Sizing Up Just Compensation Relief for Down-Zoning After *HFH* and *Eldridge*

What are the rights of California landowners to relief under the constitutional just compensation clauses when government imposes restrictions on private land use? HFH, LTD. v. SUPERIOR COURT and ELDRIDGE v. CITY OF PALO ALTO seem to establish that landowners have a cause of action when down-zoning deprives them of substantially all use of their land, but not when the regulation merely reduces the land's market value. Venturing into and beyond the cases, this article explores several tests for determining whether down-zoning deprives land of substantially all its usefulness. It concludes that relief should be granted when down-zoning makes economically advantageous use of land impossible.

Terra Investments bought a tract of unimproved land on the outskirts of a growing California city. Under the municipal zoning[1] ordinance then applicable, Terra could construct condominiums on the land. Before Terra had taken any steps toward development,[2] the city rezoned the land for agricultural use. Assuming that the down-zoning[3] drastically reduced the value of the land, can Terra obtain relief—either invalidation of the down-zoning or compensation for

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[1] The term "zoning" refers to restrictions imposed by government on the use of privately owned land. Generally, zoning involves the division of land into districts and the adoption of regulations regarding the manner in which land in different districts may be used. Regulations can be directed to the kinds of uses that may be made of land—*e.g.*, residential, commercial, or industrial use designations—or to the height, bulk, or density of structural improvements—*e.g.*, maximum height, minimum setback, or minimum acreage-per-dwelling provisions. *See* Miller v. Board of Pub. Works, 195 Cal. 477, 486, 234 P. 381, 384 (1925); D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 101-02 (1971).

[2] This article does not address just compensation issues that arise when zoning proscribes uses established on land before enactment of the prohibition. *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 6.06 (2d ed. 1976).

[3] "Down-zoning" refers in this article to zoning that reduces the intensity of use premitted for particular land. If land is unzoned, any restrictions imposed upon it constitute down-zoning. If the use of land is already restricted, the intensity of permissible use can be reduced either by changing the kinds of use that may lawfully be made—*e.g.*, from industrial to residential—or by decreasing the density of allowable use—*e.g.*, from single family dwellings on one-acre parcels to single family dwellings on five-acre parcels.

losses attributable to it[4]—under the federal or California constitutional just compensation clauses?[5]

Lawyers attempting to answer this question for landowners in Terra's position have long had reason to consider it an unwelcome task in two respects. In the first place, the relevant courts historically have provided no clear rules to determine the availability of relief for down-zoning premised on the compensation clauses. The United States Supreme Court has said on the one hand that governmental entities may properly restrict land use without compensating landowners under their broad police powers to regulate in the interest of the public health, safety, morals, and general welfare.[6] On the other hand, the Court has declared that regulation may be so onerous as to constitute a taking of property impermissible without compensation.[7]

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[4]This article does not pursue the question of whether landowners have an option to seek either a declaration of the invalidity of zoning or monetary compensation. One panel of the California Court of Appeal split over this issue, the majority holding monetary compensation proper and the dissenter regarding declaratory relief as the landowners' exclusive remedy. Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1st Dist. 1976). Several commentators have addressed the question of an appropriate remedy for down-zoning offensive to the compensation clauses. *See, e.g.*, Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 URB. LAW. 25 (1973); Comment, *"Takings" Under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances*, 30 SW. L. J. 723 (1976); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974).

[5]The fifth amendment of the United States Constitution provides in part: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The clause directly restricts only the conduct of the federal government. However, the Supreme Court has applied the compensation requirement to the states and their political subdivisions by incorporating it into the due process clause of the fourteenth amendment. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 235-41 (1897). Article 1, section 19 of the California Constitution provides in part: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." CAL. CONST. art. 1, § 19. A reference in this article to the "compensation clauses" is a reference to both federal and state constitutional just compensation requirements.

The California Supreme Court has indicated that the purpose of the compensation clauses is "to distribute throughout the community the loss inflicted upon the individual by the making of public improvements." Bacich v. Board of Control, 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943). The court has long held the compensation clauses applicable when government has physically appropriated private property for public use. *E.g.*, McCann v. Sierra County, 7 Cal. 121 (1857). It has also held that California's provision requires compensation when public projects cause physical damage to private property. Holtz v. Superior Court, 3 Cal. 3d 296, 302, 475 P.2d 441, 444, 90 Cal. Rptr. 345, 348 (1970). Landowners argue that, as a matter of economic reality, the policy of charging the public with the cost of improving the community's welfare applies equally to the situation in which down-zoning reduces the value of land. This article focuses upon the limited instance in which the courts have accepted the argument.

[6]*See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-88 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 410-11 (1915).

[7]Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). *Accord*, Penn-

Despite the uncertainty created by these opposing propositions, the Court has expressly declined to formulate any general rule for ascertaining when regulation is beyond the reach of the police power and amounts to a taking.[8]

Until the latter part of 1975, California courts had likewise made no attempt to clarify the applicability of the just compensation clauses to public regulation of private land use. They often reiterated that losses incidental to the exercise of the police power did not require compensation.[9] However, they apparently never undertook to define the scope of the police power as limited by the just compensation clauses. They preferred instead to label land use restrictions as within or without the police power on an *ad hoc* basis, as particular claims for relief were pressed by landowners.[10]

The second reason that advising landowners in Terra's position has brought attorneys little satisfaction is that the courts have afforded relief for down-zoning under the compensation clauses in very few cases. Both the United States Supreme Court and the California courts have sanctioned down-zoning despite its imposition of large losses upon landowners.[11] They have only found regulation impermissible without compensation where governments employed the restrictions as a prelude to public acquisition of land[12] or as a means of

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sylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922): "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

[8] Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962): "There is no set formula to determine where regulation ends and taking begins." *Accord*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922): "[T]his is a question of degree—and therefore cannot be disposed of by general propositions."

[9] *E.g.*, Hamer v. Town of Ross, 59 Cal. 2d 776, 787, 382 P.2d 375, 382, 31 Cal. Rptr. 335, 342 (1963); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 530, 370 P.2d 342, 351, 20 Cal. Rptr. 638, 647 (1962), *appeal dismissed*, 371 U.S. 36 (1962); McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 890, 264 P.2d 932, 938 (1953), *cert. denied*, 348 U.S. 817 (1954); Wilkins v. City of San Bernadino, 29 Cal. 2d 332, 338, 175 P.2d 542, 547 (1946); Zahn v. Board of Pub. Works, 195 Cal. 497, 512, 234 P. 388, 394 (1925), *aff'd*, 274 U.S. 325 (1927).

[10] *See, e.g.*, McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 889-92, 264 P.2d 932, 938-39 (1953), *cert. denied*, 348 U.S. 817 (1954); Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d 557, 570-73, 89 Cal. Rptr. 897, 905-06 (1st Dist. 1970).

[11] *E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384, 396-97 (1926) (reduction in value from $10,000 per acre to $2,500 per acre); Hadacheck v. Sebastian, 239 U.S. 394, 405, 410-11 (1915) (reduction in value of tract from $800,000 to $60,000); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 519, 530, 370 P.2d 342, 344, 351, 20 Cal. Rptr. 638, 640, 647 (1962) (great value to no appreciable economic value), *appeal dismissed*, 371 U.S. 36 (1962); Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (2d Dist. 1967) (damages of $1,066,000 sought).

[12] Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 462, 327 P.2d 10, 16 (2d Dist. 1958); *accord*, People *ex rel* Dep't of Pub. Works v. Southern Pac. Transp. Co., 33 Cal. App. 3d 960, 965, 109 Cal. Rptr. 525, 528 (2d Dist. 1973)

obtaining actual public use of private property without incurring the expense of acquiring it.[13] Until quite recently, neither the United States Supreme Court nor the California courts had ever held simple down-zoning[14] cause for relief under the compensation clauses,[15] though landowners had advanced the claim in numerous cases.[16]

The job of counseling landowners in Terra's position has of late been made a little easier, and perhaps less inevitably thankless. Two recent California decisions—*HFH, Ltd. v. Superior Court*,[17] decided by the California Supreme Court, and *Eldridge v. City of Palo Alto*,[18] handed down by the Court of Appeal for the First District—help to clarify the law to some extent by articulating a rough rule for determining whether down-zoning warrants relief under the compensation clauses. Departing from the *ad hoc* labeling that was characteristic of earlier opinions, the cases focus upon the effect that down-zoning has upon land as an asset.[19] Read together, *HFH* and *Eldridge* estab-

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(dictum); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 856-63, 77 Cal. Rptr. 391, 399-404 (3d Dist. 1969) (plans for future condemnation one of several factors). If courts tolerated such precondemnation down-zoning, governmental entities could substantially undercut the requirement of just compensation for physical appropriation of land by imposing regulations that would greatly depress the value of the land they wished to acquire.

[13] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412-16 (1922) (obtaining subjacent support for surface improvements owned by private parties and public entities by effectively forbidding owner of underlying coal to extract it, despite express reservation of right to do so in deeds conveying surface rights); Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963) (obtaining the equivalent of an air navigation easement for landing and take-off of airplanes by proscribing structures or vegetation more than three inches high on land surrounding municipal airport).

[14] For the purposes of this article, "simple down-zoning" is defined as down-zoning enacted neither as a prelude to public acquisition of land nor as a means of obtaining actual public use of private property without incurring the expense of acquiring it. Unless otherwise apparent from the context, references to down-zoning made throughout this article are references to simple down-zoning.

[15] *But see* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (invalidating down-zoning for lack of a "substantial relation to the public health, safety, morals, or general welfare"). Although *Nectow* is sometimes cited as bearing on the just compensation issue, *e.g.*, Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 626, 125 Cal. Rptr. 575, 582 (1st Dist. 1976), the Court found the regulation improper because it was irrational, not simply because it injured property interests.

[16] *E.g.*, cases cited notes 9-11 *supra*.

[17] 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

[18] 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1st Dist. 1976).

[19] The supreme court expressly acknowledged this departure in *HFH*:

> [O]ur conclusion in no sense turns on the verbal distinction between "takings" and "police power." While these terms have a venerable history in discussions of this question, at best they have served as a shorthand method of indicating the result; neither hard nor easy cases are decided by such merely verbal lines.

15 Cal. 3d at 522, 542 P.2d at 247, 125 Cal. Rptr. at 375.

lish that landowners cannot obtain relief if down-zoning merely reduces the market value of their land, but do have a cause of action if the regulation "[forbids] substantially *all* use of the land."[20] The rule is generally consistent with previous California decisions since it makes the vast majority of down-zoning measures invulnerable to claims for relief premised upon the compensation clauses. Nevertheless, it is California's first affirmative recognition of a cause of action for harsh down-zoning in and of itself, as well as the first pronouncement on the applicability of the compensation clauses to down-zoning that can be called a rule, albeit a rough one.

Leaving aside the question of whether it is too favorable to landowners or not favorable enough, the rule that emerges from *HFH* and *Eldridge* cannot be hailed as the definitive resolution of the relationship between down-zoning and the just compensation clauses. The rule is incomplete without a method for determining whether down-zoning forbids substantially all use of land. The California Supreme Court gave this problem very little consideration in *HFH.* A cryptic paragraph in the court of appeal's opinion in *Eldridge* addresses the problem, but does so in a manner apparently inconsistent with the supreme court's reasoning in *HFH.* The line that the courts have drawn between merely reducing market value and forbidding substantially all use cannot provide the clarity desired by lawyers advising landowners like Terra until some means is recognized for deciding on which side of the line particular land use restrictions will fall. This article attempts to bring predictive utility to the rough rule announced in the cases by recommending a test for determining whether down-zoning forbids substantially all use of land.

The first portion of this article briefly describes the facts and relevant holdings in the *HFH* and *Eldridge* decisions. The second section discusses three potential tests of whether down-zoning forbids substantially all use of land that are based upon passages found in the cases: (a) whether the private burden occasioned by down-zoning outweighs the public benefit attributable to it, (b) whether down-zoning leaves land without substantial market value, and (c) whether down-zoning renders land unsalable. Despite their arguable grounding in *HFH* or *Eldridge*, analysis will show that these tests suffer from a number of defects. The final section of this article proposes a test that is based upon precedent in other jurisdictions. The recommended test asks whether down-zoning makes economically advantageous use of land impossible. This test is superior to the others considered because it defines a threshold for relief that is consistent with the supreme court's reasoning in *HFH* and offers landowners a

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[20] *Id.* at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16 (emphasis in original).

realistic possibility of a remedy for harsh down-zoning, corresponding to the loss of a key attribute of landownership.

I. *HFH* AND *ELDRIDGE* IN BRIEF

HFH, Ltd. v. Superior Court[21] involved a city's down-zoning of unimproved land from a commercial to a single family residential classification. Plaintiff landowners brought an inverse condemnation[22] action against the city. They alleged that their land was useless for single family residential purposes.[23] They further asserted that the down-zoning deprived them "of any reasonably beneficial use of . . . [the land] commensurate with its value,"[24] and reduced the market value of the land from $400,000 to $75,000.[25]

In characterizing the case before it, the California Supreme Court emphasized plaintiffs' failure to allege that the land was useless for all purposes permissible under the residential zoning classification.[26] The court found plaintiffs' claimed inability to make reasonably beneficial use of their land commensurate with its value inadequate in two respects. It observed first that the substantial value admittedly remaining in the down-zoned land rebutted the allegation that reasonably beneficial use was impossible. This observation was dictum since plaintiffs had in fact made no such allegation. They claimed only that the down-zoning prevented them from making reasonably beneficial use of their land *commensurate with its value.* This latter phrase furnished the court with an independent ground for disregarding plaintiffs' contention. The court reasoned that the concept of use commensurate with value was tautological since the value of land was a function of the uses that could be made of it; prohibition of beneficial uses would ordinarily result in a corresponding decline in market value. Therefore, the uses allowed after down-zoning could only

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[21] 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

[22] One court defined inverse condemnation as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100, 101 n.1 (1962), *quoted in* D. HAGMAN, *supra* note 1, at 328.

[23] 15 Cal. 3d at 512, 542 P.2d at 240, 125 Cal. Rptr. at 368.

[24] *Id.* at 512 n.2, 542 P.2d at 240 n.2, 125 Cal. Rptr. at 368 n.2.

[25] Plaintiffs originally purchased the land for some $388,000, after their grantor obtained commercial zoning from the city. They entered into a contract to sell the property to a third party for $400,000 upon the condition that plaintiffs induce the city to restore the commercial zoning, which it had withdrawn approximately five years after plaintiffs' purchase. *Id.* at 512, 542 P.2d at 240, 125 Cal. Rptr. at 368.

[26] As indicated above, plaintiffs alleged that the land was useless for single family residential purposes. The court did not explain what other uses the zoning permitted that plaintiffs failed to allege were impossible.

be incommensurate with the value of land if landowners enjoyed a vested right in the market value associated with the uses permitted under the zoning previously applicable. In this light, it is apparent that alleging an inability to make reasonably beneficial use commensurate with value was effectively the same as simply alleging a reduction in market value.[27] Hence, the decrease in market value of more than eighty percent was the nub of plaintiffs' claims that the city had taken property by down-zoning their land from a commercial to a single family residential classification.

The supreme court held that plaintiffs' complaints failed to state a cause of action in inverse condemnation. In doing so, the court set forth the rule—perhaps implicit in prior California decisions,[28] but never clearly expressed—that landowners cannot obtain relief under the constitutional just compensation clauses for down-zoning that merely reduces the market value of their property.[29] However, the court reserved the question of whether relief would be appropriate "in the event a zoning regulation forbade substantially *all* use of the land in question."[30]

Shortly after the California Supreme Court handed down *HFH*, the Court of Appeal for the First District decided *Eldridge v. City of*

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[27]This analysis differs somewhat from the court's treatment of the use-commensurate-with-value problem. The court did not say that plaintiffs' allegation was essentially equivalent to the assertion that the city's down-zoning reduced the market value of their land. Instead, the court dismissed the allegation by observing that down-zoning could only deprive plaintiffs of use commensurate with value if plaintiffs enjoyed a vested right in the previous zoning classification, and that California courts would recognize no such vested right. 15 Cal. 3d at 512 n.2, 542 P.2d at 240 n.2, 125 Cal. Rptr. at 368 n.2.

The court's statement that plaintiffs had no vested right in the previous zoning classification of their land virtually foretold the central holding in *HFH* that down-zoning which merely reduces market value is not actionable under the compensation clauses. The statement was only an answer to plaintiffs' claimed inability to make use commensurate with the value of their land if it meant that plaintiffs had no vested right in the market value associated with the previous zoning; if they had a vested right in that market value, down-zoning could deprive them of use commensurate with it. Assuming that the court meant that plaintiffs had no vested right in the market value of their land under the prior zoning classification, it follows that down-zoning that merely reduced the market value of their land would not entitle them to relief.

[28]*See, e.g.*, Hamer v. Town of Ross, 59 Cal. 2d 776, 787, 382 P.2d 375, 382, 31 Cal. Rptr. 335, 342 (1963); Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (2d Dist. 1966).

[29]15 Cal. 3d at 513-18, 542 P.2d at 240-44, 125 Cal. Rptr. at 368-72. The court rejected the argument that plaintiffs should prevail under the California Constitution if not under the federal since the former requires compensation for the damaging as well as for the taking of private property for public use. The court construed the damage for which compensation would be due as limited to physical harm to property. *Id.* at 517-18, 542 P.2d at 243-44, 125 Cal. Rptr. at 371-72.

[30]*Id.* at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16 (emphasis in original).

Palo Alto.[31] *Eldridge* seems to answer in the affirmative the question left open in *HFH* regarding the right to relief where down-zoning forbids substantially all use of land. It is apparently the first California decision to hold that a landowner can rely upon the compensation clauses to obtain relief for down-zoning, even though the increased regulation is neither connected with plans for future public acquisition nor employed as a means of procuring actual public use of land without formally acquiring it.

Plaintiffs in *Eldridge* owned undeveloped acreage in the foothills bordering the City of Palo Alto. The city originally zoned the land for single family residential use on parcels no smaller than one acre. Some twelve years later, the city decided that the undeveloped character of the foothills should be preserved. It rezoned most of the area for open space use, apparently allowing construction of one residence on parcels of ten or more acres.[32] Plaintiffs sued the city in inverse condemnation, alleging that the down-zoning deprived them of any substantial or reasonable use of their lands. The trial court sustained the city's demurrer, and plaintiffs appealed. After referring to the distinction drawn in *HFH* between mere diminution in market value and deprivation of substantially all use, the court of appeal held that plaintiffs stated a cause of action when they alleged, in substance, that the open space zoning ordinances denied them any[33]

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[31] 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1st Dist. 1976). The procedural history of the *Eldridge* case suggests that it may have an authoritative stature approaching that of a California Supreme Court decision. The court of appeal originally decided in favor of plaintiff Eldridge prior to the supreme court's opinion in *HFH*. 124 Cal. Rptr. 547 (1st Dist. 1975). On appeal, the supreme court remanded the case for reconsideration in light of *HFH*. *Eldridge* was then consolidated with a similar case, and the two were argued before the same panel of the court of appeal that had previously ruled in favor of plaintiff Eldridge. Modifying its earlier opinion only slightly, the court again decided in favor of the landowners. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1st Dist. 1976). The supreme court then denied the city's petition for a hearing. *Id.* at 355, 129 Cal. Rptr. at 602.

[32] The provisions of the open space ordinances are not included in the majority opinion. The following description appears in the dissenting opinion:

> Under the new zoning "construction of one-family dwellings on the property . . . is expressly limited to 10-acre minimum lots with a maximum of impervious area and building coverage of 3.5 per cent . . . ." Uses are limited to "(1) Public recreation (2) Enjoyment of scenic beauty (3) Conservation of use of natural resources (4) Production of food or fiber (5) Protection of man and his artifacts (buildings, property, etc.) (6) Containment and structuring of urban development."

57 Cal. App. 3d at 651, 129 Cal. Rptr. at 600 (ellipses in original). Language in the majority opinion suggests that the court may have doubted whether the ordinances did permit construction of one residence on each ten-acre parcel. *Id.* at 628, 129 Cal. Rptr. at 584; *see* note 42 *infra*.

[33] The word "all" would probably have been a better choice for the court's purposes than the word "any." Denial of any reasonable or beneficial use suggests that if one of several feasible uses were denied but the others allowed, plaintiffs would nonetheless be entitled to relief. In effect, such a rule would

reasonable or beneficial use of their land.[34]

The *Eldridge* decision builds upon the rule stated by the supreme court in *HFH*. In combination, the two cases establish that landowners have no cause of action when down-zoning merely reduces the market value of their land, but are entitled to relief if the new restrictions "[forbid] substantially *all* use"[35] or "[deny] any reasonable or beneficial use"[36] of the property.[37] This is both the first real

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give landowners a vested right to make any feasible use of their property. Virtually every zoning restriction would be subject to challenge, since the function of zoning is to preclude what might otherwise have been feasible uses. This cannot have been the result intended in *Eldridge*. It is patently inconsistent with the supreme court's refusal of relief in *HFH* for the prohibition of commercial use of plaintiffs' land. The *Eldridge* court clearly regarded "denial of any reasonable or beneficial use" as synonymous with "forbidding substantially all use"; it coined the former expression in paraphrasing the question left open in *HFH*, which employed the latter phraseology. Eldridge v. City of Palo Alto, 57 Cal. App. 3d at 624, 129 Cal. Rptr. at 581. Since the word "all" is less apt to generate confusion than the word "any," the court of appeal would have done well to follow the supreme court's diction in this respect.

[34]The author assumes that *Eldridge* stands for the proposition that landowners are entitled to relief under the compensation clauses whenever down-zoning denies them any reasonable or beneficial use of their land. *But see* note 37 *infra*. An alternative reading of the case is arguably possible. Courts have established that zoning may not be used to escape the requirement of paying for land actually used by the public. *E.g.*, Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963); *see* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 516-17 n.14, 542 P.2d 237, 243 n.14, 125 Cal. Rptr. 365, 371 n.14 (1975) (dictum), *cert. denied*, 425 U.S. 904 (1976). It might be suggested that *Eldridge* merely exemplifies this actual public use rule. The contention can be made that the city's open space zoning resulted in actual public use of plaintiffs' land in much the same way as would the purchase or condemnation by the city of an open space or scenic easement in the land. Zoning and easement alike would give the public such uses as conservation of natural fauna and flora beneficial to the communal ecosystem and enjoyment of visual and psychological relief from the unesthetic and tension-inducing aspects of modern municipal living. Although this characterization of open space zoning as within the actual public use rule has some plausibility, one California court apparently rejected it. *See* Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1st Dist. 1976).

[35]HFH, Ltd. v. Superior Ct., 15 Cal. 3d at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16 (emphasis in original).

[36]Eldridge v. City of Palo Alto, 57 Cal. App. 3d at 628-29, 129 Cal. Rptr. at 583-84.

[37]The rule may not hold when the uses forbidden are deemed injurious or nuisance-like. Long before deciding *HFH*, the supreme court upheld a prohibition on excavation of rock, sand, and gravel from land located in a watercourse, despite the trial court's finding that the land had no appreciable economic value for any other purpose. Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 519, 530, 370 P.2d 342, 344, 351, 20 Cal. Rptr. 638, 640, 647 (1962), *appeal dismissed*, 371 U.S. 36 (1962). The court emphasized that airborne dust caused by excavation could be injurious to nearby residents, including sufferers from respiratory ailments who had chosen the area for its therapeutic climate. *Id.* at 519-20, 524, 370 P.2d at 345, 348, 20 Cal. Rptr. at 641, 644. Whether such injurious use cases will be excepted from the rule established by *HFH* and *Eldridge* and the dimensions of such an exception are problems not explored in this article.

recognition by California courts of a right to relief for simple down-zoning and the most explicit formulation that they have provided to explain how the just compensation clauses bear upon public regulation of private land use. However, in applying the rule to particular cases, courts will have to determine whether the down-zoning involved actually does forbid substantially all use or deny any reasonable or beneficial use of the land it restricts. Only when the courts establish a test for making that determination will landowners confronted with harsh down-zoning be able reliably to assess their prospects for relief. The remainder of this article attempts to indentify an appropriate test.

II. THREE PLAUSIBLE BUT UNACCEPTABLE TESTS

Neither *HFH* nor *Eldridge* expressly establishes a test for ascertaining whether down-zoning forbids substantially all use or denies any reasonable or beneficial use of land.[38] Arguably, however, there is some support in the opinions for three distinct tests. This section will introduce and criticize each of them.

The first test discussed entails balancing the burden that down-zoning imposes on private landowners against the benefit it confers on the public. This test is suggested by four inquiries proposed by the *Eldridge* court to be used on remand by the fact-finder in determining whether the city's open space zoning in fact denied plaintiffs any reasonable or beneficial use of their land. The second test considered focuses on whether down-zoning leaves land without substantial market value. It is derived from one possible interpretation of dictum found in *HFH*. The test taken up third asks whether down-zoning renders land unsalable. It is modeled after the first inquiry urged upon the fact-finder by the *Eldridge* court.

Despite the apparent grounding of each of these tests in one or the other of the cases, analysis will show that none of them is acceptable. The balancing approach is inconsistent with the supreme court's implicit decision in *HFH* not to weigh private burden against public benefit. Similarly, when regarded as tests in their own right, both substantial market value and salability are incompatible with the supreme court's indication that land's usefulness rather than its marketability is the attribute to focus upon in down-zoning actions. Moreover, substantial market value is an arbitrary standard for relief

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[38] It would be cumbersome to include "forbids substantially all use" and "denies any reasonable or beneficial use" in every reference to the standard for relief under *HFH* and *Eldridge*. Doing so is neither necessary nor desirable, since the two expressions denote the same phenomenon, and the former phrase is less apt to generate confusion. *See* note 33 *supra*. Ordinarily, this article will use the supreme court's language—forbids substantially all use—or very similar wording. The court of appeal's phraseology will only be substituted or included where the context requires.

that has no connection with the compensation clauses or the important attributes of landownership, and the salability test affords no realistic possibility of relief at all. In sum, this section will establish that neither the balance of private burden and public benefit, the existence of substantial market value for land, nor the salability of land should be embraced as the test of whether down-zoning deprives the land of substantially all its usefulness.

A. Balancing Private Burden Against Public Benefit

Having ruled in *Eldridge* that plaintiffs' complaints were invulnerable to the city's demurrers, the court of appeal remanded the case to the trial court to determine whether the city's open space zoning in fact denied plaintiffs any reasonable or beneficial use of their land. In so doing, the court suggested four factual inquiries that it thought were relevant to answering the central question on remand. The fact-finder was to consider: (1) "whether the 10-acre homesites of plaintiffs' land are salable at all"; (2) "the extent, and impact, of the intrusion upon plaintiffs' property by the 'paths and trails system' planned to allow 'public access through the foothills lands'"; (3) "whether there is any reasonable basis for the ordinances' declared aims of encouraging agricultural usage, preserving natural resources and creating wildlife sanctuaries on the land"; and (4) "generally, the reasonableness of the ordinances' concept that although the foothills may be subdivided into 10-acre homesites, they must nevertheless without compensation therefor remain 'open space.'"[39]

Viewed together, the court's suggested inquiries seem to imply that whether down-zoning denies any reasonable or beneficial use of land is to be determined by balancing the burden that the restriction imposes upon private property owners against the promise of benefit such regulation holds for the public. The court's first two questions, regarding the salability of the land zoned for open space use and the impact of the paths and trails system planned to allow public access through the down-zoned area, are apparently addressed to the magnitude of the detriment to which the city's open space preservation program will subject plaintiffs' property interests.[40] On the other

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[39] 57 Cal. App. 3d at 628, 129 Cal. Rptr. at 584.

[40] The court presumably intended the fact-finder to consider the impact of the city's proposed paths and trails system on the usefulness of the surrounding land, rather than upon the land over which the paths actually ran. Plaintiffs would unquestionably be entitled to compensation with respect to the latter property. McCann v. Sierra County, 7 Cal. 121 (1857). The author assumes that the court intended the fact-finder to assess the impact of the paths and trails only if their construction was at least clearly in the offing by the time of trial. The supreme court established in *Selby Realty Co. v. City of San Buenaventura* that government's mere adoption of plans for public use of particular private land does not create a cause of action in inverse condemnation with respect to

hand, in posing its third question, concerned apparently with the efficacy of the open space zoning in promoting its declared objectives, the court focuses the fact-finder's attention upon the worth of the regulations to the community.[41] Finally, the court urged the fact-finder to assess the general reasonableness of restricting plaintiffs' use of their lands under the open space zoning without compensating them for their losses.[42] In the context of the factors introduced by

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the land designated for future public use. 10 Cal. 3d 110, 119-21, 514 P.2d 111, 116-18, 109 Cal. Rptr. 799, 804-06 (1973). A fortiori, such plans would not be a ground for relief with respect to surrounding land.

It is possible that the court thought the city's plans for public paths and trails through the foothills were relevant even if construction was not imminent. Despite the limitation imposed by the *Selby* decision, the plans might have been significant in the court's view as a factor contributing to the appearance of the city's open space preservation program as a scheme for evading the obligation to pay for land actually used by the public. *See also* note 34 *supra*.

[41] The court directed the fact-finder to consider whether there was any reasonable basis for the open space zoning's declared aims of encouraging agricultural usage, preserving natural resources, and creating wildlife sanctuaries on the land. 57 Cal. App. 3d at 628, 129 Cal. Rptr. at 584. Elsewhere in its opinion, the court held that these objectives in themselves were quite proper. *Id.* at 629-31, 129 Cal. Rptr. at 586-88. Presumably, the reasonable basis into which the court thought inquiry should be made was the suitability of the open space zoning to the purposes it was ostensibly intended to serve.

A problem arises if the court's question is interpreted to ask simply whether the city's open space zoning had *any* tendency to advance its declared objectives. Although zoning that had no tendency to further the permissible public ends for which it was enacted could clearly be invalidated, *e.g.*, Nectow v. City of Cambridge, 277 U.S. 183 (1928); Hamer v. Town of Ross, 59 Cal. 2d 776, 781-83, 382 P.2d 375, 379-80, 31 Cal. Rptr. 335, 339-40 (1963), this result would seem to flow not from the compensation clauses, but rather from the general due process requirement that regulations affecting property have some rational connection with the promotion of permissible ends. *See, e.g.*, United States v. Caroline Prods. Co., 304 U.S. 144, 152 (1938) (dictum). Read as an inquiry into whether the zoning was irrational, the court's third question seems antecedent to the just compensation issue; irrational zoning would be invalid on that account and, having no effect, could not operate to take property. Moreover, as a matter of logic, the monetary payment appropriate to cure a transgression of the compensation clauses would not remedy the defect in irrational zoning; such regulation would still be an arbitrary disruption of private property interests by government.

Some commentators have suggested that relief under the compensation clauses depends upon whether the private burden imposed by restrictions on land use outweighs the public benefit attributable to the restrictions. *E.g.*, C. HARR, LAND-USE PLANNING 544-45 (1959), *quoted in* D. HAGMAN, *supra* note 1, at 327; 5 N. WILLIAMS, AMERICAN PLANNING LAW § 162.06, at 438 (1975); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 30-41 (1970), *reprinted in* 10 CAL. L. REVISION COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 303, 332-43 (1971). In this light, it seems appropriate to interpret the *Eldridge* court's third inquiry as addressed not merely to whether the open space zoning had any tendency to accomplish its declared aims, but rather to the zoning's level of effectiveness in serving its intended purposes. Then, combining this question with the others the court propounded, the efficacy or social utility of the zoning would be balanced against the private hardship occasioned by it.

[42] The fact-finder was to consider "generally, the reasonableness of the ordinances' concept that although the foothills may be subdivided into 10-acre

the first three questions, the reasonableness to which the court refers in the fourth seems necessarily to require a balancing of private burden against public benefit.[43]

Some commentators and a few courts in other jurisdictions have adopted balancing as a general test for determining whether the compensation clauses apply to down-zoning,[44] but in *HFH* the California Supreme Court implicitly rejected weighing the private burdens occasioned by particular restrictions on land use against the public benefits attributable to them. Without considering whether the advantage to the community of down-zoning plaintiffs' property from a commercial to a residential classification was large or small, the court held that a mere reduction of market value did not warrant relief under the just compensation clauses. In effect, the court said that no

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homesites, they must nevertheless without compensation therefor remain 'open space.'" 57 Cal. App. 3d at 628, 129 Cal. Rptr. at 584. This direction is ambiguous. The court could have been referring to the reasonableness of limiting plaintiffs to one dwelling per ten-acre parcel without compensating them for their losses. Alternatively, the court might have been alluding to apparently contradictory provisions in the zoning ordinances that permitted ten-acre homesites but seemed to forbid structural improvements on the land. If the zoning ordinances were in fact internally inconsistent, they would have been incapable of rational application. As explained in note 41 *supra*, irrationality is more appropriately viewed as a general due process problem than as a factor bearing on whether relief should be granted under the compensation clauses. Since the *Eldridge* court addressed its recommended inquiries to the compensation issue, this author rejects the internal contradiction reading of the fourth question in favor of the interpretation concerned with the general reasonableness of imposing the open space restrictions without compensating plaintiffs.

[43] This reading of the court's four suggested inquiries is based upon certain assumptions discussed in notes 40-42 *supra*.

[44] *E.g.*, C. HARR, *supra* note 41, at 544-45; 5 N. WILLIAMS, *supra* note 41, § 162.06, at 438; Van Alstyne, *supra* note 41, at 30-41; Langguth v. Village of Mount Prospect, 5 Ill. 2d 49, 124 N.E.2d 879 (1955); *see* Fulling v. Palumbo, 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1967). *But see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1193-96 (1967).

A balancing test would be a sensible way to reconcile two opposing policies at play where application of the compensation clauses to down-zoning is in issue. On the one hand, the policy inherent in the compensation clauses is that the costs of improving the public condition should be borne by the public, rather than by individual property owners whose valuable interests are appropriated for the common good. *See* note 5 *supra*. On the other hand, governments should not so often be obliged to pay for private losses attributable to down-zoning that public regulation of land use is effectively crippled. *See* Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915), *quoted in* Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 530, 370 P.2d 342, 351-52, 20 Cal. Rptr. 638, 647-48 (1962), *appeal dismissed*, 371 U.S. 36 (1962); *cf.* HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 523, 542 P.2d 237, 248, 125 Cal. Rptr. 365, 376 (1975) (great importance of zoning for society cautions against capricious departure from precedents denying relief in majority of cases), *cert. denied*, 425 U.S. 904 (1976). Under a balancing test, relief would be available when the private burdens of down-zoning outweigh its public benefits. The ideal of compensation would thus be recognized when doing so does not significantly hamper the ability of government to guard and promote the public welfare by regulating land use.

zoning measure was within the compensation clauses—regardless of whether it produced a veritable public bonanza or was a very mediocre vehicle for fulfilling community needs—unless it did more than reduce market value; to be even arguably actionable under *HFH*, down-zoning had to forbid substantially all use of the affected land.[45]

The balancing approach suggested by the court of appeal in *Eldridge* cannot be reconciled with the supreme court's reasoning in *HFH*. Such a weighing process would make the magnitude of public benefit an integral component of the test for determining whether down-zoning crossed the *HFH* threshold for relief. Yet in construing the *HFH* complaints to allege mere diminution of market value rather than deprivation of substantially all use, the supreme court focused exclusively upon the quantum of hardship imposed upon the landowners. The factors that the court considered significant were plaintiffs' failure to assert that their land was useless for every purpose permitted by the residential zoning and their admission that it retained substantial market value despite the down-zoning. Nowhere did the court suggest that the magnitude of public benefit was in any way relevant to the determination that plaintiffs had alleged only a reduction of market value.

In short, the balancing test that emerges from reading together the four inquiries proposed in *Eldridge* must be rejected as inconsistent with the supreme court's opinion in *HFH*. Instead, a test must be found that defines the threshold for relief by a fixed level of private hardship, unaffected by the magnitude of public benefit produced by particular down-zoning measures.

B. Substantial Market Value

One test of deprivation of substantially all use that is based solely upon the level of private hardship is whether down-zoning leaves land without substantial market value. This test is suggested by one interpretation of dictum in *HFH* in which the court observed that the substantial market value of plaintiffs' land, admitted by them to be worth $75,000, rebutted the allegation—not actually made by plaintiffs—

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[45] The supreme court's implicit rejection in *HFH* of balancing private burden against public benefit may well stem from the traditional rule that courts will not pass on the wisdom or necessity of enactments, but will instead defer to the legislative determination unless no reasonable person could consider it sound. *E.g.*, Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 522-23, 370 P.2d 342, 346-47, 20 Cal. Rptr. 638, 642-43 (1962), *appeal dismissed*, 371 U.S. 36 (1962). The rule is based upon general separation of powers principles. *See, e.g., id. See also* Ferguson v. Scrupa, 372 U.S. 726, 728-30 (1963). It may also reflect an unspoken judicial sentiment that courts are ill-equipped to evaluate the efficacy of legislation like zoning. A balancing test would expand greatly the scope of review, requiring courts to assess the social utility of zoning as a matter of course whenever landowners sought relief under the compensation clauses. This could account for the absence of balancing in *HFH*.

that no reasonably beneficial use could be made of the land.[46] Presumably, zoning does not forbid substantially all use of land if reasonably beneficial use remains possible. Thus, the court's dictum apparently reflects its understanding that the existence of substantial market value rebuts an assertion that down-zoning forbids substantially all use of land. If read to make substantial market value a conclusive indication that down-zoning does not deprive land of substantially all its usefulness, the *HFH* dictum seems to recognize a substantial market value test.[47]

There are good reasons to doubt, however, that the supreme court actually intended substantial market value as a test in its own right of whether down-zoning forbids substantially all use of land. In the first place, it would be somewhat anomalous to treat the concepts of market value and usefulness as identical, particularly since the court apparently introduced the notion of usefulness by design. The court reserved the possibility of relief for a deprivation of substantially all use after it held that mere reduction of market value did not constitute a cause of action. If the court had regarded the presence or absence of substantial market value for down-zoned land as the decisive issue, it would have been more sensible, after rejecting a claim for relief premised upon a mere reduction of market value, simply to reserve the question of whether relief should be granted when down-zoning left land without substantial market value. That the court chose instead to frame its reserved question in terms of the usefulness of land suggests that it did not regard that concept as synonymous with marketability for a substantial price.

More fundamentally, the absence of substantial market value cannot be accepted as the threshold for relief in down-zoning cases because such a test would either be patently contrary to the central holding in *HFH*, or it would be an arbitrary line having no rational connection whatever with the compensation clauses or with the im-

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[46] 15 Cal. 3d at 512 n.2, 542 P.2d at 240 n.2 125 Cal. Rptr. at 368 n.2. The *HFH* dictum inspired similar dictum in at least one other case. In Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1st Dist. 1976), plaintiffs alleged, in effect, that the county's open space zoning of their land reduced its value from $960,000 to $210,000 and made "'development' of the property . . . 'economically infeasible.'" *Id.* at 325, 131 Cal. Rptr. at 634. Citing the *HFH* dictum, the *Pinheiro* court observed that the admitted market value of the land indicated that reasonably beneficial use remained possible. However, as the court emphasized, plaintiffs failed to allege that no reasonably beneficial use remained for the down-zoned land, and the court's observation was therefore not essential to its determination that the complaint was inadequate under *HFH*. (The court's treatment of plaintiffs' assertion that development was economically infeasible is discussed in note 60 *infra*.)

[47] Under an alternative interpretation of the court's dictum, substantial market value is merely some evidence tending to rebut the assertion that down-zoning forbids substantially all use of land. *See* text accompanying note 63 *infra*.

portant attributes of landownership. The problem lies in deciding whether the market value remaining for down-zoned land is substantial. If the determination were based upon the market value of the land prior to the down-zoning, it would amount to a rule that relief would be granted when down-zoning reduced the market value of land by a certain percentage. Such a rule would fly in the face of the court's holding in *HFH* that a mere reduction of market value—there a decline of more than eighty percent—is no ground for relief. Thus, assessment of the substantiality of the remaining market value cannot be based upon a comparison of values before and after the down-zoning.

It might be suggested that a court could determine substantiality by comparing the remaining market value of the down-zoned land with the market value of other land similar in nature to the down-zoned land. However, since the comparison would be meaningful only if the court recognized the value of the similar land as substantial, such an approach begs the question unless the substantiality of the value of similar land is somehow a "given." The mere fact that similar land exists and has a value does not make that value substantial. It could be very high or extremely low, depending upon which zoning regulations were applicable to the similar land. There is no *a priori* reason to regard the value associated with certain zoning of the similar land as substantial and that obtaining under different zoning as insubstantial. The same zoning could produce high values when conferred upon one kind of land and low values when imposed on other land.[48] Hence, the substantiality of the value of similar land cannot be divined as a matter of pure logic. Courts, therefore, could not assess the substantiality of the value remaining for down-zoned land by comparing it with the value of similar land.

Since the substantiality of market value could neither be based on the previous value of the down-zoned land nor determined by analogy to the value of similar land, the courts would be faced in the end with defining it as a fixed amount of money per measurable unit of land. But how would they arrive at this magical amount? It seems that they would simply have to pull a figure out of the air—say, 5¢ per square foot—basing the choice solely upon what seemed to them more than a paltry amount of money. Obviously, the figure would have no logical relationship to the constitutional prohibitions against taking property without compensation, nor would it have any necessary connection with the functional advantages of owning land. It would be no more than an arbitrary number.

Thus, conditioning relief upon whether down-zoning leaves land without substantial market value seems unsatisfactory in at least two senses. First, it ignores the conceptual shift in *HFH* from marketability to usefulness, the court having denied relief for mere reductions in market value but reserved the possibility of relief for depriva-

tions of substantially all use. Second, such a test would lead courts to establish a completely arbitrary line with no palpable source in either the compensation clauses or the important attributes of landownership. The search for a test more closely connected with the compensation clauses or the functional advantages of owning land leads back to the *Eldridge* decision.

C. Salability

In *Eldridge*, the court of appeal directed the fact-finder to consider whether the ten-acre homesites permitted by the city's open space zoning were salable. Though it is doubtful that the court intended the inquiry as a dispositive test in itself—three additional inquiries having been suggested in the opinion—a salability test would satisfy the *HFH* requirement that the private hardship be something beyond a mere reduction of market value; by definition, land that is unsalable has lost all market value. And, unlike the substantial market value test, the salability test is clearly related to the traditional meaning of the prohibition against taking property without compensation. Courts have almost always recognized compensable taking to include physical appropriation of land by government.[49] In such cases, private ownership is completely negated, and nothing of economic significance remains to landowners. Similarly, if down-zoning were to render land entirely unsalable, the landowners would retain nothing of economic significance. By hypothesis, they could obtain no money by selling their land. Nor could they derive economic benefits by using the land, since the feasibility of such gain would certainly have made the land salable at some price. Thus, down-zoning that rendered land unsalable would be the economic duplicate of a physical taking. This gives the salability test a degree of intuitive appeal.

There are two serious problems, however, with a salability test. Like the substantial market value test, the salability test is incompatible with the conceptual shift in *HFH* from denying relief for mere decreases in market value to leaving open the question of whether down-zoning that forbids substantially all use of land would be actionable. Had the court envisioned a threshold based on salability—that is, on the presence or absence of any market value for land—it probably would have circumscribed its holding that a mere reduction of

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[48] For example, fertile plains distant from established communities might be worth a great deal if zoned for agricultural use and much less if restricted to residential use, whereas the reverse could be true of relatively steep, wooded hills on the outskirts of a growing town.

[49] *E.g.*, United States v. Lynah, 188 U.S. 445, 465, 468-71 (1903); McCann v. Sierra County, 7 Cal. 121 (1857). *But cf.* Cammeyer v. Newton, 94 U.S. 225, 234 (1876) (dictum) (compensation not required "in cases of extreme necessity in time of war and of immediate and impending public danger").

market value did not constitute a cause of action by reserving the possibility of relief where down-zoning totally destroyed market value; clarity would have counseled against a shift from marketability to usefulness if the court regarded the two denotatively distinct concepts as interchangeable.

There is a second reason to doubt that a salability test would be acceptable to the *HFH* court. If the compensation clauses were applied to down-zoning only when the land subjected to increased restriction was rendered unsalable, it might almost as well be said that the clauses do not apply to land use regulation at all—at least where government enacts the down-zoning neither as a prelude to public acquisition nor as a means of obtaining actual public use of land without the expense of acquisition. It seems safe to say that land is virtually never in fact unsalable. In an active economy with available investment capital, someone will probably always be willing to pay some small amount for down-zoned land, even though no return on the investment can be expected in the near future. Investors purchase such property for speculation, gambling that its value will appreciate when conditions change or the land is up-zoned. In some instances, land burdened by very restrictive zoning will be salable not only to speculators, but also to conservation groups interested in ensuring that the land not be put to any of the traditionally profitable uses that would entail alteration of its natural character. Thus, as a practical matter, a salability test would make the question reserved in *HFH* bogus, since under such a test the hypothesized case of land deprived of substantially all its usefulness would seemingly never arise. The supreme court presumably would not have engaged in the wasted motion of reserving such an imaginary issue for future consideration.

In sum, despite its strong economic resemblance to the physical taking situation for which courts have traditionally granted relief, the salability test must be rejected. It is inconsistent with the conceptual shift in *HFH* from land's marketability to its usefulness. Furthermore, since land is probably never truly unsalable, the test seems to render illusory the possibility of relief for harsh down-zoning foreshadowed in *HFH* and established in *Eldridge*.

III. Economically Advantageous Use as an Appropriate Test

The inadequacies of the balancing, substantial market value, and salability tests confirm that *HFH* and *Eldridge* in themselves provide no tenable means of determining when down-zoning deprives land of substantially all its usefulness. Yet absent some test for deprivation of substantially all use, the cases offer only rough guidance to landowners trying to assess the likelihood that courts will grant them relief for harsh down-zoning. This section proposes a test that would

give landowners a reliable means of deciding whether to seek relief; the test suffers from none of the defects inherent in the formulations previously considered. Suggested by decisions of courts in sister states, the proposed test asks whether down-zoning makes economically advantageous use of land impossible. This section first explains when a test based on land's capacity for economically advantageous use would result in relief under the compensation clauses. Next, it examines precedents for such a test from other jurisdictions. Finally, it measures the test against *HFH* and the factors found to be important in the course of rejecting the balancing, substantial market value, and salability tests.

The capacity of land for economically advantageous use is linked to its capacity for generating income or equivalent benefits. Rent paid for the use of a dwelling and proceeds from the sale of a vegetable crop are examples of income. A property owner enjoys benefits equivalent to income by personal consumption of that which could otherwise be exchanged for income, as by living in a dwelling that could otherwise be rented or dining on vegetables that could otherwise be sold. Under the proposed test, if down-zoning renders land completely incapable of generating income, economically advantageous use is impossible, and the down-zoning therefore forbids substantially all use of the land.

It is quite likely, however, that if enough labor and capital were invested in a permissible land-related enterprise, some income could be obtained even from land subject to very restrictive zoning. This does not mean that the land involved could be used to economic advantage. The labor and capital alone would almost certainly have generated income had they been invested in some other venture unrelated to the land, such as working for wages and depositing available funds in an interest-bearing savings account. Thus, in the vast majority of cases, it will not be possible to determine whether down-zoned land retains the capacity for economically advantageous use by asking simply whether it is capable of generating income.

Assuming that land is capable of generating income in conjunction with labor and capital, its capacity for economically advantageous use must be assessed in the context of the alternative opportunities available to landowners for sound investment of their labor and capital. If readily available alternative investments present more favorable prospects for gain[50] than do the potential land-related en-

[50] Investors assess prospects for gain by evaluating both the possibilities that an economic venture will generate income and the risks that it will result in losses. Thus, a potential land-related enterprise—say, a commercial swimming pool in an arid but earthquake-prone location—could offer possibilities of large income and still present small prospects for gain if the risks of loss were substantial enough.

terprises, it is unlikely that any economic advantage could be derived by using the land, and a reasonable landowner-investor would not use it. On the other hand, if a potential land-related enterprise presents the more favorable investment, then a clear economic advantage probably could be obtained through use of the land; the landowner could expect to receive more income from the land-related investment than from the available alternatives for investing labor and capital.

A somewhat more perplexing problem is posed when land-related and alternative investments present roughly the same prospects for gain. In one sense, using the land would not create an economic advantage because the same income presumably could have been obtained without its use. However, investment opportunities are rarely identical. For one reason or another, an investor might find the potential land-related enterprise more attractive. In such cases, ownership of the land carries with it an investment option that would otherwise be unavailable. This option in itself constitutes an economic advantage attributable to the usefulness of the land. Therefore, economically advantageous use is possible whenever there is a potential land-related enterprise that offers prospects for gain equal or superior to those presented by readily available alternative investments for labor and capital.[51]

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[51] Two special problems merit brief consideration. First, the fact that economic advantage could be gained by constructing one house in the middle of a one-hundred-acre parcel of land would not mean that all of the land retained the capacity for economically advantageous use. Confronted with such a case, a court would have to determine how much of the land would actually be used for residential purposes. This would of course include not only the land beneath the structure and that needed for the flower garden, but also a buffer zone of acreage affording prospective residents a desirable degree of privacy. However, as soon as the addition of another acre to the buffer zone would contribute nothing to the worth of the residential use in the middle, the remaining land should be found to lack the capacity for economically advantageous use. A similar analysis will be required whenever down-zoning reduces the density of permissible use.

The second point is that the time when down-zoning deprives land of its capacity for economically advantageous use need not be the date that the tighter regulation is imposed. For example, a person might purchase land zoned for residential use at a time when construction is not economically advantageous, the nearest established community still being too far away. If the county then rezones the land for agricultural use, the landowner would have no cause of action, even though poor soil and rough terrain made it impossible to derive economic advantage from agricultural use of the land. Down-zoning or no, economically advantageous use would not have been feasible at that time. Suppose, however, that after several years of suburban sprawl the once distant communities have become close at hand, and the land ripe for residential development—but for the down-zoning. It seems that a landowner who could establish that economically advantageous residential use was clearly foreseeable at the time of the down-zoning should be entitled to relief. In such a case, the landowner's decision to purchase or to continue to hold the land just prior to the down-zoning presumably was premised on the reasonable expectation that economically advantageous use would soon be possible. The test of capacity for economically ad-

In sum, the test of capacity for economically advantageous use would entitle landowners to relief under the compensation clauses in either of two situations: (1) when down-zoning renders land entirely incapable of generating income, or (2) when the down-zoned land, though still capable of generating income with a sufficient investment of labor and capital, can be expected to produce so little income that landowner-investors seeking to maximize their returns would be obliged to expend their resources some place else. In other words, the test would provide relief whenever down-zoning makes it unreasonable to seek income through a land-related enterprise.[52]

Support for the economically advantageous use test outlined above can be found in other jurisdictions where courts have employed verbal formulas quite similar to those found in *HFH* and *Eldridge* to describe the circumstances under which the compensation clauses apply to restrictions imposed on land use. Courts elsewhere have not said in so many words that relief from down-zoning depends upon whether land retains the capacity for economically advantageous use,

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vantageous use should protect the expectation of advantageous use, whether grounded in the capacity of the land at the time of down-zoning or in its probable capacity for the future. Foreseeability would likewise seem to be the appropriate criterion for relief when the imposition of down-zoning on land having the capacity for economically advantageous use does not immediately destroy that capacity, but subsequent events make advantageous use impossible under the new zoning. If the subsequent events were foreseeable, relief seems in order.

[52] Professor Waite has suggested a test somewhat analogous yet, at the same time, vitally different:

> "Taking" should only occur when the land or interests in land remaining to the owner immediately after the governmental action is not of practical utility. Lack of practical utility . . . would be shown by inability to earn a reasonable return on the value of the entire tract, appraised immediately before, and without regard to, the action taken.
>
> . . . [Circumstances relevant to fixing a reasonable return] might be the average rate of return earned in the locality by similar real estate developments, and by other investments, local or otherwise, of comparable risk and possibility of gain.

Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283, 289-90 (1967). Although this approach resembles the economically advantageous use test in its assessment of usefulness by reference to the income generating capacity of land, the similarity ends there. Professor Waite's test would judge the reasonableness of the return in relation to the value of the land prior to down-zoning. By contrast, the test of capacity for economically advantageous use ignores entirely the value of the land itself, both before and after down-zoning, and focuses instead upon the return that can be obtained from additional investments of labor and capital.

Professor Waite's test, keyed as it is to the rate of return on the value of land prior to the down-zoning, is closely related to tests based upon reduction of market value. The income that down-zoned land can generate will have much to do with its market value, and a required rate of return on the market value of land prior to down-zoning will translate roughly into some limit on the percentage by which down-zoning can reduce market value. Since *HFH* rejected reduction of market value as a basis for deciding whether to grant relief, the supreme court would presumably eschew Professor Waite's approach as well.

but their opinions strongly suggest that this has in fact been the determinative criterion.

In *MacGibbon v. Board of Appeals*,[53] the Supreme Judicial Court of Massachusetts ruled that a municipality could not use its regulatory powers to prevent filling of tidal marshland since such a restriction deprived property owners of all practical use of their land.[54] The court did not explicitly define practical use. However, it found impractical such remaining uses as conservation, pride of ownership, bird watching, looking at the water, growing marsh hay to enhance the view, hiking, and flying model airplanes or kites. Since the trial court apparently found these uses feasible, the supreme court presumably did not brand them impractical because the land involved was not well adapted to them. Rather, the court probably found them wanting because it considered them unlikely to be economically advantageous. As indicated above in explaining the mechanics of the proposed test, land that is incapable of generating income lacks the capacity for economically advantageous use. The uses remaining to the landowners in *MacGibbon* seem to fall within this rule. Certainly, conservation and pride of ownership do not generate income; it is strange even to regard them as uses. It also seems unlikely that income could be generated by selling the right to look at, hike through, or fly kites over privately owned tidal marshland. The prospects for marketing these recreational opportunities are particularly slim since people can often engage in such activities on publicly owned lands without charge or for a minimal fee sufficient only to cover the costs of maintaining the facility. Thus, it appears quite likely that the restrictions on filling the marshlands did make economically advantageous use of them impossible in fact. One can only surmise that this is what the court had in mind when it found no practical use remaining.

Recourse to a test of capacity for economically advantageous use is perhaps more obvious in *Arverne Bay Construction Co. v. Thatcher*.[55] This is the oft-cited case in which the New York Court of Appeals articulated the rule that zoning "which permanently so restricts the

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[53] ___ Mass. ___ , 340 N.E.2d 487 (1976).

[54] Read together with an earlier opinion in the same case (MacGibbon v. Board of Appeal, 356 Mass. 635, 255 N.E.2d 347 (1970)), the court's holding implied strongly that restrictions precluding practical use of land amounted to a taking under the constitutional compensation clauses. However, in a subsequent denial of a petition for rehearing (MacGibbon v. Board of Appeal, ___ Mass. ___, 344 N.E.2d 185 (1976)), the court said that its ruling had not been of constitutional dimensions and suggested that the requirement of practical use was a limitation implicit in the state's delegation to municipalities of the power to regulate land use. Notwithstanding the court's subsequent characterization of its holding, its treatment of the practical use issue remains relevant here, since it is the nature of the requirement, and not its source, that concerns us.

[55] 278 N.Y. 222, 15 N.E.2d 587 (1938).

use of property that it cannot be used for any reasonable purpose goes . . . beyond regulation, and must be recognized as a taking of the property."[56] The action was brought by the owner of unimproved realty located in a generally undeveloped area that the city zoned for residential use. The air in the vicinity was fouled by emissions from a nearby municipal incinerator and odors from an open sewage system. Based upon plaintiff's showing that its property could not be "profitably used for residential purposes,"[57] the court of appeals held the residential zoning improper under the federal and state just compensation clauses. *Arverne Bay* comes within the second rule set forth earlier for determining whether economically advantageous use of down-zoned land is possible. It seems quite likely that a dwelling constructed on plaintiff's land would have generated some amount of income, although, owing to the air pollution, such accommodations presumably would have commanded rent below that which would have been paid for comparable living quarters in a less noxious environment. Despite the likelihood that the land could have generated some income if a dwelling had been built, the court determined that the property would "remain unimproved and unproductive."[58] The court could have reached this conclusion only upon a finding that the rental income that could be expected to flow from a dwelling situated on the land would not justify the costs of construction. In other words, the court must have believed that greater income could be obtained if the labor and capital that would have been necessary to improve the land were instead devoted to readily available alternative investments. It thus appears that plaintiff's land had lost the capacity for economically advantageous use. This is very probably what the court meant in saying that profitable residential use of the property was impossible.[59]

The economically advantageous use test apparently employed in *MacGibbon* and *Arverne Bay* is a suitable complement to the deprivation-of-substantially-all-use standard established in *HFH* and *Eldridge*. As will be seen, the test poses none of the difficulties that counseled rejection of the balancing, substantial market value, and salability tests. Although dictum from the supreme court in *HFH* might be read to cut against the test, an alternative interpretation of the court's observation makes it fully consistent with adopting the capacity for economically advantageous use as the threshold for relief in down-

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[56] *Id.* at ___, 15 N.E.2d at 592 (emphasis deleted).

[57] *Id.* at ___, 15 N.E.2d at 590.

[58] *Id.*

[59] There have been other cases in which courts elsewhere apparently were concerned with whether down-zoning made economically advantageous use impossible. *See* Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232, 239-43 (1963).

zoning cases.[60]

In *HFH* the California Supreme Court indicated in dictum that the existence of substantial market value for land rebuts an assertion that down-zoning forbids substantially all use of the land.[61] If interpreted to mean that substantial market value conclusively establishes that down-zoning has not deprived land of substantially all its usefulness, the dictum undermines the economically advantageous use test and supports the substantial market value test discussed earlier. Assuming that substantial market value for down-zoned land can be established,[62] its existence does not necessarily demonstrate that economically advantageous use of the land is feasible. Investors will almost certainly pay something for land even though no immediate return on the investment is anticipated, and the market value for land among speculators could conceivably be high enough for courts to consider it substantial. Also, conservation groups might be willing to pay sizable amounts for undeveloped land that is subject to very restrictive zoning regulations precluding economically advantageous use. In short, land may lack the capacity for economically advantageous use and nevertheless continue to enjoy a substantial market value. Therefore, if by its dictum the court meant that relief would never be appropriate when down-zoned land retained substantial market value, the court could not have envisioned a test based on capacity for economically advantageous use; such a test might well entitle landowners to relief despite the existence of substantial market value. If the court indeed equated substantial market value with sufficient usefulness to preclude relief, it presumably contemplated a substantial market value test.

The conflict between the court's dictum in *HFH* and the economically advantageous use test is by no means inevitable. The dictum can alternatively be read to treat substantial market value for

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[60] One post-*HFH* decision might be read to cut against the economically advantageous use test. In Pinheiro v. County of Marin, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1st Dist. 1976), plaintiffs asserted that down-zoning made "'development' of [their] property . . . 'economically infeasible.'" *Id.* at 325, 131 Cal. Rptr. at 634. The court found the allegation insufficient to satisfy the *HFH* threshold for relief. This suggests that the court may have understood deprivation of substantially all use to mean something other than depriving land of its capacity for economically advantageous use. Quite possibly, however, the court took "development" to include only those economically advantageous uses of land that involve significant structural improvements, excluding the likes of agriculture. Had plaintiffs alleged that not only development but all use of their land was economically infeasible, the *Pinheiro* court might have found the complaint actionable.

[61] *See* 15 Cal. 3d at 512 n.2, 542 P.2d at 240 n.2, 125 Cal. Rptr. at 368 n.2; text accompanying note 46 *supra*.

[62] The reader should ignore for the present the difficulties that arise in trying to distinguish between substantial and insubstantial value, previously discussed in text accompanying notes 47-48 *supra*.

land not as a conclusive rebuttal to the assertion that down-zoning forbids substantially all use of the land, but only as some evidence tending to rebut that assertion.[63] This reading is significant because substantial market value can also be regarded as some evidence of the capacity of land to support economically advantageous use. The probative worth of substantial market value stems from the inference that if investors are willing to spend a relatively large amount to purchase land, they probably anticipate an ongoing return from their investment. The inferred expectation of these would-be buyers that the land can be used to economic advantage is some evidence that it can in fact be so used. The higher the market value remaining for down-zoned land, the less likely it is that the land has lost its capacity for economically advantageous use. Thus, if the supreme court meant by its dictum only that substantial market value for land was some evidence tending to establish that down-zoning did not forbid substantially all use of the land, the dictum would be quite harmonious with defining deprivation of substantially all use as making economically advantageous use of land impossible.

The some evidence interpretation of the *HFH* dictum is preferable to the reading that equates substantial market value with usefulness sufficient to deny relief. The latter reading leads to the substantial market value test, the weaknesses of which were discussed above, whereas the former interpretation makes *HFH* completely compatible with the economically advantageous use test, which has none of the faults attributed to the tests previously analyzed. Unlike the balancing of private burden against public benefit, the capacity of land for economically advantageous use defines a threshold for relief that focuses solely upon the level of private hardship imposed by down-zoning; the threshold does not vary with the magnitude of public benefit promised by the increased regulation. Unlike both the substantial market value test and the salability test, the economically advantageous use test follows the conceptual shift in *HFH* from marketability to usefulness; this test concentrates upon the landowner's ability to use the land, rather than upon the marketability of the property. The test does not convert the question reserved in *HFH* into empty verbiage, as the salability test appears to do. While down-

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[63]The procedural posture of the case might cut against the some evidence interpretation. In considering the adequacy of plaintiffs' complaints, the court accepted the facts alleged as true. 15 Cal. 3d at 511, 542 P.2d at 239, 125 Cal. Rptr. at 367. Thus, the character of one alleged fact as some evidence tending to rebut another would seem an unlikely matter for comment. However, the court made the observation regarding substantial market value in dictum. *See* text accompanying notes 21-26 *supra*. Therefore, the court was not constrained by the appropriate scope of inquiry in passing on a demurrer, and it could have taken the liberty to note the character of substantial market value as some evidence of usefulness.

zoned land may never be completely unsalable, it is quite possible that restrictive regulation will make economically advantageous use impossible, as cases such as *MacGibbon* and *Arverne Bay* demonstrate.[64] Finally, unlike the essentially arbitrary cut-off established by the substantial market value test, the capacity of land to support economically advantageous use is a boundary directly related to the functional significance of land for those who own it. When down-zoning makes economically advantageous use of land impossible, landowners who formerly could have invested their labor and capital in the land can no longer do so if they desire to maximize their incomes.[65] This is the sort of meaningful threshold for relief that should be ascribed to the question reserved by the supreme court in *HFH* and answered by the court of appeal in *Eldridge*.

CONCLUSION

Read together, *HFH* and *Eldridge* bring a measure of clarity to California law governing the application of the just compensation clauses to down-zoning. The cases establish that landowners can obtain relief when down-zoning forbids substantially all use of their land but have no cause of action when it merely reduces the market value of the land. However, the decisions do not clearly indicate how fact-finders are to determine whether down-zoning actually does forbid substantially all use of land. Consequently, *HFH* and *Eldridge* give landowners only a rough standard to use in deciding whether to seek relief for harsh down-zoning.

In seeking a definite test for deprivation of substantially all use, this article looked initially to specific portions of the *HFH* and *Eldridge* opinions, examining three potential tests and finding them all unacceptable. A balancing test, requiring that the private burden occasioned by down-zoning be weighed against the public benefit attributable to the regulation, was rejected because it was inconsistent with *HFH*, which contemplated a threshold for relief based solely

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[64] No doubt, the test of capacity for economically advantageous use will itself confine relief for down-zoning to the exceptional case; rarely will restrictions render land incapable of supporting any advantageous use. This is quite consistent, however, with the historically unsympathetic attitude that California courts have had toward challenges to down-zoning based on the compensation clauses. *See* text accompanying notes 11-16 *supra*. Clearly, the supreme court did not intend in *HFH* greatly to expand the protection afforded landowners when it reserved the possibility of relief for down-zoning that "forbade substantially *all* use of the land." 15 Cal. 3d at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16 (emphasis in original).

[65] The landowners could, of course, sell the land to speculators and reinvest in other land having the capacity for economically advantageous use. This, however, ignores the traditional view that land is not fungible. Moreover, only a salability test could escape this criticism, and the weaknesses of that test have already been established. *See* text accompanying note 49 *supra*.

upon the level of private hardship associated with down-zoning. A test focusing upon whether down-zoning left land without substantial market value proved untenable on two accounts. It was keyed to the marketability of land, rather than to its usefulness, and the standard of substantiality was either blatantly at odds with the central holding in *HFH* or completely arbitrary, having no necessary connection with the compensation clauses or the important attributes of landownership. A salability test was discarded because, like the substantial market value test, it was based upon marketability instead of usefulness, and also because, as a practical matter, it transformed the possibility of relief, foreshadowed in *HFH* and confirmed in *Eldridge*, into an illusion.

The final section of the article has proposed a test for deprivation of substantially all use that possesses none of the shortcomings of those considered before it. Under this test, courts would grant relief to landowners when down-zoning makes economically advantageous use of their land impossible. In essence, economically advantageous use is impossible when land is incapable of generating income sufficient to warrant the investments of labor and capital necessary to conduct a land-related enterprise. It appears that courts in other states employ an economically advantageous use test in determining whether down-zoning forecloses all practical or reasonable use of land. California courts should adopt the test because it is consistent with *HFH* and provides a realistic possibility of relief that corresponds with the loss of a fundamental attribute of landownership.

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