteenth amendment.[9]

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of claims. Williamson County Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985).

4. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The fifth amendment, which is applicable to the states through the fourteenth amendment, Chicago, B. & Q. Ry. v. City of Chicago, 166 U.S. 226 (1897), provides, "[n]o person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Parallel provisions are found in the Florida Constitution: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . ." FLA. CONST. art. X, § 6(a) (1968); "No person shall be deprived of life, liberty or property without due process of law. . . ." FLA. CONST. art. I, § 9 (1968).

5. In *Monroe*, 365 U.S. at 171-72, the Court notes that "[t]here can be no doubt . . . that Congress had the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."

6. 451 U.S. 527 (1981). For a useful analysis of the case, see Blum, *The Implications of Parratt v. Taylor for Section 1983 Litigation*, 16 URB. LAW. 363 (1984). For a succinct legislative history of section 1983 and an excellent overview of the statute, see A.B.A., Section 1983: SWORD AND SHIELD (Freilich & Carlisle, eds. 1983); *see also* Note, *Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism*, 53 S. CAL. L. REV. 945 (1980).

7. *Parratt*, 451 U.S. at 535.

8. Warth v. Seldin, 422 U.S. 490 (1975).

9. Des Vergnes v. Seekonk Water Dist., 601 F.2d 9 (1st Cir. 1979); Safeguard Mut. Ins. Co. v. Miller, 472 F.2d 732 (3d Cir. 1973); Kennedy Park Homes Ass'n v. City of Lack-

The more difficult issue is to determine who may be sued for causing deprivation of constitutional rights. Although the statute provides that it may be asserted against "any person" who violates protected rights, it is well settled that the statute was not meant as a waiver of the eleventh amendment,[10] which prohibits citizens' suits for damages against the states[11] absent express waiver.[12]

In a 1961 case, *Monroe v. Pape*,[13] the Supreme Court held that cities, and by implication, other local governments, were not "persons" subject to suit under section 1983. That decision effectively foreclosed Civil Rights Act redress for local land use policies until 1978, when the Court overruled *Monroe* on that point. In *Monell v. Department of Social Services*,[14] the Court held that "Congress *did* intend municipalities and other local government units to be included among those persons to whom section 1983 applies."[15] The Court limited its holding to "local government units which are not considered part of the State for eleventh amendment purposes."[16] Since the *Monell* decision, landowners have not hesitated to avail themselves of the more liberal availability of the damages remedy for regulatory "takings" existing under section 1983.[17]

Although state agencies, as "arms of the state," are immune from section 1983 damages liability,[18] there was, until recent years,

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awanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

10. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. This language has been construed to prohibit damages suits against one of the United States by citizens of the same state. Employees of Dep't of Pub. Health and Welfare v. Dep't of Pub. Health and Welfare, 411 U.S. 279 (1973).

11. Edelman v. Jordan, 415 U.S. 651 (1974); Quern v. Jordan, 440 U.S. 332 (1979); *cf.* Hutto v. Finney, 437 U.S. 678 (1978) (Brennan, J., concurring). The eleventh amendment bars unconsented damages suits against a state but does not bar injunctive actions to enjoin states from violating the U.S. Constitution. Ex parte Young, 209 U.S. 123 (1908).

12. Although the eleventh amendment is phrased as a limitation on the jurisdiction of the federal courts, it has been treated as a species of sovereign immunity, which can be waived by a state. Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). The Florida Constitution states that "[p]rovisions may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." FLA. CONST. art. X, § 13 (1968). Express waiver for damages liability arising out of regulatory "takings" is found in §§ 161.212, 253.763, 380.085 and 403.90, FLA. STAT. (1983).

13. 365 U.S. 167 (1961).

14. 436 U.S. 658 (1978).

15. *Id.* at 690 (emphasis in original).

16. *Id.* at 691 n. 54.

17. Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); Parks v. Watson, 716 F.2d 646 (9th Cir. 1983); Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983).

18. *Edelman*, 415 U.S. 651.

some question as to whether counties, as "political subdivisions" of the state,[19] shared the immunity. In *Edelman v. Jordan*,[20] the Supreme Court noted in dictum that "a county does not occupy the same position as a State for purposes of the Eleventh Amendment. . . . [W]hile county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment."[21] The Court reaffirmed its interpretation of the eleventh amendment in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*:[22]

> By its terms, the protection afforded by that Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."[23]

In addition to government entities, government officials may be sued in their official and individual capacities for violation of protected rights under section 1983.[24] Individual liability has been

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19. Florida is "divided by law into political subdivisions called counties" which "may be created, abolished or changed by law." FLA. CONST. art. VIII, § 1(a) (1968). As political subdivisions, counties are entitled under Florida law to sovereign immunity from damage actions. Kaulakis v. Boyd, 138 So. 2d 505 (Fla. 1962); Jackson v. Palm Beach County, 360 So. 2d 1 (Fla. 4th DCA 1978). The Florida Constitution also provides that a county has "all power of local self-government not inconsistent with general law. . . ." FLA. CONST. art. VIII, § 1(g) (1968). General county powers are enumerated in ch. 125, FLA. STAT. (1983). To the extent that a federal court will look to state law to furnish the facts defining the nature of the political body in question, Florida counties appear to be "persons" amenable to § 1983 actions. *See* Moor v. County of Alameda, 411 U.S. 693 (1973). It is clear, however, that the existence of immunity under the eleventh amendment is a question of federal, not state, law. Owen v. City of Independence, 445 U.S. 622 (1980).

20. 415 U.S. 651.

21. *Id.* at 667 n. 12.

22. 440 U.S. 391 (1979).

23. *Id.* at 400-01. Apparently the lower federal courts agree that counties are persons subject to suit under section 1983. *See, e.g.*, Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983); Van Ooteghem v. Gray, 584 F. Supp. 897 (S.D. Tex. 1984); Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984); Sanders v. St. Louis County, 724 F.2d 665 (8th Cir. 1983); Ocean Acres Ltd. P'ship v. Dare County Bd. of Health, 514 F. Supp. 1117 (E.D.N.C. 1981).

24. Monell v. Department of Social Servs., 436 U.S. 658 (1978); Owen v. City of Independence, 445 U.S. 622 (1980).

asserted against a wide variety of public officials in the land use context, including a city mayor and council members,[25] a building inspector,[26] and a chief real estate agent for a water district.[27] Although individual government officials may be sued, their actions do not subject the government entity to vicarious liability on a respondeat superior theory unless they act pursuant to an official government custom or policy.[28] Private citizens or organizations which conspire or act jointly with public officials may also be liable for constitutional deprivations under section 1983.[29]

III. "UNDER COLOR OF STATE LAW"

The first major element of a section 1983 action is that the deprivation of a federal right must occur "under color of any statute, ordinance, regulation, custom or usage of any State." This "color of law" requirement is an essential element of the plaintiff's prima facie case. The phrase includes not only actions taken pursuant to the express command of law, but may also include "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[30] The Supreme Court has equated this statutory language to the "state action" requirement of the fourteenth amendment,[31] stating that "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State."[32] Furthermore, the language "ordinance . . . of any State" clearly embraces local ordinances.[33]

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25. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1983).

26. Laverne v. Corning, 522 F.2d 1144 (2d Cir. 1975).

27. Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir. 1983), *cert. denied*, 461 U.S. 847 (1983).

28. *Monell*, 436 U.S. 658.

29. Adickes v. Kress & Co., 398 U.S. 414 (1970); *Greenville County*, 716 F.2d 1409; *Westborough Mall*, 693 F.2d 733. The government official need not be named as defendant in a § 1983 suit against a private co-conspirator. 42 U.S.C. § 1985 provides for civil actions arising out of conspiracies to interfere with civil rights; however, the statute requires a showing of a suspect class. Kimble v. D.J. McDuffy, Inc., 648 F.2d 340 (5th Cir. 1981), *cert. denied*, 454 U.S. 1110 (1982).

30. *Monroe*, 365 U.S. at 184.

31. United States v. Price, 383 U.S. 787 (1966); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

32. *Lugar*, 457 U.S. at 937. The existence of mere state regulation of a private entity, or its fulfillment of a public function, are insufficient to satisfy the state action requirement. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

33. *E.g.*, *Edelman*, 415 U.S. 651; Cowart v. City of Ocala, 478 F. Supp. 774 (M.D. Fla. 1979).

IV. "DEPRIVATION"

The second major element of a section 1983 action is the deprivation of the plaintiff's federally protected right.[34] It is now firmly established that section 1983 provides a cause of action when a local land use regulation causes a deprivation of property rights in violation of the fifth and fourteenth amendments. The United States Supreme Court recognized protection under the statute for property rights in *Lynch v. Household Finance Corp.*:[35]

> The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[36]

In the landmark case *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,[37] the Supreme Court soundly reaffirmed the vitality of section 1983 in the land use context. In that case, property owners challenged land use ordinances adopted by a regional planning agency, alleging that the agency, the individual members of its governing body, and its executive officer had adopted a multistate regional general plan and ordinances which destroyed the value of the landowners' property, thereby taking their property without due process and without just compensation in violation of the fifth and fourteenth amendments.[38] Citing the "liberal construction" to be given section 1983, the Court held that the landowners had properly stated a claim for relief.[39]

Successful section 1983 claims have been stated against local governments in a variety of other contexts, including rezoning and denial of rezoning,[40] denial of building permits,[41] revocation of

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34. *Parratt*, 451 U.S. 527.
35. *Lynch*, 405 U.S. 540.
36. *Id.* at 552.
37. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).
38. *Id.* at 394.
39. *Id.* at 399-400.
40. *Hernandez*, 643 F.2d 1188 (city liable for failure to rezone from single family to multi-family residential or limited office); *Westborough Mall*, 693 F.2d 733 (city, city council, and city manager liable for deprivation of zoning rights).
41. *Greenville County*, 716 F.2d 1409 (county and county council liable for denial of building permit to construct low-income apartments).

valid permits,[42] excessive sewer assessments,[43] discriminatory water districting,[44] and denial of subdivision plat applications.[45]

The Eleventh Circuit has affirmed a grant of summary judgment in favor of a property owner against a county commission, the county, and the individual commissioners, arising out of their denial of due process in refusing to approve a preliminary subdivision plat. In *Southern Cooperative Development Fund v. Driggers*,[46] the plaintiffs submitted pre-application plans for approval of a proposed agricultural cooperative. After receiving permission to submit an application for preliminary plat approval, the plaintiffs filed and revised a plat application. Despite its compliance with all local ordinances, the plaintiffs' plan was the subject of community criticism. A study confirmed the plaintiffs' compliance with local ordinances but still, the commission disapproved the plat without stating its reasons. Finding that the plaintiffs complied with the requirements of the county subdivision regulations, the court held that "the defendants had an administrative duty to approve the plaintiffs' proposed plat and their refusal to do so was a violation of the plaintiffs' guarantee of due process."[47] While the circuit court's opinion did not mention damages, the summary judgment under review had granted injunctive relief and ordered a later trial on damages.[48]

Land use regulations which are racially discriminatory are also within the reach of section 1983. In *Scott v. Greenville County*,[49] a developer sought a building permit to construct low-income housing. Following the county council's decision to freeze the issuance of permits, a decision which was obviously directed to preventing the project, the plaintiff brought suit in state court, eventually prevailing on his claim of entitlement to the permit.[50] Concerned with adverse publicity associated with the litigation, the plaintiff sold his interest in the project for a sum which only partially offset his

42. Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982) (city liable for revoking already authorized building permit).

43. Rodgers v. Tolson, 582 F.2d 315 (4th Cir. 1978) (town commissioners liable for arbitrary, excessive, and retaliatory sewer assessment).

44. Des Vergnes v. Seekonk Water Dist., 601 F.2d 9 (1st Cir. 1979).

45. Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983), *cert. denied*, 103 S. Ct. 3539 (1983).

46. *Id.*

47. *Id.* at 1356. It has been clear since Carey v. Piphus, 435 U.S. 247 (1978), that denials of procedural due process are also actionable under § 1983.

48. Southern Coop. Dev. Fund v. Driggers, 527 F. Supp. 927, 930 (M.D. Fla. 1981).

49. 716 F.2d 1409 (4th Cir. 1983).

50. *Id.* at 1411.

expenses and lost profits.[51] He subsequently brought a section 1983 action in federal court against the county and the individual commissioners, alleging that the withholding of the permit was motivated by racially discriminatory intent in violation of the equal protection clause, that the withholding was a deprivation of property without due process, and that the permit was property taken without just compensation.[52]

Following its holding that the plaintiff had stated a claim for denial of equal protection, the Fourth Circuit considered the due process claim. Because the plaintiff "held a cognizable property interest, rooted in state law, to which federal due process protection extended,"[53] and further because the complaint stated a claim for deprivation without due process, the court upheld the due process claim. However, because the permit was not actually issued, the court held that it was not taken.[54] The court remanded for consideration of the plaintiff's damages for injuries which were fairly traceable to the withholding of the permit until the date of the state supreme court order which had suspended the issuance of the permit pending appeal.[55]

V. "REMEDIES"

A. *Generally*

Section 1983 provides that the defendant "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." A companion statute, 42 U.S.C. section 1988, provides that federal courts shall "furnish suitable remedies" for violations of section 1983. These statutes have been interpreted to mean that "[t]he rule of damages . . . is a federal rule responsive to the need whenever a federal right is impaired."[56] Furthermore, "where federal law is unsuited or insufficient 'to furnish suitable remedies,' [courts will] look to the principles of the common law, as altered by state law, so long as such principles are not inconsistent with the Constitution and laws of the United States."[57]

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51. *Id.* at 1413.
52. *Id.*
53. *Id.* at 1418-19.
54. *Id.* at 1421. Of interest is the court's indication that "where a previously valid permit has issued and construction begun, a subsequent rezoning that effectively revokes permission to build is a confiscatory taking of the permit itself." *Id.*
55. *Id.* at 1425.
56. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969).
57. Moor v. County of Alameda, 411 U.S. 693, 703 (1973). A concise discussion of § 1983

The remedy provided by section 1983 is supplemental to any state remedy.[58] Therefore, the availability of a state remedy does not preclude a suit under the Civil Rights Act.[59] Local governments "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief . . .."[60] If the elements of the cause of action are proven, nominal damages are presumed.[61] Actual damages proximately resulting from the deprivation generally must be proven under the general federal common law.[62] As expected, damages awards under section 1983 are determined by compensation principles, so that a plaintiff must prove that he was actually injured by the deprivation before he may recover substantial compensatory damages.

Punitive damages may be awarded under section 1983,[63] even without actual loss.[64] Such damages are allowed at the discretion of the fact finder, based on a finding of willful or malicious violations of constitutional rights.[65] The Supreme Court has held, however, that punitive damages are not available against a municipality.[66]

Attorney's fees in civil rights cases are permitted at the discretion of the court under 42 U.S.C. section 1988.[67] However, the court's discretion in awarding the fees is narrow, and the legislative history of section 1988 indicates that fees should be awarded to a

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remedies is found in Nahmond, *Damages and Injunctive Relief Under Section 1983*, 16 URB. LAW. 201 (1984).

58. Monroe v. Pape, 365 U.S. 167 (1961).

59. *But see Hamilton Bank*, 105 S. Ct. 3108.

60. *Monell*, 436 U.S. at 690.

61. *Carey*, 435 U.S. 247; Smith v. Wade, 461 U.S. 30 (1983).

62. Because nominal damages are available without proof of actual injury, *Carey*, 435 U.S. 247, it is possible that constitutional violations may arise from the "chilling" or deterrence of the exercise of constitutionally protected rights. Thus a local government which threatens unconstitutional action may be liable under § 1983. *See* Laird v. Tatum, 408 U.S. 1, 14 (1972) (all that is required is a "claim of specific present objective harm or a threat of specific future harm."); Keyishian v. Bd. of Regents, 385 U.S. 589 (1980); NAACP v. Button, 371 U.S. 415, 433 (1963) ("[Constitutionally-protected] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."); Davis v. Village Park II Realty Co., 578 F.2d 461 (2d Cir. 1978) (threat of eviction actionable); Velazquez v. Chardon, 500 F. Supp. 10, 12 (D. P.R. 1980) (the "threat of dismissal" of an employee by a state for political reasons "is enough to trigger a civil rights cause of action and entitlement to immediate specific relief.").

63. *Carey*, 435 U.S. 247.

64. McCulloch v. Glasgow, 620 F.2d 47 (5th Cir. 1980).

65. Schwab v. First Appalachian Ins. Co., 58 F.R.D. 615 (S.D. Fla. 1973).

66. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

67. *See* Blum v. Stenson, 104 S. Ct. 1541 (1984), for a discussion of what constitutes a "reasonable fee" under § 1988.

prevailing plaintiff unless special circumstances would render an award unjust.[68] Even though the eleventh amendment bars damages awards against state agencies, it does not bar an award of attorneys' fees from the state treasury under section 1988 to the plaintiff who secures injunctive relief.[69]

B. Regulatory Takings

The most controversial issue in contemporary section 1983 land use cases is the availability of damages for "regulatory takings." Although the Supreme Court has on several occasions accepted jurisdiction in cases which presented this issue, it has never reached a decision on the question. Until its decision this year in *Williamson County Planning Commission v. Hamilton Bank*,[70] the Court's opinions[71] appeared to leave little doubt that it would endorse the remedy in the right case. The lower federal courts have had little trouble recognizing the remedy, although they have been analytically inconsistent in applying it. Now, however, after *Hamilton Bank*, the question still has not been decided, although it can be argued that the Supreme Court, at least with its present composition, is leaning the other way. To properly gauge the import of *Hamilton Bank*, it must be placed in historical perspective.

Although used interchangeably as a basis for finding unconstitutional action in land use decisions, the due process clause of the fourteenth amendment and the takings clause of the fifth amendment[72] are separate and distinct provisions, and the legal consequences flowing from violation of either may differ.[73] Whenever property is "taken" by local government action outside a formal eminent domain proceeding,[74] an action for inverse condemnation[75]

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68. Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968); Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980).

69. Hutto v. Finney, 437 U.S. 678 (1978).

70. ___ U.S. ___, 105 S. Ct. 3108 (1985).

71. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); *Monell*, 436 U.S. 658.

72. *See* discussion *supra* note 4.

73. *See San Diego Gas*, 450 U.S. at 636 (Brennan, J., dissenting).

74. In Florida, eminent domain proceedings are governed generally by chs. 73 and 74, FLA. STAT. (1983).

75. The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. "Inverse condemnation is 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no for-

may be brought.[76]

Originally, in *Mugler v. Kansas*,[77] the Supreme Court had held that a valid exercise of the police power is not an appropriation.[78] That principle has become the basis for accepted doctrine in interpreting the "taking" provisions in many state constitutions: if the regulation deprives an owner of all beneficial use of property, then it is invalid from the outset and its enforcement will be enjoined. Damages, however, cannot be awarded.[79] Local governments, realizing that they probably will not be forced to pay compensation for confiscatory ordinances, have adopted an approach characterized by the statement, "[i]f all else fails, merely amend the regulation and start over again."[80]

The Supreme Court, however, with its decision in *Pennsylvania*

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mal exercise of the power of eminent domain has been attempted by the taking agency.' " A landowner is entitled to bring such an action as a result of "the self-executing character of the constitutional provision with respect to compensation. . . ." A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase "inverse condemnation," as a common understanding of that phrase would suggest, simply describes an action that is the "inverse" or "reverse" of a condemnation proceeding. Hernandez v. City of Lafayette, 643 F.2d at 1199 n. 24 (citing United States v. Clarke, 445 U.S. 253, 257 (1980) (emphasis omitted)).

76. The Supreme Court of Florida has identified six factors, based on federal law, for determining whether there has been a taking of property requiring compensation: (1) whether there is a physical invasion; (2) the degree to which there is a diminution in value; (3) whether the regulation confers a public benefit or prevents a public harm; (4) whether the regulation promotes the public health, safety, morals or welfare; (5) whether the regulation is applied arbitrarily and capriciously; and (6) whether the regulation curtails investment-backed expectations. Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981). For an analysis of that case, *see* Bricklemyer, *The Florida Test for Taking*, 57 FLA. B.J. 87 (Feb. 1983). A useful overview is found in Schwenke and Hemke, *Florida Inverse Condemnation Law: A Primer for the Litigator*, 5 NOVA L.J. 167 (1981). *See also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

77. 123 U.S. 623 (1887).

78. *Id.* at 668.

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.

Id. at 668-69.

79. *E.g.*, Dade County v. National Bulk Carriers, Inc., 450 So. 2d 213 (Fla. 1984); Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

80. *San Diego Gas*, 450 U.S. at 656 n. 22 (Brennan, J., dissenting) (quoting a city attorney's advice to fellow city attorneys).

Coal Company v. Mahon,[81] established that an otherwise proper police power regulation which "goes too far . . . will be recognized as a taking."[82] In *Mahon*, the Court upheld a coal company's vested right to mine beneath land to which it had sold the surface rights, despite a subsequently enacted ordinance prohibiting the intended use. Although there is disagreement as to whether *Mahon* invalidated the regulation on due process grounds or found a regulatory taking,[83] the Supreme Court stated approvingly in *Penn Central Transportation Co. v. City of New York*[84] that *Mahon* "is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.' "[85] Unfortunately, although strongly suggesting that compensation is a viable remedy for excessive regulation, the Court in *Penn Central* again did not actually order the remedy on the facts of that case, although three dissenting Justices would have done so.[86]

In a more recent case, a majority of the Supreme Court espoused the remedy of compensation for excessive land use regulation, although again the issue was avoided on procedural grounds. In *San Diego Gas & Electric Co. v. City of San Diego*,[87] the owner of a parcel of property which was zoned to permit development as a nuclear power plant challenged the rezoning and open-space plan which precluded the plant's development. The lower court's decision denying damages was affirmed on the basis that the Supreme Court lacked jurisdiction to review it, a conclusion disputed by four dissenting Justices.[88] The dissenters would have required

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81. 260 U.S. 393 (1922).

82. *Id.* at 415.

83. *See, e.g.* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 (C.A. N.Y. 1976): *Mahon* equated an invalid exercise of regulating zoning power, perhaps only metaphorically, with a "taking" or a "confiscation" of property. . . . [T]he gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric. . . .

See also Williamson County Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1983) (Stevens, J., concurring); Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVTL. L. 105 (1985).

84. 438 U.S. 104 (1978).

85. *Id.* 127.

86. 438 U.S. at 138-53.

87. 450 U.S. 621 (1981). The court, in its previous term, considered a California case which seemingly presented the regulatory taking issue, but avoided the issue on a procedural ground. *Agins*, 598 P.2d 25.

88. 450 U.S. at 639. Justice Rehnquist, in his concurring opinion, noted that if he were

compensation, as would Justice Rehnquist, who nevertheless concurred in the majority's procedural disposition.[89]

Of vital interest to land use lawyers is Justice Brennan's articulation of the concept of "temporary taking."[90] According to that principle, "once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[91] Thus, the award of "interim damages" has the potential to solve the problem of the amount of compensation to be paid once a taking has occurred. As explained by Justice Brennan, "the payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken."[92]

The lower federal courts have cited Justice Brennan's dissent for the proposition that section 1983 provides a remedy for confiscatory land use regulation. Brennan stated in a footnote to his dissent that in cases where regulations do not further the public health, safety, morals, or general welfare, "[a]lthough the government entity may not be forced to pay just compensation under the Fifth Amendment, the landowner may nevertheless have a damages cause of action under 42 U.S.C. § 1983 for a Fourteenth

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satisfied that the Court had jurisdiction over the case, he "would have little difficulty agreeing with much of what is said in the dissenting opinion of Justice Brennan." *Id.* at 633-34. One can infer that five justices were in support of the damages remedy for regulatory taking. With the retirement of Justice Stewart, who joined in Brennan's dissent, the balance of the Court on the issue was again open to doubt. *See* Siemon, *supra* note 83. This doubt was reaffirmed, but not resolved, in *Hamilton Bank.*

89. 450 U.S. at 633-34.

90. *San Diego Gas*, 450 U.S. at 657.

91. *Id.* at 653.

92. *Id.* at 657. The Supreme Court of Florida has indicated that full compensation usually equals the fair market value of the property taken. Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972). The award of compensation in Florida is a judicial function. Behm v. Division of Admin., 383 So. 2d 216 (Fla. 1980). As there is no constitutional right to a jury trial in an eminent domain proceeding, United States v. Reynolds, 397 U.S. 14 (1970), it would follow that there is no constitutional right to a jury trial in an inverse condemnation trial. In federal and Florida courts, inverse condemnation suits are usually heard in two parts, with the question of whether there has been a taking decided by the court and the issue of the amount of compensation by the jury. *See* Arastra Ltd. P'ship. v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated on stipulation*, 417 F. Supp. 1125 (N.D. Cal. 1976); Kopetzke v. County of San Mateo, 396 F. Supp. 1004 (N.D. Cal. 1975); Sarasota-Manatee Airport Auth. v. Alderman, 238 So. 2d 678 (Fla. 2d DCA 1970); FLA. STAT. § 73.071(1) (1983).

Amendment due process violation."[93] The courts have responded favorably to this proposition.

In *Wheeler v. City of Pleasant Grove*,[94] a developer brought a section 1983 action against the city and its officers for declaratory, injunctive, and equitable relief, as well as money damages, when the city revoked an authorized building permit following a public referendum disapproving the project. In Florida law terms, the case was a fairly typical "vested rights" situation, and the district court granted the landowner an injunction restoring the permit but denied damages for delay, or, in Justice Powell's terms, "interim damages." The Fifth Circuit affirmed the injunction and remanded "for a determination of damages sustained by the plaintiffs."[95]

Perhaps the most significant case to apply section 1983 to land use regulation under the rationale of *San Diego Gas* is *Hernandez v. City of Lafayette*.[96] In *Hernandez*, the landowner, seeking only damages,[97] alleged that the city, through zoning ordinances and its failure to rezone, deprived him of property without due process and without compensation under the fifth and fourteenth amendments.[98] The case arose when the city, in furtherance of its plans to construct a parkway through the landowner's property refused to grant the landowner's request for rezoning from single family to medical office complex.[99] After the landwoner reached an informal settlement with the city council and the mayor for rezoning for limited office use, the mayor refused to sign the formal settlement and vetoed the rezoning ordinance.[100] The city subsequently repealed the ordinance providing for the new parkway.[101]

The landowner filed suit under section 1983, claiming that the city had delayed its zoning decision to maintain the depressed market value of his land so that the costs of a right of way to con-

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93. *San Diego Gas*, 450 U.S. at 656 n. 23; *Wheeler*, 664 F.2d 99. Even in cases in which invalidation is the remedy chosen by a court, the complete relief afforded by the remedial language of § 1983 would appear to authorize damages awards for harm caused by the invalid regulation. For example, a court could logically award delay damages (such as interest, taxes, or carrying costs) occasioned by a wrongful permit denial.

94. 664 F.2d 99 (5th Cir. 1981).

95. *Id.* at 101. The Fifth Circuit noted that Owen v. City of Independence, 445 U.S. 622 (discussed hereinafter) was decided by the Supreme Court after the district court's decision.

96. 643 F.2d 1188 (5th Cir. 1981).

97. *Id.* at 1195 n. 14.

98. *Id.* at 1189.

99. *Id.* at 1190-91.

100. *Id.* at 1191.

101. *Id.*

struct the parkway would be minimal.[102] The Fifth Circuit, citing Justice Brennan's dissent in *San Diego Gas*, held that:

> [A]n action for damages will lie under § 1983 in favor of any person whose property is taken for public use without just compensation by a municipality though a zoning regulation that denies the owner any economically viable use thereof. The measure of damages in such a case will be an amount equal to just compensation for the value of the property during the period of the taking.[103]

The Court also ruled that where a regulation is not enacted in furtherance of the public health, safety, morals or general welfare, there may be a damage cause of action under section 1983 because such a regulation "would constitute the deprivation of property without due process of law under the Fourteenth Amendment."[104]

From these cases, it is apparent that the compensation remedy developing in the lower federal courts under section 1983 is an attractive alternative or, at least, an adjunct to the more traditional state court invalidation remedy. In many cases, invalidation of a confiscatory ordinance is a meaningless remedy, given the years it may take to achieve a final judgment. Indeed, landowners may wish to join claims for invalidation and damages under section 1983, which authorizes "an action at law, suit at equity or other proper proceeding for redress." Even if invalidation were the remedy granted, the plaintiff arguably should also recover "temporary taking" damages for the period from the enactment of the regulation until final judgment.[105]

C. *Vested Rights*

Another fascinating prospect, which has met with mixed results in the lower federal courts, is the application of the damages rem-

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102. *Id.*

103. *Id.* at 1200. However, the Court also held that where the application of a general zoning ordinance to particular property does not initially but does eventually deny the owner an economically viable use of his land, or where a classification initially denies economically viable use but the owner delays or fails to seek timely review, a taking does not occur until the governing body has a realistic opportunity and reasonable time to renew and correct the inequity. "[M]ere fluctuations in value" during that time are "incidents of ownership," and "absent extraordinary delay," are not compensable. *Id.*, at 1201 (citing *Agins*, 447 U.S. at 262-63 n. 9, quoting Danforth v. United States, 308 U.S. 271, 285 (1934)).

104. 643 F.2d at 1200.

105. *See* Justice Brennan's dissenting opinion in *San Diego Gas*, 450 U.S. at 636; *see also Wheeler*, 664 F.2d 99.

edy under section 1983 to "vested rights" cases. As a well established principle in Florida, a property owner may vest rights to a certain development approval by demonstrating a good faith, substantial reliance on the approval.[106] Such a showing has the remedial benefit of offering a court-ordered, specific development (as opposed to simple invalidation of the offending regulation), but the delay inherent in litigation often makes this remedy an empty one.[107]

It is clear that the property rights protected under section 1983 are those created by state law.[108] A "vested right" is such a property right. If a vested right is repudiated by local government, it would appear that an uncompensated "taking" of that property right occurs, compensable under section 1983. The appropriate measure of damages would be the difference in the value of the property with and without the repudiated development approval. In *Wheeler v. City of Pleasant Grove*,[109] the Fifth Circuit[110] authorized interim damages for local action repudiating a building permit, which action the court termed "confiscatory."[111] Other federal decisions have skirted the vested rights issue with inconclusive results, often, it appears, because the issue was not properly framed or presented.[112] The remedial language of section 1983 ap-

106. *E.g.*, Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10 (Fla. 1976); Rhodes, Hauser and Demeo, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 13 STETSON L.R. 1 (1983).

107. One of the best known Florida estoppel/vested rights cases is Town of Largo v. Imperial Homes Corp., 309 So. 2d 571 (Fla. 2d DCA 1975). There, despite the landowner's apparent, complete victory in winning the right to complete a multi-family development, the passage of time rendered that land use uneconomical. The site is occupied today by single-family homes.

108. *Lynch*, 405 U.S. 538; Bunkley v. Watkins, 567 F.2d 304 (5th Cir. 1978).

109. 664 F.2d 99 (5th Cir. 1981).

110. Although *Wheeler* was decided after Sept. 30, 1981, it is binding in the Eleventh Circuit as a decision of the "Old Fifth Circuit," Unit B panel, submitted for decision Sept. 30, 1981. *See* P.L. 96-452 (1980). Bonner v. City of Prichard, 661 F.2d 1206, 1209 n. 5 (11th Cir. 1981); Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982).

111. 664 F.2d at 100. *See also* Wermager v. Cormorant Township Bd., 716 F.2d 1211, 1215 (8th Cir. 1983), in which the court raised, but did not reach, the question of a section 1983 remedy for vested rights violations and Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347, 1354 (11th Cir. 1983), *cert. denied*, 703 F.2d 582 (1983).

112. *See* Nemmers v. City of Dubuque, 716 F.2d 1194, 1197-98 (8th Cir. 1983), which was *not* a 1983 action and which, therefore, applied only state law. *Nemmers* was cited in a § 1983 case, Scott v. City of Sioux City, 736 F.2d 1207, 1217 n. 12 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985) for the (arguably erroneous) proposition that "[vested rights are] a matter of state law not actionable under 42 U.S.C. § 1983." In the Court's defense, the theory apparently was presented by the plaintiff as an afterthought. *See also* Amico v. New Castle County, 101 F.R.D. 472, 482 n. 12 (D. Del. 1984), which observed that the vested rights doctrine might be applied under 42 U.S.C. § 1988, as an appropriate remedy provided

pears, at least, to authorize the interim damages endorsed by the *Wheeler* court.

D. Hamilton Bank

In its 1984-85 term, the Supreme Court had another opportunity to settle the damages issue, but once again failed to do so, in *Hamilton Bank*.[113] Just as the Court majority's apparent endorsement of the remedy in *San Diego Gas*[114] provided encouragement to the "taking mavens,"[115] the Court's most recent disposition of the issue, although of no more direct precedential value than its prior miscues, opens the question to debate and litigation even in those courts that have followed *San Diego Gas*.

In *Hamilton Bank*, the Court was faced with what can be summarized as a vested rights claim: a landowner had relied upon platting approvals secured under existing zoning, only to have the local planning commission change its mind and apply a later-enacted zoning revision to torpedo the partially-completed project.[116] The landowner sued in federal court under section 1983, and was awarded injunctive relief but was denied interim damages.[117] The Sixth Circuit Court of Appeals reversed the denial of damages, reasoning that the landowner had been temporarily denied all "economically viable" use of the land.[118]

The Supreme Court, in an opinion authored by Justice Blackmun and joined by five other members of the Court, held that the damages claim was premature.[119] The majority based its finding on two alternative grounds. First, even though the local government's denial of plat approval was final for purposes of administrative review, it did not represent "a final decision regarding the application of the regulations to the property at issue."[120] The Court based its holding on the fact that the landowner had not applied for variances from the zoning and subdivision code provisions that

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by state law. This rationale, while favorable to the landowner, overlooks the well-settled doctrine that property rights are protected from unconstitutional "deprivations" under section 1983.

113. 105 S. Ct. 3108.
114. 450 U.S. 621.
115. *See* Kanner, LAND USE L. & ZONING DIG., May, 1981, at 8.
116. 450 U.S. 621.
117. *Id.* at 3115.
118. *Id.* at 3116.
119. *Id.*
120. *Id.* at 3117.

had mandated denial of plat approval.[121]

The second basis for the Court's holding was that the property owner had not availed itself of Tennessee's statutory procedures for seeking "just compensation" for such regulatory takings.[122] The Court reasoned that the Fifth Amendment does not prohibit all takings; it prohibits only uncompensated takings.[123] Thus, until the landowner pursued the state authorized procedure and was denied compensation, it could not be said that an unconstitutional, uncompensated taking had occurred.[124] On both grounds, the Court held that the landowner's claim for invalidation and consequential damages, under a due process theory, also was not ripe for decision.[125]

As to the first point, failure to apply for a variance, the Court recognized the rule that exhaustion of administrative remedies is not ordinarily required as a condition to suit under section 1983.[126] The opinion, however, distinguished administrative remedies, or "procedures . . . [for] review of an adverse decision," from "the question whether an administrative action must be final before it is judicially reviewable."[127] As to such a finality requirement, the Court noted that "resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow [the landowner] to develop the subdivision in the manner [the landowner] proposed."[128]

Adding this holding to the progression of similar holdings in *Penn Central*,[129] *Agins*,[130] and *San Diego Gas*[131] raises serious doubt whether any case will ever be ripe, in the Court's view, for the award of damages. No matter how many times and in how many ways a property owner is rebuffed by a local government in an attempt to develop property, it can almost always be argued that the local code offers one more way to apply for relief.[132] Local

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121. *Id.*
122. *Id.* at 3120-21.
123. *Id.* at 3121.
124. *Id.* at 3121-22.
125. *Id.* at 3123.
126. *Id.* at 3120.
127. *Id.*
128. *Id.*
129. 438 U.S. 104.
130. 598 P.2d 25.
131. 450 U.S. 621.
132. In the words of the Hamilton Bank landowner's attorney, "letting the 'initial decision-maker' (the Planning Commission) decide when it has reached its definitive position is like slipping the fox into the chicken coop. . . . At what point does one jump off the merry-

governments and their attorneys are attuned to this dilemma; local officials, especially post-*Hamilton Bank*, are quick to couple a denial of development approval with a suggestion to apply for further relief in some other form. Delay, as Justice Brennan noted in his *San Diego Gas* dissent, is always on the side of the local government.[133] Moreover, further applications and negotiations will often offer the local government attorney an opening to assert that the landowner has waived the right to complain about an adverse decision.

The second basis for the *Hamilton Bank* holding, that the landowner had failed to utilize state procedures to seek compensation,[134] is less troublesome in Florida and other states where the remedy is not recognized.[135] In Florida, for example, statutory compensation procedures for regulatory takings are limited to certain permitting decisions of state agencies and are generally not available for local land use decisions; invalidation is the exclusive remedy.[136] There will probably be jurisdictional attacks on this basis in all states, however, with more success in those states that have adopted, and perhaps in those that have not flatly rejected, the compensation remedy.

Justice Brennan authored a separate opinion in *Hamilton Bank*, concurring in the procedural disposition of the case and restating his temporary taking damages thesis as advanced in *San Diego Gas*.[137] Notably, he was joined only by Justice Marshall.[138] Justice Stevens, speaking only for himself, penned a concurring opinion in which he flatly rejected the temporary taking damages remedy in the absence of "a deliberate decision to appropriate certain property for public use for a limited period of time . . . ."[139]

Thus, the continued vitality of *San Diego Gas* as a basis for awards of interim damages in the lower federal courts is now open

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go-round and let an impartial third party (i.e., a jury) decide the facts and apply the law?" Bauman, *Hamilton Bank—Supreme Court says: Don't Make a Federal Case out of Zoning Compensation*, 8 ZONING & PLANNING L. REP. 137, 141 (1985).

133. 450 U.S. at 658.

134. 105 S. Ct. at 3121.

135. *See* Fred F. French Inv. Co. v. City of New York, 350 N.E.2d 381 (1976); Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

136. *Compare* Atlantic Int. Inv. Corp. v. State, 10 F.L.W. 449 (Fla. Aug. 30, 1985), *and* Key Haven Assoc. Ent., Inc. v. Board of Trustees, 427 So. 2d 153 (Fla. 1983) *with* Dade County v. National Bulk Carriers, Inc., 450 So. 2d 213 (Fla. 1984) *and* Pinellas County v. Ashley, 464 So. 2d 176 (Fla. 2d DCA 1985).

137. 105 S. Ct. at 3124.

138. *Id.*

139. *Id.* at 3126.

to question, especially since the plurality in *Hamilton Bank* was careful not to intimate a view on the issue. In those states where damages for regulatory takings may be sought in state court, Supreme Court holdings that pursuit of state remedies is not a condition precedent to section 1983 relief[140] have, as a practical matter, been seriously undermined. Even in circuits such as the Eleventh, where both damages and injunctive relief are clearly available under section 1983,[141] attorneys for local governments will undoubtedly ask the lower federal courts to reexamine the issue in light of *Hamilton Bank*. Fortunately for landowners in the Eleventh Circuit at least, the circuit court has cited *San Diego Gas* only as support for its independent analysis allowing the section 1983 remedies;[142] it will not likely be prompted to depart from its own views simply because the Supreme Court has once again wavered on an issue it appears determined not to decide.

Importantly, the issue in *Hamilton Bank* was only interim damages for the "temporary taking," such as that which occurs when the use of property is delayed for several years by a local policy ultimately enjoined as confiscatory. Even Justice Stevens's dissent distinguished "permanent harms" from "temporary harms" and did not intimate disapproval of the compensation remedy for regulations totally and permanently depriving the landowner of all beneficial use.[143] The Court in *Penn Central* soundly endorsed this remedy, although the Court now reads *Penn Central* as imposing a finality requirement that may be difficult for the landowner to overcome.

Despite the application in *Hamilton Bank* of the finality requirement to injunctive relief as well as to damages, it is unlikely that the opinion will have much effect on the lower federal courts' disposition of due process, injunctive relief cases brought under section 1983. In such cases, the remedial language of section 1983, quite apart from any fifth amendment theory of "temporary taking," should authorize "invalidation of the regulation, and if . . . appropriate, actual damages."[144] Such damages, while not compensating the property owner for lost use value of the land during the time before injunctive relief, should make the injunctive remedy

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140. *E.g.*, Ellis v. Dyson, 421 U.S. 426 (1975).

141. *Southern Co-op Dev. Fund*, 696 F.2d 1347; *Wheeler*, 664 F.2d 99; *Hernandez*, 643 F.2d 1188.

142. *See Hernandez*, 643 F.2d at 1194-1200.

143. 105 S.Ct. at 3125-26.

144. *Id.* at 3122.

more meaningful and complete by compensating for interest, taxes, and other direct costs incurred during the period of lost use.

VI. "IMMUNITIES"

Section 1983 defendants may avail themselves of certain "immunity" defenses to escape from damages liability. These defenses apply differently in the case of government entities than they do for individuals. In *Scheuer v. Rhodes*,[145] the Supreme Court identified two "mutually dependent rationales" for official immunity:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.[146]

Two types of immunity are applicable to section 1983 defendants: absolute and qualified. Absolute immunity is available to states and state agencies,[147] as well as to certain state officials acting in a legislative capacity, such as state legislators;[148] and to officials acting in a judicial or quasi-judicial capacity, such as judges,[149] prosecutors,[150] and trial witnesses.[151] Absolute immunity from suit applies only to acts within the scope of official duties.[152]

The scope of liability for local government officials also is determined by the nature of the conduct. It is clear that municipalities are not entitled to absolute or qualified immunity.[153] However, lo-

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145. 416 U.S. 232 (1974).

146. *Id.* at 240. Although § 1983 does not mention any immunity defenses, the court noted that "a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' " Owen v. City of Independence, 445 U.S. 622, 637 (1980) (citing Pierson v. Ray, 386 U.S. 547, 555 (1967)).

147. *Edelman*, 415 U.S. 651.

148. Tenney v. Brandhove, 341 U.S. 367 (1951). The basis for this common-law immunity is the overriding policy concern that elected officials, acting in their legislative capacity, should be free to conduct the affairs of government for the good of the general population without fear of suits for damages inflicted by their policy decisions.

149. Pierson v. Ray, 386 U.S. 547 (1967); Stump v. Sparkman, 435 U.S. 349 (1978). There is no derivative judicial immunity for persons who conspire with judges. Dennis v. Sparks, 449 U.S. 24 (1980).

150. Imbler v. Pachtman, 424 U.S. 409 (1976).

151. Briscoe v. Lahue, 103 S. Ct. 1108 (1983).

152. Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980).

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

cal legislators, including city and county council members, have been afforded absolute immunity in land use cases.[154] The Supreme Court has also held that unelected individual members of a regional planning agency are absolutely immune from section 1983 liability arising out of their adoption of a confiscatory land use plan.[155]

A possible exception to the absolute immunity doctrine is that it may not apply to conduct which is beyond that necessary to perform legislative duties. For example, absolute immunity may not extend to a commission's "executive actions" in enforcing a zoning change by refusing to approve certain plans or by attempting to hinder construction of a certain project.[156] The absolute immunity may not extend to executive officials of a local government in their "enforcement conduct."[157] Absolute legislative immunity may also be unavailable to individual commissioners if their actions can be characterized as administrative rather than legislative.[158]

More pertinent to suits against local government officials is the qualified immunity which is available to individuals who act in "good faith" in the course of exercising legitimate official discretion. Qualified immunity has been asserted by a number of local officials in the land use context, including county council members,[159] county supervisors,[160] and city planning commissioners.[161]

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154. Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981) (city mayor entitled to absolute immunity for zoning ordinances and failure to rezone); Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980) (county council members absolutely immune for damages resulting from rezoning); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980) (city directors absolutely immune for rezoning decision); Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1351 (E.D. Va. 1979) (county legislators absolutely immune in down zoning case); Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978) (county and municipal legislators absolutely immune in rezoning decision).

155. *Lake Country Estates*, 440 U.S. 391. However, the court also noted that the agency itself was not immune under the eleventh amendment. *Id.* at 400-01.

156. *See* Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979).

157. *Id.* at 1321.

158. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974). Although a federal court would likely make an independent determination of the nature of the governmental process as a matter of federal law, the Supreme Court has accepted a state's determination of the legislative status of a single parcel rezoning change. *See* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976). In Florida, there is a split of authority as to whether rezoning of a particular parcel of land is legislative or administrative. *Cf.* City of Coral Gables v. Carmichael, 256 So. 2d 404 (Fla. 3d DCA 1972), *cert. denied*, 268 So. 2d 1 (Fla. 1972); Andover Dev. Corp. v. City of New Smyrna Beach, 328 So. 2d 231 (Fla. 1st DCA 1976), *cert. denied*, 341 So. 2d 290 (Fla. 1976).

159. *Greenville County*, 716 F.2d 1409.

160. Thomas v. Younglove, 545 F.2d 1171 (9th Cir. 1976).

The qualified good faith immunity test was first enunciated in *Wood v. Strickland.*[162] In essence, the official involved knew or reasonably should have known that his actions would violate another person's constitutional rights, or if he took actions with malicious intent to cause a deprivation of constitutional rights or other injury, then the qualified immunity would be unavailable to that official.[163] Later, in *Procunier v. Navarette,*[164] the Court identified two branches of the rule announced in *Wood*: an "objective" and "subjective" test. Under the objective branch, qualified immunity is not available if (1) the constitutional right allegedly violated was clearly established at the time of the official's challenged act; (2) the official knew or should have known of the rights involved; and (3) the official knew, or should have known that his acts violated the constitutional rule.[165] Under the subjective branch, regardless of the objective state of the law, government officials may still be held liable if they act with malicious intent to deprive the complainant of a constitutional right or to cause him other injury.[166]

The Supreme Court has further refined the test for qualified immunity, essentially eliminating the subjective test. The Court now applies an objective test, which requires the defendant to show that his conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[167] That requires the Court to determine "not only the currently applicable law, but whether that law was clearly established at the time an action occurred."[168] The advantage of that standard is that it requires public officials to be familiar with clearly established constitutional rights and laws.[169] In all cases, the defendant has the burden to allege and prove his good faith immunity as an affirmative defense.[170]

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161. M.J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975).

162. 420 U.S. 308 (1975).

163. *Id.* at 322.

164. 434 U.S. 555 (1978).

165. *Id.* at 562.

166. *Id.* at 566.

167. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

168. *Id.* at 818.

169. The Supreme Court noted that its main reason for abandoning the subjective test was because "substantial costs attend the litigation of the subjective good faith of government officials," including "distraction of officials from their government duties, inhibition of discretionary action, and deterrence of able people from public service," as well as "broadranging discovery and the deposing of numerous persons . . .[which] can be peculiarly disruptive of effective government." *Id.* at 816-17.

170. Gomez v. Toledo, 446 U.S. 635 (1980); Williams v. Treen, 671 F.2d 892 (5th Cir.

VII. CONCLUSION

Section 1983 has become an effective tool for property owners faced with local governments that fail to consider the constitutional dimensions of local land use policies.[171] Too often, experience has shown, local governments have been quick to enact permitting regulations of questionable validity, knowing that they would get another chance even if they lost in court. As any land use practitioner knows too well, local officials are sometimes quite candid in their resolve to "win the war" by losing a series of such "battles," secure in the knowledge that the delays of litigation eventually will wear down all but the best-financed developer.

Of course, well-reasoned land use regulations are essential to the preservation of Florida's natural beauty and quality of life. Section 1983 provides a remedial framework to ensure that private property rights are not forgotten in the process.

1982).

171. Another effective tool, the antitrust laws, have also forced local governments to think carefully before acting with disregard for private property rights. Claims under the Sherman Antitrust Act, 15 U.S.C. § 1, and the Clayton Antitrust Act, 15 U.S.C. § 12, may frequently appear in section 1983 actions. *See Westborough Mall*, 693 F.2d 733; Spiegel, *Local Governments and the Terror of Antitrust*, 69 A.B.A. J. 163 (Feb. 1983). However, The Local Government Antitrust Act of 1984, 98 STAT. 2750, Pub. L. 98-544 (Oct. 24, 1984), has eliminated damages actions against local governments and officials under the Clayton Act, 15 U.S.C. §§ 15, 15a, 15c.