

# “Fair” is Fair: Valuing The Regulatory Taking

*The United States Supreme Court recently signaled that it may provide a money damage remedy for excessive land use regulations that constitute regulatory takings. The California Supreme Court, however, recently limited the remedy available for regulatory takings to ordinance invalidation. This comment examines the United States and California Supreme Court positions on regulatory taking remedies. It critically evaluates the alternative “full” and “fair” compensation approaches to valuing regulatory takings announced by Justice Brennan in his dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego. The comment concludes that should the United States Supreme Court provide a money damage remedy for regulatory takings, adoption by the California judiciary of a “fair” compensation standard would best serve the State’s land use planning and policy objectives.*

## INTRODUCTION

The United States and the California Supreme Courts are approaching a conflict on the issue of the proper remedy for an excessive<sup>1</sup> land use regulation. If a court construes an excessive regulation as a taking<sup>2</sup> of property, the fifth amendment<sup>3</sup> de-

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<sup>1</sup> As used in this comment, an excessive regulation is one that takes so much of the value of an individual’s property rights that it is unconstitutional. See notes 29-36 and accompanying text *infra*.

<sup>2</sup> The United States Supreme Court has not developed “any ‘set formula’” for determining when a government action constitutes a compensable taking. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Some significant factors have emerged, however, from the essentially *ad hoc* inquiries in this area. Courts more readily find a taking if government physically invades private property; if the government action is not reasonably necessary to effectuate a substantial public purpose; if the action frustrates distinct investment-backed expectations; or, if the government action acquires resources to permit or facilitate uniquely public functions. *Id.* at 123-28, and authorities cited therein. This article focuses exclusively on regulatory taking remedies.

<sup>3</sup> U.S. CONST. amend. V provides: “[N]or shall private property be taken for public use without just compensation.” This fifth amendment protection applies to the states through the fourteenth amendment. See *Chicago B. & Q.*

mands just compensation.<sup>4</sup> Pursuing a pro-planning policy,<sup>5</sup> the California Supreme Court recently stated that an unconstitutional regulation does not effectuate a taking.<sup>6</sup> Rather, the court said that such a regulation constitutes an invalid exercise of police power,<sup>7</sup> the proper remedy for which is judicial invalidation of the ordinance.<sup>8</sup>

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R.R. Co. v. Chicago, 166 U.S. 226 (1897). See also *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980). The California Constitution also provides just compensation for government damage to private property as well as for the taking of property. CAL. CONST. art. I, § 19 (West Cum. Supp. 1980).

<sup>4</sup> See note 24 and accompanying text *infra*.

<sup>5</sup> 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). In that case the California Supreme Court stated that

[t]he expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. . . .

In the half century since *Euclid* [*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)] the foregoing abstract principles under the force of experience have coalesced into a specific functional requirement. Community planners must be permitted the flexibility which their work requires.

24 Cal. 3d at 275, 598 P.2d at 30, 157 Cal. Rptr. at 377.

See also *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 523, 542 P.2d 237, 248, 125 Cal. Rptr. 365, 376 (1975) ("Zoning and other land use regulation, long an established feature of our lives, expresses both a concern for our present quality of life and our collective fiduciary responsibility to the future. . . ."); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 120, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 805 (1973) ("The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer."). See generally *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 (1980).

<sup>6</sup> *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) (a landowner may not "elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid.") 24 Cal. 3d at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

<sup>7</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>8</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979) (a landowner may seek invalidation of an excessive regulation through a declaratory relief or a mandamus proceeding), *aff'd*, 447 U.S. 255 (1980).

The United States Supreme Court, on the other hand, appears ready to adopt the opposing view that an excessive regulation constitutes a taking that requires monetary compensation for the period during which it is in force.<sup>9</sup> Mandating compensation for excessive regulations will greatly increase the cost of zoning efforts to local governments, and consequently will inhibit innovative land use policies.<sup>10</sup> These are the very results that the California Supreme Court seeks to avoid.<sup>11</sup>

This comment considers the United States and California Supreme Courts' positions regarding remedies for regulatory takings and assesses the California judiciary's alternatives should the United States Supreme Court rule that excessive regulation demands compensation. Part I summarizes the regulatory taking issue. It examines an historical distinction underlying the disparate treatment that American courts have afforded to taking claims. This disparity depends on whether a court characterizes the government action as an exercise of its eminent domain power or its police power.<sup>12</sup> Part II assesses two landmark cases that set forth the respective United States<sup>13</sup> and California<sup>14</sup> Supreme Court positions on regulatory takings. Part III considers

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<sup>9</sup> See generally *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 636-61 (1981) (Brennan, J., dissenting).

<sup>10</sup> See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 275-76, 598 P.2d 25, 30-31, 157 Cal. Rptr. 372, 376-77 (1979), *aff'd*, 447 U.S. 255 (1980). Several commentators have also asserted that compensation for unconstitutional regulations would cripple the zoning function of local governments. See, e.g., Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1 URBAN L. ANN. 1, 2 (1968); Bowden & Feldman, *Uncertain Regulatory Taking Standards and Remedies Threaten California's Open Space Planning*, 15 U.C. DAVIS L. REV. 371, 397 n.123 (1981) [hereinafter cited as Bowden & Feldman]; Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1597-99 (1977).

<sup>11</sup> See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 275-76, 598 P.2d 25, 30-31, 157 Cal. Rptr. 372, 376-78 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>12</sup> See *Sax, Takings and the Police Power*, 74 YALE L.J. 36, 36 (1964); Note, *Eminent Domain*, 66 HARV. L. REV. 1134, 1134 (1953). See generally *United States v. Clarke*, 445 U.S. 253 (1980) (discussing the nature and limits of the eminent domain power); *Mugler v. Kansas*, 123 U.S. 623 (1887) (distinguishing between government's eminent domain and police power).

<sup>13</sup> See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

<sup>14</sup> 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).

the alternative "full"<sup>15</sup> and "fair"<sup>16</sup> compensation approaches to regulatory takings. Part IV asserts that the fair compensation approach best comports with the policy objectives of California's Supreme Court<sup>17</sup> and Legislature.<sup>18</sup>

### I. CONTRASTING TWO MEANS OF TAKING: EMINENT DOMAIN VERSUS REGULATORY TAKING

Courts have traditionally classified government actions that deprive landowners of property interests into two groups. The first, most common form is condemnation under eminent domain.<sup>19</sup> Government may take private property for a public use<sup>20</sup> either by compelling its sale to the government<sup>21</sup> or by physi-

<sup>15</sup> See, e.g., Tomain, *Elimination of the Highest and Best Use Principle: Another Path Through the Middle Way*, 47 *FORDHAM L. REV.* 307, 310 (1968). This comment uses the term full compensation as a shorthand method of characterizing the valuation and compensation standard employed in eminent domain compensation. See notes 86-90 and accompanying text *infra*.

<sup>16</sup> See Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 *COLUM. L. REV.* 1021, 1052 (1975) [hereinafter cited as Costonis, "Fair" Compensation]. The term fair compensation is used by its best-known proponent, Professor John Costonis, to describe partial compensation. See notes 93-105 and accompanying text *infra*.

<sup>17</sup> See notes 117-141 and accompanying text *infra*.

<sup>18</sup> See generally CAL. GOV'T CODE §§ 65100-66403 (West 1966 & Cum. Supp. 1982). These sections set forth a comprehensive planning and zoning system for local governments in California, including planning commissions and departments, general plan requirements, zoning authority, and regional planning districts. See also Comment, *Exclusionary Zoning in California: A Statutory Mechanism for Judicial Nondeference*, 67 *CALIF. L. REV.* 1154, 1165-67 (1979); Comment, *Conversion of Apartments to Condominiums: Social and Economic Regulations under the California Subdivision Act*, 16 *CAL. W.L. REV.* 466, 471 (1980).

<sup>19</sup> See generally J. SACKMAN, *NICHOL'S LAW OF EMINENT DOMAIN* (rev. 3d ed. 1981).

<sup>20</sup> See, e.g., CAL. CIV. PROC. CODE § 1240.010 (West Cum. Supp. 1982). This typical statute limits state and local governments' exercise of the eminent domain power to takings for a public use. Public uses include public utilities, CAL. PUB. UTIL. CODE §§ 610-624 (West Cum. Supp. 1982); parks, CAL. GOV'T CODE §§ 38002, 38010, 39732, 40401(b) (West 1968 & Cum. Supp. 1982); and other purposes, CAL. CIV. PROC. CODE § 1240.010 (West Cum. Supp. 1982) (providing general condemnation authority to the Legislature for any purpose it deems a public use).

<sup>21</sup> See Sax, *supra* note 12, at 36. See also Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 *YALE L.J.* 221, 225-30 (1931) (discussing history of gov-

cally invading it.<sup>22</sup> The remedy for either form of governmental taking by physical appropriation is just compensation.<sup>23</sup> This remedy grants the landowner compensation equal to the property's fair market value<sup>24</sup> at the time of the taking.

By contrast, in cases of regulatory deprivation of property value, the landowner retains title to the property but cannot use the parcel in contravention of the regulation.<sup>25</sup> Although the landowner loses a property interest,<sup>26</sup> courts rarely grant compensation for the loss.<sup>27</sup> This is true even though the regulation may affect an owner as severely as an actual physical appropriation of the land.<sup>28</sup>

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ernmental acquisition as taking). Traditionally, governments used the eminent domain power to condemn private property and acquire absolute title. *See generally* United States v. Clarke, 445 U.S. 253 (1980).

<sup>22</sup> *See, e.g.*, Griggs v. Allegheny County, 369 U.S. 84 (1962) (airport noise caused a taking); United States v. Causby, 328 U.S. 256 (1946) (low level aircraft flights over a chicken farm prevented the owner from conducting business and constituted a taking); Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) (government construction of a dam that caused flooding of plaintiff's property held to be a taking).

<sup>23</sup> *See* note 3 *supra*.

<sup>24</sup> Fair market value is the "price agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy. . . ." UNIF. EMINENT DOMAIN CODE § 1004(a), 13 U.L.A. 104 (1980). *See* City of Daly City v. Smith, 110 Cal. App. 2d 524, 531, 243 P.2d 46, 50-51 (1st Dist. 1952); CAL. CIV. PROC. CODE § 1263.320 (West Cum. Supp. 1982).

<sup>25</sup> *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (historic landmark law prohibited plaintiff from constructing office tower above Grand Central Terminal); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (ordinance restricted the number of unrelated persons living in a single residence); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (ordinance prohibited certain uses of plaintiff's land); Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) (open space ordinance prevented plaintiff from developing property at any density greater than one unit per acre), *aff'd*, 447 U.S. 255 (1980); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (ordinance prevented commercial use of plaintiff's property).

<sup>26</sup> *See* cases cited in note 25 *supra*.

<sup>27</sup> *See* notes 30-31 and accompanying text *infra*.

<sup>28</sup> *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981). In that case, the trial court had found that the City's down-zoning of plaintiff's parcel to agricultural use where no such use could be made damaged plaintiff in an amount exceeding \$3 million. The California Court of Appeal subsequently reversed the trial court on the ground that a police power regulation could not effect a taking. *Id.* at 627.

Despite the possibility of severe losses due to government regulation of property, the United States Supreme Court has never held that a harsh regulation constitutes a compensable taking.<sup>29</sup> Most state courts that have considered regulatory takings have also denied monetary compensation.<sup>30</sup> Courts instead prefer to invalidate regulations that cause an unconstitutional deprivation of property and enjoin their enforcement.<sup>31</sup>

The manner in which courts treat landowners who are deprived of property value thus depends on the means of the deprivation.<sup>32</sup> In *Agins v. City of Tiburon*,<sup>33</sup> the California Supreme Court recently drew a stark line between eminent domain actions and regulations that deprive a landowner of a property in-

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<sup>29</sup> See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1977); *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Berman v. Parker*, 348 U.S. 26 (1954); *Goreib v. Fox*, 274 U.S. 603 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>30</sup> Those states that limit the remedy for a regulatory taking to ordinance invalidation include: Arizona, *Davis v. Pima County*, 121 Ariz. 343, 590 P.2d 459 (1978); Colorado, *Gold Run, Ltd. v. Board of County Comm'rs*, 38 Colo. App. 44, 554 P.2d 317 (1976); Florida, *Mailman Dev. Corp. v. City of Hollywood*, 286 So. 2d 614 (Fla. 1974); Minnesota, *Holaway v. City of Pipestone*, 269 N.W.2d 28 (Minn. 1978); New York, *Fred French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 187 N.Y.S.2d 5 (1973); North Dakota, *Eck v. City of Bismark*, 283 N.W.2d 193 (N.D. 1979); Oregon, *Fifth Ave. Corp. v. Washington County*, 282 Or. 591, 581 P.2d 50 (1972); Pennsylvania, 53 PA. CONS. STAT. ANN. § 11001 (Purdon 1981), applied in *Gaeble v. Thornbury Township*, 8 Pa. Commw. 399, 303 A.2d 57 (1973) (statute limits remedy to invalidation). For a review of the California decisions upholding disputed ordinances, see Cunningham, *Inverse Condemnation as a Remedy for Regulatory Takings*, 8 HASTINGS CONST. L.Q. 517, 521-32 (1981).

<sup>31</sup> See *Toso v. City of Santa Barbara*, 101 Cal. App. 3d 934, 949-50, 162 Cal. Rptr. 210, 218-19 (2d Dist. 1980); cases cited in note 30 *supra*. See also Bowden, *Legal Battles on the California Coast: A Review of the Rules*, 2 COASTAL ZONE MGMT. J. 273 (1974); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1450-51 (1974) [hereinafter cited as Note]. But see Hagman, *Cancel the Metamorphosis*, 32 LAND USE L. & ZONING DIG. No. 7, at 3 (July 1979) (injunctive or declaratory relief is "mostly theoretical" in California).

<sup>32</sup> See generally Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 403 (1978) [hereinafter cited as Costonis, *The Disparity Issue*]; Sax, *supra* note 12, at 36.

<sup>33</sup> 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980).

terest.<sup>34</sup> In *San Diego Gas & Electric Co. v. City of San Diego*,<sup>35</sup> however, the United States Supreme Court indicated a possible willingness to eliminate the distinction between the remedies afforded to each type of deprivation and to require compensation in either instance.<sup>36</sup>

## II. THE POSITIONS OF THE UNITED STATES AND CALIFORNIA SUPREME COURTS REGARDING REGULATORY TAKINGS

### A. *Agins v. City of Tiburon: The California View*

California's Supreme Court apparently believes that government may treat landowners differently when policy considerations justify the differing treatment. In *Agins v. City of Tiburon*,<sup>37</sup> the California Supreme Court adopted a firm rule against remedying an excessive regulation by awarding monetary compensation.<sup>38</sup> In this case, the city of Tiburon had zoned plaintiff's five-acre parcel for residential use, allowing a maximum of one dwelling per acre.<sup>39</sup> Plaintiff argued that this limitation constituted a taking and sought two million dollars in damages.<sup>40</sup> The trial court held that an inverse condemnation claim based on an allegedly harsh regulation failed to state a cause of

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<sup>34</sup> *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).

<sup>35</sup> 450 U.S. 621 (1981).

<sup>36</sup> *Id.* at 636-61 (Brennan, J., dissenting).

<sup>37</sup> 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>38</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 275, 598 P.2d 25, 29, 157 Cal. Rptr. 372, 376 (1979): "We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." *But see* Bowden & Feldman, *supra* note 10, at 389 for the proposition that this language is dictum.

<sup>39</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 270-71, 598 P.2d 25, 26-27, 157 Cal. Rptr. 372, 373-74 (1979), *aff'd*, 447 U.S. 255 (1980). In 1973, Tiburon zoned plaintiff's property as part of a "Residential Planned Development and Open Space Zone." This zoning classification permitted only single-family residences and open space and accessory uses. 24 Cal. 3d at 271, 598 P.2d at 27, 157 Cal. Rptr. at 374. The city began condemnation proceedings after adopting the ordinance, but the city dropped the action a year later. Plaintiffs never applied for a development permit or variance for the property. *Id.*

<sup>40</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 226, 271-72, 598 P.2d 25, 27, 157 Cal. Rptr. 372, 374 (1979), *aff'd*, 447 U.S. 255 (1980).

action.<sup>41</sup> The California Supreme Court agreed, holding that inverse condemnation liability should not be imposed for a confiscatory land use regulation.<sup>42</sup> When confronted with a regulation that deprives a landowner of the complete use and enjoyment of his property, a court must instead invalidate<sup>43</sup> the regulation as an excessive use of the government's police power.<sup>44</sup>

The California Supreme Court cited three policy grounds to support this position. First, allowing an inverse condemnation action for an excessive regulation would have a "chilling effect" on the exercise of local governments' police power.<sup>45</sup> The possibility of large, unanticipated monetary judgments would inhibit aggressive local planning.<sup>46</sup>

<sup>41</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272, 598 P.2d 25, 27-28, 157 Cal. Rptr. 372, 375 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>42</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd*, 447 U.S. 255 (1980). The California Supreme Court rejected the plaintiffs' contention

that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional 'taking of [plaintiffs'] property without payment of just compensation' for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of police power . . . is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing . . . that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available.

24 Cal. 3d at 272, 598 P.2d at 28, 157 Cal. Rptr. at 375.

<sup>43</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276-77, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 378 (1979), *aff'd*, 447 U.S. 255 (1980). The court stated: "the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate remedy under the circumstances." 24 Cal. 3d at 276-77, 598 P.2d at 31, 157 Cal. Rptr. at 378.

<sup>44</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>45</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979), *aff'd*, 447 U.S. 255 (1980). "This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe." 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377 (quoting from Hall, *supra* note 10, at 1597).

<sup>46</sup> Several commentators agree that monetary damages for inverse condemnation would severely handicap the local governmental zoning function. *See*,

Second, permitting landowners to obtain money damages for excessive regulations might usurp the legislature's traditional role of governing land use.<sup>47</sup> Although the court's logic on this point is unclear<sup>48</sup> the justices appear concerned that inverse condemnation judgments will foreclose legislative policy options. In effect, courts could compel legislative bodies to pay for bad regulations rather than permit their redrafting without financial penalty.<sup>49</sup>

Finally, because California voters may zone by initiative,<sup>50</sup> the possibility for fiscal chaos would exist.<sup>51</sup> The court's rationale in this area is again vague.<sup>52</sup> The court appears concerned that large amounts of public funds might inadvertently be jeopardized by a wide-ranging land use initiative<sup>53</sup> that is later deemed

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*e.g.*, Beuscher, *supra* note 10, at 1-2; Bowden & Feldman, *supra* note 10, at 396; Girard, *A Step in the Right Direction?*, 31 LAND USE L. & ZONING DIG., No. 9, at 4 (1979); Hall, *supra* note 10, at 1597-99; Note, *supra* note 31, at 1450. See generally P. BOSSELMAN, D. CALLES, & J. BANTA, THE TAKING ISSUE (1973).

<sup>47</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979), *aff'd*, 447 U.S. 255 (1980). See also Note, *supra* note 31, at 1450; Girard, *supra* note 46, at 3; Hall, *supra* note 10, at 1597-99.

<sup>48</sup> The court's discussion of this issue is brief and general in its terms. See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>49</sup> The argument that courts might usurp the legislature's resource allocation function is detailed in Note, *supra* note 31, at 1450-51, *cited in Agins v. City of Tiburon*, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>50</sup> *Arnell Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 524-25, 620 P.2d 565, 573, 169 Cal. Rptr. 904, 912 (1980) (California voters may properly zone by initiative because zoning is a legislative function, not an adjudicatory act).

<sup>51</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979), *aff'd*, 447 U.S. 255 (1980). The California Supreme Court asked:

Are the voters, through the initiative power, also to have this unwelcome power to *inadvertently* commit funds from the public treasury? The logical extension of requiring compensation for the mere enactment of a harsh zoning measure indicates that the answer would be in the affirmative. The potential for fiscal chaos would be great if this were the result.

24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377 (quoting Hall, *supra* note 10, at 1598) (emphasis in original).

<sup>52</sup> See note 51 *supra*.

<sup>53</sup> The California Coastal Zone Management Act, enacted in 1972 through the initiative process, indicates the potential breadth of a land use initiative. See CAL. PUB. RES. CODE §§ 27000-27650 (West 1977) (repealed 1977) (current

unconstitutional. Because initiatives are essentially legislative acts,<sup>54</sup> the voters, like the legislature, should have an opportunity to reconsider and revise an unconstitutional measure without financial penalty.<sup>55</sup>

The United States Supreme Court affirmed the California court's decision in *Agins*.<sup>56</sup> The Court, however, never reached the issue of whether compensation is an available remedy for an unconstitutionally severe regulation. Since it found Tiburon's ordinance valid,<sup>57</sup> the Court never reached the issue. In the following term, the Court again had an opportunity to consider the remedy question.

*B. San Diego Gas & Electric Co. v. City of San Diego: The Emerging United States Supreme Court View*

In *San Diego Gas & Electric Co. v. City of San Diego*,<sup>58</sup> the United States Supreme Court signaled that it may soon permit a money damage remedy for excessive regulation. In this case, San Diego's master plan originally designated plaintiff's parcel for industrial uses.<sup>59</sup> The city later down-zoned part of the property, and included it in a long-range open space plan. The city also proposed a bond issue to obtain funds to acquire the land. When the bond issued failed, the parcel remained designated for open space uses.<sup>60</sup> Plaintiff sued the city in inverse condemnation and received a damage award from the trial court in excess of three

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amended version at CAL. PUB. RES. CODE §§ 30000-30900 (West 1977 & Cum. Supp. 1982)).

<sup>54</sup> *Arnell Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 524-25, 620 P.2d 565, 573, 169 Cal. Rptr. 904, 912 (1980).

<sup>55</sup> See note 49 and accompanying text *supra*. The same arguments apply to voter initiatives and legislative enactments, since both are legislative acts. See *Arnell Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 514-19, 620 P.2d 565, 566-70, 169 Cal. Rptr. 904, 905-09 (1980).

<sup>56</sup> *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

<sup>57</sup> *Id.* at 255.

<sup>58</sup> 450 U.S. 621 (1981).

<sup>59</sup> *Id.* at 624. Although the master plan designated the property for industrial uses, it did not designate the entire parcel as industrial. The city zoned 112 acres for agricultural uses and 116 acres for industrial uses. *Id.* at 624 n.4.

<sup>60</sup> *Id.* at 625. When the bond issue failed, the city made no further attempts to acquire the property. However, the open space plan that included the property remained in effect, as did the down-zoning of 39 acres to the agricultural holding category. *Id.*

million dollars.<sup>61</sup>

The city appealed to the California Supreme Court, which remanded the case to the Court of Appeal in light of the intervening decision in *Agins*.<sup>62</sup> In an unpublished opinion, the Court of Appeal reversed the trial court judgment.<sup>63</sup> Plaintiff then appealed to the United States Supreme Court, arguing that the California Supreme Court had improperly limited the remedy to invalidation of the city's zoning ordinance.<sup>64</sup>

In a plurality opinion written by Justice Blackmun, the Court refused on procedural grounds to resolve the remedy issue.<sup>65</sup> However, the four-member dissent, authored by Justice Brennan, argued for monetary compensation for regulatory takings.<sup>66</sup> In addition, although Justice Rehnquist concurred with the plurality on the procedural issue,<sup>67</sup> he agreed with the dissent's view on the remedies question.<sup>68</sup> If Justice O'Connor agrees with Jus-

<sup>61</sup> *Id.* at 627. In the San Diego County Superior Court, plaintiff prevailed when the court found that the open space regulation deprived plaintiff "of all practical, beneficial or economic use of the property. . . ." *Id.* at 626. The trial court held in favor of the plaintiff despite the city's argument that as a charter city it was not bound by its general plan designations. *Id.* The city also argued that plaintiff had failed to seek approval for any development plan, but the trial court agreed with plaintiff that an application would have been impractical and futile in view of the general plan designation. *Id.* at 627.

<sup>62</sup> *Id.* at 628.

<sup>63</sup> *Id.* at 629. Although the Court of Appeal held that an excessive regulation did not give rise to an inverse condemnation action, it did not invalidate the regulation. Instead, the court found that unresolved factual issues remained regarding the constitutionality of the city's actions. *Id.* at 630. This finding would later allow a majority of the United States Supreme Court to avoid a decision on the merits of the case. *See* note 65 *infra*.

<sup>64</sup> *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 630 (1981).

<sup>65</sup> *Id.* at 633. The plurality opinion said in part:

Thus, however we might rule with respect to the [California] Court of Appeal's decision that appellant is not entitled to a monetary remedy—and we are frank to say that the federal constitutional aspects of that issue are not to be cast aside lightly—further proceedings are necessary to resolve the federal question whether there has been a taking at all. The court's decision, therefore, is not final, and we are without jurisdiction to review it.

*Id.*

<sup>66</sup> *Id.* at 636-61 (Brennan, J., dissenting). Justices Stewart, Marshall, and Powell joined Justice Brennan. *Id.* at 636.

<sup>67</sup> *Id.* at 636 (Rehnquist, J., concurring).

<sup>68</sup> *Id.* at 633-34 (Rehnquist, J., concurring).

tice Brennan's dissent,<sup>69</sup> the Court may well adopt the dissent's view as law in a future case.

In his dissenting opinion, Justice Brennan first argued that the ruling of the California Court of Appeal constituted a final judgment.<sup>70</sup> He then contended that a regulation effects a taking if it deprives the landowner "of all or most of his interest in the property."<sup>71</sup> Justice Brennan concluded that the Constitution demands compensation for such a taking, even if the regulation is only temporarily in force.<sup>72</sup>

This logic marks a reversal in the Supreme Court's historical approach to land use regulation. Although Justice Brennan found support for his position in dicta in previous cases,<sup>73</sup> the Court has never mandated compensation for an excessive regulation.<sup>74</sup>

If the Supreme Court adopts Justice Brennan's endorsement of monetary damages,<sup>75</sup> it must decide how to value a property interest that has been taken by an unconstitutionally harsh regulation. Justice Brennan suggests that the Court use "[o]rdinary principles" that it has "regularly applied" in condemnation cases<sup>76</sup> to determine this value. He contends that courts should

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<sup>69</sup> Research has revealed no published opinions by Justice O'Connor on the subjects of inverse condemnation or regulatory takings.

<sup>70</sup> *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 639-46 (1981) (Brennan, J., dissenting).

<sup>71</sup> *Id.* at 653 (Brennan, J., dissenting).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 647-48 (Brennan, J., dissenting), *citing, inter alia*, *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). Justice Brennan went on to note that "[o]n many other occasions, the Court has recognized in passing the vitality of the general principle that a regulation can effect a Fifth Amendment 'taking'." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 648 (1981). These occasions include: *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980); *Kaiser-Aetna v. United States*, 444 U.S. 164, 174 (1979); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

<sup>74</sup> See cases cited in note 29 *supra*; Cunningham, *Inverse Condemnation as a Remedy for Regulatory Takings*, 8 HASTINGS CONST. L.Q. 517, 525 (1981).

<sup>75</sup> See notes 66-72 and accompanying text *supra*. At least one commentator has expressed the view that monetary compensation for invalid regulation is the logical extension of modern developments in the Supreme Court case law regarding inverse condemnation. See Beuscher, *supra* note 10, at 10.

<sup>76</sup> *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 658-59 (1981) (Brennan, J., dissenting).

value any interest as of the date of its taking, and that government should compensate the landowner for any damage suffered during the regulation's effective period.<sup>77</sup>

This standard offers sparse guidance in the context of temporary regulatory takings. Consider, for example, the facts of the *Agin* case.<sup>78</sup> If a regulatory taking had been found in *Agin*, then the city would have had to compensate the landowner for the loss of development rights during the regulation's effective period. Ordinary eminent domain principles would require that the city pay damages equal to the fair market value of the interest taken.<sup>79</sup> However, determining the precise interest taken is a highly speculative process. Plaintiff could allege impairment of the right to construct residences,<sup>80</sup> a shopping center,<sup>81</sup> a power plant,<sup>82</sup> or a myriad of other possible uses.

If the *San Diego* dissent becomes law, state courts must determine the proper measure for compensation in regulatory taking cases. Justice Brennan's dissent indicates<sup>83</sup> that the Constitution may allow more than one approach.

### III. STANDARDS OF COMPENSATION FOR TEMPORARY REGULATORY TAKINGS

Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego* alluded<sup>84</sup> to two approaches for determining a compensation award for a temporary regulatory taking: "full"

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<sup>77</sup> *Id.*

<sup>78</sup> See note 39 and accompanying text *supra*.

<sup>79</sup> See note 24 *supra*; A. JARR, LAW OF EMINENT DOMAIN 102-03 (1953); 6 J. SACKMAN, *supra* note 19, § 12.3.

<sup>80</sup> See, e.g., *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (city prevented plaintiff from constructing high-rise apartment development); *Arastra Ltd. Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975) (city plan prevented plaintiffs from constructing housing units on a parcel in the Palo Alto foothills).

<sup>81</sup> See, e.g., *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (City of Cerritos zoned plaintiff's undeveloped land low-density residential when plaintiff had a contract to sell the property on which a shopping center was to be built).

<sup>82</sup> See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (city's general plan and zoning designation prevented plaintiff from building nuclear power plant on lagoon).

<sup>83</sup> *Id.* at 658-60 (Brennan, J., dissenting).

<sup>84</sup> *Id.* See authorities cited *id.* at 659 n.25.

and "fair" compensation.<sup>85</sup> Under the first standard, which has its basis in eminent domain law,<sup>86</sup> government pays to the owner the fair market value of the interest taken.<sup>87</sup>

Two of the commentators who Justice Brennan cited in his dissent<sup>88</sup> advocate the full compensation approach. They recommend characterizing the interest taken as an easement that prohibits development of the subject property.<sup>89</sup> Eminent domain principles would require compensation equal to the difference in value between the use allowed under the excessive regulation and the highest use to which the owner could reasonably put the property.<sup>90</sup> Therefore, a plaintiff with undeveloped land might successfully argue that his property was best suited for commercial purposes.<sup>91</sup> Appropriate compensation would thus equal the value of an easement that prohibited commercial uses, measured during the time that the excessive regulation applied to the

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<sup>85</sup> See notes 15-16 *supra*.

<sup>86</sup> See Tomain, *supra* note 15, at 307.

<sup>87</sup> See note 79 *supra*.

<sup>88</sup> In *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 659 n.25 (1981) (Brennan, J., dissenting), Justice Brennan cites R. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 168-72 (1966) [hereinafter cited as R. BABCOCK]; and Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PENN. L. REV. 179, 198-239 (1961) [hereinafter cited as Krasnowiecki & Paul]. Babcock argues for a system of partial compensation for regulatory takings in which "the greater interests of the community are acknowledged but the consequence to the landowner is such that he receives a monetary compensation. . . ." R. BABCOCK, *supra* this note, at 168. The government would, in effect, be taking an easement by a harsh regulation, and the standard of compensation would be the fair market value of that easement.

Krasnowiecki & Paul suggest a method by which government can take the development rights of a parcel but delay paying for them as long as the owner does not sell the property. Once the regulated property is sold, however, compensation is calculated according to the "same procedures as is the valuation of property for purposes of 'just compensation' in condemnation. . . ." Krasnowiecki & Paul, *supra* this note, at 198-99.

<sup>89</sup> R. BABCOCK, *supra* note 88, at 169; Krasnowiecki & Paul, *supra* note 88, at 199.

<sup>90</sup> See *People ex. rel. State Pub. Works Bd. v. Talleur*, 79 Cal. App. 3d 690, 695, 145 Cal. Rptr. 150, 152 (1st Dist. 1978); CAL. CIV. PROC. CODE § 1263.320 (West Cum. Supp. 1982).

<sup>91</sup> See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 626 (1981) (trial court compensated plaintiff for loss of commercial opportunity even though plaintiff's property remained completely undeveloped).

parcel.<sup>92</sup>

The second approach alluded to by Justice Brennan is fair compensation.<sup>93</sup> Professor Costonis explains that a fair compensation analysis begins by dividing a parcel into five categories of potential development.<sup>94</sup> The first category, the "Zero Intensity Use," contemplates denial of any and all development of a parcel.<sup>95</sup> The second level, the "Resource Protection Use," represents a low level of development that is unlikely to provide an adequate return on investment.<sup>96</sup> The third level, the "Reasonable Beneficial Use," represents a level of development that provides a sufficient return on investment to prevent a court from finding a taking.<sup>97</sup> The fourth level, the "Allowable Use," permits the most extensive and profitable development of the parcel under an existing, valid regulation.<sup>98</sup> The final category, the

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<sup>92</sup> R. BABOCK, *supra* note 88, at 168; Kasnowiecki & Paul, *supra* note 88, at 198-99.

<sup>93</sup> See note 84 *supra*. Under a fair compensation theory, compensation is not based on fair market value. It is instead measured by the increment of value lost beyond the value that a regulation validly may take. See Costonis, "Fair" Compensation, *supra* note 16, at 1051-52. Although fair compensation is mainly Costonis' brainchild, it is not exclusive to him. See D. HAGMAN & D. MISZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 296 (1978) (monetary remedy for regulatory taking may be something less than full compensation). See also MODEL LAND DEV. CODE §§ 5-303 to -305, at 202-07 (1975) [hereinafter cited as MODEL LAND DEV. CODE], which takes a position similar to the fair compensation model. The Model Code compensates the owner only for the loss of those development rights to which he has a clear constitutional right. The municipality would provide compensation equal to the value of "the minimum development necessary to eliminate the unconstitutional taking." MODEL LAND DEV. CODE, *supra* this note, § 5-304, at 203. See also Bosselman, *The Third Alternative in Zoning Litigation*, 17 ZONING DIG. 113, 114-19 (1965) (advocating fair compensation).

<sup>94</sup> Costonis, "Fair" Compensation, *supra* note 16, at 1050-51.

<sup>95</sup> *Id.* at 1050. This category allows no use and would have "a negative return because the owner must nevertheless pay real estate tax and other carrying costs that are incident to land ownership." *Id.*

<sup>96</sup> *Id.* at 1050-51. Costonis places in this category lands such as those designated for shoreland conservation, "that is, tight land use controls, typically adopted to protect natural and man-made environmental amenities." *Id.* at 1050.

<sup>97</sup> *Id.* at 1051. Reasonable Beneficial Use "is premised on the . . . generalization . . . that land use controls can bar a parcel's most profitable use or even uses of lesser profitability without being confiscatory if they allow the landowner a reasonable economic return . . ." *Id.*

<sup>98</sup> *Id.* Allowable Use "is, in fact, the category under which the vast majority

"Highest and Best Use," represents the most extensive use of completely unregulated land.<sup>99</sup>

The United States Supreme Court has held that government may deprive an owner of a substantial portion of a parcel's value as long as a reasonable use remains.<sup>100</sup> The Reasonable Beneficial Use in the fair compensation model<sup>101</sup> seems to fit this rule. Fair compensation theorists reason that because government may take a substantial portion of the property's value without providing compensation, government need not pay for the entire interest that is taken by an unconstitutionally excessive regulation.<sup>102</sup>

The fair compensation model would provide compensation to the owner only for the value taken by the regulation's margin of excessiveness.<sup>103</sup> Thus, using the fair compensation categories, government may take the value between the Highest and Best Use and the Reasonable Beneficial Use without compensating the landowner.<sup>104</sup> However, if a regulation is invalid, government must pay the landowner an amount equal to the difference in value between the use allowed under the invalid regulation and the Reasonable Beneficial Use.<sup>105</sup>

A hypothetical illustrates the difference between the full and fair compensation models. Suppose that housing of one unit per acre represents the Reasonable Beneficial Use of a five-acre parcel.<sup>106</sup> The local government zones the land exclusively for open space uses. According to the fair compensation model, government must compensate the landowner for the difference in the land's value as open space and as a five unit housing develop-

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of private land is zoned in America today. Accordingly, it usually corresponds to what, in eminent domain terminology, is the standard of 'highest and best use under existing land use controls.'" *Id.*

<sup>99</sup> *Id.* at 1050.

<sup>100</sup> See *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>101</sup> Costonis, "Fair" Compensation, *supra* note 16, at 1051. See note 95 and accompanying text *supra*.

<sup>102</sup> Costonis, "Fair" Compensation, *supra* note 16, at 1051-52; D. HAGMAN & D. MISZYNSKI, *supra* note 93, at 296; MODEL LAND DEV. CODE, *supra* note 93, § 5-304, at 203.

<sup>103</sup> See note 102 and accompanying text *supra*.

<sup>104</sup> See notes 94-99 and accompanying text *supra*.

<sup>105</sup> See note 102 and accompanying text *supra*.

<sup>106</sup> See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 277, 598 P.2d 25, 32, 157 Cal. Rptr. 372, 378 (1979), *aff'd*, 447 U.S. 255 (1980).

ment.<sup>107</sup> Under the full compensation model, government would pay an amount equal to the difference in the value of the land as open space and its value at its highest reasonable use.<sup>108</sup> Thus, the approach that a court adopts in determining an inverse condemnation award may significantly affect its amount.

#### IV. FULL AND FAIR COMPENSATION IN LIGHT OF CALIFORNIA'S LAND USE REGULATION POLICY OBJECTIVES

When it decided *Agins v. City of Tiburon*,<sup>109</sup> the California Supreme Court could have provided either of two remedies for the unconstitutional land use regulation. The court could have characterized the regulation as a fifth amendment taking and required the city to compensate landowners for their property.<sup>110</sup> Alternatively, the court could have limited the remedy to ordinance invalidation without monetary compensation.<sup>111</sup> The court chose the latter path, avoiding a ruling that would harm local planning and zoning.<sup>112</sup>

If Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*<sup>113</sup> becomes law, however, the sole remedy of ordinance invalidation will not be a constitutional alternative.<sup>114</sup> Invalidation will have to be accompanied by a judicial decision that the excessive regulation effected a compensable taking during its effective period.<sup>115</sup> Thus, California courts would have to provide compensation along with the invalidation remedy.

Justice Brennan's dissent in *San Diego Gas & Electric Co.*, however, indicates that courts may constitutionally use more than one approach to evaluate damages for temporary regulatory takings.<sup>116</sup> Given the choice between the full and fair compensa-

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<sup>107</sup> See note 102 and accompanying text *supra*.

<sup>108</sup> See notes 88-92 and accompanying text *supra*.

<sup>109</sup> *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).

<sup>110</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 226, 272, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 374-75 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>111</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 374-75 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>112</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 275, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>113</sup> 450 U.S. 621, 636-61 (1981) (Brennan, J., dissenting).

<sup>114</sup> *Id.* at 653 (Brennan, J., dissenting).

<sup>115</sup> *Id.*

<sup>116</sup> See sources cited *id.* at 659 n.25 (Brennan, J., dissenting).

tion measurements, the California court may best advance the pro-planning objectives announced in *Agins*<sup>117</sup> by selecting the fair compensation standard.<sup>118</sup> The *Agins* court sought to protect local zoning authorities from the chilling effect of monetary judgments,<sup>119</sup> to avoid judicial encroachment on zoning policy,<sup>120</sup> and to protect the public treasury from the fiscal incursions that might result from poorly planned land use initiatives.<sup>121</sup>

Adoption of a fair compensation standard for temporary regulatory takings would not chill local planning as much as a full compensation standard would. Fair compensation damages would be smaller and more predictable than full compensation damages. Smaller judgments would result because it costs less to compensate for the loss of a Reasonable Beneficial Use than for the Allowable Use.<sup>122</sup> For example, the temporary rental value of five homes on a five acre parcel will be much smaller than the income lost because of delayed development of a commercial project such as a shopping center,<sup>123</sup> power plant,<sup>124</sup> or apartment complex.<sup>125</sup>

Adoption of a fair compensation standard would increase predictability because local governments and courts may more easily gauge a parcel's Reasonable Beneficial Use than its Allowable Use.<sup>126</sup> It seems easier to calculate the rental value of five homes on five acres than to determine the lost income arising from the postponement of an elaborate commercial development.<sup>127</sup> To

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<sup>117</sup> See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 277, 598 P.2d 25, 32, 157 Cal. Rptr. 372, 378 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>118</sup> See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 277, 598 P.2d 25, 32, 157 Cal. Rptr. 372, 378 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>119</sup> See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 277, 598 P.2d 25, 32, 157 Cal. Rptr. 372, 378 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>120</sup> See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 277, 598 P.2d 25, 32, 157 Cal. Rptr. 372, 378 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>121</sup> See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 277, 598 P.2d 25, 32, 157 Cal. Rptr. 372, 378 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>122</sup> See note 102 and accompanying text *supra*.

<sup>123</sup> See, e.g., *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (plaintiff claimed a loss of \$325,000).

<sup>124</sup> See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 624 (1981) (trial court awarded damages of over \$3 million).

<sup>125</sup> See, e.g., *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (plaintiff claimed a \$10 million loss).

<sup>126</sup> See notes 97-98 and accompanying text *supra*.

<sup>127</sup> See notes 106-108 and accompanying text *supra*.

calculate the latter, courts would first have to establish the standard that the landowner must meet in showing his intended development.<sup>128</sup> Courts would then have to arrive at a fair valuation of the damages caused by the project's delayed development.<sup>129</sup>

Apart from consuming scarce judicial resources, full compensation for temporary regulatory takings would discourage innovative zoning. The potential cost of a zoning error could be enormous under this standard,<sup>130</sup> while governments could accept the more predictable risks that fair compensation would present.

The California Supreme Court's second *Agins* goal is to avoid judicial encroachment on legislative land use determinations.<sup>131</sup> Judicial interference is considerable when courts force governments to purchase property by way of inverse condemnation.<sup>132</sup> Courts, in effect, allocate scarce public resources, making financial decisions normally reserved for the legislature. An ordinance invalidation remedy alone eliminates all risk of such encroachment,<sup>133</sup> since courts exercise no allocation function. Ordinance invalidation alone, however, may not withstand constitutional scrutiny.<sup>134</sup> If it does not, temporary damages will need to accompany invalidation.<sup>135</sup> The extent of the damage remedy's encroachment upon legislative resource allocation thus depends upon the standard of compensation used. A fair compensation standard will result in smaller judgments than will a

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<sup>128</sup> See *People ex. rel. State Pub. Works Bd. v. Talleur*, 79 Cal. App. 3d 690, 145 Cal. Rptr. 150 (1st Dist. 1978). See also CAL. CIV. PROC. CODE § 1263.320 (West Cum. Supp. 1980) (fair market value defined); CAL EVID. CODE §§ 810-822 (West Cum. Supp. 1982) (enumerating factors which may be considered in determining fair market value).

<sup>129</sup> See sources cited in note 128 *supra*.

<sup>130</sup> See, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 627 (1981) (the trial court award of over \$3 million in damages illustrates the potential cost of a zoning mistake).

<sup>131</sup> See notes 47-49 and accompanying text *supra*.

<sup>132</sup> See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981). If the trial court ruling had survived, the city would have been forced to purchase land which it had already determined that it could not afford. *Id.* at 625.

<sup>133</sup> See notes 42-55 and accompanying text *supra*.

<sup>134</sup> *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting). See also notes 65-72 and accompanying text *supra*.

<sup>135</sup> *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting).

full compensation standard.<sup>136</sup> Judicial use of the fair compensation standard, therefore, minimizes judicial interference with the local planning and zoning function and thus better comports with the second *Agins* objective.<sup>137</sup>

Adoption of a fair compensation standard would also advance the third *Agins* objective of limiting the inadvertent expenditure of public funds that constitutionally infirm voter initiatives might require.<sup>138</sup> California voters may enact wide-ranging planning and zoning laws by initiative.<sup>139</sup> If an initiative unconstitutionally impinged upon private property rights, courts might have to levy monetary damage awards against state and local governments<sup>140</sup> in addition to invalidating the law. The amount of damages under a fair compensation standard would be lower than under a full compensation standard.<sup>141</sup> Thus, although voters could reconsider a judicially invalidated unconstitutional measure, a fair compensation standard would minimize the inadvertent expenditures for temporary damages brought about by the overreaching initiative.

#### CONCLUSION

In *Agins v. City of Tiburon*, the California Supreme Court limited the remedy for an unconstitutional land use regulation to ordinance invalidation. The court thus protected the ability of municipalities to zone imaginatively without the threat of bankruptcy.<sup>142</sup> California, along with other states that limit the remedy for regulatory takings to ordinance invalidation, may soon face a United States Supreme Court decision that overrules cases such as *Agins*.<sup>143</sup> Should the Court overturn *Agins*, the California Supreme Court could still protect innovative zoning by providing a remedy that includes ordinance invalidation ac-

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<sup>136</sup> See notes 102-108 and accompanying text *supra*.

<sup>137</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 377 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>138</sup> *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 377 (1979), *aff'd*, 447 U.S. 255 (1980).

<sup>139</sup> See *Arnell Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 514-19, 620 P.2d 565, 566-70, 169 Cal. Rptr. 904, 905-09 (1980). See also note 53 *supra*.

<sup>140</sup> *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting).

<sup>141</sup> See notes 102-108 and accompanying text *supra*.

<sup>142</sup> See notes 37-55 and accompanying text *supra*.

<sup>143</sup> See notes 65-77 and accompanying text *supra*.

accompanied by fair compensation for the temporary regulatory taking.

By ruling that invalid regulations take only that portion of a property's value below its Reasonable Beneficial Use, the California Supreme Court may limit the size of potential compensation awards.<sup>144</sup> Although an invalid regulation would be characterized as a taking, the cost of the taking would not unduly burden the public treasury. Thus, should the United States Supreme Court follow the reasoning of Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*,<sup>145</sup> the California Supreme Court need not entirely surrender the policy objectives that it sought to promote in *Agins*.

*Alan F. Ciamporcero*

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<sup>144</sup> See notes 102-109 and accompanying text *supra*.

<sup>145</sup> *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 636-61 (1981) (Brennan, J., dissenting).

