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The Relationship of Just Compensation to
The Land Use Regulatory Power:
An Analysis and Proposal

THOMAS P. CLARK, JR.* and
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The Fifth Amendment to the Constitution of the United States
commands "nor shall private property be taken for public use, with-
out just compensation." These dozen words have produced volumes
of argument, analysis and opinion, the great bulk of which relate
to the "taking" issue. Scholars, lawyers, and judges have been so
intrigued by the question of whether any given governmental act,
which has an impact on private property, is or is not a "taking",
that the consequences of finding a taking have scarcely been exam-
ined. This preoccupation with the "taking" issue has led to careless
use of language and to misconceptions of law. In discussing the
"taking" issue, it has been widely assumed that where there is a
"taking", compensation is required.

Mr. Justice Oliver Wendell Holmes in the famous case of Pennsyl-
vania Coal Co. v. Mahon¹ stated what we think is the correct rule

¹ 260 U.S. 393 (1922).

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respecting the consequences of finding a “taking”. He said that
when the diminution in property value caused by a governmental
action “reaches a certain magnitude, in most if not all cases there
must be an exercise of eminent domain and compensation to sustain
the act.” A governmental act which results in a taking cannot
stand unless there is compensation as required by the fifth amend-
ment. Otherwise, it is clear from the holding in the case, the act
must be declared unconstitutional.

While the rule was correctly stated in Pennsylvania Coal, impre-
cise use of language in other decisions has led to confusion. In
Goldblatt v. Town of Hempstead, New York, the Supreme Court
said “this is not to say, however, that governmental action in the
form of regulation cannot be so onerous as to constitute a taking
which constitutionally requires compensation. Pennsylvania Coal
Co. v. Mahon.” While this statement in Goldblatt is not neces-
sarily at odds with the rule from Pennsylvania Coal, it certainly
implies that where a taking is found, compensation will be required.

A recent California court of appeal decision carried this implica-
tion to its logical conclusion. In HFH, Ltd. v. Superior Court, a
City of Cerritos ordinance down zoned certain property from com-
mercial to residential, thereby reducing its value from $400,000.00
to $75,000.00. The trial court dismissed a cause of action in inverse
condemnation for failure to state a cause of action. In reversing,
the court of appeal stated:

We do hold that in certain appropriate cases, even a valid exer-
cise of the police power can invoke the application of the principle
of inverse condemnation.

Petitioners here have adequately alleged that the City’s rezoning
of the property in question amounts to a ‘taking’ or ‘damaging’ for
public use for which compensation must be paid. Their complaint
thus states a cause of action for inverse condemnation . . .

Notwithstanding the purported “holding” in HFH, Ltd. that even the valid
exercise of police power may constitute compensable takings, the Court
found facts suggesting that the city’s down zoning was “arbitrary and dis-
criminatory” (41 Cal. App. 3d at 916, 116 Cal. Rptr. at 442). It necessarily
follows that the zoning regulation was an invalid exercise of police power
or a “taking”. Conceptually, these issues presented in the HFH, Ltd., differ
very little from those in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926),
the major distinction being that Euclid involved initial zoning and HFH,
Ltd., a re-zoning. We believe that in light of numerous authorities ruling
that a landowner has no vested right in existing zoning this distinction
has no significant weight. Miller v. Board of Public Works, 195 Cal. 477,
234 P. 381 (1925); Wheat v. Barrett, 210 Cal. 193, 290 P. 1033 (1930); Ander-
Our purpose in writing is limited to providing an analysis of major cases with respect to the supposed requirement of compensation for the invalid exercise of police power. Our focus is primarily upon land use cases. Our analysis of decisions of the United States Supreme Court, the courts of California, and other leading jurisdictions reveals that the taking/just compensation clause has been interpreted as a disabling provision. Governmental acts which result in the taking of private property for public use without compensation have been found to be unconstitutional and void. Compensation has not been required because such acts are nullities. We have found that unless a governmental act affects a confiscation or an actual physical invasion of land for governmental or public purposes, no compensation is required. If a governmental act does not reach the level of confiscation but nonetheless results in a "taking" of private property for public use without compensation, the sole remedy is invalidation of the government actions.

At the conclusion of our analysis of the cases we propose a possible solution to the difficulties we see in the present state of the law. We recognize that competing policy considerations exist respecting the proper balance between the public need to regulate land use and the desire of private owners to utilize their property in the most economic manner.

I. Supreme Court Cases

In *Pumpelly v. Green Bay Co.*, private property had been flooded by the back water of a dam constructed pursuant to a Wisconsin statute. It was argued that there had been no taking within the meaning of the Constitution and that the damage was merely a consequential result of the state's power to improve a navigable waterway. The Supreme Court held that the landowner was entitled to compensation even though his title had not been disturbed. The property, however, had been rendered valueless by governmental action which amounted to physical invasion.

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7. *Son v. City Council*, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964). Even if there was a "taking" we agree with Justice Fleming's dissent in HFH, Ltd. that the court's conclusion, that a cause of action in inverse condemnation had been stated, was error.

7. *Son v. City Council*, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964). Even if there was a "taking" we agree with Justice Fleming's dissent in HFH, Ltd. that the court's conclusion, that a cause of action in inverse condemnation had been stated, was error.

7. *Son v. City Council*, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964). Even if there was a "taking" we agree with Justice Fleming's dissent in HFH, Ltd. that the court's conclusion, that a cause of action in inverse condemnation had been stated, was error.

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80 U.S. 166 (1871).
Sixteen years later, in Mugler v. Kansas, the United States Supreme Court specifically limited Pumpelly to situations where there is a “physical invasion” of private property and a “practical ouster” of possession. In Mugler, a beer brewery, having no alternative use, became valueless when the state prohibited the manufacture, distribution or sale of alcoholic beverages. The alleged damage to property was found to be incidental to the accomplishment of a valid state objective. Accordingly, the Court held that there was no compensable taking.

Mr. Justice Harlan, speaking for the Court, rejected the landowner's contention that the doctrine of the Pumpelly case required compensation.

The question in Pumpelly v. Green Bay Co. arose under the State's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals, and safety of the people. That case, as this court said in Transportation Co. v. Chicago, 99 U.S. 642, was an extreme qualification of the doctrine, universally held, that 'acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him a right of action. It was a case in which there was a 'permanent invasion of the real estate of the private owner, and a practical ouster of his possession.' His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.

After distinguishing Pumpelly, the Court clearly and unequivocally held that a valid exercise of the police power cannot amount to a constitutionally compensable taking.

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.

Moreover, the police power must not be “burdened” with requirements of compensation. In this regard, Justice Harlan stated:

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9. Id. at 668.
10. Id. at 668-69 (Emphasis added).
The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.11

According to Justice Harlan, there is a difference in kind between the police power and eminent domain, not a difference in the degree of regulation. In his view, a valid exercise of police power restricting the use of property required no compensation. Eminent domain alone raised the compensation issue. Thus, use restrictions, even total use prohibitions, were valid without compensation if pursuant to a valid police power objective.

According to Mugler, the validity of police power objectives is a question of substantive due process and not just compensation.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends [public health, morals and safety] is to be accepted as a legitimate exertion of police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund Cases, 99 U.S. 718, the courts must obey the Constitution rather than the lawmaking department of government . . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palatable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.12

Several years later, the United States Supreme Court precisely defined the substantive due process analysis as it relates to the police power in Lawton v. Steele:13

To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.14

Thus, before the turn of the century, the United States Supreme Court had defined the analytical limits of the police power and had precluded the use of "compensation" to remedy an unconstitutional exercise of that power. Even though confusion and misconception

11. Id. at 669 (Emphasis added).
12. Id. at 661.
13. 152 U.S. 133 (1894).
14. Id. at 136-37.
reign where the taking issue is concerned, these principles have been consistently affirmed.

The Holmes decision in Pennsylvania Coal is responsible for much of the confusion. Justice Holmes suggested that results should not turn on the characterization of state action as being pursuant to either the eminent domain power or the police power. Pennsylvania Coal Co. v. Mahon. Although there is broad practical overlap between the Harlan position as enunciated in Mugler v. Kansas and the Holmes position articulated in Pennsylvania Coal, the differences in approach are significant.

The Pennsylvania Coal case was born of the physical phenomena known as “subsidence” which is caused by the removal of anthracite coal from beneath the earth’s surface. The surface tends to collapse when its support is thus removed causing great damage to structures on the surface as well as water, sewer and gas lines running under the streets.

The coal companies had owned much of the land in the anthracite region but had sold parts of it, retaining the mineral rights and extracting from the buyer a waiver of the right to recover for damages from subsidence. However, in 1921, the Pennsylvania legislature enacted the Kohler Act prohibiting coal mining conducted so as to cause subsidence which might damage virtually any public or private structure on or beneath the earth’s surface. Later the same year, H. J. Mahon received notice from Pennsylvania Coal that mining beneath his home had reached a point where subsidence would result in the near future. Mahon sought to enjoin mining beneath his property on the ground that such activity would violate the Pennsylvania anti-subsidence statute. The coal company responded that the act was unconstitutional in that (1) it impaired the waiver of action provision of the land sales contract, and (2) took property for a public purpose without compensation by depriving the company of its mining rights.

Many courts and legal commentators have taken the questionable position that the Court disregarded the contract question and disposed of the case on the “taking” issue. Even though Justice Holmes discussed in some detail the protections afforded by the fifth and fourteenth amendments to the United States Constitution, the discussion was probably dictum and was at most an alternative holding. Following the often cited diminution in value analysis,

15. 260 U.S. at 415.
16. Id. at 412-13.
17. F. Bosseman, D. Callies and J. Banta, The Taking Issue 243-44 (1973) [hereinafter cited as the Taking Issue] points to a letter from Jus-
Justice Holmes stated as follows:

But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.\(^{18}\)

Notwithstanding, Justice Holmes' analysis of the "taking" issue, the opinion offered no indication that just compensation would be available as an alternative remedy to equitable relief from the application of an unconstitutional regulation. Thus, even under Justice Holmes' analysis, when a regulation amounts to a "taking" because it goes "too far" it is unconstitutional and cannot be applied. To assert a contrary position would create the anomalous position of declaring that a governmental entity cannot enforce a particular regulation because it is unconstitutional, but if it chooses to enforce the unconstitutional regulation it must pay for diminution in value caused thereby. This position is not only legally untenable but also subverts the statutory framework relating to the process of acquisition by eminent domain.

Nonetheless, many courts have seized upon the Court's comment that "if regulation goes too far, it will be recognized as a taking" to support the proposition that the distinction between eminent domain and the police power is a difference in the degree and not a difference in the kind of regulation. These same courts apparently assume that if the degree is great there is not only a "taking" but compensation may also be required.

Lest any confusion be created by the perhaps unfortunate language of Justice Holmes, the Court soon reaffirmed the principles of Mugler, at least with respect to the land-use regulatory power, in Euclid v. Ambler Realty Co.\(^{19}\) The taking issue was squarely presented by a real estate developer. The per acre value of his tract fell from $10,000 to $2,500 when it was zoned to seriously restrict the industrial use previously contemplated for the site.\(^{20}\)

\(^{18}\) 260 U.S. at 416 (Emphasis added).
\(^{19}\) 272 U.S. 365 (1926).
\(^{20}\) Id. at 384.
The Court declined to determine whether this reduction in value was sufficient to constitute a taking under the asserted Pennsylvania Coal doctrine. Rather, the Court upheld the zoning ordinance as a valid exercise of the police power without reaching the taking issue per se. It is interesting to note that Mr. Justice Holmes joined in this decision.

Numerous police power objectives were cited as being promoted by the zoning ordinance. The Court then fell back on the presumption of valid legislative enactment.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.\(^{21}\)

This is unmistakably the substantive due process standard: the Pennsylvania Coal case did not preempt the Mugler approach. The Court ignored the diminution in value and focused entirely upon the validity of the police power objectives.

The opposite result on similar reasoning was reached in Nectow v. City of Cambridge,\(^{22}\) where a plot of land was zoned for residential use even though surrounded by industrial uses. As in Euclid, the Court noted the serious diminution in value but decided the case, as it should have, on the basis of substantive due process. The particular zone involved was found to be arbitrary and unreasonable in that it was not indispensable to the general plan embodied in the zoning ordinance as a whole. Thus the ordinance was found to be unconstitutional as applied to the plaintiff's property and its enforcement enjoined. As in Pennsylvania Coal, the regulation was invalidated on constitutional grounds and compensation was not required.

After the 1920's, the Supreme Court fell silent with respect to land-use controls and the taking issue. In 1962, this silence was broken by Goldblatt v. Town of Hempstead, New York.\(^{23}\)

In Goldblatt, the Court sustained an ordinance which effectively prohibited the defendants from further utilizing their land for sand and gravel mining, a use to which it had been long devoted. The prohibition was accomplished by outlawing quarrying operations below the water table, a point already passed by defendants.

\(^{21}\) 272 U.S. at 395.
\(^{22}\) 277 U.S. 183 (1928).
\(^{23}\) 369 U.S. 590 (1962).
The case has been cited for the proposition that an otherwise valid ordinance is not unconstitutional because it deprives property of its beneficial uses. However, even a cursory examination of the opinion reveals this to be in error. The ordinance was upheld merely because of the presumption in favor of statutory validity. The Court went to great lengths to emphasize that the record was devoid of the input necessary to either uphold or condemn the ordinance. Although the ordinance prohibited the use to which the property previously had been devoted, there was no finding with respect to the availability of alternative uses. Conversely, the town failed to produce evidence to show that the ordinance was reasonably calculated to promote the public health, safety, morals or welfare.

More significantly, the Court cites both Mugler and Pennsylvania Coal, with approval. Given the apparent inconsistency between the two cases, one would hardly expect that both doctrinal approaches could survive side by side. Mugler announced that a valid police power restriction on use of property cannot be a taking requiring compensation, so long as the owner remains in possession and control of his property. Pennsylvania Coal announced that a severe private property injury may amount to an attempted unconstitutional "taking"—no mention was made of the just compensation question. Goldblatt implicitly resolves the inconsistency.

Justice Clark, speaking for the Court, initially noted that the ordinance completely prohibits the beneficial use to which the property has previously been devoted but warned that such characterization is not determinative of whether or not the ordinance is unconstitutional.

It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.24

The Court then cites Mugler v. Kansas for the proposition that the constitutionality of an exercise of the police power must be determined by substantive due process standards and not by the principles of eminent domain. After agreeing with Mugler that the difference between the police power and the power of eminent domain

24. Id. at 592 (Citations omitted).
is one of kind and not degree, the Court then apparently qualifies this principle by citing Pennsylvania Coal for the proposition that, "governmental action, in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." 25 Again, the inconsistency appears but is quickly clarified by the Court when Justice Clark redefines the constitutional limits of the police power:

To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance. 26

It is evident that the diminution in value test announced by Pennsylvania Coal is merely one element in the substantive due process analysis, and not the dispositive factor in resolving the question of compensation. The peripheral relationship of the diminution in value test to the validity and compensability of an exercise of the police power is re-enforced by the Court's statement that, "although a comparison of values before and after is relevant, see, Pennsylvania Coal Co. v. Mahon, supra, it is by no means conclusive." 27

Accordingly when a land-use regulatory manifestation of the police power is challenged, the threshold question is whether the challenged regulation meets the reasonable means/legitimate end test required by the due process clause of the Fourteenth amendment. In evaluating the reasonableness of the means employed, one factor for consideration is the loss in value suffered by the landowner by virtue of the regulations. If the regulation meets the substantive due process standards, notwithstanding a severe diminution in value, the exercise of the police power is, a priori, valid; a compensable "taking" cannot occur because the taking issue turns on the same substantive due process standards. If, on the other hand, the challenged regulation fails because either the means employed are unreasonable or the end sought is beyond the authority of the governmental entity, the exercise of the police power is constitutionally infirm and, therefore, cannot be enforced. Courts have alternatively couched the legal conclusion of unconstitutionality in terms of "denial of due process" and a "taking without just compensation". Whatever the legal conclusion, the remedy of just compensation is inconsistent with the due process analysis leading thereto. Requiring compensation would explicitly sanction the enforcement of an exercise of the police power, whether or not constitutionally valid.

25. Id. at 594.
26. Id. at 595 (Emphasis added).
27. Id. at 594.
An illegal exercise of the police power can never amount to a constitutionally compensable taking.

II. NEW YORK AND PENNSYLVANIA

Two recent decisions, in Pennsylvania and New York, have concluded that equitable relief only, is available to remedy an unconstitutional exercise of the police power, notwithstanding the threshold determination that the constitutional infirmity is grounded on the "taking" clause.

In Gaebel v. Thornbury Township, the landowner alleged that the so-called "down-zoning" of his property required compensation because of the severe restriction in use. The Court found the following language from, In White's appeal, dispositive of the landowner's claim for damages in inverse condemnation:

Police power should not be confused with that of eminent domain. Police power controls the use of property by the owner for the public good its use otherwise being harmful, while eminent domain and taxation take property for public use. Under eminent domain, compensation is given for property taken, injured or destroyed, while under the police power no payment is made for diminution in use, even though it amounts to an actual taking or destruction of property . . . .

If . . . there is doubt as to whether the statute is enacted for a recognized police object, or if, conceding its purpose, its exercise goes too far, it then becomes the judicial duty to [investigate and] declare the given exercise of the police power invalid. . . .

Accordingly the court held that the property owner's "exclusive recourse is to challenge the constitutionality of Thornbury's zoning ordinance . . . ."

Likewise, in Fred F. French Investing Co., Inc. v. City of New York, the landowner also claimed damages in inverse condemnation by virtue of "down-zoning." The Court held that the re-zoning of the landowner's property was an unconstitutional exercise of the police power but refused to permit the alternative remedy of "just compensation." The Court followed the "taking calculus" established by Mugler v. Kansas, in reasoning that:

30. 303 A.2d at 59 (Emphasis added).
31. Id. at 60.
If the change in the use of the property is incidental to a valid exercise of the sovereign's police powers dictated by sound considerations of public safety, health and welfare, then it is a constitutionally privileged act for which no compensation need be paid. *(Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205.)*

In contrast, if the challenged police power exercise is found constitutionally infirm, the only available remedy, in the absence of physical appropriation, is to restore the property to the zoning classification existing prior to the unconstitutional act.

**III. CALIFORNIA CASES**

Some courts have assumed, without analysis, that an invalid exercise of the police power may require just compensation. These courts have looked solely to the value diminution principle discussed by the court in *Pennsylvania Coal*, to determine whether a compensable taking has occurred. The California Supreme Court however, has consistently avoided such blind adherence to a doctrine that cannot and should not be applied to land-use regulations.

Most prominent among these cases are *Consolidated Rock Products Co. v. City of Los Angeles*, and *McCarthy v. City of Manhattan Beach*. In *Consolidated Rock*, the Court distinguished *Pennsylvania Coal* by stating as follows:

> It was decided before the principles of comprehensive zoning were established and differs from our case additionally in that the mining was to be done underground and the persons to be benefited by the legislation were grantees as to whom the right to mine had been expressly reserved.

In *McCarthy*, the Court based the distinction on the contractual waiver:

> While plaintiffs recognize that some value incident to property must yield to the police power, they argue that the zoning restriction as applied to their beach land goes beyond mere regulation and constitutes an unwarranted interference with the use of their property so as to exceed the scope of permissible zoning. They cite in particular the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 [43 S. Ct. 158, 67 L. Ed. 322]. But as there stated, 'the question depends upon the particular facts.' That was an action between two private parties, the statute involved admittedly destroyed previously existing rights of property and contract as reserved between the parties, and the propriety of the statute's prohibition upon the single valuable use of the property for coal-mining operations was considered in relation to special benefits to be gained by an individual rather than by the whole community.

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33. Id. at 765 (Citations omitted).
34. Id. at 768.
36. 41 Cal. 2d 879, 264 P.2d 932 (1953).
37. 57 Cal. 2d at 528, 370 P.2d at 350, 20 Cal. Rptr. at 646.
In those circumstances application of the statute to the property was held to effect such diminution in its value as to be unconstitutional and beyond the legitimate scope of the police power.\textsuperscript{38}

The California courts have consistently adhered to a strict \textit{Mugler v. Kansas} approach to the compensation issue. Where a proper exercise of the police power injures private property no compensation is required. If the police power exercise is found invalid, the only remedy available is equitable relief. Only in the event that (1) title is taken, or (2) property is otherwise invaded, or (3) the injury results from an intentional effort to reduce the value of the property in the event of future acquisition by eminent domain, will compensation then be a proper remedy.

The taking issue aside, three Court of Appeal decisions have been cited as adding an additional exception to the no compensation rule we have outlined herein.\textsuperscript{39} It seems clear that compensation is required where an attempted police power exercise results in a physical invasion or appropriation.\textsuperscript{40} These land-use cases have been thought to add precondemnation property value manipulation as an exception to the no-compensation rule. Our analysis shows this to be error. At the outset it must be noted that one of the three did not require compensation and the other two were physical invasion cases.

In \textit{Kissinger v. City of Los Angeles}, the plaintiff land developer had applied for and received building permits and had commenced construction of apartment buildings on property situated one mile from the southerly end of the San Fernando Airport. The Los

\textsuperscript{38} 41 Cal. 2d at 890-91, 264 P.2d at 938-39.


\textsuperscript{40} A student comment in the Stanford Law Review [Fulham, Scharf, \textit{Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance}, 26 STAN. L. REV. 1439 (1974)] has difficulty fitting \textit{Bydlon v. United States}, 175 F. Supp. 891 (Ct. Cl. 1959) into this exception. That case, however, involved a regulation which cut off access to certain private property. Access is an essential property right and the regulation took the property as surely as if the government had constructed a fence around the private property with a sign saying "keep out property of the United States." While the physical invasion present in \textit{Pumpelly} was absent in \textit{Bydlon} the distinction doesn't seem persuasive and we think the case falls into this category.
Angeles City Council, upon being informed by one of its members of this development "within the area that will shortly be acquired for airport purposes",41 requested the Board of Airport Commissioners to "consider condemning this property in order that the same may be acquired on the basis of its present value as vacant land."42 Two days later the City Council adopted an emergency ordinance "down zoning" the property from R-3 to R-1 and the plaintiff's construction was curtailed. The new zoning reduced the value of the property from $114,000 to $48,000. The City Council justified this action on the ground that it was to prevent "an undue congestion of population"43 in the area and thus expose fewer people to the hazards arising from operation of the airfield.

The Court held that the new zoning ordinance was invalid. Three grounds were specifically set forth for the invalidation and a fourth was suggested.

First the Court found that the zoning ordinance was illegal spot-zoning.44 Looking to the police power objectives set forth by the City to justify the zoning, the court found that the hazards arising from the operation of the airfield were equally applicable to nearby properties which had been allowed to develop in the manner in which plaintiff had sought to develop. Further the Court found that the cited hazards had existed at the time the property was originally zoned R-3 and that there had been no change in circumstances to justify a down-zoning or to justify a variation between the zoning upon plaintiff's property and the properties nearby. Therefore the ordinance constituted illegal "spot-zoning" and was invalid.

A second ground for invalidation of the down zoning ordinance was that plaintiff had acquired a vested right to construct the multiple dwellings. He had commenced work on the construction pursuant to building permits granted by the City prior to the zoning change. The Court said:

Plaintiffs thus had a vested right to construct the multiple dwellings for which the permits had been issued, and the ordinance if enforced as to these lots would result in the taking of plaintiff's property without compensation and without due process of law.45

It should be well noted that the fact that the ordinance, if enforced, would result in the taking of plaintiff's property without compen-

42. Id.
43. Id. at 458, 327 P.2d at 14.
44. Id. at 460, 327 P.2d at 15.
45. Id. at 463, 327 P.2d at 16-17.
sation did not require the payment of compensation. Rather the fact of taking without compensation was a ground for invalidating the ordinance. Enforcement of the ordinance would have an unconstitutional result. Therefore the ordinance was void.

The third ground set forth for an invalidation of the ordinance was the failure of the City to follow the procedures outlined in its own Charter for the enactment of rezoning ordinances. The City had failed to refer the rezoning to the Planning Commission for investigation and public hearing. Therefore the rezoning had not been properly enacted and was invalid.

The case of *Kissinger v. City of Los Angeles* has been cited for a fourth proposition: a harsh zoning regulation calculatedly designed to decrease future condemnation costs will result in a de facto taking requiring compensation. *Klopping v. City of Whittier.* A careful reader of the *Kissinger* opinion, however, searches in vain for such a statement. The Court did find, "that the purpose of the ordinance was to depress the value of plaintiffs' property in order that it might be acquired for airport purposes at such depressed value is crystal clear from the evidence." The Court, however, made no attempt to rest its decision on this ground. The comment comes in the context of the Court's discussion of the illegal spot-zoning aspects of the rezoning ordinance in question. Even if the Court rested its decision upon the precondemnation aspect of the rezoning ordinance, no compensation was due on account of this "bad motive."

When examined in context, the *Kissinger* court's finding, that the purpose of the rezoning ordinance was to restrict increases in the property value, relates to the validity of the police power exercised. The Court found that there was not a reasonable relationship between the rezoning and the police power objective cited by the City. The Court then turned to the apparent real purpose behind the ordinance and found that that purpose could not support the ordinance. The unstated conclusion of the Court is that manipulation of property values in contemplation of future condemnation is not a valid police power objective. An ordinance enacted pursuant to such objective is therefore invalid. This invalidity does

46. 8 Cal. 3d 39, 46, 500 P.2d 1345, 1351, 104 Cal. Rptr. 1, 7 (1972).
47. 161 Cal. App. 2d at 462, 327 P.2d at 16.
not require compensation but, rather, prohibits enforcement of the ordinance.

A second California airport zoning case illustrates how a zoning ordinance can be the basis of an inverse condemnation suit a la Pumpelly v. Green Bay. In Sneed v. County of Riverside,48 the plaintiff alleged that by reason of aircraft operations over his property and a “zoning” ordinance the County took from him an air navigation easement over approximately 60 acres of his property. The alleged easement ranged from 4 feet in height at that part of the property closest to the airport to a height of 75 feet farthest away. The height restriction ordinance precluded plaintiff's existing use of the land as a thoroughbred race horse breeding ranch and reduced the value from $550,000 to $225,000.

Two factors respecting the Sneed case should be noted carefully. First the County of Riverside was not only the zoning authority but also owned and operated the airport involved. Secondly, the airport was in use and the airspace over plaintiff's property was being used in aircraft takeoff and landing maneuvers prior to and at the time of the suit.

The case was on appeal from a ruling of the trial court dismissing the complaint without leave to amend pursuant to the defendant's demurrer. The issue before the Court, then, was whether the complaint stated a cause of action for inverse condemnation. The plaintiff set forth two bases upon which compensation was allegedly due: first, that the County obtained an easement through the plaintiff's airspace by virtue of the height restriction ordinance; second, aircraft repeatedly invaded his airspace at the direction of defendants' flight control employees. The Court of Appeal found that a cause of action in inverse condemnation had been stated.

The complaint did not allege that compensation was due by virtue of the adverse effect that the zoning ordinance had upon plaintiff's property values. Nor did the complaint allege that the zoning was an attempt to influence property values in contemplation of future eminent domain action.49

The Court succinctly stated the issue presented on appeal:

The basic controversy is whether the Riverside ordinance is in reality a height limit ordinance authorized under the police power or whether it takes an air easement over plaintiff's property without payment of compensation therefor.50

48. See supra note 39.
49. Like Kissinger, Sneed was cited for such a proposition in Klopping v. City of Whittier, 8 Cal. 3d at 46, 500 P.2d at 1351, 104 Cal. Rptr. at 7. That issue, however was not before the court in Sneed and was not discussed by the court in its opinion.
50. 218 Cal. App. 2d at 208, 32 Cal. Rptr. at 319.
The Court determined that building restrictions near airports were different in kind from the more common building height regulations.

We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulations of buildings and zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass of the area above the restricted zone.\(^5\)

The Court then discussed the major cases in the United States which have held that an airport operator is liable for the easement taken by repeated aircraft maneuvers over the property adjacent to an airport runway. The Court in a lengthy quote from the leading case of *Ackerman v. Port of Seattle*,\(^5\) stated a major distinction between non-compensable police power exercises and compensable exercises of eminent domain.

But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable.\(^5\)

The *Sneed* case stands for the limited proposition that a cause of action in inverse condemnation is stated where the complaint alleges that an airport operator has caused aircraft to invade the airspace over an adjacent landowner's property and where the airport operator, through its zoning power, has attempted to take a license to permit such invasions without the payment of compensation. The cases cited by the Court support the proposition that repeated invasion of airspace by lowflying aircraft is sufficient to state a cause of action in inverse condemnation against the airport operator who directed such flights. The zoning aspect of the case was, therefore, superfluous to the stating of a cause of action. The zoning ordinance, however, clearly had the effect of dedicating the airspace over plaintiff's property to public airport use. Thus, the County of Riverside was physically invading plaintiff's property just as was done in *Pumpelly v. Green Bay Co.*

In *Peacock v. County of Sacramento*,\(^5\) a lower court finding of inverse condemnation was upheld. The case involved a parcel of

51. Id. at 209, 32 Cal. Rptr. at 320 (Emphasis added).
52. 55 Wash. 400, 348 P.2d 664 (1960).
53. 218 Cal. App. 2d at 211, 32 Cal. Rptr. at 321.
54. See supra note 39.
land located near the end of a private airport runway. The County had been contemplating acquisition of the airport as well as the land nearby for a clear air space zone at the end of the runway. A height zoning ordinance was adopted which effectively precluded plaintiff's plans for placing a residential development on the land and eliminated all other uses to which the land might have been adapted. After denying building permits and delaying for a period of nearly five years, the County abandoned the airport acquisition plan.

The Court of Appeal summarized the trial court's findings of fact and affirmed the trial court's conclusion that compensation was required for the de facto taking of plaintiff's land. The Court of Appeals was content to recite the County's contentions on appeal and knocked them down like strawmen. For this reason there is no cogent rationale for the Court's decision set forth in the opinion. However, by carefully reading the trial court findings, as set forth by the Court on appeal, one can ascertain the basis for the decision and harmonize it with prior California cases.

On its face, the Peacock decision may be said to stand for the proposition that an invalid attempt at police power regulations can require compensation. It is clear, however, that the case involved actual physical invasion of plaintiff's air space by aircraft maneuvers in connection with takeoffs and landings at the airport.55 Thus the case falls within the Sneed rule. There was, in addition, a strong indication of a pre-condemnation seizure of plaintiff's property.

In May of 1960, the County imposed restrictions upon plaintiff's property which prevented all beneficial uses. The restrictions were part of an interim study ordinance and the trial court sustained their validity during the period while the County was studying the airport acquisition and related land use policies. In November of 1963, however, the study stage ended and the County reached a decision to proceed with the airport plan. Nevertheless, the restrictions on plaintiff's land were continued without a formal exercise of eminent domain. The trial court found that at the point in 1963 when the general plan was adopted reflecting the airport acquisition and attendant condemnation plans, the County had effectively condemned plaintiff's land for public use.

55. Throughout the life of the ordinance the airport began and continued operations as a public facility by means of a lease—leaseback agreement entered into between the private owners of the airport and the county: 271 Cal. App. 2d at 848, 77 Cal. Rptr. at 395. This case, like Sneed, falls within the physical invasion rule and need not be distinguished as was attempted in 26 STAN. L. REV. at 1449.
A very key finding should be noted. Even though the airport was privately owned, the County entered into a lease-leaseback agreement with the private owner. Thus the County acquired a public interest in the airfield and said field was operated as a public facility. Thus, without going further, a claim for inverse condemnation as in Sneed was stated. The public air facility caused aircraft used by the public to invade the airspace over the plaintiff's land. This invasion was supplemented by the County's ordinance which precluded building upon the land and thereby effectively took a license for such invasion. The Court of Appeal found the Sneed decision to be directly applicable. The Court quoted a discussion of the Sneed case in Morse v. The County of San Luis Obispo:

In Sneed, the County of Riverside enacted an ordinance imposing height restrictions on all structures on certain property, the effect of which was to create an easement in the airspace over plaintiff's property for use as an approach zone to the county airport.

* * *

Large numbers of aircraft took off and landed at the airport by flying at low altitudes over his property. The basic issue, according to the court, was whether the Riverside ordinance was a height-limit ordinance authorized by the police power or whether in reality it created an air easement over plaintiff's property without the payment of compensation. After distinguishing between municipal regulations which restrict or destroy certain rights indigenous to private ownership of property (non-compensable losses) and regulations which transferred those rights to public enjoyment (compensable takings), the court concluded that a regulation which lowers the height of existing buildings within the approach patterns of an airport contemplates a public use of airspace above private land, in effect an air easement, for which compensation must be paid . . . .

The Court went further in Peacock, however, by finding the taking of a fee simple rather than an easement. This result seems predicated upon the fact that the ordinance in Peacock precluded all uses.

Another major factor which explains the Peacock decision is the County's avowed purpose to take plaintiff's land by eminent domain. The trial court noted that one purpose of the interim study restrictions was to preclude an increase in the value of plaintiff's property. However, the motivation to manipulate property

57. 271 Cal. App. 2d at 861, 77 Cal. Rptr. at 402-03 (Emphasis added).
values by the use of zoning regulations does not appear to have been central to the trial court's decision.

The rationale seems clear. The County officials had repeatedly assured plaintiff that his land would be purchased by the public. When these plans became firm, that is on the date when the general plan was adopted, plaintiff found himself owning land which he could not use for any purpose and which would be condemned by the public at some indefinite future date. The Court quite logically concluded, then, that the seizure of plaintiff's land occurred when the interim study phase of the project ended.

Compensation became due only when the County's intention to take the property by eminent domain became fixed. At that time the Court found that compensation was due, not because of the intention to manipulate property values, but because plaintiff had been effectively denied all beneficial uses of his property. Plaintiff found himself in the same position as if eminent domain had been exercised; he could not use the land and the public was enjoying his airspace. Compensation was due because of a de facto exercise of eminent domain through total use prohibition and invasion of airspace.

The Peacock case is an anomaly because the County abandoned its plans to acquire the airport and released all the restrictions on plaintiff's land. The decision to abandon the plans was not connected with the lawsuit, but was motivated by an independent difficulty encountered in negotiations with the private owners of the airport. Thus even assuming that the Court was correct in its analysis that plaintiff had been denied all use of his property, the denial was only temporary. Yet the County of Sacramento found itself acquiring a fee simple absolute in land for which the public no longer had use. While it may be fair to say that compensation was due to Mr. Peacock for the period in which he was forced to hold his land out of beneficial use, it seems absurd to have required the County to pay for more than it took. In the absence of some special showing that Peacock suffered an irretrievable opportunity loss or that he could make no reasonable use of his land after the restrictions were removed, it seemed that the County should have paid only for his losses occasioned by the temporary use prohibition.

IV. SOME POLICY CONSIDERATIONS AND PROPOSALS

Arguments attempting to establish when compensation ought to

58. 271 Cal. App. 2d at 864, 77 Cal. Rptr. at 404.
be paid for diminution in property value resulting from land use regulations are many and varied. Persuasive policy considerations support each point of view. We feel that the present state of the law is over balanced against the private property owner whose plans may apparently be frustrated at the whim of public agencies which need not bear the burden of paying compensation for losses occasioned by unconstitutional regulations. At the same time, we feel the solution proposed in HFH, Ltd. v. Superior Court, would shift the balance too far against public agencies attempting to regulate the use of private property. We think a more reasonable delineation is possible and desirable.

A landowner who finds his development plans frustrated by a purported police power regulation is quite justified in feeling that some of his property has been taken by the government. The downzoning situation is a rather poignant example of where a landowner finds the value of his property greatly reduced by a governmental action. When the regulations are motivated by environmental consideration, as they are so frequently in the present political atmosphere, the landowner cannot be blamed for feeling that the public ought to share in the costs of preserving the natural environment.

The present state of the law, as we have seen above, does not provide the frustrated landowner with an adequate remedy. If an unconstitutional regulation has been imposed upon his land, his only recourse is to seek invalidation of a purported regulation. He is not entitled to compensation for the costs involved in the delay of his project. All too often the costs of righting the wrong exceed the damage sustained by the wronged.

On the other hand, persuasive arguments exist against any requirement that government must pay for good faith, though mistaken, attempts to regulate private property for the public good. Local governments should not be made guarantors of private property owner expectations. The public treasury is insufficient to pay for all property value diminutions resulting from attempted regulations.

Perhaps the most serious impact of HFH, Ltd. and the supposed holding of Peacock is the chilling effect they might have on future attempts to regulate the use of land. Land use regulation is one
of the most vital functions performed by local government today. As population increases, and desirable land resources diminish, the pressure on local government for development will become even more intense. If legislative discretion is encumbered by burdens such as the decision in *HFH, Ltd.*, our land resources will be unavoidably squandered to the detriment of the public. Faced with the possibility of enormous inverse condemnation damages, local governments may well forgo attempts to regulate the use of private property.

The present state of the law is unsatisfactory in that it allows land use restriction with impunity. Local governments need not fear the possibility of paying for impacts on private property caused by land use regulation. If the regulation is valid, no compensation is due. If the regulation is unconstitutional, the landowner is limited to declaratory relief and may not obtain damages. The *HFH, Ltd.* solution, however, goes too far to correct this imbalance. Not only would the *HFH* "holding" require compensation for damages occasioned by valid land use regulations, but it would also allow an invalid regulation to continue in existence and charge the local government for the damages.

We think a middle ground is more reasonable. No compensation whatsoever should be allowed where the land use regulation imposed is valid. But if a court finds an attempted regulation to be unconstitutional, it should be invalidated. The landowner should also be allowed to recover for the temporary loss he suffered during the operation of the invalid regulation (assuming he took reasonably prompt steps to invalidate the offending regulation). In this manner the property owner could be made whole, and the government would not pay for more than it took.

This proposal raises potentially difficult problems of valuation. It may be that in some instances, because of changed economic situation, the delay occasioned by the invalid land use regulation will irretrievably cost the landowner his opportunity for reasonable development. We think these situations would be rare. In most cases the landowner should be limited to his holding costs and legal fees. The burden would be upon the landowner to establish that his development was imminent and was delayed by the regulation.

We think that it is an unreasonable perversion of the law to allow an unreasonable and unconstitutional land use regulation to continue in existence and to require the local government to pay the damages occasioned thereby. It seems much more rational to invalidate the offending regulation and to require payment for the damage incurred between enactment and invalidation.