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Agin v. City of Tiburon: An Aggrieved Party-Loss of Inverse Condemnation Actions in Zoning Ordinance Disputes

This casenote provides a review of the California Supreme Court's most recent reconciliation of the respective rights of individual landowners vis-a-vis local government entity in the area of land use control. In this case, by abolishing the availability of an action for inverse condemnation in connection with a local zoning ordinance, the court has adopted an all-or-nothing approach to the determination of the propriety of the legislative action. The unfortunate result of the ruling is a severe curtailment of an individual property owner's right to recoupment of lost value.

I. INTRODUCTION

It is well recognized that the government cannot "take"¹ an individual's property without providing *just compensation and due process of law*.² Initially, this constitutional protection afforded the industrious and the acquisitive a sense of security in that one knew that whatever was acquired would remain so, and that even if it were taken for a valid public purpose, it would be replaced with just compensation by the appropriating authority. In recent years, however, judicial interpretation and public need have given birth to permutations of such terms as "take,"³ "just compensation,"⁴ and "due process,"⁵ such that it is apparent that property

1. "To appropriate for one's own or another's use or benefit. . . ." THE AMERICAN HERITAGE DICTIONARY 1311 (1970).

2. "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.; and, "[P]rivate property shall not be taken or damaged for public use without just compensation." CAL. CONST., art. I, § 19.

3. "[W]hen land use regulation results in a virtual prohibition on use so that value of the property in question is substantially reduced, if not totally destroyed, evidence exists that a taking has occurred." *Trust of Three v. City of Emeryville*, 430 F. Supp. 833, 840 (C.D. Cal. 1977). "Diminution of profits or a requirement that some loss be suffered is not enough when all other accoutrements of ownership remain, to be a 'taking'." *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646, 679 (1974).

4. The Fifth Amendment provides that private property shall not be taken for public use without just compensation. And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. In enforcing the Constitutional mandate, the Court at an early date adopted the concept of market value: the own-

rights⁶ may very well have taken on a chameleon-like quality. As between legitimate governmental needs⁷ and the rights of landowners, it would seem that there is no *pareto optimality*,⁸ and that the individual landowner, and not the public, will all too often bear the greater share of the burden imposed by public needs and purposes.⁹

It is the purpose of this casenote to discuss the remedies now available in California to an aggrieved landowner who claims that a particular zoning ordinance is unconstitutionally restrictive. This discussion will particularly focus upon the effect on such remedies by the recent California Supreme Court decision in *Agins v. City of Tiburon*.¹⁰

er is entitled to the fair market value of the property at the time of the taking.

United States v. Reynolds, 397 U.S. 14, 15-16 (1970).

5. "Due process of law does not consist of legislative legerdemain, but rather is intended to secure the individual from the arbitrary exercise of the powers of government-unrestrained by higher 'law of the land'." *City of Cincinnati v. Borsert Mach. Co.*, 43 Ohio Op. 2d 76, 78, 236 N.E.2d 216, 219 (1968). "Constitutional Due Process is not a hard and fast legal concept. The standards to be applied must necessarily conform to the concept of what is fair and reasonable." *Osmond v. Spence*, 359 F. Supp. 124, 127 (D. Del. 1974).

6. "Property," in a legal sense, has been broadly defined. The United States Supreme Court has said that the term "property" is not used in "[the] vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law . . . [Instead it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . ."

Agins v. City of Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28-29, 157 Cal. Rptr. 372, 375-76 (1979).

7. In *Agins*, the court recognized the power of the government to preserve and improve the quality of life for its citizens by and through the regulation of the use of private land, and that the constitutional rights of the individual landowner must be balanced against the legitimate needs of the government. 24 Cal. 3d at 273, 598 P.2d at 28-29, 157 Cal. Rptr. at 375-76.

8. The term *pareto optimality* is used by economists and political theorists to describe the situation, existing thus far in theory only, wherein two or more parties are confronted with a continuum of options. The optimum choice, or solution chosen would be that which involved no negative factors, *i.e.*, the parties would each acquire something without an attendant loss of some value to any other party. This theory obtains its name and origin from the Italian economist, Vilfredo Pareto.

9. We have said that the "underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements . . . to socialize the burden . . . 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 . . . (citations omitted). Justice Clark, dissenting. 24 Cal. 3d at 266, 598 P.2d at 32, 157 Cal. Rptr. at 379 (citing *Holtz v. Superior Court*, 3 Cal. 3d 296, 303, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 349 (1970)), *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

10. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979). Immediately prior to the publication of this article it was learned that *Agins* will be heard by the United States Supreme Court in April of 1980. A reversal of *Agins* by the Court would

Prior to *Agins*, an aggrieved landowner could bring an action against a public entity asking for a declaration that a zoning ordinance, enacted pursuant to a particular land development plan be declared unconstitutional and therefore void. Or, in the alternative, he could sue for damages in inverse condemnation.¹¹ *Agins*, however, has now limited the remedies available and the extent to which relief under them may be granted.

II. *KLOPPING* AND *ELDRIDGE*—PREDECESSORS TO *AGINS*

In *Agins*, two prior cases were explained, distinguished, and perhaps, partially overruled. Those two cases were *Klopping v. City of Whittier*¹² and *Eldridge v. City of Palo Alto*.¹³

In *Klopping*, plaintiffs alleged that the city's actions, in announcing on two separate occasions its intent to condemn their real property, were unreasonable and were performed, to some extent, for the purpose of depressing the fair market value of the land.¹⁴ This, plaintiffs claimed, constituted a de facto "taking" of their property by the city. The California Supreme Court, in pertinent part, recognized that a de facto taking¹⁵ (requiring compensation by the public authority) may occur in cases involving particularly harsh zoning regulations which are "calculatingly designed to decrease any future condemnation award."¹⁶

affect numerous recent California holdings. See, e.g., *Furey v. City of Sacramento*, 24 Cal. 3d 862, 598 P.2d 844, 157 Cal. Rptr. 684 (1979); *Briggs v. State of California ex rel. Dep't of Parks and Recreation*, 98 Cal. App. 3d 190, 159 Cal. Rptr. 390 (1979); *Air Quality Products, Inc. v. State of California*, 96 Cal. App. 3d 340, 157 Cal. Rptr. 791 (1979); *Viso v. State of California*, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (1979).

11. The term "inverse condemnation" describes a situation in which "property has been taken by the exercise of the power of eminent domain, but without any payment of compensation having been made" by the appropriating authority. *State of California v. United States District Court*, 213 F.2d 818, 821 n.10 (9th Cir. 1954). In an inverse condemnation action, the property owner must plead and prove that there is an infringement of his property rights by the public entity, *People v. Ricciardi*, 23 Cal. 2d 390, 400, 144 P.2d 799, 804 (1943); and, there must be an actual appropriation or impairment of a valuable property right by the public entity, *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 190 Cal. Rptr. 799 (1973).

12. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

13. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

14. There were other issues involved in *Klopping* which are not pertinent to this discussion and are not set forth.

15. "In de facto taking cases, the landowner claims that because of particularly oppressive acts by the public authority the 'taking' actually has occurred earlier than the date set by statute." 8 Cal. 3d 39, 46, 500 P.2d 1345, 1351, 104 Cal. Rptr. 1, 7 (1972).

16. *Id.* 62, 500 P.2d at 68, 104 Cal. Rptr. at 23. See also, *Turner v. County of Del*

Eldridge involved a zoning ordinance which classified plaintiffs' land as permanent open space and conservation lands. In essence, plaintiffs complained that the city's ordinance denied them of any reasonable or beneficial use of their land.¹⁷ The city's demurrers were sustained without leave to amend by the trial court. The court of appeal reversed.

The issue before the *Eldridge* court was the same as that posed in the *Agins* case, that is, whether a landowner may sue in inverse condemnation where a zoning ordinance was so oppressive as to constitute a taking of property. The *Eldridge* court decided this issue in the affirmative,¹⁸ and further stated that whether the ordinance constituted a "taking" was a question for the *trier of fact*.¹⁹

Norte, 24 Cal. App. 3d 311, 316, 101 Cal. Rptr. 93, 96 (1972). The court in *Turner* held that even if a zoning ordinance is found to constitute a valid exercise of the state police power, the landowner would still be entitled to compensation if there was a taking of the property.

17. Two separate and distinct actions were initiated at the trial court level. The two plaintiffs were *Eldridge* and *Beyer* and the appeals were consolidated for the purpose of appellate consideration.

Eldridge, in his complaint, only sought damages in inverse condemnation, while *Beyer*, complained that the ordinances effectuated a taking of his property and prayed for damages or alternatively, for a declaration that the ordinances were unconstitutional and therefore void.

18. "[A] valid zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation." (emphasis added). See note 13 *supra*, at 626 (petition for hearing denied, July 15, 1976).

The *Eldridge* decision is supported by the same authority relied upon by the *Agins* court in holding that no action in inverse condemnation would lie:

Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain.

1 NICHOLS, EMINENT DOMAIN 116-21 (3d ed. 1975).

The *Agins* court reached the opposite conclusion of the *Eldridge* court by hinging its argument on another statement by *Nichols*, *supra*, that "[S]uch legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation." 24 Cal. 3d 266, 272, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979).

To the extent that *Eldridge* held that such regulation gave rise to an action in inverse condemnation, it was expressly disapproved by *Agins*. *Id.* at 272, 598 P.2d at 28, 157 Cal. Rptr. at 375.

19. The *Eldridge* court stated that the question could not be decided as a matter of law, that is, at a hearing on a demurrer. The *Agins* court, however, upheld the trial court's holding that *as a matter of law*, plaintiffs were not entitled to a favorable judgment in declaratory relief. *Id.* at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

It should be noted that, in *Agins*, plaintiffs claimed in their pleading papers that the ordinance had completely destroyed the value of their property for any purpose or use whatsoever.

A general demurrer will test the sufficiency of the pleading to state a cause of

III *AGINS*—STATEMENT OF THE FACTS

Plaintiffs, owners of five acres of unimproved land in the City of Tiburon,²⁰ brought suit against the city on a claim of inverse condemnation. Plaintiffs also sought a declaration that the city's zoning ordinance was unconstitutional.

Plaintiffs' claim originated when the city, pursuant to California Government Code section 65302(a),²¹ undertook to develop a general plan of land-use control. In January of 1972, the city acquired the services of several expert consultants who were to make recommendations which would assist the city in preparing a general plan of land development. These expert consultants subsequently submitted reports to the city which, in essence, recommended that:

(1) Tiburon attempt to acquire most of Tiburon Ridge for open space; and,

(2) The purchase of open space lands be financed through the issuance of general obligation bonds.

Tiburon subsequently passed Ordinance No. 124 N.S.²² Under

action, and all well pleaded facts will be deemed true for this limited purpose, but this does not admit conclusions of law.

Furthermore, on a demurrer, the court may take judicial notice of any relevant material, such as resolutions, reports and other official acts of the county or other public entity. *Pan Pacific Properties v. City of Santa Cruz*, 81 Cal. App. 3d 244, 146 Cal. Rptr. 428, 432 (1978).

The *Agins* court took judicial notice of the City's Ordinance and concluded that plaintiffs were left with a considerable amount of use of their property, despite their allegations to the contrary. Therefore, the court concluded, as a matter of law, that plaintiffs had failed to state a cause of action entitling them to declaratory relief. 24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

20. The City of Tiburon will hereinafter be referred to as either "the city" or "Tiburon."

21. The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, plan proposals. The plan shall include the following elements:

(a) A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, . . . and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan. The land use element shall also identify areas covered by the plan which are subject to flooding and shall be reviewed annually with respect to such areas.

CAL. GOV'T CODE § 65302 (West Supp. 1979).

22. Tiburon City Ordinance No. 124 N.S. became effective on June 28, 1973. It adopted widespread zoning modifications which utilized some of the expert consultants' recommendations.

this ordinance, plaintiffs' land was designated RPD-1, a Residential Planned Development and Open Space Zone.²³ Ordinance 124 N.S., as applied to plaintiffs' land, required plaintiffs to build a minimum of one and no more than five dwelling units on their five acres of land.²⁴

On October 15, 1973, plaintiffs filed a claim²⁵ against the city alleging that the value of their land had been completely destroyed by the adoption of Ordinance No. 124 N.S. The city rejected plaintiffs' claim.

The city, on December 4, 1973, filed a complaint²⁶ in eminent domain²⁷ and subsequently, on November 1, 1974, filed a notice of abandonment of the eminent domain proceeding.²⁸ The action

23. "The authorized uses of land so designated are (1) *one-family dwellings*, (2) open space uses, and (3) accessory buildings and accessory uses." 24 Cal. 3d 266, 271, 598 P.2d 25, 27, 157 Cal. Rptr. 372, 375 (1979).

24. Under the designation RPD-1, building density is restricted to not less than .2 and not more than 1 dwelling unit per gross acre. *Id.*

25. The claim referred to is an administrative procedure, under which a public entity is or may become a party defendant. Such a claim involves no judicial action, but often is a prerequisite to filing a lawsuit against the entity.

This claims' procedure is governed by California Government Code, section 900. The claims' procedure is for the purpose of providing notice to the public entity so the entity may investigate the claim and have the opportunity to settle meritorious claims and thereby avoid unnecessary lawsuits.

The inverse condemnation claims statute provides:

No claim is required to be filed to maintain an action against a public entity for taking of, or damage to, private property pursuant to Section 19 of Article I of the California Constitution.

However, the board shall, in accordance with the provisions of this part, process any claim which is filed against a public entity for the taking of, or damage to, private property. . . .

CAL. GOV'T CODE § 905.1 (West Supp. 1979).

26. The eminent domain process is subject to the provision of the Code of Civil Procedure section 1230.010. The rules of practice governing civil actions, unless provided otherwise, by statute, are generally the rules of practice in eminent domain proceedings. CAL. GOV'T CODE § 1230.040 (West Supp. 1979).

The proceeding is commenced by the public entity filing a complaint. CAL. CODE OF CIV. PROC. § 1250.110 (West Supp. 1979).

The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

- (a) The public interest and necessity require the project.
- (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
- (c) The property sought to be acquired is necessary for the project.

CAL. CODE OF CIV. PROC. § 1240.030 (West Supp. 1979).

27. Eminent domain is "the right or power to take private property for public use. It is an inherent and necessary attribute of sovereignty and exists independently of constitutional provisions and is superior to all property rights." *United States v. 209.25 Acres of Land*, 108 F. Supp. 454, 459 (W.D. Ark. 1952).

28. The notice of abandonment of the eminent domain proceeding was given pursuant to CAL. CIV. PROC. CODE § 1255a (a) (West 1972). The trial court entered its judgment of dismissal on May 20, 1975, and the city paid the plaintiffs the sum of \$4,500.00 pursuant to CAL. CIV. PROC. CODE § 1255a (c) (West 1972). Section 1255 of the California Code of Civil Procedure was repealed in 1975. 24 Cal. 3d at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374 (1979).

was dismissed and on June 16, 1974 plaintiffs filed a complaint against the city in the Superior Court, claiming, *inter alia*, that Ordinance No. 124 N.S. was unconstitutional.

Defendant city's demurrer to the first cause of action²⁹ was sustained without leave to amend and plaintiffs were granted ten days to amend their second cause of action, which sought declaratory relief. Plaintiffs chose not to amend, dismissal of the action followed, and plaintiffs appealed.³⁰

IV. THE REMEDY

Agins decided the question left unanswered in *HFH, Ltd., v. Superior Court*,³¹ namely, whether *vel non* the landowner would be entitled to compensation in the event a zoning ordinance prohibited *substantially all use* of one's real property.³²

The *Agins* court contended that policy considerations compelled the conclusion that "inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional

CAL. CIV. PROC. CODE § 1255a (a) and (c) read in pertinent part:

(a) Written Notice; Implied Abandonment

The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment. . . .

(c) Judgment Dismissing Proceedings; Costs and Disbursements

Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion of any party, a judgment shall be entered dismissing the action and awarding the defendants their recoverable costs and disbursements. . . .

CAL. CIV. PROC. CODE § 1255a (West 1972). Section 1255a, subdivision (a) has been superseded by sections 1268.020 and 1268.510(a); and, subdivision (c) by sections 1235.140, 1268.510(c) and 1268.610.

29. Plaintiffs' first cause of action was for damages claimed in inverse condemnation. 24 Cal. 3d at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374 (1979). See notes 11 and 25, *supra*, for the distinctions between eminent domain and inverse condemnation actions.

30. A dismissal of the complaint rightly follows a party's failure to amend after a demurrer has been sustained. *Rader v. Apple Valley Bldg. & Development Co.*, 261 Cal. App. 2d 308, 68 Cal. Rptr. 108 (1978).

31. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365, *cert. denied*, 425 U.S. 904 (1975). In *HFH, Ltd.*, the court determined that inverse condemnation is not available to an aggrieved landowner who alleges that a zoning action merely reduced the market value of his property.

32. In *HFH, Ltd.*, we specifically noted that 'This case does not present, and we therefore do not decide the question of entitlement to compensation in the event a zoning regulation forbade substantially *all use* of the land in question. We leave the question for another day.' (citations omitted).

regulation is alleged.”³³

Plaintiffs' chief argument was that the ordinance had imposed such limitations upon the use of their property that an unconstitutional “taking” had occurred.³⁴ However, this argument was dismissed by the *Agins* court, which relied upon *State of California v. Superior Court*³⁵ and which essentially adopted the argument of various commentators³⁶ in holding that plaintiffs' sole remedy was a declaratory action, or mandamus,³⁷ rather than an

33. 24 Cal. 3d at 274, 598 P.2d at 29, 157 Cal. Rptr. at 376 (1979).

34. Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional ‘taking of [plaintiffs]’ property without payment of just compensation’ for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity’s exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation.

Id. at 272, 598 P.2d at 28, 157 Cal. Rptr. at 375.

35. 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974).

36. 1 NICHOLS, EMINENT DOMAIN (3d ed. 1975); Fulham & Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974); Hall, *Eldridge v. Palo Alto: Aberration or New Direction In Land Use Law?*, 28 HASTINGS L. J. 1569 (1977).

37. A plaintiff, in attacking a zoning ordinance, may attack the ordinance on the grounds that it is unconstitutional, and that if not unconstitutional, it is unconstitutional as applied to plaintiff.

In the first instance, the court may hold that the zoning ordinance is unconstitutional *per se*. That is, the wisdom of enacting a particular ordinance is not before the court. If there is any reasonable justification in passing the ordinance, the court will not, and cannot, substitute its judgment for that of the legislature. If there is a rational basis or if the facts of any given case indicate that the reasonableness of the ordinance is debatable, the courts may not disturb the legislative determination. See *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 460, 327 P.2d 10, 15 (1958).

Mandamus, on the other hand, would lie where the public entity is claimed to have exercised its police power beyond its constitutional limits. *O’Hagen v. Board of Zoning Adjustment, City of Santa Rosa*, 19 Cal. App. 3d 163, 96 Cal. Rptr. 484 (1971). See California Civil Procedure Code Sections 1085 and 1094.5 for the review procedures. Mandamus, however, will lie *only* when a ministerial act is involved. If an authority may choose between two reasonable alternatives, (i.e., exercise of discretion) mandamus will not lie. For example, if there is a constitutionally valid scheme of zoning, the courts may still properly inquire as to whether the scheme of classification districting has been applied “fairly and impartially.” *Reynolds v. Barret*, 12 Cal. 2d 244, 83 P.2d 32 (1938). The city or other public entity cannot create an “island” when no rational reason exists for the classification. For example, one lot as residential in the midst of an area zoned as a business district is discriminatory and invalid. This is commonly known as “spot zoning.” See, e.g., *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958), and *Reynolds v. Barrett*, 12 Cal. 2d 244, 251, 83 A.2d 29, 33 (1938).

Where it is claimed that a zoning ordinance is unreasonable, or discriminatory, as applied to a particular parcel of land, it is incumbent on the plaintiff to produce sufficient evidence that will justify the court in concluding, as a matter of law, that the ordinance is unreasonable and invalid. *Sladovich v. County of Fresno*, 158 Cal. App. 2d 230, 239, 322 P.2d 565, 570 (1958).

Where the authority of the public entity is exercised pursuant to its police power of eminent domain, and that authority is valid constitutionally, a landowner may still sue in inverse condemnation if the police power authorized by statute is

action for damages in inverse condemnation.

Previously, in *HFH, Ltd.*, the court had held that inverse condemnation "does not lie in zoning actions in which the complaint alleges the mere reduction of market value, and that a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging of property."³⁸

In the instant case, however, more was involved than mere diminution in market value. Plaintiffs claimed that the zoning ordinance deprived them of all use of their property.³⁹ Essentially, plaintiffs' argument, in seeking compensation for the alleged taking by legislation was that if a state or local entity, in exercising its police power, exceeded the constitutional limitations imposed upon that power, it was tantamount to the taking of property by eminent domain.⁴⁰ Were plaintiffs' argument accepted, reasoned the *Agins* court, an aggrieved landowner could "transmute an excessive use of the police power into a lawful taking"⁴¹ merely by bringing an action in inverse condemnation—in effect legislating a result which the elected officials could not.⁴²

The *Agins* court was concerned not only with the possibility of private action validating excessive police action, but also with the probability that by forcing compensation, the judiciary would "chill" the use of the state police power in bringing about a desired social end.⁴³ The court recognized that state and local entities have legitimate interests in providing for systematic and

not exceeded and a compensable taking has occurred. See notes 25 and 26, *supra*. However, inverse condemnation *does not* lie when plaintiff claims that the state or local entity has "taken" his property through restrictive regulations, *i.e.*, via zoning. *Agins v. City of Tiburon*, 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377 (1979).

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

39. Justice Clark, in his dissent stated that the plaintiffs had alleged that the ordinance destroyed completely, "the value (of their property) for any purpose or use whatsoever." The city had evidently admitted this fact through the demurrer.

40. 24 Cal. 3d at 279, 598 P.2d at 32, 157 Cal. Rptr. at 379 (1979).

41. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 377.

42. *Id.*

43. But note the legislature's own admonition:

The legislature hereby . . . declares that this article [Open-Space Zoning] is not intended and shall not be construed, as authorizing the city . . . to exercise its power to adopt . . . an open space zoning ordinance in a manner which will . . . damage private property for public use without the payment of just compensation therefor.

CAL. GOV'T CODE § 65912 (West Supp. 1979).

orderly growth, and that land-use planning was very efficacious in effectuating that goal.⁴⁴ In balancing the protected constitutional property rights of the individual against possible encroachments upon those rights by the state's exercise of its police power, the court held that the judicial control of the legislative excesses is to be *limited to invalidation of the particular legislative action*,⁴⁵ at least in situations concerning the application of a zoning scheme. "[T]he need for preserving a degree of freedom in the land-use planning function and the inhibiting financial force which inheres in the inverse condemnation remedy persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances. . . ."⁴⁶

Analysis of *Agins* indicates that, henceforth in California, an inverse condemnation claim is no longer available as a remedy where it is alleged that a zoning ordinance is unconstitutional because it constitutes a taking without just compensation. The sole remedies now available are declaratory relief and mandamus. A close scrutiny, respecting the applicability of these two remedies, reveals that the *Agins* court has left the aggrieved landowner without adequate redress in the name of social development.

V. THE EXTENT OF THE REMEDIES

As a result of *Agins*, the remedies available to a party aggrieved by a particular zoning ordinance are not only limited in number, but in extent of their application. Recognizing current social values,⁴⁷ the *Agins* court reiterated the position taken in *HFH, Ltd.*, that an ordinance which, on its face results in a mere diminution in property value is not unconstitutional *per se*.⁴⁸ In *HFH, Ltd.*,⁴⁹

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

45. *Id.* at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377. The court stated that if the remedy of inverse condemnation were available to the aggrieved landowner in such a situation, it would threaten legislative control over appropriate land-use development.

It has been noted that "The weighing of costs and benefits is essentially a legislative process. In enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of that ordinance. Determining that a particular land-use control requires compensation is an appropriate function of the judiciary, whose function includes protection of individuals against excesses of government. But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses."

46. 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 379 (1979).

47. Note 7, *supra*.

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

49. *Id.*

the court refused to provide the aggrieved party with a remedy where a change in zoning reduced the value of the property from \$400,000.00 to \$75,000.00. This was viewed as a mere diminution in property value.⁵⁰

Citing Justice Holmes in *Pennsylvania Coal Co., v. Mahon*,⁵¹ the *Agins* court recognized, as in *HFH, Ltd.*, the practical truism that individual property rights are subject to an implied limitation and must yield to the police power.⁵² However, the *Agins* court failed to recognize a necessary corollary to the above truism, i.e., that the police power may not be exercised beyond constitutional limits.⁵³ The limits imposed upon the exercise of police power by the invalidation of legislation, through *Agins*, is restricted to those situations where the zoning ordinance will have the effect of depriving the landowner of *substantially all use* of his property.⁵⁴

VI. CONCLUSION

Justice Clark, the sole dissenter in *Agins*, summarized his views by stating that, in California, "title to real property will no longer be held in fee simple but rather in trust for whatever pur-

50. Many cases have been decided which have recognized and upheld the use of state police power to effectuate land-use development; and, that organized community development is within the parameters of legitimate public purposes. See e.g., *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing that aesthetic and environmental well-being is as important, and therefore deserving of protection, as is economic well-being); *Bermann v. Parker*, 348 U.S. 26, 33 (1954) (within power of legislature to determine that the community shall be beautiful, healthy, spacious, clean, well-balanced and carefully patrolled); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926) (recognizing additional restrictions with respect to the use and occupation of private lands in urban communities).

51. 260 U.S. 395 (1922).

52. Justice Holmes stated that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Id.* at 413.

53. See note 17, *supra*.

54. The *Agins* court stated that:

Accepting as we must the general proposition that whether a regulation is excessive in any particular situation involves questions of degree, turning on the individual facts of each case, we hold that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property.

24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378 (1979). However, aggrieved landowners may have a problem in stating a cause of action in that the court may rule, as a matter of law, that no cause of action exists. See note 18, *supra*.

poses and uses a governmental agency exercising legislative power elects, without compensation.”⁵⁵

The practical effect of the *Agins* decision is that the aggrieved landowner has a mere nominal remedy, which, in effect, is no remedy at all. Just what constitutes substantially all use of one's property is a question which has been left to future legislative or judicial construction. It is apparent, however, that declaratory relief provides little comfort to the aggrieved landowner for two reasons. First, if there is any rational basis or reasonable justification for a legislative determination regarding a particular zoning action, the courts will not substitute their judgments for that of the legislature's. Second, mandamus will lie only to compel the commission of a ministerial duty. If there is any allowance for the exercise of discretion in applying an ordinance to a particular parcel of property, mandamus will not lie.⁵⁶ In any event, the plaintiff has the burden to produce sufficient evidence that will justify the court in concluding that, as a matter of law, the ordinance is unreasonable as applied to plaintiff's property and is discriminatory as applied to him.

The pervasive trend of the courts in the area of land-use planning, as indicated by the line of decisions from *Pennsylvania Coal* to *Agins*, has been to expand and to enlarge the parameters within which the public entity, whether it be local or state, may exercise its police power to promote the general public welfare. The exercise of this expanded police power is now unhindered by the concern for economic sanctions which might once have deterred overregulation.

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55. *Id.* at 282, 598 P.2d at 34, 157 Cal. Rptr. at 381.

56. See note 37, *supra*. See also *Jacobs v. State Board of Optometry*, 81 Cal. App. 3d 1022, 1034, 147 Cal. Rptr. 225, 232 (1978).