Zoning And The Vested Right To Use Property: There ought to be a right!

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There ought to be a right!

INTRODUCTION

It would seem that ownership of real property subject to an existent comprehensive zoning plan would create an interest for the owner in the use of his property. But, there is a substantial conflict between the government's power to take or damage private property for public use (the power of eminent domain) and the government's power to regulate the use of property (the police power). These powers exist at all levels of government, including state, county and municipal, and have a constitutional basis in California.¹ The fundamental distinction between them is that the exercise of eminent domain power requires compensation to the owner, while the exercise of the police power does not. The individual property owner should know when the exercise of government power requires compensation. The answer, however is not clear, nor does it seem fair.

The enactment of the California Government Code § 65860² which

   Sec. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . .
   (Amended Oct. 10, 1911; Nov. 5, 1918; Nov. 6, 1928; Nov. 6, 1934)
Cal. Const. Art. 11 § 7 (West 1973) Counties and cities; ordinances and regulations; authority
   Sec. 7. A county may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.
   (Added June 2, 1970)
   (a) County and city zoning shall be consistent with the general plan of the county or city by *** January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if:
   (i) the city or county has officially adopted such a plan, and
   (ii) the various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs in such a plan.
   (b) Any resident or property owner within a city or a county, as the case may be, may bring an action in the superior court to enforce compliance with the provisions of subdivision (a). . . .

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requires that all zoning laws be consistent with the general plan of a community, the adoption of California Government Code §§ 65553 to 65570\(^2\) which requires governments to plan for open space lands, the adoption of the California Coastal Zone Conservation Commission Act of 1972\(^4\) which creates commissions to protect the environment within 1,000 yards of the California coastline, the enactment of the California Environmental Quality Act, which requires environmental impact reports in order to gain a building permit, and the general sentiment of the people of this state against future growth in local communities has caused a re-evaluation of planning and zoning throughout the state. This re-evaluation has and will cause a severe reduction in the permissible uses of private property under various municipal, county, and state plans. While the majority of the people favor new government planning and rezoning, those property owners who are going to be seriously affected by the government’s exercise of power may suffer great hardship and severe pocketbook losses from the restricting of the use of their property. The power to zone, rezone, and “down-zone” (the reduction of permissible use of property by changing its use or decreasing the use per unit area) is pervasive. The conflicting interests of the owner and the government are both financial. The owner wants compensation for the loss of the use of his property. The government wants to restrict property uses at the lowest cost to the taxpayers.

There would seem to be a fundamental definitional distinction between taking or damaging property or property interests, and regulation of the method and manner in which property is used. By statute taking or damaging is limited to property which is “for a more necessary public use than that to which it has already been appropriated.”\(^6\) Regulation is limited to that which restricts use “to promote the public morals, health, safety, or general welfare.”\(^7\) But consider the way that distinction was described in 1960 by a

(c) In the event that a zoning ordinance becomes inconsistent with a general plan, such zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended.


District Court of Appeal in California:

... the fundamental distinction between eminent domain and the police power is recognized ... The determination depends on whether or not the action is essential or reasonably necessary to safeguard public health, safety, or morals. If the injury is a result of legitimate governmental action reasonably taken for the public good and for no other purpose, and is reasonably necessary to serve a public purpose for the general welfare, it is a proper exercise of the police power to permit the taking or damaging of private property without compensation. If, however, the taking or damaging for the purposes of public health, safety, or morals is not so essential to the general welfare or is not prompted by so great a necessity, it comes within the purview of eminent domain and cannot be justified without proper compensation to the owner.8

This distinction is based on the necessity of the exercise of government power and would define regulation as that taking or damaging which is reasonably necessary or essential. It cannot be said that this case stands for the rule of law in its present status. It is an example of how far afield the courts have gone in defining the power to regulate.9 It further implies that there is something to be taken by the use of the police power.

Since 1926 when the U.S. Supreme Court upheld comprehensive zoning regulations as constitutional in Village of Euclid v. Ambler Realty Co.,10 the power of regulation has expanded at a frightening rate. To avoid the taking arguments before the courts, they have stripped the property owner of his bundle of rights that make up real property ownership. A basic incident to real property ownership is that the owner has a right to use his property. However, the courts have evolved a theory of vested rights, which defines the right to use property as only existing when it is in fact used and that right is limited to the extent of that use in fact.

In the conflict between the power of eminent domain and the police power, the emphasis on the side of the police power has been to expand the validity and scope of government power. On the side of eminent domain, the emphasis has been upon shrinking of property rights to avoid the possibility of taking or damaging. Ex-

9. Arguably under this rule a lot could be appropriated in fee for a school, highway, courthouse, or whatever if found essential and reasonably necessary.
amine how the trends in evolution of this conflict have fared in the courts.

THE CONFLICT

a) The Scope and Validity of Zoning Power

The power to zone and regulate the use of property is spelled out in the California Government Code § 65850:

Scope of power to regulate by ordinance. Pursuant to the provisions of this chapter, the legislative body of any county or city by ordinance may:

(a) Regulate the use of buildings, structures and land as between industry, business, residents, open space, including agriculture, recreation, enjoyment of scenic beauty and use of natural resources, and other purposes.
(b) Regulate signs and billboards.
(c) Regulate location, height, bulk, number of stories and size and use of lots, yards, courts, and other open spaces; the percentage of a lot which may be occupied by a building or structure, the intensity of land use.
(d) Establish requirements for offstreet parking and loading.
(e) Establish and maintain building setback lines.
(f) Create civic districts around civic centers, public parks, public buildings or public grounds and establish regulations therefor.

It should be noted that regulate is the key word throughout the statute. But the scope of that regulation is determined by local government legislative entities, and is conclusive unless the owner can show that the ordinance is unreasonable, arbitrary, discriminatory, oppressive, confiscatory, or interferes with property rights. All these factors make up the general test of the reason-


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In treating the scope of police power the U.S. Supreme Court said in Hadacheck v. Sebastian, 19

It is to be remembered that we are dealing with one of the most essential powers of government,—one that is least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. 20

Consider the statement in Zahn v. Board of Public Works, 21 "The fact that . . . zoning of petitioner's property . . . depreciates its value is not of controlling significance. Every exercise of the police power is apt to effect adversely the property interest of somebody." 22 Thus the courts have permitted legislative determinations to cripple the property owner economically through the use of the police power.

But the power is not unlimited. "Discontinuance forthwith of a non-conforming use which is not a nuisance and which existed when the ordinance was adopted is a deprivation of property without due process of law." 23

In Willkins v. City of San Bernardino 24 where the plaintiff deliberately and willfully built multiple dwelling units on property zoned for single family units, his action was upheld by the trial court because "it would be impractical to use them for single fam-

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22. Id. at 410.
24. Id. at 512, 234 P.2d at 394.
ily dwellings." The trial court was reversed by the California Supreme Court which held, "we cannot say that there was any abuse of legislative discretion in denying plaintiff's requests for rezoning, or that there has been any arbitrary, oppressive or unreasonable application of the zoning ordinance to plaintiff's property . . ." The court did note the restraints on the police power as exercised through zoning,

... [Z]oning ordinances have been held invalid and unreasonable as applied to particular property . . .: 1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances. [citations omitted] 2. Where the restrictions create a monopoly. [citations omitted] 3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance. [citations omitted]. 4. Where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an "island" in the middle of a larger area devoted to other uses, [citations omitted].

However, these restraints are difficult to prove in light of the presumption against them.

Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determination of the legislative body, if there be any reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power.

The burden on the deprived owner is tremendous in asserting his claim against the government for rezoning his property. The test seems to be that if the government asserts any justification that is not totally irrational and illogical, it may regulate the use of Realty with its police power. Under such a test the regulation of property is limited only by the illogic of local government officials and the whims of the voters. The use of property is not entrusted to very safe hands.

Of course, the owner of property who is injured as a result of rezoning of his property must be accorded notice and a hearing.

27. Id. at 341, 175 P.2d at 548-9.
28. Id. at 345, 175 P.2d at 551.
29. Id. at 340, 175 P.2d at 548.
30. Id. at 339, 175 P.2d at 547.
31. Id.; see People's Lobby, Inc. v. Board of Sup'rs of Santa Cruz County, 30 Cal. App. 3d 869, 106 Cal. Rptr. 666 (1973).
before his property may be subjected to the police power. However, the California Supreme Court has recently ruled that notice and hearing requirements do not apply where the property is rezoned by a ballot initiative and not by the legislative branch of the government. But the right to a fair hearing is not the same as a right to a fair result from such hearing. The government is required to grant a hearing, it is not required to listen and weigh the evidence. In practical politics with the scope of the police power as broad as it is, the property owner's probable injury will fall on deaf ears when the majority of the voters assert their desire to restrict the use of that owner's property. The distinction must be drawn between a fair hearing which meets due process requirements for legislative bodies, and a fair use of regulatory power. There does not appear to be any requirement of fairness or equity in defining the scope of the police power. The courts have instead viewed the problem by looking at the validity of the police power and the scope of it, and they have not permitted their own judgment to interfere unless vested rights have actually been injured or the exercise of the police power is totally irrational or unreasonable.

It should be noted that the police power as defined here is the legislative power used by local and state governments. When the power is used by a government agency in a hearing then there is a different standard of review and a different type of proceeding required. The California Supreme Court has recently ruled unanimously that where variances are granted by a zoning agency, "... variance boards like the ones involved in the present case must render findings to support their ultimate rulings [and] ... that when called upon to scrutinize a grant of a variance a reviewing court must determine whether substantial evidence supports the findings of the administrative board and whether the findings support the board's action." Thus in an administrative board action

35. Again the author's cynicism may be unfounded as to government functions, but majority rule is part of our democratic system, and those who are in the greatest number and are most vocal usually rule at such hearings.
a record is required, but the court carefully avoided deciding that a "fundamental vested right" was involved which would allow "an independent judgment in reviewing the evidence" by the court where it "... must find abuse of discretion if the weight of the evidence fails to support the findings." Thus although the effect of a variance and a rezoning may be the same, the method by which it is accomplished determines whether a record is required and what the scope of judicial review will be.

The problem of the use of the police power has perplexed many commentators. In trying to explain the use of police power Professor Sax distinguishes the difference between eminent domain and the police power by dividing the functions of government into two categories. One function is the enterprise capacity which "... describes the economic function of providing for and maintaining the material plant..." The other function is as an arbiter, which defines "... standards to reconcile differences among private interests in the community." He redefines the concepts of taking and regulation because he believes that the courts do not recognize a coherent distinction.

Destruction of recognized economic interests, on the ground that there is no property interest, is so widespread and pervasive that the policy of preventing individual economic loss as such can hardly be said to have been given significant recognition by the courts.

The redefinition is not based on whether interests are actually taken, rather it is based on the function which the government serves when it takes interests.

The rule proposed is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a noncompensable exercise of the police power.

Sax's redefinition may bring some consistency to the distinction between police power and eminent domain as determined by the

37. Id. at 510, Note 1, 522 P.2d at 14, 113 Cal.Rptr. at 837.
38. Id. at 510, Note 1, 522 P.2d at 14, 113 Cal.Rptr. at 837.
40. Id. at 62.
41. Id. at 63.
42. Id. at 53.
43. Id. at 63.
courts, but it does little to bring a concept of fairness into the exercise of government power. It can only be concluded that the ability of the individual property owner to contest the scope and validity of the exercise of government power is minimal. It would seem further that the government when acting in an arbitral capacity should consider the preservation of property uses and values, but such action is not considered by Sax.

A better test is that proposed by Professor Van Alstyne, a rational nexus test.

This rational nexus test postulates a strong presumption of the validity of zoning regulations, and imposes upon the party attacking a restriction the burden of showing that the regulation, as applied to his property, constitutes an arbitrary and unreasonable exercise of the police power. It assumes the existence of identifiable factual criteria capable of judicial assessment in considering whether a particular land use regulation has been rationally applied; and it further assumes that the process of organizing a community land use plan and use zones is not so highly discretionary as to insulate it from effective judicial review. Finally, the rational basis test accepts judicial responsibility for evaluating the reasonableness of a regulation, as applied, in light of all the surrounding circumstances, including the nature and use of the subject property and of surrounding properties, trends in the land development pattern in the community, suitability of the affected property for uses permitted by the regulation, impact of the regulation upon the value of the property, practicability of less drastic restrictions, and the extent to which enforcement of the regulatory scheme tends to promote legitimate planning purposes.

Such a test would serve the desired purpose of removing the present "some logical basis test," and redefining reasonableness and arbitrariness to a court reviewable standard which balances the interests of private property use against the needs of the public. Such a test might lead to a definition of property interests which would include a right to use property. Even now there exists in property ownership the right to the use of it when enough conduct is undertaken by the owner.

b) The Vested Right to Use Property Which May be Taken.

The Restatement of Property defines, "The word 'interest' is used

44. Van Alstyne, Taking or Damaging by Police Power; The Search for Inverse Condemnation Criteria, 44 So. Cal. L. Rev. 1 (1971).
in this restatement both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them.\textsuperscript{46} It further states, “At any one time and place, however, there is a maximum combination of rights, privileges, powers and immunities in the land that is legally possible, and which constitutes complete property in land . . .”.\textsuperscript{47} An owner who has purchased real property subject to a comprehensive zoning regulation would presumably believe that he had an interest in it to the maximum legal use under such regulation. But the courts have not viewed the situation with as much logic. Rather they have held, “It is settled that a property owner acquires no vested right, as against future zoning, merely by purchasing real property,”\textsuperscript{48} or even “. . . by purchasing property in reliance on the existing zoning and thereafter making certain endeavors to develop it for a specified use.”\textsuperscript{49}

The courts have avoided establishing or creating a right to use property. It appears that such a right is non-existent until it is exercised. The logic for denying the owner a vested right in the use of his property is based on the presumption of the validity of zoning laws, the courts’ construction of the scope of the police power, and the avoidance by the courts of expanding the scope of eminent domain power.

The procedure and scope of eminent domain proceedings are set forth in the Code of Civil Procedure in California.\textsuperscript{50} It is defined as “the right of the people or government to take private property for public use.”\textsuperscript{51} There is an expansive definition of “public use” which includes “all other public uses authorized by the government of the United States,”\textsuperscript{52} “all other public uses authorized by the Legislature of the State of California,”\textsuperscript{53} and “all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature.”\textsuperscript{54} The government may take “all real property belonging to any person”\textsuperscript{55} but the limitation on the taking of property is “that the use to which it is applied is a use

\begin{footnote}
47. Id. at § 5, comment (e).
49. Id. at 90, 40 Cal.Rptr. at 48.
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authorized by law,"^56 and "that the taking is necessary to such use."^57 It is further required that local governments or agencies,

\[\ldots\] by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion... such resolution shall be conclusive evidence: (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury.^58

The standards for eminent domain are thus quite different than those for the exercise of police power. Public necessity is the justification for taking,^59 whereas property may be regulated for more intangible reasons such as health, safety, and the general welfare. If the owner of land must give up an interest in his property by eminent domain for public necessity, and the government fails to initiate condemnation proceedings against him:

\[\ldots\] the owner of a parcel may bring an action in inverse condemnation requiring the taking of such parcel and a determination of the fair market value payable as just compensation for such taking. In such inverse condemnation action the court may, in addition, or in the alternative, if it finds that the rights of the owner have been interfered with, award damages for any such interference by the public entity.^60

In determining the value of property in a condemnation action both "the highest and best use of the property" and "the applicable zoning and the opinion of the witness as to the probability of any change in such zoning"^61 are given great weight.

One would think that the use of land is an interest in land which would be subject to the power of eminent domain. Land ownership is very important in our society. Its use is a major factor in determining its value. Why is the owner left without a court remedy

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58. Id. at § 1241 subdiv. 2, no such two thirds majority requirement is imposed on zoning and planning, Cal. Gov. Code § 65503 (1969).
59. The conclusiveness of the necessity as determined by the government entity may not be subject to review. Los Angeles v. Bartlett, 203 Cal. App. 2d 523, 21 Cal. Rptr. 776 (1962). But the standard is nevertheless considerably more rigid.
61. Cal. Code of Civ. Proc. § 1272.02(b) (3) and (4).
for the taking of the use of land? The answer is the courts’ vested rights theory.

In order to state a cause of action for inverse condemnation, there must be an invasion or appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury.\(^6\)

Zoning regulations are not contracts by the city and may therefore be modified by the latter. Property is always held subject to the valid exercise of police power. The theory of vested rights relates only to such rights as an owner may possess not to have his property rezoned after he has started construction thereon or massing use thereof permitted by law when such construction or use does not constitute a nuisance.\(^6\)

The right to use property is thus not a right ordinarily found in the law, which may be intelligently waived or which may be invaded only with the consent of the right holder. Rather it is a right which arises out of the lawful use of land in fact by the owner with the consent of government, and is nonexistent unless it is exercised in fact. Such a right is very elusive when it is considered that the only reasons for property ownership, or at least the major interest in it, is the use to which it can be put. Vested rights are protected from legislative interference, and property ownership is a definite vested constitutional right, but this right is emasculated when the right to use is not likewise protected. The elusiveness of the right has led one commentator to this conclusion:

There is some incongruity in a device that destroys hundreds of thousands of dollars of vacant land value, while preserving from destruction the value, for example, of a non-conforming neighborhood delicatessen.\(^6\)

It would seem that compensation should be awarded whenever a special damage can be shown.\(^6\)

A case of major importance on this issue of inverse condemnation is now before the California Supreme Court. In *H.F.H., LTD v. Superior Court* and *Von’s Grocery v. Superior Court*, the parties bought property in reliance on the C-2 zoning for development as a shopping center in the City of Cerritos. Eventually the city, after declaring a moratorium with respect to the use of certain prop-

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65. It. at 635.
... Contra for another recent case as to inverse condemnation for downzoning, see Gisler v. County of Marin, 48 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1972).
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The property zone categories including the petitioners', rezoned the property to low-density, single family residential while retaining the commercial zoning for other similarly situated property. The California District Court of Appeal, Second Circuit, held, on the granting of demurrers by the trial court to the city, that such an action by the city stated a cause of action in inverse condemnation.

The city under such circumstances must be put to its proof in justifying such action and demonstrating that a property owner is not being unfairly burdened with the cost of improving the public welfare which in justice ought to be borne by the public.67

The alleged loss of the land value to the petitioners was $325,000, and the court said:

In principle, the hardship resulting from loss of investment by purchasing property in reliance on an existing zoning classification seems no less devastating than a hardship resulting from loss of investment in actually making use of the property.68

The appeals Court did not hold that the petitioners had a vested right in the use of property as discussed herein, although it did consider the argument. Rather, it felt that the loss was so substantial that the burden on the petitioners was unfair and thus should state a cause of action in inverse condemnation. The California Supreme Court has vacated the decision pending the appeal in which many cities and counties have filed amicus curiae briefs. Whether this decision will ultimately change the concept of vested rights in land use, will expand the definition of arbitrary and discriminatory police power in zoning, or will fall into line with the older decisions expanding the police power is unclear.

But the trend is clear, the vested right has further eroded in the past few years, and with the exception of one case concerning vested rights against the Coastal Zone Conservation Act69 has been fairly consistent. The exception was where a builder had "not only obtained a building permit but also engaged in substantial lawful work and incurred substantial liabilities."70 He was held to have obtained a vested right as against the requirement of obtaining a permit from the San Diego Coast Regional Commission. But

67. Id. at 919, 116 Cal.Rptr. at 444.
68. Id. at 920, 116 Cal.Rptr. at 444.
69. See, supra note 4.
In this case, *San Diego Coast Regional Commission v. See the Sea, Ltd.*, will be easy to limit to its facts as it may only apply to the Coastal Zone Conservation Act and only to the time between the adoption of the Act and its becoming effective. In *See the Sea* Justice Mosk dissented and gave the prevailing rule:

The rule long established in this state and in most jurisdictions is that the mere acquisition of a building permit affords a builder no protection against a change in the zoning laws adopted after its issuance and that in order to continue the construction of a project initiated prior to a change in the law, a builder must have obtained a vested right by making substantial expenditures for construction in good faith reliance on the permit prior to the effective date of the new law.\(^{71}\)

An example of insufficient "substantial work in reliance" on a permit to have a right vest is the grading of lots for development under a grading permit before the changed zoning law made building the planned multiple dwelling units unlawful.\(^{72}\) On the other hand, $2,300 work done on a permit to build has been held enough to vest a right to complete the building.\(^{73}\) However, in a recent case\(^ {74}\) $21,000 spent in reliance on a permit and over two years of using the premises under the permit was held not enough to vest a right to estop the city from denying the use, because the permit was found to have been granted in violation of a zoning ordinance. The rationale for the denial of the previously granted use was:

In the area of permits and zoning laws . . . the courts have expressly or by necessary implication consistently concluded that the public and community interest in preserving the community patterns established by zoning laws outweighs the injustice that may

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71. *Id.*, at 894, 513 P.2d at 1323, 109 Cal. Rptr. at 381-2.
73. Kissinger v. Los Angeles, 161 Cal. App. 2d 454, 463, 327 P.2d 10, 16 (1958). (There was an additional element of bad faith by government in this case.)
74. Pettit v. City of Fresno, 34 Cal.App.3d 813, 110 Cal.Rptr. 262 (1973); how an owner is to know whether a permit violates zoning laws when he has been granted a permit for a variance or non-conforming use is difficult to understand. *See also*, Millbrae Ass'n for Residential Survival v. City of Millbrae, 262 Cal. App. 2d 222, 69 Cal. Rptr. 251 (1968).
be incurred by the individual in relying upon an invalid permit to build issued in violation of zoning laws.\textsuperscript{75}

As limited as the right has become it may now be lost. It appears that a vested right to use property may be divested by time and one's own accounting methods. In \textit{National Advertising Co. v. County of Monterey}\textsuperscript{76} the court held that an outdoor advertiser had a vested right to use his signs which were not fully amortized, but that those signs which had been fully amortized retained no such right for the owner. It further held that the county could compel the removal of the other signs at the owner's own expense if a reasonable time for amortization was given "commensurate with the investment involved."\textsuperscript{77}

Extending this premise, an owner may buy property under a comprehensive zoning plan, and have no vested right to the present zoning. He may then build in compliance with the zoning regulations and acquire a vested right not to have his property rezoned unless compensation is paid for the loss of his use. But, the government may rezone his property and grant him a non-conforming use. Then it may eliminate the non-conforming use and compel the owner to remove the structure at his own cost without having to pay compensation if a reasonable time is given to amortize the use. Such a result may benefit society, but it certainly does not seem fair.

Under such an extension of the above rule, if the regulatory body is patient enough, it may virtually never need to use an eminent domain proceeding. Even if the logic of the result might be appealing in the case of outdoor advertising signs, it would be quite absurd if applied to a large commercial building that was rezoned to agricultural use or residential use. But, there would be no vested right!

Consider one more abuse of the police power. A city may deny a building permit to a landowner because it has planned to put a street on his property, and the planned building interferes with the planned street. The owner had refused to dedicate the street to the city, and alleged that the refusal of the permit was a taking.

\textsuperscript{75} Id. at 820, 110 Cal. Rptr. at 266.
\textsuperscript{77} Id. at 879, 464 P.2d at 35, 83 Cal. Rptr. at 579.
of his property. The California Supreme Court held, "that the enactment of a general plan for future development of an area, indicating potential public uses of privately owned land . . . [is not] . . . inverse condemnation of that land,"78 and that "a governmental body may require dedication of property as a condition for its development."79 Such a decision amounts to the proposition that the government may refuse to allow a lawful use of property, but it does not have to take it, it only has to contemplate taking it. But in a recent decision80 it was held that an unreasonable delay in bringing a condemnation action stated a cause of action for damages in inverse condemnation for the loss of value because of the pending proceedings. The two decisions are difficult to reconcile.

Many of the police power decisions arise out of the policy that "... the objective of zoning [is] to eliminate non-conforming uses . . ."81 But it is common knowledge that whenever property is developed a builder will seek either a non-conforming use or a variance to increase his use. The policy of eliminating non-conforming uses has not really been effective. Further the criteria for the granting of the permits with non-conforming uses or variances is often substantially affected by the amount of public attention that the development and the hearings receive.

Although the above survey is not a complete history of the evolution of the conflict between the powers of eminent domain and regulation of land use, it does show the dominance of the regulatory police power and the elusiveness of the vested right to use prop-

79. Id. at 119, 514 P.2d at 117, 109 Cal. Rptr. at 804, see Associated Home Builders, etc. Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971). But see, Southern Pacific Co. v. City of Los Angeles, 242 Cal.App.2d 38, 51 Cal.Rptr. 197 (1966), cert. denied 385 U.S. 647 (1967), where a requirement to dedicate a street in order to receive a building permit was held a taking, because the builder did not seek to expand his use beyond the permissible use under the regulation.
There ought to be a Right!

There ought to be a re-evaluation of the right to use property, and a curtailing of the police power to take it.

There Ought To Be a Right

The California Supreme court has said, "Damage caused by the proper exercise of police power is merely one of the prices an individual must pay as a member of society." There can be no doubt that the power to regulate land use is an important and necessary government function, which is essential to the orderly development of a community. But it also seems obvious that the power of regulation in its present form is unfair. When a community has developed a general plan and has zoned the area in accordance with that plan, the individual owner of zoned property ought to be able to rely on the use that has been granted by the government. When a city decides to change its plans, it should then "socialize the burden of loss — to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society." If such a burden is not shared by all those who benefit, then the doctrine of caveat emptor which is now dwindling as a real property conveyances doctrine, will arise anew not as between buyers and sellers, but as between either of them and the state. In fact it is now common practice for developers to buy land contingent on the approval of a zoning change. Under present circumstances raising the issue of zoning may cause the area planning to be reconsidered and may cause the land to be down-zoned instead of upzoned when the prospect of development is brought to the attention of the zoning authorities and the public.

One state court has viewed the situation more sanely, "If the gain to the public is small, from rezoning real estate, and the hardship to the owner is great, no valid reason exists for the exercise of such


83. Reynolds v. Barret, 12 Cal.2d 244, 250, 83 P.2d 29, 32 (1938) . . . see Bosselman, Callies, & Banta, The Taking Issue (1973) (U.S.G.P.O.) for strong support of this position and a denial of a vested right to use land.

84. Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 1, 8. See, Bacch v. Board of Control, 23 Cal.2d 343, 350, 144 P.2d 818, 823 (1943) " . . . the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements . . ."
police power." Some California courts have given credence to the concept, when they have avoided or overcome the vested rights problem:

In short the ordinance arbitrarily rezoned plaintiff's property to a use to which it could not economically be put, lying as it does between multiple dwelling development and commercial development and discriminates against the plaintiffs by preventing the use of their property for the use for which it is best fitted, while permitting all other property similarly situated zoned to be used as R-3 property.\(^8\)

A zoning ordinance may not be used as a device to take property for public use without payment of compensation.\(^7\)

The problem has become the definition of the vested right, and when it vests. Without the vested right the owner has not only no right to compensation, but no right to complain.

Excluding the control and regulation of nuisances,\(^8\) regulations should be divided into two categories. First, those regulations which benefit society and the property owner as well. These are such regulations as fire protection regulations, reasonable off-street parking requirements, pest control regulations, and other similar types of regulation. The results of such regulations is the mutual benefit to society and the owner, and any compromise of the use of property bears some equivalency to the benefit received for the owner's health, safety, and general welfare. These regulations are what the layman would consider to be valid exercises of police power. Further, the layman would be unlikely to feel an interest in his property had been taken or damaged by the exercise of this police power. This type of regulation should be left unchanged.

The second type of regulation is that which when exercised is of little or no benefit to the owner, but the use of his land is restricted for the benefit of society at large. This type of regulation generally involves policy changes in a planned area. If the policy as to the growth of an area is changed so as to lessen the intensity

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87. Id. at 462, 327 P.2d at 16, citing Dobbins v. City of Los Angeles, 195 U.S. 223 (1904).
of land use or the population, the burden should not fall on some property owners for the benefit of all society. Although zoning law in its present status would allow the government to take as much as it can without having to give compensation, it does not seem fair in light of the policy considerations of eminent domain to allow it to do so. The use of such regulations involves social engineering or land use planning for which the owner of vacant property subject to rezoning or down-zoning bears the whole economic burden. It is contrary to the concept of socializing the burden which is contemplated in eminent domain, but unless the law is changed there will be no compensation for the exercise of this type of police power.

In City of Long Beach v. Mansell,89 the California Supreme Court held:

... [T]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon the public interest or policy which would result from the raising of an estoppel.90

If the owner of property had some right to assert in reliance on the existing zoning, then such an estoppel would be beneficial to him. But as the cases have indicated, there is no such right, because such a right does not vest until property is developed with a permit under the zoning law, and then it may be divested if a reasonable amortization period is given by the regulatory entity. But if the value of property lost due to pre-condemnation announcements and excessive delay in bringing condemnation proceedings is not too speculative to state a cause of action for damages in inverse condemnation,91 why should not an action for inverse condemnation lie for the rezoning or down-zoning of property? Is the damage any less ascertainable? The present policy which only grants a vested right when the property is actually developed encourages rapid development in a haphazard fashion because the property

89. 3 Cal. 3d 462, 476 P.2d 423, 91 Cal.Rptr. 23 (1970).
90. Id. at 496-97, 476 P.2d at 448, 91 Cal. Rptr at 48.
owner must develop in an unstable zoning situation to preserve his use.

It is proposed that once a community has decided upon a comprehensive general plan and has zoned in accordance with said plan, that a right to the use allowed each parcel ought to vest\textsuperscript{92} regardless of the conduct of the property owner. Thereafter if a variance or non-conforming use is requested by the owner from the government, it could grant or deny it under the present standards of issuing such uses. However, if the use increases the fair market value of the property, the owner would be required to pay the government the fair market value of the increased use.

This rule would make the zoning laws consistent with the property tax laws in California.\textsuperscript{93} Because the use of property would be well defined and easier to evaluate, assessment for taxation would be more fair and consistent.

The proposed rule would balance the burden of social engineering by local governments among all the citizens who benefit by creating a right which when taken or damaged is subject to eminent domain power compensation. It would thus remove the standard of "some logical basis" for the legislative exercise of police power of this type, and substitute a standard of "public necessity for the public welfare." It would weigh a vested right on the part of the property owner against the benefit which society is to receive for the change in the zoning laws. It would bring the law up to the expectations of the property owner by creating something of legally recognizable value in the use of property.

The proposed rule would create some stability in planning. The vested right to use property would be well defined. Planners would be circumspect in the initial zoning of property, and builders would not be tempted to plan on the expectancy of receiving a greater use than the existing zoning permits on the grounds that

\textsuperscript{92} This right is strongly supported by Professor Donald G. Hagman of the U.C.L.A. Law School in his Windfall-Wipeout theory advocated in his address at the Pepperdine University School of Law, Land Use Planning and Control Symposium, January 18, 1975.


§ 402.1 states in part, "there shall be a rebuttable presumption that restrictions will not be removed or substantially modified in the predictable future and that they substantially equate the value of the land to the value attributable to the legally permissible use or uses."
they desired to use the property in a novel way, or that they would bring business to the community.

The proposed rule would eliminate the inherent discrimination between those who have built on their property and those who have not. Every owner would be able to plan the use of his land in accordance with his right. When a change in policy might occur, owners would not be tempted to throw together any plan and start building to prevent the loss of their right to construct under the existing zoning. Instead if the policy changed and the property was down-zoned, the owner would be compensated for his economic loss.

Under the proposed rule the will of the majority in planning would be socialized so that if a policy change in the growth or population of a local community were contemplated, the minority would not have to suffer a non-compensable loss for the benefit of the majority who do not hold property subject to the change. The tax dollar would be applied to recompense the losses of those injured, and the majority would pay for the benefit that they are to receive. Similarly if the value of property was to be enhanced by an increased use of land, the owner would have to recompense the majority through the payment of money for the benefit he receives. Thus the burden of change would be equably applied to all those who benefit or suffer.

The granting of variances and non-conforming uses would be less abused by developers, because the standard for upgrading the permissible use of property would be the necessity standard used in eminent domain, and this has been accomplished in part by the recent requirement of a factual record and a substantial evidence test in review of agency or board decisions for variances. With such a right to use clearly defined the procedure would be to "reverse condemn" the property if the public needed a greater use in land. Also, developers would tend less to use influence and cajolery with local planners in order to get favors with regard to future use.

Property values and growth would be better controlled under the proposed rule because the owners would not tend to speculate on

the future conduct of government with regard to property use, since necessity and cost would be involved in the change of use, and not speculation as to the whims of local government.

Much of the controversy about the reasonableness of the exercise of police power and when the right to complain vests would be settled. The problems of unfairness to individuals would diminish. The legal use of property would become a right of privilege incident to ownership, that would not change.

The proposed rule would make the legal use of property a sort of contract between the owner and the government.\textsuperscript{96} Where the government represents the people and the public interest, and the property owner holds his right to use his property and can rely on that right, the ends of zoning and the rights of individuals are best served. Alternatively, the zoning of use could be viewed as a license to use which could only be revoked or revised with compensation.

The rule would revive the distinction between the taking or damaging of property and the regulation of it. It would place property ownership back on a reasonable basis, because the value of property would be determined not only by its location and size, but also the actual use to which it could be legally put.

The power to regulate would not be diminished by the creation of such a right because it is assumed that the rights arise out of a comprehensive zoning plan. Rather it compels government to be fair to the owner once his right is established. It does not usurp the police power, rather it requires that it be consistent and equitable. It compels the government to be fair with the owner once police power regulation has been applied.

It should be noted that the theory of vested rights has largely been created by the courts.\textsuperscript{96} Thus the courts can change the law with regard to them. Most of this comment has been devoted to the unfairness of the present law as regards to the injury to individuals. The proposed rule would certainly cure much of that unfairness. If, as Professor Van Alstyne\textsuperscript{97} proposed, the present system does not give the courts enough leeway in testing the reasonableness of the regulatory power, the placing of a right to use, which vests on the determination of a comprehensive plan, would increase

\textsuperscript{95} Topanga Association for A Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).
\textsuperscript{96} See, supra, note 60.
\textsuperscript{97} See, Cal. Pub. Res. Code § 27404, (West —) defining a vested right for the purposes of the Coastal Zone Conservation Act of 1972, which is essentially the court created definition.
the reasonableness of changes in regulation, and would not require
second guessing the discretion of local government by the judi-
ciary. Such a right would also eliminate the problem of trying to
determine which function government is trying to assert in the
taking of property as proposed by Professor Sax. 98

There are two logical ways to create such a right. Either to
create the right by implication which may be the subject of an
estoppel against the government as in Mansell, 99 which is essen-
tially the reliance on zoning argument used in the HFH, LTD100
case, or define rezoning or down-zoning of property as a taking of
a vested property right to use for public use by statute. 102 Either
method would create the stability of land use and land use plan-
ing that should be desired by local communities.

Although there would be some administrative problems in creat-
ing such a right out of the present wasteland in which the law
stands, the stability which would result, and the inherent fairness
that should result, would far outweigh problems that would arise
during the transition. Without such a right property ownership
may soon become meaningless, since the owner will become the
slave of government in the use of his property.

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98. See supra, notes 44 and 45.
99. See supra, notes 38, 39, 40, 41, and 42.
100. See supra, Mansell, notes 89 and 90.

Mansell has recently been used as authority to estop a county from
denyng the validity of a use permit for use of the property as a
mobile home park where the owner-plaintiff had relied on the
permit in purchasing the land, receiving a grading permit, receiv-
ing approval of construction plans, and receiving approval of
sewer hookups. Strong v. County of Santa Cruz, 1 Civil 33481
102. See supra, notes 54, 55, and 56.

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