Time Is Money: Deterring Condemnation Blight Through Stricter Standards For Inequitable Pre-Condemnation Activity

Government activity preceding the acquisition of private property by eminent domain may profoundly affect the market value of target parcels. Some pre-condemnation activity is so inequitable that it creates an unconstitutional taking under the fifth and fourteenth amendments. This comment examines current standards for determining inequitable pre-condemnation activity, focusing on the two tests of Klopping v. City of Whittier. *It determines that the* Klopping *tests, while theoretically sound, must be refined if landowners and condemnors are to receive consistent judicial treatment. Accordingly, it sets forth several proposals to more adequately define this cause of action.*

INTRODUCTION

The planning and political processes that precede government acquisition of private property by eminent domain[1] or inverse condemnation[2] may profoundly affect land values. For example, if a regulatory authority announces its intention to construct a

[1] Eminent domain is an action brought by a condemning authority to compel the sale of private property to the government. *See* United States v. Clarke, 445 U.S. 253, 255 (1980).

[2] Inverse condemnation is an action brought by the landowner to compel the government to purchase property it has been using without paying compensation. *See id.* at 257. Both inverse condemnation and eminent domain, *see* note 1 *supra*, ensure that "[p]rivate property may be taken or damaged for public use only when just compensation . . . has been paid to . . . the owner." CAL. CONST. art. I, § 19 (West Cum. Supp. 1981). *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 529-560 (8th ed. 1974). This constitutional guarantee underlies both actions, and does not apply only when the taking is inexpensive or easy. Indeed, the need for compensation is greatest where the loss is greatest. Stoebuck, *Condemnee's Rights*, 56 IOWA L. REV. 293, 307 (1970).

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lake in a rural area, news of that project may raise land values in surrounding communities as developers see the potential for resort property.[3] Not all planning actions, however, elicit a positive response in the real estate market. In fact, the announcement of a decision-maker's[4] intent to condemn a particular parcel may cause a site's value to plummet.[5] In addition, the delays inherent in government action may decrease a parcel's value by clouding its title indefinitely.[6] Even adopting a general plan may negatively affect the local market.[7]

These actions are called "pre-condemnation activity."[8] In appropriate cases, this activity effects an unconstitutional taking under the fifth[9] and fourteenth[10] amendments. A decrease in

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[3] *See* San Diego Land, etc., Co. v. Neale, 78 Cal. 63, 20 P. 372 (1888), *disapproved*, Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

[4] In this comment, "decision-maker" refers to multi-member government bodies with the power of eminent domain. *Cf.* Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 104 [hereinafter cited as *Legislative Motive*] (setting forth a similar definition in determining legislative motivation).

[5] *See, e.g.*, Board of Educ. v. Clarke, 89 Mich. App. 504, 280 N.W.2d 574 (1979). In *Clarke*, a local school board wavered on condemning private property for over four years. During that time, the owners were unable to rent the target property, and the homes situated on it deteriorated to the point where they had to be demolished. When the board finally commenced condemnation proceedings, the property had retained only 10% of its original value. *See also* Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966); Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975); Note, Agins v. City of Tiburon*: An Aggrieved Party - Loss of Inverse Condemnation Actions in Zoning Ordinance Disputes*, 7 PEPPERDINE L. REV. 457, 463-66 (1980) [hereinafter cited as Pepperdine Note].

[6] Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). *See* Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979) (requirement that land be reserved for freeway use until some indefinite date constitutes an unreasonable delay); notes 41-49 and accompanying text *infra*.

[7] *See* Comment, Selby Realty Co. v. City of San Buenaventura*: How General Is the General Plan?*, 26 HASTINGS L.J. 614 (1974) [hereinafter cited as *General Plan?*]; Note, 19 WASHBURN L.J. 374 (1980) [hereinafter cited as Washburn Note] (examining Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979) as an exception to the rule that planning can never be a taking); notes 79-91 and accompanying text *infra*.

[8] *See generally* Annot., 37 A.L.R.3d 127 (1971 & 1981 Supp.).

[9] The fifth amendment provides, in relevant part, "[N]or shall private prop-

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value that results from inequitable pre-condemnation activity is "condemnation blight."[11]

Courts do not completely agree upon the circumstances that obligate a decision-maker to compensate an aggrieved landowner for condemnation blight.[12] The California Supreme Court, however, has articulated the most sophisticated approach to inequitable pre-condemnation activity.[13] In *Klopping v. City of Whittier*,[14] the court held that a landowner states a cause of action

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erty be taken for public use, without just compensation." U.S. CONST. amend. V. *See also* note 2 *supra* (quoting California's similar constitutional requirement).

[10] U.S. CONST. amend. XIV. The fifth amendment is applied to the states through the due process clause of the fourteenth amendment. *See* Chicago B. & Q.R.R. v. City of Chicago, 166 U.S. 226 (1897); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 456-59 (1978). Provisions similar to the fifth and fourteenth amendments' prohibitions against takings exist in the constitutions of each state. *See, e.g.*, CAL. CONST. art. I, § 19 (West Cum. Supp. 1981), *quoted in* note 2 *supra*. Constitutional provisions in 23 states are broader than the fifth amendment, requiring compensation for property *damaged* by the government for public use. Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1439-40 n.3 (1974).

[11] *See generally* Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765 (1973).

[12] City of Chicago v. Loitz, 61 Ill. 2d 92, 97, 329 N.E.2d 208, 211 (1975). Some courts, in fact, require the condemning authority physically to invade the property to sustain a condemnation blight award. *E.g.*, Far-Gold Constr. Co. v. Village of Chatham, 141 N.J. Super. 164, 357 A.2d 765 (1976) (adopting resolutions that express a borough's desire to acquire a tract for park purposes and to authorize application for state and federal funds only constitutes planning, and does not represent a compensable taking without physical appropriation). A distinct minority of federal and state courts, however, hold some pre-condemnation activities to be so inequitable as to constitute a taking. 61 Ill. 2d at 97, 329 N.E.2d at 212. *See generally* Annot., *supra* note 8. *See also* Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980) (good faith planning activities do not create a compensable taking in condemnation blight). *But see* notes 79-91 and accompanying text *infra* (arguing that planning can create a cause of action for inequitable pre-condemnation activity if the adoption of a general plan is an announcement of intent to condemn). *Cf. In re* Crosstown Expressway, 3 Pa. Commw. Ct. 1, 281 A.2d 909 (1971) (whether planning is a taking is a matter of degree).

[13] Kanner, *supra* note 11, at 802. *See also* City of Honolulu v. Chun, 54 Hawaii 287, 292-93, 506 P.2d 770, 773 (1973) ((Levinson, J., dissenting); Sproul Homes of Nevada v. State, 611 P.2d 620, 622 (Nev. 1980).

[14] 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). *See The Supreme Court of California 1971-72*, 61 CALIF. L. REV. 587 (1973) [hereinafter cited as Calif. Note]; Pepperdine Note, *supra* note 5, at 459-60; notes 23-35 and accompanying text *infra*.

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when a decision-maker decreases a parcel's market value in one of two ways: either by unreasonably delaying eminent domain proceedings after announcing an intent to condemn, or by otherwise acting unreasonably.[15]

This comment examines *Klopping*, the elements of these two tests, and state and federal analyses of condemnation blight. It first examines the *Klopping* decision, focusing on the acts and policies that prompted the California Supreme Court to overturn a judicial directive against a cause of action for inequitable pre-condemnation activity.[16] In discussing the tests' four elements—unreasonable delay, announcement of intent, other unreasonable conduct, and diminutions in value—the comment argues that courts should presume that delays exceeding six months are unreasonable.[17] It further posits that an objective standard should define "announcement," so that even a delay after the enactment of a general plan could be actionable.[18] In exploring "other unreasonable conduct,"[19] this comment advocates that the decision-maker's motivation should be reviewable in condemnation blight cases, reversing the present presumption of good faith.[20] It further urges that, because of statutory "consistency requirements,"[21] courts should presume an action ineq-

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[15] Klopping v. City of Whittier, 8 Cal. 3d 39, 52, 500 P.2d 1345, 1355, 104 Cal. Rptr. 1, 11 (1972). *See* text accompanying notes 34-35 *infra.*

[16] *See* Atchison, Topeka, and Sante Fe Ry. v. Southern Pac. Co., 13 Cal. App. 2d 505, 518, 57 P.2d 575, 581 (2d Dist. 1936) (citing San Diego Land, etc., Co. v. Neale, 78 Cal. 63, 20 P. 372 (1888)), *disapproved on other grounds,* County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957); note 32 *infra.*

[17] *See* notes 54-64 and accompanying text *infra.*

[18] *See* notes 79-91 and accompanying text *infra. But see* Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); note 80 *infra.*

[19] *See* text accompanying note 34 *infra.*

[20] *See* Toso v. City of Santa Barbara, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (2d Dist. 1980); Viso v. California, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (3d Dist. 1979); notes 115-124 and accompanying text *infra. Cf.* Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1st Dist. 1976) (suggesting that motivation is relevant in down-zoning cases); Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (2d Dist. 1958) (allowing an examination of legislative intent in "spot zoning" cases).

[21] *E.g.,* CAL. GOV'T CODE § 65860 (West Cum. Supp. 1981). For a discussion of consistency, see City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 521, 160 Cal. Rptr. 907 (4th Dist. 1979).

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uitable if it is inconsistent with the governing general plan.[22]

The comment concludes that, while courts should continue to use the *Klopping* tests when reviewing pre-condemnation activity, they should refine the tests' four elements. The presumptions, jury standards, timing principles, and extensions of existing doctrine that this comment proposes will help courts to achieve that goal.

I. *Klopping v. City of Whittier*[23]

In May of 1965, the city of Whittier, California adopted a resolution to form a parking district and build a public garage. The plaintiffs' land was among the parcels to be condemned. The following November, the city began condemnation actions against the properties.[24]

To defray the cost of the new parking district, the city attempted to levy assessments against local businesses that would benefit from the garage. These property owners filed suit to enjoin the assessment.[25] The challenge made it impossible for the city to sell bonds to finance the district and to acquire the parcels.

In response, the city issued a second resolution, stating that it would not be " 'fair and equitable' to continue the restraining effect of the pending condemnation suit on the use of the properties sought to be condemned."[26] This second resolution authorized dismissal of the condemnation action, but declared the city's "*firm intention to reinstitute proceedings* when and if the assessment battle was terminated in the city's favor."[27] In November of 1966, the city dismissed the condemnation proceedings.[28]

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[22] *See* notes 125-131 and accompanying text *infra*.

[23] 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

[24] *Id.* at 42, 500 P.2d at 1348, 104 Cal. Rptr. at 4.

[25] *See* Alpha Beta Acme Markets, Inc. v. City of Whittier, 262 Cal. App. 2d 16, 68 Cal. Rptr. 327 (2d Dist. 1968).

[26] Klopping v. City of Whittier, 8 Cal. 3d 39, 42, 500 P.2d 1345, 1348, 104 Cal. Rptr. 1, 4 (1972).

[27] *Id.* (emphasis added).

[28] Another suit ensued to determine whether the termination was a voluntary dismissal, *see* CAL. CIV. PROC. CODE § 581 (West 1976), or an abandonment. *See* CAL. CIV. PROC. CODE § 1268.510 (West Cum. Supp. 1981). Successful suitors may recover costs when decision-makers abandon condemnation proceedings, *id.* §§ 1268.610-.620, and the plaintiffs in *Klopping* were success-

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The plaintiffs submitted an inverse condemnation claim to the city. The basis of the claim was the diminution in property value caused by "the original resolution of [the city's] intent to condemn,"[29] and "the resolution abandoning the condemnation proceeding but simultaneously announcing the city's intention to resume eminent domain action."[30] The city rejected the claim, and the case was ultimately appealed[31] to the California Supreme Court.[32]

In *Klopping*,[33] the California Supreme Court held that

> a condemnee must be provided with an opportunity to demonstrate that . . . the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and . . . as a result of such action the property in question suffered a diminution in market value.[34]

Klopping thus produced two tests of inequitable pre-condemnation activity. The first derives from an unreasonable delay following an announcement of intent to condemn; the alternate is based on "other unreasonable activity." Both of these tests require a common element: diminution in the target property's

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ful in showing an abandonment. City of Whittier v. Aramian, 264 Cal. App. 2d 683, 70 Cal. Rptr. 805 (2d Dist. 1968).

[29] Klopping v. City of Whittier, 8 Cal. 3d 39, 42, 500 P.2d 1345, 1348, 104 Cal. Rptr. 1, 4 (1972).

[30] *Id.*

[31] The lower courts sustained without leave to amend the city's demurrers as to matters occurring before the original condemnation action, but with leave to amend as to matters following the action. The plaintiffs chose not to amend, and the actions were dismissed. *Id.* at 44, 500 P.2d at 1348, 104 Cal. Rptr. at 5.

[32] Before the court heard *Klopping*, the courts of appeal had been split on the question whether a cause of action for inequitable pre-condemnation activity existed in California. The earliest case on the subject, Atchison, Topeka, and Sante Fe Ry. v. Southern Pac. Co., 13 Cal. App. 2d 505, 57 P.2d 575 (2d Dist. 1936), *disapproved on other grounds*, County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957), had held that courts could not "lend a willing ear to speculation." 13 Cal. App. 2d at 517, 57 P.2d at 581. In People *ex rel.* Department of Pub. Works v. Lillard, 219 Cal. App. 2d 368, 33 Cal. Rptr. 189 (3d Dist. 1963), the court implied that, under equitable principles, a landowner could recover for a decision-maker's acquisition activity that reduced the target property's market value.

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

[34] *Id.* at 52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.

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market value.[35]

II. Analysis of the *Klopping* Tests

Many state and federal courts have considered the parameters of condemnation blight in light of *Klopping*.[36] The United States Supreme Court, however, has not composed clear guide-

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[35] *See* County of Los Angeles v. Berk, 26 Cal. 3d 201, 223, 605 P.2d 381, 395, 161 Cal. Rptr. 742, 756 (1980). The *Klopping* court determined that rental value is the proper measure of the landowner's monetary loss because it "relates directly to the fair market value of the property. . . ." Klopping v. City of Whittier, 8 Cal. 3d 39, 54 n.7, 500 P.2d 1345, 1357 n.7, 104 Cal. Rptr. 1, 13 n.7 (1972) (citing Luber v. Milwaukee County, 47 Wis. 2d 221, 177 N.W.2d 380 (1970)). *Cf.* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653-60 (1980) (Brennan, J., dissenting) (arguing for awarding interim damages for losses caused by unconstitutional regulatory activity); Duerksen & Mantell, *Interim Damages: A Remedy in Land Use Cases*, 33 Land Use L. & Zoning Dig. 6 (Apr. 1981). The *Klopping* court remanded the determination of the proper time frame to calculate recovery after allowing for public response. 8 Cal. 3d at 54, 500 P.2d at 1357, 104 Cal. Rptr. at 13. It indicated, however, that the delay following the second announcement was inequitable because that announcement appeared "to have no discernible relation to a desire to insure public input into the decision-making process since, presumably, discussion on the advisability and location of a parking district occurred at the time of the first announcement." *Id.* at 55, 500 P.2d at 1357, 104 Cal. Rptr. at 13. This reluctance to clearly hold one of the statements inequitable *per se* indicated the court's concern with preserving public involvement in the decision-making process:

> [W]e are . . . aware that to allow recovery under all circumstances for decreases in market value caused by precondemnation announcements might deter public agencies from announcing sufficiently in advance their intention to condemn . . . . A reasonable interval of the time between an announcement of intent and the issuance of the summons serves the public interest. Therefore, in order to insure meaningful public input into condemnation decisions, it may be necessary for the condemnee to bear slight incidental loss.

Id. at 51, 500 P.2d at 1354, 104 Cal. Rptr. at 10-11. *See* notes 55-64 and accompanying text *infra* (arguing that a six-month delay should be unreasonable *per se*).

[36] *See, e.g.*, City of Chicago v. Loitz, 61 Ill. 2d 92, 97-98, 329 N.E.2d 208, 211-12 (1975) (citing Annot., *supra* note 8). *See also* Bowden & Feldman, *Take It or Leave It: Uncertain Regulatory Taking Standards and Remedies Threaten California's Open Space Planning*, 15 U.C. Davis L. Rev. 371, 384-86 (discussing the distinction between "pre-condemnation" and "plan designation" activity in Rancho LaCosta v. County of San Diego, 111 Cal. App. 3d 54, 168 Cal. Rptr. 491 (4th Dist. 1980)).

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lines for determining inequitable pre-condemnation activity,[37] and the national condemnation blight cases are by no means consistent.[38] The elements of the tests must be refined if decision-makers and landowners are to receive consistent judicial treatment.

A. *The First Test: Unreasonably Delaying Eminent Domain Action Following an Announcement of Intent to Condemn*

The first of the *Klopping* tests consists of two elements: an unreasonable delay, and an announcement of intent to condemn.[39] Landowners must, of course, bear the costs of some delays and announcements, thus to allow time for public response to government proposals.[40] At present, however, no delay has been declared unreasonable *per se*.

1. Unreasonable Delay

In a condemnation blight action, determining the reasonableness of any delay is unquestionably within the province of the trier of fact.[41] In *Klopping*, a two-year delay followed the city's initial announcement of intent to condemn. The delay after the second announcement ended in litigation in the California Supreme Court.[42] The court, however, did not specifically find either of these delays unreasonable. It instead remanded the determination of the proper time frame for assessing the parcel's reduced value.[43] Thus, the two-year period cannot help courts refine the *Klopping* test, except by suggesting an outside limit for reasonable delays.

Courts have not consistently used any time limit to determine

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[37] *See* Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980) (acknowledging but failing to refine the *Klopping* test).

[38] *See generally* Annot., *supra* note 8; Washburn Note, *supra* note 7. *See also* notes 44-54 and accompanying text *infra*.

[39] Klopping v. City of Whittier, 8 Cal. 3d 39, 52, 500 P.2d 1345, 1355, 104 Cal. Rptr. 1, 11 (1972). *See* note 34 and accompanying text *supra*.

[40] Klopping v. City of Whittier, 8 Cal. 3d 39, 55, 500 P.2d 1345, 1354-55, 104 Cal. Rptr. 1, 13 (1972). *See* note 35 *supra*.

[41] Klopping v. City of Whittier, 8 Cal. 3d 39, 54, 500 P.2d 1345, 1357, 104 Cal. Rptr. 1, 13 (1972); People *ex rel.* Department of Pub. Works v. Peninsula Enterprises, Inc., 91 Cal. App. 3d 332, 356, 153 Cal. Rptr. 895, 908 (2d Dist. 1979).

[42] *See* notes 24-32 and accompanying text *supra*.

[43] *See* note 35 *supra*.

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whether a delay is unreasonable. For example, in *Department of Conservation v. Aspegren Financial Corp.*,[44] the department's petition to condemn the plaintiff's land followed its initial announcement of intent by more than three years. Yet, the Illinois Supreme Court declared that this delay was not unreasonable *per se*.[45] Similarly, in *Johnson v. California*,[46] the fact that target land might be acquired in ten to twenty years did not require immediate eminent domain proceedings.[47] However, the Supreme Court of Kansas, in *Ventures in Property I v. City of Wichita*,[48] found it unreasonable to require a privately owned parcel to remain undeveloped indefinitely.[49]

While these results differ, they are not inconsistent; nor do they conflict with *Klopping*. The *Klopping* court intended neither to inhibit simple long-range planning,[50] nor to require

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[44] 72 Ill. 2d 302, 381 N.E.2d 231 (1978).

[45] *Id.* at 308, 381 N.E.2d at 234 (citing Metropolitan Sanitary Dist. v. Industrial Land Dev. Corp., 121 Ill. App. 2d 393, 257 N.E.2d 532 (1970) (5½ year delay); Department of Pub. Works & Bldgs. v. Gieseking, 108 Ill. App. 2d 105, 246 N.E.2d 707 (1969) (5 year delay)).

[46] 90 Cal. App. 3d 195, 153 Cal. Rptr. 185 (1st Dist. 1979) (plaintiffs sought recovery for decision-maker's plans to construct a freeway and use their property for rights-of-way).

[47] *Id.* at 199, 153 Cal. Rptr. at 188. The court concluded that,

> Until design has been completed, environmental considerations have been accounted for, and actual condemnation resolutions are issued, it cannot be said with any certainty what property will be required for a project. *Klopping* was not intended to inhibit long-range planning of public projects or to require that property for proposed public improvements be purchased before it may be needed.

Id. (citing Smith v. California, 50 Cal. App. 3d 529, 123 Cal. Rptr. 745 (2d Dist. 1975)).

[48] 225 Kan. 698, 594 P.2d 671 (1979). *See generally* Washburn Note, *supra* note 7, at 379-81; note 6 *supra*.

[49] Ventures in Property I v. City of Wichita, 225 Kan. 698, 713-14, 594 P.2d 671, 682-83 (1979). *See also* note 61 *infra* (court declaring 6 month limit for appropriate action by decision-maker).

[50] Johnson v. California, 90 Cal. App. 3d 195, 199, 153 Cal. Rptr. 185, 188 (1st Dist. 1979). *See* Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, *cert. denied*, 295 N.C. 733, 248 S.E.2d 862 (1978) (taking not established where initial alternative planning proposals for state park that contemplated acquisition of the property had been made, where no master plan had been adopted, and where, even when adopted, the master plan would not assure that any lands contemplated for inclusion in the park would be acquired); Howell Plaza, Inc. v. State Highway Comm'n, 66 Wis. 2d 720, 226 N.W.2d 185 (1978) (plaintiff

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that a decision-maker purchase private property for public use before it is needed.[51] Moreover, courts have indicated that landowners should bear minor costs resulting from reasonable delays, such as those necessary to encourage adequate public response.[52] These policies justify denying compensation for the long-range planning in *Aspegren Financial Corp.* and *Johnson.* They also mandate recovery in cases like *Klopping* and *Ventures in Property I*, where the condemnor's desires amounted to little more than pipe dreams.[53]

It is difficult to draw the line between pipe dreams and long-range planning. Unfortunately, when courts fail to draw the line, the results may be disastrous.[54] Therefore, state legislatures should demarcate a presumption of unreasonable delay, a line

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shopping center corporation failed to state cause of action by alleging that defendant commission occupied its lands by plotting, planning, and acquiring property in anticipation of freeway construction by having appraisals made, and by the fact that the authorities urged the plaintiff to forgo developing its property in anticipation of freeway development). *But see* notes 79-92 and accompanying text *infra* (advocating the abolition of the general rule that planning cannot be a taking).

[51] Johnson v. California, 90 Cal. App. 3d 195, 199, 153 Cal. Rptr. 185, 188 (1st Dist. 1979).

[52] Klopping v. City of Whittier, 8 Cal. 3d 39, 51, 500 P.2d 1345, 1354-55, 104 Cal. Rptr. 1, 10-11 (1972); *see* note 35 *supra. See also* Agins v. City of Tiburon, 24 Cal. 3d 266, 278, 598 P.2d 24, 32, 157 Cal. Rptr. 372, 378 (1979) (citing City of Walnut Creek v. Leadership Housing Sys., 73 Cal. App. 3d 611, 622-23, 140 Cal. Rptr. 690, 696 (1st Dist. 1977)) ("The expression of political preference cannot be so burdened."), *aff'd,* 444 U.S. 255 (1980); Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 678, 146 Cal. Rptr. 687, 694 (1978) ("A more chilling effect upon open and frank discussion essential to community decision-making process . . . is difficult to imagine.")

[53] *See* text accompanying notes 27, 48 *supra. But cf.* City of Los Angeles v. Lowensohn, 54 Cal. App. 3d 625, 636, 127 Cal. Rptr. 417, 424 (2d Dist. 1976) ("There is no recovery via condemnation for the taking of a pipe dream.").

[54] *See, e.g.,* Foster v. City of Detroit, 254 F. Supp. 655 (D. Mich.), *aff'd,* 405 F.2d 138 (6th Cir. 1966). In *Foster,* the plaintiff landowner began plans for slum-clearing in 1949. In 1950, the city began a condemnation suit. After the institution of the proceedings, the plaintiffs were advised to visit a designated public official if they had questions. The official told the plaintiffs not to improve the property in an attempt to get more money from the city, and that they would be told when the property would be taken. The city abandoned the condemnation suit ten years after filing. *See also In re* Elmwood Park Project, etc., 376 Mich. 311, 136 N.W.2d 896 (1965) (city's activities reduced rental values by more than 90% and caused foreclosure and abandonment of some properties); Board of Educ. v. Clarke, 89 Mich. App. 504, 280 N.W. 2d 574 (1979), *discussed in* note 5 *supra.*

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that, if crossed, would result in a finding of condemnation blight.

California has a statute supporting such a presumption. Section 1245.260 of the California Code of Civil Procedure provides:

> If a public entity has adopted a resolution of necessity but has not commenced an eminent domain proceeding to acquire the property *within six months after the date of the adoption of the resolution* . . . the property owner may, by an action in inverse condemnation . . . [r]ecover damages from the public entity for any interference with the possession and use of the property resulting from the ordinance.[55]

The California Supreme Court has recognized that this statute's predecessor authorized inverse condemnation suits for condemnation blight.[56] However, it has not opted to interpret either statute to declare a six-month period between announcement and condemnation unreasonable *per se*.[57]

This is an unfortunate choice. The legislature enacted section 1245.260 and its predecessor[58] to allow compensation for land value reduced by delayed condemnation proceedings.[59] Recovery is available irrespective of whether the decision-maker ultimately abandons condemnation proceedings.[60] If a landowner acquires standing to sue for these losses six months after a deci-

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[55] CAL. CIV. PROC. CODE § 1245.260 (West Cum. Supp. 1981) (emphasis added).

[56] Klopping v. City of Whittier, 8 Cal. 3d 39, 57 n.9, 500 P.2d 1345, 1359 n.9, 104 Cal. Rptr. 1, 15 n.9 (1972) (interpreting CAL. CIV. PROC. CODE § 1243.1, ch. 1681, § 1, 1971 Cal. Stats. 3607 (current version at CAL. CIV. PROC. CODE § 1245.260 (West Cum. Supp. 1981)).

[57] Klopping v. City of Whittier, 8 Cal. 3d 39, 57 n.9, 500 P.2d 1345, 1359 n.9 104 Cal. Rptr. 1, 15 n.9 (1972). *See* note 56 *supra*. *But see* Calif. Note, *supra* note 14, at 592-93 (disagreeing with Justice Mosk's analysis of CAL. CIV. PROC. CODE § 1243.1, ch. 1681, § 1, 1971 Cal. Stats. 3607 (current version at CAL. CIV. PROC. CODE § 1245.260 (West Cum. Supp. 1981)). *See also* Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671, 683 (1979) (ordering condemnor to take action within six months of decree or face judgment in inverse condemnation).

[58] Ch. 1681, § 1, 1971 Cal. Stats. 3607 (current version at CAL. CIV. PROC. CODE § 1245.260 (West Cum. Supp. 1981)).

[59] *See Law Revision Comment, 1975 Addition*, CAL. CIV. PROC. CODE § 1245.260 (West Cum. Supp. 1981).

[60] Klopping v. City of Whittier, 8 Cal. 3d 39, 57, 500 P.2d 1345, 1359, 104 Cal. Rptr. 1, 15 (1972). *See* CAL. CIV. PROC. CODE § 1245.260(d) (West Cum. Supp. 1981). *Cf.* Luber v. Milwaukee County, 47 Wis. 2d 271, 177 N.W.2d 380 (1970) (statute limited the right to recover rental loss to one year before taking).

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sion-maker announces its intent to condemn, it is consistent to view the six-month delay as unreasonable.[61] In fact, the legislative history of section 1245.260 *assumes* that a cause of action accrues under the statute after six months.[62]

California's judiciary, and courts in states with similar statutes,[63] should therefore adopt a presumption of unreasonable delay in condemnation blight actions if the condemning authority fails to institute eminent domain action within six months of its announcement of intent to condemn.[64] Public response is necessary for sound planning,[65] however, and the decision-maker should thus be allowed to rebut this presumption by showing that its announcement and the resultant delay were incident to acceptable planning[66] and public response.

2. Announcement of Intent to Condemn

Most courts hold that adopting a resolution expressing a decision-maker's desire to acquire funding is not an announcement sufficient to constitute a taking.[67] Under *Klopping*, an announcement may be the first step down a path of inequity and

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[61] *See, e.g.*, Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979). In *Ventures in Property I*, the court determined that some forms of planning activity can give rise to a taking. *See generally* Washburn Note, *supra* note 7. Because the case was one of first impression and a departure from the general rule that planning cannot be a taking, the court retained jurisdiction for six months to allow the decision-maker to cease acting inequitably or to institute eminent domain proceedings. 225 Kan. at 713-14, 594 P.2d at 683.

[62] *See Law Revision Commission Comment, supra* note 59, comment (1).

[63] *See, e.g.*, MD. REAL PROP. CODE ANN. § 12-105 (1981); MASS. GEN. LAWS ANN. ch. 79, § 16 (West 1969); MICH. STAT. ANN. § 8.265(18) (Cum. Supp. 1981); MINN. STAT. ANN. § 117.105 (West 1977) (90 days); N.J. REV. STAT. ANN. § 20:3-25 (West Cum. Supp. 1981); N.C. GEN. STAT. § 40A-51 (Cum. Supp. 1981) (24 months). *Cf.* NEB. REV. STAT. § 76-711 (Cum. Supp. 1980) (requiring two years between abandonment and new eminent domain proceedings).

[64] *See* notes 67-92 and accompanying text *infra*.

[65] *See* notes 40, 50-52 and accompanying text *supra*.

[66] *See* notes 50-52 and accompanying text *supra;* notes 79-92 and accompanying text *infra*. *See also* Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979); Washburn Note, *supra* note 7, at 379-81.

[67] *E.g.*, Johnson v. California, 90 Cal. App. 3d 195, 153 Cal. Rptr. 185 (1st Dist. 1979); Far-Gold Constr. Co. v. Village of Chatham, 141 N.J. Super. 164, 357 A.2d 765 (1976); Hurley v. Rapid City, 80 S.D. 180, 121 N.W.2d 21 (1963) (city resolution to construct highway across plaintiff's property is insufficient to satisfy inverse condemnation requirements).

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unconstitutionality. The announcement not only determines when the meter begins running on the decision-maker's use, it determines whether there is a taking at all.[68] Therefore, the legal definition of "announcement" is all-important in condemnation blight cases.

The complex structure of government defies a simple definition of "announcement" because most decision-makers have many political spokespersons.[69] Aggrieved landowners have sought recovery for statements of condemnation intent ranging from those of military officers who leaked a government plan to acquire property adjoining a military reservation,[70] to the statements of a city attorney at a probate sale,[71] to newspaper publication of a highway interchange map,[72] to a formal resolution

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[68] *Cf.* Klopping v. City of Whittier, 8 Cal. 3d 39, 57, 500 P.2d 1345, 1359, 104 Cal. Rptr. 1, 15 (1972); Calif. Note, *supra* note 14, at 597.

[69] *See, e.g.*, PRINCIPLES AND PRACTICE OF URBAN PLANNING 29-47 (W. Goodman ed. 1968) (explaining the multiple levels of government interaction). *See also* H. BERNSTEIN & D. BERNSTEIN, LEGAL ASPECTS OF PLANNING AND ZONING (1974).

[70] NBH Land Co. v. United States, 576 F.2d 317 (Ct. Cl. 1978) (military officers' divulgence to local interests of proposed government scheme to acquire land adjoining military reservation, resulting in diminution in value of some adjoining property was not a compensable taking even though scheme was eventually defeated).

[71] Bank of Am. Nat'l Trust & Sav. Ass'n v. County of Los Angeles, 270 Cal. App. 2d 165, 75 Cal. Rptr. 444, (2d Dist. 1969), *disapproved in part*, Klopping v. City of Whittier, 8 Cal. 3d 39, 52 n.5, 500 P.2d 1345, 1355 n.5, 104 Cal. Rptr. 1, 11 n.5 (1972). A deputy counsel had appeared at a probate sale and announced that the Board of Supervisors had adopted a resolution to condemn the target parcel. The plaintiffs complained that this announcement stifled the bidding process and sought to recover the difference between the price at which the property was sold and the anticipated higher bid. The court of appeal rejected the claim. In *Klopping*, the California Supreme Court stated, "To the extent the decision holds that losses occasioned by an announcement of intent to condemn are not recoverable . . ., it is disapproved. However, we note that the speculative nature of 'anticipated bids' is such that the case presented matters not currently before us." 8 Cal. 3d at 52 n.5, 500 P.2d at 1355-56 n.5, 104 Cal. Rptr. at 11 n.5.

[72] *See* Highway Dev. Co. v. Mississippi State Highway Comm'n, 343 So. 2d 477, 479 (Miss. 1975) (newspaper publication of highway interchange plans was not binding on condemnor). *See also* Whyte v. Kansas City, 22 Mo. App. 409 (1886) (plaintiff learned of adoption of sidewalk ordinance from newspaper and proceeded to tear away the front of his building and to rebuild it four feet back from its original face; court held that, without instituting formal condemnation proceedings, city could abandon project and avoid liability), *cited in* Annot., *supra* note 8, at 141.

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and placement of a bond issue to acquire target property.[73]

A possible solution to this definitional problem is to require simply that the only announcement satisfying the *Klopping* test is a formal resolution by the unified voice of the condemning authority.[74] In California, this would be consistent with a presumption raised by section 1245.260, under which the time for valuing condemnation loss begins with the decision-maker's resolution of necessity.[75] Furthermore, this simple definition would give courts an objective act to search for when deciding a condemnation blight case.

Unfortunately, such a solution would compel further sluggishness in planning activity. Condemnors could prolong their processes, knowing that liability would arise only after a formal resolution.[76] Thus, the formal resolution should not be the touchstone for defining "announcement" in an action for inequitable pre-condemnation activity. Instead, because condemnation blight relates primarily to the reaction of the marketplace,[77] the standard should reflect the market. Courts should find an announcement of intent to condemn whenever a decision-maker's statement is such that a reasonable person in the real estate market would expect it to substantially affect the market value of a target parcel. This standard would deter hasty political decisions as well as delays that could profoundly affect private property values.[78] It would also permit the trier of fact to inves-

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[73] *See* Toso v. City of Santa Barbara, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (2d Dist. 1980) (pre-condemnation activities did not warrant damages to option holder where city held public hearing concerning the possible acquisition of the property and placed a proposition on the ballot, and where there was no resolution of necessity).

[74] *See* Rancho La Costa v. County of San Diego, 111 Cal. App. 3d 54, 168 Cal. Rptr. 491 (4th Dist. 1980); Bowden & Feldman, *supra* note 36, at 384-86.

[75] CAL. CIV. PROC. CODE § 1245.260 (West Cum. Supp. 1981), set forth in text accompanying note 55 *supra*.

[76] *See, e.g.*, Rancho La Costa v. County of San Diego, 111 Cal. App. 3d 54, 168 Cal. Rptr. 491 (4th Dist. 1980) (county adopted informal policy of refusing to accept requests for rezoning and conditional use permits, then vigorously fought owner's attempt to annex to another area).

[77] *E.g.*, Klopping v. City of Whittier, 8 Cal. 3d 39, 43-52, 500 P.2d 1345, 1349-50, 104 Cal. Rptr. 1, 4-11 (1972).

[78] *E.g.*, Smith v. State, 50 Cal. App. 3d 529, 123 Cal. Rptr. 745 (2d Dist. 1975) (seven year delay following announcement); Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979) (indefinite delay); Bakken v. State Highway Comm'n, 142 Mont. 166, 382 P.2d 550 (1963) (five year delay).

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tigate actions that are not now considered pre-condemnation activity. Specifically, it would allow a fact-finder to determine whether adopting a general plan can be a taking under the *Klopping* test.

a. The General Plan as an Announcement of Intent to Condemn

In *Selby Realty Co. v. City of San Buenaventura,*[79] the California Supreme Court held that the adoption of a general plan is "several leagues short" of inequitable pre-condemnation activity.[80] When this rule originated more than a century ago,[81] the general plan was a " 'dream for the future, . . . more a vague hope and prediction than a rigid blueprint."[82] *Selby Realty,* and the cases following the rule,[83] developed from the idea that con-

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[79] 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

[80] *Id.* San Buenaventura adopted a highly detailed general plan setting out five years of projected street development, and indicating the exact amount of land needed from Selby's parcel, measured to the last fraction of a foot. When Selby applied for building permits to construct an apartment building, the city denied them because the building would interfere with a street proposed on the general plan. City officials offered to grant the permit if Selby would dedicate the land required for the street. Selby declined and brought suit in inverse condemnation. *Cf.* Bauman v. Ross, 167 U.S. 548 (1897) (highway and subdivision plan); Benedict v. City of New York, 98 F. 789 (2d Cir. 1899) (aqueduct plan); Hempstead Warehouse Corp. v. United States, 98 F. Supp. 572 (Ct. Cl. 1951) (airport expansion plan); Weintraub v. Flood Control Dist., 104 Ariz. 366, 456 P.2d 936 (1969) (flood control plan); Washburn Note, *supra* note 7, at 377 n.21.

[81] *See* Baumann v. Ross, 167 U.S. 548 (1897); State *ex rel.* Evans v. James, 4 Wis. 408 (1855), *cited in* Annot., *supra* note 8, at 134.

[82] *General Plan?*, *supra* note 7, at 621.

[83] *E.g.*, Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980); Danforth v. United States, 308 U.S. 271 (1939); Weintraub v. Flood Control Dist., 104 Ariz. 566, 456 P.2d 936 (1969); Adams v. Sims, 238 Ark. 696, 385 S.W.2d 13 (1964); Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980); Lipson v. Colorado State Dept. of Highways, 588 P.2d 390 (Colo. App. 1978); Dade County v. Still, 370 So. 2d 64 (Fla. App. 1979); Territory v. Ala Moana Gardens, Ltd., 39 Hawaii 514 (1952); City of Chicago v. Loitz, 61 Ill. 2d 92, 329 N.E.2d 208 (1975); Hardesty v. State Roads Comm'n, 343 A.2d 884 (Md. App. 1974); Robie v. Mass. Turnpike Auth., 347 Mass. 715, 199 N.E.2d 914 (1964); Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 172 So. 2d 196 (1965); Heinrich v. City of Detroit, 90 Mich. App. 692, 282 N.W.2d 448 (1979); Hamer v. State Highway Comm'n, 304 S.W.2d 869 (Mo. 1957); Bakken v. State Highway Comm'n, 142 Mont. 166, 382 P.2d 550 (1963); Hogsett v. Harlan County, 4 Neb. 310, 97 N.W. 316 (1903);

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demning authorities should not have to pay for making idealistic policy statements that might never be carried out.[84]

Many modern general plans, however, are nothing like those of the simpler past. In fact, they are often highly specific drafts detailing areas to be condemned or dedicated.[85] Landowners seldom avoid the limitations of these plans. In fact, if a general plan requires dedication for a street, an owner often will not be able to develop his parcel until he dedicates the designated land.[86] Thus, a general plan may be more than a "graphic projection of future community developments;"[87] it may impose real limitations on the land's use, and thus its market value.[88]

It would be absurd to decree that enacting a general plan is "unreasonable activity"[89] creating a cause of action in condemnation blight. One court, however, has recognized that in the public eye, adopting a general plan creates a definite project.[90]

Far-Gold Constr. Co. v. Village of Chatham, 141 N.J. Super. 164, 357 A.2d 765 (1976); City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971); Browning v. North Carolina State Highway Comm'n, 263 N.C. 130, 139 S.E.2d 227 (1964); Empire Constr. Co. v. City of Tulsa, 512 P.2d 119 (Okla. 1973); Nether Provence Township v. Jacobs, 6 Pa. Commw. Ct. 594, 297 A.2d 550 (1973); Hurley v. Rapid City, 80 S.D. 180, 121 N.W.2d 21 (1963); Hubler v. City of Corpus Christi, 564 S.W.2d 816 (Tex. Civ. App. 1978); State *ex rel.* Road Comm'n v. Bettilyon's, Inc., 17 Utah 2d 135, 405 P.2d 420, *cert. denied*, 382 U.S. 1010 (1965). *See generally* Annot., *supra* note 8.

[84] City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 531, 533, 160 Cal. Rptr. 907, 913 (4th Dist. 1979) (quoting Comment, *Land Development and the Environment: The Subdivision Map Act*, 5 PAC. L.J. 55, 68 (1974)).

[85] *See generally General Plan?, supra* note 7, at 616-18.

[86] "Buyers of property are aware of this practice." People *ex rel.* Department of Pub. Works v. Curtis, 255 Cal. App. 2d 378, 382, 63 Cal. Rptr. 138, 140 (2d Dist. 1967).

[87] *General Plan?, supra* note 7, at 617.

[88] *See id. See also* City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 531, 531-34, 160 Cal. Rptr. 907, 912-14 (4th Dist. 1979).

[89] *See* notes 93-131 and accompanying text *infra.*

[90] City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 521, 160 Cal. Rptr. 907 (4th Dist. 1979). Garden Grove amended its general plan so that land abutting Santa Ana went from a classification of low density residential to industrial. Santa Ana sought an annulment of the amendment on the ground that the "City Council of Garden Grove abused its discretion under the California Environmental Quality Act (CEQA . . . [CAL. PUB. RES. CODE §§ 21000-21193 (West Cum. Supp. 1981)]) in adopting a negative declaration instead of preparing an environmental impact report (EIR) before taking the challenged action." 100 Cal. App. 3d at 524, 160 Cal. Rptr. at 908. Garden Grove countered that an amendment of a general plan was not a "project" within the

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Thus, a general plan in some circumstances may be tantamount to an announcement that the property will be soon taken for public use. Acceding to the reasonableness theme of the *Klopping* test, the general rule that planning is not a taking should be discarded. Instead, triers of fact should determine whether a general plan is so specific that it is an announcement commencing inequitable pre-condemnation activity.[91]

In sum, the first of the *Klopping* tests inadequately defines both "unreasonable delay" and "announcement of intent to condemn." Therefore, under codes similar to California Civil Procedure Code section 1245.260,[92] delays exceeding six months between an announcement of intent to condemn and condemnation proceedings should be unreasonable. Decision-makers should be able to rebut this presumption by showing that any such delay resulted from acceptable planning or time for public response. Courts should also provide objective guidelines for the "announcement" element, so that a decision-maker's statement that would foreseeably decrease market values would start the clock running on a cause of action for inequitable pre-condemnation activity. Under this standard, the trier of fact could decide whether adopting a general plan constitutes an "announcement" by *Klopping*'s tests.

B. *The Second Test: Other Unreasonable Conduct Before Condemnation*

Klopping's second test allows a condemnee to demonstrate

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meaning of CEQA, so that it was not subject to the statute's strictures in amending the plan. The Fourth District held that the plan was indeed a project within the meaning of CEQA, noting that the general plan has "[been] transformed from just an "interesting study" to the basic land use charter governing the direction of future land use in the local jurisdiction." *Id.* at 532, 160 Cal. Rptr. at 913. *See also* CAL. GOV'T CODE §§ 66473.5, 65860 (West Cum. Supp. 1981).

[91] There are instances where the enactment of a general plan may be irrevocable. *See, e.g.*, Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975) (LAFCO approval of an annexation is "an irrevocable step as far as that public agency is concerned." *Id.* at 278, 529 P.2d at 1027, 118 Cal. Rptr. at 259). *Cf.* Gordon v. Warren Planning & Urban Renewal Comm'n, 388 Mich. 82, 199 N.W.2d 465 (1975) (ordinance prohibiting all building within area set for thoroughfare by master plan and containing no time limit for condemnation held unconstitutional).

[92] CAL. CIV. PROC. CODE § 1245.260 (West Cum. Supp. 1981), set forth in text accompanying note 55 *supra*.

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that the "public authority acted improperly . . . by other unreasonable conduct prior to condemnation."[93] *Klopping* did not qualify the conduct that could give rise to pre-condemnation damages.[94] Thus, establishing a taking for condemnation blight is a matter of degree,[95] and the activities that may come under consideration are innumerable.[96] Although the test is broad, some courts have held that even invading the property for surveying and marking does not satisfy condemnation blight requirements.[97] Still, some general principles do emerge from this unrefined element.

The line between reasonable and unreasonable activity develops when a "special and direct" interference with property results from a decision-maker's conduct.[98] This interference occurs

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[93] Klopping v. City of Whittier, 8 Cal. 3d 39, 52, 500 P.2d 1345, 1355, 104 Cal. Rptr. 1, 11 (1972).

[94] People *ex rel.* Department of Pub. Works v. Peninsula Enterprises, Inc., 91 Cal. App. 3d 332, 354, 153 Cal. Rptr. 895, 907 (2d Dist. 1979).

[95] *In re* Crosstown Expressway, 3 Pa. Commw. Ct. 1, 6, 281 A.2d 909, 911 (1971).

[96] *E.g.*, Jones v. California, 22 Cal. 3d 144, 583 P.2d 165, 148 Cal. Rptr. 640 (1978) (frontage road cutting off freeway access from potential subdivision); Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972) (announcement of intent to pursue acquisition after abandonment of condemnation suit); Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979) (development approved on condition that plot be reserved indefinitely for a potential highway); Gordon v. Warren Planning & Urban Renewal Comm'n, 388 Mich. 82, 199 N.W.2d 465 (1975) (ordinance prohibiting all building within area set for thoroughfare by master plan and containing no time limit for condemnation held unconstitutional); Board of Educ. v. Clarke, 89 Mich. App. 504, 280 N.W.2d 574 (1979) (school board indecision over condemnation led to deterioration and demolition of homes on subject property). *See generally* Annot., *supra* note 8; Annot. 5 A.L.R.3d 901 (1966 & 1981 Supp.).

[97] *E.g.*, Highway Dev. Co. v. Mississippi State Highway Comm'n, 343 So. 2d 477 (Miss. 1975) (newspaper publication of highway interchange plans, landowner's viewing them in condemnor's office, actions of condemnor in placing stakes in landowner's field, and alleged partial conveyance by third party in exchange for curb-cut permit were not binding upon condemnor as a taking); Schnack v. New Jersey, 160 N.J. Super. 343, 389 A.2d 1006 (1978) (taking not established without destruction of beneficial use of land). *See, e.g.*, MINN. STAT. ANN. § 117.041 (West 1977) (no liability for entry to survey with proper notice).

[98] Toso v. City of Santa Barbara, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (2d Dist. 1980); People *ex rel.* Department of Pub. Works v. Peninsula Enterprises, Inc., 91 Cal. App. 3d 332, 355, 153 Cal. Rptr. 895, 908 (2d Dist. 1979).

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between the "planning" and "acquisition" stages of the condemnation process.[99] Thus, initiating sale negotiations between a decision-maker and a landowner does not create a cause of action.[100] Also, potential liability from inequitable pre-condemnation activity should not unnecessarily chill public debate among government officials.[101] Once events move beyond initial planning, however, no adequate standard exists for determining unreasonable pre-condemnation conduct.

Indeed, the "special and direct" rule has the same definitional problems as the "announcement of intent to condemn" element.[102] It allows the decision-maker to avoid liability for acting unreasonably until it takes affirmative steps to acquire a parcel. Thus, if a condemning authority passes a resolution to acquire funding, it has not reached the acquisition stage because funding may never materialize.[103] Likewise, if an agency includes a parcel in one of several alternate plans, it has not reached the acquisition stage, although news of the parcel's potential condemnation may affect its value.[104] Even adopting an official map is not unreasonable under this standard because it arguably only sets forth official dreams, and has little to do with acquisition.[105] To

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[99] People *ex rel.* Department of Pub. Works v. Peninsula Enterprises, Inc., 91 Cal. App. 3d 332, 356, 153 Cal. Rptr. 895, 908 (2d Dist. 1979). *See* Barbaccia v. Santa Clara County, 451 F. Supp. 260 (N.D. Cal. 1978). *See also* Rancho LaCosta v. County of San Diego, 111 Cal. App. 3d 54, 66, 168 Cal. Rptr. 491, 497 (4th Dist. 1980) (distinguishing "pre-condemnation" from "plan designation" activity).

[100] City of Chicago v. Loitz, 11 Ill. App. 3d 42, 295 N.E.2d 478 (1974) (service of notices or initiation of negotiations between government agency and landowner do not in themselves constitute physical taking or infliction of damage on property), *aff'd*, 61 Ill. 2d 92, 329 N.E.2d 208 (1975). *See also* Comment, *Statutory Restrictions on the Exercise of Eminent Domain in Wisconsin: Dual Requirements of Prior Negotiation and Provision of Negotiating Materials*, 63 MARQ. L. REV. 489 (1980); Comment, *Preliminary Requirements for Condemnation in Missouri: Necessity, Public Use, and Good Faith Negotiations*, 44 MO. L. REV. 503 (1979).

[101] *See* Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 678, 146 Cal. Rptr. 687, 694 (1st Dist. 1978).

[102] *See* notes 67-76 and accompanying text *supra*.

[103] *See* Far-Gold Constr. Co. v. Village of Chatham, 141 N.J. Super. 164, 357 A.2d 765 (1976); Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252 (1978).

[104] Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252 (1978). *See* Orsetti v. City of Fremont, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1st Dist. 1978) (property down-zoned to agricultural zoning has various alternate uses).

[105] *See* Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514

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apply some objective basis for determining unreasonable conduct leading to inequitable pre-condemnation activity, courts must develop a definitional standard.

The purpose of condemnation blight actions is to allow recovery for the effects of agency conduct on the community's economic attitude toward a target parcel.[106] A trier of fact should therefore find that a decision-maker has engaged in "other unreasonable conduct" whenever a reasonable person in the real estate market would consider that the condemnor has reached the acquisition stage. Such an objective standard necessarily refines two potential inequitable activities: down-zoning before acquisition, and acting inconsistently with the governing general plan.

1. Down-Zoning as a Prelude to Acquisition

The California Supreme Court has determined unequivocally that an unconstitutional taking results when an authority lowers a zoning designation to acquire a target parcel at a reduced price.[107] In California, the usual remedy for a landowner affected by an unconstitutional zoning ordinance is invalidation of the enactment.[108] In condemnation blight actions, however, the rem-

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P.2d 111, 109 Cal. Rptr. 799 (1973); notes 79-92 and accompanying text *supra*.

[106] *See* Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972); notes 23-36 and accompanying text *supra*.

[107] HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975). "[D]own-zoning rises to a taking only in connection with inequitable pre-condemnation actions by the public agency." *Id.* at 517 n.14, 542 P.2d at 243 n.17, 125 Cal. Rptr. at 371 n.17. *See* People *ex rel.* Department of Pub. Works v. Southern Pac. Transp. Co., 33 Cal. App. 3d 960, 109 Cal. Rptr. 525 (2d Dist. 1973) (zoning restriction imposed to depress value with view to future acquisition by eminent domain itself creates cause of action in inverse condemnation against governmental unit enacting zoning ordinance); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (3d Dist. 1969) (county refused to permit even the growth of vegetation on subject land while assuring landowner that the restrictions were of no consequence because it intended to acquire the land for airport use; five years later the county renounced its intent); Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963) (zoning ordinance prohibiting buildings or vegetation in excess of three inches, enacted to avoid acquisition for airport use, gave rise to cause of action in condemnation blight).

[108] *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 518-20, 542 P.2d 237, 244-45, 125 Cal. Rptr. 365, 372-73 (1975). The rationale behind this limitation of remedies is clearly to protect the community

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edy is one of money damages.[109] Thus, a cause of action for inequitable pre-condemnation activity can offer money damages, instead of mere invalidation, to an aggrieved landowner.[110]

The constitutional validity of a zoning ordinance depends on whether the ordinance is rationally related to its objectives.[111] If

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planning process from liability for large sums. "If a government entity and its responsible officials were held subject to a claim for inverse condemnation . . . the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 120, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 805 (1973). *See also* Buescher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1 URB. L. ANN. 1, 1-2 (1968).

The Supreme Court may be ready to reject the California rule. In San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981), Justice Brennan dissented from the majority holding that the Court lacked jurisdiction over a case factually similar to *Agins*. Brennan's dissent argued in favor of granting money damages for the imposition of an unconstitutional zoning ordinance. *Id.* at 653-60 (Brennan, J., dissenting). Justices Stewart, Marshall, and Powell joined in this view. More important, Justice Rehnquist, who concurred with the majority on the jurisdiction question, agreed with Justice Brennan on the remedy issue. *Id.* at 633-36 (Rehnquist, J., concurring). Thus, if a jurisdictionally sound case comes before the Court, the *San Diego Gas & Electric* panel will be split, and Justice O'Connor could cast the deciding vote. *See* Bowden & Feldman, *supra* note 36, at 391-92.

[109] HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 517 n.14, 542 P.2d 237, 243 n.14, 125 Cal. Rptr. 365, 371 n.14 (1975); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (3d Dist. 1969). *See* Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972); note 107 *supra*.

[110] For a discussion of the various remedies in state and federal courts, see Bowden & Feldman, *supra* note 36, at 389-95. *See also* Bayerd, *Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations Into Gold*, 21 SANTA CLARA L. REV. 171 (1981); DiMento *et al.*, *Land Development and Environmental Control in the California Supreme Court: The Deferential, The Preservationist, and the Preservationist-Erratic Eras*, 27 U.C.L.A. L. REV. 859, 1019 (1980) (arguing that a harsh regulation can never support an inverse condemnation award).

[111] *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (Court respects legislative decisions that are "reasonable, not arbitrary" and bear a rational relationship to a permissible state objective); Goldblatt v. Village of Hempstead, 369 U.S. 590, 596 (1962) (legislative enactment will be upheld if any statement of facts could be reasonably assumed to support the exercise of police power); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 367 (1926) (constitutional standard for determining validity of a legislative act is whether there is a reasonable basis for the act and it substantially relates to the protection of public health, safety, or welfare); Ensign Bickford Realty Co. v. City Council, 68 Cal. App. 3d 467, 476, 137 Cal. Rptr. 304, 313 (1st Dist. 1977) (rea-

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the enactment has a rational basis, the decision-maker's motivation is irrelevant.[112] Thus, even if a condemnor's motivation is less than honorable,[113] a trier of fact may not examine that underlying intent to determine whether a cause of action exists for inequitable pre-condemnation activity.[114] In a condemnation blight action, where courts are primarily concerned with economic effects, the current standard of constitutional muster makes little sense.

a. Examining Legislative Motivation in Condemnation Blight Actions

Some courts have employed a "bad faith" exception to the general rule against questioning motivation in zoning decisions.[115] This exception allows courts to hear evidence of a decision-maker's motivation whenever plaintiffs allege that a condemnor intended the down-zoning to reduce a target parcel's price.[116]

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sonableness of legislative act judged by objective effect, not by the subjective intent of the ordaining body).

[112] McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 899, 264 P.2d 932, 952 (1953); Toso v. City of Santa Barbara, 101 Cal. App. 3d 932, 954-56, 162 Cal. Rptr. 210, 230-32 (2d Dist. 1980); Ensign Bickford Realty Co. v. City Council, 68 Cal. App. 3d 467, 476, 137 Cal. Rptr. 403, 313 (1st Dist. 1977).

[113] *See* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated by stipulation of parties*, 417 F. Supp. 1125 (1976). Palo Alto passed a resolution permitting open space acquisition of part of the plaintiff's property. A consulting firm then recommended that the city rezone the property to prevent any development before acquisition. The city adopted the proposal, freezing the zoning of the plaintiff's property and facilitating purchase at a much lower price. The court held that "the open space ordinance was not a bona fide attempt to impose limitations on the use of the property of the plaintiff, but rather the final step in a program designed to acquire rights over the property for the enjoyment and use of the public in general." 401 F. Supp. at 978-79.

[114] *See* Rancho LaCosta v. County of San Diego, 111 Cal. App. 3d 54, 62, 168 Cal. Rptr. 491, 495 (4th Dist. 1980).

[115] *See* Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1st Dist. 1976) (court should examine motive if regulatory agency down-zones before acquisition); Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (2d Dist. 1958) (evidence of intent admissible in claim of "spot zoning"). *See also* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977) (court may consider motive if there is proof of a racially discriminatory purpose in a legislative act).

[116] *See* Viso v. California, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (3d Dist.

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While this exception obviously deters some inequitable pre-condemnation activity, it is inadequate. Plaintiffs will find it difficult to prove a decision-maker's state of mind when reasonable alternative bases for down-zoning are readily available.[117] The exception also forces courts to weigh regulators' motivation against frequently sound planning results.[118] Such a comparison would fail to recognize that bad faith and a rational basis may co-exist.[119] To avoid this problem, courts should examine the

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1979); Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1st Dist. 1976). *See also* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated by stipulation of parties*, 417 F. Supp. 1125 (1976).

[117] *See* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971). Probing motivation requires inquiry into two types of motivation: dominant and subordinate. Professor Brest asserts that "a complainant who can prove that, but for the decisionmaker's desire to promote an illicit objective, the decision would not have been made, should clearly have won his case." *Legislative Motive, supra* note 4, at 119. He further posits that circumstantial or direct evidence can support a finding of subordinate motivation. *Id.* at 120-23.

One rationale for not investigating motive is futility; a law struck down because of the decision-maker's motivation "would presumably be valid as soon as the legislature . . . repassed it for different reasons," 403 U.S. at 225, thus making invalidation a waste of judicial time. *See also* United States v. O'Brien, 391 U.S. 367, 384 (1968) (Court refused to invalidate law that could be reenacted if a legislator made a "wiser" speech about it). The futility argument, however, does not apply to condemnation blight. The remedy for inequitable pre-condemnation activity is not invalidation of an involved ordinance, but money damages for lost rental values. *See* note 35 *supra*. Thus, Brest's formula for raising a presumption, *see* note 123 *infra*, is intact. *See also* Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 360 (1949) ("disutility" of invalidating good law because of legislative motivation); *Legislative Motive, supra* note 4, at 127-28 (arguing that the basis of a legislative decision must be proper when made if the enactment is to have any effect).

[118] "Of course, courts should 'eschew guesswork' in constitutional adjudication as elsewhere. This resolution argues, however, for non-intervention when the proof of motivation is less than clear and not necessarily for a total rejection of its relevance." Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212 (1970).

[119] For example, in Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated by stipulation of parties*, 417 F. Supp. 1125 (1976), the city's resolutions were designed to promote the development of open space. Open space is a legitimate government goal. *See* CAL. GOV'T CODE §§ 65561-65563 (West Cum. Supp. 1981). *See also id.* §§ 65302(e), 65910-65912. In fact, the California Legislature has determined that open space is a "matter of public interest." *Id.* § 65561(b). *See also* Agins v. City of Tiburon, 447 U.S. 255, 261 (1980). However, the *Arastra* ordinances were also designed

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condemnor's motivation independent of the decision's objective basis. This would allow the landowner to recover damages for condemnation blight, yet preserve valid ordinances for the public good.

Only the members of the decision-making body are in the position to know the reasons for down-zoning.[120] A political sophisticate would rarely publicly admit to an unconstitutional motivation.[121] Moreover, if the motivation is indeed improper, the decision-maker can mask it simply by publicly endorsing a valid alternative basis for the zoning decision.[122] If courts instead presume bad faith when a zoning change reduces a parcel's pre-acquisition value, the decision-maker will be prompted to reveal its motivation as an ultimate defense.[123] If the condemning au-

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to enable acquisition at a reduced price. 401 F. Supp. at 970.

[120] *See Legislative Motive, supra* note 4, at 114-15 n.104 (discussing methods of proof in examining legislative motivation). *See also* Ely, *supra* note 118, at 1219-20, 1268 (suggesting that only the intent of the majority of a multi-member legislative body is relevant to adjudicating legislative motivation). *But see Legislative Motive, supra* note 4, at 120 n.124 (arguing that, at a minimum, the motivation of those decision-makers whose votes were decisive should be subject to review).

[121] *See, e.g., Legislative Motive, supra* note 4, at 123-24. *Cf.* Truax v. Raich, 239 U.S. 33 (1915) (legislature announced its improper motivation in law's text).

[122] *See, e.g.,* Rancho La Costa v. County of San Diego, 111 Cal. App. 3d 54, 62-63, 168 Cal. Rptr. 491, 494-95 (4th Dist. 1980).

[123] Brest has devised a four-step syllogism to support judicial review of illicit motivation:

> 1. Governments are constitutionally prohibited from pursuing certain objectives—for example, the disadvantaging of a racial group, the suppression of a religion, or the deterring of interstate migration.
>
> 2. The fact that a decisionmaker gives weight to an illicit objective may determine the outcome of the decision. The decisionmaking process consists of weighing the foreseeable and desirable consequences of the proposed decision against its foreseeable costs. Considerations of distributive fairness play an important role. To the extent that the decisionmaker is illicitly motivated, he treats as a desirable consequence one to which the lawfully motivated decisionmaker would be indifferent or which he would view as undesirable.
>
> 3. Assuming that a person has no legitimate complaint against a particular decision merely because it affects him adversely, he does have a legitimate complaint if it would not have been adopted but for the decisionmaker's consideration of illicit objectives. If in fact the rule adopted is useful and fair, the adversely affected party

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thority can develop a sound reason for its decision, there will be no award of *Klopping* damages. If the trier of fact determines that the reason for the down-zoning is illicit, and thus destroys the veil of silence in the planning community,[124] it may grant an

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> might have no legitimate grievance, whatever considerations went into its adoption. In our governmental system, however, only the political decisionmaker—and not the judiciary—has general authority to assess the utility and fairness of a decision. And, since the decisionmaker has (by hypothesis) assigned an incorrect value to a relevant factor, the party has been deprived of his only opportunity for a full, proper assessment.
>
> 4. If the decisionmaker gave weight to an illicit objective, the court should presume that his consideration of the objection determined the outcome of the decision and should invalidate the decision in the absence of clear proof to the contrary. Evidence sufficient to establish that the decisionmaker gave any weight to an illicit objective will also often establish that the decision would not have been made but for the pursuit of that objective. A complainant may, however, prove clearly and convincingly that the decisionmaker gave weight to an illicit objective and yet fail to establish with equal certainty that this affected the outcome of the decision. It is conceivable—though seldom likely—that the same decision would have been made even in the absence of illicit motivation. In this case, proof that the decisionmaker took account of an illicit objective rebuts whatever presumption of regularity otherwise attaches. For this reason, and because of the constitutional interests at stake, the court should place on the decisionmaker a heavy burden of proving that his illicit objective was not determinative of the outcome.

Legislative Motive, *supra* note 4, at 116-18 (footnotes omitted).

According to Professor Cleary, three elements influence rules for allocating pleading burdens: policy, probability, and fairness. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11 (1959). Presuming bad faith promotes the established policy of granting recovery to landowners in condemnation blight. *See* notes 24-35 and accompanying text *supra*. The presumption also ensures that decision-makers will consider actions carefully rather than make hasty, potentially costly decisions. *See* notes 5, 54 *supra*. Moreover, given the difficulty of proving motivation, *see* notes 117-121 and accompanying text *supra*, and the decision-maker's ability to take target parcels, *see* notes 1-2 and accompanying text *supra*, fairness militates in favor of presuming "inequitable" activity. *Cf.* Delgado, *Active Rationality in Judicial Review*, 64 MINN. L. REV. 467, 476 n.44 (1980) (applying Cleary's theorem to burdens in ascertaining adjudicative fact).

If the court finds the decision-maker's motivation to be illicit, courts should permit the activity to continue only if its purpose is to serve entirely legitimate objectives. *Legislative Motive*, *supra* this note, at 131.

[124] *Cf.* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (applying the

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award, but an otherwise valid ordinance will stand intact.

2. Acting Inconsistently With the Governing General Plan

Some states have statutory "consistency" requirements for agency approval of zoning ordinances and subdivision maps. California Government Code section 66473.5[125] is such a requirement. It provides that "[n]o local agency shall approve a map unless the legislative body shall find that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan . . . ."[126] Section 65860

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doctrine of *res ipsa loquitur* to break the medical community's silence in cases where patients are unconscious of the procedures performed on them).

A related question is the effect of 42 U.S.C. § 1983 (1976) on remedies for unconstitutional zoning ordinances. *See* Bowden & Feldman, *supra* note 36, at 393-98 (arguing against using § 1983 in land use disputes); Hyson, *The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation,* 12 Urb. L. Ann. 21, 41-48 (1976). The prima facie case for a § 1983 violation does not require proof of illicit intent, Monroe v. Pape, 365 U.S. 167, 171 (1976), but the measure of damages is unclear. One commentator has stated that

> Invalidation of an overly restrictive ordinance is usually inadequate relief for the landowner since the full benefit of his property has been unlawfully denied him during litigation and since the municipality may attempt to "zone around" the challenger or pass another, only slightly less restrictive, ordinance following a successful challenge. . . . Thus, an action for damages under § 1983 is viewed as a means for obtaining complete recovery.

Third Circuit Review 26 Vill. L. Rev. 896, 899 n.26 (1980) (citing Hyson, *supra,* at 41-48). The Supreme Court has indicated in *dicta* that allegations that a land use ordinance deprived the owner of the beneficial use of his property state a valid cause of action under § 1983. Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 399-400 (1979). The Third Circuit, however, recently held that zoning ordinances may not infringe on constitutionally protected property rights unless the enactment was procedurally defective or manifestly irrational. Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980). *See generally Third Circuit Review,* 26 Vill. L. Rev., *supra.* A cause of action for inequitable pre-condemnation activity permits a landowner to be compensated for the loss of rental value under the fifth and fourteenth amendments. Thus, it fills a remedial gap that the denial of a § 1983 cause would create. *See also* Carlisle, *The Evolution of Section 1983—Verdict In on Liability but Jury Out on Remedy,* 12 Urb. Law. 727 (1980); Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement,* 46 U. Cin. L. Rev. 45 (1977).

[125] Cal. Gov't Code § 66473.5 (West Cum. Supp. 1981).

[126] *Id.* The statute further provides that "A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is com-

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of the Government Code contains a similar requirement for county and city zoning ordinances.[127] Under this latter statute, an enactment is "consistent" if the city or county has officially adopted a general plan, and the uses authorized by the ordinance are compatible with the "objectives, policies, general land uses, and programs specified in the plan.[128] The penalty for violating the consistency requirement is similar to that for enacting an unconstitutional zoning ordinance: mere invalidation of the offensive enactment.[129]

Although no court has applied the consistency requirement to condemnation blight, the requirement does fit within the "other unreasonable activity"[130] element of the *Klopping* test. Like the *Klopping* test, the consistency requirement promotes uniform government treatment of private property. Thus, a landowner should be able to claim unreasonable activity and receive damages for actions that are inconsistent with the general plan. This is especially true if the ordinance has an independent rational basis that could circumvent the invalidation requirement.[131]

Consequently, courts should find inequitable pre-condemnation activity under the second *Klopping* test when a zoning action, map approval, or other agency conduct is inconsistent with the governing general plan. In addition, when down-zoning reduces a target parcel's market value before government acquisition, courts should presume that the action is unreasonable, so that the decision-maker will have the burden of proving good faith. Moreover, the trier of fact should determine the bounds of the "acquiring stage" in condemnation blight actions. Once it finds that pre-condemnation activity is unreasonable, the trier of fact needs only to determine the extent of the *Klopping* damages.

C. *The Common Element: Diminution in Market Value*

The two alternative *Klopping* tests for inequitable pre-condemnation activity—unreasonable delay following an announce-

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patible with the objectives, policies, general land uses and programs specified in such a plan." *Id.*

[127] *Id.* § 65860.

[128] *Id.*

[129] *Id.* § 65860(b). *See* note 108 and accompanying text *supra.*

[130] *See* text accompanying notes 33-34 *supra.*

[131] *See, e..g,* note 119 *supra* (open space zoning is a legitimate goal).

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ment of intent to condemn, and other unreasonable conduct—have a common element: diminution in the target parcel's market value.[132] This element requires that the landowner be compensated for unreasonable losses resulting from a condemnor's conduct.[133] The property owner bears losses associated with a decline in general property values, or those stemming from natural disasters before condemnation.[134] Moreover, because *Klopping* damages are based on rental values,[135] the recovery should not exceed the property's value before the decision-maker acted inequitably.[136]

Timing is a major problem in assessing diminutions in value because there is generally no way to measure when the market first responded to the decision-maker's activity.[137] To counter this, the measure of condemnation blight should relate to the date that the inequitable conduct began.[138] The proper measure of diminution should run either from the date of the announcement of intent to condemn,[139] or from the beginning of "other unreasonable activity,"[140] within the guidelines for those standards.[141]

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[132] *See* Klopping v. City of Whittier, 8 Cal. 3d 39, 52, 500 P.2d 1345, 1355 104 Cal. Rptr. 1, 11 (1972); text accompanying note 34 *supra.*

[133] For a discussion of "severance damages," paid to the owners of lands adjacent to the condemned parcels, see Note, *Condemnation Blight and the Abutting Landowner*, 73 MICH. L. REV. 583 (1975). *See also* FLA. STAT. ANN. § 73.071 (West Cum. Supp. 1982); MD. REAL PROP. CODE ANN. § 12-104(b) (1981).

[134] Klopping v. City of Whittier, 8 Cal. 3d 39, 53, 500 P.2d 1345, 1354-55, 104 Cal. Rptr. 1, 12 (1972). *See also* MASS. GEN. LAWS ANN. ch. 79, § 12A (West Cum. Supp. 1981) (full compensation of value before disaster).

[135] Klopping v. City of Whittier, 8 Cal. 3d 39, 53, 500 P.2d 1345, 1356, 104 Cal. Rptr. 1, 12 (1976). *But see* Calif. Note, *supra* note 14, at 593-95 (arguing that rental value creates an excessive damage award).

[136] This measure would include damages for artificial increases in value. *See, e.g.*, Merced Irrigation Dist. v. Woolstenhume, 4 Cal. 3d 478, 492-93, 483 P.2d at 9-10, 93 Cal. Rptr. 833, 841-42 (1971).

[137] *See* notes 32-35 *supra.* This determination should be among the duties of the trier of fact. *See* note 41 *supra.*

[138] In *Klopping*, for example, this would have been the date of the second resolution. *See* note 35 *supra.*

[139] *See* notes 67-78 and accompanying text *supra.*

[140] *See* notes 93-106 and accompanying text *supra.*

[141] *See* notes 63-66, 106-107 and accompanying text *supra.*

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III. Synthesis and Proposal

The *Klopping* tests for condemnation blight are by no means refined. In response, this comment suggests several proposals to protect aggrieved landowners and to promote consistent treatment in the nation's courts.

First, following the lead of California Code of Civil Procedure section 1245.260, legislatures should adopt statutes creating a cause of action for delays exceeding six months.[142] This would allow courts to presume that any delay beyond six months is unreasonable. The condemning authority should be allowed to rebut this presumption by showing that its activities and concomitant delays resulted from long-range planning or public response to its proposals.[143]

Second, a trier of fact should find that a statement or action is an "announcement of intent to condemn" if a reasonable person in the real estate market would foresee the act's deleterious effects, unrelated to reasonable social costs, on the target parcel's value.[144] Thus, because modern general plans may be highly specific,[145] the trier of fact should determine whether the enactment or modification of a general plan is an announcement of intent to condemn under the *Klopping* test.

Third, a condemnor should have performed "other unreasonable conduct" when a trier of fact determines that a "special and direct" interference has occurred at the "acquisition" stage. Evidence of down-zoning should create a presumption of illicit motivation by the decision-maker, requiring it to show that it rezoned in good faith.[146] Failure to do so should result in an award of money damages, not in invalidation of an otherwise sound ordinance. Moreover, when an action is inconsistent with the governing general plan, the conduct should be presumed unreasonable.

Finally, the trier of fact should use these proposals to determine the amount of any diminution in the property's value. It should start the damage meter running either from the date of the condemnor's announcement of intent, or from the date of "other unreasonable conduct," within the standards determining

[142] *See* notes 55-66 and accompanying text *supra*.
[143] *See* notes 64-66 and accompanying text *supra*.
[144] *See* notes 93-106 and accompanying text *supra*.
[145] *See* notes 79-92 and accompanying text *supra*.
[146] *See* notes 107-124 and accompanying text *supra*.

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those dates.[147]

Conclusion

This comment has demonstrated that planning and other precondemnation conduct can have profound and diverse effects on the value of target property. These effects can create an unconstitutional taking, giving rise to an action for condemnation blight. In *Klopping v. City of Whittier*,[148] the California Supreme Court developed two tests for determining a cause of action for such a taking: diminution in a target parcel's value, and either an unreasonable delay following an announcement of intent to condemn or other unreasonable conduct. Unfortunately, interpretation of the elements of these tests has not sufficiently refined the cause of action. Further, courts have yet to examine condemnation blight in light of "consistency" requirements or exceptions to the general rule that planning is never a taking. This comment has developed proposals to refine the *Klopping* tests so as to protect landowners from the inconsistent and possibly devastating results of the planning and political processes.

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[147] *See* notes 137-141 and accompanying text *supra*.

[148] 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

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