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T.S. Baumgardner

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"TAKINGS" UNDER THE POLICE POWER—THE DEVELOPMENT OF INVERSE CONDEMNATION AS A METHOD OF CHALLENGING ZONING ORDINANCES

by T.S. Baumgardner

The police power of the government to regulate the public health, safety, morals, and general welfare is an inherent element of sovereignty without which no government could exist. Blackstone describes the police power as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." It is through the police power that the state and its municipal subdivisions regulate the use of private property by zoning. Through zoning, a city is divided into districts and different regulations upon land are prescribed for each district. These restrictions upon an individual owner's use of his land promote the public welfare by prohibiting uses incompatible with the use and enjoyment of neighboring lands.

Closely related to police power regulation of land use through zoning is the power of eminent domain, the power to take private property for public use. Although the Federal Constitution contains no express grant of this power, the fifth amendment's prohibition against the taking of private property for public use without just compensation implicitly recognizes the right of the government to appropriate private property for the benefit of the public. Provisions requiring just compensation for the taking of private property for public use or for a taking or damaging of private property for public use

1. The federal and state governments are sovereigns by virtue of their constitutions. 6 E. McQuillen, MUNICIPAL CORPORATIONS § 24.02, at 467 (3d ed. 1969) (hereinafter cited as McQuillen). Thus, the police power inheres in both. However, the federal government rarely chooses to exercise its power and, accordingly, the police power is generally thought to be reserved to the states. Id. at 469. In general, municipalities are granted independent sovereignty through state enabling statutes or "home rule" provisions in state constitutions. See, e.g., TEX. CONST. art. 11, § 5 (home rule provision); CAL. GOV'T CODE § 65850 (West Supp. 1976) (state enabling statute).

2. 4 W. Blackstone, COMMENTARIES *162.


5. These provisions are modeled after the Illinois constitution which was amended in 1870 to require compensation when property is either taken or damaged for public use. ILL. CONST. art. 1, § 15. Those states with "taken or damaged" constitutions are: ARIZ. CONST. art. 2, § 17; ARK. CONST. art. 2, § 22; CAL. CONST. art. I, § 14; COLO. CONST. art. II, § 15; GA. CONST. art. I, § 2-301; ILL. CONST. art. I, § 15; KY. CONST. § 13; LA. CONST. art. I, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. 3, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. III, § 14; NEB. CONST. art. I, § 21; N.M. CONST. art. II, § 20; N.D. CONST. art. I, § 14; OKLA. CONST. art. 2, § 24; S.D. CONST.

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appear in every state constituion except those of New Hampshire and North Carolina. In the usual case of the exercise of the power of eminent domain the government institutes proceedings against the landowner for the purpose of paying the landowner just compensation for the taking of his property. This procedure is known as condemnation. Typically, the only issue to be decided by the court in a condemnation proceeding is the amount of compensation required.

"Inverse condemnation" is the term most commonly used to describe the remedy of a landowner whose property has been taken or damaged by the government without the institution of formal condemnation proceedings. The word "inverse" is used to describe this form of action because the landowner, not the sovereign, institutes the proceedings. Unlike a condemnation proceeding the issue in an inverse condemnation proceeding is not only the amount of compensation due but also whether there has in fact been a "taking" requiring compensation.

The availability of the inverse condemnation procedure as a basis for relief turns upon whether the government's action is classified as an exercise of the police power which is noncompensable, or as an act of eminent domain, a "taking," for which the landowner is entitled to compensation. This distinction is especially important where a landowner seeks compensation from the government for damages sustained as a result of zoning restrictions placed upon his land. Traditionally, the enactment of building and zoning restrictions has been considered a proper exercise of the police power which cannot be attacked upon the ground that the restrictions constitute a taking without compensation. This traditionally noncompensable exercise of the police power is quite similar, however, to the taking of property under the power of eminent domain for which compensation is required.

This Comment discusses the problems that inhere in attempting to distinguish between exercises of the police power and "taking" under the power of eminent domain. More particularly, this Comment proposes the availability of inverse condemnation as a remedy for landowners injured as a result of zoning restrictions placed upon their property.

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8. See Note, supra note 6, at 232-36.


10. See I P. NICHOLS, EMINENT DOMAIN § 1.42[10], at 1-189 (3d ed. 1972) [hereinafter cited as NICHOLS].
I. TRADITIONAL CONCEPTS OF POLICE POWER AND EMINENT DOMAIN

The view that a private property owner who is injured as a result of an exercise of the police power is not entitled to compensation is justified on the ground that either the injury is *damnnum absque injuria* or the owner is sufficiently compensated by sharing in those general benefits to the community which result from the exercise of the police power. Therefore, from the perspective of a property owner seeking compensation for injury sustained as a result of government action, the difference between an exercise of the police power and a taking under the power of eminent domain is crucial. In general, eminent domain involves the taking of property needed for public use whereas the police power involves the regulation of property to prevent an owner from using the property in a manner that is detrimental to the public interest. The two are often indistinguishable, however, since a regulation may have all of the economic consequences of a taking. Eminent domain and land use restrictions under the police power also resemble each other in that each power recognizes the superiority of community needs over the selfish interests of individuals; eminent domain prevents an individual from obstructing the public interest by refusing to part with his property and the police power prevents an individual from using his property in a way that is detrimental to the general welfare of the community. As the close relationship of these two powers suggests, to determine when a regulation becomes a taking is not an easy task.

The police power has often been described as the "least limitable" of the governmental powers. An attempt to define its reach or trace its outer limits is fruitless for each case turns upon its own facts. Nevertheless, since the police power acts as a qualification of the due process clause of the fourteenth amendment by permitting a person to be summarily deprived of the beneficial enjoyment of his property without compensation, notice, or a hearing, the power must have limits or the protection of the fourteenth amendment is eliminated. For this reason, some limitations have been placed upon an exercise of the police power. The police power must be used to promote the health, safety, or general welfare of the public, and the exercise of the power must be "reasonable." An exercise of the police power going beyond these basic limits is not constitutionally permissible. Of course, a problem arises

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12. *See Nichols § 1.42, at 1-109. See also State v. Richards, 157 Tex. 166, 301 S.W.2d 597* (1957); *Ellis v. City of West Univ. Place, 141 Tex. 608, 175 S.W.2d 396* (1943); *Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475* (1934).
15. *See McQuillin § 24.04, at 473.*
16. *Berman v. Parker, 348 U.S. 28* (1954). The Court also noted that once the legislature has spoken, "the public interest has been declared in terms well-nigh conclusive." *Id.* at 32 (emphasis added).
18. *Nichols § 1.42[1], at 1-114 to -115.*
19. *The means used must have a substantial relationship to the objects sought to be achieved. McQuillin § 24.05, at 478.*
20. *Nichols § 1.42[1], at 1-116 to -121.*
in determining whether the "limits" of the police power have been overstepped.

One of four theoretical factors usually determines the validity of an exercise of the police power: (1) the physical invasion theory, (2) the noxious use theory, (3) the diminution in value theory, and (4) the balancing of interests theory.

Physical Invasion Theory. Early in the history of interpretation of the fifth amendment's taking clause the Supreme Court recognized that an invasion of land by water, earth, sand, or other material, or a placing of an artificial structure which effectively destroyed the land or impaired its usefulness, constituted a taking for which compensation must be paid. While nontrespassory injuries are often held noncompensable, the courts never deny compensation for a physical takeover. Strict application of the physical invasion theory, however, sometimes led to otherwise unjustifiable results. For example, in United States v. Central Eureka Mining Co. the federal government closed privately owned gold mines to induce experienced miners into an essential war effort. The Supreme Court held that this was not a compensable taking of property as "the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them." 25

Noxious Use Theory. This theory upholds as valid any regulation of the use of property, even to the point of total destruction of value, so long as the use prohibited is harmful to others. The first Mr. Justice Harlan outlined this concept in the landmark case of Mugler v. Kansas. Plaintiff brewery owners claimed that their property had been taken without compensation as a result of the enactment of a law forbidding the sale or manufacture of liquor. Holding that no compensation was required, Harlan made a distinction between noxious and inoffensive uses of property. The abatement of a noxious use which is harmful to the public is not a taking of property, for no one has a vested right to injure the public. Therefore, no compensation is required no

22. Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1871) (flood control dam caused flooding of plaintiff's land). See also United States v. Lynah, 188 U.S. 445 (1903) (flood from government works turned plaintiff's rice plantation into bog); Brazos River Authority v. City of Graham, 163 Tex. 167, 354 S.W.2d 99 (1961) (defendant river authority's operation of dam caused repeated inundation of plaintiff city's sewage disposal plant). But see Bedford v. United States, 192 U.S. 217 (1904). In Bedford the Court denied compensation when revetments erected by the Government had caused gradual erosion of the plaintiff's land which had been subject to overflow for a number of years. The Court distinguished Pumpelly and Lynah by noting that in those cases there had been an actual invasion of the land as opposed to mere consequential damage. See generally Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L.J. 221. 233-36 (1931); Spies & McCoid, Recovery of Consequential Damages in Eminent Domain, 48 Va. L. Rev. 437 (1962).
23. Michelman, supra note 21, at 1184. See also Nichols § 1.42[1].
25. Id. at 165-66; see Sax, Takings and the Police Power, 74 Yale L.J. 36, 48 (1964), in which the author cites this case as support for the rejection of the physical invasion theory.
26. See, e.g., Houston & T.C. Ry. v. City of Dallas, 98 Tex. 396, 84 S.W. 648 (1905); City of Houston v. Johnny Frank's Auto Parts Co., 480 S.W.2d 774 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).
27. 123 U.S. 623 (1887); see Michelman, supra note 21, at 1199 n.72.
28. Note the emphasis on public benefit in the opinion:
matter how great the economic loss. If the government interferes with harmless uses of property, however, compensation must be paid. 29

**Diminution in Value Theory.** This theory is based upon the idea that the sovereign may not accomplish through the police power that which can be accomplished only by an act of eminent domain. In simpler terms, private property cannot be taken by regulation of the sovereign. The theory looks to the degree of damage to the property owner in order to determine whether there has been noncompensable damage under the police power or a deprivation of property rights under the power of eminent domain. In the case of *Pennsylvania Coal Co. v. Mahon* 30 the Court invalidated a state law which required coal companies owning mineral rights in land to leave pillars of coal to prevent subsidence of property above the ground. Mr. Justice Holmes, the main proponent of the diminution in value theory, stated that "[t]he general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 31 The coal companies' right to the coal in those pillars could not be taken without just compensation. 32

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29. One author has expressed the view that often the issue in this type of case is not one of noxiousness or harm-creating activity but one of inconsistency between perfectly innocent and independently desirable uses. See Sax, *supra* note 25, at 49-50. For example, the author cites *Miller v. Schoene*, 276 U.S. 272 (1928), in which the complainant was required by law to cut down his red cedar trees because they produced cedar rust which was fatal to apple trees in nearby orchards. The Court stated that it did not need to determine whether or not the infected cedars constituted a nuisance in order to uphold the legislation. *Id.* at 280. The Court further stated: "The state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of the apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that there is, a preponderant public concern in the preservation of one interest over the other." *Id.* at 279. The holding is based upon judicial non-interference with legislative determination of public interests. See note 34 infra and accompanying text. See also *Stockwell v. State*, 110 Tex. 550, 221 S.W. 932 (1920).

30. 260 U.S. 393 (1922); see *F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE* 124-38 (1973); *Michelman, supra* note 21, at 1190-93; *Sax, supra* note 25, at 50-60.


32. Mr. Justice Brandeis dissented on the ground that the state had merely regulated a noxious and harmful use of property. The state had not "taken" any property belonging to the coal company. To the contrary, the state merely had required the company to leave pillars of coal in the ground to prevent subsidence damage, a perfectly valid regulation of the use of property under the police power. "The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with the paramount interests of the public." *Id.* at 417. See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). The Court in *Goldblatt* held valid as a proper exercise of the police power a town ordinance regulating dredging and pit excavation within its city limits. Complainants alleged that the ordinance prevented them from continuing their business and, therefore, constituted a taking of their property without due process of law in violation of the fourteenth amendment. The Court conceded that the ordinance prohibited the complainants from continuing their business but found that an ordinance is not necessarily an
Balancing of Interests Theory. Using this theory, the test of the validity of an exercise of the police power is whether or not society's need for the measure outweighs the resulting individual losses. If society's gain is greater, the exercise of the police power is deemed valid. However, when courts are confronted with a claim that an exercise of the police power is invalid under the balancing of interests theory, a presumption arises that, in utilizing the police power, the legislature or the executive body has already weighed the competing interests and found in favor of the public. Thus, the courts will generally find that they are not in a position to act as a super-legislature and undermine that finding.

II. Modern Concepts of Police Power and Eminent Domain

The diminution in value rule stated by Justice Holmes in the Pennsylvania Coal case took precedence over the other approaches and was the basis for countless court decisions. As society has progressed, courts have been faced with "taking" controversies considerably different from that discussed by Justice Holmes in 1922. New land use regulations such as air easements, urban redevelopment programs, aesthetic controls, and comprehensive zoning plans have posed significant problems for modern courts.

A. Pre-1970 Case Law

Air Easements. In United States v. Causby the Supreme Court was faced with the issue of whether low overhead flights of Army and Navy aircraft constituted a "taking" of property within the meaning of the fifth amendment. An invalid exercise of the police power merely because it deprives the owner of his ability to take advantage of the most beneficial use of his property. Id. at 592. Moreover, the Court was not impressed by the fact that the ordinance effectively destroyed the commercial value of complainant's property. Although the Court cited Pennsylvania Coal for the proposition that regulation cannot be so onerous as to constitute a taking which requires compensation, the Court noted that there was no evidence in the record to show that a prohibition of further mining would reduce the value of the property in question. Id. at 594. In a similar case, Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, appeal dismissed, 371 U.S. 36 (1962), the court dealt specifically with the allegation of complainant gravel miners that the property had no appreciable value for any of the uses for which it was zoned. Dismissing this contention, the court noted that the legislature had considered a number of uses for which the property was suited: stabling horses, cattle feeding, and golf courses. Id. at 524, 370 P.2d at 351, 20 Cal. Rptr. at 647.

33. See City of Houston v. Johnny Frank's Auto Parts Co., 480 S.W.2d 774, 779 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (pecuniary loss plaintiffs will suffer from enforcement of ordinance not so out of proportion to benefit public will receive as to render ordinance invalid); McClain, supra note 17, at 171-73 in which the author notes that the balancing test is often used to determine the reasonableness of an exercise of the police power. See also Michelman, supra note 21, at 1171-72 which argues that the correct test for compensability is fairness: whether it is fair to proceed with a measure which inflicts private loss without granting economic relief. A similar view is taken in Dunham, A Legal and Economic Basis for City Planning, 58 COLUM. L. REV. 650 (1958) which advocates an equitable approach to the meaning of taking.

34. See Berman v. Parker, 348 U.S. 256 (1954), in which the Court states that the legislature or executive body, not the judiciary, is the main guardian of the public interests to be served. See also Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699 (1959), in which the Texas Supreme Court held unconstitutional the portion of a statute which provided for judicial review de novo of an administrative agency's determination of the existence of slum or blight. This decision is discussed by McClain, supra note 17, at 193-94.

35. The most recent Supreme Court decision based upon Pennsylvania Coal is Goldblatt v. Hempstead, 369 U.S. 590 (1962). Although the decision in Goldblatt applies the diminution in value theory, the result is exactly opposite from that reached in Pennsylvania Coal. See discussion in note 32 supra.

The Court of Claims had found that these flights caused the destruction of the complainants' business and depreciation in the value of their property, all of which amounted to the taking of an easement by the Government. Since there were no findings of the nature or duration of the easement taken, the Supreme Court, on appeal, found that no easement in favor of the Government had arisen. Nevertheless, since complainants had been deprived of the beneficial ownership of their property, the Court held a "taking" had occurred and the complainants were entitled to compensation. Furthermore, in *Griggs v. County of Allegheny* the Court made it clear that continuous daily flights over property can constitute the taking of an air easement for which compensation is required.

**Urban Redevelopment.** In *Berman v. Parker* the Supreme Court was faced with a challenge to the District of Columbia Redevelopment Act of 1945. That statute sought to protect and promote the welfare of the inhabitants of substandard housing and blighted areas by eliminating injurious conditions through the use of all means necessary and appropriate, including taking property for redevelopment under the power of eminent domain. The complainants alleged that their property could not constitutionally be taken for this project for two reasons: (1) their property was not slum housing and, therefore, they were being deprived of their property without due process of law in violation of the fifth amendment, and (2) the plan provided that the property, if taken, would be placed into the hands of a private management agency and redeveloped for private use and, thus, did not fall within the Government's power to take private property for public use. Denying plaintiff's claim, the Court stated that if Congress determines that a beautiful capital would promote public welfare, the judiciary has little power to review that decision. Moreover, nothing in the fifth amendment stands in the way of the power of the legislature to determine that the community should be beautiful as well as healthy. Thus, if an undertaking is within the authority of Congress, the right to accomplish it through eminent domain is clear. *Berman* provides an excellent example of the use of the police power to determine what is in the public interest, and of the use of the power of eminent domain to effectuate that determination. Also, the case, and other cases upholding urban redevelopment programs, clearly illustrate the expanding concept of "public purpose." As one author notes, the test of "actual use" by the public in order

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37. *Id.* at 262; see *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962) (compensation granted for taking of land not directly under flight paths of aircraft).
39. The recovery was granted to plaintiffs against the operators of the airport while in *Causby* relief was granted against the operators of the aircraft.
42. 348 U.S. 26, 30 (1954).
43. *Id.* at 33.
to justify an exercise of the power of eminent domain has been abandoned, and the test of "beneficial use" to the public has been adopted.\textsuperscript{45}

\textit{Aesthetic Controls.} Other examples of valid exercises of police power to take property for the "beneficial use" of the public are controls such as those which regulate the use of outdoor signs and billboards or the location of junkyards. Both the California Supreme Court\textsuperscript{46} and the New York Court of Appeals\textsuperscript{47} have recognized the validity of regulation of outdoor signs through amortization of non-conforming uses. A non-conforming use is one which is permitted by a zoning ordinance to continue notwithstanding the fact that similar uses are not permitted in the area in which the use in question is located.\textsuperscript{48} Under a plan for amortization, however, the non-conforming use is not permitted to remain indefinitely. The owner is given a fixed time in which to write off, or amortize, his expenditure in the non-conforming use. After this time period has expired the use will be prohibited. For example, suppose a landowner has purchased a billboard upon which he displays advertising promoting his auto sales business. Shortly after his purchase a zoning ordinance is enacted which prohibits the use in the area of outdoor signs larger than five square feet. The ordinance, however, provides for amortization of non-conforming uses by permitting such uses for a period of two years. The landowner will be allowed to use his sign for two years during which time he will be able to recoup a portion, if not all, of his investment. Obviously, this is an excellent resolution of the competing interests of the landowner in receiving the benefit of his investment and the public in eliminating unsightly billboards from the streets and highways.\textsuperscript{49} Similarly, comprehensive plans with amortization provisions for the elimination of junkyards have become increasingly common. These plans have been carefully scrutinized by the courts, however, and held unconstitutional if a reasonable amount of time for recoupment of investment is not provided.\textsuperscript{50}

\textbf{B. Recent Cases}

The aforementioned cases disclose a heightened judicial awareness of aesthetic considerations with respect to constitutional challenges to land use regulation. The evolution in judicial thinking as to what constitutes a public purpose continued into the 1970s as public concern over environmental quality grew and courts became increasingly sensitive to the aesthetic factor.


\textsuperscript{46} National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577 (1970), appeal dismissed, 398 U.S. 946 (1971) (upheld ordinance requiring all billboards in a certain district to be removed within one year).

\textsuperscript{47} People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, 338 N.Y.S.2d 97 (1972) (upheld ordinance limiting signs to those not exceeding four square feet in area).

\textsuperscript{48} BLACK'S LAW DICTIONARY 1206 (rev. 4th ed. 1968).

\textsuperscript{49} The idea behind amortization is that the owner of a nonconforming use should be given a reasonable and definite time in which to recoup his investment. Amortization not only allows the spreading of any losses which may occur, but also enables the owner of a non-conforming use to enjoy, for a time, a monopolistic position by virtue of the zoning ordinance. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 446 n.2, 274 P.2d 34, 40 n.2 (1954).

\textsuperscript{50} See, e.g., City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953); City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953).
when deciding "takings" controversies.\textsuperscript{51} This increasing awareness may be attributed to a drawing away from the nineteenth century idea that the only function of land is to enable its owner to make money.\textsuperscript{52} Today, all land use is interrelated; members of a modern society must think in terms of the entire ecological system.\textsuperscript{53}

As a result of this new awareness, state and regional systems of regulation have recently been enacted for control of land use on a wide scale. Among the first of these systems was a comprehensive plan in the San Francisco Bay area enacted to conserve the shoreline by requiring permits for any project involving filling or dredging of the bay. In the leading case the plaintiff, Candlestick Properties, had purchased land submerged at high tide in which to deposit fill from construction projects. Denied a permit to carry out the plan, the plaintiff sought damages, contending that the land was suitable for no other purpose and, therefore, the denial of the permit to fill was tantamount to a taking of property without just compensation. The California Supreme Court found that the haphazard manner in which the bay was being filled was inimical to the welfare of both present and future residents of the bay area. Thus, the restriction imposed did not go so far beyond proper regulation as to amount to a taking under the power of eminent domain.\textsuperscript{54} In a similar case, the Supreme Court of Wisconsin upheld a county shoreland ordinance restricting the land to certain permitted uses. The court stated that "[t]he changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation."\textsuperscript{55} These cases clearly demonstrate an increasing willingness of the

\textsuperscript{51} As stated by the Court of Appeals for the Fifth Circuit:

The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy.

\textsuperscript{52} See F. Bosseman \& D. Callies, \textit{The Quiet Revolution in Land Use Control} 314-18 (1971). In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922), the Court states that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." \textit{See also} United States v. Causby, 328 U.S. 256, 262 (1946), in which the Court found a taking requiring compensation because otherwise "[t]he owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed.

\textsuperscript{53} F. Bosseman \& D. Callies, \textit{supra} note 52, at 314-18.

\textsuperscript{54} Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970). \textit{See also} Potomac Sand \& Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241, \textit{cert. denied}, 409 U.S. 1040 (1972) (regulation prohibiting the removal of sand and gravel from wetlands was valid exercise of the police power). \textit{But see State v. Johnson, 265 A.2d 711 (Me. 1970) (ordinance prohibiting filling of marshland when the land was without value unless filled was invalid exercise of the police power).}

\textsuperscript{55} Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761, 768 (1972). The court distinguished this type of regulation from a "taking" under the power of eminent domain which refers to the securing of a benefit not presently enjoyed but to which the public is not entitled. In this case, however, there was a present right of the public in the shorelands which the ordinance merely protected from harm. Id. at 771. \textit{See also} Turnpike Realty v. Town of Dedham, 284 N.E.2d 891 (Mass.), \textit{cert. denied}, 409 U.S. 1108 (1972) (regulation which prohibited the erection of any building unless used as an accessory to agricultural, horticultural, or recreational use of land or water not requiring filling held to be valid exercise of the police power). \textit{But see Dooley v. Town Plan \& Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964), in which the Connecticut
courts to protect the environment for the good of the public, even at the expense of the private landowner.

III. ZONING

By virtue of the common law a landowner has the right to use his property in any manner that he chooses so long as he does not cause unreasonable harm to others. As one could foresee, this rule made chaos of cities and resulted in a call for remedial action. The first attempts to organize cities by separating incompatible uses into different areas involved the use of the power of eminent domain to pay the landowner for the right to establish other uses. The validity of this method was unquestionable since an identical result could have been achieved through the use of the police power without the necessity of giving compensation. Cities soon discovered this and enacted zoning laws. At first, many courts struck down these early attempts at zoning as both violative of due process of law and unconstitutional takings of property without just compensation.

The Supreme Court was faced with a challenge to the validity of zoning laws as constitutional exercises of the police power in Village of Euclid v. Ambler Realty Co. The case involved a zoning ordinance which divided the plaintiff's land into three divisions: one allowed two-family dwellings only, another permitted apartments, hotels, and churches, and the third provided for industrial uses. Plaintiff alleged that the land was immediately in the path of progressive industrial development; for such uses the land had a market value of $10,000 per acre. On the other hand, if the use were limited to the residential purposes for which the land was zoned, the market value would not be in excess of $2,500 per acre. Upon these allegations the plaintiff challenged the ordinance as violative of the fourteenth amendment. Rejecting this contention, the Court noted that the increasing concentration of the population in cities had created problems such

Supreme Court held invalid a local flood plain zoning classification. The ordinance listed uses for the property which included parks, playgrounds, and wildlife sanctuaries. The court found that these uses restricted the potential buyers of the complainant's property to the town or the government, thus making the regulation unreasonable and invalid. 197 A.2d at 773.

This is the legal maxim sic utere tuo ut alienum non laedus. See 1 W. BLACKSTONE, COMMENTARIES *306.

See Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77 (1899), aff'd, 188 U. S. 491 (1903) (statute restricted height of buildings and provided for payment of damages to any person owning or having an interest in an uncompleted building damaged by the act and further provided compensation to all persons sustaining damages to their property by reason of the limitation of the height of buildings prescribed by the act); State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920) (ordinance divided the city into restricted residential districts and prohibited erection of any other type of building and further provided compensation to the owner of land in such a district for the restriction imposed).

"Zoning" is defined as the division of a city by legislative regulation into districts and the prescription and application in each district of regulations prescribing the use to which buildings within designated districts must be put. BLACK'S LAW DICTIONARY 1793 (rev. 4th ed. 1968). The success of zoning in achieving urban organization has been questioned by several commentators. See generally McDougall, Performance Standards: A Viable Alternative to Euclidian Zoning?, 47 TUL. L. REV. 255, 255-58 (1973).

See, e.g., Eubank v. Richmond, 226 U. S. 137 (1912); Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913); City of St. Louis v. Dreisroener, 243 Mo. 217, 147 S.W. 998 (1912).

See, e.g., Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913); City of St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861 (1893).

272 U. S. 365 (1926).

Id. at 364.
as traffic, noise, and general confusion. These conditions, in the Court's opinion, made restrictions upon the use and occupation of private lands a necessity. The Court also stated, however, that provisions of an ordinance as applied to particular premises may be found invalid if clearly arbitrary and unreasonable.

In *Nectow v. Cambridge* the Supreme Court made clear that not every restriction upon land use would withstand constitutional attack. The plaintiff had contracted to sell valuable land for industrial use. Subsequently, the land was rezoned as residential, reducing its value. The Court inquired whether the health, safety, and general welfare of the inhabitants of the city were promoted by the ordinance in question. Since value to the community by the restrictive classification was minimal but loss to the plaintiff was serious, the Court held the ordinance invalid.

Although the use of zoning has changed considerably since the decisions in *Euclid* and *Nectow*, the fundamental ideas set forth in those decisions form the basis for most modern zoning decisions. As the Court pointed out in *Euclid*, although the meaning of a constitutional guarantee never varies, the scope of its application must expand or contract to meet the new and different conditions which are constantly coming within the field of its operation.

Therefore, although the fifth amendment protection against the taking of private property for public use can never be disregarded, the protection must be interpreted flexibly in light of the changing conditions of society. As society has progressed, zoning restrictions have become more sophisticated and have been used for purposes other than those upheld in *Euclid*. The courts have been called upon to determine the validity of these innovative zoning restrictions in the light of present conditions. Examples of the current trend may be seen in the reaction of the courts to two modern uses of zoning: phased zoning and zoning for the preservation of natural resources.

### A. Phased Zoning: A Question of Timing

In the classic case of *Arverne Bay Construction Co. v. Thatcher* the New York Court of Appeals was faced with a challenge that restrictions placed upon the plaintiff’s property by a zoning ordinance resulted in a deprivation of property without due process of law. Plaintiff desired to build a filling station upon land which was zoned for residential purposes only. The undisputed facts showed that the land in the area had long been vacant due to the location of an incinerator and a sewer in the immediate vicinity. The court found that the plaintiff’s property could not be used profitably at that time or in the immediate future for residential purposes. Although acknowledging that temporary hardship or inconvenience of the individual in holding unproductive property might ultimately be compensated by the benefit to the public, the court nonetheless determined that an ordinance which perma-

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63. Id. at 392-93.
64. Id. at 395.
65. 277 U.S. 183 (1928).
66. Id. at 188-89.
68. 278 N.Y. 222, 15 N.E.2d 587 (1938).
nently restricts property so that it cannot be used for any reasonable purpose goes beyond regulation and must be recognized as a taking. Therefore, the restriction was held invalid.

There may be a better solution to the problem presented in Arverne Bay. The court might have applied the amortization principle used in the sign and billboard cases. To illustrate, assume that the expected population expansion into the neighborhood of the plaintiff's filling station would take ten years. Through use of the amortization principle the plaintiff could build a filling station and amortize its cost over ten years. At the end of ten years the landowner would be required to convert the land to residential use. This result is a more equitable resolution of the competing interests between the landowner and the public.

In a more recent case, Golden v. Planning Board, the court which decided Arverne Bay upheld a zoning regulation which timed zoning for residential development to coincide with the availability of municipal services. The case apparently was distinguishable from Arverne Bay as the restrictions placed on the property in question were not permanent. Although the issue of the validity of timing residential development is central in both cases, the court evidently determined that the restriction in Golden was not of sufficient duration for the court to find a taking. This decision appears correct. If an owner is forced merely to postpone plans for development of land, to hold the restriction invalid and thereby nullify the purpose of the ordinance would be unwise.

B. Zoning for Preservation of Natural Resources

Zoning ordinances which restrict the erection of buildings have recently become widely used as a method of preserving the natural state of the environment. The most interesting case involving this type of zoning restriction is Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills. Complainant owned a large tract of industrially zoned land and a smaller adjoining tract which was within a "meadow" zone restricted to agricultural, conservational, recreational, and like uses. Complainant began filling the smaller tract of land in violation of the ordinance. Upon a denial of a request for a permit to continue such operations, complainant filed suit alleging that the "meadow" zoning provisions amounted to a taking of property without compensation. The New Jersey Supreme Court found that the main purpose of the zoning was the preservation of the natural state of the meadows, and the secondary purpose was the utilization of the land as a flood water detention basin. Both benefited the public. Although the line between regulation and taking is a matter of degree, when the purpose and effect of a regulation is to appropriate private property for open space or for a flood

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69. Id. at 233, 15 N.E.2d at 592. “The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.” Id.
72. Id. at 380-81, 285 N.E.2d at 303, 334 N.Y.S.2d at 154.
74. 193 A.2d at 240.
control purpose, the line has been crossed.\textsuperscript{75} Thus, the court found that the complainant had been deprived of the beneficial use of his property, a deprivation amounting to a taking.\textsuperscript{76}

The court in \textit{Parsippany-Troy Hills} was aware of the possible impact of this decision. To hold the zoning restrictions invalid would leave the land unregulated, thereby allowing the owner to use the land as he saw fit. This result would have proven damaging to the public interest. Accordingly, the court directed that the judgment not become effective for such a period of time as the trial court should find reasonably necessary to enable the enactment of proper regulations for the area.\textsuperscript{77} This farsighted approach to the problem allowed the court to reach a solution which was fair to both the landowner and the public.

\section*{IV. Inverse Condemnation}

Inverse condemnation has become a useful remedial device for landowners injured as a result of government action. Therefore, most courts have reasoned that the just compensation clause is self-executing and necessarily implies a waiver of sovereign immunity.\textsuperscript{78} This interpretation provides landowners an effective means of bringing a cause of action against the sovereign state.\textsuperscript{79} Furthermore, although the action of inverse condemnation originated in cases concerning the diversion of riparian rights,\textsuperscript{80} courts have moved away from the primitive position which required a physical invasion or taking and now recognize that loss of intangible property interests may provide a basis for a landowner to claim the fifth amendment right to just compensation.\textsuperscript{81}

\subsection*{A. Traditional Remedies for the Injured Landowner}

Traditionally, a landowner has been able to challenge a regulatory ordinance by alleging that its provisions are arbitrary, unreasonable, or have no substantial relation to the public health, safety, morals, or general welfare. A landowner's motive for challenging an ordinance was often his unwillingness to comply with it.\textsuperscript{82} Thus, the nullification of the offending regulation has been accompanied by the issuance of an injunction against continued enforcement.\textsuperscript{83} Injunction cases often contain dictum stating that the particu-
lar police power action being declared invalid and enjoined was a taking requiring just compensation.\textsuperscript{84} No compensation was ordered in these cases, however, since that was not the remedy requested.

Significant dictum from the Supreme Court in controversies concerning police power regulations has laid the foundation for claims of compensation for injuries suffered as a result of excessive regulation.\textsuperscript{85} In \textit{United States v. Central Eureka Mining Co.}\textsuperscript{86} the plaintiff sought to recover damages incurred as a result of wartime regulations prohibiting the operation of a gold mine. Concluding that the regulations did not constitute a taking when considered in light of the need for strict economic controls during wartime, the Court set forth the following principles:

Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. \ldots In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking. \ldots However, the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation. \ldots In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income.\textsuperscript{87}

This language compels the conclusion that damages were disallowed in this case because of the necessity for strict economic regulations in time of war. Yet, the Court recognized that a regulation which merely inflicts economic harm can be so unreasonable as to constitute a taking requiring compensation.

\textbf{B. Policy Considerations}

The notion of expanding the concept of inverse condemnation so as to provide a remedy for those injured as a result of zoning restrictions has provoked wide discussion of policy considerations.

\textit{Arguments for Allowing Inverse Condemnation in Zoning Cases.} Since individual losses resulting from zoning restrictions are quite frequent and often devastating, private landowners look to the courts for redress. To allow these injured persons the remedy of inverse condemnation is attractive for several reasons: the remedy implements the purpose of the fifth amendment,\textsuperscript{88} reduces pressures on landowners and courts to upset comprehensive zoning, achieves a "fair" outcome, and deters arbitrary action of officials responsible for zoning.

\textsuperscript{84} See, \textit{e.g.}, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

\textsuperscript{85} The Court has often stated that police power regulations can be so excessive or unreasonable as to constitute a taking for which compensation is required. \textit{See, e.g.}, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); \textit{United States v. Causby}, 328 U.S. 256, 266 (1946); \textit{United States v. General Motors Corp.}, 323 U.S. 373, 378 (1945); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The idea of landowner election to recognize the invalid regulation as a taking and seek compensation was first raised in \textit{Note, Eminent Domain—When Is Property Taken—Allegation that Wartime Shutdown Order Was Arbitrary Supports Claim for Compensation}, 66 \textit{Harv. L. Rev.} 1134 (1953).

\textsuperscript{86} 357 U.S. 155 (1958).

\textsuperscript{87} Id. at 168.

\textsuperscript{88} This, of course, also applies to just compensation provisions in state constitutions.
The fifth amendment guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. The policy underlying the eminent domain provision is the distribution throughout the community of the loss inflicted upon the individual by the making of public improvements. Since zoning is enacted for the public benefit, a zoning ordinance which results in the taking of private property should be subject to attack in the same manner as any other taking of private property for public use.

Under traditional remedies, if the government imposes a burdensome zoning regulation on land use, the individual landowner seeks a judicial determination that the regulation cannot be applied to his land. If the landowner is successful, the land goes completely unregulated. Since the landowner is free to do as he pleases, the result could be the destruction of a comprehensive zoning plan. If inverse condemnation were allowed, both the pressure on the owner to have the land declared unrestricted and the pressure on the courts to allow the owner to use the land would be reduced. Moreover, inverse condemnation would allow monetary compensation for loss of the profitable use of land, and the courts would no longer be forced into judicial zoning in order to compensate the landowner for the loss of the beneficial use of the property.

The constitutional requirement of just compensation derives as much content from basic equitable principles of fairness as from technical concepts of property law. Traditional remedies force the courts into an either/or situation. The court must either rule for the landowner by declaring the regulation invalid or uphold the regulation and leave the landowner without compensation. Inverse condemnation would allow courts to achieve a result which is fair to the individual as well as to the general public.

As long as the property of an individual can be regulated without cost to the general public, the consequences of the regulation are not likely to be considered when making the zoning decision. If administrators and citizens are aware, however, that a landowner may be able to compel the government to pay for the restriction, they will be forced to weigh the benefits of the restriction against the cost which must be borne to achieve those benefits. If inverse condemnation is extended to allow compensation for injuries sustained as a result of zoning restrictions, then the true cost of the regulation in

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89. Armstrong v. United States, 364 U.S. 40, 49 (1960). The language of the fifth amendment requirement of just compensation is derived from the Magna Carta. However, the legislative history concerning the motivation behind the addition of the clause in the fifth amendment is scant. See generally F. Boselman, D. Callies & J. Barta, supra note 30, at 99-104; Lenhoff, Development of the Concept of Eminent Domain, 42 Colum. L. Rev. 596 (1942); Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553 (1972).
90. Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818, 823 (1943).
92. Id.
94. As stated by Mr. Justice Holmes, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
95. Dunham, supra note 91, at 1253.
light of the benefit to the public is more likely to be reflected in the zoning decision.  

Arguments Against the Extension of Inverse Condemnation to Zoning Cases. Those who disfavor expanding inverse condemnation as a remedy for landowners injured by zoning point to the possibility of several undesirable consequences of the remedy in the zoning context: (1) the threat of damage suits would deter efficient land use planning, (2) excessive financial demands would be made upon municipalities, and (3) annual budgeting processes would be upset by uncertainty.

A municipality is authorized to exercise police power to promote the public health, safety, or general welfare. The opponents argue that a municipality must be free to exercise this authority in the form of zoning regulations without incurring liability should exercise of that authority later prove erroneous. If landowners are allowed to recover damages from municipalities as a result of unduly burdensome zoning restrictions, then necessary public action might not be taken by a municipality. A similar burden would be placed upon a municipality forced to compensate landowners for losses resulting from zoning restrictions. If a large area of land is involved in the zoning regulations, disgruntled landowners could combine and bring so many inverse condemnation suits that a municipality would be financially unable to make the necessary payments. Thus, the entire scheme of land use controls could be destroyed. Moreover, in most zoning cases the placement of the landowner in his pre-zoning position by the issuance of an injunction is a sufficient remedy.

If landowners were allowed to use inverse condemnation to attack zoning ordinances, legislative control over the allocation of financial resources would be reduced. The plaintiff, in choosing either the injunctive or compensatory form of relief, would exercise control over the expenditure of public funds. Furthermore, a public agency choosing to proceed by regulation only is entitled to be judged upon this basis. The government should not be allowed through inverse condemnation to purchase compliance with unauthorized regulations.

C. Case Law Concerning the Availability of Damages in Zoning Litigation

Several jurisdictions have been faced, either directly or indirectly, with the question of whether to allow inverse condemnation as a remedy for excessive zoning restrictions. The most recent and most interesting confrontation with

96. Id. at 1254.
98. Cabaniss, supra note 97, at 1601.
99. 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 159.18, at 386 (1975).
100. See Note, supra note 97, at 1452.
101. Id. at 1450.
103. See Note, supra note 85, at 1135.
the inverse condemnation question in zoning litigation arose in the state courts of California. The controversy centered on "down-zoning," or rezoning into a less profitable classification. In 1966 the plaintiff-landowners purchased commercially zoned property in the city of Cerritos for the purpose of constructing a shopping center. In July 1971 the city declared a moratorium with respect to the use of certain zone categories in order to re-study land use policies. In October 1971 the city adopted a general zoning plan which designated the plaintiffs' property for neighborhood commercial use. Thereafter, the plaintiffs submitted plans to the city for development of the land as a shopping center and requested that the commercial zone be reinstated. In July 1972 the city rejected the proposed plans and rezoned the property as low density, single family residential property, an action which allegedly caused a fall in the market value of the property from $400,000 to $75,000. Furthermore, the size, shape, and location of the property allegedly rendered it useless for single family residential purposes. The city's demurrer to plaintiffs' complaint in inverse condemnation was sustained by the Superior Court, Los Angeles County, and the plaintiffs sought a writ of mandamus directing the lower court to overrule the demurrer. The court of appeals ruled for the landowners and held that in certain cases even a valid exercise of a city's zoning power could invoke the application of the principle of inverse condemnation. The Supreme Court of California reversed, holding that inverse condemnation lies only for a taking or damaging of property and plaintiffs had not alleged facts to support such a claim.

The decision rested upon several major grounds: (1) a purchaser of land merely acquires a right to continue a use instituted before the enactment of more restrictive zoning, (2) diminution of market value does not constitute "damage" in the constitutional sense, (3) the appropriate method of challenging a general zoning plan is by a proceeding in mandamus, not through an action for damages, and (4) legislative, rather than judicial, action holds the key to reform in the area of just compensation. In this case the court attempted to justify its decision by finding that the landowners had no property interest in the industrial zoning classification. Therefore, when the industrial classification was lifted from the property, and a more restrictive and less profitable classification placed upon it, no "taking" of property occurred for which compensation is required.

The finding that the landowners had no property interest allowed the court to deny compensation under the state constitution which provides for compensation whenever property is taken or damaged. In this case, however, the plaintiffs suffered a real and substantial injury as a result of the down-zoning.

105. HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 520, 542 P.2d 237, 244, 125 Cal. Rptr. 365, 373 (1975).
106. Id. at 516, 542 P.2d at 242, 125 Cal. Rptr. at 370. The court's view is that a zoning classification is not property which can be "taken or damaged" in the constitutional sense.
107. Id. at 518, 542 P.2d at 244, 125 Cal. Rptr. at 372.
108. Id. at 518-19, 542 P.2d at 244, 125 Cal. Rptr. at 371, 372.
The fact that the plaintiffs may share in the general benefits resulting from the zoning ordinance obviously offers them little solace. The courts could fashion a more equitable solution in cases such as this by allowing the plaintiffs limited compensation. For example, the plaintiffs in the above case could have been allowed to recover damages in the amount of the difference between the original price of the land, $100,000, and the current selling price, $75,000, making the total recovery $25,000. This "out-of-pocket" type of compensation would allow the plaintiffs to shoulder a $300,000 "loss" of the difference between the market value of the land as industrially zoned and the price which they paid for the land. By allowing limited recovery of damages, the plaintiffs would not be forced to suffer more than their share of the cost of the public benefit.\(^\text{10}\)

In *City of Miami v. Romer*,\(^\text{11}\) a Florida case, the plaintiff sued to recover compensation for a ten-foot strip of land on a lot which was restricted by a set-back ordinance. The plaintiff alleged that the purpose of the ordinance was to prevent construction of buildings so that the city could ultimately acquire the property without paying for the improvements. The Supreme Court of Florida found that the establishment of set-back lines by a municipality was a proper exercise of the police power, but also stated that if the set-back ordinance were enacted without regard to the public health, safety, or general welfare, the only question remaining would be whether a deprivation of the owner's beneficial use of the property amounted to a "taking" of the strip for which compensation was required.\(^\text{12}\)

A recent appellate court decision held that the enactment of a zoning ordinance under the police power does not entitle the property owner to seek compensation through inverse condemnation for the taking of the property.\(^\text{13}\) Interestingly enough, the court cites *City of Miami v. Romer* as supporting this statement. The court further stated that if the ordinance as applied to the property involved is arbitrary, unreasonable, discriminatory, or confiscatory, the relief available to the property owner is a judicial determination that the ordinance is invalid.\(^\text{14}\)

The Supreme Court of New Jersey rendered a unique decision in *Lomarch Corp. v. Mayor & Common Council*.\(^\text{15}\) The controversy arose when the city enacted an ordinance which in effect placed a one-year freeze upon construction in a proposed subdivision pending a decision by the city on whether to condemn the property for a public park. The plaintiff landowner brought suit to declare the ordinance invalid as violative of both the federal and state constitutions in that the ordinance did not provide for compensation. The court held that the ordinance would be unconstitutional if it did not provide for compensation.\(^\text{16}\) The court stated, however, that when the constitutional-
ity of such an ordinance is challenged, the ordinance will be upheld upon an implied duty to make payment of adequate compensation to the landowner for the temporary taking of the property. The court recognized the severe and somewhat arbitrary restriction that had been placed upon the landowner’s right to use the property, but also recognized the public concern in prohibiting construction upon the lands to be condemned for park purposes in the future.

The building restrictions in *Lomarch* were placed on the land so that the city, if it decided to condemn the land for a park, would not have to pay for improvements to the land. No one would question the legitimacy of this reasoning. It seems unfair, however, to force the landowner to hold his property unproductive and pay his property taxes while the city takes its time in determining whether to condemn the property. By allowing the landowner adequate compensation for the temporary taking of the property, the city’s objectives in enacting the ordinance are satisfied without injuring the landowner in the process.

The most recent case in Pennsylvania concerning the availability of inverse condemnation to one injured by a zoning ordinance is *Gaebel v. Thornbury Township.*117 The plaintiffs owned commercially zoned land which was rezoned as a flood plain, thereby limiting the land to agricultural, horticultural, and recreational uses. The plaintiffs alleged that the restrictions imposed by the amended ordinance constituted a taking of property without just compensation. Therefore, the plaintiffs petitioned under statutory eminent domain provisions for appointment of viewers to ascertain and award just compensation.118 Statutory procedures were also available for challenges to the validity of any provision of a zoning ordinance.119 Although the court recognized that a regulation may be so unreasonable as to constitute a taking of private property which can only be effectuated through eminent domain, the court stated that such was not the issue presented. The true issue was whether the plaintiffs’ exclusive recourse to challenge the zoning ordinance was through the procedures established by statute for such a challenge. The court held that the plaintiffs would have access to the remedy of inverse condemnation in only one circumstance: when a township under the power of eminent domain substantially deprived the plaintiffs of the beneficial use and enjoyment of their property.120 A dissenting opinion agreed with the majority that a challenge to the validity of a zoning ordinance must be carried out through the exclusive remedies provided. The plaintiffs, however, were not challenging the validity of the ordinance involved. According to the dissent, the question was whether the zoning ordinance was a valid police power regulation or whether the ordinance was a taking of the plaintiffs’ property without compensation.121 Since the judicial relief provided in the statutory zoning appeal proceeding is modification or nullification of the offending ordinance,122 the majority opinion obviously side-stepped the question directly presented by the plaintiffs.

120. 303 A.2d at 60.
121. Id. at 62.
A somewhat peculiar fact situation gave rise to judicial determination of the availability of damage suits for landowners in Texas. After the plaintiff began construction of a building the city claimed that this construction was in violation of city zoning ordinances and obtained a restraining order and temporary injunction against further construction. The city's action was later declared erroneous. In the meantime, the plaintiff's construction project had been delayed almost two years. The plaintiff brought suit to recover from the city the damages incurred as a result of this delay. The Supreme Court of Texas held that the plaintiff was not entitled to recover, reasoning that since the city was exercising a lawful right to enforce ordinances, the fact that the ordinance was later determined invalid did not allow the plaintiff to recover damages. The court, however, limited the holding to situations where the ordinance was not unreasonable or void on its face. In another Texas case, Kirschke v. City of Houston, the plaintiffs were denied a building permit to construct a public garage because the property was to be used for a public highway. After three years, however, the city had neither instituted condemnation proceedings nor lifted the "freeze" upon the plaintiffs' property. The plaintiffs brought suit for damages, alleging that the denial of the permit and the city's inaction manifested an intention to subject the property to public use and amounted to a taking. The court held that the plaintiffs were entitled to obtain relief by mandamus or mandatory injunction requiring the city to issue the requested permit, but were not entitled to recover damages or compensation since an actual taking or even damage to the property had not occurred. The court in this case missed the mark if it was attempting to achieve a fair result. If the city had a valid reason for denying the permit, the intention to build a highway upon the land, then requiring the city to issue the requested permit made little sense. Upon commencement of the highway construction the city would be forced either to pay the plaintiffs the value of the land with the garage, or to reroute the highway. Although the court recognized the injustice of requiring plaintiffs to wait until the city condemned the property, the court failed to utilize the best solution: to pay the owners for the temporary taking of the property.

In recent years the Federal District Court for the District of Nevada has been confronted with controversies arising from land use regulations in the Lake Tahoe Basin. In Brown v. Tahoe Regional Planning Agency the plaintiffs challenged a land use regulation which zoned lands as forest and recreational districts. The plaintiffs alleged that the restrictions made the land unavailable for any private beneficial use and amounted to the dedication of the lands to the public for use as parks or general recreational areas. The court

\[123. \text{City of West Univ. Place v. Ellis, 134 Tex. 222, 134 S.W.2d 1038 (1940).}
\[124. \text{Ellis v. City of West Univ. Place, 141 Tex. 608, 175 S.W.2d 396 (1943).}
\[125. \text{Id. at 612, 175 S.W.2d at 398.}
\[126. 330 S.W.2d 629 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.), cert. denied, 364 U.S. 939 (1961).}
\[127. \text{Id. at 634. But see City of Abilene v. Bailey, 345 S.W.2d 540 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.), in which the court allowed recovery of damages for the diminution in value of the plaintiff's property caused by obnoxious odors and insects from the city's sewage plant. See Note, Condemnation Blight and the Abutting Landowner, 73 MICH. L. REV. 583, 601 (1975).}
stated that public welfare and necessity may reasonably require exceptionally restrictive land use classifications for the protection of public interests in the Lake Tahoe Basin, but that such valid regulations may, nevertheless, constitute a taking of private property for public use, entitling the owner to just compensation. In a later case, however, the court found that allegations that the improvement district had imposed special assessments and ad valorem taxes on property based upon pre-zoning ordinance classifications had failed to rebut the presumption of constitutionality of the ordinance and failed to establish a cause of action for inverse condemnation. This ruling was based primarily upon the ground that the standards of pleading to which a complaint is held on a motion to dismiss are more stringent when the complaint challenges a presumptively constitutional act. Thus, the plaintiffs' allegations of loss in value of the property were insufficient alone to support the claim of an unconstitutional taking. These cases indicate that this court would uphold a landowner's suit in inverse condemnation for recovery of damages incurred as a result of valid zoning restrictions placed upon property for the purpose of conservation and natural resources preservation. Such a result appears fair to all concerned. The public has a definite interest in preserving natural resources, but restrictions placed upon land in order to achieve this result often are found to be unreasonably harsh and, accordingly, are held invalid. This could have the detrimental effect of forever destroying the area's natural beauty. If the landowner is allowed to recover damages, however, then he will neither destroy the environment nor suffer the entire cost of preserving it.

V. ALTERNATIVES TO TRADITIONAL REMEDIES

The conclusion to be drawn from "takings" decisions is clear: The courts are not anxious to allow recovery of damages against governmental agencies. As has been demonstrated, however, the courts are often willing to declare an excessive zoning restriction an unconstitutional taking of property without just compensation and then place an injunction upon enforcement of the ordinance. This judicial attitude must lead to undesirable results. Restrictions placed upon property to preserve the natural state of the environment provide the most obvious example. If the ordinance is upheld, the landowner is, in effect, forced to dedicate the land to public use. If the restriction is declared invalid, however, and the landowner is allowed the beneficial use of the property, the public interest in natural beauty is subordinated. A solution may be found in a balancing of interests approach. Unfortunately, the courts, although expressing hopes of reaching a "fair" decision by balancing the interests of the landowner and the public, have refused to reach a compromise between these interests. Generally, if the interest of the landowner in the beneficial use of the property is greater than the public interest in the preservation of the natural state, the landowner is entitled to just compensation. If the interest of the public is greater, the landowner is allowed to use the property for the purpose of conservation and natural resources preservation. Such a result appears fair to all concerned. The public has a definite interest in preserving natural resources, but restrictions placed upon land in order to achieve this result often are found to be unreasonably harsh and, accordingly, are held invalid. This could have the detrimental effect of forever destroying the area's natural beauty. If the landowner is allowed to recover damages, however, then he will neither destroy the environment nor suffer the entire cost of preserving it.

129. Id. at 1132. The plaintiffs did not recover damages, however, since they failed to exhaust the administrative remedies provided in the ordinance.
131. Id. at 437.
132. See, e.g., note 33 supra.
zoning restriction, a court will declare the regulation invalid and issue an injunction against enforcement. Yet, a strong public interest in enforcement of an ordinance will lead a court to uphold the ordinance despite its burden upon an individual landowner. This all or nothing approach accomplishes little in the way of fairness, and the courts would do well to strike a balance. Rather than simply allow either the landowner or the public to "win" or "lose," each could "win" and "lose" a little. A good example of this balancing approach is the Lomarch decision in which the court required the public to pay for the benefits received as a result of excessive regulations rather than allowing the landowner the free and uncontrolled use of the property.  

Although Lomarch gives equal weight to both individual and societal needs, the decision is only one ray of the spectrum of solutions available through an innovative balancing of interests. For instance, the payment of damages is not necessarily required. In the Parsippany-Troy Hills decision, for example, the court ordered the zoning authority to reassess policies and formulate zoning consistent with the interests of both the public and the landowner. Other examples are the billboard and junkyard cases which show that fairness can be achieved without the payment of damages through the use of amortization. Of course, amortization cannot be used in every situation. In the HFH, Ltd. case, for example, to allow the landowners to construct an entire shopping center and then "phase out" individual stores through amortization would have been ridiculous. The proposed alternative of limited compensation to the landowner is, thus, a further example of a way to achieve a fair result in situations which involved a clash between public and private interests.

As the preceding discussion suggests, the judiciary could take a more active role in "takings" controversies. However, there are drawbacks to this approach. Judicial attempts to achieve a fair result in each case undermines predictability of outcome in the system. If carried to an extreme, each landowner could be required to litigate each individual claim, thereby increasing the responsibilities of already overburdened courts. Nevertheless, zoning litigation based upon constitutional "taking" allegations is already frequent, and, as in any common law evolution, patterns ultimately will develop. In addition, legislation defining the respective rights of the landowner and the public, and providing equitable remedies should those rights be infringed, could eradicate many of these problems. Yet, appeals to the legislature encouraging correction of the defects of the present system have gone unan-

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133. See notes 115-16 supra and accompanying text. See also Bydlon v. United States, 175 F. Supp. 891 (Cl. Ct. 1959) (compensation awarded to owners of fly-in resorts in a national forest whose businesses were destroyed by federal law prohibiting aircraft landings in the forest).

134. See notes 73-77 supra and accompanying text.

135. The principle of amortization need not be restricted to these types of cases. See notes 68-70 supra and accompanying text.

136. See Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 STAN. L. REV. 727 (1967); Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 SANTA CLARA LAW. 1, 28 (1967). In the latter article the author proposes a scheme of flexible administrative adjustment of claims against public agencies through the use of inverse condemnation.
swered. Until the legislatures have taken affirmative action in this respect, the courts should attempt to achieve a fair result in each individual case.

VI. Conclusion

As concern for environmental quality grows, the necessity of land use regulations to make the most efficient use of natural resources becomes more apparent. There can be no doubt of the necessity for proper restrictions upon land use. Nevertheless, however great this necessity, the fifth amendment guarantee against the taking of private property for public use must be preserved. When excessive restrictions are placed upon the use of property for the benefit of the public, the individual landowner should not be forced to bear more than his share of the cost of these benefits.

Obviously, the present system of challenging zoning ordinances is inadequate to effectuate these goals. Traditional remedies force the courts to make zoning decisions by modifying or nullifying excessively burdensome use restrictions. But this is not to say that allowing inverse condemnation is the key. Admittedly, the extension of inverse condemnation to allow damage suits in zoning litigation has its drawbacks. Even though neither remedy is completely adequate, however, the courts could take an active role in reaching a compromise between the competing interests in “takings” controversies until legislatures see fit to enact zoning ordinances which provide for a fair resolution of claims.