Land Use Takings: The Compensation Issue

By DANIEL R. MANDELKER*

No constitutional problem has proved more contentious in land use regulation than the taking issue. Courts must draw lines between land use restrictions that do or do not pass the constitutional property taking test.

Courts that hold land use regulation unconstitutional usually provide relief by injunction as the appropriate judicial remedy. A successful landowner in land use litigation is granted an injunction setting aside the land use restriction that the court has held unconstitutional as applied in his particular case.[1] Courts do not provide an alternative remedy based on the taking clause by awarding compensation to the landowner for an unconstitutional land use restriction.[2]

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1. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979) (regulations authorizing public access to what had previously been a private marina found to be a "taking" and enforcement enjoined); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (regulations which had the effect of making it commercially impossible to mine certain coal on private property held unconstitutional and enforcement enjoined). Injunctive relief is available only in those cases challenging the constitutionality of land use restrictions "as applied" to the landowner's property. Courts will not enjoin regulations in a facial attack case. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

2. *See, e.g.*, Davis v. Pima County, 121 Ariz. App. 343, 590 P.2d 459 (1978), *cert. denied*, 442 U.S. 942 (1979); Gold Run, Ltd. v. Board of County Comm'rs, 38 Colo. App. 44, 554 P.2d 317 (1976); Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. Dist. Ct. App. 1973), *cert. denied*, 419 U.S. 844 (1974); Allen v. City & County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977); McShane v. City of Faribault,—Minn.—, 292 N.W.2d 253 (1980); Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381,

This remedial preference inverts the customary remedial hierarchy typical of private litigation. Equitable relief by injunction in private litigation is extraordinary. It is available only when relief of harm through damages is not adequate, and then only if the court finds that the equities of the case justify the injunctive remedy.[3] In land use litigation, courts never inquire into the adequacy of monetary relief. They grant injunctions to set aside excessive land use restrictions without examining the equities.

In recent years, litigants have attempted to restore to land use litigation the remedial hierarchy characteristic of private lawsuits. They have urged judicial acceptance of an inverse condemnation remedy in place of the usual relief through injunction.[4] The inverse condemnation remedy would allow courts to award compensation to landowners who successfully challenge restrictive land use

385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976); Eck v. City of Bismarck, 283 N.W.2d 193 (N.D. 1979).

Inverse condemnation advocates have cited a number of state court cases in support of their claim that the states have recognized the inverse condemnation remedy in land use control litigation. *See, e.g.*, Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, SOUTHWEST LEGAL FOUNDATION, 1980 INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 177, 206-07. The cases cited by Professor Kanner do not support his claim. *See, e.g.*, Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979) (compensation required when city demanded reservation of land for future condemnation for highway purposes); State v. Mayhew Prod. Corp., 204 Neb. 266, 281 N.W.2d 783 (1979) (state statute required compensation for billboard removal); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) (rejection of water development permit held to be taking of scenic easement requiring compensation).

3. For a discussion of the subordinate role played by the injunction in the customary remedial hierarchy, see O. FISS, THE CIVIL RIGHTS INJUNCTION 38-45 (1978).

4. Inverse condemnation is a monetary remedy sought by landowners alleging a deprivation of property by a public agency without just compensation. It is a private cause of action invoking the eminent domain clause of the federal or state constitutions. For a general discussion of 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; Feder & Wieland, *Inverse Condemnation—A Viable Alternative*, 51 DEN. L.J. 529 (1974); Huxtable, *Inverse Condemnation—Its Structures, Advantages, and Pitfalls*, SOUTHWEST LEGAL FOUNDATION, 1977 INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 219; Stubbs, *Inverse Eminent Domain Resulting from Governmental Action*, SOUTHWEST LEGAL FOUNDATION, 1979 INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 437; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971); 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*, 26 STAN. L. REV. 1439 (1974); Comment, *"Takings" Under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances*, 30 SW. L.J. 723 (1976); Comment, *Limiting the Availability of Inverse Condemnation as a Landowner's Remedy for Downzoning*, 13 URB. L. ANN. 263 (1977).

regulations.

The latest round of litigation to secure compensation for landowners affected by unconstitutional land use regulation was inconclusive. In *Agins v. City of Tiburon*,[5] the United States Supreme Court affirmed a California Supreme Court decision[6] denying compensation to landowners restricted by low density zoning enacted to implement a comprehensive open space plan. *Agins* had reached the California Supreme Court without a trial, the owners having appealed a trial court decision to dismiss their complaint. The case was an attack on the facial validity of the ordinance. The constitutionality of the ordinance had yet to be tested as applied to the Agins' land.

While the California Supreme Court found on the merits that compensation was not allowable in California as a remedy in land use litigation, the United States Supreme Court did not reach this issue. It noted that the land use ordinance applicable to the Agins' property allowed a density of between one and five units per acre. Since the Agins' had not asked the city to determine what density it would permit, the Court concluded that they had not demonstrated a restriction on their land sufficient to constitute a taking. On this basis, it affirmed the decision of the California Supreme Court.[7]

Another California case, *San Diego Gas and Electric Co. v. City of San Diego*[8] was working its way through the judicial system at the same time as *Agins*. *San Diego* was not an appeal on the pleadings. A trial court had awarded compensation to the gas company following a trial in which it found that excessively restrictive

5. 447 U.S. 255 (1980).

6. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

7. 447 U.S. at 263. The reasoning of the United States Supreme Court was quite different from that of the California Supreme Court. After holding that inverse condemnation is not available as a remedy in zoning cases, the California Supreme Court denied injunctive relief, holding that mere diminution in market value is not sufficient to constitute a taking. Agins v. City of Tiburon, 24 Cal. 3d 266, 277, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378 (1979). The United States Supreme Court denied relief because plaintiffs did not exhaust their administrative options and so were unable to demonstrate a restriction sufficient to constitute a taking. 447 U.S. at 262. In light of this difference, and because the United States Supreme Court did not decide whether inverse condemnation is an available remedy in zoning cases, a remand for a determination consistent with its opinion would have been more appropriate.

8. 146 Cal. Rptr. 103 (App. 1978), *rev'd on remand without published opinion*, 4 Civ. No. 16277 (filed June 25, 1979), *dismissed for lack of jurisdiction*, 49 U.S.L.W. 4317 (1981).

open space zoning constituted a taking. The California Court of Appeal affirmed,[9] but the California Supreme Court remanded for reconsideration in light of its decision in *Agins*.[10] The court of appeal then reversed its decision on the compensation award.[11] The United States Supreme Court dismissed the case for the same reasons given in *Agins*.[12]

The compensation issue in land use regulation thus continues to trouble courts asked to recognize compensation claims as well as legislatures asked to provide a compensation remedy.[13] This article

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9. *Id.* *See also* Memorandum from Chris Duerken, The Conservation Foundation (July 7, 1980); Brief for Appellants at 10 n.5, Agins v. City of Tiburon, 447 U.S. 255 (1980).

10. The decision was summarily vacated by the California Supreme Court and remanded to the court of appeal. Brief for Appellants at 10 n.5, Agins v. City of Tiburon, 447 U.S. 255 (1980).

11. *Id.* The court of appeal's reversal is contained in an unpublished decision.

12. 49 U.S.L.W. 4317 (1981). The dissenting opinion stated that compensation for a permanent taking was not allowable but indicated that compensation should be available for a temporary taking.

"The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation. . . . Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a 'taking.' . . . Alternatively the government may choose formally to condemn the property, or otherwise to continue the offending regulation: in either case the action must be sustained by proper measures of just compensation." 49 U.S.L.W. at 4327 (Brennan, J., joined by Stewart, Marshall & Powell, JJ., dissenting).

In his concurrence, Justice Rehnquist indicated that "[i]f I were satisfied, that this appeal was from a 'final judgment or decree' . . ., I would have little difficulty in agreeing with much of what is said in the dissenting opinion of JUSTICE BRENNAN." *Id.* at 4320.

See Professor Cunningham's article in this symposium for a more complete explication of the *San Diego* case. Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517 (1981).

13. Florida has provided a statutory inverse condemnation remedy applicable to selected state environmental regulation. The statute is modeled on a provision contained in AMERICAN LAW INSTITUTE, MODEL LAND DEVELOPMENT CODE § 9-112 (1976). For a careful analysis of the Florida law, see Kolis, *The Taking Issue: Florida Law Authorizes Compensation for "Unreasonable" Takings by State Environmental Agencies*, 38 URB. LAND No. 3, at 14 (1979). The statute applies only if a trial court finds an "unreasonable exercise of the state's police power constituting a taking without compensation." *See, e.g.*, FLA. STAT. ANN. § 380.85 (West Supp. 1980). *See also* Haisler & Rhodes, *The Legislature's Role in the Taking Issue*, 4 FLA. ST. U.L. REV. 1 (1976).

The arguments against inverse condemnation apply as persuasively to a legislative remedy, even though the legislature can spell out the limits of the remedy and avoid the uncertainties of court-imposed compensation. The Florida legislation does not attempt to indicate when the remedy lies, since under the statute the availability of compensation depends on a court finding that a "taking without compensation" has occurred.

examines the compensation issue. It argues that advocates who support the compensation claim have misconceived the role of the compensation remedy. There has never been an absolute right to compensation, even in cases in which an interference with property rights sufficient to constitute a taking is clear. Whether compensation is payable for excessive land use restrictions raises a remedial question which courts retain the discretion to resolve. They are not likely to provide compensation to landowners, even in cases in which an unconstitutional property taking occurs.

I. The Nature of the Inverse Condemnation Remedy

Federal and state constitutions require public agencies to pay compensation for land they have physically occupied for public purposes.[14] An example is the physical occupation of private property by a state highway agency to build a road. A compensation remedy is clearly available in these cases. What of the case in which a public agency elects not to occupy the land of a property owner physically, but carries out a public project that physically interferes with private property rights? Is the property owner in this situation left without a compensation remedy?

Federal and state courts have thought not. Beginning with the United States Supreme Court case *Pumpelly v. Green Bay*,[15] courts have awarded compensation to property owners when a public agency has engaged in conduct physically damaging to the landowner's property but has not voluntarily initiated eminent domain proceedings. The action in inverse—or reverse—condemnation allows the court to assess against the public agency the compensation it should have made available to the landowner in eminent domain proceedings of its own.

The facts in *Pumpelly* indicate the kind of physical damage to

14. The Fifth Amendment to the United States Constitution states: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. This provision is made applicable to the states by the Fourteenth Amendment. U.S. CONST. amend. XIV. State constitutions have similar provisions, *e.g.*, CAL. CONST. art. I, § 19: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid . . . ."

15. 80 U.S. (13 Wall.) 166 (1871). For a discussion and analysis of this case, *see* Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 40-43.

property that grounds an inverse condemnation action. In that case, plaintiff's land was flooded when the city constructed a public dam near his property. Plaintiff sued and recovered in inverse condemnation for the damage to his property interest. Since *Pumpelly*, the inverse condemnation cause of action for physical damage to property has become well established in federal and state courts.[16]

While well established, the right to compensation in inverse condemnation actions is not absolute. The physical damage cases do not trouble the courts, provided that a link can be established between the physical damage and the government activity claimed to be responsible for the damage.[17] In these cases, specific relief through injunction will not remedy the plaintiff's harm. Property damage has occurred and cannot be remedied except through monetary damages that compensate for the harm to the property owner.

Compensation awards in inverse condemnation-physical damage cases do not reflect unquestioning judicial acceptance of the remedial hierarchy observed in private litigation. That point is made by inverse condemnation cases arising out of continuing as well as past physical damage. An important example is found in the cases in which property owners have successfully asserted inverse condemnation claims when airplane overflights have interfered with the use of their property.[18] While the courts can award monetary compensation to remedy past damage in these cases, only an injunction can provide the necessary prospective relief from continuing airplane overflights. Such remedial relief by injunction would be consistent with the private lawsuit remedial hierarchy.

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16. For a discussion of these cases, *see* Mandelker, *supra* note 15; Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431 (1969).

17. *See, e.g.*, Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). In the course of extending a county road, Los Angeles County deposited earth fills in a prehistoric landslide area. A geological study found that the land had stabilized, and future slides were not expected. A major landslide then occurred, causing substantial damage to private property. Although finding no negligence on the part of the county, the California Supreme Court awarded damages in inverse condemnation. The court held that "any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable . . . whether forseeable or not." *Id.* at 263-64, 398 P.2d at 137, 42 Cal. Rptr. at 97.

18. *See* Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

Courts do not provide relief by injunction in the overflight cases for an obvious reason: they are not willing to close down major airports simply to avoid property damage to affected property owners. The private remedial hierarchy is therefore reversed. Courts award monetary relief through inverse condemnation in the airplane overflight cases because they have decided that relief by injunction does not serve social interests. As the Oregon Supreme Court pointed out in awarding compensation in such a case, "[i]nverse condemnation . . . provides the remedy where an injunction would not be in the public interest, and where the continued interference amounts to a taking for which the constitution demands a remedy."[19]

This explanation of the inverse condemnation award in airplane overflight cases indicates that the remedial hierarchy characteristic of private lawsuits does not control inverse condemnation litigation. Courts refuse relief by injunction even when the inadequacy of monetary damages might indicate that injunctive relief is necessary.[20]

There is reason to believe that the courts also disregard the private remedial hierarchy in land use regulation cases, a point which will be discussed later. Here the point should be made that

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19. Thornburg v. Port of Portland, 233 Or. 178, 191-92, 376 P.2d 100, 106 (1962). The rejection of the remedial hierarchy implicit in *Thornburg* and the underlying policy rationale for relief by inverse condemnation is clear in cases that deny the inverse remedy for policy reasons. In Northcutt v. State Road Dep't, 209 So. 2d 710 (Fla. Dist. Ct. App. 1968), property owners sued in inverse condemnation for damage caused by vibration and noise from a nearby interstate highway. In denying relief, the court distinguished this type of case from the airplane overflight cases: "An airport may be placed at a considerable distance from a city while it is a public necessity for roads and highways to be built close to, or directly through a city, and sometimes through its most heavily populated areas. To sustain the amended complaint of the plaintiffs as sufficient for inverse condemnation would bring to an effective halt the construction, operation and maintenance of access roads and highways within the State of Florida. It would be impossible to determine and prepare with any degree of accuracy, a reasonable budget for the construction of highways and access roads in the future in Florida. After the access roads and highways were constructed and in operation, each individual land owner adjacent thereto could seek damages from the state for a 'taking' of their property resulting from the increased noises, dust and vibrations, coming from the motor vehicles using the adjacent highway." *Id.* at 711.

For discussion *see* Comment, *The Highway Cases: Noise as a Taking or Damaging of Property in California*, 20 SANTA CLARA L. REV. 425 (1980).

20. At least one court took this position in a private nuisance case. *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). *See also* McCulloch v. Glasgow, 620 F.2d 47 (5th Cir. 1980) (court awarded damages in § 1983 action when relief by injunction deemed inadequate).

the remedial assumptions courts make in inverse condemnation cases contradict the claims made by advocates of the inverse condemnation remedy for land use litigation.

Inverse condemnation advocates find a symmetry in the remedies available for unconstitutional takings and equate available remedies without remedial ranking.[21] For these advocates, the nature of the land use taking is irrelevant to the inverse condemnation claim. They note that federal and state constitutions require that property not be taken without just compensation. They next construct a compensation syllogism based on this constitutional command that includes taking through land use regulation as well as conventional physical taking cases:

> Any constitutional taking of property requires just compensation.
> An excessive land use regulation, like a physical taking, is a constitutional taking of property.
> *Therefore,* an excessive land use regulation requires compensation.

The compensation syllogism ignores the rejection of the private remedial hierarchy in the airplane overflight-inverse condemnation cases. These cases reject the remedial symmetry assumption implicit in the compensation syllogism that automatically requires monetary relief whenever a constitutional taking occurs. As the Oregon Supreme Court pointed out, courts award monetary relief in inverse condemnation cases only when the remedy by injunction is not in the public interest.

In *Agins,* the California Supreme Court also rejected the compensation syllogism. It established a remedial hierarchy in land use regulation taking cases that prefers the injunctive remedy to avoid the "chilling effect" that monetary inverse condemnation relief can have on land use regulation programs.[22] The California *Agins* deci-

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21. *See, e.g.,* Brief of Amicus Curiae Half Moon Bay Properties in Support of Appellants at 18-19, Agins v. City of Tiburon, 447 U.S. 255 (1980), in which amicus argues that: "Tiburon has, through its ordinances, effectively compelled the Agins to maintain their land as 'open space' for the aesthetic pleasure of Tiburon's residents. Had Tiburon instead forcibly seized Agins' property and staked it out as 'open space preserve,' the loss to the Agins—and the benefit to Tiburon residents—would be no different. Yet the court below has denied compensation in the first case, although it clearly would be proper in the second. There is no ground in logic to justify the difference." Nor is there any ground in policy . . . ."

22. The court concluded that a monetary inverse condemnation remedy "will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally

sion rejects the remedial hierarchy implicit in private litigation in which monetary relief is the preferred judicial remedy. The question to be considered next is whether the remedial hierarchy adopted by the California Supreme Court is justified as a proper interpretation of the constitutional taking doctrine in land use law.

II. The Taking Claim in Land Use Law

An answer to the remedial question in land use taking cases first requires a detour to examine the constitutional basis for the taking claim that arises in land use regulation. Briefly put, the taking claim arises when land use regulation is so excessive that no reasonable use of the land remains to the landowner.[23] In this situation, the compensation advocate argues that a taking has occurred and that compensation should be paid.

The difficulty with this argument is that land use taking law now indicates that takings occur only in the most extreme circumstances. In these cases, remedial relief to the landowner through injunction is sufficient to remedy the harm created by the unconstitutional land use restriction.

The most serious taking problem in land use regulation arises when the burdens of regulation are physically disconnected from its benefits. A number of regulatory programs fit this category, most notably historic landmark, open space, wetlands and flood plain protection programs. In all of these programs, severe land use

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safe." 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377 (quoting from Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1597 (1977)). Additionally, it would be a usurpation of legislative power for the judiciary to force condemnation upon a legislature. For these reasons, invalidation rather than forced compensation is the appropriate remedy. 24 Cal. 3d at 276, 598 P.2d at 31, 157 Cal. Rptr. at 378. *See also* Northcutt v. State Road Dep't, 209 So. 2d 710 (Fla. Dist. Ct. App. 1968).

23. For general discussion and analysis of the taking claim in land use litigation, *see* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CALIF. L. REV. 1 (1971); Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283 (1967); Comment, *Regulation of Land Use: From Magna Carta to a Just Formulation*, 23 U.C.L.A. L. REV. 904 (1976).

restrictions are often imposed on property owners so that the general public can enjoy the benefits of the protected resource.[24] A municipality, for example, may prevent the demolition of an historic landmark so that the general public can enjoy the benefits of the preserved historic structure. The preservation of open space and other natual resource areas may also require severe land use restrictions so that the benefits of these areas can be widely enjoyed.

Recent trends in United States Supreme Court land use law indicate that this Court will rarely find a constitutional taking of property under land use programs of this type. The constitutional issues raised by these cases were first considered by the Supreme Court in *Penn Central Transportation Co. v. New York City*.[25] In a puzzling opinion, the Court held constitutional the Grand Central Terminal landmark designation which the city applied to prohibit the construction of a high-rise building that would have used the terminal's air rights.

While the Court in *Penn Central* wavered between the taking, equal protection[26] and due process doctrines,[27] its holding on the

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24. Several commentators have argued that a harm-benefit test should be applied to determine the constitutionality of these restrictive police power regulations. Under this test, government regulation enacted to bestow a benefit upon the community is unconstitutional. A land use regulation is constitutional only when its purpose is to prevent a harmful activity. For a discussion and critique of this approach, *see* Berger, *supra* note 23, at 172-75.

The harm-benefit test is no longer applied in land use taking cases. *See* notes 25-33 and accompanying text *infra*. *See also* D. MANDELKER, ENVIRONMENT AND EQUITY ch. 4 (1981).

25. 438 U.S. 104 (1978).

26. Plaintiffs had argued that, unlike historic preservation and zoning legislation, landmark laws are discriminatory because they arbitrarily single out an individual parcel of land for less favorable treatment. *Id.* at 131-132. Adopting an equal protection standard, the Court relied on comprehensive planning to rebut the spot zoning argument: "It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or 'reverse spot,' zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones . . . . In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan." *Id.* at 132.

27. The Court recognized historic preservation as a legitimate zoning purpose. *Id.* at 129. *See* Marcus, *The Grand Slam Central Terminal Decision: A Euclid for Landmarks, Favorable Notice for TDR and a Resolution of the Regulatory/Taking Impasse*, 7 ECOLOGY L.Q. 731 (1979).

burden and benefit issue is of special interest. Though its opinion on this point is unclear, the Court appeared to hold that the burden of the landmark restriction on the terminal owners was justified by the benefits of landmark preservation enjoyed by the entire city, which the terminal owners shared.[28]

Agins presented a similar burden and benefit problem. In that case, the city implemented an open space designation in its open space plan[29] by adopting a low density zoning ordinance limiting the Agins' property to a density of one to five dwelling units per acre. Language used by the Supreme Court indicated that the burden of the low density restriction was justified by the community-wide benefits which the low density, open space zoning conferred.[30]

This relaxed attitude toward the benefit-burden problem, and the Court's willingness to uphold the objectives of historic preservation and open space regulation, suggest that most land use regulation will not raise a taking problem in federal court.[31] State courts are equally sympathetic to land use regulation that imposes restrictive regulations to confer diffuse public benefits. While the constitutionality of landmark preservation is not fully established at the state level,[32] recent state cases have unanimously upheld

28. 438 U.S. at 134-38.

29. California cities like Tiburon must prepare an open space plan. CAL. GOV'T CODE § 65563 (West 1980). The open space plan is one element in a local comprehensive plan which California municipalities are required to prepare and adopt. *See generally* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation,* 74 MICH. L. REV. 899 (1976). Tiburon's enactment of the restrictions on the Agins' property to implement a comprehensive planning program weakens the argument that the Agins' property was singled out for a "taking."

30. "The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' five-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with any diminution in market value that the appellants might suffer." 447 U.S. at 262.

31. *See, e.g.*, Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980) (rejecting equal protection and taking objections to local land use regulation).

32. *Compare* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed,* 429 U.S. 990 (1976) (court struck down landmarks preservation of private parks and mandatory TDR program) *with* Mayor of Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974) (court upheld refusal to permit demolition of historic church). For a general discussion of the constitutionality of landmark preservation, *see* S. ROHAN, ZONING AND LAND USE CONTROLS ch. 7 (1978); Gerstell, *Needed: A Landmark Decision,* 8 URB. LAW. 213 (1976).

flood plain and wetlands regulation.[33] A recent New Jersey lower court decision, that the environmental purpose of natural resource regulation justifies restrictive regulatory burdens on property, may well summarize the trend of the law.[34]

One other aspect of the *Agins* decision deserves comment for its bearing on the taking doctrine. Recall that the property owners in *Agins* challenged the ordinance as an unconstitutional taking on its face. They made no attempt to secure a building permit under the ordinance or to press the city to allow them the highest residential density permissible under the ordinance.[35] This failure to exhaust remedies is often fatal to plaintiffs' claims in state courts.[36] These courts are understandably reluctant to consider

33. *See* Maple Leaf Investors, Inc. v. State, 88 Wash. 2d 726, 565 P.2d 1162 (1977) (flood plain legislation upheld); Brecciaroli v. Connecticut Comm'r of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975) (wetlands regulations upheld; landowner not deprived of all reasonable use of land); Turnpike Realty Co. v. Township of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973) (flood plain ordinance prohibiting residences and commercial uses upheld); Potomac Sand & Gravel Co. v. Governor of Md., 266 Md. 358, 293 A.2d 241 (1971), *cert. denied*, 409 U.S. 1040 (1972) (absolute prohibition of dredging and filling wetlands upheld); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975) (wetlands regulations upheld as valid police power measure to prevent future activities that would be harmful to the public); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (wetlands legislation requiring a conditional use permit to fill land upheld).

34. In Usdin v. State, 173 N.J. Super, 311, 414 A.2d 280 (1980), landowners alleged that the designation of their land as a floodway for a four year period constituted an unconstitutional taking of property. The court stated that "if the purpose of the restriction [of the land use] was to prevent an abuse and the restrictions are reasonably related to that end, the act of restricting is a proper exercise of police power." *Id.* at 320, 414 A.2d at 289. While this statement is merely dictum because the court found no taking on other grounds, it appears to reflect recent trends in the law.

35. Plaintiffs argued that a landowner cannot get effective relief through administrative mandamus proceedings in California. They based this conclusion on Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973), in which the California Supreme Court held that the city may change the challenged regulation, even after trial commences, thereby forcing plaintiffs to start over again. Brief for Appellants at 28, Agins v. City of Tiburon, 447 U.S. 255 (1980). Plaintiffs further argued that it would be futile to require them to seek the highest residential density permissible and then challenge the zoning in an administrative mandamus proceeding because California governmental bodies can simply ignore a landowner's application. Plaintiffs contended that mandamus proceedings would be totally ineffective in such a situation. *Id.* at 29.

36. *See* Spears v. Berle, 48 N.Y.2d 254, 397 N.E.2d 1304, 422 N.Y.S.2d 636 (1979), in which the New York Court of Appeals reversed a lower court's finding that regulations preventing mining on wetlands property constituted a taking. The decision was reversed because there was no proof of an unreasonable restriction. There was no trial or hearing on the taking question, and the only evidence on the record was plaintiff's testimony that no activity other than the proposed mining would afford a reasonable return on the property.

constitutional issues until the plaintiff has exhausted all available administrative possibilities to avoid an unconstitutional land use restriction.

When *Agins* reached the Supreme Court, it borrowed from the exhaustion principle to avoid facing the inverse condemnation issue.[37] State courts base the exhaustion principle on the availability of a zoning remedy, such as a zoning variance, which can remove a potentially unconstitutional zoning restriction from a tract of land. In *Agins*, the Supreme Court decided it could not reach the inverse condemnation issue because the Agins' had not applied for a building permit to discover what density the city would allow. The Court required "exhaustion" in the sense that it required the property owners to test the constitutional extent of the regulatory burden on their property.

Taken together, *Penn Central*, *Agins* and their analogous state cases severely restrict the scope of the taking challenge to land use regulation. The Supreme Court has accepted regulatory purposes that impose restrictive land use burdens, has refused to entertain facial attacks on land use regulations, and has indicated that even harsh land use restrictions can be justified by widely distributed community benefits.[38]

Id. at 264, 397 N.E.2d at 1308, 422 N.Y.S.2d at 641. To sustain his burden of proof, "the landowner should produce 'dollars and cents' evidence as to the economic return that could be realized under each permitted use." *Id.* at 263, 397 N.E.2d at 1308, 422 N.Y.S.2d at 640. The court remitted the case to the trial court for a hearing on the taking issue. *Id.* at 265, 397 N.E.2d at 1309, 422 N.Y.S.2d at 641.

Agins and *Spears* are similar holdings. Both courts found no taking because there was no proof of an unreasonable restriction. *See* note 37 and accompanying text *infra*. For an excellent discussion of the exhaustion doctrine in land use cases, see Note, *Exhaustion of Remedies in Zoning Cases*, 1964 WASH. U.L.Q. 368.

37. 447 U.S. at 263. *See* Bonner v. Coughlin, 517 F.2d 1311, 1319-20 (7th Cir. 1975) (Stevens, J.), *modified on other grounds*, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978), holding that a constitutional § 1983 claim does not lie when plaintiff has an adequate state remedy. *Bonner* was cited with approval in Ingraham v. White, 430 U.S. 651, 679 n.74 (1977)(Powell, J.).

38. *Penn Central* does leave the taking issue unresolved to some extent. *See* Note, *Penn Central Transportation Company v. New York City: Easy Taking-Clause Cases Make Uncertain Law*, 1980 UTAH L. REV. 369. The Supreme Court noted that the terminal was earning a reasonable return, and also noted that no investment backed expectations of its owners were frustrated. Penn Central Transp. Co. v. New York City, 438 U.S. at 124, 136. It is not clear how the Court would decide a case in which investment backed expectations were precluded and the landowners were unable to realize a reasonable return. Note, *supra*, at 380. The Court's adoption of Professor Michelman's "fairness" approach may well mean that it will apply a strict standard of scrutiny when harsh regulations justified by

This doctrinal totality indicates that a court following the Supreme Court's lead will declare a land use regulation unconstitutional only in an especially harsh and insupportable set of circumstances. The court must be willing to discredit the municipality's justification for its land use program. It must be willing to believe that the benefits conferred by the program do not justify the burdens it imposes. Finally, the landowner must have demonstrated through application to the municipal authority that no constitutionally permissible land use is allowable.

There is no justifiable reason in this factual setting for a court to accept the compensation syllogism and award monetary relief to a landowner through the inverse condemnation remedy. The airplane overflight cases indicate that alternative remedies in land use taking cases are not symmetrical, that there is no absolute remedial hierarchy, and that the order to be assigned in the remedial hierarchy is determined by the "public interest." Certainly there is no reason in the fact situation just outlined to confirm the public interest in the land use regulation at issue by awarding monetary relief to the landowner. A fact situation in which a municipality imposes oppressively burdensome land use restrictions for no discernible public purpose cries for corrective relief that will allow the landowner to proceed with its development plans.

It is true that most state courts will not give specific relief to successful property owners in land use litigation that will modify a zoning ordinance to permit them to go forward with their development.[39] Most state courts view specific relief of this kind as improper judicial interference with local legislative powers. They will

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widely distributed benefits upset "distinct investment backed expectations." *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). The Supreme Court's opinion in *Agins* also recognized that the appellants' investment backed expectations were not frustrated because the challenged ordinance allowed the construction of some residential units. 447 U.S. at 262.

39. *See* Hartman, *Beyond Invalidation: The Judicial Power to Zone*, 9 URB. L. ANN. 159 (1975). The problem of judicial relief in zoning litigation is complicated because a local legislative action by the governing body is required. The governing body must modify the zoning ordinance in a manner that will allow the plaintiff's development to proceed if the developer is to secure adequate redress from a zoning regulation a court has held excessively restrictive. Some courts now hold that local governing body proceedings to amend zoning ordinances are administrative. *See* text accompanying note 55 *infra*. In these jurisdictions, a court holding a zoning regulation unconstitutional would normally remand to the local governing body in its administrative capacity for further proceedings necessary to carry out the court's decision. Monetary relief would normally not be available.

usually remand to the municipality for appropriate relief "in accordance with the court's opinion." If a municipality resists compliance—an event which sadly occurs all too often—the landowner's court victory will be frustrated. Advocates for the inverse condemnation remedy in land use litigation often cite the inadequacy of judicial relief to support their arguments.[40]

This argument is misplaced. Modifications in the judicial approach to injunctive relief in land use litigation are more in the public interest than compensatory relief when public policy does not justify a land use regulation a court holds to be unconstitutional. Some erosion is already evident in the judicial hesitancy to compel specific changes in land use regulations,[41] especially in the

40. Appellants and Amicus argued in *Agins* that injunctive relief is seldom granted by California courts and, even when granted, it provides inadequate relief for past harm. Brief for Appellants at 27-28, Agins v. City of Tiburon, 447 U.S. 255 (1980); Brief of Amicus Curiae Half Moon Bay Properties, Inc., in Support of Appellants at 26-27.

41. *See* Union Oil Co. of Cal. v. City of Worthington, _ Ohio St. 2d _, 405 N.E.2d 277 (1980), in which the court held that a trial court which invalidates a zoning ordinance should give notice that the municipality should rezone the property within a reasonable period of time. *Id.* at —, 405 N.E.2d at 279-80. The court further stated that, "[i]n the event the zoning authority either fails to rezone or fails to rezone the property in a constitutionally permissible manner, the court shall examine the reasonableness of the proposed use, and, upon finding that use to be reasonable, enjoin the city from interfering with it." *Id.* at —, 405 N.E.2d at 280. The decision was based on an earlier Michigan Supreme Court case which held that when a zoning ordinance is declared invalid, the municipal agency has sixty days to present an amended ordinance "comporting with the dictates of equity as well as the requirements of constitutional reasonableness as applied to an aggrieved landowner's parcel." Ed Zaagman, Inc. v. Kentwood, 406 Mich. 137, 181, 277 N.W.2d 475, 483 (1979). If the court finds the amended ordinance to be unacceptable, it may then grant specific relief. *Id.* at 182, 277 N.W.2d at 483. *See also* Hartman, *supra* note 39.

In Pennsylvania, the state zoning enabling legislation provides the judiciary with the power to grant site specific relief to a landowner who has successfully challenged the validity of a zoning restriction as applied to his property. PA. STAT. ANN. tit. 53, § 11011(2) (Purdon's Supp. 1980) provides that: "If the court . . . finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or, failure to act is in question on the appeal, it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order."

This statute has been interpreted to authorize courts to grant site specific relief, but not the authority to order a rezoning. Ellick v. Board of Supervisors, 17 Pa. Commw. Ct. 404, 415, 333 A.2d 239, 246 (1975). *See* Hyson, *The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation*, 12 URB. L. ANN. 21, 38-48 (1976).

exclusionary zoning cases.[42] The courts that provide specific relief to successful litigating developers in exclusionary zoning cases are aware of the oppressive nature of exclusionary zoning restrictions. They are also aware of the cost of litigation delays to the developer, and of the frustration that follows a failure to provide specific judicial relief to eliminate exclusionary restrictions held unconstitutional.[43] Comparable compelling arguments support the award of specific judicial relief in cases in which a municipality adopts environmental or similar land use regulations that impose unreasonable restrictions on landowners, with no social justification.

III. The Section 1983 Analogy

Additional perspective on the compensation remedy in land use litigation is provided by a review of land use cases brought under section 1983 of the federal Civil Rights Act of 1866.[44] Unavailable until recently as the basis for actions against municipalities,[45] section 1983 now authorizes damage actions against municipalities for violations of "any rights, privileges, or immunities secured by the Constitution and laws."[46] This statute provides a

42. *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977) (court ordered issuance of building permit to successful developer litigant); Berenson v. Town of Newcastle, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979) (same result, though court struck lower court's determination of appropriate residential density as improper exercise of judicial power).

43. *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 549-51, 371 A.2d 1192, 1226-27 (1977).

44. 42 U.S.C. § 1983 (Supp. 1980). Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), established a private monetary action under the Fourteenth Amendment for deprivation of federally protected rights. Following Monell v. Department of Social Servs., 436 U.S. 658 (1978), which established municipal liability under § 1983, the United States Supreme Court has indicated that a *Bivens* action under the Fourteenth Amendment might not be implied when § 1983 is available. *See* Carlson v. Green, 446 U.S. 14 (1980). *See* Davis v. Passman, 442 U.S. 228 (1979) (Congress did not intend to foreclose alternative remedies available to persons not protected by the federal Civil Rights Act of 1964).

45. In Monell v. Department of Social Servs. 436 U.S. 658 (1978), the United States Supreme Court reversed its earlier decision in Monroe v. Pape, 356 U.S. 167 (1961), and ruled that municipalities and other local governing bodies are "persons" within the meaning of § 1983 and thus subject to damage claims for constitutional violations.

46. 42 U.S.C. § 1983 (Supp. 1980). In Maine v. Thiboutot, 100 S. Ct. 2502 (1980), the Supreme Court held that in addition to providing a cause of action for constitutional violations, § 1983 provides a cause of action for federal statutory violations. Section 1983 does not provide a cause of action against the state. Quern v. Jordan, 440 U.S. 332 (1979). This holding protects state land use regulations from attack.

statutory damage action that parallels the inverse condemnation remedy for unconstitutional land use takings. Land use regulation that constitutes a taking violates the federal Constitution and clearly triggers the statutory section 1983 monetary remedy. Proponents of the inverse condemnation remedy for unconstitutional land use regulation support their arguments by noting that a comparable statutory remedy is available under section 1983. Since the statutory damages remedy is available in any event, they argue that there is no reason to deny the constitutional inverse condemnation remedy.

A close look at judicial interpretation of section 1983 indicates that the comparability argument advanced by the inverse condemnation advocates is not supported by the decisions. The damage remedy provided by section 1983 is not automatically available to property owners who litigate claims against municipalities. That section also authorizes injunctive relief. As in the inverse condemnation cases, the federal courts are likely to prefer relief by injunction rather than a monetary award in land use taking cases.[47]

The recent availability of section 1983 actions against municipalities has not yet allowed the federal courts an extensive opportunity to adjudicate these cases, but one federal district court has indicated the likely judicial position on remedial relief in an important land use decision. The Tahoe Regional Planning Agency (TRPA) is a major regional planning agency formed by interstate compact between California and Nevada to protect the area surrounding Lake Tahoe, which has an especially attractive natural setting. When TRPA enacted an ordinance that substantially restricted the market value of a tract of property by reclassifying it from residential to "general forest" and "recreation" uses, its owners brought suit under section 1983 against the TRPA and members of its governing body. The case reached the United States Supreme Court, which held that the complaint stated a claim for relief under section 1983.[48]

47. Note that the Eleventh Amendment requires injunctive rather than monetary relief in suits brought against a state. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

48. Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). The Supreme Court took the case on certiorari to decide whether the TRPA as an interstate compact agency was entitled to Eleventh Amendment immunity, and whether the individual members of the agency's governing body were entitled to absolute immunity from federal damage claims. It found that the TRPA was not entitled to Eleventh Amendment immunity, but that the agency's members were entitled to absolute immunity when they

On remand, in *Jacobson v. Tahoe Regional Planning Agency*,[49] the federal district court held that plaintiffs in section 1983 actions are not necessarily entitled to damages as the appropriate remedy. In dismissing the case, the court held that public policy dictates a denial of monetary relief when an injunction and declaratory relief can provide an adequate alternative remedy.[50] Like the California Supreme Court in *Agins*, the court in *Jacobson* noted that to provide monetary relief in land use actions could have a chilling effect on local land use regulation.[51] A damage remedy would "inhibit the exercise of the police power," and "frustrate the budgeting of public funds."[52] "Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses."[53] As most courts do in land use taking cases, *Jacobson* inverted the usual remedial hierarchy to hold that relief through injunction, not damages, is the preferred judicial remedy.

The judicial preference for relief by injunction is also apparent in section 1983 cases raising other constitutional objections. One of these other constitutional objections is based on the procedural due process clause of the federal Constitution. Plaintiffs in section 1983 land use cases are likely to raise procedural due process objections because objections based on the taking or other substantive constitutional clauses will probably not be successful. The procedural due process claim raises problems likely to become increasingly critical as litigants begin to invoke section 1983 to assert constitutional rights in the land use regulation process.

Land use regulation decisions most likely to raise due process problems are usually made in the local legislative process. The leg-

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acted in a legislative capacity.

49. 474 F. Supp. 901 (D. Nev. 1979).

50. *Id.* at 902-04. The court denied injunctive relief and dismissed the case because plaintiffs did not own the property in question when the suit was commenced. *Id.* at 904.

51. *Id.* at 903-04. The court adopted the reasoning in *Agins* that inverse condemnation would have detrimental effects on the distribution of public funds and so inhibit legislative action. *See* note 22 and accompanying text *supra*.

52. 474 F. Supp. at 903.

53. *Id.* at 903-04 (quoting from Comment, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1450 (1974)). *Accord*, in a § 1983 action, Pamel Corp. v. Puerto Rico Highway Auth., 621 F.2d 33, 35 (1st Cir. 1980): "Our research has disclosed no case in which a federal court has ordered a state or local government unit to pay for a diminution of the value of a piece of property caused by a zoning regulation."

islative zoning action that prompted the taking claim in *Agins* is one example. While most state courts hold that the zoning procedures used in the local legislative process need not meet constitutional due process criteria,[54] some state courts have taken a contrary position.[55]

Whether these state court cases imposing procedural due process obligations on the local legislative zoning process are based on statutory or constitutional command is not clear. What is clear is that comparable constitutional objections to legislative zoning procedures may be made in federal section 1983 actions.[56] When made in federal court, procedural due process objections must be based on federal rather than state constitutional requirements.[57] These requirements could provide procedural protection in the legislative zoning process comparable to the procedural protection provided by some state courts.[58]

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54. *See* Mueller v. City of Phoenix, 102 Ariz. 575, 435 P.2d 478 (1967); City of Miami Beach v. Schauer, 104 So. 2d 129 (Fla. Dist. Ct. App. 1958), *cert. dismissed,* 112 So. 2d 838 (Fla. 1959); Rutland Environmental Protection Ass'n v. Kane County, 31 Ill. App. 3d 82, 334 N.E.2d 215 (1975); Bryant v. Lake County Trust Co., 166 Ind. App. 92, 334 N.E.2d 730 (1975); Puryear v. City of Greenville, 432 S.W.2d 437 (Ky. 1968); Crall v. City of Leominster, 362 Mass. 95, 284 N.E.2d 610 (1972); Levitt v. Incorporated Village of Sands Point, 6 N.Y.2d 269, 160 N.E.2d 501, 189 N.Y.S.2d 212 (1959); Donnelly v. City of Fairview Park, 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968); O'Rourke v. City of Tulsa, 457 P.2d 782 (Okla. 1969).

55. These states hold that the local legislative process is quasi-judicial. *See* Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975); Acierno v. Folsom, 337 A.2d 309 (Del. 1975); Aldom v. Borough of Roseland, 42 N.J. Super. 495, 127 A.2d 190 (1956); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); Horn v. Township of Hilltown, 461 Pa. 745, 337 A.2d 858 (1975); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972).

56. Section 1983 encompasses all constitutional violations. *See* text accompanying note 46 *supra.*

57. Federal courts apply federal constitutional principles in cases litigated under § 1983. *See* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION 59-95 (1979).

58. Federal procedural due process law has been developed in cases in which government action has deprived the person invoking due process protection of an "entitlement" made available by a public agency. *See, e.g.,* O'Bannon v. Town Court Nursing Center, 444 U.S. 819 (1980); Mathews v. Eldridge, 424 U.S. 319 (1976) (disability benefits); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare assistance). In its recent cases, the United States Supreme Court has applied a balancing test that considers the nature of the private interest, the risk of an erroneous decision under the procedures used, the value of additional procedural safeguards, and the additional fiscal and administrative burdens that additional procedural safeguards would impose on public agencies. For discussion, *see* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing,* 88 HARV. L. REV. 1510 (1975); *Developments in the Law—Zoning,* 91 HARV. L. REV. 1427, 1504-28 (1978). *See* United Land Corp. of America v. Clarke, 613 F.2d 497 (4th Cir. 1980), holding that the plaintiff did not have a protected property interest in an application for local erosion permit sufficient to ground a procedural due process objection arising out of

The opportunity to make constitutional procedural due process objections to local zoning actions in section 1983 cases opens up new possibilities for landowners claiming monetary relief. How the federal courts might react to monetary section 1983 claims based on procedural due process violations in land use cases is indicated by *Carey v. Piphus*,[59] a United States Supreme Court decision. In *Carey*, plaintiffs were elementary and secondary school students who were suspended, without procedural due process, for infractions of school rules.[60] The procedural due process violation was admitted, but it was not clear whether the suspensions would have occurred even if proper procedures had been followed.

Plaintiffs brought section 1983 actions based on the procedural due process violations, asking for declaratory and injunctive relief as well as actual and punitive damages. Both students were reinstated during the pendency of the judicial proceedings after relatively short periods of time. In one case, the student was readmitted under a temporary restraining order. Plaintiffs' demands for monetary relief turned on the damage flowing from the procedural due process violation rather than the harm inflicted by the temporary suspensions. They claimed that constitutional rights are valuable in themselves, that deterrence of constitutional violations is necessary, and that "every deprivation of procedural due process may be *presumed* to cause some injury."[61]

Plaintiffs also claimed that compensatory damages should be awarded even though the suspensions were jusitified. The procedural due process clause was intended to guarantee "the feeling of just treatment."[62] The "deprivation of protected interests without procedural due process, even where the premise for the deprivation is not onerous, inevitably arouses strong feelings of mental and

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the local government's denial of the application.

59. 435 U.S. 247 (1978).

60. Both students were suspended without a hearing. Piphus was accused of smoking marihuana in school. Prior to the suspension, a meeting was held between school officials, Piphus and his mother. The purpose of the meeting was not to determine whether he had been smoking, but to explain the purpose of the suspension. *Id.* at 249. Respondent Brisco was suspended after refusing to remove an earring he was wearing. There was no hearing, but his mother was previously warned that her son would be suspended if he did not remove the earring. *Id.* at 250. Both plaintiffs were readmitted to school shortly after they filed suit. *Id.* at 250, 251.

61. *Id.* at 254 (emphasis in original).

62. *Id.* at 261 (quoting from Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).

emotional distress in the individual who is denied the feeling of just treatment."[63]

The Supreme Court, in an opinion by Justice Powell, disagreed. Powell rejected the contention that "damages should be presumed to flow from every deprivation of procedural due process."[64] Damages would be available if mental and emotional distress could actually be proved. Powell then held that plaintiffs were only entitled to nominal damages.

Carey is colored by the personal nature of the claimed injury to plaintiffs and the obvious analogy to tort law.[65] The case and its holding are still capable of application to the land use regulation process, even though property rather than personal interests are affected.[66] The "feeling of just treatment" justification for procedural due process protection is as applicable to the land use regulation process as it is to school suspensions.[67] As one leading commentator has noted, one of the major purposes of the taking clause is to prevent the feeling of unjust deprivation that would prevail should property regulation surpass the limits of the socially tolerable.[68] Feelings of unjust deprivation in land use regulation can oc-

63. 435 U.S. at 261.

64. *Id.* at 263.

65. Justice Powell's opinion explicitly recognizes that injuries resulting from a deprivation of procedural due process are analogous to injuries resulting from a common law tort. He held that the common law of torts provided guidelines for damage awards under § 1983. *Id.* at 258. Courts should not presume that damages flow from the alleged violation of personal rights; the burden of proving injury is upon the plaintiff. *Id.* at 262. Damages will only be awarded if actual injury is sustained. *Id.* at 254. Since the plaintiffs in *Carey* were unable to prove any actual injury, the court found that they were entitled to no more than nominal damages. *Id.* For an excellent discussion of the tort analogy applied by the Court see, Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus*, 93 HARV. L. REV. 966 (1980).

A similar tort analogy has been applied by courts in physical damage-inverse condemnation cases. *See* Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 13-18.

66. Lynch v. Household Fin. Corp., 405 U.S. 538 (1971), applied § 1983 to property damage claims. For a case following *Carey* and awarding nominal damages for a procedural violation in a land use case, see McCulloch v. Glasgow, 620 F.2d 47 (5th Cir. 1980).

67. An example is the "appearance of fairness" doctrine adopted by the Washington Supreme Court, which requires adherence to minumum procedural safeguards in zoning matters. *See* Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972); Chrobuck v. Snohomish County, 78 Wash. 2d 858, 480 P.2d 489 (1971). *See generally* Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA L. REV. 50 (1974).

68. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1208-15 (1967).

cur as well from a failure to observe procedural requirements, even though the result might not have differed had procedural requirements been observed.

Powell's opinion, immersed as it is in the tort analogies raised by plaintiffs' claims, fails to address the problem of monetary relief under section 1983 for procedural due process violations in a larger context. Powell does state, in important dictum, that "rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interest protected by the particular right in question."[69] He might have enlarged this observation by pointing out that the usual judicial remedy in procedural due process violation cases is a remand to the decisionmaking agency for new proceedings in accordance with due process dictates.[70] Powell might not have considered this course of action in *Carey* because the plaintiffs were, in fact, reinstated.

Carey closes the circle on monetary relief claims in land use actions under section 1983. *Jacobson* holds that an injunction is the preferred remedy when a taking is found. When the only constitutional violation is procedural, *Carey* indicates that the procedural violation does not warrant a monetary damage award when no actual damage is shown.

IV. Federal Abstention Doctrine

This discussion of federal section 1983 actions suggests another reason why the demand for an inverse condemnation remedy may not succeed in federal litigation. The reason lies in principles of judicial restraint that limit federal court intervention in matters of state and local competence, such as land use regulation.[71] This self-imposed limitation on federal jurisdiction is important because plaintiffs are likely to seek a federal forum for inverse condemnation land use actions.

69. 435 U.S. at 259.

70. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1227-50 (1977).

71. For an elaboration of this argument, see Sager, *Questions I Wish I Had Never Asked: The Burger Court in Exclusionary Zoning*, 11 SW.U.L. REV. 509, 512-23 (1979). *See also* Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975); Pamel Corp. v. Puerto Rico Highway Auth., 621 F.2d 33, 36 (1st Cir. 1980) ("Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy.").

Note that the United States Supreme Court in *Agins* could not have made a binding interpretation of the California state constitution that would have compelled California courts to recognize the inverse condemnation remedy. A Supreme Court holding that inverse condemnation lies in land use taking cases would only bind federal courts as an interpretation of the federal Constitution. Faced with the reluctance of state courts to entertain inverse condemnation land use taking actions, plaintiffs would most likely seek inverse condemnation relief in federal courts should the United States Supreme Court recognize this remedy.[72]

In federal courts, plaintiffs in inverse condemnation actions face a limitation on federal jurisdiction—the federal abstention doctrine[73]—that reflects federal court reluctance to interfere in state and local concerns. The federal abstention doctrine also applies to land use inverse condemnation actions brought under section 1983.[74]

The doctrine of federal abstention developed as a method through which federal courts could avoid accepting state law cases when a state law decision might avoid the necessity to consider a federal question.[75] Initially, federal courts limited federal abstention to cases in which state law was unsettled.[76] Later, the federal courts extended the federal abstention doctrine to additional categories. One of these categories, especially applicable in land use litigation, calls for federal court abstention when necessary to allow a

72. State courts hostile to the inverse condemnation remedy would likely find a way around it, even though plaintiffs sued on the federal constitution. A state court could dismiss an inverse condemnation by applying the exhaustion doctrine, or by holding that no taking had occurred. *See* note 7 *supra.*

73. For a discussion of the federal abstention doctrine and its applicability to inverse condemnation land use cases, see Harris, *Application of the Abstention Doctrine to Inverse Condemnation Actions in Federal Court,* 4 PEPPERDINE L. REV. 1 (1977); Note, *Land Use Regulation, the Federal Courts and the Abstention Doctrine,* 89 YALE L.J. 1134 (1980).

74. *See* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION 157-60 (1979).

75. *See* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine,* 122 U. PA. L. REV. 1071 (1974); Harris, *Application of the Abstention Doctrine to Inverse Condemnation Actions in Federal Court,* 4 PEPPERDINE L. REV. 1 (1977); Note, *Land Use Regulation, the Federal Courts and the Abstention Doctrine,* 89 YALE L.J. 1134 (1980); *Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133 (1977).

76. *See, e.g.,* Texas v. Pullman Co., 312 U.S. 496 (1941). The Supreme Court held that federal abstention is warranted when the controversy raises an unclear issue of state law, and there is a possibility that state adjudication of that issue could avoid the necessity of reaching the federal question. Under this doctrine, the federal court does not dismiss the case, but retains jurisdiction over the federal issues. Harris, *supra* note 75, at 9.

state to work out questions of state policy.[77] Since land use planning and zoning regulations address problems that concern the state or municipality for which they are enacted, federal courts can apply the abstention doctrine to decline jurisdiction over land use litigation. While the United States Supreme Court has not yet considered the federal abstention doctrine in land use taking cases, several lower federal courts have applied federal abstention to decline jurisdiction in cases of this type.[78]

The Ninth Circuit Court of Appeals' decision in *Sederquist v. City of Tiburon*[79] is typical of federal court decisions applying the federal abstention doctrine to decline court challenges to local land use regulation. In *Sederquist,* the city adopted a temporary moratorium on all development in an area including plaintiffs' property, and subsequently zoned as open space the road over which plaintiffs claimed an easement of access. Plaintiffs alleged that these acts constituted a taking for which compensation was required. The court invoked the federal abstention doctrine, recognizing that land use regulation is a sensitive area of state and local policy.[80] Quoting from an earlier Ninth Circuit case, the court stated that "[f]ederal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems."[81] The court also reasoned that a state court determination of appli-

77. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943). The Supreme Court held that federal courts should abstain when a case bears upon difficult questions of state policy which are more important than the immediate issue at bar. State courts are better able to work out questions of state policy. Under this doctrine, federal courts may dismiss the case entirely. Harris, *supra* note 75, at 9.

78. For cases granting abstention, see Pamel Corp. v. Puerto Rico Highway Auth., 621 F.2d 33 (1st Cir. 1980); Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978); Muskegon Theatres, Inc. v. City of Muskegon, 507 F.2d 199 (6th Cir. 1974); Fralin and Waldron, Inc. v. City of Martinsville, 493 F.2d 481 (4th Cir. 1974); Hill v. City of El Paso, 437 F.2d 352 (5th Cir. 1971); Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978); Santa Fe Land Improvement Co. v. City of Chula Vista, 71 F.R.D. 573 (S.D. Cal. 1976); Rancho Palos Verdes Corp. v. City of Laguna Beach, 390 F. Supp. 1004 (C.D. Cal. 1975).

Other federal courts refuse to apply the abstention doctrine in land use cases. *See* Hotel Coamo Springs, Inc. v. Colón, 426 F. Supp. 664 (D.P.R. 1976); Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D.N.J. 1976) (no state question presented); M. J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975); Rasmussen v. City of Lake Forest, 404 F. Supp. 148 (N.D. Ill. 1975); Donohoe Constr. Co. v. Maryland-National Capital Park and Planning Comm'n, 398 F. Supp. 21 (D. Md. 1975); Lerner v. Town of Islip, 272 F. Supp. 664 (E.D.N.Y. 1967) (request for injunctive relief).

79. 590 F.2d 278 (9th Cir. 1978).

80. *Id.* at 281.

81. *Id.* at 282.

cable state law might render the federal constitutional issue moot.[82]

Abstention cases like *Sederquist* indicate that some federal courts follow principles of federalism that give substantial credence to local policy-making in land use regulation. These cases reinforce cases like *Penn Central,* which applied the constitutional taking doctrine to affirm local land use regulation even when it placed substantial restrictions on the private use of land. Taken together, these cases indicate that the federal courts are not likely to take jurisdiction when land use litigation raises questions of state and local policy.

Conclusion

The demand for monetary compensation through the inverse condemnation remedy in land use taking cases certainly has an intuitive appeal. All constitutions mandate compensation when a taking of property has occurred. Excessive land use regulation can be a taking, and when it is a taking the Constitution would seem to mandate that compensation be paid.

The difficulty with this argument is that it attaches a single remedy to a constitutional violation which can be overcome with equally effective relief through an injunction. Nothing in land use law or the law of remedies necessarily links any one remedy to insupportable harm to property interests. While the remedial hierarchy in private litigation gives preference to monetary relief, this article has indicated that courts for good reason do not respect this preference in actions against public entities. They invert it in land use cases, denying monetary relief altogether in the inverse condemnation cases, and all but reject it in the only significant section 1983 case decided so far.

This rejection of the inverse condemnation claim in land use litigation does not mean that local governments will remain undisciplined when their land use programs pass constitutional taking limits. Remedial injunctive relief to property owners stands as an effective control. Courts can be expected to refine and amplify their injunctive remedies as they learn the realities of local land

82. *Id.* at 280. It is apparent here that the court was applying the *Pullman* abstention doctrine.

use regulation, the demands of the development process, and the potential reach of their remedial powers.