INVERSE CONDEMNATION UNAVAILABLE AS REMEDY FOR DEPRIVATION OF PROPERTY VALUE BY CITY ZONING ORDINANCE

Agins v. Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *cert. granted*, 48 U.S.L.W. 3426 (1980) (No. 79-602, 1979 Term)

The California Supreme Court in *Agins v. Tiburon*[1] established a major zoning law precedent by disallowing inverse condemnation as a remedy for an alleged deprivation of all value of a landowner's property.

The city of Tiburon enacted a general land use plan designating areas of the city for open-space use.[2] A zoning ordinance limited residential development of plaintiff's property to a density of .2 to 1 dwelling units per acre.[3] In his suit against the city, the landowner alleged that the ordinance completely destroyed the value of his property.[4]

Plaintiff, for his first cause of action for inverse condemnation, claimed damages for loss of value.[5] For his second cause of action, plaintiff sought a declaratory judgment invalidating the ordinance as violating the fifth amendment to the United States Constitution[6] and article I, section 19 of the California constitution[7] prohibiting uncompensated taking. The superior court dismissed the case,[8] sustaining

1. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *cert. granted*, 48 U.S.L.W. 3426 (1980) (No. 79-602, 1979 Term).

2. California state law requires every city to prepare a general land use plan. The plan includes designating land for open-space, scenic beauty, housing, industry, business, and other categories of private and public uses. "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." CAL. GOV'T CODE § 65302(a) (Deering 1979).

3. Tiburon, Cal., Ordinance 124 N.S. (June 28, 1973), *construed in* Agins v. Tiburon, 24 Cal. 3d 266, —, 598 P.2d 25, 27, 157 Cal. Rptr. 372, 374 (1979), *cert. granted*, 48 U.S.L.W. 3426 (1980) (No. 79-602, 1979 Term).

4. The court noted that following the enactment of Ordinance 124 N.S., Agins never sought to use his property or to receive a definitive statement of how many dwelling units he could build. 24 Cal. 3d at —, 598 P.2d at 27, 157 Cal. Rptr. at 374.

5. *Id.*

6. The fifth amendment to the United States Constitution provides in part: "nor shall private property be taken for public use without just compensation." U.S. CONST. art. V.

7. The California Constitution provides: "Private property may be taken or damaged for public use only when just compensation, . . . has first been paid to . . . the owner. . . ." CAL. CONST. art. I, § 19.

8. 24 Cal. 3d at —, 598 P.2d at 28, 157 Cal. Rptr. at 375.

defendant's general demurrer to the inverse condemnation claim without leave to amend,[9] and sustaining the demurrer to the declaratory judgment claim with ten days' leave to amend.[10] On appeal the California Supreme Court affirmed and *held:* A landowner alleging that a zoning ordinance deprived him of all reasonable and substantial use of the land may not claim inverse condemnation as a remedy[11] and instead must rely on declaratory relief or mandamus.[12]

Eminent domain is the sovereign's power to confiscate or use private property without the owner's consent.[13] The fifth amendment to the United States Constitution,[14] applicable to the states through the fourteenth amendment,[15] prohibits the taking of property for public use without compensation. This constitutional provision is the basis for the government's power to condemn property and for citizens' right to compensation. The compensation requirement ensures distribution of costs throughout the community.[16] The California constitution similarly prohibits governmental taking of property, and requires compensation for damage to property.[17]

In contrast to the mandatory compensation requirement of eminent domain, police power regulation does not require compensation.[18] Po-

9. Courts should not sustain a demurrer without leave to amend if a possibility exists that the defect is curable, unless it is clear that no cause of action exists for the alleged act. "Leave to amend should be denied where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists. Obviously, no amendment would change the result." 3 WITKINS CIV. PRO. § 847 (2d ed. 1971).

10. 24 Cal. 3d at —, 598 P.2d at 28, 157 Cal. Rptr. at 375.

11. *Id.*

12. The court in the second part of the opinion denied declaratory relief to Agins on the theory that plaintiff retained reasonable or substantial use. *Id.* at —, 598 P.2d at 31, 157 Cal. Rptr. at 378.

13. 1 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 1.11, at 2 (revd. 3d ed. Rohan comp. 1976) [hereinafter cited as NICHOLS]; *see* Comment, *Regulation of Land Use: From Magna Carta to a Just Formulation*, 23 U.C.L.A. L. REV. 904, 904 n.4 (1976).

14. *See* note 6 *supra.*

15. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

16. Bacich v. Board of Control, 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943); Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 224 (1941). *See also* Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 626, 129 Cal. Rptr. 575, 582 (1976) (purpose behind inverse as well as ordinary condemnation).

17. *See* note 7 *supra*; note 66 *infra.*

18. Eminent domain takes property because it is useful to the public, while the police power regulates the use of, or impairs rights in, property to prevent detriment to public interest; in the exercise of eminent domain private property is taken for public use and the owner is compensated, while the police power regulates an owner's use and enjoyment of property, or deprives him of it by destruction, for the public welfare, without

In *United States v. Benfield*[47] the Eighth Circuit Court of Appeals asserted that both physical confrontation and concurrent cross-examination are essential elements of a defendant's sixth amendment right of confrontation.[48] Unless the defendant waives, forfeits, or loses by necessity this constitutional right, a confrontation that does not entail an actual face-to-face meeting between the accused and the witness does not meet the requirements of the sixth amendment.[49] In reaching this conclusion, the Court specifically relied upon *Mattox v. United States*,[50] *Kirby v. United States*,[51] *Dowdell v. United States*,[52] and *Snyder v. Massachusetts*.[53] Writing for a unanimous court, Chief Judge Gibson argued that, "While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment."[54]

In the opinion of the court, physical confrontation is of primary importance because it guarantees to the accused the right to participate in the conduct of his defense.[55] Moreover, the court expressed the belief that the accuracy of an adverse witness' testimony is sharpened by the presence of the defendant.[56] Cross-examination is an essential com-

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Evaluation and a Legal Analysis, 26 STAN. L. REV. 619 (1974); 20 DE PAUL L. REV. 924 (1971); 42 MO. L. REV. 121 (1977).

See also G. CHU & W. SCHRAMM, LEARNING FROM TELEVISION 84-86 (1968) (study indicated that media instruction to students matches effectiveness of live instruction); Ryan & Cassan, *Television Evidence in Court*, 122 AM. J. PSYCH. 655 (1965) (discussing use of video-taped interviews to determine legal competency).

47. 593 F.2d 815 (8th Cir. 1979).

48. *Id.* at 821.

49. *Id.* at 820-22.

50. 156 U.S. 237 (1895). *See* note 18 *supra* and accompanying text.

51. 174 U.S. 47 (1899). *See* note 21 *supra* and accompanying text.

52. 221 U.S. 325 (1911). *See* note 21 *supra* and accompanying text.

53. 291 U.S. 97 (1934). *See* note 21 *supra* and accompanying text.

54. 593 F.2d at 821.

55. *Id.*

56. *Id.*

> The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel.

Id.

In a footnote, the court noted that "[e]xclusion of the defendant from a deposition where testimony is taken for introduction at trial also potentially conflicts with the defendant's right of self-representation." *Id.* at 821 n.8 (citations omitted).

The court cited no authority to support its contention that a face-to-face meeting between defendant and witness increases the likelihood that the witness will truthfully relate the facts. Whether effective cross-examination by counsel produces the same result, and whether the court's

panion to physical confrontation, but it is not independently sufficient to satisfy the requirements of the sixth amendment.[57]

Once the court established that physical confrontation was required, it turned to the question of whether Benfield, verbally or through his actions, had lost the protection of his constitutional right. The court found that Benfield had not waived, forfeited, or lost by necessity his right to physically confront Cady at the deposition.[58] No evidence of an affirmative waiver by Benfield existed,[59] and the court did not find the charge against Benfield so heinous as to excuse the prosecutrix from facing defendant while testifying.[60] Shifting its focus to the specific procedure used at the deposition, the court found that the absence of a face-to-face meeting between Benfield and Cady, and the latter's unawareness that during the course of the deposition she was being monitored by defendant, resulted in only an imperfect confrontation.[61] As such, it was insufficient to test the accuracy of Cady's perceptions and expressions of her ordeal.[62]

The court carefully noted that it did not condemn the use of electronic devices in the courtroom.[63] Instead, the court's concern stemmed from the particular procedure employed. The deposition procedure used was "[t]oo great an abridgement . . . of defendant's con-

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proposition is sound from a psychological standpoint is unclear. *See generally* C. KLEINKE, FIRST IMPRESSIONS 27 (1975); M. LADD & R. CARLSON, CASES AND MATERIALS ON EVIDENCE 166-73 (1972); Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239 (1967); 44 U.M.K.C. L. REV. 517, 521-25 (1976); *see also* United States v. West, 574 F.2d 1131, 1141 (4th Cir. 1978) (Widener, J., dissenting) (undocumented statement that "we must recognize that a witness will often make accusations behind the back of the accused which he will not repeat to his face").

57. 593 F.2d at 821. "The right of cross-examination reinforces the importance of physical confrontation." *Id.*

58. *Id.* at 821-22.

59. *Id.* at 821.

60. *Id.* The court merely assumed, without deciding, that a grievous crime against a person could excuse the victim from facing the defendant while testifying. *Id.* Although noting that State v. Richey, 107 Ariz. 552, 555, 490 P.2d 558, 561 (1971), allowed the examination, in defendant's absence, of a child abuse victim's competency to testify, the *Benfield* court found no indication that the child had given substantive testimony in the defendant's absence. 593 F.2d at 821 n.10. The *Benfield* court concluded that "[t]o find a waiver or forfeiture in this case would destroy the right of confrontation in nearly all cases of alleged crimes against persons." *Id.* at 821.

61. 593 F.2d at 821-22.

62. *Id.*

63. "Today's decision should not be regarded as prohibiting the development of electronic video technology in litigation. Where the parties agree to a given procedure or where the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming." *Id.* at 821.

frontation right to pass constitutional muster."[64] The court ordered that Benfield's conviction be reversed[65] and, after disposing of Benfield's objections against the government's ability to retry him,[66] remanded the case to the district court for further proceedings.[67]

Benfield's significance lies in the Eighth Circuit's reestablishment of the requirement of a face-to-face meeting between defendants and witnesses as an important part of the constitutional right of confrontation. The court's emphasis on defendants' right to personal, physical confrontation is consistent with the *Mattox* line of cases[68] and the holdings of *Diaz* and *Allen*.[69] The Supreme Court's recent focus on effective cross-examination as the essential element of confrontation, however, had shifted the requirement of physical confrontation to the background.[70] Thus, the *Benfield* court's reemphasis on face-to-face meetings absent a showing of waiver, forfeiture, or necessity indicates that physical confrontation has not been eliminated from the rights guaranteed by the sixth amendment.

The decision in *Benfield* is also important because the court expressly approved the use in criminal trials of video-taped depositions that comply with the terms of Rule 15 and allow the defendant to participate actively in the proceeding. Commentators generally agree that a jury is capable of satisfactorily viewing a deponent's demeanor through video tape,[71] and the court's decision exhibits a willingness to accept this proposition.[72]

A deposition proceeding plays a significant role in the ultimate deter-

64. *Id.* "Here the right of confrontation was considerably curtailed by the procedures employed. What curtailment or diminishment might be constitutionally permissible depends on the factual context of each case, including the defendant's conduct." *Id.*

65. *Id.* at 822.

66. *Id.*

67. *Id.*

68. *See* notes 18, 21 *supra* and accompanying text.

69. In neither *Diaz* nor *Allen* did the Supreme Court declare defendant's confrontation right satisfied by vicarious representation through counsel. Instead, the Court devised the waiver and forfeiture exceptions, respectively, to the right of confrontation. *See* notes 30-37 *supra* and accompanying text. Thus, the ability of Benfield's attorney to cross-examine Cady at the deposition, *see* note 11 *supra*, could not properly support a finding that Benfield's right of confrontation was satisfied.

70. *See* notes 22-27 *supra* and accompanying text.

71. *See* cases and other authorities cited note 46 *supra*.

72. *Cf. The Supreme Court, 1969 Term, supra* note 25, at 115 (when applied to *Benfield*, suggests that although video tape sufficiently exhibits a witness' demeanor, the Constitution may not require that the jury view demeanor).

mination of a defendant's guilt or innocence. Thus, the *Benfield* court's careful scrutiny of the procedure employed during the victim's deposition is commendable. The court's holding that confrontation between defendants and witnesses must be complete precludes a step backward toward a judicial system in which ex parte affidavits and depositions would be sufficient to support a criminal conviction.[73]

73. *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895); note 28 *supra*.

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defendant's general demurrer to the inverse condemnation claim without leave to amend,[9] and sustaining the demurrer to the declaratory judgment claim with ten days' leave to amend.[10] On appeal the California Supreme Court affirmed and *held:* A landowner alleging that a zoning ordinance deprived him of all reasonable and substantial use of the land may not claim inverse condemnation as a remedy[11] and instead must rely on declaratory relief or mandamus.[12]

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lice power regulation must serve the interests of public health, safety, morals, and general welfare.[19] Historically, courts have expanded the scope of police power and, consequently, have restricted property rights.[20] Police power banished nuisances in the 1800's[21] and now en-

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compensation other than the sharing of the resulting general benefits. Constitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of the police power.

29A C.J.S. *Eminent Domain* § 6 (1965). *See also* Hulen v. City of Corsicana, 65 F.2d 969, 970 (5th Cir. 1933); Creasy v. Stevens, 160 F. Supp. 404, 410 (W.D. Pa. 1958), *rev'd on other grounds sub nom.* Martin v. Creasy, 360 U.S. 219 (1959); Franco-Italian Packing Co. v. United States, 128 F. Supp. 408, 413 (Ct. Cl. 1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391, 153 P.2d 950, 953 (1944); Ackerman v. Port of Seattle, 55 Wash. 2d 400, 408, 348 P.2d 664, 668-69 (1960); Conger v. Pierce County, 116 Wash. 27, 36, 198 P. 377, 380 (1921); 1 NICHOLS, *supra* note 13, at § 1.42(1); J. SACKMAN, THE IMPACT OF ZONING AND EMINENT DOMAIN UPON EACH OTHER 107 (1971).

19. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1973); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 906 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Dahl v. City of Palo Alto, 372 F. Supp. 647, 648 (N.D. Cal. 1974); Brown v. Tahoe Regional Planning Agency, 385 F. Supp. 1128, 1132 (D. Nev. 1973); McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 885, 264 P.2d 932, 935 (1953); Wilkins v. City of San Bernadino, 29 Cal. 2d 332, 338, 175 P.2d 542, 547 (1946); Gisler v. County of Madera, 38 Cal. App. 3d 303, 306, 112 Cal. Rptr. 919, 920 (1974); Turner v. County of Del Norte, 24 Cal. App. 3d 311, 314, 101 Cal. Rptr. 93, 95 (1972); 1 NICHOLS, *supra* note 13, at § 1.42; Bowden, *Legal Battles on the California Coast: A Review of the Rules*, 2 COASTAL ZONE MANAGEMENT J. 273, 275 (1976); Comment, *"Takings" Under The Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances*, 30 SW. L.J. 723, 725 (1976). *See generally* Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959).

20. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926); Miller v. Board of Pub. Works, 195 Cal. 477, 484-85, 234 P. 381, 383 (1925). *See* notes 21-22 *infra*.

21. *See* Standard Oil v. City of Marysville, 279 U.S. 582 (1929) (ordinance proscribed burial of petroleum tanks); Zahn v. Board of Pub. Works, 274 U.S. 324 (1927) (zoning ordinance classified building); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (ordinance restricted industrial development); Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916) (ordinance prohibited emission of dense smoke); Hadacheck v. Sebastion, 239 U.S. 394 (1915) (ordinance prohibited operation of brick foundry); Reinman v. Little Rock, 237 U.S. 171 (1915) (ordinance prohibited operation of livery stable); Heerdt v. City of Portland, 8 F.2d 871 (D. Or. 1925) (ordinance prohibited maintenance of fuel yards); Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925) (ordinance restricted area to two-family dwelling units).

> In short, the police power, as such, is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the public health, safety, morals, or general welfare of the public . . . What was at one time regarded as an improper exercise of the police power may now . . . be recognized as a legitimate exercise of that power.

Id. at 484, 234 P. at 383. *See also* Comment, *supra* note 13, at 907. A regulation that extends beyond prevention of a noxious use is invalid. Willison v. Cook, 54 Colo. 320, 130 P. 828 (1913) (building of store could not be restricted under police power when use did not infringe on rights of others); City of St. Louis v. Hill, 116 Mo. 527, 22 S.W. 861 (1893) (building restrictions unconstitutional).

compasses zoning to protect open-space land.[22]

Plaintiffs have the burden of proving a regulation to be arbitrary or unreasonable.[23] Courts use two approaches to define this standard in zoning cases. First, the goal of the regulation must be in the public welfare.[24] The most effective way to attack a regulation's objective is to argue bad-faith government action.[25] Specifically, courts will grant relief to a landowner who proves that a regulation was enacted to lower property values in anticipation of condemnation.[26] The second category determines the validity of a regulation by measuring its effect on landowners.[27] The property affected by the regulation must retain some use, although it may not be the most beneficial use,[28] and the land

22. Brown v. Tahoe Regional Planning Agency, 385 F. Supp. 1128 (D. Nev. 1973) (general forest and recreation); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (open space), *cert. denied,* 425 U.S. 904 (1976); Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 146 Cal. Rptr. 687 (1978) (private commercial, recreational); Sierra Terreno v. Tahoe Regional Planning Agency, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776, *cert. denied,* 440 U.S. 957 (1978); Pinhiero v. County of Marin, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1976) (open space); Dale v. City of Mountain View, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976) (same).

23. Town of Hempstead v. Goldblatt, 369 U.S. 590, 594 (1962); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959); Berman v. Parker, 348 U.S. 26, 33 (1954); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 395 (1926); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 906 (9th Cir. 1975); Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 677, 146 Cal. Rptr. 687, 694 (1978); *see* Feiler, *Zoning: A Guide to Judicial Review,* 47 J. URB. L. 319, 321-22 (1969). *See also* Van Alstyne, *Taking or Damaging By Police Power: The Search for Inverse Condemnation Criteria,* 44 S. CAL. L. REV. 1, 27-28 (1971).

24. *See* Van Alstyne, *supra* note 23, at 14-26. *See also* Berman v. Parker, 348 U.S. 26, 33 (1954).

25. Van Alstyne, *supra* note 23, at 23-26. *See generally* Sax, *Taking and The Police Power,* 74 YALE L.J. 36, 60-64 (1964).

26. Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated,* 417 F. Supp. 1125 (1976) (landowners, led to believe acquisitions inevitable, prevented from developing land); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974) (moratoriums that preceded zoning intended to decrease value of land in event of acquisition); Willey v. Griggs, 89 Ariz. 70, 358 P.2d 174 (1960) (development prohibited to decrease cost of acquiring highway); Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972) (condemnor unreasonable in issuing precondemnation announcements); Toso v. City of Santa Barbara, 88 Cal. App. 3d 654, 671-76, 151 Cal. Rptr. 912, 921-23 (1979) (totality of city's activity found unreasonable); Peacock v. City of Sacramento, 271 Cal. App. 2d 845, 853, 77 Cal. Rptr. 391, 397 (1969) (county restricted development, intending to prevent cost increase from date ordinance enacted to date of acquisition); Long v. City of Highland Park, 329 Mich. 146, 45 N.W.2d 10 (1950) (zoned commercial area residential to reduce cost of acquisition). *See also* City of Walnut Creek v. Leadership Hous. Sys., Inc., 73 Cal. App. 3d 611, 619-20, 140 Cal. Rptr. 690, 694 (1977); Van Alstyne, *supra* note 23, at 23.

27. *See* Van Alstyne, *supra* note 23, at 27-48. *See generally* Sax, *supra* note 25; Comment, *supra* note 13.

28. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (prohibition of most beneficial

must retain some value,[29] although the value may be severely diminished.[30] Courts grant relief to landowners deprived of substantially all use.[31] A temporary regulation is valid on the assumption that the landowner will regain use of the property in the future.[32] Furthermore, the regulation must prevent a harm to the public rather than confer a benefit.[33] Landowners subject to easements and rights of access have shown unconstitutional government action because the government benefited

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use is not per se evidence of unconstitutionality). *See also* Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962); Brown v. City of Fremont, 75 Cal. App. 3d 141, 147, 142 Cal. Rptr. 46, 50 (1977); Turner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972); Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 129, 52 Cal. Rptr. 292, 295 (1966).

29. Justice Holmes stated the rule in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922): "[W]hile property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." The ordinance was invalidated because it was an unconstitutional use of police power.

30. HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (80% diminution in market value does not invalidate regulation or require award of damages), *cert. denied*, 425 U.S. 904 (1976); Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 146 Cal. Rptr. 687 (1978) (diminution in market value insufficient to show taking); Orsetti v. City of Fremont, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978) (same); Sierra Terreno v. Tahoe Regional Planning Agency, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776 (same), *cert. denied*, 440 U.S. 957 (1978); Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 329, 131 Cal. Rptr. 633, 637 (1976) (diminution in value absent allegation of precondemnation activities, lack of beneficial use, or public use of property, insufficient to show taking).

31. San Diego Gas & Elec. Co. v. City of San Diego, 80 Cal. App. 3d 1026, 146 Cal. Rptr. 103 (1978) (court found ordinance valid but granted compensation because landowner denied all substantial use); Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976) (same); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 549, 193 A.2d 232, 242 (1963) (ordinance, restricting use of swampland deprived landowner of all reasonable use, unconstitutional); Summers v. City of Glen Cove, 17 N.Y.2d 307, 308, 217 N.E.2d 663, 664, 270 N.Y.S.2d 611, 612 (1966) (ordinance limiting use of land to one single-family dwelling was so economically infeasible on particular lot as to amount to confiscation); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 226-27, 15 N.E.2d 587, 591-92 (1938) (ordinance permanently depriving owner of all profitable or reasonable use of land is unconstitutional). *See also* Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 326-27, 131 Cal. Rptr. 633, 635 (1976) (dictum).

32. United States v. Central Eureka Mining, 357 U.S. 155, 168 (1957) (temporary restriction on operation of gold mines in aid of war effort not unconstitutional taking); Steel Hill Dev., Inc. v. Town of Sanborton, 469 F.2d 956, 962 (1st Cir. 1972) (adoption of ordinance as stopgap measure in emergency not unconstitutional); State v. Superior Court, 12 Cal. 3d 237, 253, 524 P.2d 1281, 1291, 115 Cal. Rptr. 497, 507 (1974) (denial of permit to develop land during environmental study not unconstitutional). *See also* Golden v. Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972); Comment, *supra* note 13, at 922.

33. Mugler v. Kansas, 123 U.S. 623 (1887) (regulation to eliminate noxious use); *see* note 21 *supra*. *See also* Dunham, *A Legal and Economic Basis For City Planning*, 58 COLUM. L. REV. 650 (1958); Comment, *supra* note 13, at 907-11.

from the regulation.[34] Finally, the public benefit from the regulation must outweigh the private loss.[35] If the diminution in value is greater than the public benefit accomplished by the regulation, the government has exceeded its police power.[36]

Upon finding a regulation arbitrary or unreasonable, the court may award the landowner declaratory relief or a writ of mandamus declaring the law unconstitutional as applied to the land in question,[37] or may award damages for inverse condemnation.[38]

Inverse condemnation is a private cause of action to force the government to initiate condemnation under eminent domain.[39] Generally, courts allow inverse condemnation only when government action causes irreparable harm—when declaratory relief would not restore the landowner to his original position.[40] These cases fall into three categories. First, courts compensate landowners whose property is damaged as a result of public improvements made to adjacent land.[41] Second,

34. Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959) (right of access); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943) (same); Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974) (air easement), *cert. denied,* 419 U.S. 1122 (1975); Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963) (same).

35. City of Houston v. Johnny Frank's Auto Parts Co., 480 S.W.2d 774, 779 (Tex. Civ. App. 1972) (quoting Caruthers v. Board of Adjustment, 290 S.W.2d 340, 346 (1956)); Comment, *supra* note 19, at 727-28; Comment, *supra* note 13, at 911-14.

36. Nectow v. Cambridge, 277 U.S. 183 (1928); Hamer v. Town of Ross, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938). *See also* Van Alstyne, *supra* note 23, at 35-42.

37. Hamer v. Town of Ross, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963) (ordinance declared invalid as applied to particular property owner); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938) (ordinance creating an island is arbitrary and discriminatory); Pacific Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211, 237 P. 538 (1925) (ordinance declared an arbitrary interference); Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958) (ordinance found arbitrary, unreasonable, and discriminatory); Dooley v. Town Planning & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964) (zoning charge unreasonable and confiscatory).

38. For a general discussion on inverse condemnation see Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1968 URB. L. ANN. 1; Van Alstyne, *supra* note 23; Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974); Comment, *supra* note 19; 13 URB. L. ANN. 263 (1977).

39. *See* notes 7, 38 *supra. See also* Feder & Wieland, *Inverse Condemnation—A Viable Alternative*, 51 DEN. L.J. 529, 530 (1974).

40. *See* Note, Eldridge v. City of Palo Alto: *Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1584-89 (1977); Note, *supra* note 38, at 1444-49. *But see* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (although case resolved on immunity issue, court in dictum indicated inverse condemnation is appropriate in restrictive zoning cases).

41. Holtz v. Superior Court, 3 Cal. 3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970) (construc-

courts compensate for nonregulatory activities that cause the government to acquire an easement or right of access to effectuate a public improvement.[42] Third, inverse condemnation is appropriate in cases in which government regulation has unreasonably delayed condemnation or has lowered market value before condemnation.[43]

In most downzoning actions courts do not award damages in inverse condemnation because the regulation does not involve physical invasion. The regulation usually restricts the owner's use of his property but does not constitute a compensable taking under the Constitution.[44] Courts disallow inverse condemnation in regulatory cases involving mere diminution in market value[45] or future implementation of the regulation.[46]

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tion of subway caused property damage); Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965) (highway improvement caused landslide that damaged adjacent property); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944) (negligent replacement of dikes caused storm river to break levees damaging private property). *See also* Note, *supra* note 38, at 1443.

42. *See* note 34 *supra* and accompanying text.

43. *See* note 26 *supra* and accompanying text. *See also* Note, *supra* note 40.

44. 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); Viso v. State, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (1979); Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 146 Cal. Rptr. 687 (1978); City of Walnut Creek v. Leadership Hous. Sys., Inc., 73 Cal. App. 3d 611, 140 Cal. Rptr. 690 (1977); *see* note 22 *supra* and accompanying text. *See also* Note, *supra* note 38, at 1443-53.

45. HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (80% diminution in value not enough to show taking), *cert. denied,* 425 U.S. 904 (1976); Viso v. State, 92 Cal. App. 3d 15, 21, 154 Cal. Rptr. 580, 585 (1979) (plaintiffs failed to allege that no reasonably beneficial use remained); Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 146 Cal. Rptr. 687 (1978) (plaintiffs alleged only diminution in value); Orsetti v. City of Fremont, 80 Cal. App. 3d 961, 970, 146 Cal. Rptr. 75, 80 (1978) (reduction in market value does not state a cause of action for inverse condemnation); Sierra Terreno v. Tahoe Regional Planning Agency, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776 (diminution in value not enough to show taking), *cert. denied,* 440 U.S. 957 (1978); Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 326, 131 Cal. Rptr. 633, 634 (1976) (plaintiffs alleged reduction in market value); Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 128, 52 Cal. Rptr. 292, 295 (1966) (plaintiffs alleged land worthless for highest and best economic use); MacGibbon v. Board of App., 369 Mass. 512, 517, 340 N.E.2d 487, 490 (1976) (diminution in value not enough to show taking).

46. State v. Superior Court, 12 Cal. 3d 237, 256, 524 P.2d 1281, 1292, 115 Cal. Rptr. 497, 509 (1974) (temporary denial of permit because development may conflict with proposed plan is not at this time a taking); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 119, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 804 (1973) (tentative plan did not amount to intention to condemn); Dale v. City of Mountain View, 55 Cal. App. 3d 101, 108, 127 Cal. Rptr. 520, 523 (1976) (future plan cannot be challenged until implemented); Hilltop Properties v. State, 233 Cal. App. 2d 349, 356, 43 Cal. Rptr. 605, 609 (1965) (planning in anticipation of public improvement is noncompensable).

In *Eldridge v. City of Palo Alto*[47] the California court of appeals expanded the remedy of inverse condemnation to include a regulation's destruction of all substantial use of the property.[48] The Palo Alto ordinance required a ten-acre minimum lot size.[49] The court concluded that the ordinance was so restrictive as to constitute a taking, thus justifying a claim for damages in inverse condemnation.[50]

In *Agins* the California Supreme Court stated that Agins was not entitled to relief in inverse condemnation or to declaratory relief.[51] Considering on demurrer[52] the availability of inverse condemnation as a remedy when affected property retains no value,[53] the court offered two lines of reasoning to overrule *Eldridge*.[54] First, the court concluded that an ordinance alleged to deprive the landowner of all use of his property was necessarily arbitrary and unreasonable[55] and an invalid exercise of police power. The court did not transmute the unconstitutional regulation into a valid exercise of eminent domain because the ordinance contained no provision for compensation.[56]

Second, the court focused on the potential impact of inverse condemnation on planning policy, examining three areas of adverse conse-

47. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

48. *Id.* at 634, 129 Cal. Rptr. at 587.

49. The court noted that the one and five acre zones appeared to meet the requirement that the owner be allowed reasonable use of his property. *Id.* at 624, 129 Cal. Rptr. at 580.

50. *Id.*

51. 24 Cal. 3d 266 at —, 598 P.2d at 28, 157 Cal. Rptr. at 375.

52. When ruling on a demurrer the court must accept the facts properly pleaded by the plaintiff as true. HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 512, 542 P.2d 237, 239, 125 Cal. Rptr. 365, 367 (1975), *cert. denied*, 425 U.S. 904 (1976); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 124, 109 Cal. Rptr. 799, 807 (1973); Dale v. City of Mountain View, 55 Cal. App. 3d 101, 106, 127 Cal. Rptr. 520, 522 (1976). *But see* rules on judicial notice in Saltares v. Krisrovich, 6 Cal. App. 3d 504, 511, 85 Cal. Rptr. 866, 869 (1970); CAL. EVID. CODE § 452 (Deering 1979); note 76 *infra*. *See also* Dale v. City of Mountain View, 55 Cal. App. 3d at 105, 127 Cal. Rptr. at 522, Covig v. RKO General, Inc., 232 Cal. App. 2d 56, 63-64, 42 Cal. Rptr. 473, 478 (1965).

53. The Supreme Court in *HFH* had left undecided the question of whether inverse condemnation is available in cases in which the landowner is deprived of substantially all use of his property. *See* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 520 n.16, 542 P.2d 237, 244 n.16, 125 Cal. Rptr. 365, 372 n.16 (1975), *cert. denied,* 425 U.S. 904 (1976).

54. 24 Cal. 3d at —, 598 P.2d at 28, 157 Cal. Rptr. at 375.

55. *Id.* (quoting NICHOLS, *supra* note 13, at § 142(1)); 29A C.J.S. *Eminent Domain* § 6, at 182 (1965). *See also* San Diego Gas & Elec. Co. v. City of San Diego, 80 Cal. App. 3d 1026, 146 Cal. Rptr. 103, 114 (1978) (discussion of remedy when police power is arbitrary).

56. 24 Cal. 3d at —, 598 P.2d at 28, 157 Cal. Rptr. at 375 (citing 1 NICHOLS, *supra* note 13, at § 142(1)).

quence.[57] The majority argued that government liability would deter cities from passing innovative land use regulations.[58] That would result in judicial control over public expenditures because the legislature would be reluctant to act for fear of unpredictable financial consequences.[59] The second policy reason against inverse condemnation is that the court in issuing compensation would usurp the legislative function.[60] In addition, voters would have the power to commit funds from the treasury to compensate a landowner affected by restrictive zoning. This result is a logical extension of the California voters' present ability to exercise zoning control by initiative.[61] For these reasons the majority concluded that declaratory relief or mandamus was the proper remedy.[62]

Having settled the issue of inverse condemnation, the court addressed Agins' right to declaratory relief.[63] The court concluded that on the face of the ordinance[64] *Agins* fell within the holding of *HFH, Ltd. v. Superior Court*—that mere diminution in market value is insufficient to establish the invalidity of a regulation.[65]

In dissent, Justice Clark presented several arguments to support retention of inverse condemnation as a remedy in zoning disputes. First, he posited that the California State Constitution guarantees just compensation when the government takes or damages private property for public use.[66] Because the ordinance destroyed the value of Agins' property, and because Tiburon derived benefits from this action, Agins

57. *Id.* at —, 598 P.2d at 29, 157 Cal. Rptr. at 377.

58. *Id.* at —, 598 P.2d at 30, 157 Cal. Rptr. at 377 (citing Note, *supra* note 40, at 1597). *See also* Brief for Amici Curiae City of Tiburon at 20.

59. *See* note 58 *supra*.

60. 24 Cal. 3d at —, 598 P.2d at 30, 157 Cal. Rptr. at 377.

61. *Id.* at —, 598 P.2d at 31, 157 Cal. Rptr. at 377.

62. *Id.* at —, 598 P.2d at 32, 157 Cal. Rptr. at 379.

63. *Id.*

64. The court took judicial notice of the Tiburon ordinance. The ordinance allowed Agins development of .2 to 1 dwelling units per acre. On the face of this ordinance, Agins' property clearly maintained some value, though perhaps a diminished value. *See* note 12 *supra*; note 74 *infra* and accompanying text.

65. *See* notes 30, 45 *supra* and accompanying text.

66. 24 Cal. 3d at —, 598 P.2d at 32, 157 Cal. Rptr. at 379 (Clark, J., dissenting). Other courts have interpreted the word "damage" in the California Constitution. *See generally* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 524, 542 P.2d 237, 248, 125 Cal. Rptr. 365, 376 (1975) (Clark, J., dissenting) ("There is no reason why this word should be construed in any other than its ordinary sense. It embraces more than taking."), *cert. denied*, 425 U.S. 904 (1976); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943) (word "damages" indicates liberal policy of compensation).

could seek compensation. Second, the dissent argued that legislation sanctioning open-space zoning expressly prohibited damaging of property without compensation.[67] Consistent precedent supported the rule that harsh zoning gives rise to inverse condemnation; the majority ignored that precedent.[68] Third, the dissent claimed the ruling concerning inverse condemnation was obiter dicta because the majority ultimately found that *Agins* fell within the *HFH* ruling of mere diminution.[69] Fourth, the dissent asserted that the Supreme Court ultimately would overrule *Agins*. Federal constitutional guarantees are at stake, and federal decisions in similar cases support inverse condemnation as a remedy.[70] Last, the dissent warned of the adverse effects that could occur as a result of the court's decision.[71] A landowner who may sue only for invalidation and not compensation will lose interim use of his land and be subjected to costly legal proceedings. Even if the landowner does prevail, the government can reenact a modified regulation.[72]

In considering the cause of action for inverse condemnation the *Agins* court ruled out the availability of inverse condemnation when property is deprived of all value.[73] In the second cause of action for declaratory relief, the court took judicial notice of the ordinance and concluded that Agins' property retained some value.[74] Thus, the case became one of "mere diminution" decided within the holding of *HFH*.[75] The court should have applied the logic of the second argu-

67. The government code provides:

> The legislature hereby finds and declares that this article is not intended and shall not be construed, as authorizing the city or county to exercise or adopt, amend or appeal an open-space zoning ordinance in a manner which will take or damage property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States.

CAL. GOV'T CODE § 65912 (Deering 1979).

68. The dissent cited Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972) (in bank). *See* notes 26, 43 *supra* and accompanying text. 24 Cal. 3d at —, 598 P.2d at 33, 157 Cal. Rptr. at 380 (Clark, J., dissenting).

69. 24 Cal. 3d at —, 598 P.2d at 34 n.3, 157 Cal. Rptr. at 381 n.3. *See* notes 63-64 *supra* and accompanying text.

70. 24 Cal. 3d at —, 598 P.2d at 34-35, 157 Cal. Rptr. at 381-82. *See* note 40 *supra*.

71. 24 Cal. 3d at —, 598 P.2d at 35, 157 Cal. Rptr. at 382.

72. *Id. See also* Appellant's Petition For Rehearing at 21-26.

73. 24 Cal. 3d at —, 598 P.2d at 28-29, 157 Cal. Rptr. at 375-76.

74. *See* note 64 *supra* and accompanying text.

75. *See* note 65 *supra* and accompanying text.

ment to the inverse condemnation claim.[76] The *HFH* diminution-in-value holding fails to give rise to Agins' cause of action in inverse condemnation.[77] Judge Clark asserted persuasively that the ruling on inverse condemnation is dictum.[78] Nevertheless, the California Supreme Court's position on inverse condemnation is apparent: inverse condemnation is not a valid cause of action when a landowner alleges total destruction of property value as a result of zoning.[79]

The court's decision does not deviate from precedent and supports sound policy considerations.[80] *Agins* is a case of first impression.[81] Although *HFH* decided only the issue of inverse condemnation regarding diminution[82] and left open the question of total deprivation of value,[83] *HFH* in no way mandated the conclusion that deprivation of all value would lead to a contrary decision. Courts have granted inverse condemnation only when invalidation would fail to restore the landowner to his original position.[84] Deprivation of all value because of a restrictive ordinance does not fall into this "irreversible" category.[85] *Agins* does not stand for the proposition that inverse condemnation is not available when the state takes an easement[86] or when the regulation reduces market value prior to condemnation.[87] *Agins* addressed only

76. The court should have taken judicial notice of the ordinance when it ruled on the inverse condemnation claim. Plaintiff alleged that his property retained no value. Plaintiff's allegation should not have deterred the court from examining the ordinance and giving it primacy over the allegation in the complaint as the court did when it decided the declaratory judgment issue. The Tiburon ordinance allowed Agins' development of .2 to 1 dwelling units per acre. Under this ordinance Agins' property clearly maintains some value, although perhaps a diminished value. "A demurrer reaches not only the pleading itself, but also such matters as may be considered under the doctrine of judicial notice. The complaint is to be read as if it contains all judicial matters of which the court can take judicial notice *even in the face of allegations to the contrary*." Saltares v. Kristovich, 6 Cal. App. 3d 504, 511, 85 Cal. Rptr. 866, 869 (1970) (citations omitted) (emphasis added). *See also* Dale v. City of Mountain View, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976); CAL. EVID. CODE § 452 (Deering 1979).

77. *See* notes 45, 65 *supra* and accompanying text.

78. *See* note 76 *supra* and accompanying text.

79. *See* note 11 *supra* and accompanying text.

80. *See* Note, *supra* note 38, at 1446-53.

81. No other California Supreme Court case has decided the issue of inverse condemnation when the landowner alleges deprivation of all value. The California Court of Appeals addressed the issue. *See* note 47 *supra* and accompanying text.

82. *See* note 45 *supra* and accompanying text.

83. *See* note 52 *supra*.

84. *See* note 40 *supra* and accompanying text.

85. *See* notes 42-44 *supra* and accompanying text.

86. *See* note 43 *supra* and accompanying text.

87. *See* note 43 *supra* and accompanying text. *Contra,* note 68 *supra* and accompanying text.

the unavailability of inverse condemnation when declaratory judgment and mandamus will restore the landowner to his original position.[88]

The court's rejection of inverse condemnation on the ground that landowners should not be given their choice of relief is based on two sound policy considerations.[89] Legislators would otherwise be less likely to deal innovatively with the environmental effects of rapidly growing communities for fear of financial liability. If every landowner were compensated for loss of use the legislature would have less control over the allocation of public expenditures.[90] In addition, the function of the legislature is to weigh the costs and benefits of a policy—a function the courts cannot perform. The legislature can balance the public benefits against the cost of compensation under eminent domain and determine the better solution.[91]

The California Supreme Court overreached its proper concern in *Agins v. Tiburon* by addressing the availability of inverse condemnation when property retains no value.[92] The court's intention is nevertheless clear: declaratory relief and mandamus are the only appropriate remedies available to landowners affected by severe downzoning.[93]

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88. The majority distinguished Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972) (in bank), from *Agins*. "*Klopping* involved a plaintiff's recovery for the decline in market value as the result of an unreasonable delay in the institution of eminent domain proceedings following announcement of intent to condemn. . . . In the matter before us there was no such delay or conduct." The majority did not overrule *Klopping*. Inverse condemnation is still appropriate in a case where there is irreparable harm. 24 Cal. 3d at —, 598 P.2d at 31, 157 Cal. Rptr. at 378.

89. *See* note 57-61 *supra* and accompanying text. *See also* Note, *supra* note 38, at 1450. *But see* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 523, 542 P.2d 237, 248, 125 Cal. Rptr. 365, 376 (1975) (Clark, J., dissenting), *cert. denied*, 425 U.S. 904 (1976); Appellants' Petition for Rehearing at 17-26, 39.

90. *See* note 59 *supra* and accompanying text. *See also* Note, *supra* note 40, at 1597; Note, *supra* note 38, at 1450.

91. *See* note 60 *supra* and accompanying text. *See also* note 89 *supra*.

92. *See* note 78 *supra*.

93. 24 Cal. 3d at —, 598 P.2d at 31, 157 Cal. Rptr. at 378.