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Takings Law—Is Inverse Condemnation an Appropriate Remedy for Due Process Violations?—San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981)

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TAKINGS LAW—IS INVERSE CONDEMNATION AN APPROPRIATE REMEDY FOR DUE PROCESS VIOLATIONS?—*San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

In 1966 the San Diego Gas & Electric Company acquired 412 acres of land in the northern part of the city of San Diego as a potential site for a proposed nuclear power plant.[1] At the time of acquisition approximately 116 acres of the tract were zoned for industrial use, with the remainder in a temporary agricultural "holding" category.[2] The city enacted a master plan in 1967 designating most of the tract for future industrial use.[3] In June of 1973 the city downzoned thirty-nine acres from industrial to agricultural use[4] and also changed the designation of 214 acres on the master plan from "future industrial" to "open space."[5] The amended master plan explicitly acknowledged that the open-space designation did not necessarily prohibit the placement of a nuclear plant on the land.[6]

1. The tract included a 214-acre estuary and wildife refuge known as the Los Penasquitos Lagoon. The lagoon was the focus of this action in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981). These undeveloped acres are low-lying and serve as a drainage basin and flood plain for three separate watersheds. In addition, much of this same area is subject to tidal inundation and standing water. *Id.* at 624. These factors become significant in assessing the validity of San Diego's inclusion of the lagoon in its open-space plan. *See* note 5 *infra*. The lagoon's characteristics indicate that the city acted in good faith and in furtherance of the public welfare by recognizing the critical importance of preventing the destruction of rare estuarian habitats in semi-arid climates. The furtherance of such public interest is a prerequisite to any municipal land use regulation. *See* text accompanying note 46 *infra*.

2. Land in a "holding" category has not been officially zoned, but rather is under study to determine what the permissible land uses should be. Holding zones are also referred to as "stopgap ordinances." 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 11.01 (4th ed. 1975). "Holding" categories are generally used by municipalities to limit land use to existing uses, even though there is no intention to maintain the status quo indefinitely. Although often attacked as being unfair, the reasonable use of holding zones is generally upheld. *E.g.*, State *ex. rel.* Randall v. Snohomish County, 79 Wn. 2d 619, 488 P.2d 511 (1971).

3. Enacting such a plan does not affect the actual zoning of specific tracts. 1 A. RATHKOPF, *supra* note 2, § 11.01. The master plan does, however, suggest the probable direction of future zoning changes. This is especially true for acreage which is classified in the temporary "holding" category. Thus, by enacting the master plan, the city had not officially changed the zoning of the company's tract. Nevertheless, the city's action did raise the expectation that when the lands were taken from the temporary "holding" category and permanently zoned, that zone would probably be "industrial." *See id.*

4. San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal. Rptr. 103, 109 (Cal. Ct. App. 1978) (opinion vacated by the California Supreme Court's grant of the city's petition for a hearing). After the rezoning, 77 acres remained in the industrial zone, 39 acres were placed in the permanent agricultural zone, and the rest of the tract remained in the agricultural "holding" category with the provision that 50 of those acres would be considered for future industrial use. *Id.* at 109 n.1.

5. *Id.* The city was required by state statute to adopt an open-space element to its master plan for the purpose of "comprehensive and long-range preservation and conservation of open-space land within its jurisdiction." CAL. GOVT. CODE § 65563 (West Supp. 1981).

6. The amended master plan suggested, however, that the city acquire the 214 acres designated as open space and preserve them as parkland. Unfortunately, in September of 1973 the electorate

The company was nonetheless forced to abandon its plans for a nuclear power plant after the discovery of an off-shore seismic fault.[7] The company was thus confronted with the prospect of selling the land subject to its "open-space" designation on the master plan. Because that designation depressed the land's speculative value, the company sued the city alleging that the 1973 zoning change and adoption of the open-space plan was a "taking" of the company's land in violation of the fifth amendment of the United States Constitution.[8] The company claimed "that the city had deprived it of the entire beneficial use of the property"[9] and requested an inverse condemnation award of over six million dollars.[10] The San Diego County Superior Court held the city liable for inverse condemnation and a jury set damages at over three million dollars.[11] The California Court of Appeal, however, ultimately reversed the judgment of the supe-

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turned down a city bond issue that would have provided funds for the purchase of the land. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 625 (1981).

7. *Id.* at 626 n.6.

8. "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. The just compensation clause of the fifth amendment is applicable to state actions through the 14th amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980). Fifth amendment "takings" are also referred to as actions for "inverse condemnation." The concepts are rooted in the law of eminent domain.

Normally, if a municipality is going to take private property for public use, it must purchase, or condemn, that property under the power of eminent domain. If the municipality fails to provide just compensation through eminent domain proceedings before the taking or damaging of the property, the property owner is entitled to institute a suit for inverse condemnation to compel an ex post facto recovery of just compensation. *See generally* Van Alstyne, *Taking Or Damaging By Police Power: The Search For Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970) (discussing concept of inverse condemnation and analyzing irreconcilable judicial applications); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974) (criticizing extension of inverse condemnation remedy to zoning cases).

The company also pleaded that the San Diego ordinance violated the eminent domain provisions of the state constitution, CAL. CONST. art. I, § 19, which parallel the guarantees of the fifth amendment. *See* San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal. Rptr. 103, 109–110 (Cal. Ct. App. 1978) (opinion vacated by the California Supreme Court's grant of the city's petition for a hearing).

9. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 626 (1981).

10. In its original complaint the company pleaded alternatively for both inverse condemnation and injunctive or declaratory relief. *Id.* Granting the request for declaratory relief would result in the invalidation of the ordinance, which would return the land to its zoning status before the 1973 changes, but no compensation would be given. The theory behind such relief is that the ordinance violates the 14th amendment's due process clause and is therefore void. *See* note 48 and accompanying text *infra*. The city would be free, however, to acquire the land through eminent domain proceedings and reenact the ordinance.

Granting inverse condemnation, on the other hand, assumes that the city has already taken the property, but has failed to provide just compensation. Consequently, the court would order the city to keep the property but to compensate the company for their loss. *See* note 8 *supra*.

11. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 627 (1981). The superior court had dismissed the claim for declaratory relief as an improper challenge to the validity of a legislative act. *Id.* at 626. Consequently, the court considered the challenge to the ordinance only as an unconstitutional taking.

rior court.[12] The appellate court held that the company could not recover monetary relief through inverse condemnation, but rather that its sole remedy was to seek invalidation of the offending ordinances.[13] The California Supreme Court denied review and the company appealed to the United States Supreme Court.[14] The company argued that the California court could not automatically deny it a recovery for inverse condemnation.

In *San Diego Gas & Electric Co. v. City of San Diego,*[15] the Court, after hearing arguments on the merits, dismissed the case on jurisdictional grounds. The majority said that although the California court had decided that monetary compensation was not an appropriate response to the company's takings claim, the court had not rendered a final judgment or decree upon which an appeal could be heard.[16]

Four dissenting Justices, led by Justice Brennan, interpreted the California Court of Appeal's action as a ruling that no taking had occurred,[17] thus constituting a final judgment.[18] The dissent then said that a land-

12. The California Court of Appeal originally affirmed the superior court's decision. San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal. Rptr. 103 (Cal. Ct. App. 1978) (opinion vacated by the California Supreme Court's grant of the city's petition for a hearing). In discussing the appropriate course of action for over-regulated landowners, the appellate court said:

> If the City has acted arbitrarily or discriminatorily in passing the ordinance in question, the landowner should use administrative mandate to have the ordinance changed . . . ; if the City has enacted an unconstitutional or invalid zoning ordinance, the landowner may seek mandate, injunctive relief or declaratory relief . . . and the governmental agency is immune from any tort liability . . . ; if the zoning is valid but so harsh that it deprives the owner of all beneficial use of its land, there has been a condemnation and damages are proper . . . .

Id. at 114. On June 13, 1978, the appellate court denied the city's petition for a rehearing. *Id.* at 103.

The California Supreme Court granted the city's petition for a rehearing, but before the hearing took place the court decided Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd,* 447 U.S. 255 (1980), which disallowed inverse condemnation awards based on zoning regulations. *See* notes 64–66 and accompanying text *infra.* The court then transferred *San Diego Gas & Electric* back to the appellate court for reconsideration. The appellate court, upon reconsideration, reversed the trial court's decision on the basis that *Agins* mandated the result. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 629 (1981).

13. The court of appeal, in an unpublished opinion, held that the company's "remedy is mandamus or declaratory relief, not inverse condemnation." *Id.* at 630. This represents a complete reversal from the appellate court's first holding. *See* note 12 *supra.*

14. The Court granted certiorari, but postponed consideration of its jurisdiction until hearing the merits of the case. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 630 (1981).

15. 450 U.S. 621 (1981).

16. *Id.* at 630 n.10.

17. The dissent's position was that just compensation must accompany a taking. Because the California courts refused a monetary remedy, they had therefore implicitly ruled that no taking had occurred. *See* note 78 and accompanying text *infra.*

18. The dissent said that "[s]ince the Court of Appeal held that no Fifth Amendment 'taking' had occurred, no just compensation was required. This is a classic final judgment." 450 U.S. at 646. The dissent recognized that the company was not left without a remedy and that the litigation had not yet reached a natural culmination, even though the California courts refused to grant an inverse condemnation award. *Id.* at 643. Thus, the final decision that the dissent reviews is essentially the California

owner subjected to overly restrictive zoning cannot be limited to seeking the invalidation of the ordinance, but rather must be allowed to claim just compensation for the time that the regulation was in effect.[19] This proposal thus advocates the creation of a "temporary taking" doctrine.[20]

The dissent's view is noteworthy because although Justice Brennan spoke only for a minority of four, Justice Rehnquist stated in his concurring opinion that if he were able to reach the merits of the case, he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan."[21] Furthermore, the majority also expressed reservations about the California Court of Appeal's refusal to allow inverse condemnation awards for land use takings.[22] Since *San Diego Gas & Electric,* Justice O'Connor has replaced one of the Brennan minority. Nevertheless, a majority of the Supreme Court may be ready to rule that a municipality that overly restricts land use through zoning must compensate the landowner for the use of the property during the time the overly restrictive zoning ordinance was in effect.[23]

This Note first examines the Supreme Court cases that involve fifth amendment taking and fourteenth amendment due process challenges to land use regulations. Next, this Note discusses the meaning of Justice Brennan's proposals and their potential effect on land use planning and zoning. This Note suggests that overly restrictive zoning ordinances should not be viewed as a taking requiring just compensation. Instead these ordinances should be viewed as invalid exercises of the municipality's police power because of their failure to provide substantive due process to the landowner.[24] The landowner's remedy should therefore be the invalidation of the ordinance, not just compensation.[25] If the invalidation of the zoning ordinance is not adequate relief for the landowner, this Note proposes to let landowners sue for a monetary award under 42

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courts' position that inverse condemnation actions are never appropriate challenges to zoning regulations.

19. *Id.* at 658–59.

20. *Id.* at 657. *See* text accompanying notes 86–87 *infra*.

21. 450 U.S. at 633–34.

22. The majority did not discuss whether state courts may appropriately deny inverse condemnation awards in response to invalid zoning, but they were "frank to say that the federal constitutional aspects of that issue are not to be cast aside lightly . . . ." *Id.* at 633.

23. Even if Justice Brennan's proposals are not explicitly adopted by the United States Supreme Court in the near future, state courts—which have the primary responsibility of applying land use law—will certainly notice that this proposal appears to command the majority of the Court. Already one state court has embraced the proposals of Justice Brennan. Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15, 19–20 (1981).

24. *See* note 48 and accompanying text *supra*.

25. *See* text accompanying notes 55–56 *infra*.

U.S.C. § 1983,[26] which allows damages if an individual's constitutional rights are violated.

I. LEGAL BACKGROUND

Municipal ordinances that regulate land use are exercises of the municipality's police power.[27] Although landowners may challenge these ordinances on procedural grounds,[28] landowners' more common complaints allege substantive defects. These complaints involve two different legal theories. First, the landowner may claim that the ordinance is an invalid exercise of the municipality's police power.[29] This is essentially a request to have the ordinance invalidated. Second, the landowner may attempt to force the government to pay for the economic burden the regulation creates rather than attempt to seek the invalidation of the ordinance. This second theory is based on the takings clause of the fifth amendment and on the law of eminent domain.[30] The interrelationship between these two theories is dealt with by the Brennan dissent in *San Diego Gas & Electric* and is the subject of this Note.

A. Early History of Challenges to Land Use Regulations

Courts originally upheld the authority of governments to regulate private land use on principles relating to the law of nuisance.[31] Municipalities had authority to abate specific existing land uses on behalf of the public just as neighbors could sue to enjoin a nuisance on their own behalf. Not surprisingly, the prevailing doctrine established that the municipality

26. (1976). *See* note 127 *infra*.

27. Police powers are based on the state's inherent authority to enact laws that promote the public health, safety, morals, and general welfare. To the extent that land use ordinances accomplish these purposes, they are valid exercises of police power. *See* 1 A. RATHKOPF, *supra* note 2, § 2.01. Individual municipalities have the power to enact land use ordinances only to the extent that the state has granted this authority through a state enabling act. *See, e.g.*, WASH. REV. CODE ch. 36.70 (1981).

28. For a particular municipal ordinance to be valid it must conform to the procedural requirements of the enabling act. *See* note 27 *supra*.

29. The standard criteria used to evaluate the validity of police power actions in general was put forth in Lawton v. Steele, 152 U.S. 133 (1894). The *Lawton* Court stated:

> To justify the state . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Id. at 137. The authority for the Court's test rests in the due process clause of the 14th amendment, which provides that "no State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. *See* note 48 *infra*.

30. This second theory requires a remedy of inverse condemnation. *See* note 8 *supra*.

31. *See* 1 A. RATHKOPF, *supra* note 2, § 1.01.

need not compensate the landowner who suffered financially when the nuisance was enjoined.[32] The United States Supreme Court affirmed this doctrine in *Mugler v. Kansas*.[33] In *Mugler*, the Court determined that a Kansas law prohibiting breweries was a valid exercise of police power and that the resulting economic loss to an established brewery was not compensable.[34]

The Court in *Hadacheck v. Sebastian*[35] emphasized the force and extent of the *Mugler* doctrine. The land use regulation challenged in *Hadacheck* forced an established brickyard to cease operation after residential development had encroached upon the brickyard. Although the regulation effectively diminished the brickyard's value from $800,000 to $60,000,[36] the Court found that the regulation was a valid exercise of police power and therefore no compensation was required.[37]

The unlimited application of the *Mugler* doctrine was questioned, but not overruled, in *Pennsylvania Coal v. Mahon*.[38] In an opinion by Justice Holmes, the Supreme Court recognized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[39] Nevertheless, the Court also stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[40] In *Pennsylvania Coal*, however, the Court did not require the government to pay compensation, even though the Court found that the ordinance constituted a taking.[41] Instead it effectively invalidated the regulation by refusing to enforce its provisions. Thus, while the language in

32. Similarly, neighbors who successfully enjoin a local nuisance are not expected to compensate the person whose nuisance is enjoined. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 90, at 602–06 (4th ed. 1971). *But see* Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972).

33. 123 U.S. 623 (1887).

34. *Id.* at 668–69.

35. 239 U.S. 394 (1915).

36. *Id.* at 405.

37. *Id.* at 410–414.

38. 260 U.S. 393 (1922).

39. *Id.* at 413.

40. *Id.* at 415.

41. There is some controversy about how Justice Holmes was using the word "taking." Because the remedy for a fifth amendment taking is just compensation, *see* note 8 *supra*, Justice Holmes may not have been using "taking" in its constitutional sense at all. *See* Note, Eldridge v. City of Palo Alto: *Aberration Or New Direction In Land Use Law?*, 28 HASTINGS L. J. 1569, 1574–76 (1977).

Justice Brennan in his dissenting opinion in *San Diego Gas & Electric* acknowledges this interpretation, but maintains that "this view ignores the coal company's repeated claim before the Court that the Pennsylvania statute took its property without just compensation." 450 U.S. at 649 n.14.

Justice Brennan also insists that a taking always requires just compensation, *id.* at 654, and explains the absence of a compensation award in *Pennsylvania Coal* on the basis that no one had asked for it. *Id.* at 650–51 n.17. *But see* note 78 *infra*.

Pennsylvania Coal may be read to indicate that valid exercises of governmental police powers may be a taking if they go "too far," the effect of the decision was to *invalidate* an exercise of police power on the basis of its unreasonable or confiscatory nature.[42] The application of the "too far" test to takings claims has spawned a confusing and often contradictory body of law.[43]

B. Zoning as a Valid Police Power

Methods of municipal land use regulation made a subtle but significant shift in the 1920's. Rather than enact regulations that prohibited specific existing uses from a defined area, municipalities began to limit defined areas to specific uses. This type of land use zoning,[44] rather than enjoining existing nuisances, attempts to avoid their development. Zoning does not, however, avoid the problem of frustrating the expectations of land owners and developers.

Because zoning ordinances directly further the public good by preventing nuisances, the Supreme Court upheld them as valid police powers in

42. In this sense Holmes' analysis is virtually indistinguishable from the due process analysis used in Lawton v. Steele, 152 U.S. 133 (1894), to test the validity of an exercise of police power. *See generally* note 29 *supra* (discussing *Lawton*). The criteria and remedy are the same in both cases. The critical difference is that Holmes, in *Pennsylvania Coal*, called his "too far" test a fifth amendment takings test, not a test for 14th amendment due process. This difference is so profound that one authority suggests that Holmes may have effectively rewritten the Constitution. F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE 124–38 (1973).

43. One distinguished commentator recently said, "The law of takings, at least as expressed by the Supreme Court, has essentially been without doctrinal advance for fifty years, and the two opposing and inconsistent lines of authority have not been explained or resolved; they are simply there." Oakes, *Property Rights In Constitutional Analysis Today*, 56 WASH. L. REV. 583, 607 (1981). *See also* Michelman, *Property, Utility, and Fairness: Comments On the Ethical Foundations Of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196–1201 (1967) (suggesting that the distinctions used to identify "too far" are illusory); Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1070 (1980) (suggesting that the "too far" test is a mislabelled application of due process criteria). The Supreme Court in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), admits that it, "quite simply, has been unable to develop any 'set formula' for determining" when a "taking" has occurred. *Id.* at 124. Even Justice Brennan noted in *San Diego Gas & Electric* that, in the regulatory sense, identifying a "taking" is "the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark." 450 U.S. at 649–50 n.15 (quoting C. HAAR, LAND-USE PLANNING 766 (3d ed. 1977)). Besides Michelman, several commentators have attempted to reconcile the confusing case law into workable criteria for determining what constitutes a taking, but with limited success. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Van Alstyne, *supra* note 8.

44. Zoning did not become a judicially sanctioned police power in the United States until early in the 20th century. This can probably be attributed to the tendency of United States courts to afford private property rights the same protections as personal liberties. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 398 (1975). At least one commentator sees this tendency reemerging. Oakes, *supra* note 43, at 621–26.

Village of Euclid v. Ambler Realty.[45] The Court conditioned the validity of zoning ordinances on two factors: (1) The zoning ordinance must advance legitimate public interests,[46] and (2) The effect of the ordinance must not be unreasonable or confiscatory.[47] This two-pronged test basically follows the due process test traditionally used to determine the validity of exercises of police powers in general.[48] The *Euclid* opinion, coming four years after *Pennsylvania Coal,* essentially incorporates both the *Mugler* doctrine and the "too far" test of *Pennsylvania Coal*.[49] Under the *Euclid* test a zoning ordinance must advance a legitimate public purpose, but must not be too burdensome upon the landowner.

This test was applied again by the Court in *Nectow v. City of Cambridge*.[50] In *Nectow,* the Court balanced the two prongs of the *Euclid* test in determining that the challenged zoning ordinance, which prohibited industrial development on the plaintiff's land, was an invalid exercise of police power.[51] The landowner was later relieved of the oppressive regu-

45. 272 U.S. 365 (1926).

46. *Id.* at 395.

47. *Id.* at 386.

48. The *Euclid* Court merely takes the due process criteria set forth in Lawton v. Steele, 152 U.S. 133 (1894), and applies them to zoning regulations. *See generally* note 29 *supra* (discussing *Lawton*). The *Lawton* rationale has survived the demise of other aspects of substantive due process and is still favorably cited by the Court. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590, 595 (1962). Similarly, the *Euclid* test still determines the validity of zoning ordinances, but *Euclid*'s criteria are no longer framed as a test for substantive due process, but rather as a test for regulatory "takings." *See* Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980). This evolution has created considerable confusion and inconsistency in judicial language. *See* note 43 *supra*. Whether labelled as a test of substantive due process or mislabelled as a "takings" test, land use regulation under attack is judged by the same criteria—the two-pronged *Euclid* test. To be technically accurate, however, *Euclid*'s two-pronged analysis should be applied as a measure of substantive due process. *See* Oakes, *supra* note 43, at 591–94; Stoebuck, *supra* note 43, at 1069–70. At least one state court has expressly recognized this important distinction. 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, *cert. denied*, 429 U.S. 990 (1976).

Professor Stoebuck identifies the *Lawton* test as having three rather than two prongs, but the same considerations are present in either formulation. Use of the two-pronged formulation is advocated here because it segregates the two principal components that can be analyzed separately: (1) The ordinance's effect on society generally, and (2) The ordinance's effect on any one person. Furthermore, the two-pronged test is consistent with the *Euclid* Court's approach.

49. Holmes' "too far" analysis might be more accurately viewed as a mislabelled application of the due process criteria of *Lawton* and *Mugler*. *See* notes 42 and 48 *supra*.

50. 277 U.S. 138 (1928).

51. The plaintiff in *Nectow* owned land directly across the street from an industrial development. His land, however, was zoned residential by the city of Cambridge. The plaintiff had a tentative contract to sell the land for further industrial development, but the buyer refused to comply when the city of Cambridge enacted the zoning ordinance. 277 U.S. at 187. The Court found that the injury to the plaintiff was "clearly established." *Id.* at 188. The Court invalidated the ordinance on the basis that it failed to serve a public purpose because the land was not best suited for residential development. *Id.* at 187. Thus the Court's analysis seems ultimately to rely on balancing the effect on the landowner with the magnitude of potential public benefit. *See id.* at 188–89. This subjective weighing of the two prongs of the *Euclid* test typifies analysis used to determine the validity of land use

lations, but received no compensation. Following *Nectow*, the Court did not hear another case involving zoning disputes until 1974.[52] Consequently the states, bound by the two-pronged criteria of *Euclid*, were free to define the substantive limits within which zoning ordinances would be valid exercises of police power.

Many landowners use the "too far" language of *Pennsylvania Coal* as a basis for challenging zoning ordinances as fifth amendment takings requiring just compensation rather than the two-pronged *Euclid* test to invalidate the offensive ordinances.[53] Nevertheless, most state and federal courts have responded to these takings challenges not by awarding compensation but by applying the *Euclid* due process test and *invalidating* the zoning ordinance if it failed.[54]

The application of the due process test to takings claims has resulted in confusion because the proper remedy for a takings claim would seem to be inverse condemnation, not invalidation.[55] In theory, a taking requires that the landowner be justly compensated for the diminished value of the land, not that the land be returned to its unregulated status. Furthermore, governments should be allowed to take land in return for just compensation only if done pursuant to a valid exercise of police power.[56] This would mean that zoning ordinances could never constitute takings because the second prong of the *Euclid* test declares invalid any exercise of the zoning police power that goes too far.[57]

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ordinances. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962). *See also* Note, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315 (1979) (analyzing whether or not balancing is appropriate for this purpose); text accompanying notes 95–98 *infra* (identifying Justice Brennan's abandonment of balancing in his dissent in *San Diego Gas & Electric*).

52. Oakes, *supra* note 43, at 617 n.215.

53. *See* note 8 *supra*; text accompanying notes 38–43 *supra*.

54. Federal courts have never granted inverse condemnation to rectify an oppressive zoning ordinance. Pamel Corp. v. Puerto Rican Highway Auth., 621 F.2d 33 (1st Cir. 1980). The remedy, as in *Nectow*, has always been invalidation of the ordinance.

For state authority see, e.g., Davis v. Pima County, 121 Ariz. 343, 590 P.2d 459 (1978), *cert. denied*, 442 U.S. 942 (1979); Gold Run, Ltd. v. Board of County Comm'n, 38 Colo. App. 44, 554 P.2d 317 (1976); Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614 (Fla.), *cert. denied*, 419 U.S. 844 (1974); Holaway v. City of Pipestone, 269 N.W.2d 28 (Minn. 1978); Eck v. City of Bismarck, 283 N.W.2d 193 (N.D. 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, *cert. denied*, 429 U.S. 990 (1976).

55. *See* note 8 *supra*.

56. This is a corollary to the proposition that if the exercise of police power was invalid, no acquisition of property actually occurred. *See* Stoebuck, *supra* note 43, at 1062, 1081–82.

57. *See* notes 45–49 and accompanying text *supra*.

C. *Recent Supreme Court Responses to Challenged Land Use Ordinances*

The Supreme Court has never decided whether a land use regulation that goes too far ever constitutes a fifth amendment taking requiring the payment of just compensation. In fact, following the decision in *Pennsylvania Coal,* no land use regulation has been found by the Court to be a taking. In *Goldblatt v. Town of Hempstead,*[58] the Court faced a takings challenge to a city ordinance that effectively forced an active sand and gravel pit to close. The Court relied on *Mugler,* stating that "[i]f this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."[59] The Court then determined that the ordinance's effects were not unreasonable and upheld the ordinance as a valid exercise of police power under the two-pronged due process test of *Euclid.*[60]

The next takings claim based on a land use ordinance reached the Court in *Penn Central Transportation Co. v. New York City.*[61] The challenged zoning ordinance prohibited further construction atop the Grand Central Terminal in New York City. The Court accepted the New York court's finding that the ordinance advanced legitimate public interests and analyzed the case only on the basis of whether the city had gone "too far" in diminishing the value of Penn Central's property. The Court decided it had not.[62] The opinion, written by Justice Brennan, suggested that even if the ordinance had been found to be a taking, *invalidation, not just compensation,* would have been the appropriate remedy.[63]

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58. 369 U.S. 590 (1961).

59. *Id.* at 592. The Court goes on to state: "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." *Id.* at 594. This statement does not take into account, however, that takings analysis applies only if the ordinance "is otherwise a valid police regulation." *Id. See* text accompanying notes 55–57 *supra.*

60. The Court cites to the "classic statement of the rule in Lawton v. Steele," 152 U.S. 133 (1894), discussed in note 29 *supra.* 369 U.S. at 594–95. *See* note 48 *supra.*

61. 438 U.S. 104 (1978).

62. *Id.* at 136–38.

63. Justice Brennan stated:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty . . . . [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons . . . . Indeed, we 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."

Id. at 123–24 (emphasis added). Thus Justice Brennan acknowledges that invalidation is an appropriate response when a zoning ordinance constitutes a taking.

The next case bringing the taking issue to the Supreme Court was *Agins v. City of Tiburon*.[64] In *Agins*, the challenged zoning ordinance limited the potential development of the plaintiff's land to five single family dwellings. The plaintiff brought suit for inverse condemnation damages of two million dollars asserting that the zoning ordinance was a fifth amendment taking. The California Supreme Court struck down the claim, saying:

> [A]lthough a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he may not recover damages on the theory of inverse condemnation.[65]

By foreclosing inverse condemnation remedies, the California court's holding in *Agins* appears to say that zoning ordinances are never properly challenged as being fifth amendment takings.[66]

Agins claimed before the United States Supreme Court that the California court could not properly limit the remedies of oppressively zoned landowners. The Court, however, did not reach this issue because it affirmed the decision on the basis that no taking had occurred.[67] The Court noted that the zoning ordinance still allowed the plaintiff to construct five residences on his five acres, and that this was not unreasonable or confiscatory.[68]

Following *Agins*, the California courts' position remained that inverse condemnation awards are not available in response to challenged zoning ordinances. The constitutionality of this position was challenged again in *San Diego Gas & Electric*. Once again the majority failed to reach the merits of this issue, this time on jurisdictional grounds.[69] The dissent,

64. 447 U.S. 255 (1980).

65. Agins v. City of Tiburon, 24 Cal. 3d 266, 269–70, 598 P.2d 25, 26, 157 Cal. Rptr. 372, 373, *aff'd* 447 U.S. 255 (1980).

66. California courts before *Agins* had confronted the issue whether inverse condemnation may ever be an appropriate attack against a zoning ordinance. In HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), the California Supreme Court held that landowners subject to zoning-induced diminutions of property value do not have constitutional claims of inverse condemnation. One year later, however, the same court denied a petition of review to Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976). The California Court of Appeal in *Eldridge* upheld the right of an aggrieved landowner to acknowledge the validity of the zoning ordinance, but nonetheless bring suit for inverse condemnation. *Id.* at 621, 129 Cal. Rptr. at 579. The California Supreme Court in *Agins* expressly disapproved *Eldridge*. 24 Cal. 3d at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

67. 447 U.S. at 263.

68. *Id.* at 262.

69. *See* text accompanying notes 71–74 *infra*.

however, gave some indication of how the Court may treat this issue when it does reach the merits.[70]

II. THE COURT'S REASONING

A. *The Majority Opinion*

The majority of the Court dismissed San Diego Gas & Electric Company's taking claim citing lack of jurisdiction under 28 U.S.C. § 1257.[71] That statute limits the jurisdiction of the Court to hearing only final judgments of state courts.[72] The majority opinion, written by Justice Blackmun and joined by Chief Justice Burger and Justices White and Stevens, claimed that there was no final judgment in the California court on the issue of whether a taking had occurred.[73] Furthermore, the Court noted that the company was still free to seek invalidation of the zoning ordinance and open-space plan at the superior court level.[74] The majority did view the California court as saying that the company was not entitled to monetary relief even if there was a taking and acknowledged that such an automatic foreclosure of remedies presented federal constitutional issues that "are not to be cast aside lightly."[75] Nevertheless, because "further proceedings are necessary to resolve the federal question whether there has been a taking at all,"[76] the majority did not reach these issues. Justice Rehnquist, concurring, rejected the case under the same jurisdictional analysis.[77]

B. *The Dissent's Proposals*

Justice Brennan's dissent, joined by Justices Stewart, Marshall, and Powell, reached a different result on the jurisdiction issue. From the dissent's perspective the California court, by disallowing monetary compensation, implicitly made the final determination that no "taking" had oc-

70. *See* text accompanying notes 78–90 *infra*.

71. (1976). *See* 450 U.S. at 630–31 n.10.

72. Section 1257 states: "*Final judgments* or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . ." (emphasis added).

73. 450 U.S. at 633.

74. *Id.* at 632. The majority also seemed persuaded that, because the company had never been refused permission to develop, it was still "free to pursue reasonable investment." *Id.* at 631 n.12.

75. *Id.* at 633.

76. *Id.*

77. *Id.* at 633–36. Justice Rehnquist stated that:

> 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.

Id. at 633–34. *See* text accompanying notes 21–23 *supra*.

curred on the ground that there can be no "taking" without just compensation.[78] The dissent viewed the company's chance to obtain declaratory relief invalidating the ordinance as merely an option to pursue a different constitutional theory.[79] Therefore the dissent claimed that the California court had made a "classic final judgment."[80] Overcoming the jurisdictional issue, the dissent reached the merits of the question whether the California court may constitutionally bar the company from the fifth amendment takings remedy of inverse condemnation.

Justice Brennan cited *Agins, Penn Central, Goldblatt,* and *Pennsylvania Coal* as standing for the proposition that land use regulations can constitute fifth amendment takings if they go "too far."[81] The dissent noted that the typical governmental taking occurs only when the government actually occupies the land,[82] but nonetheless maintained that land use regulations may just as effectively "deprive the owner of all or most of his interest in the property," and therefore constitute a taking.[83] In determining whether a taking had in fact occurred, Justice Brennan said the focus should be solely on the imposition forced upon the landowner.[84]

The dissent emphasized that if any governmental action is found to be a taking, inverse condemnation *must* be awarded because "mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause."[85] The dissent would not require a municipality to purchase the burdened property outright when it is guilty of a zoning-taking. Rather, the municipality has the option of rescinding the offending ordinance and paying compensation only for a temporary taking.[86] This payment would constitute a use fee "for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the

78. The dissent vigorously argued that "takings" and just compensation are inseparable. The dissent interprets the Court's past decisions as having "consistently recognized that the just compensation requirement in the fifth amendment is not precatory: once there is a 'taking,' compensation *must* be awarded." *Id.* at 654. This is a rather dubious proposition, however, when applied to regulatory "takings." For instance, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the first Supreme Court case to hold that a valid police power may be a "taking," no just compensation was required. In fact, no Supreme Court decision has ever awarded just compensation in response to a regulatory "taking." *See* cases cited in note 54 *supra*. A recent opinion written by Justice Brennan suggests that invalidation rather than compensation is an appropriate remedy for an ordinance that constitutes a taking. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). *See* note 63 and accompanying text *supra*.

79. 450 U.S. at 643. This "different" theory would presumably be that the ordinance was void for violating the due process clause of the 14th amendment.

80. *Id.* at 646.

81. *Id.* at 647–49.

82. *Id.* at 651.

83. *Id.* at 653.

84. *Id.* at 656–57.

85. *Id.* at 656.

86. *Id.* at 658–59.

government entity chooses to rescind or otherwise amend the regulation."[87] In this way, inverse condemnation would always accompany a successful taking claim.[88]

The dissent refused to consider any policy arguments in favor of limiting the liability that municipalities would unavoidably confront in enacting zoning ordinances.[89] Justice Brennan claimed that the relationship between taking and just compensation awards was an express constitutional guarantee that transcends any considerations of public policy.[90]

The dissent's position can thus be summarized in three points. First, if a land use regulation is challenged as a "taking," the judicial determination of the claim turns solely on the degree of imposition forced upon the landowner. Second, if a land use regulation is found to be a "taking," just compensation *must* be awarded. Third, if the ordinance is later rescinded, that compensation will be measured as a use fee or "temporary taking."

III. ANALYSIS

A. The Practical Effect of the Dissent's Proposals

The judicial test used to determine the validity of zoning ordinances has traditionally been the two-pronged *Euclid* test weighing the public benefit against the private burden, which is essentially a test of fourteenth amendment due process.[91] Even when zoning ordinances are challenged as a fifth amendment taking, courts have applied the *Euclid* rationale and invalidated the ordinances when they failed the test.[92] Thus, the two-pronged *Euclid* test has evolved into the test for zoning ordinance takings.[93] The *Euclid* test determines the validity of a zoning ordinance by balancing its two prongs.[94] In his dissent in *San Diego Gas & Electric*, however, Justice Brennan suggests that the only factor to be considered in determining whether a zoning ordinance constitutes a taking is the magnitude of the public burden imposed on the landowner. The degree of public benefit is immaterial.[95] Thus, Justice Brennan's position apparently aban-

87. *Id.* at 658.

88. This doctrine is consistent with the dissent's assertion that just compensation must accompany takings. *See* note 78 *supra*.

89. *See* 450 U.S. at 660–61.

90. *Id.* at 661

91. *See* notes 45–52 and accompanying text *supra*; 1 A. RATHKOPF, *supra* note 2, § 4.01.

92. *See* cases cited in note 54 *supra*.

93. *See* Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980); text accompanying note 100 *infra*.

94. *See* note 51 *supra*.

95. *See* 450 U.S. at 656–57.

dons the traditional test of balancing public and private interests,[96] and relies solely on the *Pennsylvania Coal* "too far" test.

This new perspective is inconsistent with the takings analysis in Justice Brennan's majority opinion in *Penn Central Transportation Co. v. New York City*.[97] That opinion stated:

> [I]n instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. . . . Zoning laws are, of course, the classic example . . . .[98]

Likewise, in *Agins v. City of Tiburon*,[99] heard only nine months before *San Diego Gas & Electric*, the Court said that a zoning ordinance may be a taking "if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . . [T]he question necessarily requires a weighing of private and public interests."[100] Justice Brennan now says that the public benefit and the burden on the landowner should no longer be balanced but rather should be analyzed for distinct causes of action.[101] The dissenting opinion fails, however, to provide an adequate rationale for this significant departure from the traditional doctrine.

Besides implicitly altering the well-established rationale used for determining whether a regulation has gone too far, the dissent also takes the position that monetary compensation must follow such a taking in every case.[102] Most courts that have considered this issue have concluded that compensation for a regulatory taking is inappropriate if invalidation of the ordinance relieves the plaintiff's burden.[103] Even in *Pennsylvania Coal*, the only case in which the Supreme Court found the challenged regulation to be a taking, the Court's remedy was to refuse to enforce the offensive regulation rather than require compensation.[104]

The dissent's reasons for viewing existing takings doctrine in this form

96. The history of challenges to zoning ordinances chronicles the necessity and advantages of balancing public benefits and private losses. The Court seemed to recognize this in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124–27 (1978). This same perspective is also implicit in the decisions of Goldblatt v. Hempstead, 369 U.S. 590 (1962), and Hadacheck v. Sebastian, 239 U.S. 394 (1915).

97. 438 U.S. 104 (1978).

98. *Id.* at 125.

99. 447 U.S. 255 (1980).

100. *Id.* at 260–61.

101. 450 U.S. at 656 n.23.

102. *See* note 78 *supra*.

103. *See* note 54 and accompanying text *supra*.

104. *See* notes 41–42 and accompanying text *supra*.

are not altogether certain. One possibility suggested by the dissent is that over-regulated landowners are left without adequate remedies if monetary awards are judicially foreclosed.[105] Although the dissent's proposals respond to this inadequacy, they create even more serious problems by unduly inhibiting municipalities' abilities to regulate land use.

B. Municipalities' Ability to Regulate Land Use

When enacting zoning ordinances, municipalities implicitly find that the long-term benefits to be realized by society outweigh the burdens borne by the regulated landowners.[106] If these burdens are not so concentrated or severe that they violate the *Euclid* test's second prong, the zoning ordinance is a valid exercise of the municipality's police power.[107] By authorizing this municipal authority, the *Euclid* doctrine encourages municipalities to guide their orderly development.[108]

The dissent's proposals, by forcing municipalities to pay inverse condemnation claims for what would otherwise be invalid exercises of municipalities' police powers, would discourage municipalities from performing their land use planning responsibilities.[109] This is especially true when the land being regulated has great potential profitability in compari-

105. *See* 450 U.S. at 655–56 n.22. The dissent argued in support of its position that if a municipal ordinance is merely invalidated by a successful landowner's suit, the municipality is free to reenact a slightly altered ordinance and force the landowner to judicially challenge the new regulations. *Id.* This process could theoretically go on indefinitely.

The dissent fails to examine other possibilities that would more equitably prevent the situation described above. For instance, under this Note's proposal, the landowner would be entitled to collect actual damages, and even punitive damages, in response to such bad faith municipal behavior. *See* note 136 *infra*.

106. If this were the case, the ordinance would probably fail the *Lawton v. Steele* test for valid exercises of police power. *See* note 29 *supra*; text accompanying note 46 *supra*.

107. *See* text accompanying notes 45–49 *supra*.

108. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–89 (1926).

109. *See, e.g.*, Note, Eldridge v. City of Palo Alto: *Aberration or New Direction in Land Use Law?*, 28 HASTINGS L. REV. 1569, 1597–99 (1977); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1449–50 (1974) [hereinafter cited as Note, *Inverse Condemnation*]. Justice Brennan acknowledges the existence of this important policy consideration, but responds that "the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches." 450 U.S. at 661. Therefore, when a "taking" has occurred, considerations of public policy cannot prevent the award of just compensation. The public policy ignored by Justice Brennan, however, involves defining what should be a "taking." Because the Constitution does not define "taking," and because the "too far" test only begs the question, perhaps considerations of public policy are critically important.

Justice Brennan's position assumes that a temporary zoning restriction can deprive a landowner of "property" in the fifth amendment sense. Furthermore, the position assumes that deprivation of this kind of "property" goes "too far." These assumptions involve very fundamental judgments about the degree to which government can constitutionally regulate land use. Such judgments should not be made without deference to public policy. Indeed, such judgments define public policy.

son to an austere municipal budget.[110] With inverse condemnation claims available, the only certain way municipalities can avoid payment of just compensation is to avoid regulation, regardless of the public purposes the ordinance advances. Justice Brennan responded to this argument, saying this potential liability is a positive incentive encouraging municipalities to "err on the constitutional side of police power regulations."[111] Although this potential liability may indeed encourage municipalities to be more conservative in their land management strategies, there are ample incentives already present to insure that municipalities err in favor of constitutionality. These include the costs of litigation and administration that result from overzealous regulation.[112]

The dangers of this chilling effect on land use regulations are magnified by the absence of a well-defined demarcation of what constitutes a taking. The "too far" test is one of the more mystic determinations of the judiciary.[113] The Supreme Court itself has acknowledged that the determination of what constitutes a taking is "a question of degree—and therefore cannot be disposed of by general propositions."[114] In order to err on the side of constitutionality with any degree of confidence, local officials would be forced to adopt far more conservative land use controls.

Furthermore, this chilling effect would operate inequitably. To avoid devastating liability in the face of an evanescent "too far" test, municipal authorities could ill afford aggressive land use regulation of parcels with great potential value. Such disaster-avoidance conservatism would tend, therefore, to aid the owners of the most valuable tracts of land at the expense of the general public. Furthermore, judicially imposed liability which discourages municipalities from performing their official duties runs counter to the established policies of the Court.[115]

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110. Inverse condemnation awards are measured by the actual economic value of the land being taken. *See* note 8 *supra*. *But see* note 122 *infra*. The dissent would apply the same criteria to "temporary takings." 450 U.S. at 658–59.

111. *Id.* at 661 n.26.

112. Justice Brennan indicates that these overhead costs, along with the possibility of ordinance invalidation, are insufficient deterrents to keep municipalities from regulating landowners in an unconstitutional fashion. *Id.* at 655–56 n.22. This presumably provides the basis for his advocating the expansion of the inverse condemnation claim. The dissent fails to consider, however, the possibility of allowing damage remedies, rather than inverse condemnation awards, in response to invalid zoning. *See* text accompanying notes 125–137 *infra*.

113. *See* note 43 *supra*.

114. *San Diego Gas & Electric*, 450 U.S. at 649 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

115. The Court has only recently abrogated the doctrine of governmental immunity. The Court's policy has been, however, to refuse to abrograte the doctrine completely in cases where liability would inhibit the performance of the government's official duties. *See* Carlson v. Green, 446 U.S. 14, 18–19 (1980).

C. *Invalid Land Use Regulations as Inverse Condemnation Claims*

Even if owners of invalidly zoned land are not adequately compensated by the invalidation of the offending ordinance, inverse condemnation is an inappropriate method of filling the void. A municipality should not be forced to acquire property or property rights that it does not want.[116] Such acquisitions should be made by legislative decision, not judicial fiat.[117] Justice Brennan recognized this argument and stated that courts should not force a municipality into property acquisition if the municipality rescinds the ordinance.[118] Under Justice Brennan's analysis, however, the municipality is still liable after rescission for an inverse condemnation award to compensate for the temporary taking.[119]

The automatic awarding of compensation for the temporary taking of the land may result in a windfall for the landowner, as demonstrated by the facts of *San Diego Gas & Electric*. If the company prevailed on its inverse condemnation action, the city, after rescinding the zoning ordinance, would have to pay the company for the "use" of the land for the time the ordinance was in effect. The company would thus be compensated whether or not it had suffered any actual damage. If the company had no desire or opportunity to sell the land while the challenged ordinance was in effect, the invalidation of the ordinance would place the company in the same position it would have occupied had the ordinance never been enacted. Yet the Brennan analysis still requires compensation. This additional remedy is an unnecessary windfall.

The prospects of a windfall will encourage landowners to challenge land use regulations on takings theories. The likelihood of such litigation pressure could exacerbate the chilling effect discussed above.[120]

Justice Brennan's proposed inverse condemnation awards are not only an improper response to the landowner's situation, they similarly misconceive the municipalities' position. Justice Brennan views the inverse condemnation award as resulting in the public bearing the costs of the

116. An inverse condemnation award theoretically completes an eminent domain acquisition. *See* note 8 *supra*.

117. *See* Note, *Inverse Condemnation*, *supra* note 109, at 1450.

118. The dissent states:

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

450 U.S. at 658.

119. *Id.* at 658–59; *see* text accompanying notes 86–88 *supra*.

120. *See* text accompanying notes 109–112 *supra*.

benefits it has received.[121] Compensating a temporary taking would then be analogous to a retroactive use fee, just as if a lease had been prospectively negotiated for the time the overreaching ordinance was in effect.[122] The primary benefits and purposes of land use planning, however, are long-range in nature and designed as much to benefit the evolution of our habitat as to provide for immediate gratification.[123] This is especially true with open-space plans. Thus, even though the public would be paying for a taking under Justice Brennan's approach, it often will receive little, if any, true benefit from the temporary taking. Such a payment to landowners is more properly characterized, and more properly computed, as damages.

IV. AN ALTERNATIVE APPROACH

A primary concern of the dissent is that the over-regulated landowner is left without an adequate remedy if barred from obtaining an inverse condemnation award.[124] This may be true in some situations. For example, a landowner who is foreclosed from an inverse condemnation award may prevail in a suit for declaratory relief, but may not be adequately compensated.[125] Although Justice Brennan's proposals would compensate those landowners on the basis of a temporary taking, his proposals also com-

121. 450 U.S. at 656.

122. Exactly how the dissent proposes to calculate the just compensation for temporary "takings" is not clear. The dissent says both that the compensation is to leave the landowner in the same position as if there had been no "taking," 450 U.S. at 657, and that the award is to serve as compensation for the use of the property while the regulation is in effect. *Id.* at 658–59. These two ideas lead to different results if the landowner was holding open land for speculative purposes. Since the speculating landowner is in the same position after the regulation is rescinded, one might read the dissent to say that no compensation is necessary. On the other hand, the dissent clearly establishes that a temporary taking requires a use fee in every case. *See* note 78 *supra*.

Determining the amount of just compensation is a confusing and difficult task even when the taking is not complicated by being temporary in nature. *See* Note, *Inverse Condemnation, supra* note 109, at 1451 n.54.

123. This was, for instance, clearly the intention of the *Euclid* Court when they upheld the zoning process as a valid police power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–94 (1926).

124. 450 U.S. at 654–57.

125. Because declaratory relief places the landowner in the same position that the landowner was in before the regulation, only in the unusual case would additional compensation be necessary. Justice Brennan suggests the case where the municipality regulates in a harassing or bad faith manner. *See* note 105 *supra*. Additional compensation would be appropriate under those circumstances. *See* note 136 *infra*.

Another example would be an ordinance that curtails existing uses of the land. If, for example, the landowner is profiting by renting land for camping, parking area, or gathering wild rice, and the invalid ordinances halt these activities during the legal challenge, the municipality should be liable to the landowner for the damages caused by the unconstitutional regulation. *See* note 135 *infra*.

pensate landowners who have suffered no loss.[126] A better remedy would be one that is less broad and that awards compensation to the landowner only when the landowner has suffered provable damages.

A possible substitute remedy is 42 U.S.C. § 1983,[127] which provides that any person injured by deprivation of constitutional rights is entitled to collect damages. Justice Brennan states in *San Diego Gas & Electric* that this remedy is available in response to invalid zoning ordinances that fail to advance legitimate public interests,[128] the first prong of the *Euclid* test. Justice Brennan's analysis should be expanded to include both prongs of the *Euclid* test.

If a landowner is subject to a zoning ordinance that goes too far, that ordinance fails the fourteenth amendment due process test[129] and the landowner has been deprived of a constitutionally guaranteed right.[130] Therefore, that landowner may claim provable damages under section 1983.[131] Under this analysis a state court does not completely foreclose landowners from a monetary remedy when it bars claims of inverse condemnation. Although this damage remedy for constitutional violations has not been expressly approved by the Supreme Court for use against municipalities,[132] two federal courts of appeal have indicated that section 1983 provides an appropriate remedy in land use disputes.[133] If the Supreme Court affirms the availability of such damages, section 1983 would provide an equitable recovery for owners of invalidly zoned land.

Unlike Justice Brennan's proposition, the use of section 1983 damages is easily reconciled with existing doctrines governing challenges to land use ordinances. The well-established *Euclid* test would continue to determine the validity of zoning regulations. Courts could continue to balance private loss and public gain in determining whether a regulation has gone

126. *See* text following note 119 *supra*.

127. (1976). This section states:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

128. 450 U.S. at 656 n.23.

129. *See* note 48 *supra*.

130. *See* note 29 *supra*.

131. *See* Rockwell, *Constitutional Violations In Zoning: The Emerging Section 1983 Damage Remedy*, 23 U. FLA. L. REV. 168 (1981); *see also* Manley, *Inverse Condemnation Under 42 U.S.C. Section 1983*, 12 URB. LAW. 276 (1980) (blurring, as the title suggests, the concepts of inverse condemnation and damages, but nonetheless advocating a restrained application of § 1983 damages to oppressive land use regulations).

132. Rockwell, *supra* note 131, at 178.

133. Gordon v. City of Warren, 579 F.2d 386, 390–91 (6th Cir. 1978); Jacobsen v. Tahoe Regional Planning Agency, 558 F.2d 928, 941–42 (9th Cir. 1977).

too far. In addition, municipalities would pay for the actual damages they cause, not for benefits they never receive. Damages, however, would rarely be an appropriate response to invalid regulations on undeveloped land.[134] Damages should be assessed primarily in response to ordinances that directly affect current land uses.[135] Damages are also appropriate in cases where municipal authorities take advantage of the unavailability of inverse condemnation remedies by enacting invalid regulations in bad faith. In those cases, punitive damages and attorney's fees should be imposed at the discretion of the court.[136]

Under this proposed alternative, the San Diego Gas & Electric Company would not be limited to seeking declaratory relief, but would be free to prove damages under section 1983. The facts of the case, however, suggest that the company has suffered no actual damages.[137] This demonstrates how inequitable an inverse condemnation recovery would be under these circumstances.

V. CONCLUSION

A four justice minority of the Supreme Court indicated in *San Diego Gas & Electric* that landowners subject to zoning ordinances that go too far must be allowed to bring actions for inverse condemnation and that successful actions must be accompanied by monetary compensation. Both the majority and concurring opinions expressed support for this proposition, but were unable to reach the merits on jurisdictional grounds. Inverse condemnation, however, is an inappropriate response to overly-restrictive zoning. Invalid zoning ordinances are better viewed as being void for failure to provide the substantive due process guaranteed by the Constitution. As void ordinances, they cannot be fifth amendment

134. Rockwell, *supra* note 131, at 193; *see, e.g.*, City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978).

135. *See* note 125 *supra*. The judiciary should be hesitant to award damages due to harm to the landowner's value expectations because *Euclid* and subsequent cases have clearly established that the regulation of land use in the public interest is a valid police power which should be anticipated. Thus, while land use regulations may dash the hopes of a landowner, they need not be seen as destroying compensable expectations.

136. This would seem to be the appropriate response to the dissent's scenario, *see* note 105 *supra*. Section 1983 damages include punitive damages and attorney's fees at the discretion of the court. *See* Rockwell, *supra* note 131, at 192.

137. Although San Diego Gas & Electric Company claims that the zoning ordinance had taken its property through over-regulation, thereby rendering it useless, the company was nonetheless able to sell 40 of the acres for $1.7 million in 1979. In addition, the company received an additional $1,483,140 from ratepayers by virtue of the property being a rate base asset during the time of the supposed temporary taking. In total, the company has received in revenue attributable to the "taken" property almost as much as its original purchase price—and still owns 372 of the original 412 acres. Brief for the Conservation Foundation, et al. at 13–14, *San Diego Gas & Electric*, 450 U.S. 621.

takings of property that require just compensation.[138] Instead the landowners are freed from the invalid regulations.

In certain situations mere freedom from the invalid regulations will not compensate landowners adequately. Damage awards, as authorized under 42 U.S.C. § 1983, would be appropriate under these circumstances.

Kim C. Pflueger

138. *See* note 56 and accompanying text *supra*.