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THE SUPREME COURT FAILS TO DECIDE THE INVERSE CONDEMNATION ISSUE: *MACDONALD, SOMMER & FRATES v. YOLO COUNTY*

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I. INTRODUCTION

The last six years have been interesting for those concerned with regulatory takings[1] and inverse condemnation.[2] During these years, the United States Supreme Court decided four cases[3] that raised expectations as to whether the Court would decide if an excessive govern-

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1. A regulatory taking occurs when the owner of property (real or personal) argues that his property has been taken because its value has been diminished by governmental regulation. The argument increasingly has been made in zoning cases, in which the value of real property is substantially decreased either by a municipality's changing the zoning of the real property or by a municipality's refusal to allow development of real property as zoned.

2. The United States Supreme Court has described inverse condemnation 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." United States v. Clarke, 445 U.S. 253, 257 (1980).

3. MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

mental regulation can become a taking and, if so, what remedies are available to one whose property has been taken. Although it is now reasonably clear that regulatory action that goes too far may be a taking, a question still remains: once a taking is found, what is the remedy? The Court failed to provide the answer, despite the wealth of opportunities that these four cases offered.

The first opportunity came in the 1980 case of *Agins v. City of Tiburon,*[4] in which the Court held that no taking occurred when a city downzoned the claimant's land. Justice Powell, speaking for a unanimous Court, left the door open for a future case in which the Court would consider what remedies would be available to the landowner.[5] Less than one year later, Justice Brennan raised inverse condemnation proponents' hope in his dissent, joined by three other justices, in the Court's 1981 decision of another downzoning case, *San Diego Gas & Electric Co. v. City of San Diego.*[6] Because Justice Rehnquist's concurring opinion agreed in principle with Justice Brennan's dissent,[7] many proponents felt that it would be only a matter of time before the Court would rule that the fifth amendment demanded damages for inverse condemnation.[8]

Practitioners and academicians awaited further consideration of the issue by the Court. Most felt that the Court had a suitable case in *Williamson County Regional Planning Commission v. Hamilton Bank.*[9] The Court's decision in 1985, however, did not reach the merits. Shortly after it decided *Hamilton Bank*, the Court accepted the appeal of *MacDonald, Sommer & Frates v. Yolo County,*[10] an inverse condemnation case prompted by a county's refusal to permit land development in accordance with its current zoning.

Eight months of speculation ended in June 1986, but the Court again dodged the issue. *MacDonald*, like *San Diego Gas & Electric* and *Hamilton Bank* before it, merely titillates; it does not satisfy. In fact,

4. 447 U.S. 255 (1980).

5. *Id.* at 263.

6. 450 U.S. 621 (1981).

7. *Id.* at 633-34.

8. *See, e.g.,* Hagman, *Comment on San Diego Gas & Electric Co. v. City of San Diego*, 33 LAND USE L. & ZONING DIG. No. 5, at 5 (1981); Kanner, *Comment on San Diego Gas & Electric Co. v. City of San Diego*, 33 LAND USE L. & ZONING DIG. No. 5, at 8 (1981).

9. 473 U.S. 172 (1985).

10. 106 S. Ct. 2561 (1986).

proponents of inverse condemnation may conclude that *MacDonald* leaves them farther from satisfaction than they thought possible after *San Diego Gas & Electric*. These proponents do have some hope, however, because the Court has before it no fewer than three inverse condemnation suits in its current term: two more California land use cases, *First English Evangelical Luthern Church v. County of Los Angeles*[11] and *Nollan v. California Coastal Commission*,[12] and a Pennsylvania coal mining case, *Keystone Bituminous Coal Association v. DeBenedictis*,[13] which apparently raises the same issue as the classic case of *Pennsylvania Coal Co. v. Mahon*.[14]

The purpose of this article is to review and organize the current law of inverse condemnation in light of *MacDonald*. First this article briefly reviews the origin of inverse condemnation and the tangled web woven by the Court in *Agins, San Diego Gas*, and *Hamilton Bank*. Second, the article reviews *MacDonald* and the state of the law after *MacDonald*. Finally, the article provides some insight into what action can be expected from the Court on inverse condemnation and finishes with some practical considerations for current land use disputes.

II. INVERSE CONDEMNATION BEFORE *MACDONALD*

A. *The Origins of Inverse Condemnation*

Responsibility for the concept of "inverse condemnation" can be laid at the feet of Oliver Wendell Holmes, Jr.. Writing for the majority in *Pennsylvania Coal Co. v. Mahon*, Holmes opined that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[15] Although an earlier part of his opinion in *Pennsylvania Coal* referred to the need

11. *Lutheran Church* involves a fifth amendment taking claim in which a county ordinance zoned part of the church's land as a flood plain, thereby stopping the church from building on that part of its land. The Supreme Court has noted probable jurisdicton in the case. 106 S. Ct. 3292 (1986).

12. *Nollan* involves a claim that a taking occurred when a county demanded public access to a privately owned beach before issuing a building permit to convert a summer cottage into a permanent home. The Supreme Court has noted probable jurisdiction in the case. 107 S. Ct. 312 (1986).

13. 771 F.2d 707 (3d Cir. 1985), *cert. granted*, 106 S. Ct. 1456 (1986). *Keystone* involves a claim that a taking occurred when the state prohibited the mining of coal in certain areas. The Court heard argument in the case on November 10, 1986. 55 U.S.L.W. 3372 (Nov. 10, 1986).

14. 260 U.S. 393 (1922).

15. *Id.* at 415.

for the *use* of eminent domain if the regulation went too far,[16] Holmes' conceptualization that a regulation that goes too far is a taking has become the important contribution of the opinion.[17] Although Holmes can be credited, or blamed, for originating the concept, there is some doubt whether he *intended* to create the concept.

1. The "Due Process" Clause or the "Eminent Domain" Clause?

If by calling an excessive governmental regulation a "taking" one intends to literally invoke the "eminent domain" clause of the fifth amendment,[18] the argument is that the logical remedy is "just compensation."[19] On the other hand, if by calling an excessive governmental regulation a "taking" one means that a claimant has been deprived of property under the "due process" clause,[20] the argument is that the logical remedy is invalidation of the statute in whole or as applied to the particular claimant.[21] Justice Holmes' statement in *Pennsylvania Coal* stands at the center of the dispute as to how the term "taking" should be read.

Some commentators have rejected the "inverse condemnation" reading of Justice Holmes' statement.[22] Arguably, the statement is nothing more than a metaphor.[23] If a regulation goes too far, the regulation does not literally become a taking that requires the payment of just

16. *Id.* at 413.

17. This is particularly true after Justice Brennan focused on this language in *San Diego Gas & Electric*, 450 U.S. at 649.

18. U.S. CONST. amend. V. The fifth amendment reads in pertinent part: "nor shall private property be taken for public use, without just compensation." *Id.*

19. *See* Justice Brennan's dissenting opinion in *San Diego Gas & Electric*, 450 U.S. at 636.

20. U.S. CONST. amend V. The fifth amendment reads in pertinent part: "nor shall be deprived of the life, liberty, or property, without due process of law." *Id.*

21. *See* Justice Stevens' concurring opinion in *Hamilton Bank*, 105 S. Ct. at 3125.

22. *See, e.g.*, Callies, *The Taking Issue Revisted*, 37 LAND USE L. & ZONING DIG. No. 7, at 6 (1985); Girard, *Agins: A Step in the Right Direction*, 31 LAND USE L. & ZONING DIG. No. 9, at 3 (1979); Siemon, *Comment on San Diego Gas & Elec. Co. v. City of San Diego*, 33 LAND USE L. & ZONING DIG. No. 5, at 6 (1981); Stoebuck, *Agins: A Step in the Right Direction (And Over the Precipice)*, 32 LAND USE L. & ZONING DIG. No. 3, at 5 (1980).

23. The New York Court of Appeals described Holmes' use of the word "taking" with respect to overly-intrusive regulations as "metaphorical" in *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 595, 350 N.E.2d 381, 385, 385 N.Y.S.2d 5, 9, appeal denied, 429 U.S. 990 (1976). Justice Brennan used the term in *San Diego Gas & Electric* and attributed the language to *French*. *See* 450 U.S. at 649 n.14.

compensation. Instead, the regulation is void. If one accepts this, a government must literally take the property in question by eminent domain in order to carry out its stated purpose.

There is some justification for this argument. First, in *Pennsylvania Coal* Justice Holmes also said, "One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."[24] Arguably, courts have interpreted Justice Holmes's statement, "if a regulation goes too far it will be recognized as a taking," out of context. The *real* meaning of *Pennsylvania Coal* is that if a regulation goes too far it is invalid, and if the government still wants to accomplish the regulatory goal it must use eminent domain to acquire the property interest offended by the regulation.

Justice Stevens advanced a second argument in his concurring opinion in *Hamilton Bank*. Justice Stevens first distinguished "permanent harms" and "temporary harms."[25] He then proceeded to consider the claimed taking in *Hamilton Bank* as a permanent taking, and concluded that:

> [T]he essence of the holding is a conclusion that the harm caused by the regulation is one that the Government may not impose unless it is prepared to pay for it. In my opinion, when such a situation develops, there is nothing in the Constitution that prevents the Government from electing to abandon the permanent-harm-causing regulation. The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that "goes too far" as a "taking" does not mean that such a regulation may never be cancelled and must always give rise to a right to compensation.[26]

The thrust of the argument appears to be that merely calling a governmental action a taking does not mean that the claimant is entitled to "just compensation"; the government also has the option of rescinding the regulation.

With respect to temporary takings, Justice Stevens concluded that

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24. 260 U.S. at 413.

25. Justice Stevens stated:

> "The substance of a restriction may permanently curtail the economic value of the property. Or the procedures that must be employed, either to obtain permission to use property in a particular way or *to remove an unlawful restriction on its use*, may temporarily deprive the owner of a fair return on his investment."

105 S. Ct. at 3125 (emphasis added).

26. *Id.* at 3125-26.

the eminent domain clause did not mandate compensation.[27] The essence of Justice Stevens' view is that if a claimant has received procedural due process, the government should be able to make the conscious choice of rescinding the regulation or exercising its power of eminent domain. Inverse condemnation, Stevens reasoned, makes both the paying of compensation and the amount of compensation a surprise to the government that has enacted the challenged regulation. Thus, as a logical conclusion to this line of reasoning, a court should invalidate the regulation and let the government decide if it wants to proceed by eminent domain or abandon the purpose of the regulation altogether.

The Court has adopted *de facto* the "due process" view of regulatory takings in its four non-decisions.[28] Nonetheless, the Court has left open the possibility that it might explicitly adopt inverse condemnation. If the Court, after flirting with inverse condemnation for the last seven years, finally adopts the "eminent domain" view of regulatory takings, there is still one more threshold question: what is a taking?

2. What Constitutes a "Taking"

Justice Brennan addressed the issue of what constitutes a taking in his noted majority opinion in *Penn Central Transportation Co. v. New York City*: "[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' "[29] It is an understatement to say that Justice Brennan's formulation says little. In fact, he goes on to describe the Court's determinations of what constitutes a taking as "essentially ad hoc, factual inquiries."[30] Further, *Agins, San Diego Gas &*

27. Stevens stated:

> If his property is harmed—even temporarily—without due process of law, he may have a claim for damages based on the denial of his procedural rights. But if the procedure that has been employed to determine whether a particular regulation "goes too far" is fair, I know of nothing in the Constitution that entitles him to recover for this type of temporary harm.

Id. at 3126-27.

28. By failing to find that a taking was properly alleged or proven in each of the cases, the Court left the claimants with only procedural due process arguments that three of the claimants have declined to make and the fourth, Hamilton Bank, could not prove. Only in *Hamilton Bank* did the claimant assert that its procedural due process rights were violated, and the jury found in favor of the county on that cause of action. *Id.* at 3127.

29. 438 U.S. 104 (1978).

30. *Id.* at 124.

Electric, and *Hamilton Bank* have added little to the formulation of what constitutes a taking because in each case the majority found that no taking had occurred.

What constitutes a taking is a critical question in these cases because the Court either agreed with the lower courts that no taking occurred[31] or held that the issue was not ripe.[32] The Court in each of these cases did not consider the appropriate remedies if a taking were found. The purpose of this article is not to review the myriad of cases and articles[33] that have dealt with the takings question. This article is concerned with whether the Court will allow inverse condemnation when it determines that a taking has occurred by a municipality's downzoning land or not allowing the land to be developed as zoned. While it is hard to predict when the Court will find that a taking has occurred, in past cases the Court has found regulatory takings.[34] The issue, then, is the proper remedy if a taking is found.

3. The Remedy for a Taking: The Importance of *Penn Central*

Although *Agins* appears to be the modern starting point for tracing how the Court has dealt with the issue of remedies for inverse condemnation, a somewhat earlier point is Justice Brennan's majority opinion in *Penn Central*. *Penn Central* involved a railroad's claim that its property was taken when New York City refused to approve either of two designs for an office building to be built atop Grand Central Terminal.[35] Justice Brennan began his majority opinion with this issue:

> The question presented is whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic

31. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981).

32. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986).

33. *See e.g.*, Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984); Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 N.Y.U. L. REV. 465 (1983); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Ross, *Modeling and Formalism in Takings Juriprudence*, 61 NOTRE DAME L. REV. 372 (1986); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sterk, *Governmental Liability for Unconstitutional Land Use Regulation*, 60 IND. L.J. 113 (1984).

34. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

35. 438 U.S. at 115-16.

landmarks—in addition to those imposed by applicable zoning ordinances—*without effecting a "taking" requiring the payment of "just compensation."*[36] [emphasis added]

Justice Brennan went on to hold that there was no taking of the railroad's property,[37] and laid the groundwork for the recent inverse condemnation cases.

B. *The* Agins *Case*

The Court's first serious review of a claim that a land use regulation constituted a taking was *Agins v. City of Tiburon*.[38] *Agins* involved the downzoning of a valuable five acre parcel from multi-family use to single-family use. Agins alleged that the five acres had "greater value than any other suburban property" in California, and that the land had " 'the highest market values of all lands' in Tiburon."[39] Although Agins had not applied for approval to develop the land, he sued the city, alleging that there had been a taking of his land and that he was entitled to $2,000,000 as just compensation.

The trial court granted the city's demurrer to Agins' complaint.[40] The California Supreme Court affirmed, holding that there was no taking, and that even if there was, Agins' only remedies were mandamus and declaratory relief.[41] The California Supreme Court stated that a claimant alleging a regulatory taking cannot "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."[42] After defining the remedies available to a regulatory takings claimant, the California Supreme Court went on to hold that Agins' property was not taken and that he was not entitled to relief. The United States Supreme Court affirmed in a unanimous decision written by Justice Powell, but only on the basis that no taking had occurred. The Court found that the sole issue was whether the enactment of a zoning ordinance could alone be a taking: "Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding

36. *Id.* at 107.
37. *Id.* at 138.
38. 447 U.S. 255 (1980).
39. *Id.* at 258.
40. *Id.*
41. Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).
42. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

the application of the specific zoning provisions."[43] Justice Powell then cited the classic zoning cases and *Penn Central* to hold that there was no taking because the state advanced a legitimate state interest and the claimant still had the economically viable use of building five single-family homes on his land.[44]

Concerning the issue of remedies, Justice Powell stated: "Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation."[45] *Agins* set the stage for a battle over inverse condemnation. The Court had left open two questions: (1) what if the zoning ordinance did deprive the claimant of all economically viable use, and (2) what if the claimant had attempted to develop his land?

C. *The* San Diego Gas & Electric *Case*

Only nine months after deciding *Agins*, the Court decided *San Diego Gas & Electric Co. v. City of San Diego*,[46] a case that had the potential of answering the first of the questions stated above. In *San Diego Gas & Electric*, the San Diego Gas & Electric Company (SDG&E) spent $1,770,000 assembling 412 acres as a possible site for a nuclear power plant. The city then placed most of the site in an "open-space" zone. SDG&E then brought a mandamus action against the city, and sued the city for inverse condemnation, seeking $6,150,000 as just compensation.

Before the California Supreme Court decided *Agins*, the trial court in *San Diego Gas & Electric* dismissed the mandamus action as "not the proper remedy," but ruled that the city's actions had deprived SDG&E of "all practical, beneficial or economic use of the property."[47] In a subsequent jury trial to determine damages, SDG&E was awarded $3,000,000.

The California Court of Appeal affirmed, but the California Supreme Court vacated the court of appeal's decision.[48] The California Supreme Court remanded the case to the court of appeal for reconsid-

43. 447 U.S. at 260.
44. *Id.* at 262-63.
45. *Id.* at 263.
46. 450 U.S. 621 (1981).
47. *Id.* at 626.
48. *Id.* at 628.

eration in light of the supreme court's opinion in *Agins*. The court of appeal reversed itself and the trial court by holding, consistent with *Agins*, that inverse condemnation was not available to SDG&E and that its sole remedies were mandamus and declaratory relief.[49] The California Supreme Court denied further review, and SDG&E appealed to the United States Supreme Court.

Justice Blackmun, joined by Chief Justice Burger and Justices Stevens and White, held that the case was not reviewable because the California courts had not made a final decision that a taking had occurred.[50] Justice Blackmun concluded his opinion with dicta that provided some hope for the proponents of inverse condemnation:

> Thus, however we might rule with respect to the Court of Appeal's decision that appellant is not entitled to a monetary remedy—and we are frank to say that the federal constitutional aspects of that issue are not to be cast aside lightly—further proceedings are necessary to resolve the federal question whether there has been a taking at all.[51]

Justice Rehnquist concurred in the result, forming the necessary five vote majority for disposal of the case. Justice Rehnquist began his opinion, however, with words that seemed to give the proponents reason for celebration:

> If I were satisfied that this appeal was from a "final judgment or decree" of the California Court of Appeal, as that term is used in 28 U.S.C. § 1257, I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan.[52]

The focus of the case, therefore, was taken from the majority's "non-decision" and placed on Justice Brennan's dissent.

Justice Brennan dissented, joined by Justices Marshall, Powell, and Stewart. Justice Brennan cited Justice Holmes' famous quote from *Pennsylvania Coal*,[53] and proceeded to adopt the eminent domain theory of regulatory takings. He stated his view simply:

> [O]nce 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 regula-

49. *Id.* at 629-30.

50. *Id.* at 633.

51. *Id.*

52. *Id.* at 633-34.

53. *Id.* at 649. *See supra* notes 15-24 and accompanying text.

> tion first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[54]

At this point, the proponents of inverse condemnation could reasonably believe that the Court would adopt their position when presented with the right case.

D. *The* Hamilton Bank *Case*

Williamson County Regional Planning Commission v. Hamilton Bank,[55] a Tennessee case on appeal from the Sixth Circuit, appeared to be the right case.[56] While the claimants in *Agins* and *San Diego Gas* based their taking claims on the application of zoning ordinances, the claimant in *Hamilton Bank* based its claim on denial of its plans to subdivide land. These plans comported with the zoning ordinance in effect at the time that the development was first approved.

In 1973 the Williamson County Regional Planning Commission approved the preliminary plat for over 700 dwelling units on a 676 acre tract. The developer, Hamilton Bank's predecessor, intended to build a golf course surrounded by homes. The developer spent about $3,000,000 on the golf course, and began subdividing other land for home sites. In 1977 the county changed its zoning ordinance to reduce the number of houses the developer could build from that originally approved. Nonetheless, through 1979 the Planning Commission continued to apply the 1973 zoning ordinance and gave final approval to the construction of 212 houses.

In 1980 the Planning Commission asked the developer to submit a revised preliminary plat before it sought final approval for the remaining sections of the development. The Commission raised several objections to the revised preliminary plat, and applying the 1977 ordinance, disapproved the plat primarily because of the density of the proposed development. The developer appealed to the County Board of Zoning Appeals, and the Board determined that the Planning Commission should apply the 1973 ordinance.

After foreclosing on most of the remaining land owned by the developer, Hamilton Bank resubmitted two preliminary plats to the Plan-

54. 450 U.S. at 653.

55. 473 U.S. 172 (1985).

56. *See* Bauman, *Deja Vu, or Et Tu Supreme Court?* 37 LAND USE L. & ZONING DIG. No. 7, at 3 (1985); Callies, *supra* note 22, at 6; Morgan, *Regulatory "Takings": A Pragmatic Approach*; 37 LAND USE L. & ZONING DIG. No. 7, at 4 (1985).

ning Commission in 1981. One plat had been approved in 1973 and reapproved several times thereafter, and the other showed the final plans for development of the vacant land. The Planning Commission rejected the preliminary plats and refused to follow the 1973 ordinance as directed by the County Board of Zoning Appeals.

Hamilton Bank then filed suit in federal court for inverse condemnation and a declaration that state law estopped the Planning Commission from denying approval of the preliminary plats as submitted.[57] After trial, the jury found that Hamilton Bank had been denied the "economically viable" use of its property and awarded it $350,000 in damages for the temporary taking.[58] The district court granted judgment notwithstanding the verdict, and the Sixth Circuit Court of Appeals reversed, reinstating the jury's decision.[59]

In the majority opinion, Justice Blackmun, joined by Chief Justice Burger and Justices O'Connor and Rehnquist, held that the case was not ripe.[60] First, Justice Blackmun opined that there had not yet been a "final decision regarding the application of the zoning ordinance and subdivision regulations" to Hamilton Bank's property.[61] In addition, Hamilton Bank had not used state procedures for obtaining just compensation.[62] Finally, in what one commentator has referred to as a "small bombshell,"[63] the Court held that until a claimant has exhausted all state law remedies, he is precluded from bringing a section 1983 action in federal court.[64]

Justice Brennan concurred[65] and reiterated his position in his dissent in *San Diego Gas*, but he agreed with Justice Blackmun that the case was not ripe.[66] Justice White dissented from the holding that the issues were not ripe, but did not file an opinion.[67]

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57. 105 S. Ct. at 3114.

58. *Id.* at 3115.

59. *Id.*

60. *Id.* at 3124-25. Justice Powell did not take part in the case, Justices Brennan and Marshall concurred in the opinion, Justice Stevens concurred in the judgment, and Justice White dissented from the judgment.

61. *Id.* at 3117.

62. *Id.*

63. Bauman, *Hamilton Bank: No Decision on the Compensation Issue*, 8 ZONING & PLAN. L. REP. 137 (1985).

64. 105 S. Ct. at 3121.

65. Justice Marshall joined Brennan's concurring opinion.

66. 105 S. Ct. at 3124-25.

67. *Id.* at 3124.

Justice Stevens wrote the most interesting opinion, concurring in the judgment but not in the reasoning of the Court.[68] Justice Stevens explicitly rejected the concept of inverse condemnation and struck at the heart of its historical justification: "The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that 'goes too far' as a 'taking' does not mean that such a regulation may never be cancelled and must always give rise to a right of compensation."[69] He explained that the claimant could argue only that his procedural due process rights were violated and that because the jury rejected Hamilton Bank's due process claim, the judgment should be reversed.[70]

Hamilton Bank left regulatory taking law in turmoil. It was clear that a claimant must pursue all state law remedies and receive a "final determination" with respect to permissible land uses. It was just as clear, however, that no one knew just what constituted a "final determination."

III. *MacDonald* and Its Aftermath

A. *The* MacDonald *Case*

MacDonald, Sommer & Frates v. Yolo County[71] was decided almost exactly one year after *Hamilton Bank*. After the Court's non-decision in *Hamilton Bank*, it appeared likely that the Court would finally confront the inverse condemnation issue.

MacDonald, Sommer & Frates (MacDonald) owned land in Yolo County, California, which is adjacent to the City of Davis, California. The land was used for agricultural purposes but was designated on the general plan and zoned for residential use. MacDonald desired to subdivide the land into lots for 159 single and multi-family structures. In 1975, MacDonald submitted a tentative subdivision map to the Yolo County Planning Commission.[72]

The Planning Commission rejected the map, and the County's Board of Supervisors affirmed the Planning Commission's decision. The Board cited several reasons why the map was not consistent with the

68. *Id.* at 3125-27.

69. *Id.* at 3125-26.

70. *Id.* at 3127.

71. 106 S. Ct. 2561 (1986).

72. Seeking approval of a tentative subdivision map is the first official step a California subdivider must take in order to gain final approval for a subdivision. *See* CAL. GOV'T CODE § 66452 (West Supp. 1987).

county's general plan or the county's zoning regulations.[73]

Rather than modify the proposal and resubmit it, MacDonald filed suit in California Superior Court, seeking two different forms of relief. The suit sought a writ of mandate to force the county to reconsider its decision, and declaratory relief and damages for inverse condemnation.[74] In its claim for inverse condemnation, MacDonald asserted that the city and the county had restricted its land to an "open-space agricultural use by denying all permit applications, subdivision maps, and other requests to implement any other use."[75] According to the complaint, the result of the city and county actions was the appropriation of the "entire economic use" of MacDonald's land for "a public, open-space buffer."[76] Finally, the complaint alleged that "any application for a zone change, variance or other relief would be futile."[77]

The city and the county demurred.[78] The Superior Court granted the demurrer, noting that MacDonald could use the land for agriculture, agricultural storage facilities, and ranch and farm dwellings.[79] The Superior Court specifically rejected MacDonald's conclusory allegations that the county precluded every principal use and left the property valueless as zoned.[80] The Superior Court also concluded that monetary damages for inverse condemnation are precluded in California by *Agins v. City of Tiburon*.[81]

MacDonald appealed the inverse condemnation claim to the Califor-

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73. 106 S. Ct. at 2563. MacDonald's subsequent suit focused on four of the Board's allegedly improper reasons:

1. The map provided for access from only one public street, a street that the city refused to grant permission to extend;
2. The map did not provide for sewer service by any governmental entity, and there was no pending application for sewer service;
3. The county would be unable to provide "intense enough" police protection; and
4. The map indicated no provision for a water system by any governmental entity.

Id.

74. *Id.*

75. *Id.*

76. *Id.* at 2563-64.

77. *Id.* at 2564.

78. *Id.*

79. *Id.*

80. *Id.*

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

nia Court of Appeal.[82] The court held that even if MacDonald could establish a fifth amendment taking, *Agins* limited MacDonald's remedy to overturning the statute as applied to its property.[83] The court, however, held that there had been no taking. In its unpublished opinion the court of appeal stated:

> Here plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of the particular plan cannot be equated with a refusal to permit any development. . . . *Land use planning is not an all-or-nothing proposition*. . . . Here, as in *Agins*, the refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development.[84] [emphasis added]

MacDonald pressed on to the United States Supreme Court. Writing for a five-justice majority, Justice Stevens held that there had been no taking of MacDonald's land because MacDonald "[s]till has yet to receive the Board's 'final, definitive position regarding how it will apply the regulations at issue to the particular land in question.' "[85] Justice Stevens then referred to the Court's holdings in *Agins, San Diego Gas & Electric*, and *Hamilton Bank* and concluded by stating: "[I]n this case, the holdings of both courts below leave open the possibility that some development will be permitted, and thus again leave us in doubt regarding the antecedent question whether appellant's property has been taken."[86]

Justice White wrote a strong dissent.[87] He primarily addressed the Court's treatment of the case's procedural aspects, and came to the conclusion that MacDonald had stated a taking claim.[88] Justice White added that the Court's prior decisions should not be read to require a potential inverse condemnation claimant to either make "repeated ap-

82. MacDonald's petition to the California Superior Court for a writ of mandamus was still pending at the time the U.S. Supreme Court decided the case. 106 S. Ct. at 2563.

83. *Id.* at 2565.

84. *Id.*

85. *Id.* at 2568.

86. *Id.* at 2568-69.

87. *Id.* at 2569. Chief Justice Burger joined the dissent in whole and Justices Rehnquist and Powell joined in part.

88. *Id.* Justice White stated, "The factual allegations that we must consider, when the opinion below is correctly read, do state a takings claim and therefore present the remedial question that we have thrice before sought to resolve." *Id.*

plications" or receive the "decisionmaker's definitive position" before the claimant has a viable claim for inverse condemnation.[89] Finally, Justice White concluded by reiterating his support for Justice Brennan's articulation of damages for inverse condemnation in *San Diego Gas.*[90]

Justice Rehnquist agreed with Justice White's procedural analysis of the case but declined to echo White's unqualified support for Justice Brennan's position in *San Diego Gas*:

> As Justice White recognizes in Part IV of his opinion [Justice White's support of damages for inverse condemnation], the questions surrounding what compensation, if any, is due a property owner in the context of "interim" takings are multifaceted and difficult. I would not reach these questions without first permitting the courts below to address them in light of the fact that [MacDonald] has sufficiently alleged a taking.[91]

Justice Rehnquist's refusal to rule on the damages question could mean that either he wants to see how a lower court will formulate a damage remedy or, less likely although still possible, he is rethinking whether damages should be a remedy at all.

B. *The Supreme Court After* MacDonald

It is always a treacherous undertaking to predict what the Court will do, and any predictions as to how the Court will handle the inverse condemnation issue must take into account the changes in personnel on the Court. First, Justice Stewart, who joined Justice Brennan's dissent in *San Diego Gas*, retired from the Court and was replaced by Justice O'Connor. Chief Justice Burger also retired from the Court and was replaced as Chief Justice by Justice Rehnquist. Justice Rehnquist was in turn replaced by Judge Antonin Scalia of the District of Columbia Circuit.[92] Nonetheless, one can consider how the incumbent justices have voted on inverse condemnation and the Court's decision in *MacDonald* in order to predict the Court's outcome in three regulatory taking cases scheduled for consideration.[93]

Three justices appear to be firmly in favor of some form of inverse

89. *Id.* at 2571.

90. *Id.* at 2573.

91. *Id.* at 2574.

92. Justice Scalia is a former professor of the University of Chicago School of Law and a noted law and economics scholar.

93. *See supra* text accompanying notes 11-13.

condemnation. Despite joining the majority opinion in *MacDonald*, Justice Brennan restated as recently as *Hamilton Bank*[94] the position he first articulated in his majority opinion in *Penn Central* and expanded on in *San Diego Gas & Electric*. While his alignment with the majority in *MacDonald* may indicate some second thoughts about inverse condemnation, such an argument is not particularly persuasive when one considers the strength of his views in *San Diego Gas & Electric* and *Hamilton Bank*. Justice Marshall joined Justice Brennan without separate statement in each of the inverse condemnation cases. Justice White made it clear in his dissent in *MacDonald* that he is fully in favor of inverse condemnation.[95]

The next step is more difficult, but it appears that at least two other justices are in favor of inverse condemnation. Justice Powell joined Justice Brennan's dissent in *San Diego Gas & Electric*, and also joined Justice Rehnquist's dissent in *MacDonald*. Justice Rehnquist, whose concurrence in *San Diego Gas & Electric* stated that he would have "little difficulty in agreeing with much of" Justice Brennan's dissent,[96] dissented in *MacDonald* in a very interesting way. He referenced Justice White's statement that the issues surrounding damages for "interim" takings are "multifaceted and difficult," and then concluded that he would remand for determination of those damages.[97] Taking Justice Rehnquist's statements at face value, one can conclude that he favors inverse condemnation but will withhold determination of damages until after a judgment either allowing or disallowing damages. It appears, then, that at least five justices favor inverse condemnation.

On the other side, Justice Stevens, in his *Hamilton Bank* concurrence, has made it clear that he is opposed to inverse condemnation. As he stated in *Hamilton Bank*, "[t]emporary harms [that are by-products of governmental decision making] are an unfortunate but necessary by-product of disputes over the extent of the Government's power to inflict permanent harms without paying for them."[98] As to permanent takings, Justice Stevens concludes that the claimant's proper remedy is invalidation of the governmental regulation.

The remaining three justices' positions are more difficult to predict. Justice Blackmun has voted with the majority in each of the cases re-

94. 105 S. Ct. 3108, 3124-25 (1985).
95. 106 S. Ct. 2561, 2572-73 (1986).
96. 450 U.S. 621, 633-34 (1981).
97. 106 S. Ct. at 2574.
98. 105 S. Ct. at 3126.

viewed in this article, and he wrote the Court's opinions in both *San Diego Gas & Electric* and *Hamilton Bank*. One could conclude that he opposes inverse condemnation, but if he does he would have joined Justice Stevens' concurring opinion in *Hamilton Bank*. Justice O'Connor is in a similar position. She was not on the Court when *Penn Central, Agins,* or *San Diego Gas & Electric* were decided, but she joined the majority opinions in *Hamilton Bank* and *MacDonald*. Furthermore, she did not join Justice Stevens' concurring opinion in *Hamilton Bank*. Finally, Justice Scalia, as the newest member of the Court, is the greatest unknown.

The expected vote on the "right" inverse condemnation case is, therefore, five to one in favor of inverse condemnation, with three unknowns. This should cheer the proponents of inverse condemnation, but it hardly strikes fear into the hearts of its opponents. The final issue is determining the "right" inverse condemnation case.

IV. BEYOND *MACDONALD*

A. *The "Right" Inverse Condemnation Case*

Asking what constitutes the "right" inverse condemnation case is misleading because the question assumes there *is* a "right" inverse condemnation case. As the Court has worked its way through several regulatory takings cases over the last decade, commentators speculated that the current case before the Court was the "right" one.[99] By consistently accepting cases that raise the inverse condemnation issue, only to render non-decisions, the Court has left itself open for a great deal of second-guessing.

Despite the Court's non-decisions and the justices' inconsistencies, the "right" inverse condemnation case apparently must have several elements. First, the claimant must have at least attempted to obtain approval of his development plans by the appropriate regulatory body. This point can arguably be gleaned from Justice Powell's observation in *Agins* that "[b]ecause the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provision."[100] Justice Blackmun drove the point home in *Hamilton*

99. Such speculation is inevitable. The Cout has fueled the speculation, however, by reviewing the several cases discussed in this article in a relatively short period of time.

100. 447 U.S. 255, 260 (1980).

Bank by stating that the Bank had "submitted a plan for developing its property, and thus has passed beyond the *Agins* threshold."[101]

Second, even if the claimant meets the *Agins* threshold, submission of only one plan for development may not be enough. In *Hamilton Bank* the developer submitted a plan and successfully appealed its denial to the County Board of Zoning Appeals. Nonetheless, the Planning Commission refused to follow the direction of the County Board of Zoning Appeals, and the developer sued. The Supreme Court emphasized that the Bank had not appealed the Planning Commission's decision, nor had it sought variances in order to be able to develop the land as proposed.[102] Justice Stevens clearly required more than one application in *MacDonald* by stating:

> Here, in comparison to the situations of the property owners in [*Agins, San Diego Gas & Electric*, and *Hamilton Bank*], appellant has submitted one subdivision proposal and has received the Board's response thereto. Nevertheless, appellant still has yet to receive the Board's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[103]

Third, the claimant must exhaust virtually all administrative remedies.[104] This conclusion may not seem obvious, but considering all that the developer and the bank did in *Hamilton Bank*, arguably a claimant must not only try the obvious but show that he has gone the "extra mile." Allegations of frustration and futility did not persuade the Court in *Penn Central, Agins, San Diego Gas & Electric, Hamilton Bank,* or *MacDonald*. As Professor Callies concluded in discussing *MacDonald*, "[T]he majority confirms it is going to be darned difficult for a landowner to come before a federal court on a regulatory taking/compensation theory without having sought and been denied a lot of permits."[105] Justice Stevens added what Professor Callies called a "parting shot"[106] in *MacDonald* by noting, "Rejection of exceedingly grandiose development plans does not logically imply that less ambi-

101. 105 S. Ct. at 3117.

102. *Id.* at 3117-19.

103. 106 S. Ct. 2567-68.

104. *See* Callies, *The "Full Bore" Application of Hamilton Bank*, 38 LAND USE L. & ZONING DIG. No. 9, at 4-5 (1986).

105. *Id.* at 5.

106. *Id.*

tious plans will receive similarly unfavorable reviews."[107]

Fourth, *Hamilton Bank* holds that in order to claim a violation of a federal constitutional right, a claimant will have to be in one of two positions. In the first position, the claim must arise in a state that has expressly rejected inverse condemnation, such as California or New York.[108] In the second position, provided for claimants in states that have accepted inverse condemnation or at least have not rejected it, the claimant must utilize any available procedure for compensation under state law.[109] Arguably, the second position includes not only the Tennessee statutory procedure for compensation present in *Hamilton Bank*, but also bringing an inverse condemnation suit in state court and losing. As Gus Bauman put it, "In essence, the Court is closing the federal courthouse door to nearly all Fifth and Fourteenth Amendment just compensation clause claims."[110]

Finally, consistent with the taking cases, the Court apparently wants a showing of extensive damages and essentially arbitrary action by the governmental entity charged with the taking. In general, the Court has been unsympathetic to downzoning cases. The inverse condemnation cases generally include elements of arbitrariness, and most involve new or changing standards.[111]

B. *Current Cases and Potential Cases*

In addition to the previously discussed points, potential inverse condemnation claimants should consider several other points. First, several state[112] and federal[113] courts have ruled in favor of inverse

107. 106 S. Ct. at 2569 n.9.

108. As to California, see Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979). As to New York, see Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1977), and Penn Central Transportation Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

109. 105 S. Ct. at 3121.

110. Bauman, *supra* note 63, at 138.

111. *Agins, San Diego Gas & Electric*, and *Hamilton Bank* all involved the application of new ordinances to the subject land.

112. *See, e.g.*, City of Scottsdale v. Corrigan, 149 Ariz. 553, 720 P.2d 528 (1986), *cert. denied*, 107 S. Ct. 577 (1987); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981).

113. *See, e.g.*, Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir.), *cert. denied*, 104 S. Ct., 151 (1983); Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985); Williamson County Regional Planning Comm'n v. Hamilton Bank, 729 F.2d 402 (6th Cir. 1984).

condemnation, or at least have stated they were leaning in that direction. On the other hand, other state courts, including two of the most influential highest state courts, have rejected inverse condemnation.[114] Finally, some federal courts have either rejected inverse condemnation[115] or have literally applied the various obstacles of *Hamilton Bank*, including the need to seek state compensation remedies[116] and ripeness.[117]

Furthermore, potential claimants must make their proposals for development comply closely with existing regulations other than those attacked. In each case, the Court has apparently looked for any other reason to explain the downzoning of the parcel or the proposed develpment's rejection. The Court has also made it clear that a potential claimant must pursue all possible administrative and judicial avenues of relief under state law. This requirement, however, cuts against the need of most developers to proceed quickly, for the passage of time usually translates into large monetary losses for a developer. The developer is then faced with the unenviable decision of whether to persist in seeking approval for the development or to concede a loss and move on to another location.

When opposing developers, municipalities have a tremendous advantage in the inverse condemnation battle. Nonetheless, municipalities are in a worse position than they were before courts raised the spectre of inverse condemnation. In his dissent in *San Diego Gas*, Justice Brennan recounts the advice one city attorney gave his peers: "If all else fails, merely amend the regulation and start over."[118] A municipality can, however, make it difficult for developers by following the Court's insistence that the claimant pursue all avenues of relief under state law. The municipality may leave open the possibility that it will reconsider its decision, or provide for several methods of requesting variances or

114. *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

115. *See, e.g.*, Citadel Corp. v. Puerto Rico Highway Auth., 695 F.2d 31 (1st Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985).

116. Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); Four Seasons Apartments v. City of Mayfield Heights, 775 F.2d 150 (6th Cir. 1986).

117. Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); HMK Corp. v. County of Chesterfield, 616 F. Supp. 667 (E.D. Va. 1985); Golemis v. Kirby, 623 F. Supp. 1057 (D.R.I. 1986).

118. 450 U.S. at 655 n.22.

conditional use permits. The best defense for municipalities may be to give developers as many avenues of request and appeal as possible. In addition, the more flexible a municipality is, the less likely it will face an inverse condemnation action.

The Court has strongly indicated that it is interested only in cases in which the municipality has refused to allow development or has severely cut back on previously allowed development. The key, then, may be good faith. If a municipality tries to work with developers and provide for realistic uses of land, it is unlikely that the municipality will lose an inverse condemnation action.

V. CONCLUSION

The law of inverse condemnation is still in a state of flux. Although at least five justices of the Supreme Court may be ready to allow inverse condemnation when presented with the right case, proponents of inverse condemnation should be concerned. Their opportunity for victory is on the wane because the Court has not yet found the right case. The proponents' only option is to wait and see what the Court does with its new inverse condemnation cases.

For opponents of inverse condemnation, victory may well be at hand. Even if the Court is ready to embrace inverse condemnation, it is having a difficult time finding the right case. Further, even if the Court finds the right case, the facts indicating a taking may be so unusual that a holding in favor of one inverse condemnation claimant may have little practical effect on a municipality that administers its zoning and development laws in good faith. Finally, the Court may get the right case and reject inverse condemnation. Only time and circumstance will tell.