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Agins v. City of Tiburon: The Case of the Frustrated Landowner

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AGINS V. CITY OF TIBURON: THE CASE OF THE FRUSTRATED LANDOWNER

The less pleasant aspects of urban life, such as smoke, noise, and congestion, have created a general desire to relegate the sources of these inconveniences to areas removed from those where people live and play. An increasing national awareness that the physical and aesthetic resources of the country are finite and must be preserved has prompted governmental entities to balance the need for industry and adequate housing with the requirement that we maintain our country as a pleasant place in which to live.

One of the mechanisms developed to deal with land use control is the zoning of designated areas of land for specific uses.[1] Implicit in the zoning process is the balancing of the constitutionally protected rights of the private property owner with the public need to regulate land use:[2]

> by restricting the rights of all property owners, each will benefit. Each landowner relinquishes some property right for the good of the social whole. The only compensation given to the landowner is a pro rata benefit in the form of nuisance protections, reciprocal control over neighboring land uses and property value stablization.[3]

Such zoning was declared constitutionally valid in 1926 by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*[4] and is now accepted in every jurisdiction in this country.[5] Conflicts still arise, however, when landowners are confronted with particularly restrictive

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1. *See* Bowden, *Article XXVIII—Opening The Door To Open Space Control*, 1 PAC. L.J. 461, 466-92 (1970) [hereinafter cited as Bowden]. The subject of Bowden's article was repealed on November 5, 1974. CAL. CONST. art. 28 (West 1978). A legislative section on open space zoning has since been added to CAL. GOV'T CODE §§ 65910-65912 (West Supp. 1966-1979). Bowden emphasizes that zoning is a flexible exercise of the police power, which expands and contracts on the basis of social necessity. Bowden, *supra*, at 473. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *prob. juris. noted*, 100 S. Ct. 658 (1980), is an example of that flexibility; zoning ordinances were not originally created for the purpose of preserving aesthetic values. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925).

2. Bowden, *supra* note 1, at 472. *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954), where such balancing tests were used.

3. Bowden, *supra* note 1, at 501.

4. 272 U.S. 365 (1926).

5. *See* Bowden, *supra* note 1 at 471; Comment, Eldridge v. City of Palo Alto: *Aberra-*

zoning ordinances.[6] Property owners have often brought actions for damages in inverse condemnation[7] with alternative requests for declaratory relief to invalidate the oppressive ordinance as an abuse of the police power.[8] Other owners, while acknowledging the validity of a particular zoning ordinance, have sought damages in inverse condemnation.[9] In 1977, two California courts of appeal dealt with the methods of challenging restrictive zoning ordinances and reached conflicting results. In *Eldridge v. City of Palo Alto*,[10] the plaintiffs challenged an ordinance that placed their land in a permanent open space classification limiting the land to ten acres per homesite. The court held that, although valid, the ordinance was so restrictive as to create a valid

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tion or New Direction in Land Use Law? 28 HASTINGS L.J. 1569, 1570 (1977) [hereinafter cited as *Aberration*].

6. *See, e.g.*, Ybarra v. City of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (ordinance upheld that discriminated against low income groups); Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972) (minimum lot size increased); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976) (rezoning upheld even though it caused substantial reduction in value); Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1976) (upheld open space zoning that caused diminution in value).

7. Inverse condemnation refers to a cause of action against a governmental entity to recover the value of property that has in effect been appropriated by the government without prior compensation. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter cited as Sax]; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971); Comment, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974).

8. *See, e.g.*, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 513-14, 542 P.2d 237, 240-41, 125 Cal. Rptr. 365, 368-69 (1975), *cert. denied*, 425 U.S. 904 (1976) (remedy of inverse condemnation denied on mere allegation of loss of property value); State v. Superior Court (Veta), 12 Cal. 3d 234, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974) (remedy of inverse condemnation denied following the denial of a permit by the Coastal Zone Conservation Commission); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 119, 514 P.2d 111, 116-17, 109 Cal. Rptr. 799, 804 (1973) (denial of allegation of inverse condemnation based on municipality's adoption of a general plan).

Cases in which the remedy of inverse condemnation was upheld: Klopping v. City of Whittier, 8 Cal. 3d 39, 45-46, 500 P.2d 1345, 1350-51, 104 Cal. Rptr. 1, 6-7 (1972) (city held liable for just compensation because of unreasonable pre-condemnation activity); Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 628-29, 129 Cal. Rptr. 575, 584 (1976) (action for inverse condemnation sustained because no remaining reasonable use of property); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (height zoning ordinance passed in anticipation of need of acquisition of air navigation easement); Sneed v. County of Riverside, 218 Cal. App. 2d 205, 209, 32 Cal. Rptr. 318, 322 (1963) (height zoning ordinance passed in lieu of eminent domain acquisition of air navigation easement); Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 462-63, 327 P.2d 10, 16-17 (1958) (zoning for purpose of depressing property value prior to public acquisition).

9. *See, e.g.*, Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 617, 129 Cal. Rptr. 575, 577 (1976).

10. *Id.*

cause of action in inverse condemnation.[11] However, in *Pinheiro v. County of Marin*,[12] which also involved an open space classification, the court rejected the inverse condemnation claim and held that the only remedy available to an aggrieved landowner is an action in mandamus to have the ordinance in question invalidated.[13]

The California Supreme Court attempted to resolve this conflict in *Agins v. City of Tiburon*.[14] The *Agins* court held that a property owner may challenge the constitutionality of a zoning ordinance by establishing its invalidity through mandamus or declaratory relief.[15] The court expressly held that a landowner may not challenge a land use regulation on the theory of inverse condemnation and therefore disapproved *Eldridge*.[16]

I. FACTS OF THE CASE

In *Agins*, Donald and Bonnie Agins had acquired five acres of land along Tiburon Ridge in Marin County.[17] The property was hillside land with a view of the San Francisco Bay; it was purchased by plaintiffs for housing development purposes.[18]

California Government Code sections 65300[19] and 65302(a)[20] require that all California municipalities draw up a general plan specifying land use zones. Under the authority of these statutes, Tiburon

11. *Id.* at 629, 129 Cal. Rptr. at 583.
12. 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1976).
13. *Id.* at 327, 131 Cal. Rptr. at 635.
14. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *prob. juris. noted*, 100 S. Ct. 658 (1980).
15. *Id.* at 270, 598 P.2d at 26, 157 Cal. Rptr. at 373.
16. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.
17. *Id.* at 270, 598 P.2d at 26, 157 Cal. Rptr. at 373.
18. *Id.*
19. CAL. GOV'T CODE § 65300 (West 1966) provides that "[e]ach planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city."
20. CAL. GOV'T CODE § 65302 (West 1966 & Supp. 1966-1979) requires:

> The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:
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> (a) A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan.

adopted Ordinance No. 124 N.S., which went into effect in June 1973[21] and which contained widespread zoning modifications. Part of the plan designated areas to be kept as "open space." The city council authorized the sale of bonds to acquire such lands through an eminent domain action.[22]

Although no mention of plaintiffs' land was made when the bonds were approved, Tiburon's general plan designated the Agins' property as part of the area to be used for open space. More specifically, the land was zoned RPD-1, defined in Ordinance No. 123 N.S. as "Residential Planned Development and Open Space Zone."[23] The only authorized uses of land in this zoning area were single-family dwellings, open space uses, and accessory buildings and uses. Permissible building density in the area was very low: " 'not less than .2 nor more than one dwelling per gross acre depending on other specified provisions," such as architectural plans and recommendations of a required environmental impact report.[24] Because the plaintiffs owned five acres, they could have built, under the terms of the zoning ordiance, a minimum of one or a maximum of five dwelling units on their land.[25]

The Aginses failed to exhaust their administrative remedies.[26] They neither submitted to the city a plan of proposed uses of the property nor sought a definitive statement from the city on the type of land uses allowed them after Tiburon adopted its general plan. By so doing, they lost any chance to compromise with the city on permissible uses of their land. Instead, they filed a claim for $2,000,000 in damages against Tiburon in October 1973, alleging that the zoning regulations had completely destroyed the value of their property.[27] Their claim was rejected by the city.

In December 1973, Tiburon brought an action in eminent domain against the Aginses that was abandoned by the city in November 1974 and dismissed by the trial court in June 1975.[28] The city paid the plaintiffs for legal expenses incurred by them during the pendency of the action pursuant to California Code of Civil Procedure section

21. 24 Cal. 3d at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374.
22. *Id.* at 270-71, 598 P.2d at 27, 157 Cal. Rptr. at 374.
23. *Id.* at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374.
24. *Id.* (quoting Ordinance No. 124 N.S.).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

1255a(c).[29] The remedy was exclusive; the Agins had no further cause of action against Tiburon arising out of the abandoned eminent domain proceedings.[30]

Finding themselves the owners of land with severely restricted uses, the Aginses filed an action in superior court in June 1975 against the City of Tiburon seeking damages in inverse condemnation and declaratory relief on the theory that Tiburon's ordinance was an unconstitutional taking of their land without just compensation.[31] The city demurred to both causes of action. The demurrer to the first cause of action for damages in inverse condemnation was sustained without leave to amend. Plaintiffs were given ten days to amend their second cause of action for declaratory relief. They declined to do so, and the trial court dismissed their action with prejudice. The Aginses then appealed from the dismissal.[32]

II. REASONING OF THE COURT

A. Remedies

Agins presents two major issues. The first is whether Ordinance No. 124 N.S. created a constitutionally invalid "taking" of the plaintiffs' property. Unfortunately, the California Supreme Court failed to focus directly on this question; rather, it looked to the validity of the challenged zoning ordinance. This raises the second major issue: what remedies should be available to a landowner confronted with the downzoning of his property? Here, the court made two holdings: (1) the remedy of damages in inverse condemnation is not available and (2) declaratory relief is available in a challenge to the facial validity of a zoning statute.[33]

In reaching its conclusion, the court looked to the holdings of previous California cases that dealt with the propriety of remedies available to a plaintiff alleging abuse of the police power.[34] The first case relied on by the court as precedent for its conclusion that declaratory

29. CAL. CIV. PROC. CODE § 1255a(c) (West 1973) (superseded by CAL. CIV. PROC. CODE §§ 1235.140, 1268.510(c) & 1268.610 (West 1978)).

30. 24 Cal. 3d at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374.

31. *Id.* at 271-72, 598 P.2d at 27, 157 Cal. Rptr. at 374. The cause of action in inverse condemnation carried with it a claim for $2,000,000 in damages. *Id.*

32. *Id.* at 272, 598 P.2d at 27-28, 157 Cal. Rptr. at 374-75.

33. *Id.* at 269-70, 598 P.2d at 26, 157 Cal. Rptr. at 373.

34. HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976); State v. Superior Court (Veta), 12 Cal. 3d 234, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

relief is the only available remedy when a plaintiff seeks to have a land use ordinance declared invalid was *State v. Superior Court (Veta)*.[35] In *Veta*, two corporations (Veta) sought a permit to build on land within the jurisdiction of the California Coastal Zone Commission. The permit was denied.[36] Veta then sought a declaration that the act under which the Commission was operating was unconstitutional.[37] The court in *Veta* held that such relief was proper.[38] According to the *Agins* court, *Veta* stands for the proposition that "declaratory relief [is] an appropriate remedy by which to seek a declaration that a statute controlling development . . . [is] facially unconstitutional."[39]

The *Agins* court also relied on the court of appeal decision of *Friedman v. City of Fairfax*[40] as authority for its holding.[41] In that case, a change in city zoning regulations frustrated the plaintiff's plans to build multiple-family dwellings but allowed the existing uses of the property to continue.[42] The court of appeal held that no taking had occurred.[43] *Friedman* differs from *Agins* in that the land in *Friedman* was already being used for profitable purposes,[44] while the land in *Agins* was vacant. But, the court's holding in *Friedman*, that a zoning

35. 12 Cal. 3d 234, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974). *Veta*, however, was not directly on point with the issues presented in *Agins* and was used by way of analogy. In *Veta*, the real dispute was whether the permit had been properly withheld. The plaintiffs did *not* directly challenge the validity of any statute or ordinance designed to control land use; rather, they challenged the action of the Commission operating under a statute designed to achieve land control. However, it is not difficult to conclude that a remedy available to challenge an action of a governmental agency in the area of land use control should also be available to challenge an ordinance that performs the same function. Hence, although *Veta* does not directly deal with the issue of zoning by ordinance, the case does lend support to the court's rationale in *Agins*.

36. *Id.* at 242-43, 524 P.2d at 1284, 115 Cal. Rptr. at 500.

37. *Id.* at 244, 524 P.2d at 1285, 115 Cal. Rptr. at 501.

38. *Id.* at 251, 524 P.2d at 1290, 115 Cal. Rptr. at 506.

39. 24 Cal. 3d at 272-73, 598 P.2d at 28, 157 Cal. Rptr. at 375.

40. 81 Cal. App. 3d 667, 146 Cal. Rptr. 687 (1978).

41. 24 Cal. 3d at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375. *Friedman* is also not directly on point but may be persuasive authority by analogy. In *Friedman*, the land in question was already being used as a privately owned recreation area. The City of Fairfax passed a zoning ordinance in which existing uses would be allowed to continue on the property. 81 Cal. App. 3d at 672, 146 Cal. Rptr. at 690. Plaintiff, however, had found that his present use of the land was growing unprofitable and made plans to sell the land for construction of multiple-family dwellings; the new zoning regulation frustrated the implementation of his project. *Id.* at 672-74, 146 Cal. Rptr. at 690-91. The plaintiff then brought an action in inverse condemnation, alleging that the diminution in his property value constituted a taking; it was denied on the basis that there was no compensable "taking." *Id.* at 672, 146 Cal. Rptr. at 690.

42. *Id.* at 672, 146 Cal. Rptr. at 690.

43. *Id.* at 675-76, 146 Cal. Rptr. at 692-93.

44. *Id.* at 670, 146 Cal. Rptr. at 689.

regulation that restricts land to an existing use is valid, is not radically different from a ruling that vacant land may properly be restricted to narrowly specified purposes. In both situations the land in question cannot be developed for newer, more profitable uses; yet, in both situations, the property still has some value and may be used for some purpose. According to the rationale of *Friedman*, as long as the land in question has some facially viable use, there will be no taking.[45]

The cases of *HFH, Ltd. v. Superior Court*[46] and *Pinheiro v. County of Marin*[47] are also factually similar to *Agins* and provide further support for the decision reached in *Agins*; the court failed, however, to rely on them for the proposition that declaratory relief is an appropriate remedy in challenges to zoning ordinances. In *Pinheiro*, the plaintiffs suffered a loss very similar to that suffered by the Aginses; their land was downzoned and designated as open space. They sued in inverse condemnation.[48] The court of appeal held that their complaint could not lie because they had not alleged improper actions by Marin County in the zoning process[49] or actual public use of the land that would give rise to the complaint.[50]

The facts of *HFH* were also similar to those of *Agins*: the plaintiffs suffered a substantial loss when their vacant property was downzoned from commercial to single-family residential uses.[51] They sought relief in inverse condemnation on the theory that their financial loss ($325,000)[52] was so great that the zoning amounted to a "taking."[53] The California Supreme Court rejected the owners' argument on a two-fold basis, holding that (1) mere allegations of financial loss are not

45. *Id.* at 675-76, 146 Cal. Rptr. at 693.

46. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

47. 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1976).

48. *Id.* at 325, 131 Cal. Rptr. at 634. The *Pinheiro* court did not specify the manner in which the land was used before the ordinance was passed.

49. *Id.* at 327-28, 131 Cal. Rptr. at 636.

50. *Id.* at 328, 131 Cal. Rptr. at 636.

51. 15 Cal. 3d at 512, 542 P.2d at 240-41, 125 Cal. Rptr. at 367-68. More specifically, the plaintiffs, HFH, Ltd. and Von's Grocery Company, had purchased land in the City of Cerritos upon the express condition that its zoning would be changed to commercial, apparently with the intent to develop the area as a shopping center. The zoning was successfully upgraded subsequent to purchase; but the plaintiffs let the land remain vacant for a period of five years. The municipality then changed the applicable zoning ordinances, first to agricultural, then to single-family residential. *Id.* at 520, 542 P.2d at 246, 125 Cal. Rptr. at 374.

52. *Id.* at 512, 542 P.2d at 240, 125 Cal. Rptr. at 368. Plaintiffs alleged that the market value of their land was $400,000 and that the zoning change caused its value to decline to $75,000.

53. *Id.*

sufficient to give rise to an action in inverse condemnation,[54] and (2) as long as the land affected can be used for some purpose, that is, still has some value, it has not been "taken" or "damaged" within the eminent domain provisions of the California Constitution.[55]

All of the issues raised in *Agins* were substantially covered by *Veta, HFH, Friedman* and *Pinheiro*. *Veta* holds that declaratory relief is the proper remedy in challenging a zoning ordinance.[56] *HFH* authorizes that mere diminution in property value is insufficient to state a cause of action in inverse condemnation.[57] *Pinheiro* denies damages in a fact situation similar to that in *Agins*,[58] and *Friedman* states that a remaining profitable use of downzoned land defeats allegations of "taking."[59] These cases deal with all of the issues presented in *Agins*: *Friedman, Pinheiro* and *HFH* dispose of the taking issue, and *Veta* prescribes the appropriate remedy.

In *HFH*, however, the court added the following caveat: "This case does not present, and we therefore do not decide, the questions of entitlement to compensation in the event a zoning regulation forbade substantially all use of the land in question. We leave the question for another day."[60] The court in *Agins* specifically stated that it was addressing the issue left open by the caveat in *HFH*,[61] but in fact the court did not reach the issue of compensation when all use of the land has been denied. Later in the opinion, when the court upheld the validity of Tiburon's disputed zoning ordinance, it stressed that one reason the ordinance was valid was because it did not deprive the Aginses of all use of their land.[62]

Although the court in *Agins* held that no cause of action for inverse condemnation would lie against a zoning ordinance, the concept of "taking" retains significance in such cases: "taking" defines the point at which the ordinance exceeds the bounds of police power. The

54. *Id.* at 513-18, 542 P.2d at 240-44, 125 Cal. Rptr. at 368-72.

55. *Id.* at 520-23, 542 P.2d at 244-48, 125 Cal. Rptr. at 373-76. *HFH* has received mixed critical reactions. *See Aberration, supra* note 5; Note, *Compensation for Loss in Property Value Caused by Zoning*: HFH, Ltd. v. Superior Court, 65 CALIF. L. REV. 426 (1977); Note, HFH v. Superior Court—*Another Perspective on the Dilemma of the Downzoned Property Owner*, 10 LOY. L.A.L. REV. 440 (1977).

56. 12 Cal. 3d at 251, 524 P.2d at 1290, 115 Cal. Rptr. at 506.

57. 15 Cal. 3d at 513-18, 542 P.2d at 240-44, 125 Cal. Rptr. at 368-72.

58. 60 Cal. App. 3d at 325, 131 Cal. Rptr. at 634.

59. 81 Cal. App. 3d at 675-76, 146 Cal. Rptr. at 693.

60. 15 Cal. 3d at 518, n.16, 542 P.2d at 244, n.16, 125 Cal. Rptr. at 372, n.16.

61. 24 Cal. 3d at 274, 598 P.2d at 29, 157 Cal. Rptr. at 376.

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

court therefore disapproved *Eldridge v. City of Palo Alto*,[63] which had given rise to much confusion concerning the effect of a restrictive zoning ordinance. In *Eldridge*, the City of Palo Alto had zoned its foothills for open space, and plaintiffs, who had previously purchased part of the area for development purposes, were unable to build upon their land as they had planned.[64] They sued for damages in inverse condemnation. The court in *Eldridge* relied on the caveat in *HFH*[65] and concluded that although a zoning ordinance may be valid,[66] a landowner who suffers an unreasonable injury from the zoning is entitled to bring an action in inverse condemnation.[67] *Eldridge* was "expressly disapproved" by the *Agins* court.[68]

On the surface, the holding in *Agins* appears contrary to California case law, which holds that damages are the only appropriate remedy in inverse condemnation actions.[69] However, *Agins* is factually distinguishable from this previous line of authority. *Agins* involved a "regulatory" taking, that is, the plaintiffs alleged loss of their property because of a land use regulation promulgated by a public entity. The earlier cases, such as *Loma Portal Civic Club v. American Airlines Inc.*,[70] allowing only the award of damages, differ in that they usually involved taking actions sounding in tort. The general fact pattern involved some public activity, not involving a regulation, undertaken in the interest of the general welfare. The injured landowner usually sought compensation and an injunction against the public entity by way of relief[71] but was limited to damages in inverse condemnation.[72]

63. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

64. *Id.* at 621, 129 Cal. Rptr. at 577.

65. *Id.* at 618-19, 624, 129 Cal. Rptr. at 578, 581.

66. *Id.* at 631, 129 Cal. Rptr. at 228.

67. *Id.* at 633, 129 Cal. Rptr. at 587. See *Aberration, supra* note 5, which discusses the rationale of the *Eldridge* decision and how it is inconsistent with the reasoning of the United States Supreme Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and the California Supreme Court's holding in *HFH*. The *Eldridge* decision was based on a federal court decision, Arastra Ltd. v. Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976), dealing with an almost identical fact situation. Few decisions have followed the holding in *Eldridge*; rather, most appellate decisions have attempted to distinguish it. *See, e.g.*, Helix Land Co. v. City of San Diego, 82 Cal. App. 3d 932, 942, 147 Cal. Rptr. 638, 688 (1978) (flood plain zoning claimed to be a "taking" of property).

68. 24 Cal. 3d at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

69. Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 588, 394 P.2d 548, 552, 39 Cal. Rptr. 708, 712 (1964); Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 688, 76 P.2d 681, 687 (1938).

70. 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

71. *See, e.g., id.* at 594, 394 P.2d at 549-50, 39 Cal. Rptr. at 709; Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 679, 76 P.2d 681, 682 (1938).

72. Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d at 588-89, 394 P.2d at 552, 39 Cal. Rptr. at 712.

The rationale underlying the courts' decisions in *Agins* and *Loma Portal* is that the public interest is best served by limiting available remedies.[73] In regulatory taking actions — the *Agins* situation — the courts have previously held that the public interest is best served by limiting the plaintiffs to an action for declaratory relief.[74] The California Supreme Court used the same rationale in its *Loma Portal* decision, which limited damages to compensation:

> public policy denies an injunction and permits only the recovery of damages where private property has been put to a public use . . . and the public has intervened . . . . This principle is based on the policy of protecting the public interest in the continuation of the use to which the property has been put.[75]

The *Agins* and *Loma Portal* decisions are consistent in their reliance on the same policy considerations for limiting available remedies. The difference in remedies is in turn attributable to the nature of the taking to be redressed.

B. Constitutional Considerations

The court in *Agins* did not directly consider the issue of whether a "taking" had been effected by the ordinance.[76] Instead, the court discussed the remedies available to plaintiffs in regulatory zoning actions and then examined the facial validity of Tiburon's ordinance. By setting up such an approach, the *Agins* court was able to circumvent the taking issue, overruling *Eldridge* in the process.

The *Eldridge* court relied upon the United States Supreme Court decision of *Pennsylvania Coal Co. v. Mahon*[77] in holding that inverse condemnation is a viable cause of action against oppressive zoning regulations.[78] The court in *Eldridge* based its holding on Mr. Justice Holmes' statement that "while property may be regulated to a certain

73. Agins v. City of Tiburon, 24 Cal. 3d at 275, 598 P.2d at 29, 157 Cal. Rptr. at 376; Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d at 588-89, 394 P.2d at 552, 39 Cal. Rptr. at 712.

74. HFH, Ltd. v. Superior Court, 15 Cal. 3d at 520, 542 P.2d at 244-46, 125 Cal. Rptr. at 373-74.

75. 61 Cal. 2d at 588-89, 394 P.2d at 552, 39 Cal. Rptr. at 712.

76. The *Agins* court merely held, in denying declaratory relief, that the regulation was not unconstitutional on its face; it did not look to the effect of the zoning ordinance on the Agins' land. 24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

77. 260 U.S. 393 (1922).

78. 57 Cal. App. 3d at 625-26, 129 Cal. Rptr. at 582.

extent, if regulation goes too far it will be recognized as a taking."[79] The *Agins* court dismissed the *Eldridge* interpretation of this language, stating, "It is clear both from the context and the disposition in *Mahon* . . . that the term 'taking' was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than eminent domain."[80] The court's statement might have been less confusing had it explained that *Mahon* did not involve inverse condemnation.[81]

In *Mahon*, the plaintiff (Mahon) brought suit to prevent the defendant coal company from mining under his property in such a way as to cause it to subside and asserted a Pennsylvania statute barring such mining activities as a basis for his suit. The coal company replied that the deed expressly reserved the underground coal and further released the defendant from any liability that might occur because of the coal company's mining activities. The coal company further asserted that the statute in question was invalid as a limit on its freedom to contract and a taking of its property without just compensation.[82]

The United States Supreme Court concluded that the statute did involve a taking and declared the regulation invalid.[83] *Mahon* was "simply concerned with answering the threshold question whether or not the act in question is a valid exercise of the police power. . . . The act [was] simply invalidated by the Court, and the landowner [was] not placed in the position of being able to require compensation from the state . . . ."[84] Compensation was *not* mentioned as a viable remedy in *Mahon* because of the nature of the parties as private individuals.[85] Therefore, the California Supreme Court's interpretation of *Mahon* was correct; the *Agins* court merely failed to make its reasoning completely clear.

The *Agins* court failed to address adequately, however, the issue of what constitutes compensable property damage in California. Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner."[86] California,

79. 260 U.S. at 415.
80. 24 Cal. 3d at 274, 598 P.2d at 29, 157 Cal. Rptr. at 376.
81. 260 U.S. at 412.
82. *Id.*
83. *Id.* at 416.
84. *Aberration, supra* note 5, at 1575.
85. *Id.*
86. CAL. CONST., art. 1, § 19. "Damage" is generally used to describe a physical impairment of a landowner's property as a result of a public improvement. Holtz v. Superior

then, theoretically provides for more extensive compensation than federal law; the fifth amendment only provides that property may not be taken without just compensation.[87] The inverse condemnation action in *Agins* was founded on both California and United States constitutional provisions, and the California Supreme Court's rejection of the Agins' claim implicitly involved the conclusion that neither a "taking" nor a "damaging" had occurred. Unfortunately, the court failed to explain *why* it came to this conclusion; it merely concluded that "a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property."[88]

Implicit in the California Supreme Court's reasoning is the belief that the police and eminent domain powers are mutually exclusive concepts with separate remedies. This, then, is the basis of the holding in *Agins*: because the plaintiffs were damaged as a result of a zoning ordinance, traditionally considered an exercise of the police power, the remedy of inverse condemnation—based on a state's power of eminent domain and *not* its police power—is not available to them.[89] Rather, the Aginses may only seek invalidation of the ordinance in question as an abuse of Tiburon's police power.[90]

There is a logical consistency in the analysis of the California courts that the police and eminent domain powers are bordering but exclusive concepts; to admit otherwise would lead to the anomalous conclusion reached in *Eldridge*, that an abuse of the police power through excessive regulation, which deprives an individual of all use of his land, is a valid exercise of governmental prerogatives.[91] Under the logic of the California decisions, a valid regulation cannot also be deemed abusive.[92] By stating that declaratory relief is only available to a property owner alleging loss of use of his property because of zoning, the court has created a situation in which a landowner has no other legal remedy: he may either hold on to the land and use it for its desig-

Court, 3 Cal. 3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970); Reardon v. City of San Francisco, 66 Cal. 492, 6 P. 317 (1885).

87. U.S. CONST., amend. V.

88. 24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

89. *Id.* at 275, 598 P.2d at 29-30, 157 Cal. Rptr. at 376-77.

90. *Id.* at 276-77, 598 P.2d at 31, 157 Cal. Rptr. at 378.

91. 57 Cal. App. 3d at 631, 129 Cal. Rptr. at 586.

92. This is the gist of the *Agins* decision: a landowner may only plead in declaratory relief and many win only upon a showing that the regulation is invalid. Foreclosing the remedy of inverse condemnation prohibits a landowner from proving that a valid ordinance may be abusive as applied to him or her.

nated, limited purposes, sell it at a greatly reduced value, or, in an extreme case, dedicate it to the zoning municipality.

Although the court reached a logically consistent conclusion, it does not necessarily follow that the holding in *Agins* is fair or just. Every individual is expected to bear *some* loss as a result of the police power for the good of the general whole,[93] but is it reasonable that an individual is required to bear a loss as great as that suffered by the plaintiffs in *Agins*? Case authority in California, based on public policy considerations, holds that such a burden is reasonable.[94] Although the imposition of such a burden may appear to be arbitrary when viewed from the perspective of the individual landowner, the courts must look to the welfare of the state as a whole rather than attempt to equalize differences between an individual and the rest of the population.[95] The courts have ruled, in traditional police power fashion, in favor of "the preservation of the public peace, safety, morals, . . . health"[96] and general welfare.

The vast majority of cases in which plaintiffs seek relief in inverse condemnation are those involving owner-developers holding land for the purpose of later development.[97] Frustrated by a downzoning ordinance that precludes development, the landowners seek damages in inverse condemnation, claiming that a loss of anticipated profits

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93. "It is thoroughly established in this country that the rights preserved to the individual . . . are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. . . . [I]ncidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare are not considered a taking of the property for which compensation must be made."

Miller v. Board of Public Works, 195 Cal. 477, 488, 234 P. 381, 385 (1925), *appeal dismissed*, 273 U.S. 781 (1926) (quoting Carter v. Harper, 182 Wis. 148, 153, 196 N.W. 451, 453 (1923)).

94. *See* cases cited in the first paragraph of note 8 *supra*.

95. [P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day. . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.

Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926).

96. Miller v. Board of Public Works, 195 Cal. 477, 485, 234 P. 381, 383 (1925).

97. *See, e.g.*, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 511-12, 542 P.2d 237, 239-40, 125 Cal. Rptr. 365, 367-68 (1975), *cert. denied*, 425 U.S. 904 (1976) (land purchased with eye toward construction of suburban shopping center); Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 621, 129 Cal. Rptr. 575, 579 (1976) (contemplation of development of single-family residences).

constitutes a "taking" or "damaging." The courts and the legislatures cannot, of course, deliberately act to deprive a specific individual of all of his justly obtained profits; the fifth amendment is designed to prevent such arbitrary actions.[98] But courts have routinely held that "[a] party has no vested interest in a previous zoning classification of his property."[99] The California courts have concluded that a governmental entity acting under the police power for the protection of the public welfare is not required to compensate individuals for the deprivation of speculative interests.[100]

Other policy considerations cited by the California Supreme Court also support the holding in *Agins*. The first policy consideration relied upon was the need to preserve natural resources.[101] In *Agins*, this issue is of paramount concern. Land is a resource that cannot be replaced; development must be undertaken thoughtfully, in consideration of its impact on the environment. If the California Supreme Court had reached the conclusion that inverse condemnation was an available remedy in *Agins*, the policy of meaningful and effective land use regulation might have become extremely difficult to implement.

This leads to a second policy consideration underlying the court's decision: a public entity may simply be unable to afford the risk of defending suits in inverse condemnation whenever it attempts to zone. The courts refer to this as a "chilling effect."[102] The remedy of inverse condemnation is often an expensive one. In *Agins*, the plaintiffs claimed damages of $2,000,000;[103] in *HFH*, the "taking" was alleged to have cost the plaintiffs $325,000.[104] The magnitude of these claims is beyond the resources of many municipalities. If the remedy of inverse condemnation were readily available, public entities would be required to budget some of their resources for the costs of litigation or, more probably, retreat from careful and enforceable land use planning. The

98. Professor Sax suggests that this was the original and only reason behind the fifth amendment's adoption: "the clause was designed to prevent arbitrary government action, rather than to preserve the status quo." Sax, *supra* note 7, at 57-59.

99. Sierra Terreno v. Tahoe Regional Planning Agency, 79 Cal. App. 3d 439, 442, 144 Cal. Rptr. 776, 777 (1978), *cert. denied*, 440 U.S. 957 (1979).

100. *E.g.*, HFH v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976); Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

101. 24 Cal. 3d at 275, 598 P.2d at 29-30, 157 Cal. Rptr. at 376-77.

102. *Id.* at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377. "[T]he utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the control of the judiciary." *Id.*

103. *Id.* at 271-72, 598 P.2d at 27, 157 Cal. Rptr. at 374.

104. 15 Cal. 3d at 512, 542 P.2d at 249, 125 Cal. Rptr. at 368.

promotion of the general welfare—the traditional objective of the police power—would effectively be curtailed by the costly demands of individuals who feel their property has been "taken" by some form of land use regulation.

A third policy consideration underlying the court's rationale is found in the separate functions of government; courts have traditionally deferred to the wisdom of the zoning municipality when faced with a challenge to the validity of a zoning ordinance:[105]

> In deciding whether a challenged ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor. . . . "The courts may differ with the zoning authorities as to the 'necessity or the propriety of an enactment,' but so long as it remains a 'question upon which reasonable minds may differ,' there will be no judicial interference with the municipality's determination of policy."[106]

This viewpoint has been explicitly sanctioned by the United States Supreme Court: "If the validity . . . be fairly debatable, the legislative judgment must be allowed to control."[107]

The dissent in *Agins* attempted to refute some of the arguments advanced by the majority; the dissent argued that the Aginses should have been allowed compensation for their loss.[108] Justice Clark repeatedly emphasized the fact that the California Constitution requires payment for "damaging" as well as "taking" of private property, stating that the land in *Agins* had been so "damaged."[109] In so arguing, how-

105. McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 885-86, 264 P.2d 932, 935 (1953), *cert. denied*, 348 U.S. 817 (1954); Lockard v. City of Los Angeles, 33 Cal. 2d 453, 460-62, 202 P.2d 38, 42-43, *cert. denied*, 337 U.S. 939 (1949).

106. Associated Home Builders of the Greater E. Bay, Inc. v. City of Livermore, 18 Cal. 3d 582, 604-05, 557 P.2d 473, 486, 135 Cal. Rptr. 41, 54 (1976) (citation omitted) (quoting Clemons v. City of Los Angeles, 32 Cal.2d 95, 98, 222 P.2d 439, 441 (1950)).

107. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). The wisdom of the legislature will *not* control, however, in determining how much compensation an individual is due; that is a matter for the courts. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327-28 (1893).

108. 24 Cal. 3d at 279-80, 598 P.2d at 32, 157 Cal. Rptr. at 379 (Clark, J. dissenting).

109. *Id.* Justice Clark noted that Tiburon had "what is already among the highest residential land values in the state." *Id.* As a result of the majority opinion,

> Tiburon—and many other governmental agencies enacting similar land use plans—will price properties within their control out of the reach of most people. Only the most wealthy will be able to afford the purchase of and construction on land in such areas. The environment which Tiburon seeks to preserve will disproportionately benefit the wealthy landowner, whose home will be surrounded by open space, unobstructed view and unpolluted atmosphere.

ever, Justice Clark did not address the reasoning underlying the majority opinion: if an ordinance takes or damages property without compensation, the proper remedy is invalidation rather than inverse condemnation.[110] The courts, of course, have recognized that an actual "taking" or "damaging" in the physical sense is not required;[111] oppressive pre-condemnation activity such as that complained of in *Klopping v. City of Whittier*[112] may also give rise to constitutionally compensable damages.[113] The damage suffered in *Agins*, however, was insufficient to meet California's constitutional requirements:

> The Constitution does not . . . authorize a remedy for every diminution in the value of property that is caused by a public improvement [or regulation]. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes . . . will not constitute the damage contemplated by the Constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use.[114]

The Agins' land was not so damaged and there was no taking for public use. Its value merely dropped because of the adoption of the zoning ordinance.[115] The main thrust of the dissent, then, is refuted by the

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Id. at 283-84, 598 P.2d at 35, 157 Cal. Rptr. at 382 (Clark, J., dissenting).

At first reading, Justice Clark's reasoning does carry some emotional appeal; however, on closer analysis, the argument does not really hold up. As stated in the text, the proposed remedy of compensation for downzoning primarily benefits the wealthy land speculator against the interests of the surrounding community—more so than the remedies of the majority opinion. Under the main opinion, the land values of Tiburon could remain high, but the surrounding community would not be forced to subsidize the speculative real estate interests of wealthy individuals who might live there.

110. *E.g.*, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954).

111. "We are, of course, aware of the modern rule that a taking does not require a physical invasion or direct legal restraint, as an undue restriction may suffice." Dale v. City of Mountain View, 55 Cal. App. 3d 101, 109, 127 Cal. Rptr. 520, 524-25 (1976).

112. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972) (eminent domain action preceded by announcement of intent to condemn).

113. *Id.*

114. Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 482, 115 Cal. Rptr. 162, 169-70 (1974), *cert. denied*, 419 U.S. 1122 (1975).

115. The dissent, somewhat wistfully, looked for support in the recent United States Supreme Court decision, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). That case involved a fact situation almost identical to that of Sierra

analysis of the cases supporting the majority opinion: inverse condemnation is not an appropriate remedy in a challenge to a zoning ordinance, and the property in question was not "taken" or "damaged" within the meaning of the California Constitution.[116]

C. *The Validity of the Zoning Regulation*

The only remedy left to the plaintiffs in *Agins* under the majority opinion was invalidation of the ordinance. The California Supreme Court, however, dashed these last hopes. It stated that a balancing test must be applied in determining the validity of a zoning ordinance.[117] This test weighs the public purpose underlying the regulation against a landowner's right to the free use of his property.[118] The court designated the outer limits of the constitutional application of the police power in land use control when it held that "a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property."[119] Noting that, on the face of the ordinance, the plaintiffs still had the legal ability to build on their property, the court ruled that Tiburon's Ordinance No. 124 N.S. was valid and that plaintiffs had no

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Terreno v. Tahoe Regional Planning Agency, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776 (1978), *cert. denied*, 440 U.S. 957 (1979), except that *Lake Country Estates* was filed in federal court. The defendant planning agency raised the barrier of the eleventh amendment of the United States Constitution, which states that "[t]he 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. Since the Tahoe Regional Planning Agency (TRPA) was a bi-state agency, composed of officials from both California and Nevada, the plaintiffs in *Lake Country Estates* were suing a state agency, raising the question whether TRPA was immune from suit under the eleventh amendment. The Court held that TRPA was not immune from suit. Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. at 402 (1979). The Court also found, however, that the individual members of TRPA were immune because they were acting in a legislative capacity. *Id.* at 405.

In his *Agins* dissent, Justice Clark acknowledged the limited holding in *Lake Country Estates* but also added that "the sense of the holding is that an action in inverse condemnation lies for a taking brought about by land use regulation of the very nature involved in the instant case." Agins v. City of Tiburon, 24 Cal. 3d at 283, 598 P.2d at 35, 157 Cal. Rptr. at 382. This is not true. The United States Supreme Court did not decide whether inverse condemnation was a proper remedy for the plaintiffs in *Lake Country Estates*; it merely assumed that such was the case for the purposes of its decision. "Because none of the respondents filed a cross-petition for certiorari, we have no occasion to review the Court of Appeals' additional holding that a violation of the Due Process Clause was adequately alleged. For purposes of our decision, we assume the sufficiency of those allegations." 404 U.S. at 397.

116. *See* note 86 *supra*.

117. 24 Cal. 3d at 277, 598 P.2d at 34, 157 Cal. Rptr. at 378.

118. *Id.* at 274, 598 P.2d at 29, 157 Cal. Rptr. at 376.

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

cause of action against the city.[120]

The effect of the court's ruling in *Agins* is that only in rare situations in California will an action for declaratory relief be valid: (1) "zoning classifications invoked in order to evade the requirement that land *used* by the public must be acquired in eminent domain proceedings;"[121] (2) inequitable zoning actions undertaken by a public agency as a prelude to public acquisition;[122] and (3) "spot zoning" cases constituting an undue burden on the downzoned land in light of uses allowed in the surrounding area.[123] The *Agins* court did not find any of these exceptions present: there were no allegations of actual public use of the land or inequitable spot zoning.[124]

The plaintiffs in *Agins*, however, alleged that Tiburon's abandoned eminent domain action was intended to depress the value of their property.[125] They advanced their claim under the holding of *Klopping v. City of Whittier*,[126] which allowed damages in inverse condemnation because of a city's oppressive pre-condemnation activities.[127] The court did not find "persuasive" the plaintiffs' reliance on *Klopping*, stating that *Agins* was not a case falling into the *Klopping* fact pattern;[128] rather, *Agins* was more like *Selby v. City of San*

120. *Id.*

121. HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 517 n.14, 542 P.2d 237, 243 n.14, 125 Cal. Rptr. 365, 371 n.14 (1975), *cert. denied*, 425 U.S. 904 (1976) (emphasis in original). *See, e.g.*, Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963). *Sneed* involved a parcel of land adjacent to a publicly owned airport; the zoning municipality passed a regulation creating a height restriction and effectively taking an air navigation easement over plaintiff's property.

122. *See, e.g.*, Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (property in question was zoned with a height restriction intended to depress plaintiff's property value in anticipation of the acquisition of the land for a municipal airport).

123. "Spot zoning occurs where a small parcel is restricted and given lesser rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to uses for residential purposes thereby creating an "island" in the middle of a larger area devoted to other uses." Viso v. State, 92 Cal. App. 3d 15, 22, 154 Cal. Rptr. 580, 584-85 (1979) (citations omitted). *See also* Hamer v. Town of Ross, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963); Lockard v. City of Los Angeles, 33 Cal. 2d 453, 472-73, 202 P.2d 38, 49-50 (Carter, J., dissenting), *cert. denied*, 337 U.S. 939 (1949); Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938).

124. 24 Cal. 3d at 270-72, 598 P.2d at 26-28, 157 Cal. Rptr. at 373-75. The determination of whether an entity acts "reasonably" is usually a matter decided by the courts. Here the court ruled that Tiburon had acted properly. *Id.*

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

126. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

127. *Id.* at 51-52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.

128. 24 Cal. 3d at 277-78, 598 P.2d at 31-32, 157 Cal. Rptr. at 378-79.

Buenaventura,[129] which held that a public entity's adoption of a general plan did not amount to a "taking."[130] The *Agins* court held, without explanation, that Tiburon did not act unfairly and therefore the plaintiffs had no valid claim for damages.[131]

By so holding, the California Supreme Court circumvented the *Klopping* argument advanced by the plaintiffs. The Aginses did not complain specifically about the adoption of Tiburon's ordinance as much as about the activities that surrounded it—the studies leading to a recommendation of using the land as open space and the city's filing and abandonment of an eminent domain action.[132] The plaintiffs argued that the city's actions, taken as a whole, constituted oppressive conduct, which caused the value of their property to decline.

It is unclear whether the Aginses were entitled to damages under the holding of *Klopping*, because that decision did not articulate the elements that must be proved by a plaintiff in order to establish a taking.[133] It appears that the decisive factor in *Klopping* was Whittier's abandonment of an eminent domain action with the announcement that it fully intended to acquire the land if certain difficulties were worked out.[134]

Decisions after *Klopping* have only partially clarified this confusion. Another California Supreme Court decision, *Jones v. Department of Transportation*,[135] also failed to specify which facts led the court to conclude that the plaintiffs were entitled to damages as a result of the Department of Transportation's pre-condemnation activities.[136] One factor that distinguished *Jones* from *Klopping*, however, was that *Jones* involved a condemnation announcement on the part of the state agency.[137] Apparently, based on the facts in *Jones*, mere uncooperative conduct on the part of a public entity is enough to give rise to inverse condemnation damages under the rationale of *Klopping*.

The California Court of Appeal for the Second Appellate District,

129. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).
130. *Id.* at 121, 514 P.2d at 118, 109 Cal. Rptr. at 806.
131. 24 Cal. 3d at 277-78, 598 P.2d at 31, 157 Cal. Rptr. at 378.
132. *Id.*
133. 8 Cal. 3d at 52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.
134. *Id.* at 53, 500 P.2d at 1355-56, 104 Cal. Rptr. at 11-12.
135. 22 Cal. 3d 144, 583 P.2d 165, 148 Cal. Rptr. 640 (1978).
136. *Id.* In *Jones*, the plaintiffs bought a parcel of land for subdivision purposes. Their plans were thwarted by the proposed development of a freeway next to the land, cutting off access to the land. For nearly ten years plaintiffs tried to sell the land or work out an agreement with the state; however, the Department of Transportation was consistently uncooperative.
137. *Id.* at 151, 583 P.2d at 167, 148 Cal. Rptr. at 640.

in *Department of Public Works v. Peninsula Enterprises, Inc.*,[138] formulated a general rule for determining the applicability of *Klopping* damages. The court in *Peninsula Enterprises* stated that the award of such damages "depends upon whether the conduct of the public agency in question has evolved to the point where its announcements result in a special and direct interference with the owner's property; the widespread impact resulting from mere general planning is noncompensable."[139]

In *Agins*, the eminent domain action was eventually abandoned. Tiburon, unlike the City of Whittier in *Klopping*, did not announce any further intent to acquire the Agins' land. The zoning ordinance had already been implemented before the eminent domain action was filed.[140] *Agins* differs, therefore, from *Klopping* and *Jones* in that those cases did not involve the adoption of a zoning ordinance prior to the offending pre-condemnation activity. Given the vagueness of the California Supreme Court's decisions in this area, perhaps the best method of determining whether the pre-condemnation activity in *Agins* falls into a *Klopping* fact pattern is to use the test of *Peninsula Enterprises*: did the actions of Tiburon create "a special and direct interference"[141] with the owners' property? The plaintiffs in *Agins* cannot develop their land as they had originally planned and cannot sell it for its pre-ordinance value. But this is not a "special" and "direct" interference as in *Klopping* in which the city put a cloud over the plaintiff's property with its announcement that it intended to acquire the property through condemnation.[142] The plaintiffs in *Agins* are under no such threat. Nor is the fact situation completely analogous to *Jones*. In *Jones*, the plaintiffs attempted a compromise with the public entity so that plaintiffs could retain use of their land.[143] In *Agins*, the plaintiffs did not attempt to compromise. After the abandonment of the eminent domain action, the Agins filed a claim in inverse condemnation against Tiburon.[144] It appears from the facts given that Tiburon did not act "unreasonably" as the term is used in *Klopping*.

138. 91 Cal. App. 3d 332, 153 Cal. Rptr. 895 (1979).
139. *Id.* at 344, 153 Cal. Rptr. at 908.
140. 24 Cal. 3d at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374.
141. Department of Public Works v. Peninsula Enterprises, Inc., 91 Cal. App. 3d at 355, 153 Cal. Rptr. at 908.
142. 8 Cal. 3d at 54, 500 P.2d at 1357, 104 Cal. Rptr. at 13.
143. 22 Cal. 3d at 149-50, 583 P.2d at 168, 148 Cal. Rptr. at 643.
144. 24 Cal. 3d at 271-72, 598 P.2d at 27, 157 Cal. Rptr. at 374.

III. CONCLUSION

The California Supreme Court could have used *Agins* as a vehicle to issue a definitive statement on land use control in California. Unfortunately, the decision will not have this effect. The court circumvented the real issue in *Agins* by failing to define adequately what constitutes an abuse of the police power or what actions constitute a "taking." It is clear, however, that *Agins* will render a successful pleading in inverse condemnation against a zoning public entity extremely rare in California state courts. Some final resolution of this controversy is needed: it is an issue ripe for adjudication by the United States Supreme Court.

Until the Supreme Court makes such a decision, however, the rule of *Agins* is the law of the State of California. At first glance, the California Supreme Court's conclusions in *Agins* may appear unduly harsh as the Aginses have been financially injured and left without a remedy against the city that deprived them of the ability to develop their property as they had planned. The concept of private property, however, is one created by the law. Therefore, it is inevitable that as the law changes so will the acceptable parameters of private ownership of land. The needs of society in general must be weighed against the rights of the private individual. The balancing of these opposing concepts necessarily means that both parties will ultimately lose something in the resulting compromise. In California, where the lesson that use of the land must be planned in an equitable manner has been more clearly demonstrated than anywhere else, land use controls are especially important. The California Supreme Court's decision in *Agins* is an application of the widely accepted public policy consideration that the beauty of our state must be preserved. *Agins* indicates that the court will not interfere with a legislative implementation of that policy unless a landowner is deprived of *all* his property rights.

Jan E. Copley