

LIMITING THE AVAILABILITY OF INVERSE CONDEMNATION AS A LANDOWNER'S REMEDY FOR DOWNZONING

Zoning regulations often increase or decrease the value of real estate. Landowners adversely affected by the enactment of a new zoning ordinance or a change in an existing use classification have occasionally sought judicial relief. Attempts to recoup the decline in market value of property from the municipality, however, have been generally unsuccessful.¹ A recent California decision, *HFH, Ltd. v. Superior Court*,² reaffirmed this result, rejecting the contention that fairness compelled compensation for the artificial allocation of economic windfalls and wipeouts by zoning.³

In *HFH*, plaintiffs⁴ contracted to purchase a parcel of land, then zoned for agricultural purposes on condition that the seller would procure commercial zoning for the parcel to permit the development of a shopping center. The city of Cerritos rezoned the property for commercial use,⁵ and plaintiffs purchased for \$388,000.⁶ Thereafter the

1. See, e.g., *Dale v. City of Mountain View*, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976); *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972); *Morse v. County of San Luis Obispo*, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967); *Mailman Dev. Corp. v. City of Hollywood*, 286 So.2d 614 (Fla. Dist. Ct. App. 1973), cert. denied, 419 U.S. 844 (1974); *Gaebel v. Thornbury Twp.*, 8 Pa. Commw. Ct. 399, 303 A.2d 57 (1973).

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

3. A windfall is a substantial increase in the value of real property which is primarily caused by action other than the owner's. A wipeout is a corresponding decrease in value. Although zoning determinations often lead to windfalls (or wipeouts), in theory zoning alone is insufficient to produce a windfall: "Property can be re-zoned for more intensive use and not enjoy any windfall unless there is market demand for that use. Thus, while one can conceptually separate windfalls caused by government from those caused by the community, they are very hard to disentangle and measure." Hagman, *A New Deal: Trading Windfalls for Wipeouts*, 40 PLANNING 9 (1974); See also note 48 and accompanying text *infra*.

4. Plaintiffs were *HFH, Ltd.*, a limited partnership, and *Von's Grocery Company*, a Delaware corporation. Their individual suits, concerning the same parcel of property and the same legal issues, were consolidated on appeal. *HFH, Ltd. v. Superior Court*, 41 Cal. App. 3d 908, 116 Cal. Rptr. 436 (1974).

5. 15 Cal. 3d at 510, 542 P.2d at 239, 125 Cal. Rptr. at 367. A parcel map approved by the city of Cerritos, the real party in interest, provided that the property could only be used as part of an integrated shopping center development. *HFH, Ltd. v. Superior Court*, 41 Cal. App. 3d 908, 911, 116 Cal. Rptr. 436, 439 (1974).

6. 15 Cal. 3d at 511, 542 P.2d at 240, 125 Cal. Rptr. at 368. The subject property

city declared a moratorium on the use of the property⁷ and temporarily reclassified it agricultural.⁸ After the city amended its comprehensive general plan,⁹ plaintiffs contracted to sell the subject property for \$400,000, conditioned on their procuring a commercial classification for the tract. The planning commission rejected their application and an appeal to the city council failed.¹⁰ The city council subsequently zoned plaintiffs' property low density, single family residential, at the same time zoning as commercial two other quadrants of the same intersection abutting plaintiffs' land.¹¹

Plaintiffs then brought suit against the city seeking declaratory and injunctive relief and damages in inverse condemnation. Plaintiffs al-

comprised approximately 5.8 unimproved acres. Von's acquired 2.7 acres for \$150,000 with the requirement that all the 5.8 acres be committed to a joint commercial development project. HFH purchased the remaining 3.1 acres for \$238,000 and assumed the obligation of the grantor to develop the property for shopping center purposes in conjunction with Von's Grocery. *HFH, Ltd. v. Superior Court*, 41 Cal. App. 3d 908, 910-11, 116 Cal. Rptr. 436, 438-39 (1974).

7. The purpose of the moratorium was to prevent intensification of property use while the city restudied its land use policies. *HFH, Ltd. v. Superior Court*, 41 Cal. App. 3d 908, 911, 116 Cal. Rptr. 436, 439 (1974).

8. 15 Cal. 3d at 510, 542 P.2d at 239, 125 Cal. Rptr. at 367. During the years between 1966, when plaintiffs purchased the property, and 1971, when the moratorium was imposed, plaintiffs had not developed or established a more intensive use of the land. Plaintiffs did not allege that the moratorium interfered with their planned development of the land, nor did they challenge the reclassification to agricultural use at the time it was made.

The enactment of an interim zoning regulation (moratorium) to postpone for a reasonable period of time the granting of any uses which may conflict with a prospective zoning plan being studied or considered by a legislative body is a proper exercise of the police power, and therefore, is not actionable as a matter of law. *See, e.g., Capture Realty Corp. v. Board of Adjustment*, 126 N.J. Super. 200, 313 A.2d 624 (L. Div. 1973); *Dallas v. Crownrich*, 506 S.W. 2d 654 (Tex. Civ. App. 1974). *See generally*, 1 R. ANDERSON, AMERICAN LAW OF ZONING § 5.15 (1968) [hereinafter cited as ANDERSON].

9. 15 Cal. 3d at 510, 542 P.2d at 239, 125 Cal. Rptr. at 367. The amendment designated general developmental uses for the land in the area of plaintiff's property. The bulk of the property was classified for low density residential use. Specific parcels were not designated. The 1971 General Plan stated in part:

Changes in the land use element reflect the experiences and revised objectives of the City. The major changes from the 1966 and 1969 plans consist of a decrease in local shopping centers, an increase in regional shopping centers, an increase in the size of single family lots, a re-evaluation of residential densities, and an increase in park land. City of Cerritos, October 1971, General Plan Map, Chapter 4, Section 4.06.

Brief of Amici Curiae for the City of Cerritos, at 2, *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

10. 15 Cal. 3d at 511, 542 P.2d at 240, 125 Cal. Rptr. at 368.

11. *Id.* The fourth quadrant of the intersection, located in La Palma, Cal., was also zoned commercial. *HFH, Ltd. v. Superior Court*, 41 Cal. App. 3d 908, 911, 116 Cal. Rptr. 436, 439 (1974).

leged that their property was not suited for single family residential purposes,¹² and that the value of their property zoned commercial would be \$400,000, compared to \$75,000 zoned residential. The trial court sustained a demurrer without leave to amend to plaintiffs' cause of action in inverse condemnation.¹³ The district court of appeals held, however, that plaintiffs had stated a cause of action by adequately alleging the downzoning amounted to "taking or damaging" of private property for public use which must be compensated.¹⁴ The Supreme Court of California reversed, holding that a zoning classification which merely decreased the market value of property did not state a cause of action in inverse condemnation.¹⁵

Although a municipality's power to regulate land use is subject to few restraints,¹⁶ zoning regulations are often challenged¹⁷ on the ground that such actions result in an unconstitutional "taking"¹⁸ or

12. 41 Cal. App. 3d at 911, 116 Cal. Rptr. at 439 (1974). Plaintiffs alleged that the size, shape, location and other physical factors relating to their property rendered it useless for single family residential purposes. *Id.*

13. Plaintiffs sought review of the order in the appellate court and prayed for a writ of mandate directing the trial court to overrule its demurrer. *Id.* at 910, 116 Cal. Rptr. at 438.

14. *Id.* at 916, 116 Cal. Rptr. at 444.

15. 15 Cal. 3d at 515, 542 P.2d at 244, 125 Cal. Rptr. at 372.

16. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning as a valid exercise of the police power. *See generally* 1 ANDERSON, *supra* note 8, § 2.10. Judicial deference is accorded to legislative determinations in the enactment of zoning regulations, and an ordinance is upheld if there is any reasonable factual basis for it. *See, e.g.,* *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932, *cert. denied*, 348 U.S. 817 (1953); *Town of N. Redington Beach v. Williams*, 220 So.2d 22 (Fla. App. 1969); *Lubbock v. Whitacre*, 414 S.W.2d 497 (Tex. Civ. App. 1967). *See generally* 1 ANDERSON, *supra* 8, § 2.14.

17. The validity of a zoning regulation is most commonly tested by an action for a declaratory judgment or an injunction, but a writ of mandamus may be used in an appropriate case. *See generally* 3 ANDERSON, *supra* note 8, §§ 22.01-24.10.

Regardless of the procedure used to attack the zoning measure, there are many substantive grounds on which to challenge the regulation. Ordinances have been held invalid because the municipality lacked statutory enactment authority, *Hinman v. Planning & Zoning Comm'n*, 26 Conn. Supp. 125, 214 A.2d 131 (C.P. 1965); a procedural or substantive requirement of the enabling statute was not observed, *Bal Harbour Village v. State*, 299 So.2d 611 (Fla. App. 1974); it was void for vagueness, *Taylor v. Moore*, 303 Pa. 469, 154 A. 799 (1931); it lacked any reasonable relation to the police power, *Young Israel Organization v. Dworkin*, 105 Ohio App. 89, 133 N.E. 2d 174 (1956); it was not adopted in accordance with a comprehensive plan, *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973) (minority view); and it constitutes illegal spot zoning, *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958).

18. The fifth amendment, made applicable to the states through the fourteenth amendment, *Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226 (1897), provides: ". . . nor shall private property be taken for public use without just compensation."

“damaging”¹⁹ of property. When such claims are upheld, the courts will either declare the regulations invalid and unenforceable or, under special circumstances,²⁰ award damages in an inverse condemnation proceeding.²¹

Inverse condemnation is a controversial theory of relief. An inverse condemnation claimant alleges a deprivation of property without just compensation.²² Although the use of his land has been seriously impaired, the landowner has not been compensated because the land has not been physically appropriated for public use. Since a private rather than a public entity invokes the eminent domain clause, the cause of action is termed “inverse.”²³

In determining the applicability of the inverse condemnation doctrine to a particular case, a court will first examine the validity of the

U.S. CONST. amend. V. When a governmental body exercises its power of eminent domain, it formally condemns the land prior to the taking and compensates the owner for his loss through a condemnation decree. *See generally*, 2 P. NICHOLS, EMINENT DOMAIN (3d rev. ed. 1963).

19. The California Constitution extends governmental liability to cases where private property is “damaged” as well as “taken” for public use: “Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner.” CAL. CONST. art. 1, § 19. *See, e.g.*, *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); *Reardon v. City of San Francisco*, 66 Cal. 492, 6 P. 317 (1885). The constitutions of 23 states require compensation to be paid the owner for property that is damaged as well as taken for public use. *See, e.g.*, ILL. CONST. art. 1, § 15; MO. CONST. art. 1, § 26; PA. CONST. art. 1, § 10. *See generally* Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1440 n.3 (1974).

20. *See* notes 32-39 and accompanying text *infra*.

21. *See* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974).

22. *See* notes 18 & 19 *supra*.

23. Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 4. There are four types of inverse condemnation actions, each based on a particular combination of two variables: (1) the nature of the harm caused by government action (either physical or nonphysical) and (2) the nature of the government action causing the harm (either regulatory or nonregulatory). An action in inverse condemnation will be permitted in instances of physical harm to property caused by either regulatory or nonregulatory government action and nonphysical harm caused by nonregulatory government action. *E.g.*, *Holtz v. Superior Court*, 3 Cal. 3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970) (physical harm caused by nonregulatory government action); *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); *McMahon v. City of Telluride*, 79 Colo. 281, 244 P. 1017 (1926) (physical harm by regulatory government action); *Tamulion v. Michigan State Waterways Comm'n*, 50 Mich. App. 60, 212 N.W.2d 828 (1973) (physical harm caused by non-regulatory government action). *See generally* Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1, 5-7 (1967); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, *supra* note 19.

property interest alleged to have been taken.²⁴ If no valid property right is asserted, the regulation will be upheld since there has been no taking or damaging of "property."²⁵ If a valid property interest is at stake, the court will then consider whether property has been taken or damaged. The decisions on this point are somewhat inconsistent.²⁶ Generally, when regulation results in physical invasion or loss of all beneficial use of the property, compensation is awarded.²⁷ If the results are less detrimental, a finding of taking or damaging is less certain. The courts generally have not recognized inverse condemnation actions to compensate for decreased property value resulting from restrictive land use regulations, such as zoning ordinances or comprehensive city plans.²⁸ Relief has been denied to plaintiffs, for example, in cases in which zoning authorities have downzoned property from a commercial to a flood plain classification,²⁹ limited property use to open space;³⁰

24. D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 622 (2d ed. 1971).

25. For example, regulation of a noxious use has been upheld because there is no property right to maintain a nuisance. *See, e.g., Miller v. Schoene*, 276 U.S. 272 (1928). *See generally* D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW*, § 180 (1971) [hereinafter cited as HAGMAN].

26. Commentators have advanced different theories to determine when government action relating to private property requires compensation to the owner. *See Berger, supra* note 21; Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1 (1972); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039; Mandelker, *supra* note 23; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Van Alstyne, *supra* note 23; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CALIF. L. REV. 1 (1970); Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283 (1966); Comment, *An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action—With a Proposal For Reform*, 33 ALB. L. REV. 537 (1968).

27. HAGMAN, *supra* note 25, § 179.

28. *See, e.g., Selby Realty Co. v. City of San Beunaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); *Dale v. City of Mountain View*, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976) (court sustained demurrer to plaintiffs' inverse condemnation action in which plaintiffs alleged that amendment to city's general plan limiting their property to open space use damaged their right to use and enjoyment in the amount of \$1,500,000); *Mailman Dev. Corp. v. City of Hollywood*, 286 So.2d 614 (Fla. Dist. Ct. App. 1973), *cer denied*, 419 U.S. 844 (1974); *Gaebel v. Thornbury Twp.*, 8 Pa. Commw. Ct. 399, 303 A.2d 57 (1973). *Accord, Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972). *Cf. Veling v. Borough of Ramsey*, 94 N.J. Super. 459, 228 A.2d 873 (App. Div. 1967) (inverse condemnation action may not be brought against municipality for damages for loss of use of property in accordance with original valid zoning ordinance during pendency of amendments to the zoning ordinance which were subsequently found invalid).

29. *Gaebel v. Thornbury Twp.*, 8 Pa. Commw. Ct. 399, 303 A.2d 57 (1973).

30. *Dale v. City of Mountain View*, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976).

and reduced permissible density for development purposes after a more intensive development had been planned and allowed under the prior ordinance.³¹

Despite the general reluctance to allow inverse condemnation actions, if other factors are present,³² recovery for decreased property value is sometimes permitted. California courts have allowed inverse condemnation actions for damages resulting from restrictive zoning coupled with municipal plans for future acquisition of the property;³³ municipal plans to circumvent acquiring title;³⁴ or municipal confiscatory action.³⁵ In *Peacock v. County of Sacramento*,³⁶ the county severely restricted use of property located at the end of an airport runway. The court had informed the landowner to its intent to acquire the property for the airport but renounced this intent after five years of denying the owner virtually any development of his land. The court appeals held that these extraordinary circumstances warranted relief in inverse condemnation.³⁷ *Sneed v. County of Riverside*³⁸ involved municipal plans to circumvent acquiring title. The county zoning regulation in *Sneed* established height restrictions on the plaintiff's property for the purpose of acquiring structure-free approaches to a nearby airport without acquiring land for an air navigation easement. Flights were operated over plaintiff's property. The court of appeals held plaintiff stated a cause of action in inverse condemnation.³⁹

31. *Mailman Dev. Corp. v. City of Hollywood*, 286 So.2d 614 (Fla. Dist. Ct. App. 1973), *cert. denied*, 419 U.S. 844 (1974).

32. When restrictive zoning has been coupled with the following special circumstances inverse condemnation actions for damages have been upheld: (1) municipal plans for future acquisition of the property, *e.g.*, *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); *accord. Arastra Ltd. v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975); *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974); (2) municipal plans to circumvent acquiring title, *e.g.*, *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963); (3) confiscatory action, *e.g.*, *Eldridge v. City of Palo Alto*, 5 Cal. App. 3d 726, 124 Cal. Rptr. 547 (1975) (landowner whose property was zoned permanent open space and conservation land allowed to maintain inverse condemnation action).

33. *See, e.g.*, *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).

34. *See, e.g.*, *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

35. *See, e.g.*, *Eldridge v. City of Palo Alto*, 51 Cal. App. 3d 726, 124 Cal. Rptr. 547 (1975).

36. 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).

37. *Id.* at 864, 77 Cal. Rptr. at 404.

38. 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

39. *Id.* at 209, 32 Cal. Rptr. at 320.

In the absence of the special circumstances noted above, however, California courts have refused to allow inverse condemnation actions to challenge zoning regulations. In *Selby Realty Co. v. City of San Buenaventura*⁴⁰ the California Supreme Court held that the adoption of a general plan did not constitute a taking of plaintiff's property and refused to allow a cause of action in inverse condemnation.⁴¹ Similarly, in *Morse v. County of San Luis Obispo*,⁴² the court held a downzoning of plaintiff's property did not give rise to an inverse condemnation action.⁴³

In HFH, plaintiffs advanced several arguments to persuade the court to allow an inverse condemnation action to challenge the zoning classification. Relying on the weight of precedent, the court rejected plaintiffs' contention that merely showing a diminution in property value was sufficient to maintain an inverse condemnation action.⁴⁴ The

40. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

41. *Id.* at 127, 128, 514 P.2d at 122, 109 Cal. Rptr. at 810. In *Shelby*, the City of San Buenaventura and the County of Ventura had adopted a comprehensive general plan which provided a public street extension to cross plaintiff's land. Plaintiff refused to dedicate a portion for the proposed street and unsuccessfully sought a building permit to construct an apartment building on the property. Plaintiff filed an action for declaratory relief, damages in inverse condemnation, and writ of mandamus against the city and county. The court affirmed a demurrer to the inverse condemnation cause of action:

[I]nsofar as this cause of action is based upon the adoption of a general plan' there is no "taking" of the property. Nor is a cause of action in inverse condemnation stated for the denial of a building permit. The gravamen of plaintiff's complaint is that the city refused to issue the permit unless plaintiff complied with an assertedly invalid condition. The appropriate method by which to consider such a claim is by a proceeding in mandamus

Id.

42. 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

43. *Id.* at 602-03, 55 Cal. Rptr. at 712. In *Morse*, the court reasoned: Plaintiffs are apparently attempting to recover profits they might have earned if they had been successful in getting their land rezoned to permit subdivision into small residential lots, but landowners have no vested right in existing or anticipated zoning ordinances. . . . A purchaser of land merely acquires a right to continue a use instituted before the enactment of a more restrictive zoning. Public entities are not bound to reimburse individuals for losses due to changes in zoning, for within the limits of the police power "some uncompensated hardships must be borne by individuals as the price of living in a modern, enlightened and progressive community." (*Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 518, 35 Cal. Rptr. 480, 486.)

Id.

44. 15 Cal. 3d at 513-18, 542 P.2d at 240-44, 125 Cal. Rptr. at 368-72. Besides relying on *Selby* and *Morse*, see notes 40-43 and accompanying text *supra*, the court cited *State v. Superior Court (Veta)*, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974); *Gisler v. County of Madera*, 38 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966).

The concept of diminution of value as a measure for determining when a regulation became a "taking", originated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Under this approach, courts determined the degree to which the owner's profit from his

court refused to construe the state constitution's "just compensation" clause broadly enough to permit relief.⁴⁵ The court characterized zoning as regulation which confers reciprocal benefits and burdens, the purpose of which is neither to appropriate property for public use nor to provide economic gain for specific property owners.⁴⁶ Plaintiffs, the court asserted, did not object to and were willing to reap the benefits from the residential zoning imposed on other property near their proposed shopping center (supplying it with a ready market of consumers). But when the less intensive use classification was applied to their property, conferring burdens on them and benefits on other members of the community, plaintiffs sought to declare such zoning invalid and prevent its enforcement.⁴⁷

Reliance on the theory of reciprocity to justify restrictive zoning does not, however, confront the problem of the unequal benefits and burdens which the regulation creates. Reciprocity may produce dramatic and devastating effects in the form of windfalls and wipeouts.⁴⁸

property was impaired by the imposition of the regulation. Several live regulations were generally held invalid. No specific percentage of market value decline was necessary before a regulation was held a taking of property, but it was generally recognized that when the private property became completely or substantially worthless, relief was required. *See, e.g.,* Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 93 P.2d 93 (1939); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E. 2d 587 (1938). *See also* Large, *supra* note 26; Waite, *supra* note 26; Comment, *An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action—With a Proposal for Reform, supra* note 26.

Plaintiffs attempted to distinguish *Selby* by contrasting their allegedly discriminatory zoning classification with the uniformly applied zoning classification imposed in *Selby*. The court responded, however, that if discriminatory zoning was plaintiff's complaint, the proper action was a proceeding in mandamus, not inverse condemnation. Administrative action which is improper or an abuse of discretion is attacked by a mandate proceeding. *Selby Realty Co. v. City of Buena Ventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973). *See generally* 3 ANDERSON, *supra* note 8, § 22.09.

45. 15 Cal. 3d at 518, 542 P.2d at 244, 152 Cal. Rptr. at 372. The suggested interpretation was that the California constitutional provision forbidding private property to be "taken or damaged" without payment of just compensation (CAL. CONST. art. 1, § 19) was intended to cover instances of harsh regulation such as the downzoning present in HFH. 15 Cal. 3d at 518, 542 P.2d at 244, 125 Cal. Rptr. at 372. The court relied on its explanation in *Holtz v. Superior Court*, 3 Cal. 3d 296, 310, 475 P.2d 441, 450, 90 Cal. Rptr. 345, 354 (1970), that although the property owner would be protected against physical damage proximately resulting from a public improvement, "[n]o California case has ever interpreted the 'or damaged' phrase of our state Constitution to cover mere diminution of market value of property." 15 Cal. 3d at 518 n.15, 542 P.2d at 244 n.15, 125 Cal. Rptr. at 372 n.15.

46. 15 Cal. 3d at 517, 542 P.2d at 246, 125 Cal. Rptr. at 374.

47. *Id.*

48. *See* note 3 *supra*. *See also* Bagne, *Up and Down the Zoning Scale*, 26 LAND USE L. & ZONING DIG. No. 11, at 6 (1974); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *supra*

In HFH plaintiffs' property was downzoned to residential use while the three other corner lots remained commercially zoned. Attempting to meet these circumstances head-on, plaintiffs' *amici curiae* advanced a novel theory of relief which would permit the adversely affected landowner to recover damages through inverse condemnation and thereby mitigate his loss.⁴⁹ Plaintiffs argued that the court should consider the "fairness" of the effect of the challenged zoning classification. Fairness, plaintiffs asserted, the principle reflected in the compensation clauses of the state and federal constitutions, required that plaintiffs be allowed to pursue their action for damages.⁵⁰

note 26; Michelman, *supra* note 26; Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL EST. L.J. 635 (1974); Waite, *supra* note 26.

49. Alternative means of compensating the property owner who is wiped out by a downzoning should be considered since he may be foreclosed from seeking damages in inverse condemnation. Suggested alternatives include: development rights transfers, density transfers, zoning by special assessment funded eminent domain, development rights insurance, land value increment taxes, excess condemnation, recapture taxes on public improvements, and "fair" compensation through the accommodation power. See Bagne, *supra* note 48; Berger, *supra- supra* note 21; Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975); Costonis, *supra* note 26; Hagman, *supra* note 3; Rose, *supra* note 48; Waite, *supra* note 26.

50. 15 Cal. 3d at 520, 542 P.2d at 245, 125 Cal. Rptr. at 373. Plaintiffs cited *County of San Diego v. Miller*, 13 Cal. 3d 684, 532 P.2d 139, 119 Cal. Rptr. 491 (1975) in support of their fairness contention. In *Miller*, the Supreme Court of California held that the holder of an unexercised option to purchase property supported by consideration had an interest for which he was constitutionally entitled to compensation when the property was later condemned. *Id.* at 693, 532 P.2d at 144, 119 Cal. Rptr. at 496. The court noted that, although the holder of an unexercised option had no common law estate in the land, "compensation issues should be decided on considerations of fairness and public policy." *Id.* at 691, 532 P.2d at 143, 119 Cal. Rptr. at 495. The court in HFH considered *Miller* inapplicable, stating that "the issue to that case was the distribution of a condemnation award which all conceded to be appropriate, not whether otherwise lawful state action constituted a 'taking.'" 15 Cal. 3d at 520 n.17, 542 P.2d at 245 n.17, 125 Cal. Rptr. at 372 n.17. The court remained mindful of principles of fairness, citing *United States v. Fuller*, 409 U.S. 488, 490 (1973), ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law."), but concluded that equity did not require relief under these facts. 15 Cal. 3d at 520 n.17, 542 P.2d at 245 n.17, 125 Cal. Rptr. at 372 n.17.

The fairness argument considers the reliance of the property owner on the previous zoning classification and his reasonable expectations. The HFH court maintained plaintiffs' expectations regarding their property were not reasonable since they failed to recognize the possibility that their property would be rezoned. Thus HFH precludes the use of inverse condemnation to protect expectations in such circumstances.

Alternative means may provide protection. See note 49 *supra*. If a landowner has obtained a building permit or begun construction before downzoning, the doctrine of estoppel would prevent enforcement of the zoning change. Estoppel protects the landowner who has a vested right in the property and has been detrimentally affected by

The court rejected this theory on the grounds of policy and a belief that a legislative rather than a judicially devised remedy was more appropriate. The court concluded that the result advocated by plaintiffs was beyond the court's remedial power. Compensation of property owners for market value diminution resulting from zoning would require legislative reform to implement and considerable administrative machinery to enforce.⁵¹

acting in reliance on a municipality's affirmative act. The landowner is said to have acquired a vested right to continue the development and use of his property when that development has reached a certain point. Whether that necessary point has been reached depends on such factors as the land owner's receipt of administrative permission to develop the property (i.e., a building permit), his expenditures in reliance on the administrative permission, and his change of position in relation to the property. But neither acts of previous zoning nor expenditure of money on the property alone will necessarily confer vested rights. *See, e.g.,* Strong v. County of Santa Cruz, 45 Cal. App.3d 355, 119 Cal. Rptr. 362 (1975); Whitfield v. Seabrook, 259 S.C. 66, 190 S.E.2d 743 (1972). *But see* Town of Largo v. Imperial Homes Corp., 309 So.2d 571 (Fla. Dist. Ct. App. 1975) (where town approved developer's request to re-zone property for high rise apartment development and knew developer spent over \$379,000 for land and development, town was estopped from downzoning the property to prevent apartment development; building permit not a requirement for invoking equitable estoppel). *See generally* HAGMAN, *supra* note 25, § 99; Bagne, *supra* note 48, at 6; Cable & Hauck, The Property Owner's Forming Uses and Vested Rights, 10 WILLAMETTE L.J. 404 (1974); Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URBAN L. ANN. 63.

The doctrine of non-conforming uses provides that a use may continue if it lawfully pre-exists the adoption of a zoning ordinance that subsequently prohibits that use. The doctrine may protect a completed development. *See, e.g.,* Jones v. City of Los Angeles, 211 Cal. 304, 295 P.14 (1930), Dingeman Advertising Inc. v. Algoma Twp., 393 Mich. 89, 223 N.W.2d 689 (1974). *See also* HAGMAN, *supra* note 25, § 80; Cable & Hauck, *supra*, at 408.

HFH leaves open the possibility of allowing inverse condemnation where the challenged regulation seeks to terminate an existing use.

Thus we need not here consider the question of a nonconforming use which the zoning authority seeks to terminate or remove; for plaintiffs have alleged that they enjoy a vested right, not in an existing use, but in a mere zoning classification on vacant land. This case therefore raises no issue of the constitutionality of a zoning regulation which requires the termination of an existing use. 15 Cal. 3d at 513 n.12, 542 P.2d at 242 n.12, 125 Cal. Rptr. at 370 n.12.

51. 15 Cal. 3d at 518, 542 P.2d at 250, 125 Cal. Rptr. at 375. The HFH court's recognition of the need for legislative attention is a step in the right direction.

We are urged in this case to redefine the state and federal constitutional requirements of just compensation and to require payment for any zoning action when results in the diminution of market value. That we do not do so reflects less our belief that no problems exist with the present law in this area than our conviction that legislative rather than judicial action holds the key to any useful reform. *Id.* at 517-18, 542 P.2d at 246-47, 125 Cal. Rptr. at 374-75. *See also* Van Alstyne, *supra* note 23, at 68.

The legislature must comprehensively evaluate the appropriateness of inverse condemnation to challenge zoning actions. Arguably a statutory scheme which permits inverse condemnation proceedings to protect victims of wipeouts would require those property owners reaping a windfall from zoning action to pay the government the

The court also determined that in view of the nature of urban planning and the history of the subject property, the foreseeability of rezoning was, or should have been, evident to the property owners. The court intimated that had the plaintiffs discounted the value of their property by the probability of downzoning and originally paid that price, no redistribution of land values would have been effected or imposed.⁵² Plaintiffs had speculated against the system and lost.

The dissent, however, viewed the question of compensation as one turning on considerations of fairness.⁵³ The dissent argued that the state constitution "damage" provision should be construed to allow compensation for governmental downzoning provided: (1) governmental action results in substantial decrease in value of the property; (2) the decrease is of long or potentially infinite duration; and (3) the owner incurs more than his share of the financial burden.⁵⁴ Applying this test to the facts in HFH, the dissent concluded that plaintiffs had stated a valid cause of action in inverse condemnation.⁵⁵

increased value of their property in order to balance the equities. Redistribution would be achieved through government compensation of the wipeout victim. Various theories and methods of redistribution have been proposed. See generally notes 48, 49 *supra*.

52. 15 Cal. 3d at 513, 542 P.2d at 246, 125 Cal. Rptr. at 374, citing Michelman, *supra* note 26, at 1238. See also Berger, *supra* note 21, at 195-96.

53. 15 Cal. 3d at 517, 542 P.2d at 248, 125 Cal. Rptr. at 376 (Clark, J., dissenting). The dissent relied on County of San Diego v. Miller, 13 Cal. 3d 684, 532 P.2d 139, 119 Cal. Rptr. 491 (1975) (See discussion of case in note 50 *supra*) and Southern Cal. Edison Co. v. Bourgerie, 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973). In *Bourgerie* defendant landowners had acquired property subject to the restriction that neither the property itself nor adjacent property could be used for an electric transmission station. When plaintiff public utility condemned property adjacent to defendant's property, the court held defendants were entitled to compensation, citing the salutary principle of compensation based on fairness. *Id.* at 175, 507 P.2d at 968, 107 Cal. Rptr. at 80. The dissent in HFH also cited Muskopf v. Coming Hosp. Dist., 58 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (hospital tort case rejecting doctrine of governmental tort immunity as mistaken and unjust) to support the proposition that fairness should be applied in all instances of loss suffered as a result of governmental action. 15 Cal. 3d at 525, 542 P.2d at 249, 125 Cal. Rptr. at 377.

54. 15 Cal. 3d at 526, 542 P.2d at 250, 125 Cal. Rptr. at 378.

55. *Id.* The dissent reasoned that an 80% decrease in value of plaintiffs' land was clearly substantial; the decrease was of long duration since it arose as part of a comprehensive, long-term general plan passed pursuant to state law; and plaintiff's share of the burden was unfairly excessive because their property was the only quadrant of the intersection which was not zoned commercial. See note 11 and accompanying text *supra*.

It has been contended, however, that inverse condemnation would be an inappropriate remedy because it lacks support in the case law, does not have doctrinal justification, is not necessary because of other available equitable remedies, and is disfavored by strong policy reasons in fiscal management and planning. See Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, *supra* note 19. The

In the final analysis, the HFH decision adds support to the view that a property owner whose land is merely downzoned⁵⁶ is not constitutionally required to be compensated. Nevertheless, the court suggested that factual situations incorporating a downzoning "plus" are not precluded from raising a cause of action in inverse condemnation.⁵⁷

authors state that there is no doctrinal justification for the extension. *Id.* at 1445-46. An aggrieved landowner should not have the option of converting an invalid governmental exercise of the police power into a valid comparable governmental act sustainable under the different power of eminent domain. The authors also state that cases which allow inverse condemnation typically involve physical damage or non-regulatory government action, with only a few distinguishable exceptions. *Id.* at 1447. In cases of actual physical damage to property, compensation must be granted because stopping the injurious activity would not restore the property to the status quo and the landowner must have relief from the damage already suffered. The nonregulatory cases allowed inverse condemnation because the societal interest in continuing the governmental activity is greater than the interest in enjoining it. It is more desirable to compensate a property owner for his land to make possible the construction of a highway than not to construct the highway at all. Several policy reasons have been advanced: allowing inverse condemnation to challenge land use controls will inhibit government planning because planners will be threatened with possible liability with every action they take; allowing the land owner to choose between injunctive relief and compensation takes the control over allocation of resources away from the legislature; and the injury is similar to that suffered in other torts for which the municipality would not be liable. *Id.* at 1450. See Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 URBAN LAW. 15 (1973).

Proponents of statutory recognition of such suits, nevertheless, base their position on opposing policy views and case support. The primary reason advanced for allowing inverse condemnation actions is that it would lead to more careful planning by officials. Three courts have suggested the landowner should have the option of suing for damages: *State Rd. Dep't v. Tharp*, 146 Fla. 745, 1 So.2d 868 (1941); *Keck v. Haley*, 237 S.W.2d 527 (Ky. 1951); *Chase v. City of Glen Cove*, 34 Misc. 2d 810, 227 N.Y.S.2d 131 (Sup. Ct. 1962). One court has ignored a landowner's request for injunction and has required compensation: *Lomarch Corp. v. City of Englewood*, 51 N.J. 108, 237 A.2d 881 (1968). See Badler, *supra*, at 49-50; Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So Called Inverse or Reverse Condemnation*, 1968 URBAN L. ANN. 1, Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage*, 28 STAN L. REV., 779 (1976), Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, *supra*, note 19.

56. It has been suggested that the court's characterization of the "mere diminution in value" at stake seems to overlook the 80% loss in market value plaintiffs suffer, the evidence of spot zoning, inconsistency with general plans, disregard of extraterritorial factors and equal protection problems arising from the contemporaneous zoning of nearby parcels for commercial use. See Hagman, *The Taking Issue: The HFH et al.*, Round, 28 LAND USE L. & ZONING DIG. NO. 2 (1976) at 5.

57. The court notes: "This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially all use of the land in question. We have the question for another day." 15 Cal.3d at 515 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16. Thus, when the downzoning is accompanied by factors of future acquisition plans, plans to circumvent acquiring title, confiscatory action, pre-existing use rights, or vested rights in the form of administrative permits, recovery remains possible. See discussion of cases cited in notes 32-39 *supra*.

Land traditionally has been exploited on the basis of its highest and best use,⁵⁸ but it is also a resource which requires continuous management, in the course of which local governments will inevitably down-zone particular property. HFH relieves communities of some fiscal constraint which would otherwise seriously hamper their planning efforts⁵⁹ without entirely foreclosing the property owner from remedy.

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58. See Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975).

59. The possible chilling effect of extending inverse condemnation to zoning actions and paying damages with public funds is very real, as evidenced by the claims existing against many cities. Among them are claims in inverse condemnation for approximately \$85 million against Fremont, Cal., based on its general plan and for over \$40 million against Palo Alto, Cal., for rezoning to less dense uses. Brief of Amici Curiae for the City of Cerritos at 25, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975). *But cf.* San Antonio River Auth. v. Garret Bros., 528 S.W.2d 266 (Tex. Civ. App. 1975) (allowing subdivider to recover damages for government refusal to issue permits for sewer and water connections, stating that to do so would not transform government into inactive body fearful of liability and financial disaster; there were, however, elements of improper acquisitory motives on the municipality's part). *See also* Beuscher, *supra* note 55; Cabaniss, *Inverse Condemnation in Texas—Exploring the Serbonian Bog*, 44 TEX. L. REV. 1584 (1966).

