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**HFH v. SUPERIOR COURT—  
ANOTHER PERSPECTIVE ON THE  
DILEMMA OF THE DOWNZONED PROPERTY OWNER**

**I. INTRODUCTION**

Downzoning is the reclassification and restriction of the uses to which specific parcels of real property may be put.<sup>1</sup> Frequently, downzoning results in a marked reduction of the fair market value of the property involved,<sup>2</sup> thus raising the question of whether such action constitutes a compensable governmental taking of private property.<sup>3</sup> The California Supreme Court decided this issue in the negative in *HFH v. Superior Court*.<sup>4</sup> The *HFH* court held that neither the California nor the Federal Constitutions require compensation be paid for the economic effects of downzoning despite the greater protection afforded by the addition of an "or damaged" clause in the California Constitution.<sup>5</sup>

The purpose of this comment is to illustrate that an inverse condemnation cause of action should be available as a protection against down-

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1. See generally Michelman, *Property, Utility, & Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L.R. 1165 (1967) [hereinafter cited as Michelman]; Dunham, *From Rural Enclosure to Re-enclosure of Urban Land*, 35 N.Y.U.L. REV. 1238 (1960); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1 (1967) [hereinafter cited as Van Alstyne]; Comment, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971) [hereinafter cited as Comment, *Taking*]; *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 [hereinafter cited as *Griggs in Perspective*]; *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). These commentaries present the leading discussion on the subject of downzoning.

2. See Ellickson, *Alternatives to Zoning: Covenants Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973), noting that "[t]he effect of these policies is significant since zoning often affects land values by multiples, not fractions." *Id.* at 699.

3. CAL. CONST. art. 1, § 19 reads in pertinent part:

Private property may be taken or damages for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.

*Id.* The fourteenth amendment to the United States Constitution also limits the state's power. See note 23 *infra*.

4. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365, *cert. denied*, 96 S. Ct. 1495 (1975).

5. CAL. CONST. art. 1, § 19; see notes 36-41 *infra* and accompanying text.

zoning regulation. Presently, non-monetary relief is the sole remedy available to a property owner injured by downzoning.<sup>6</sup> As a result, the courts are forced to choose between upholding a presumptively desirable zoning ordinance at the expense of an individual property owner, and upholding the individual's property rights by sacrificing the ordinance. An answer to this dilemma would be to grant the property owner the remedy of inverse condemnation.

## II. HFH v. SUPERIOR COURT

Underlying the plaintiffs' claim in *HFH* was the decision of the City of Cerritos to rezone two contiguous parcels of real estate from C-2, (neighborhood commercial), to RS 6500, (single family residential, one unit per 6500 square feet). This action was challenged by the property owners, HFH, Ltd. (HFH) and Vons Grocery Company (Vons). HFH and Vons had conditioned their purchase of the land in question (which was then zoned agricultural) on the acquisition by the prior owner of commercial zoning for the property. The commercial zoning was obtained and the transaction was consummated. The property was then left undeveloped for a period of five years after which it was temporarily rezoned as agricultural and later rezoned, on a more permanent basis, as residential. Due to this latter rezoning of the property as residential, its value fell from \$388,000 to \$75,000.<sup>7</sup>

The plaintiffs brought an action for inverse condemnation alleging that the zoning action by the city was an unconstitutional taking or damaging of property and was, therefore, compensable.<sup>8</sup> The Califor-

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6. *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365, cert. denied, 96 S. Ct. 1495 (1975); see also *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973), where the denial of a building permit was challenged as a taking of private property. The court held that there was no taking and that the proper proceeding to challenge an administrative agency was in mandamus.

For a discussion of the procedural possibilities, see Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 J. URB. L. 861 (1975):

It is ironic that such a question should arise at all, particularly in California, for the courts of California pioneered monetary recovery for excessive regulation on inverse condemnation theory. Indeed, there is a rather well-settled line of authority in which aggrieved landowners sought an injunction against the government in an effort to halt or invalidate some governmental project or scheme, only to be rebuffed by the courts whose response was that the owner's *only* remedy was to sue in inverse condemnation for money damages.

*Id.* at 888 [footnotes omitted]. But see Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974).

7. 15 Cal. 3d at 512-13, 542 P.2d at 242, 125 Cal. Rptr. at 369.

8. 15 Cal. 3d at 511-12, 542 P.2d at 239-40, 125 Cal. Rptr. at 367-68.

nia Supreme Court found that the plaintiffs had failed to allege facts sufficient to demonstrate either a "damaging" or a "taking," holding that the complaint did not state a cause of action in inverse condemnation.<sup>9</sup> Despite allegations that the market value of their properties had declined by eighty percent and that no reasonably beneficial use of the land as residential property existed, the court concluded that the "or damaged" provision of the California Constitution refers to physical damage only, and that mere diminution in value is insufficient to support an action for inverse condemnation.<sup>10</sup>

The majority based its decision on "basic considerations of reciprocity" involving the benefits and burdens that one must accept in order to participate in an "ordered" society, rather than on any "distinction between 'taking' and 'police power.'"<sup>11</sup> Moreover, it refused to recognize the possibility that, without rendering land completely useless, a downzoning measure may randomly impose such severe restrictions upon a property owner as to force that person to absorb more than his fair share of the burden. The court did, however, leave open the question of whether an inverse condemnation remedy would be available when the regulation in question forbids substantially *all* use of the land.<sup>12</sup> Significantly, the majority opinion considered the "wrongfulness"<sup>13</sup> of the state action to be irrelevant in determining whether a

9. *Id.* at 514, 542 P.2d at 241, 125 Cal. Rptr. at 369. Thus, the plaintiffs were left only with the possibility of non-monetary relief in the form of a writ of mandate which might be obtained through a successful attack on the zoning ordinance as discriminatory or arbitrary. *Id.* at 516 n.13, 542 P.2d at 242-43 n.13, 125 Cal. Rptr. 370-71 n.13.

10. *Id.* at 518 & n.15, 542 P.2d at 244 & n.15, 125 Cal. Rptr. at 372 & n.15. For an opposing position see *id.* at 523, 542 P.2d at 248, 125 Cal. Rptr. at 376 (Clark, J., dissenting).

11. *Id.* at 522, 542 P.2d at 247, 125 Cal. Rptr. at 375.

12. *Id.* at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16:

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.

*Id.*, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16. That "other day" was quickly upon the court in *Eldridge v. City of Palo Alto*, 51 Cal. App. 3d 726, 124 Cal. Rptr. 547 (1975), *rehearing granted*, 57 Cal. App. 3d 613 (1976).

13. 15 Cal. 3d at 516 n.13, 542 P.2d at 242-43 n.13, 125 Cal. Rptr. at 370-71 n.13.

If such a reduction constituted an injury, it would occur regardless of the legality of the zoning action occasioning it: indeed we have held that the wrongfulness of the state's action is irrelevant in an inverse condemnation case. . . . Thus, if plaintiffs have suffered an injury cognizable under California Constitution, article I, section 19, they stand entitled to compensation regardless of the public agency's wrongfulness in causing the injury. If, on the other hand, the city has acted arbitrarily or discriminatorily in passing the zoning ordinance of which they complain, plaintiffs stand entitled to relief by administrative mandate.

*Id.*, 542 P.2d at 242-43 n.13, 125 Cal. Rptr. at 370-71 n.13. Thus, it appears that "wrongful" zoning, for example, arbitrary or discriminatory zoning, is remedied by an action in mandamus. The court fails to define "wrongfulness."

taking or damaging of property has occurred. Rather, according to the court, the critical inquiry rests on whether a legally compensable injury has occurred.<sup>14</sup>

The approach taken by the court was based in part on the difficulty of ascertaining at which point the burden imposed upon the landowner became so unreasonable as to allow an action for inverse condemnation. Instead, the court deferred resolution of the issue to the legislature.<sup>15</sup>

This fear by the court of "legislating" did not appear to deter dissenting Justice Clark. In his view, the fairness of the burden shouldered by the individual must be balanced against the demands of society.<sup>16</sup> He proposed a tripartite test to determine when compensation might be required in downzoning situations. The test considers the *substantiality* of the decrease in value, the *duration* of the decrease, and whether the owner would incur more than his *fair share* of the financial burden.<sup>17</sup> Justice Clark applied this test to this factual situation and concluded that the eighty percent diminution in market value, despite the nonphysical nature of the invasion, was sufficient to state a cause of action in inverse condemnation.<sup>18</sup>

### III. BACKGROUND: POLICE POWER V. EMINENT DOMAIN

Land use control is exercised by local governments as part of their

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14. *Id. Contra*, Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), *cert. denied*, 419 U.S. 1122 (1975), where, in an inverse condemnation action for loss of property value as a result of jet noise, the court held that the airport owner would be liable for a taking or damaging where "the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking." *Id.* at 484, 115 Cal. Rptr. at 170.

15. That we do not do so [redefine the constitutional requirements of just compensation] reflects less our belief that no problems exist with the present law in this area than our conviction that legislative rather than judicial action holds the key to any useful reform.

15 Cal. 3d at 521, 542 P.2d at 246-47, 125 Cal. Rptr. at 374-75. *See also* United States v. New River Collieries Co., 262 U.S. 341 (1923); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); County of Los Angeles v. Ortiz, 6 Cal. 3d 141, 490 P.2d 1142, 98 Cal. Rptr. 454 (1971); Beals v. City of Los Angeles, 23 Cal. 2d 381, 144 P.2d 839 (1943).

16. 15 Cal. 3d at 524-25, 542 P.2d at 248-49, 125 Cal. Rptr. at 376-77 (Clark, J., dissenting).

17. *Id.* at 526, 542 P.2d at 250, 125 Cal. Rptr. at 378. This analysis presumes the validity of the zoning ordinance; the court would still have alternatives, including:

- (1) compensating the landowner for the decrease in value;
- (2) paying total value for the land and acquiring title;
- (3) rescinding the downzoning.

*Id.* at 527, 542 P.2d at 250, 125 Cal. Rptr. at 378.

18. *Id.*, 542 P.2d at 250, 125 Cal. Rptr. at 379.

inherent police power,<sup>19</sup> to promote the health, safety, morals, or general welfare of the community.<sup>20</sup> The states exercise such control in two ways. First, a governmental entity may simply take private property and put it to a particular public use by exercising the power of eminent domain.<sup>21</sup> Secondly, it may seek, through zoning, to limit the uses to which property may be put.<sup>22</sup>

Various limitations, however, restrict the use of these powers. Primary among these is the constitutional requirement that private property cannot be taken for public use without just compensation to the owner.<sup>23</sup> Moreover, California has broadened the protection accorded a private property owner by requiring compensation not only where the property has been taken for public use, but where it has been

19. The police power derives from the tenth amendment to the United States Constitution, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

In *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381 (1925), the court stated: "The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited." *Id.* at 484, 234 P. at 383. See also *Bauer v. County of Ventura*, 45 Cal. 2d 276, 282, 289 P.2d 1 (1955).

20. See *A Standard State Zoning Enabling Act and A Standard City Planning Enabling Act*, in O. BROWDER, JR., R. CUNNINGHAM & J. JULIN, *BASIC PROPERTY LAW*, 1109-1120 (2d ed. 1973). See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Miller v. Board of Pub. Works*, 195 Cal. 477, 484, 234 P. 381, 383 (1925).

For a discussion of the source of police power and the authority of the municipality to zone land uses, see Comment, *Land-Use Control, Externalities, and the Municipal Affairs Doctrine: A Border Conflict*, 8 *LOY. L.A.L. REV.* 432, 444-51 (1975).

21. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.

*Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). See also *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (temporary federal seizure of coal mine operations justified to avert national emergency); *People v. Chevalier*, 52 Cal. 2d 299, 304, 340 P.2d 598 (1959) (right of eminent domain is an inherent attribute of sovereignty, merely limited in its exercise by the federal and state constitutions); *Gilmer v. Lime Point*, 18 Cal. 229, 250-51 (1861) (right of eminent domain is essential to the existence of sovereignty, and is only regulated—not created—by the state constitution).

22. See notes 1 & 3 *supra* and accompanying text.

23. The fourteenth amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Further, the United States Supreme Court, in *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897), held that a state is prohibited from depriving an individual of property without compensation by the due process clause of the fourteenth amendment.

Initially the contract clause of the United States Constitution, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. 1, § 10, served as a further restriction on the states' right to interfere with

damaged by the state.<sup>24</sup> However, if a governmental action is merely a regulation, no compensation is required.<sup>25</sup>

### A. Physical Harm Requirement

The courts have upheld restrictions on land use controls as valid exercises of the police power despite the fact that no compensation is made to a landowner who has suffered substantial economic loss.<sup>26</sup> These courts have reasoned that because no physical invasion of the property has occurred, the governmental action is a legitimate exercise of the police power rather than an exercise of the eminent domain power.<sup>27</sup> Thus, the distinction between eminent domain and police power is based upon the nature of the restriction. Physical intrusions are takings; non-physical limitations are regulations.

private contractual agreements. See Justice Marshall's opinion in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *but cf.* *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Peters) 420 (1837) (Justice Taney wrote that a contract granting an exclusive public franchise will not be implied if it will diminish a state's power to promote the public welfare). Note Justice Holmes' reference to the contract clause as a limitation on governmental action in the excerpt from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922), *quoted at text* accompanying note 76 *infra*.

THE FEDERALIST No. 44 (J. Madison) states that the contract clause was intended to protect the people from the "fluctuating policy" of the legislature. A zoning change in a comprehensive plan can be likened to a retroactive change in obligation.

24. CAL. CONST. art. 1, § 19; see note 36 and text accompanying notes 36-40 *infra*.

25. See 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.42[10] (J. Sackman 3d rev. ed. Supp. 1976) [hereinafter cited as NICHOLS], stating in reference to zoning restrictions that

[t]he mere fact that the imposition of such restrictions causes a reduction in value of property does not render it other than an incident of the exercise of a proper sovereign power. It is not a compensable injury. The rule of *damnum absque injuria* applies.

*Id.* at 1-193 (footnotes omitted).

See also *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962). It is noteworthy that the appeal from the lower court was taken as a matter of right to the Supreme Court, and was dismissed "for want of a substantial federal question." Presumably, the Supreme Court was simply reluctant to decide the issue at that time.

26. Two California cases have reached rather different conclusions on the basis of the police power, upholding restrictive zoning ordinances where inverse condemnation was not claimed. *Consolidated Rock Prod. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962); *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954). For a discussion of these cases, see text accompanying notes 59-63 *infra*.

27. See NICHOLS, *supra* note 25, § 1.42[2], at 1-123. See also *Inverse Condemnation*, *supra* note 5, at 1447.

As discussed previously, the distinction between valid regulation and taking is unclear. Michelman, *supra* note 1, defines "taking" as "constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation." *Id.* at 1165.

This use of a "physical intrusion" criterion for determining whether compensation is appropriate is unsupportable. The concept of property in condemnation law has been expanded with the recognition that a major attribute of property is its use, and that the denial of this use may result in the taking of property.<sup>28</sup> This expansion has been further highlighted:

The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.<sup>29</sup>

The traditional reason for denying compensation where a police power regulation is involved is inapplicable to downzoning regulations. The rationale for denying compensation for losses resulting from

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In an attempt to formulate a rule for when compensation should issue, Michelman examines four tests used by courts in making that determination: the "physical invasion" test, *id.* at 1184, the "diminution of value" test, *id.* at 1190; the "balancing social gains against private losses" test, *id.* at 1193; and the "harm-prevention/benefit-extraction" test, *id.* at 1196. He finds none of these to be acceptable, and concludes that a fairness test is the best measure of compensability. *Id.* at 1197. It is sufficient for the purposes of this Comment to recognize that if a physical invasion is not required, zoning can effect a taking of property which may require the payment of just compensation regardless of which test is applied.

28. See notes 40-41 *infra* and accompanying text. See also *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), which established the principle that government must compensate for property *destroyed* by its undertakings even though nothing tangible is *taken* or *received* in the technical sense of the words. *Griggs in Perspective*, *supra* note 1, at 82-90 contains an extensive discussion of the important cases from 1872 through 1962. See also Kanner, *When is "Property" not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CALIF. W.L. REV. 57, 64-71; Kanner, *Condemnation Blight: Just How Just is Just Compensation?* 48 NOTRE DAME [LAW. 765] 770-87 (1973).

Thus, "property" may include not only the physical land itself, but also those rights, powers, privileges, and immunities which are incident to its ownership. See *Eaton v. Boston, C.&M.R.R.*, 51 N.H. 504, 511-12 (1872). Justice Roberts examined this concept of "property" in *United States v. General Motors Corp.*, 323 U.S. 373 (1944):

The critical terms are "property", "taken" and "just compensation." It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership.

*Id.* at 377-78. See Comment, *Restrictive Covenants in Eminent Domain Proceedings: Southern California Edison Co. v. Bourgerie*, 7 LOY. L.A.L. REV. 327, 327 n.2 (1974) for an illustration of other interests which have been deemed compensable.

29. *Arverne Bay Constr. Co. v. Thatcher*, 15 N.E.2d 587, 592 (Ct. App. N.Y. 1930).



police power measures dates back to the 1887 case of *Mugler v. Kansas*.<sup>30</sup> The appellant in *Mugler* claimed that the taking of his business under the guise of a police power regulation amounted to a constitutional violation. The relevant statute prohibited the manufacture of intoxicating liquors in Kansas to protect the community from "the evils which confessedly result from the excessive use of ardent spirits."<sup>31</sup> The court held that a valid regulation could not be a "taking" in the sense of eminent domain takings because

[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.<sup>32</sup>

Certainly, payment of compensation following the enforcement of a police power regulation intended to eliminate an evil, contradicts the punitive intent of the regulation. However, comprehensive land use plans, implemented by zoning regulations, are not limited to outlawing noxious or illegal uses of property or eliminating activity which is, in itself, injurious to the community.<sup>33</sup> The purpose of this zoning is to relocate a use; not to eliminate it.<sup>34</sup> A policy of denying compensation for the elimination of uses by land use zoning results in unintended harm and redistribution of wealth. As a result, the consequences of confining the remedies for impairment of land use pursuant to zoning regulations to non-monetary relief are undesirably and unnecessarily restrictive.

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30. 123 U.S. 623 (1887).

31. *Id.* at 662.

32. *Id.* at 668-69.

33. *Miller v. Board of Pub. Works*, 195 Cal. 477, 487, 234 P. 381, 384 (1925), *appeal dismissed*, 273 U.S. 781 (1927).

34. As Justice Sutherland commented, it is concerned with "a right thing in the wrong place, —like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

This distinction between "taking" under eminent domain and "regulating" under the police power was recently discussed by a federal court in a situation regarding land use regulations. In *Smoke Rise, Inc. v. Washington Suburban San. Comm'n.*, 400 F. Supp. 1369 (D. Md. 1975), the plaintiff land developers brought an action to challenge the defendant's regulations imposing various five year moratoria on sewer hookups. In upholding the moratoria, and ruling that the regulations did not constitute a taking, the court focused on the purpose of the governmental action:

It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . .

From this results the difference between the power of eminent domain and the police power, that the former recognizes [sic] a right to compensation, while the latter on principle does not.

*Id.* at 1382, quoting *E. FREUND, THE POLICE POWER* § 511, at 546-47 (1904).

### B. California's "Or Damaged" Clause

Although policy considerations alone should dictate that there need not be a physical intrusion as a prerequisite to compensation, additional support for this position may be found in the eminent domain provision of the California Constitution. Article 1, section 19 provides that "[p]rivate property may be taken or damaged for public use only when just compensation . . . has first been paid . . . ."<sup>35</sup> This provision provides a greater degree of protection to landowners by specifically requiring that compensation be paid when property has been "damaged" by a public use. However, the majority in *HFH* cast doubt upon the meaning of the "or damaged" clause. It characterized the action taken by the City of Cerritos as having merely diminished the value of a parcel of land rather than as having "damaged" the parcel.<sup>36</sup> The court emphasized that the economic damage was the *indicia* by which the court measured the amount of compensation to be awarded when property is physically damaged.<sup>37</sup> Although it first appeared that the court may have been requiring that there be a physical intrusion before the "or damaged" provision of the California Constitution is applicable, the court later retreated from this position.<sup>38</sup>

This use of a physical impairment test as a cornerstone for distinguishing between proper exercise of the police power and improper "damagings" is not supported by case law. As Justice Clark pointed out in his dissent in *HFH*, the "or damaged" language, while having been applied to physical damagings, has not been limited solely to such situations:

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35. CAL. CONST. art. 1, § 19. The damage clause was introduced precisely for the purpose of enlarging the scope of compensable claims. See Van Alstyne, *supra* note 1, See also *Chicago v. Taylor*, 125 U.S. 161, 166-67 (1888); *Bacich v. Board of Control*, 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943); *Reardon v. San Francisco*, 66 Cal. 492, 501-02 (1885).

36. 15 Cal. 3d at 517-18, 542 P.2d at 244, 125 Cal. Rptr. at 372.

37. *Id.*

38. Initially, footnote 15 stated:

As we explained in *Holtz v. Superior Court* . . . "Our decision in the instant case, and the *Albers* decision more generally, in effect recognize that, under article I, section 14 [present article I, section 19] *physical damages* proximately resulting from a public improvement must be considered as a direct 'cost' as the property actually condemned or the materials actually utilized in its construction." Thus, while we have not hesitated to afford individuals the full measure of the protection indicated by the history of article I, section 19, no California case has ever interpreted the "or damaged" phrase of our state Constitution to cover mere diminution of market value of property.

*Id.* at 518, 542 P.2d at 244, 125 Cal. Rptr. at 372 (citations omitted) (emphasis added). However, in the order denying a rehearing (January 9, 1976), without further explanation, the entire first sentence of the above quoted original footnote was deleted. Thus no

In fact, in *Reardon v. San Francisco*, . . . this court rejected such an interpretation, noting that the word *damaged* "refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and popular sense. It embraces more than the taking."<sup>39</sup>

### C. Use as a Compensable Interest in California

In California an expanded view of property has been recognized in eminent domain cases.<sup>40</sup> Under this rationale, if the use of property has been impaired, the impairment should qualify as damage under the California Constitution.<sup>41</sup>

allusion to a requirement of physical invasion remains. Nonetheless this appears to be the only rationale to explain the court's decision as to the "or damaged" clause. *Id.* at 522, 542 P.2d at 247, 125 Cal. Rptr. at 377.

39. 15 Cal. 3d at 523, 542 P.2d at 248, 125 Cal. Rptr. at 376 (Clark, J., dissenting)(citations omitted).

40. Particularly worth noting is the language in several California zoning cases recognizing that restriction of uses of private property by regulation may be unconstitutional without compensation.

[I]f the use is so far restricted and the value depreciated that it can be said that the regulation goes too far, it will be deemed a taking of the property, in which event the ordinance becomes invalid and unconstitutional, because the taking is without due process of law.

*Bank of America v. Atherton*, 60 Cal. App. 2d 268, 273, 140 P.2d 678, 681 (1943).

In *People ex rel Stevenot v. Associated Oil Co.*, 211 Cal. 93, 294 P. 717 (1930), the principle is more explicitly stated:

The difficulty usually arises in determining whether the particular right sought to be regulated or prohibited is subject to such regulation or prohibition and whether in the particular case the legislature has gone too far with the resultant unlawful taking. It may not be disputed that the use of private property is a right as much entitled to protection as the property itself, and an undue restriction on the use thereof is as much a taking "for constitutional purposes as appropriating or destroying it."

*Id.* at 99-100, 294 P. at 721, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

This discussion from *Pennsylvania Coal* was more recently repeated in *Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n*, 11 Cal. App. 3d 557, 572, 89 Cal. Rptr. 897, 906 (1970), where the police power regulation and resulting refusal to allow plaintiff to fill its bay property was upheld as valid. See also *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972).

41. The case of *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1943) was significant in determining whether California eminent domain policy would take a limiting or expansive direction. The immediate question in *Bacich* was whether a property owner could collect compensation for impairment of his right of ingress and egress through the vehicle of an inverse condemnation action. The court ultimately decided that impairment of the right of access was compensable because the harm was unique to that property. The court candidly spoke of the policy rationale for its decision:

If the question is one of first impression its answer depends chiefly upon matters of policy, a factor the nature of which, although at times discussed by the courts, is usually left undisclosed.

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In *Southern California Edison Co. v. Bourgerie*,<sup>42</sup> for example, a restrictive covenant in a deed was found to be "property" for purposes of the just compensation clause of the California Constitution. There, an adjoining landowner claimed damages because of the proposed construction of an electric power substation on his neighbor's land where both properties were burdened with provisions prohibiting such use of the land. The court found that the individual property owner who would be hurt by the violation of the restriction should not be forced to bear the entire damage alone. The court declared that one seeking a share in the condemnation award need not prove the existence of an estate or interest in the property. Rather, public policy and fairness would determine the distribution of the burdens as between the individual and the public.<sup>43</sup>

The California Supreme Court has also been liberal in extending compensation to the taking of property interests for which, traditionally, there had been no possibility of compensation.<sup>44</sup> For example, in *County of San Diego v. Miller*,<sup>45</sup> the court found that the holder of an unexercised option to purchase property, when supported by consideration, was entitled to compensation when that property was taken by the government. In reaching its conclusion, the court emphasized the importance of fairness and public policy rather than traditional common law concepts of property:

The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does

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[O]n the one hand, 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 . . . . On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of greatly increased cost.

*Id.* at 350, 144 P.2d at 823.

A strong dissent from Justice Traynor reminded the majority that the constitutional provision, art. 1, § 14 (presently art. 1, § 19) was created to *protect* property rights that already existed and not to create new ones. The dissent focused particularly on the political basis of the opinion. *Id.* at 366, 144 P.2d at 832.

42. 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973).

43. *Id.* at 173, 507 P.2d at 967, 107 Cal. Rptr. at 78.

[T]he violation of a building restriction could cause far greater damage in monetary value to a property owner than the appropriation of a mere right of way. To establish a substantive distinction by merely labeling one a property interest for which compensation must be made and the other a mere contractual right which may be appropriated by a condemnor without any compensation is inequitable and rationally indefensible.

*Id.*, 507 P.2d at 966-67, 107 Cal. Rptr. at 77-78.

44. Other interests held to constitute property for condemnation compensation purposes include: fee interests, leaseholds, easements and rights-of-way. *See County of San Diego v. Miller*, 13 Cal. 3d 684, 688, 532 P.2d 139, 141, 119 Cal. Rptr. 491, 493 (1975).

45. 13 Cal. 3d 684, 532 P.2d 139, 119 Cal. Rptr. 491 (1975).

from technical concepts of property law . . . [T]he right to compensation is to be determined by whether the *condemnation has deprived the claimant of a valuable right* rather than by whether his right can technically be called an 'estate' or 'interest' in the land.<sup>46</sup>

#### IV. DEVELOPMENTS IN CALIFORNIA LAW

Several recent California cases have awarded compensation to the landowner when downzoning was ancillary to some other governmental activity. In *Klopping v. City of Whittier*,<sup>47</sup> the city announced its intention to acquire the plaintiff's land through condemnation, but unreasonably delayed the condemnation proceedings. The court held that the loss of use suffered by property owners, specifically the loss of rental income due to this "condemnation cloud," was recoverable, either as a "de facto taking" or as a damaging of the property.<sup>48</sup> The court in *Klopping* analogized the situation to that of a harsh zoning regulation which is "often calculatingly designed to decrease any future condemnation award."<sup>49</sup>

Similarly, in *Peacock v. County of Sacramento*,<sup>50</sup> the county passed a severe height restriction on property in order to leave sufficient over-flight airspace for the anticipated acquisition and development of a neighboring airport. This had the effect of eliminating activities such as golfing from the possible uses of the land. This police power activity was held to be a taking of the property by inverse condemnation, on the rationale that the property was taken as a prelude to eventual public acquisition.<sup>51</sup>

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46. *Id.* at 691, 532 P.2d at 143, 119 Cal. Rptr. at 495 (emphasis in original) (citation omitted).

The federal courts have also liberally extended the application of the constitutional guarantee of compensation, emphasizing the fairness element. For example, making low altitude flights of army and navy aircraft over a commercial chicken farm, and thereby destroying the use of the property was held to be a taking of property in *United States v. Causby*, 328 U.S. 256 (1946). The court held it immaterial that the land was not physically occupied, as the owner's loss was as severe as it would have been from a more conventional entry onto the land. Similarly, in *Griggs v. Allegheny County*, 369 U.S. 84, *rehearing denied*, 369 U.S. 857 (1962), the owner and operator of an airport was held liable for rendering plaintiff's property unusable as a residence because of excessive noise.

47. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

48. *Id.* at 46, 500 P.2d at 1351, 104 Cal. Rptr. at 7. The *Klopping* case is also useful as an illustration of non-physical compensable damage.

49. *Id.*

50. 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).

51. *Id.* at 862, 77 Cal. Rptr. at 403. Professor Van Alstyne has criticized this result, emphasizing the

unfortunate tendency of the existing law of inverse condemnation as it relates to

Further, in *Sneed v. County of Riverside*,<sup>52</sup> the county imposed a three inch height restriction on property adjoining an airport. This was deemed to be a taking of the air navigation easement—requiring that compensation be paid to the aggrieved property owner—in spite of the valid safety concerns which motivated the regulation.<sup>53</sup>

However, in *Eldridge v. City of Palo Alto*,<sup>54</sup> the city government reclassified 750 acres of foothill property as permanent open space, thereby limiting development to one single family dwelling unit for every ten acres. The area in question had been annexed to the city in reliance on the city's promise to continue the then-existing residential classification which allowed one single family unit per acre.<sup>55</sup> In effect, the reclassification required that nine out of every ten acres be left totally undeveloped and unused.

Initially, the court of appeal found that the plaintiff had stated a cause of action in inverse condemnation, reasoning that "a comprehensive land use zoning ordinance is not immune from the rule that where the regulation goes too far, it will be recognized as a taking."<sup>56</sup> A re-

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excessive use of the police power to treat issues on an all or nothing basis: either the regulation is valid, or it constitutes a compensable taking.

Comment, *Taking*, *supra* note 1, at 70 n.327. To avoid these extremes, he suggests the use of partial compensation, installment payment of judgments, bond issues, or relief framed in the alternative, as an incomplete list of possibilities.

An alternative method of balancing the effect of zoning regulations on property owners (some gain while others lose economic value) has been developed by Professor Donald Hagman. Hagman, Book Review, 87 HARV. L. REV. 482 (1973). In his review of *The Taking Issue*, Hagman suggests the use of special assessment techniques which redistribute the benefits from those whose land is reclassified to a higher use (windfalls) to those who bear disproportionate burdens from downzonings of their property (wipe-outs). Additionally significant is Professor Hagman's discussion of Professor Coston-is' density transfer system. This system permits an owner who is prevented from developing his or her property to sell the unused development right to one who receives an increased development classification. *Id.* at 493.

52. 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

53. *Id.* CAL. GOV'T CODE ANN. § 50485.2 (West Supp. 1976) (Airport Approaches Zoning Law) defines and authorizes the elimination of airport hazards "by appropriate exercise of the police power or the authority . . ." granted in CAL. PUB. UTIL. CODE ANN. § 21653 (West Supp. 1976). Section 21653 provides that acquisition of property interests not constituting the entire fee, through condemnation, is proper where airport activity takes less than the total fee. Thus, the legislature may have recognized, at least in part, that severe regulation of private property for a valid public purpose may constitute an unconstitutional taking of a property interest which can be remedied by an action in inverse condemnation.

54. 51 Cal. App. 3d 726, 124 Cal. Rptr. 547 (1975), *rehearing granted*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

55. *Id.* at 727-28, 124 Cal. Rptr. at 549, *rehearing granted*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

56. *Id.* at 740, 124 Cal. Rptr. at 556, *citing* *Pennsylvania Coal Co. v. Mahon*, 260

hearing of the issue was granted<sup>57</sup> in light of *HFH*, and the court found that the ordinances were valid exercises of the police power.<sup>58</sup> Thus, they were beyond constitutional attack except in proceedings for damages in inverse condemnation. The court declared, however, that while

[a] zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging . . . where the [zoning] action goes beyond the mere diminution of market value, and instead has the substantial effect of depriving the landowner of any reasonable or beneficial use of his property, the rule does not necessarily apply.<sup>59</sup>

In *Eldridge*, while there was no physical invasion of, nor harm to the property, it would appear that a "taking" had occurred, for many of the uses to which the property may have been put were rendered impermissible. The court of appeal on rehearing held, therefore, that plaintiffs stated a cause of action for damages in inverse condemnation against the city.<sup>60</sup>

The *HFH* court distinguished *Klopping*, *Peacock*, *Sneed* and the initial *Eldridge* decision. The majority recognized three situations in which downzoning may give rise to a cause of action in inverse condemnation.<sup>61</sup> It categorized these as distinct problems arising from inequitable zoning actions which are undertaken by a public agency. These inequities can occur either as a prelude to public acquisition, or as an evasion of the requirement that the state acquire the property which it intends to use for a public purpose.<sup>62</sup> In both *Klopping* and *Peacock*, downzoning was used as a prelude to eventual public acquisition of the property, while in *Sneed* an actual public use of the property was undertaken.<sup>63</sup> However, the policy which underlies granting compensation to individuals who suffer from unreasonable governmental activity should not require that a distinction be drawn between situations in which the government intends to acquire the land for its own actual use, and where it is merely using its powers to downzone the property for some other public purpose. In both cases the

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U.S. 393, 415 (1922), *rehearing granted*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

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

58. *Id.* at 631, 129 Cal. Rptr. at 587 (1976).

59. *Id.* at 624, 129 Cal. Rptr. at 581.

60. *Id.* at 633, 129 Cal. Rptr. at 587.

61. 15 Cal. 3d at 517 n.14, 542 P.2d at 243 n.14, 125 Cal. Rptr. at 371 n.14.

62. *Id.*

63. *Id.*

property owner sustains a loss as a direct result of the governmental action.

The court in *HFH* characterized the plaintiffs' loss as their inability to obtain profit from the sale of their land.<sup>64</sup> The court cited<sup>65</sup> *McCarthy v. City of Manhattan Beach*<sup>66</sup> for the proposition that mere diminution in value due to zoning regulation was not compensable. In *McCarthy*, the city had passed an ordinance permitting only recreational activities on plaintiffs' ocean front land. The owners intended to build houses on the land and brought suit asking the court to declare the ordinance void. The ordinance was held not to constitute a confiscatory taking of property, absent a showing that the beach frontage could not be used in any profitable manner in accordance with the zoning ordinance.<sup>67</sup>

Similarly, in *Consolidated Rock Products Co. v. City of Los Angeles*,<sup>68</sup> a zoning ordinance which prevented rock and gravel operations on plaintiff's land was held to be valid in spite of the fact that the property had "no appreciable economic value" for any other purpose because of the nature of the property and the weather. Further, it was of no value for the purpose for which it was rezoned, agricultural use. The court quoted from *Hadacheck v. Sebastian*,<sup>69</sup> among other cases, characterizing the state's police power as "one of the most essential powers of government, one that is the least limitable."<sup>70</sup>

The *HFH* court, in relying on *McCarthy*<sup>71</sup> and *Consolidated Rock*<sup>72</sup> failed to consider the difference between whether any damage or taking had occurred, and whether diminution in value should be the measure of recovery when compensation is due.<sup>73</sup> Diminution of value is only one

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64. *Id.* at 523, 542 P.2d at 247, 125 Cal. Rptr. at 375.

65. *Id.* at 514 n.10, 542 P.2d at 241 n.10, 125 Cal. Rptr. at 369 n.10.

66. 41 Cal. 2d 879, 264 P.2d 932 (1953).

67. The city was attempting to keep the price of the property at a lower level in anticipation of a future condemnation, which had been postponed because of inadequate funds. The court suggested that the property might be beneficially used as a private beach. *Id.* at 890, 264 P.2d at 940.

68. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962). See also *Spindler Realty Corp. v. Manning*, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975 (1966).

69. 239 U.S. 394 (1915). In *Hadacheck*, a Los Angeles ordinance which made the manufacturing of bricks within the city unlawful was upheld by the United States Supreme Court. *Id.*

70. *Id.* at 410.

71. 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954).

72. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

73. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365.



factor for consideration in determining whether the burden borne by the individual property owner is reasonable.<sup>74</sup> This factor alone should not be determinative in awarding or denying compensation. In fact, the majority failed to consider Justice Holmes' well known opinion in *Pennsylvania Coal Co. v. Mahon*,<sup>75</sup> which has been recognized by California courts to be the ruling authority on this subject.<sup>76</sup> In that case, an injunction was sought to prevent a coal company from mining beneath city streets.<sup>77</sup> In declaring that an ordinance, forbidding the extraction of coal from beneath the surface, was invalid without payment of compensation, Holmes recognized that when the exercise of the police power is unreasonable or excessive it may amount to a taking of property. He stated that the

[g]overnment hardly could go on if to some extent values could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.<sup>78</sup>

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74. See text accompanying note 27 *supra*.

75. 260 U.S. 393 (1922).

76. As the court in *Eldridge* stated in an opinion which was *vacated* in light of *HFH*, "Pennsylvania Coal Co. v. Mahon, . . . has been widely and consistently followed and must be deemed the ruling authority on the subject before us." 124 Cal. Rptr. at 552, 51 Cal. App. 3d at 734.

77. 260 U.S. 393 (1922).

78. *Id.* at 413. In discussing the fifth and fourteenth amendments' protection of private property he noted:

When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change.

*Id.* at 415-16 (citations omitted).

The rationale used by Holmes to invalidate the statute in *Pennsylvania Coal*, that severe regulations may effect takings of private property, was reiterated by the United States Supreme Court more recently in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). In *Goldblatt*, the Court upheld an ordinance prohibiting an excavation below the water table as a valid exercise of the police power. This was allowed despite the fact that it completely destroyed the utility of plaintiff's land for mining of sand and gravel. Citing *Pennsylvania Coal*, the Court reiterated:

Although Holmes' language suggests that just compensation must be paid for a police power action which results in an excessive devaluation of property, the plaintiff in *Pennsylvania Coal*<sup>70</sup> sought only monetary relief.

The *HFH* dissent, on the other hand, received *Pennsylvania Coal* as bearing significantly on the subject, citing it extensively in support of the balancing of policies required to determine when compensation is due.<sup>80</sup> Fairness requires consideration of public needs and private losses, whether they result from downzoning or other governmental action.<sup>81</sup>

Moreover, the federal courts have recently recognized the balancing process in a group of cases arising from actions taken by the City of Palo Alto.<sup>82</sup> In *Dahl v. City of Palo Alto*<sup>83</sup> the court denied a motion to dismiss, holding that a cause of action had been stated in inverse condemnation.<sup>84</sup> The court concluded that

[t]he determination of reasonableness is a factual one encompassing the interests of the public, the appropriateness of the means, and the oppressiveness of the action.<sup>85</sup>

The court stated that the question on a motion to dismiss is only whether the plaintiff would be entitled to relief if the facts, as alleged, are proved at trial; allegations that the regulation is arbitrary, capricious, and allows the plaintiff no reasonable use of his land are sufficient to state a cause of action.<sup>86</sup>

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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. There is no set formula to determine where regulation ends and taking begins. . . . How far regulation may go before it becomes a taking we need not now decide . . . .

369 U.S. 590, 594 (1961).

79. 260 U.S. 322 (1922).

80. 15 Cal. 3d at 524, 542 P.2d at 248, 125 Cal. Rptr. at 376-77.

81. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), *modified*, 57 Cal. 2d 488 (1976).

82. See discussion in text at notes 108-17 *supra*.

83. 372 F. Supp. 647 (N.D. Cal. 1974). *Dahl* resulted from a factual situation similar to *Eldridge*. See also *Arastra Limited Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1976). There, the plaintiff brought an action in inverse condemnation, alleging that the open space zoning regulations enacted by the city were actually passed for the purpose of acquiring a scenic outlook for their new park. The court held that the ordinance was equivalent to a taking in fee simple absolute where the use was so severely restricted that it was virtually unmarketable, and where ostensible purposes for the ordinance were non-existent.

84. 372 F. Supp. 647 (N.D. Cal. 1974).

85. *Id.*

86. *Id.* In another federal case, *Brown v. Tahoe*, 385 F. Supp. 1128 (D. Nev. 1973), the plaintiffs in a class action alleged that a land use ordinance adopted by the Tahoe Regional Planning Agency substantially destroyed the value of their property, and that

However, in *HFH*, similar allegations did not suffice to send the question to the jury. While recognizing that a significant problem exists, the court refused to resolve it; rather it decided to categorically burden those individuals whose property is merely diminished in value.<sup>87</sup> The court reasoned that regardless of how burdensome the financial loss may be to the landowner, the detriment must be borne as the price of living in our society.<sup>88</sup> Finally, *HFH* states that wrongfulness is irrelevant to

the ordinance was, in effect, a dedication of their property for public use. The court held that

public welfare and necessity may reasonably require exceptionally restrictive land use classification for the protection of the public interests . . . but that such valid regulations may nevertheless constitute a taking of private property for public use entitling the owner to just compensation.

*Id.* at 1132.

A potential defense raised in these cases is federal abstention from the state issues. This has been considered and rejected in three recent federal district court cases. In *Donohoe C. Co. v. Maryland-National C.P. & P. Comm'n*, 398 F. Supp. 21 (D. Md. 1975), where a property owner brought an action to recover compensation for the taking of his property by zoning regulations, the court raised the issue of abstention, *sua sponte*, holding that the issues presented did not require application of the abstention doctrine. Noting that federal and Maryland constitutional law shared the same ambiguities, the court stated:

There are advantages to abstention, but they are advantages purchased at a high price. . . . For that reason, the federal courts should abstain from exercising their jurisdiction only in those situations where deferring to state adjudication is likely to avert real harm. . . . Where state and federal constitutional issues are identical, nothing of sufficient substance is gained to offset the price of abstention.

*Id.* at 30.

In *Smoke Rise, Inc. v. Washington Suburban San. Comm'n*, 400 F. Supp. 1369 (D. Md. 1975) (see note 34 *supra* for a discussion of the facts), the court held first, that the plaintiffs were not required to exhaust their administrative remedies, as Maryland law provided no suitable administrative appeal procedure. Secondly, it concluded that the court could properly exercise jurisdiction "due to a federal question arising under the United States Constitution." *Id.* at 1372.

Finally, in *M.J. Brock & Sons, Inc. v. City of Davis*, 401 F. Supp. 354 (N.D. Cal. 1975), a property owner brought an action alleging that the general plan and zoning adopted by the city had so deprived it of the use of its land as to constitute an unlawful taking. The court found that there was no valid reason for federal abstention where questions of whether a taking had occurred under the fifth and fourteenth amendments would not be resolved by the determination of other issues on the state level. The court further noted:

It is true that a local land use regulatory scheme is the subject of concern here, but the exercise of federal court jurisdiction by no means constitutes unnecessary interference because the federal questions of taking, deprivation of civil rights are at the center of this suit.

*Id.* at 357-58.

The court also refused to dismiss the action, citing *Dahl* for the purpose of showing the sufficiency of plaintiff's allegations that the property had been rendered "substantially valueless so as to constitute an unlawful taking." 401 F. Supp. at 359.

Given these rulings, it appears likely that the federal courts will be a most effective forum to provide relief for landowners in future cases. See text accompanying notes 108-16 *infra*.

87. 15 Cal. 3d at 521, 542 P.2d at 246, 125 Cal. Rptr. at 374.

88. *Id.* at 515-60, 542 P.2d at 242, 125 Cal. Rptr. at 370.

the granting of the cause of action in inverse condemnation.<sup>89</sup> However, each situation which the court recognized as a distinct problem, —*Klopping*, *Peacock* and *Sneed*—involved governmental fault or wrongfulness.<sup>90</sup> These cases do not represent distinct problems; they represent merely distinct judicial attitudes toward the same problem.

## V. SOLUTION

Condemnation law necessarily involves policy decisions. The real issue is the extent to which the individual ought to be burdened, or can be fairly required to subsidize public projects. The pervading issue revolves around the circumstances which should exist to allow the case to go to the jury. Clearly, monetary relief will not be proper in all circumstances.

When other constitutional rights are involved payment of compensation will not remove the constitutional objection.<sup>91</sup> For example, due process objections to zoning arise in a variety of circumstances. Zoning restrictions may be attacked as arbitrary and irrelevant to the public interest. In such a case, monetary relief would be inappropriate and the zoning ordinance should be invalidated.<sup>92</sup> However, when the sole objection is that the zoning ordinance places an unreasonable burden on the individual, the ordinance may be said to constitute a taking for which just compensation should be paid.

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89. *Id.* at 516 n.13, 542 P.2d at 242-43 n.13, 125 Cal. Rptr. at 370-71 n.13.

90. See note 13 *supra*.

91. Also there will be cases where the damage is *de minimus* and uncompensable.

92. A zoning ordinance may be attacked as a violation of basic notions of equal opportunity in a market economy, and or as a violation of other due process requirements, including equal protection under the law.

Many commentators have noted the pervasiveness of special influence in determining zoning plans, particularly at the local level. Consider the following example: A regulation is passed that downzones one property owner's C-2 (commercial) classification to O-S (open space) in order to eliminate potential competition from another property owner. Both are in the supermarket business, one an established member of the community with influence on the powers that be, the other a newcomer intending to build a competing market. In such a situation, payment of money damages for the taking of property to save the zoning ordinance would not be in the public interest. Here the public gain from the measure is zero, or negative, and the loss to the potential competitor is excessive. There is no basis for the exercise of the zoning power.

The elimination of competition with the city presents a slightly different situation. In *Los Angeles Gas & Elec. Co. v. Los Angeles*, 241 F. 912 (D.C.S.D. Cal. 1917), the court held that the city could compel private companies to remove and relocate their electric poles and instrumentalities in order to install a municipal system, but that this was an appropriation of the companies' property and required payment of compensation. See also *Van Sicklen v. Browne*, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971).

Other discriminatory zoning regulations may irreparably damage constitutional rights

*Village of Euclid v. Ambler Realty Co.*<sup>93</sup> is a case which first presented the question of the constitutionality of a comprehensive zoning ordinance to the United States Supreme Court, establishing a presumption of validity for comprehensive zoning plans.<sup>94</sup> However, *Euclid* envisioned the possible necessity of court interference:

[when the provisions of an ordinance are] concretely applied to particular premises . . . or to particular conditions . . . some of them, or even many of them may be found to be arbitrary and unreasonable.<sup>95</sup>

by eliminating racial minorities, the aged, infirm or poor from a community. A zoning regulation that is demonstrated to have, for example, racial discrimination as its sole purpose is rightly enjoined. The substitution of money damages to the dispossessed property owner would not cure the constitutional deficiency.

In *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928), the Seattle zoning regulations were amended to prohibit the building of a philanthropic home for the aged in a residential district unless approved by two-thirds of the neighboring property owners. A writ of mandate issued to compel the Superintendent of Building of the City of Seattle to issue the building permit to the plaintiff, striking down the amendment. This case illustrates the use of mandamus to invalidate a discriminatory regulation, where money damages would have been inappropriate.

Similarly, in *Hunter v. Erickson*, 393 U.S. 385 (1969), an ordinance which required the approval of the voters in Akron, Ohio, before the enactment of any fair housing ordinance was declared unconstitutional. But in *James v. Valtierra*, 402 U.S. 137 (1971), a similar provision in the California constitution requiring local voter approval for low-rent housing was upheld since it dealt with economic, not racial, discrimination. Zoning restrictions which are intended to eliminate low-cost housing from a community, and the general economic segregation which is perpetuated by zoning, known as a form of "exclusionary" land-use controls, are clearly discriminatory, but may not be unconstitutional. In *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381 (1925), in an opinion strongly supporting wide zoning powers and private residential districts, the court recognized that some municipalities have

under the guise of zoning, sought to enact and enforce unreasonable and discriminatory ordinances. Some of these attempted regulations have been palpably for the exclusive and preferential benefit of particular localities.

*Id.* at 489, 234 P. at 381. For the purposes of this topic, suffice it to say that if such ordinances are found to be unconstitutional, inverse condemnation would not be the appropriate remedy.

93. 272 U.S. 365 (1926).

94. *Id.* at 395. Recently the California Supreme Court reaffirmed the holding in *Euclid v. Ambler Realty Co.*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973), by rejecting claims of inverse condemnation based only upon the adoption of a general plan, even though it indicated potential taking of private property for a public use.

If the plan is implemented by the county in the future in such manner as to actually affect plaintiff's free use of his property, the validity of the county's action may be challenged at that time.

*Id.* at 118, 514 P.2d at 116, 109 Cal. Rptr. at 804.

95. 272 U.S. at 95. This course of action was followed in *Nectow v. City of Cambridge*, 277 U.S. 183 (1923), two years later when a zoning ordinance which included the plaintiff's land in a residential district was successfully challenged as a violation of the fourteenth amendment since there was no showing of public gain in the measure and serious damage to the owner. The emergence of special exceptions, permits, conditional and nonconforming use permits and other techniques have eliminated many potential *Nectow* challenges.

The majority in *HFH* found the facts in the case to be almost identical to those in the *Euclid* case:

Tendering allegations almost identical to those urged here, the appellee in *Euclid* claimed . . . . The court upheld the zoning against the claim that it constituted a taking of the property in question, settling some half century ago the question in the instant case.<sup>96</sup>

The *HFH* court refused to recognize that the law has undergone a period of substantial change since *Euclid* upheld zoning as a valid method of land use planning. In fact, the courts have begun to recognize that zoning changes may have a significant impact on property values. Moreover, there has been recognition by the courts that unreasonable governmental action may severely burden individual landowners.<sup>97</sup> Thus, *HFH* relies on outmoded concepts of the propriety of comprehensive zoning regulations.

It is questionable whether injunctive relief will restore the landowner to his original position.<sup>98</sup> Limiting the landowner's remedy to non-monetary relief in such situations encourages private interests to obstruct the future development of the community. It gives property owners the ability to hinder projects which may be just beyond constitutionality, but are entertained for the good of the community. Once it has been determined that a landowner has suffered an unreasonable burden,<sup>99</sup> the goal of the courts should be to allocate the burden in a fair and

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96. 15 Cal. 3d at 514-15, 542 P.2d at 241-42, 125 Cal. Rptr. at 369-70.

97. See, e.g., *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963). See also note 51 *supra* and accompanying text.

98. In *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958), injunctive relief was permitted against governmental precondemnation activity. In *Kissinger*, the city was unable or unwilling to condemn plaintiff's property until some time in the future, because it was awaiting the election results on a bond issue. In granting the injunction, the court noted:

[W]here, as here, the facts are such as to show an attempt to exercise the police power in such a manner as to oppress or discriminate against an individual or individuals we are entitled to give weight to the evidence disclosing a purpose other than that declared by the ordinance in determining its validity. A zoning ordinance may not be used as a device to take property for public use without the payment of compensation.

*Id.* at 462, 327 P.2d at 16 (citations omitted). See also *Bank of America v. Atherton*, 60 Cal. App. 2d 268, 140 P.2d 678 (1943).

Although the injunction was issued in *Kissinger*, it would be insightful to note how much the owner sacrificed financially in the process of fighting the unconstitutional governmental action. Undoubtedly, the loss of use of the property during the period of time that the issue was litigated was, in itself, a significant hardship.

99. The fact that the burden placed on the owner is a partial deprivation of use and not a total loss is irrelevant. The *HFH* majority erroneously distinguished between the two situations. When the zoning regulation destroys some but not all of the market value of a parcel of land, the majority in *HFH* prefers to utilize the benefit-burden

equitable manner.<sup>100</sup> Allowing the owner to bring a cause of action in inverse condemnation will allow the court to flexibly make such readjustments where they are appropriate.<sup>101</sup>

Faced with this delicate issue, several courts have evolved various approaches to the determination of when an action for inverse condemnation will lie. A flexible approach was recently taken in *Massachu-*

*approach to determine if compensation is due. But that determination should be made based on the reasonableness of the situation. The problems with emphasizing the balancing were well considered by the lower court in the same case:*

With the current emphasis on such goals and objectives in the face of the modern urbanization explosion, we must never lose sight of the fact that individual property owners should not unreasonably be forced to carry the cost of achieving goals which are to the benefit of the entire community. Under our system of private property it is to be expected that the public will bear the cost of public improvements. 41 Cal. App. 3d 908, 915, 116 Cal. Rptr. 436, 440-41 (1974), *vacated*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365, *cert. denied*, 96 S. Ct. 1495 (1975).

[This position] if carried to its logical extreme, could result in the price to be paid being increased to total loss of his private possessions. The safeguard against that result is the constitutional provision preventing a taking or damaging of private property without just compensation. *Id.* at 916, 116, 116 Cal. Rptr. at 441. The *HFH* lower court analogized to the constitutional protection against unreasonable search and seizure even in crime-ridden urban areas:

Thus it is no more valid for the government, in the exercise of its police powers, to visit financial deprivation on the owner of private property in the name of zoning, than to impair his constitutional liberty in the name of suppressing crime.

*Id.*, 116 Cal. Rptr. 441.

Just as valuable evidence obtained in an illegal search and seizure is tainted by these means, valuable environmental projects, accomplished at the expense of constitutional concerns, are also tainted.

100. An analogy is suggested by the discussion in J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS (1967), of the regulatory role of the law of torts in the adjustment of economic losses due to accidents. In Great Britain, prior to 1961, the economic burden of highway accidents caused by negligent maintenance of roads fell upon the individual victims due to the immunity from claims enjoyed by the highway authorities. This immunity "fell to the axe of reform" long after the establishment of modern taxation: the public character of the highway authorities, formerly the excuse for no liability, furnished the structure for a wide distribution of the losses. Fleming generalizes from this as follows:

Besides—and this is pertinent to all claims for immunity in whatever guise by public authority—the fact that the risk-creating activity was carried on for the public benefit offers all the more reason why all its beneficiaries should bear a proportionate share of the incidental loss which happens to befall its adventitious victims. For it is an unquestionable solecism in the grammar of modern democracy to demand from an individual that he sacrifice himself to the State and then to fob him off with the glib consolation that this is but the toll which misfortune occasionally and at random exacts in return for the benefits to be derived from membership. If the public benefits, let it pay its own way!

*Id.* at 12-13. Downzoning enjoys just such an immunity from claims in its capacity to regulate for the public good while it inflicts severe losses randomly upon innocent citizens.

101. The dissent in *HFH* noted that, assuming the invalidity of the zoning ordinance, the condemning agency is allowed alternative methods of proceeding once the landowner has established his or her cause of action in inverse condemnation. These include compensating the owner for the decrease in value, purchasing the land, and rescinding the regulation. 15 Cal. 3d at 527, 542 P.2d at 250, 125 Cal. Rptr. at 378.

setts, in *Commissioner of Natural Resources v. S. Volpe & Co.*,<sup>102</sup> where the court attempted to balance the ecological interest in protecting the marine life of Broad Marsh, and the constitutional rights of the landowner who was planning to fill the marsh in preparation for the construction of homes.<sup>103</sup> The court remanded the case with instructions to the lower court to make further findings on the suitability of the land for other uses, and on the difference in the fair market value of the land with and without the limitations.

In *Lomarch Corp. v. Mayor & Common Council of Englewood*,<sup>104</sup> a case involving precondemnation activities, the New Jersey Supreme Court acknowledged the possibility of recognizing the equivalent of an option to purchase the property for the time it was unusable, even during litigation, allowing compensation in money damages as well as an injunction.

Finally, in *Bydlon v. United States*,<sup>105</sup> the court reached an equitable, albeit unusual, result in awarding money damages equal to the value of the interest taken. In that case, the federal government was required to pay about twenty-five percent of the value of the fee estate, which was the amount of the reduction in value caused by federal police power ordinance which took the air access rights.<sup>106</sup>

Especially for local governments which are unable to borrow large sums, the costs of purchasing land may be unnecessarily prohibitive. Where the public interest requires only that some, but not all, of the rights and uses of the land be restricted, inverse condemnation would allow the government to proceed for the public good at the appropriate cost.<sup>107</sup>

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102. 206 N.E.2d 666 (Mass. 1965).

103. *Id.* at 671, partially quoted in *Eldridge v. Palo Alto*, 57 Cal. App. 3d 613, 624, 129 Cal. Rptr. 575, 581 (1976). In that case an ordinance that gave the city a year to decide whether or not they would condemn land was held to be equivalent to an option to purchase, which required the payment of compensation to the property owner. Professor Van Alstyne has pointed out that a policy of compensation in such situations tends to act as a brake against insensitive or over-enthusiastic administration. It encourages careful planning and more adequately considered choices between operational alternatives.

Van Alstyne, *supra* note 1, at 32.

104. 237 A.2d 881 (N.J. 1968).

105. 175 F. Supp. 891 (Ct. Cl. 1959).

106. *Id.* at 900, 906-16.

107. The use of inverse condemnation has been criticized because it is feared that people will take advantage of such a rule by bad faith attacks of zoning ordinances. One such attack was that it will serve as an excuse to unload properties no longer profitable to the owners. This fear is not a valid justification for dismissing the entire course of action. As the California Supreme Court noted in *Dillon v. Legg*, 68 Cal. 2d 723, 441



It should be noted that an alternative approach is developing for an action in inverse condemnation in the federal courts.<sup>108</sup> By employing various sections of the Federal Civil Rights Act,<sup>109</sup> plaintiffs have found a more sympathetic forum in which to redress their grievances against various political entities for zoning activities. Moreover, a cause of action may also be stated under the fifth and fourteenth amendments to the United States Constitution, thereby invoking federal question jurisdiction.<sup>110</sup>

The use of the Federal Civil Rights Act, and more specifically section 1983,<sup>111</sup> allows an action against public officials in their official capacities without running afoul of state and federal sovereign immunity problems.<sup>112</sup> In addition, exhaustion of state remedies has not been a significant deterrent to these actions.<sup>113</sup> Moreover, the current trend in

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P.2d 912, 69 Cal. Rptr. 72 (1968), the fear of fraudulent claims in a torts context cannot excuse the frustration of natural justice. It was observed that "in the past, [we] have rejected the argument that we should deny recovery upon a legitimate claim because other fraudulent ones may be urged." *Id.* at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

108. *See* Camden Corp. v. Evesham Township, 420 F. Supp. 709 (D.N.J. 1976); Sanfilippo v. County of Santa Cruz, 415 F. Supp. 1340 (N.D. Cal. 1976); Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Hawaii 1975); M.J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974); Cordeco Dev. Co. v. Vazquez, 354 F. Supp. 1355 (D.P.R. 1972); Inmobiliaria Borinquen Inc. v. Garcia Santiago, 295 F. Supp. 203 (D.P.R. 1969); Shellburne, Inc. v. New Castle County, 293 F. Supp. 237 (D. Del. 1968). *Cf.* Smoke Rise Inc. v. Washington San. Comm'n, 400 F. Supp. 1369 (D. Md. 1975).

109. Civil Rights Acts, §§ 1981, 1983, 1985, 1986, 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986 (1970).

110. 28 U.S.C. § 1331 (1970). *See* M.J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975); Smoke Rise, Inc. v. Washington Suburban San. Comm'n, 400 F. Supp. 1369 (C.D. Md. 1975).

111. 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.* *See also* Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), wherein the Supreme Court refused to treat property rights differently from personal rights for purposes of civil rights remedies.

112. *See, e.g.,* Sotomura v. County of Hawaii, 402 F. Supp. 95, 101-02 (D. Hawaii 1975); Inmobiliaria Borinquen, Inc. v. Garcia Santago, 295 F. Supp. 203, 205-06 (D.P.R. 1969).

113. *See, e.g.,* Sanfilippo v. County of Santa Cruz, 415 F. Supp. 1340, 1344 (N.D. Cal. 1976); Inmobiliaria Borinquen, Inc. v. Garcia Santiago, 295 F. Supp. 203, 206 (D.P.R. 1969). *But cf.* Vistomar, Inc. v. Vasquez, 337 F. Supp. 375 (D.P.R. 1971) (exhaustion of state administrative remedies may be required if they are adequate).

federal courts is to avoid abstention in these matters.<sup>114</sup>

The use of federal question jurisdiction alleviates any problem of suing a municipality directly,<sup>115</sup> although the amount in controversy requirement of greater than \$10,000 is still applicable.<sup>116</sup> Consequently, a federal cause of action may provide an alternative inverse condemnation remedy to unsuccessful plaintiffs' in state courts.

## VI. CONCLUSION

By deferring to the legislature, the *HFH* court disappointed those hoping for some flexible judicial standard allowing for a case-by-case definition based upon the balancing of the interests involved.<sup>117</sup> It would be unfortunate to allow private property interests to dictate land-use to the cities. Nonetheless, in some circumstances, through inverse condemnation, oppressive burdens placed on individual property owners can be remedied without disrupting public projects.

The case law and principles underlying the concept of inverse condemnation are applicable to downzoning and indicate that an action should lie for inverse condemnation. By allowing such a cause of action, the court would be able to consider, on the basis of the particular facts in issue, whether the cost of planning should be borne by the individual landowner or distributed to those who benefit from the planning. This would allow the court an alternative to invalidating those governmental actions considered to be unfair, and thereby accommodate the interests of all parties involved.

*Joan Patsy Ostroy*

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114. See *Donahoe Constr. Co. v. Maryland-Nat'l Capitol Park and Planning Comm'n*, 398 F. Supp. 21 (D. Md. 1975); *M.J. Brock & Sons, Inc. v. City of Davis*, 401 F. Supp. 354, 357-59 (N.D. Cal. 1975). Cf. *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 390 F. Supp. 1004 (C.D. Cal. 1974) (although the court abstained from exercising jurisdiction, it emphasized that "special circumstances" were present).

115. This applies for injunctive and declaratory relief. See *Dahl v. City of Palo Alto*, 372 F. Supp. 647, 650 (N.D. Cal. 1974). See also *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

116. 28 U.S.C. § 1331 (1970).

117. The federal court had the opportunity to reach this question in *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974), a case presenting similar facts to *Eldridge*. The court reached a result which is now contrary to California law, as decreed by the state supreme court. See notes 83-86 *supra* and accompanying text. The federal courts now face a significant dilemma; they can continue to allow this cause of action, cutting against the grain of the California Supreme Court, or they can overrule *Dahl* and succumb to the tenets of *HFH*.