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Land Use Enactments and Inverse Condemnation

ALAN R. PERRY*

In the last decade we have witnessed, in local land use control, change in both concept and mechanics. The fair and wide distribution of land-based assets, environmental protection and controlled (if not diminished) land development are now, as compared to the past, objectives of high priority. With respect to land use control mechanics, at least four devices or tendencies can be noted: introduction of environmental impact analyses, implementation of the planning process, expansion of the overlay zone technique and adoption of the conditional (or special) use permit device to control in detail development formerly regulated merely by zone performance standards and building and related codes. In addition, the performance standards called out for the various zones (and for subdivisions) have increased in subject matter, complexity and number.

Apace, hopefully, with the increasing sophistication of land use control has been alertness for its possible abuses and continued concern for the protection the landowner will receive if the result of the control is confiscatory. Thus, our interest in the question of whether an owner will be entitled to *compensation* as a result

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of a land use enactment—an interest whetted, perhaps, because *HFH, LTD. v. Superior Court*¹ has been wending its way through the appellate courts.

In Pepperdine's 1975 Symposium issue a reasoned article² by Messrs. Thomas P. Clark, Jr. and Arthur G. Kidman examined the relationship of compensation to land use enactments. The authors' primary thesis was that compensation is available only where some form of appropriation occurs which is comparable to that involved in the exercise of the power of eminent domain; their remarks concluded with a suggestion for adoption of a concept of compensation for invalidated enactments—a concept which, as we will see, *HFH* rejected.

A. PRELIMINARY COMMENTS

"Land use enactments" may be construed to embrace almost any governmental action affecting land. In this commentary the words are used in the sense employed in California Government Code, section 810.6³ and mean, in particular, general (and other) plan adoption, conditional approvals (conditional use permits, variances, and subdivision maps) and zone classifications.

From the outset it will be helpful to recollect that land use enactments are exercises in the power of government to act to protect society from threats to health, safety, morals and general welfare. Such exercises, when in the form of land use enactments, always limit to some degree owners' rights to utilize their land. It must be emphasized that *limitation* of owners' land use is not the same as *acquisition* by the public of estates or interests in such land; thus, a zoning ordinance that prohibits a borrow pit in R-1 zoned land means I cannot use my R-1 land for a borrow pit, but it does not mean that the enacting government cannot.

If compensation is awarded because the public has, as a result of a land use enactment, acquired estates or interests in land, it

1. *HFH, LTD. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

2. Clark & Kidman, *The Relationship of Just Compensation to the Land Use Regulatory Power: An Analysis and Proposal*, 2 SYMPOSIUM PEPPERDINE L. REV. S79 (1974) [Hereinafter cited as Clark & Kidman].

3. (West 1966). "'Enactment' means a constitutional provision, statute, charter provision, ordinance or regulation."

follows that the acquisition (or "taking") was a valid exercise of the police power; as Messrs. Clark and Kidman note: "An illegal exercise of the police power can never amount to a constitutionally compensable taking."⁴ It follows that an *invalid* land use enactment cannot be the basis of an inverse condemnation claim, and that such a claim is not the appropriate method of attacking the validity of a land use enactment.⁵

B. GENERAL (AND OTHER) PLAN ADOPTION

For cities and counties, the basic mechanic of land use regulation is the *general plan*. The Government Code requires that it be adopted⁶ and lists the *elements* (i.e., topics, such as housing, transportation, etc.) with which it must deal.⁷ In practice, local government general plans focus on the fifteen to twenty-five year period following the plan adoption. Periodic review and up-dating is mandated.⁸ Presumably, each general plan will, by reason of the review process, always relate to a reasonable future period.

Until a few years ago, local general plans were as much honored by the breach as by the observance. Little or no assurance existed

4. Clark & Kidman, *supra* note 2 at 589.

5. Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973). An attack on the validity of land use enactments may be by ordinary mandamus [CAL. CIV. PROC. CODE § 1085 (West Supp. 1976)]; however, that procedure may be employed only to compel performance of a purely ministerial duty. See State of California v. Superior Court, 12 Cal. 3d 237, 542 P.2d 1281, 115 Cal. Rptr. 497 (1974). To control matters lawfully entrusted to a commission or tribunal, administrative mandamus under CAL. CIV. PROC. CODE § 1094.5 (West Supp. 1976) is required. See Gong v. City of Fremont, 250 Cal. App. 2d 568, 58 Cal. Rptr. 664 (1967). Most attempts to invalidate zoning enactments utilize administrative mandamus. A constitutional attack may be mounted by an action for declaratory relief; such a cause of action may be joined with a mandamus proceeding. However, declaratory relief is not appropriate to obtain a review of an administrative decision. See State of California v. Superior Court, *supra*. In an administrative mandamus action the inquiry is limited to the questions whether (i) the tribunal proceeded without, or in excess of, jurisdiction, (ii) there was a fair hearing and (iii) there was any prejudicial abuse of discretion. Such abuse is established if the tribunal did not proceed in the manner required by law, or the decision was not supported by the findings or the findings were not supported by the evidence [CAL. CIV. PROC. CODE § 1094.5(b) (West Supp. 1976)]. In view of the limits upon the inquiry, the power of the trial court to receive new evidence in a trial de novo is limited and confined to determining whether there was substantial evidence before the tribunal to support its decision, and the landowner has the burden to demonstrate wherein the administrative proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion. See Gong v. City of Fremont, *supra*.

6. CAL. GOV'T CODE § 65300 (West 1966).

7. CAL. GOV'T CODE § 65302 (West Supp. 1976).

8. CAL. GOV'T CODE § 65356.1 and 65361 (West Supp. 1976).

that a particular zone classification, zoning relief or subdivision decision would be consistent with the applicable general plan. However, the adoption of California Government Code, sections 65860 (a) (requiring that zoning ordinances shall be consistent with the applicable general plan) and section 66473.5 (requiring that subdivisions be consistent with the applicable general plan) (West, 1976), and related statutes, have given the general plan a measure of logical pre-eminence.

Although this brief summary of the development of the planning device may seem irrelevant to the topic, I give it to emphasize the present importance of, and reliance on, the device as a necessary tool for achieving orderly land development.

Can an adopted general plan designation for a particular parcel of land, standing alone, be the basis of action for compensation against the adopting local government? The answer seems to be a resounding "No." In the leading California case, *Selby Realty Co. v. City of San Buenaventura*,⁹ the adopted plan disclosed that, in the future, public streets were planned to go into and through plaintiff owner's land. The owner brought suit, asking, with other relief, for damages for inverse condemnation of the streets.

The Supreme Court emphasized that the general plan was tentative and subject to change, and that whether any of the owner's land would, in fact, be taken for streets depended upon unpredictable future events. Alteration, modification or ultimate abandonment of the plan are its possible fates; there is no assurance that any public use will eventually be made of plaintiff's property. While the Court alluded to Government Code section 65860 (a), it did not comment on the meaning of the nexus between the general plan and zoning ordinance. The cynic would add, I suppose, that the "tentative/unpredictable" characterization is nothing more than judicial recognition that California land use planning has been both unrealistic and inadequate and, therefore and of necessity, changeable.

The Court made a persuasive analysis of the social cost of inverse condemnation in the planning process: community planning ceasing or becoming "vacuous generalities," and the inundation of

9. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

futile suits. It did not comment on the possible (if not probable) adverse effects on land value and marketability arising from a general plan designation; that topic was lightly touched in *Smith v. State of California*¹⁰ an action for inverse condemnation arising from (i) the State's adoption, in 1966, of a freeway route through plaintiff owner's land, (ii) inaction on the part of the State, to 1973, in acquiring the land and (iii) the fact that acquisition would not be attempted until 1981 or after. The District Court of Appeal recognized the adverse effect of freeway planning on marketability, but considered inverse condemnation more costly—it

would result in acquisition of large amounts of property that may never be used and would inordinately increase the cost of any project. The real result would be a severe hampering of the State's ability to undertake necessary and worthwhile improvements in our highway system.¹¹

In *Smith*, the Court notes, in support of the "tentative/unpredictable" characteristic of planned facilities, the present uncertainties and obstacles to development, including the consideration of environmental factors necessitated by the National Environmental Policy Act of 1969¹² and the California Environmental Quality Act.¹³ Parenthetically, there is some small comfort in finding judicial recognition in the cost, delay and inconvenience currently required for development, both private and public.

Both *Selby* and *Smith* rely on *Silva v. City and County of San Francisco*.¹⁴ In *Silva*, the basis of the landowner's contention for inverse condemnation was the mere resolution of the Board of Supervisors that the subject property would be condemned as a playground "when necessary." The District Court of Appeal held that there was no taking of the land or entry or physical interference with *Silva's* property by reason of the resolution. While the Court did not expressly so state, it might be argued that the Board might change its mind because of project cost, determination that a playground so located had become unnecessary, or other reasons. While an adopted general plan with its prior expensive and time-consuming research, analysis, prognostication, multitude of public hearings and debate, is a more reliable and definitive governmental act than that involved in *Silva*, it is probably equally susceptible of change or abandonment.

10. *Smith v. State of California*, 50 Cal. App. 3d 529, 123 Cal. Rptr. 745 (1975).

11. *Id.* at 536, 123 Cal. Rptr. at 750.

12. 42 U.S.C.A. § 4321, *et seq.* (1973).

13. CAL. PUB. RES. CODE § 21000, *et seq.* (West Supp. 1976).

14. *Silva v. City and County of San Francisco*, 87 Cal. App. 2d 784, 198 P.2d 78 (1948).

The easy interpretation of *Selby*, *Smith* and *Silva* is that no right to compensation can exist before the government has, in fact, either completed or unequivocally begun the necessary process by which acquisition of estates or interests is finally accomplished.

A more meaningful task is to analyze the risks and costs, and correlative benefits, to the owner and to the public, dependent upon whether compensation is or is not awarded to the owner. If compensation is not awarded, there is a possibility that the marketability and ultimate disposition price of the land may be adversely affected; on the other hand, the subject land use disclosed by the general plan may be desirable as well as necessary to the proper development of the owner's land as well as other lands in the community. If the owner risks loss caused by inaccurate planning, that risk will be of relatively short duration as planning techniques improve and appropriate general plan amendments are adopted. It simply cannot now be determined whether the owner will suffer any meaningful monetary (or other) loss or the quantification of it. If compensation is permitted, the planning process, as noted in *Selby*, would almost inevitably become less effective, if not meaningless. Such an unhappy state of affairs, not the dollars paid, would be the high and unpalatable cost to society. Rational land development begins with long-range planning, followed by appropriate implementing processes for zone classifications, conditional approvals, appropriate landowner compensation, and the like. Any impediment to the planning capability and effectiveness will ultimately adversely affect our ability to achieve a desirable physical and cultural environment in which to live. Landowners, as such and as members of the society, will suffer monetary and social losses if the planning process is stultified; they will benefit if it is effective.

The balance of costs and benefits being what it is, we can anticipate strong judicial support of planning, manifested by resistance to efforts which will dilute it and, hopefully, by approval of efforts which will improve it.

C. CONDITIONAL APPROVALS

Frequently subdivision maps, variances (sometimes called "exceptions") or conditional ("special") use permits will be approved

on the condition that the owner of the affected land convey estates or interests to the enacting government (for example, dedication of land for streets or street widening) or construct at the owner's expense public improvements (such as curbs, gutters, paving and other street improvements); where the improvements are deemed to be needed only at a future time, a commitment to then construct, with security for that commitment, is frequently required. The validity of conditions calling for public acquisitions is well established.¹⁵

Because the owner specifically seeks to utilize the land and will reap the benefits of the permitted utilization, any public acquisition reasonably (and perhaps remotely) ameliorating foreseeable undesirable conditions directly or indirectly caused by the utilization will be deemed to be "voluntary" on the part of the owner.¹⁶

Since reasonableness of the public acquisition, in relation to the undesirable condition, determines the validity of the enactment, it is difficult to understand how an owner could ever claim inverse condemnation. Moreover, the claim could not arise until some dedicatory grant had been given by the owner; such grant, or the utilization of the approval, would likely constitute waiver of the claim.

Only one inverse condemnation case exists in this area, and that one deals with a rare if not unique fact situation. The owner, in *Hilltop Properties v. State of California*,¹⁷ subdivided land in San Jose. The State Department of Public Works indicated to the city planning commission the Department's desire that the final map show two parcels as reserved for future widening of an existing freeway. The commission communicated the desire to the owner. The owner, allegedly at the defendant's "special instance and request," filed a map showing the reservation. The opinion does not indicate that the city, in approving the map, established the reservation as a condition. Evidence was adduced to the effect that the Department had, at least orally, agreed to purchase the parcels for a specified sum. Subsequently, the defendant determined not to purchase, or utilize, the parcels. While the court held that a cause of action based on promissory estoppel was

15. *Gong v. City of Fremont*, 250 Cal. App. 2d 568, 58 Cal. Rptr. 664 (1967) (conditional use permit); *Bringle v. Board of Supervisors*, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960) (conditional variance); and, *Ayres v. City of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949) (subdivision map).

16. *Ayres v. City of Los Angeles*, 34 Cal. 2d 31, 42, 207 P.2d 1, 8 (1949).

17. *Hilltop Properties v. State of California*, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965).

stated, it decided that the facts did not support a cause of action for inverse condemnation. The request of the state that the subdivider "withhold the subject strips of land . . . does not constitute an unequivocal act evidencing an intention to take them for public use."¹⁸ Nor could it be said that the state "has in any way invaded, appropriated, or interfered with plaintiff's use or enjoyment of the subject property."¹⁹ Patently, the enjoyment and benefit was, as a practical matter, adversely affected, but the court viewed the effect as being the result of a voluntary act of the owner.

We can conjecture upon the result if (i) the city had required the reservation as a condition to map approval and (ii) it was alleged that the subdividing (and subsequent use as subdivided lands) in no direct or indirect way contributed to the need for widening. I suggest that, at best, the court might find the requirement an improper exercise of the police power and declare the parcels free of any "reservation," cloud or encumbrance—inadequate relief if their size, configuration or location made them, as a matter of fact, valueless.

D. ZONE CLASSIFICATIONS

Several zone classification cases present the best source for analysis, in land use enactments, of the nature of property rights or interests, and of "public acquisition," which will give rise to a claim for compensation. The much-plowed decisional law consists of *Sneed v. County of Riverside*,²⁰ *Morse v. County of San Luis Obispo*,²¹ and *Peacock v. County of Sacramento*.²² To that list we can now add *HFH, LTD v. Superior Court*.²³ Two other decisions, *Kissinger v. City of Los Angeles*²⁴ (invalidation of zoning ordinance)

18. *Id.* at 361, 43 Cal. Rptr. at 612.

19. *Id.*

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

21. *Morse v. County of San Luis Obispo*, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

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

23. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

24. *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958).

and *Klopping v. City of Whittier*²⁵ (condemnation) deserve comment.

In *Sneed*, the county passed an airport zoning ordinance which created height restrictions on lands adjoining airports, in order to provide clear glide angle paths. Its effect on plaintiff's land adjoining a county airport was to prohibit structures in excess of a few inches in the part lying near the airport and 75 feet in the most distant part.

The Court drew a distinction between "commonly accepted and traditional height restriction zoning regulations of buildings and zoning of airport approaches"²⁶ The latter involves an "invasion" or "trespass" into the airspace above the restricted land. Since such invasion or trespass is by aircraft utilizing the county airport facility, it amounts to actual use of the airspace by those directly involved with the public facility; it is, in a word, "public use" of such airspace.

In holding that the complaint stated a cause of action for inverse condemnation the Court viewed the situation as one in which the public had acquired an aviation easement and that, therefore, the taking was compensable.

The Court quotes with approval *Ackerman v. Port of Seattle*,²⁷

When private property rights are actually destroyed through governmental action, then police power rules are *usually* applicable (Citations omitted). But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable (Citations omitted). (Emphasis in original.)

The quoted language should not be construed as stating that where domain principles are applicable, the subject enactment is an abuse of the police power. Rather, an enactment may be a valid exercise of the police power and still result in a compensable taking.

In *Morse*, the owners sought compensation because of the downzoning of their land, located about a mile from a county airport. Desiring to subdivide it, they requested reclassification from A-1 (agricultural use, one dwelling unit per acre) to R-1 (residential use, five dwelling units per acre). A review of all land in the vicinity of the airport was undertaken; the land was downzoned

25. *Klopping v. City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

26. *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 209, 32 Cal. Rptr. 318, 320 (1963).

27. *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664 (1960).

to A-1-5 (agricultural, one dwelling unit per five acres). The requirements of the A-1-5 Zone did not establish any unusual height limitations or other characteristics particularly related to airports. No evidence was adduced showing contemplated future condemnation.

Citing earlier cases, the court uttered what has become the classic statement of the relationship of compensation to down-zoning:

[L]andowners have no vested right in existing or anticipated zoning ordinances. . . . A purchaser of land merely requires 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."²⁸

Sneed was distinguished; there an air easement was acquired, while the subject enactment "did not appropriate the use of airspace" ²⁹ The subject enactment was directed to two legitimate police power objectives: prevention of urban sprawl and forestalling of residential intensification in areas of excessive noise or hazard.

In *Peacock*, the subject land, near an airport (Phoenix Field), was part of a larger parcel which had been in the process of systematic subdividing and development for some years. In 1960, pursuant to consultant's recommendations, the county (i) passed an ordinance relating only to Phoenix Field which established drastic height limitations on land extending from the ends of the runway and (ii) acquired an interest in Phoenix Field. At about this time the county, through plans and other means, "repeatedly made clear its intention to purchase . . . additional land."³⁰ In 1963, the county (i) rezoned the area around the field, including the subject land, to A-1-B (an agricultural zone with slightly more restrictive height limitations than the 1960 ordinance), a zone specifically designed for airport approach lands and was applied

28. *Morse v. County of San Luis Obispo*, 247 Cal. App. 2d 600, 602-03, 55 Cal. Rptr. 710, 712 (1967).

29. *Id.* at 604, 55 Cal. Rptr. at 713.

30. *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 849, 77 Cal. Rptr. 391, 394 (1969).

only to lands about Phoenix Field and (ii) adopted a general plan which showed a two-runway field with a clear area greater than that proposed in the 1960 ordinance. Land acquisition negotiations were undertaken (a fact which did not seem to loom large in the decision), but efforts to complete the acquisition of the field were frustrated and, in early 1965, the county began the process of (i) terminating its interest in the field, (ii) rescinding the 1960 ordinance and (iii) deleting the field from the general plan. A few months after trial these steps were formally taken. From 1958 (when the consultant's report was authorized) to 1964 (when the plaintiff owner's inverse condemnation action was filed), the owner was constantly frustrated in his efforts to develop the subject land; officials told him the land was "frozen" until the needs of the field were known and that the county fully intended to purchase the land.

The trial court found, and the appellate court agreed, that the *cumulative* effect of the 1960 ordinance, the rezoning and the adoption of the general plan was a "taking" as of the date of adoption of the general plan. The implication of the trial and appellate courts' decisions is that, standing alone, *none* of the three enactments gave rise to the inverse condemnation action. So interpreted, *Peacock* may be a retreat from *Sneed* (which was cited with approval). The "taking" was, as the court noted and Messrs. Clark and Kidman emphasize, virtually the "fee," not a mere "avigation easement" as in *Sneed*; perhaps the greater quantum of the acquisition arose from the acts of the county officials, rather than flowing directly from the enactments. Both the *Sneed* ordinance and the 1960 ordinance in *Peacock* were enacted pursuant to the Airport Approaches Zoning Law,³¹ although the latter was only an "interim study" ordinance; the A-1-B rezoning was pursuant to the general zoning power. Except as to the interim nature of the 1960 ordinance, such distinctions would appear unimportant, and it is difficult to see the A-1-B zone enactment, standing alone, as being less an acquisition than the ordinance in *Sneed*. In fairness to the court, it should be noted that it did not expressly state that the zone enactment alone was not a compensable acquisition. The appellate court was content—as it should have been—to affirm the "cumulative" view taken by the trial court.

HFH is a simple downzone case, unaffected by the tangential and other issues raised by the airport cases. The owners contracted to

31. CAL. GOV'T CODE § 50485 *et seq.* (West 1966).

agriculturally zone land for \$388,000 upon the condition that it become commercially zoned. The city so rezoned the land in 1965 or 1966; the sale was consummated. The owners filed a parcel map in configuration appropriate for commercial uses, but installed no improvements. In 1971 the city temporarily rezoned the land as agricultural, as a means of creating a moratorium on intensification of use, all without objection from the owners. The city's 1971 general plan showed land in the area of the subject land as suitable for "neighborhood commercial;" the bulk of surrounding land was shown as "low density residential." In 1972, the owners contracted to sell the land for \$400,000, conditioned on commercial zoning. The city reclassified it, instead, for single-family residential use. As such, the subject land had a value of \$75,000. The trial court sustained a demurrer without leave to amend to a cause of action in inverse condemnation, from which ruling appeal was taken.

The court's principal holding was, citing *Morse*, that inverse condemnation does not lie in zoning actions in which reduction of value is the only adverse effect. Society should no more pay for the downzoning than it should for a losing sweepstakes ticket, said the court. Rather than that analogy, the author would prefer the argument that since the city got no part of the value increase occasioned by the upzoning, it should pay nothing for the loss of value caused by the downzoning.

In a footnote discussion, the court properly distinguished *Sneed* and *Peacock*. The former was characterized as involving a zoning ordinance creating an actual public use of property, *while the latter was stated to be an example of "inequitable precondemnation actions."*³² The leading case in that area is an eminent domain decision, *Klopping v. City of Whittier*,³³ where the city announced that it would acquire the plaintiff's land, then unreasonably delayed the proceedings; it was held that plaintiff's damages could include value decline attributable to the precondemnation actions of the city. An earlier invalidation case, *Kissinger v. City of Los Angeles*,³⁴ further illustrates the inequitable precondemnation actions doctrine. There the city reclassified land from R-3 to R-1. Spot zoning,

32. *HFH, LTD. v. Superior Court*, 15 Cal. 3d 508, 517, n.14, 542 P.2d 237, 243, n.14, 125 Cal. Rptr. 365, 371, n.14 (1975).

33. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

34. 161 Cal. App. 2d 454, 327 P.2d 10 (1958).

procedural inadequacies and vested rights (the owner had started construction of apartments on part of the land, prior to the down-zone enactment) were the bases of the invalidation. However, the court recognized that the clear purpose of the enactment was to depress the land value in order that it might be acquired for airport purposes at the lower price.

While condemnation and negotiated acquisition was contemplated and begun by the county in *Peacock*, one reading the decision has to conclude that was not a reason for the district court's view that a taking had occurred. For the Supreme Court to say, as it does, that *Peacock* is an example of downzoning rising to a taking only because it represents "inequitable precondemnation actions" is inexplicable, unless it was trying to dilute *Sneed*.

Hopefully, the decision will not be applied to the zoning enactment that permits only uses which are commercially infeasible. The court reserved the question of a zoning regulation which "forbade substantially *all* use of the land in question" (emphasis in original),³⁵ but one cannot equate the permitting of only commercially infeasible uses with the barring of substantially all uses.

Perhaps the most significant aspect of the decision was the court's reaction to the owner's request that, if the enactment were ultimately invalidated, the court require compensation to be paid for the period the enactment remained on the books. Messrs. Clark and Kidman advanced that proposal in their article, arguing that it would (i) modify the restraining effect *Peacock* will have on future land use regulation and (ii) properly compensate a landowner for the temporary loss suffered during the existence of an invalid land use enactment.

Such compensation, the court emphasized, could not be predicated on a "taking;" that issue had been resolved in the prior pages of the opinion. It could not be predicated on tort law; recognized immunity applies to legislative or administrative discretion. That left only a redefinition of "the state and federal constitutional requirements of just compensation; . . ." legislative action, not court decision, would have to provide the redefinition.³⁶

E. CONCLUSION

There have been, and will continue to be, few progeny of *Sneed*. The failure of the district court, in *Peacock*, to affirm that the

35. *HFH, LTD. v. Superior Court*, 15 Cal. 3d 508, 518, n.16, 542 P.2d 237, 244, n.16, 125 Cal. Rptr. 365, 372, n.16 (1975).

36. *Id.* at 521, 542 P.2d at 246-47, 125 Cal. Rptr. at 374-75.

downzoning, alone, constituted a compensable taking, and the Supreme Court's characterization of *Peacock* as an "inequitable precondemnation action" case, point to a narrow construction of the precepts enunciated in *Sneed*. Inequitable precondemnation actions aside, the California courts, before a land use enactment (as we have used that term) will be held to constitute inverse condemnation, will require an "actual" taking for public use. That, in turn, requires (i) an estate or interest in the land which provides a direct benefit to or particular use by members of the public or a public agency and (ii) unequivocal action by government to effectuate that benefit or use. In brief, all of the elements of an eminent domain action, except commencement of litigation by the public entity, must be found to exist. Further, one suspects that if there is any doubt about the existence of either characteristic, the question will be resolved against requiring compensation.