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Exclusionary Land Use Controls and the Taking Issue

By ROBERT R. WRIGHT*

It is somewhat redundant to speak of "exclusionary" land use controls when the effect of zoning and most of the other forms of limitations on land use is to exclude or limit certain uses. Whether cumulative or noncumulative, and however simple or complex the ordinance may be, the inherent nature of zoning is exclusionary. The common law of nuisance is exclusionary in the sense that it provides a vehicle for eliminating certain types of uses in particular areas. Police power ordinances which predated comprehensive zoning were exclusionary as to the uses against which they were directed. Subdivision ordinances, with particular reference to exactions, are exclusionary in the somewhat different sense that they may affect the economics of a particular situation to the point of creating market limitations. Efforts by cities to prevent population growth from outstripping municipal facilities by regulating development on a timed and sequential basis are partially exclusionary.

Underlying these devices, and every other exercise of the police power, is the basic question: When do governmental actions cross the undefined line between arbitrary and confiscatory action on the part of the public and valid exercise of the police power? Admittedly, in cases dealing with exclusionary zoning, there are other constitutional issues which have been raised in recent years—civil rights issues, questions of equal protection and substantive due process, the right to travel, and others. But the basic question in most of these cases remains that of the valid exercise of the police power as opposed to the confiscatory exercise of it. This article will explore the exclusionary aspect of land use regulation as it relates to the taking issue.

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I. The Acceptance of the Concept of Exclusion

As previously pointed out, the exercise of land use controls necessarily sanctions and promotes exclusion. This was recognized in *Euclid v. Ambler Realty Company*,¹ in which the United States Supreme Court first approved a comprehensive zoning ordinance. The opinion by Justice Sutherland even makes the rather peculiar point (to us today) that single-family residential neighborhoods need to be protected from the advance of apartment complexes.² He speaks of apartments in a manner similar to that employed by some courts in the 1950's and 1960's to describe mobile homes.³ The idea basically is that the preferred use—single-family residential—should be protected from what in a given period of time is viewed either simply as incompatible or as possessing nuisance-like attributes.

The concept of exclusion, however, stems from older law pre-dating the period of comprehensive zoning. Acts of Parliament and legislative enactments of the colonies used the device to prevent activities or to ban types of uses which were deemed to be contrary to the public interest.⁴ Of course, these were merely early single-

1. 272 U.S. 365 (1926).

2. "With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances." 272 U.S. at 394-95.

3. See, e.g., *Vickers v. Township Comm.*, 37 N.J. 232, 246-47, 181 A.2d 129, 130-40 (1962), *appeal dismissed, cert. denied*, 371 U.S. 233 (1963). See also, 2 R. ANDERSON, *AMERICAN LAW OF ZONING* § 14.04 (2d ed. 1976).

4. In thirteenth century England, one of the major problems was highway robbery in which the thieves would hide among the bushes and trees bordering the narrow highways. The Statute of Winchester, 1285, 13 Edw. 1, Stat. 2, c.5 commanded that highways between market towns be enlarged and that trees and brush be cut back two hundred feet from either side of the roadway to prevent a situation in which "a Man may lurk to do hurt." *Id.* at c.5. Because of the depletion of spawn and young fish used to feed swine and dogs, the

purpose exercises of the police power. Laws of this type continued to be enacted throughout the nineteenth and early twentieth centuries and occasionally were challenged on the basis that they were arbitrary and unreasonable or amounted to confiscation of property without just compensation. Ordinances regulating laundries (and directed toward the Chinese) both were⁵ and were not⁶ sustained. In *Mugler v. Kansas*,⁷ the Supreme Court in an opinion by the first Justice Harlan interpreted quite broadly the meaning of the police power when it upheld a law prohibiting the manufacture or sale of alcoholic beverages. Although the Court stated that the police power was not without limitations,⁸ the fact that the end result of the case was to put a brewery out of business and thereby greatly diminish the value of its property would seem to provide a rather broad range of permissible action.⁹ Another ordinance, regulating prostitution in New Orleans, was upheld.¹⁰ These pre-*Euclid* cases, however, usually did not involve the morals aspect of the police power. More typically, they dealt with efforts by governmental authorities to deal with traditional police power considerations relating to health and safety. This involved, among other things, the upholding of ordinances prohibiting livery stables,¹¹ the manu-

use of various types of nets and methods of taking fish from the rivers and streams was limited in an act during the time of Elizabeth I. 1558, 1 Eliz. 1, c. 17. After the great fire of London, various building regulations were imposed with respect to construction and building materials. 1666, 19 Car. 2, c. 3. The Massachusetts Bay Colony passed many such acts, including one environmental regulation intended to prevent farm animals from running at large and feeding upon the vegetation on Plumb Island in Ipswich Bay. Acts and Resolves of the Province of Massachusetts Bay 1739-40, c. 8.

5. See, e.g., *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

6. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

7. 123 U.S. 623 (1887).

8. Justice Harlan stated, for the Court, that "[t]here are, of necessity, limits beyond which legislation cannot rightfully go." *Id.* at 661.

9. One provision went so far as to permit the destruction of existing supplies of alcohol bottled for sale. The extremes of the decision are illustrated further by the statement that when a prohibition upon use is declared under the police power, this "cannot, in any just sense be deemed a taking or an appropriation of property for the public benefit" because this "does not disturb the owner in the control or use of his property . . . nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests." *Id.* at 668-69. Justice Harlan reasoned that to use the police power to destroy property "which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated" is not a taking. *Id.* at 669. This statement is obviously extreme in the light of present-day law and circumstances.

10. *L'Hote v. City of New Orleans*, 177 U.S. 587 (1900).

11. *Reinman v. City of Little Rock*, 237 U.S. 171 (1915).

facture of bricks,¹² heavy industrial smoke emissions,¹³ gasoline storage facilities¹⁴ and fertilizer operations.¹⁵

The legal analogy utilized in upholding prohibitive ordinances of this type was quite commonly the common law doctrine of nuisance.¹⁶ The established concept that an individual has the right to use and enjoy his property without undue interference from his neighbor¹⁷ appeared to the courts to be a hallowed rule of Anglo-American jurisprudence which could be applied to protect the public. Thus, in the livery stable case, *Reinman v. City of Little Rock*,¹⁸ the city authorities were ridding the downtown area of a form of activity which was akin to, and might ultimately amount to, a public nuisance because of the excrement, odors and flies associated with the activity. This was within the police power, but it was also buttressed by the familiar maxims of nuisance law. The convenience of the analogy, even though it stemmed from a different line of jurisprudential thought,¹⁹ seemed quite comforting to the courts.

Comprehensive zoning carried exclusionary devices a significant step beyond what had gone on before, however, in that local governments were not, on the surface of things, speaking only of excluding activities which gave off foul odors or polluted the atmosphere or endangered the public health, safety or morals. Under comprehensive zoning, a ladies' dress shop or a town house apartment complex could be kept out of a single-family residential area.

12. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

13. *Northwestern Laundry v. City of Des Moines*, 239 U.S. 486 (1916).

14. *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919).

15. *Northwestern Fertilizer Co. v. Hyde Park*, 97 U.S. 659 (1878).

16. This was referred to in numerous cases, including *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 587 (1900); and *Mugler v. Kansas*, 123 U.S. 623 (1887).

17. The maxim is *sic utere tuo ut alienum non laedas* and was almost invariably quoted by both older and more recent cases.

18. 237 U.S. 587 (1900).

19. After the law reforms of Henry II, in the latter part of the twelfth century, the king's courts began to encroach particularly into nuisance disputes. The law of nuisance actually began to take shape even earlier, shortly after the Norman Conquest. Britton, writing around 1300 A.D., regarded the soil as subject to a servitude by law "as, for example, to the obligation that no one shall do anything in his own soil that may be a grievance or annoyance to his neighbour." 1 BRITTON 140b, 289 (F. Nichols ed. 1901). See generally J. BEUSCHER, R. WRIGHT & M. GITELMAN, *LAND USE* 38-41 (2d ed. 1976). Nuisance law is common law, which originated in this early period of time. Zoning came to us from civil law sources, even though noncomprehensive police power regulations existed prior to comprehensive zoning. *Id.* at 500-01.

Nonetheless, in *Euclid*, after taking into account such considerations as traffic and noise, the Court again drew upon the nuisance analogy in speaking of apartments.²⁰ Even after that case the nuisance analogy was employed as necessity or convenience required.

Since the success of zoning is necessarily dependent on exclusion of uses, it is not surprising that as zoning law became more sophisticated, judicially approved exclusionary devices grew in number and acceptance. Euclidian zoning is cumulative zoning. It may be likened to a pyramid, with single-family residential zones at the apex and with all other uses excluded from such zones. But the pyramid widens as it descends, and the owner of a lot in a commercial zone may build a residence there even though he may ultimately be living next door to a McDonald's or a Holiday Inn. Noncumulative zoning developed, however, to prevent disparate or incompatible uses from existing in the same zone.²¹ Noncumulative zoning also prevents nuisance litigation, although the defendant might successfully invoke the familiar "moving to the nuisance" defense.²² In any event, the result is to exclude many higher uses from many or most lower use zones.

Other exclusionary limitations which stemmed from comprehensive zoning were height and bulk limitations,²³ although these have spawned less litigation than use limitations. In addition to controls on maximum size or height of structures, these regulations also led to restrictions on the *minimum* size. Exclusionary zoning, as a dirty word or at least as possessing a "bad" connotation, might be said to spring in large measure from *Lionshead Lake v. Township of Wayne*,²⁴ a leading case in the early 1950's. The New Jersey Court upheld minimum floor areas required for single-family dwellings on the basis that this was an appropriate exercise of

20. See note 2 *supra*.

21. See generally 1 P. ROHAN, ZONING AND LAND USE CONTROLS § 1.05[2][e] (1978).

22. See *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972); *Storey v. Central Hide & Rendering Co.*, 148 Tex. 509, 226 S.W.2d 615 (1950); see also *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 258 N.Y.S. 229, motion denied, 236 A.D. 775, 258 N.Y.S. 1075 (1932).

23. Bulk zoning relates to the height, size, shape and placement of buildings on lots, and may affect their shape. The principal purpose is to preserve or provide for light and air in the area, although it may also implement density and open space considerations. See *Shapiro v. Mayor of Baltimore*, 230 Md. 199, 186 A.2d 605 (1962); Annot., 99 A.L.R.2d 861 (1965); Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959); Toll, *Zoning for Amenities*, 20 L. & CONTEMP. PROB. 266 (1955).

24. 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953).

the police power in protecting the mental health of the occupants. The minimums were indeed quite minimum, since the ordinance forbade structures containing less than 768 square feet. The structures in question were 484 square feet and were referred to in the concurring opinion as "doll houses." Nonetheless, the decision set off a monumental academic flap, which was roundly debated in the *Harvard Law Review*,²⁵ and to which some scholars have since returned.²⁶ The ruling in the case has generally been followed, and it is no longer unusual to find such requirements.²⁷ The argument, presented against such minimums, however, is that they exclude lower economic groups from the purchase and occupancy of single-family dwellings. This, it is argued, is clearly economic discrimination and the overall effect is one of racial discrimination.²⁸ This line of thinking finds probably its best modern judicial expression in the leading case of *Southern Burlington County NAACP v. Township of Mount Laurel*,²⁹ although that case did not invalidate *Lionshead Lake*.³⁰ Instead it dealt with a zoning situation relating

25. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954). Professor Haar was quite critical of the case, while Professors Nolan and Horack felt that minimum square foot sizes were appropriate health considerations of the police power. Haar argued that cases of this type would create or promote social and economic segregation. Compare Haar's argument with comments in Babcock, *Classification and Segregation Among Zoning Districts*, 1954 U. ILL. L.F. 186, 201-04. Haar's argument regarding economic segregation was influential in later cases and in the development of more recent exclusionary zoning decisions. However, a review of the cases in an *American Law Report* annotation indicates that regulations on minimum floor space have usually been upheld under the police power. Annot., *Validity and Construction of Zoning Regulations Prescribing Minimum Floorspace or Cubic Content of Residence*, 96 A.L.R.2d 1409 (1964). Nonetheless, the argument of economic segregation and discrimination has seemingly gained in strength in recent years, as indicated by the recent case of *Home Builders League v. Township of Berlin*, 81 N.J. 127, 405 A.2d 381 (1979).

26. Williams & Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WIS. L. REV. 827.

27. See authorities cited at note 25 *supra*; but cf. *Home Builders League v. Township of Berlin*, 81 N.J. 127, 405 A.2d 381 (1979) (minimum floor area requirements invalid as arbitrary use of police power).

28. In *Home Builders League* the New Jersey Supreme Court stated: "If the Township's sole purpose in setting up the minima was to provide for more costly residences so as to exclude lower or moderate income persons, we would strike down this direct form of economic segregation." *Id.* at 141, 405 A.2d at 389.

29. 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

30. The *Mount Laurel* decision clearly had a substantial impact on *Lionshead Lake* because under *Mount Laurel* the burden is on the municipality to establish that a valid basis exists for minimum living space requirements. *Id.* at 180-81, 336 A.2d at 728. In *Home Builders League v. Township of Berlin*, space requirements were not considered to be valid

to exclusion of low and moderate income housing.

Probably more significant in terms of market limitations than the minimum floor area cases are those dealing with minimum lot sizes. Market limitations become much more severe when lot size is limited to a minimum of two or three acres than when the size of single-family dwellings is limited to no less than 1,200 square feet in usable floor space.

The "minimum" lot size cases are actually *large* lot cases. How big can a local government require a lot to be under the police power? The answer is somewhat surprising. Although there is no true uniformity in the cases, lot minimums of three to five acres have been upheld.³¹ On the other hand, some courts have invalidated smaller lot sizes which they deemed excessive, as bearing no genuine relationship to police power considerations.³² Clearly, the object of much of this large lot zoning, however the arguments in favor of it may be couched, is exclusion—exclusion from certain areas or suburban communities of low, moderate and even middle income people, exclusion of minorities who often fall in the lower or moderate income categories, exclusion of young people who cannot afford to buy into that type of market, and (probably incidentally) exclusion of older people who either want to or have to live in apartments or condominiums. In this situation, more clearly perhaps than in the situation of minimum floor space, zoning can be perceived as being employed intentionally, rather than incidentally, as an exclusionary device.

The exclusionary potential of large lot requirements was recognized in an early case by the Massachusetts Supreme Judicial Court when, in approving a one-acre minimum, it pointed out that

per se, and the court conceded that the ratio of occupants to space can affect health and other considerations. 81 N.J. at 141, 405 A.2d at 389-90. See also 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 63.01 (1974).

31. See, e.g., *Senior v. Zoning Comm'n*, 146 Conn. 531, 153 A.2d 415 (1959)(four-acre minimum upheld); *County Comm'rs of Queen Anne's County v. Miles*, 246 Md. 355, 228 A.2d 450 (1967)(five-acre minimum upheld); *Flora Realty & Inv. Co. v. City of Ladue*, 362 Mo. 1025, 246 S.W.2d 771 (1952), *appeal dismissed*, 344 U.S. 802 (1952)(three-acre minimum upheld); *Fischer v. Township of Bedminster*, 11 N.J. 194, 93 A.2d 378 (1952) (five-acre minimum upheld).

32. See, e.g., *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964)(invalidating 100,000 square foot minimums); *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 (1970)(striking down two and three-acre minimums)(also captioned as *In re Appeal of Kit Mar Builders*); *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959)(invalidating a two-acre minimum).

these restrictions could not be employed to exclude people.³³ A little over twenty years later, the Massachusetts Court invalidated a 100,000 square foot minimum based on the reasoning of the earlier case and because it found no valid relationship between the regulation itself and police power concerns.³⁴ Similarly, in *National Land and Investment Company v. Kohn*,³⁵ the Pennsylvania Supreme Court struck down a four-acre minimum in a suburb which stood in the path of onward urban growth. This case and its reasoning undoubtedly influenced the *Mount Laurel* decision in New Jersey about a decade later.³⁶

These decisions which invalidated large lot zoning were predicated on traditional considerations. The courts did not find these to be reasonable exercises of the police power. As to the plaintiffs, who were landowners or developers,³⁷ these regulations were found to be confiscatory. An important element of proof was the amount by which the value of the land was diminished.³⁸ Obviously, the

33. *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942).

34. *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964).

35. 419 Pa. 504, 215 A.2d 597 (1965)(also captioned and often cited as *National Land and Inv. Co. v. Easttown Township*).

36. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed, cert. denied*, 423 U.S. 808 (1975). *National Land* was influential because it stated that "a zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid." 419 Pa. at 532, 215 A.2d at 612. Thus, a township could not "stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live." *Id.* In the subsequent *Concord Township Appeal*, the same court reaffirmed *National Land* stating that zoning could not be used to "keep out people, rather than make community improvements." 439 Pa. at 474, 268 A.2d at 768. (The necessity of making community improvements to accommodate a growing population is often urged as a reason for exclusionary regulations.)

37. *National Land* involved the developers of an eighty-five acre residential tract entitled "Sweetbriar," which already had one-acre minimum lot sizes and which the township sought to change to four-acre minimums. *Concord Township Appeal*, 439 Pa. 466, 268 A.2d 765 (1970), involved builder-developers.

38. In *National Land* the value of the tract was reduced from \$260,000 to \$175,000 (taking the most optimistic figure). 419 Pa. at 524, 215 A.2d at 608. The same court, however, in a previous case, pointed out in rather strong terms that mere diminution in value of property due to zoning was not enough to invalidate the regulation: "Business operators [believe] that a variance can be justified by an opportunity to make money, or, conversely, that it is an abuse of discretion to deny them the opportunity. Such preoccupation with commerce is not . . . what we mean by a variance or by the kind of hardship that justifies one." *Cresko Zoning Case*, 400 Pa. 467, 471, 162 A.2d 219, 222 (1960). However, the granting of a use variance probably should be scrutinized more severely than zoning requiring excessive lot sizes.

large size of the lots reached a point where the developer could not expect to attract much of a market assuming the size and cost of a house was commensurate with the amount of land being allocated to it. Since the number of lots on which he could build was reduced, the developer's profit margin was severely diminished without any definable public harm being prevented.

Later cases have been predicated more on the ramifications of exclusion relating to population growth, economic discrimination and racial implications. These cases relied on combinations of the exclusionary arguments of the older cases and the civil rights concepts of the mid-1960's to early 1970's. These cases, as in *Mount Laurel*,³⁹ were by and large brought by civil rights groups and minorities alleging discrimination,⁴⁰ and the taking issue was secondary in this line of cases.

The more recent exclusionary zoning cases, including cases involving civil rights arguments, generally stem in one way or another from the problem of urban sprawl and the growth of suburban communities. Some states, such as Missouri, have permitted suburban municipalities to restrict quite rigorously the zoning classifications permitted within the community, even to the point of excluding all uses except single-family residential.⁴¹ These practices, which are prevalent in the St. Louis area, obviously have economic and racial overtones, as the Court of Appeals for the Eighth Circuit recognized in *United States v. City of Black Jack*.⁴² While

39. 67 N.J. 151, 336 A.2d 713 (1975).

40. In *Mount Laurel*, for example, the plaintiffs were (1) residents of the township living in dilapidated or substandard housing who wanted to secure housing advantages elsewhere in the area; (2) former residents who had to move elsewhere due to lack of suitable housing; (3) inner city nonresidents living in substandard housing; and (4) three organizations representing racial minorities. 67 N.J. at 159 n.3, 336 A.2d at 717 n.3. No developer was anywhere to be found as a party plaintiff, although some of the points raised by developers or, at least, expressed by the courts in earlier cases involving exclusion have been utilized in civil cases of this nature.

41. *McDermott v. Village of Calverton Park*, 454 S.W.2d 577 (Mo. Sup. Ct. 1970), *rev'd* *City of Moline Acres v. Heidbreder*, 367 S.W.2d 568 (Mo. Sup. Ct. 1963), as urged by the St. Louis Court of Appeals, which had reluctantly followed *Moline Acres* in *McDermott v. Village of Calverton Park*, 447 S.W.2d 837 (Mo. Ct. App. 1969). The Missouri Supreme Court cited *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955), and *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789 (1957), in support of its position. It expressed some regret that *Moline Acres* had led the Michigan Supreme Court to the opposite view (i.e., invalidation of single-family only classifications) in *Gunderson v. Village of Bingham Farms*, 372 Mich. 352, 126 N.W.2d 715 (1964).

42. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1974).

the federal court of appeals decision in *Black Jack* did not by any means completely override the Missouri Supreme Court's ruling that such zoning is legally permissible, it did erase its application to federally financed housing for persons of low and moderate income. This result is quite clear, in any event, as a result of the decision of the United States Supreme Court in *Village of Arlington Heights v. Metropolitan Development Corp.*⁴³ The Supreme Court rejected the conclusion of the New Jersey Supreme Court in *Mount Laurel* that economic exclusion or discrimination was interdicted by the federal Constitution⁴⁴—a conclusion which New Jersey had reached based on its state constitution.⁴⁵ Further, the Supreme Court rejected the argument of some courts, including (although not expressly) the Eighth Circuit in *Black Jack*, that the discriminatory effect or impact of such zoning violated the Constitution.⁴⁶ Instead, as to such zoning (which existed in a Chicago suburb in much the same manner as in the St. Louis suburbs), the Supreme Court required the showing of discriminatory intent—except as to federally financed public housing projects. It was suggested that lesser proof would be required in the latter situation because of the intent of federal housing and civil rights legislation. The Seventh Circuit, upon reconsideration of the question, arrived at a lesser test for exclusion of such housing projects,⁴⁷ and the

43. 429 U.S. 252 (1977).

44. *Id.* See generally Wright, *Constitutional Rights and Land Use Planning: The New and the Old Reality*, 1977 DUKE L.J. 841 (1978).

45. "It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in Art. I, par. 1 of our Constitution, the requirements of which may be more demanding than those of the federal Constitution." 67 N.J. at 174, 336 A.2d at 725 (footnote omitted).

46. 429 U.S. at 264-65.

47. The case was remanded to the Seventh Circuit to consider whether a showing of something less than discriminatory intent might be sufficient in cases involving the locating of public housing in a municipality zoned solely or primarily for single-family use. The court of appeals concluded that something less than a showing of clear discriminatory intent would suffice because of the public policy and statutory obligation embodied in the Fair Housing Act, 42 U.S.C. § 3601-3631 (1976). *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). The court also concluded that in the case of public housing, zoning could be used in such a way as to preclude construction of low-cost housing. This was interpreted by the district court as meaning that the presence or absence of a discriminatory effect would be decisive. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 469 F.Supp. 836, 842 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980). One major factor bearing upon the question was whether there was other land in Arlington Heights which was zoned to permit federally subsidized housing. If there was no such land, then the Fair Housing Act was deemed to be

Supreme Court tacitly approved.⁴⁸

As a result of these housing cases, an additional problem has been posed by the Eighth Circuit in the most recent of the *Black Jack* cases.⁴⁹ This is the question of whether, having by its action prevented a public housing project which should have been entitled to locate there and having thus in effect destroyed the project, a community should be required to take affirmative steps to correct the situation by taking action which would create such a housing project (or otherwise compensate for its original action). In short, having sinned, should the municipality be forced to expiate its actions by way of restitution? The Eighth Circuit answered affirmatively, and the United States Supreme Court denied certiorari.⁵⁰ This decision is in line with the philosophy of the lower court in *Mount Laurel* and the Seventh Circuit opinion in *Gautreaux v. Chicago Housing Authority*,⁵¹ which apparently envision

violated. The district court decision, cited above, approved an annexation proposal agreed upon between the parties which would provide the necessary land within the boundaries of Arlington Heights.

48. The Supreme Court denied certiorari of the Seventh Circuit's opinion. 434 U.S. 1025 (1978).

49. *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033 (8th Cir. 1979), cert. denied, 445 U.S. 905 (1980).

50. *Id.* This would seem to go beyond the *Arlington Heights* decision.

51. 503 F.2d 930 (7th Cir. 1974)(affirmed in *Hills v. Gautreaux*, 425 U.S. 284 (1976)). The late Justice Tom C. Clark, sitting by assignment, wrote the Seventh Circuit opinion, which sought to fit the housing situation into the mold of affirmative relief in school desegregation and busing cases. He distinguished *Milliken v. Bradley*, 418 U.S. 717 (1974), which had reversed an order requiring consolidation of local school districts in the Detroit area thereby interfering with the functions of local government without proof of a constitutional violation. Justice Clark used *Milliken* as a basis for stating that area-wide solutions in connection with public housing could be required when housing patterns demanded it. In affirming the case, the opinion by Justice Potter Stewart also discusses *Milliken* at some length and reaches the conclusion that the requirement of dispersal of public housing throughout the Chicago area did not involve coercion of units of local government because the Chicago Housing Authority and HUD were authorized to operate outside the city limits and local governmental units were not really affected by such activity.

In *Mount Laurel*, 161 N.J. 317, 319 A.2d 935 (1978), the New Jersey Supreme Court did not require supervision by the lower court of the township's acceptance of its "fair share" of such housing. The case was explicitly followed in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977). Subsequent litigation involved an action alleging failure by the township to alter its zoning in such a manner as to be in compliance. There was intervention by a mobile home developer. The superior court upheld the township's conclusions as to "fair share." *Southern Burlington County NAACP v. Township of Mount Laurel*, 391 A.2d 935 (N.J. Sup. Ct. 1978). See also *Home Builders League v. Township of Berlin*, 81 N.J. 127, 405 A.2d 381 (1979); *Fobe Associates v. Borough of Demarest*, 74 N.J. 519, 379 A.2d 31 (1977); *Pascack Ass'n v. Mayor and Council of Washington*, 74 N.J. 470, 379 A.2d 6 (1977). Compare the *Mount Laurel* case with *Berenson v. Town of New*

court involvement in this process on a scale approximating judicial involvement in the desegregation and school busing decisions.

In any event, one-use zoning provides another basis for potential exclusion except with regard to federal housing projects, and except in New Jersey or in states which adhere to the *Mount Laurel* view or which, as stated, reject the validity of such zoning.⁵² Even in the case of public housing projects, the Supreme Court in *James v. Valtierra*⁵³ and in *City of Eastlake v. Forest City Enterprises*,⁵⁴ provided the constitutional basis to undercut such projects through the device of the referendum. This may be regarded as being in line with the rejection of the economic discrimination and exclusionary effect argument, but it is curiously naive to assume that such referenda do not have socio-economic and, quite probably, racial overtones.⁵⁵

There is another suburban problem other than the desire of homeowners and developers to maintain an attractive, single-family community free, or largely free, from apartments or commercial operations. This is the problem of the suburban community having to accommodate itself to rapid growth along with the concomitant requisite of providing adequate public facilities to serve the growing population. Obviously, extensive single-family zoning eliminates or helps to alleviate the problem in jurisdictions where it is permitted subject to the federal limitations stemming from *Arlington Heights*. The New Jersey Court in *Mount Laurel*, however, took an entirely different view. That court required that the township accept its "fair share" of the population expansion occurring within the general area. The township could not, to paraphrase the Pennsylvania Supreme Court in *National Land*, stand as a barrier in the path of urban growth. While the *Mount Laurel* opinion did not define "fair share" or impose affirmative guidelines, the New Jersey Court has subsequently elaborated on the

Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

52. See *Gunderson v. Village of Bingham Farms*, 372 Mich. 352, 126 N.W.2d 715 (1964); *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427 (1931); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975).

53. 402 U.S. 137 (1971).

54. 426 U.S. 668 (1976).

55. This was pointed out in the dissent by Justice Thurgood Marshall in *James v. Valtierra*, 402 U.S. at 143, in which he was joined by Justices Brennan and Blackmun. The California referendum provision was specifically directed at federally or state financed low income housing.

subject.⁵⁶ Cases of this type have been the primary vehicle utilized to erode or eliminate exclusionary zoning. Courts have also, almost uniformly, pointed out the need for regional or state-wide planning as a means of largely correcting this problem and eliminating the vast majority of these cases.⁵⁷ This is in line with the thinking of practically all of the scholars in this field,⁵⁸ and is in accord with the Model Land Development Code.⁵⁹ It seems obvious that with planning addressing itself to a region which cuts across local governmental boundary lines and even across state lines, the end result could provide adequately for the accommodation of all forms of housing and land uses within the general area. It is the ancient adherence to regulation by each locality without consideration of the condition of nearby or adjoining local governments that produces much of the problem. Courts have at times forced consideration of the impact of a particular action upon adjoining localities.⁶⁰ But only in recent years have some states given attention to the need for planning on a regional or statewide basis,⁶¹ and the continuing conduct of planning and zoning on a local level provides the basis for much of this type of litigation.

The growth-limiting device which has most successfully withstood constitutional attacks relating to exclusion is that involving planned growth controls. This is a timed and sequential form of growth which does not prevent population expansion but limits it to coincide sequentially with a plan for the development of overburdened community facilities. This device was approved by

56. See *Fobe Associates v. Borough of Demarest*, 74 N.J. 519, 379 A.2d 31 (1977); *Pascack Ass'n v. Mayor and Council of Washington*, 74 N.J. 470, 379 A.2d 6 (1977).

57. *Mount Laurel* makes this point, but so do such cases as *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970) and the dissent in *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *appeal dismissed*, 409 U.S. 1003 (1972).

58. See, e.g., Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. Pa. L. Rev. 515 (1957); Hagman, *Regionalized-Decentralism: A Model for Rapprochement in Los Angeles*, 58 GEO. L.J. 901 (1970); Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1 (1971).

59. MODEL LAND DEVELOPMENT CODE § 7-201 (allowing a state land planning agency to designate areas of critical state concern), §§ 7-301 to 7-305 (attempting to deal with some regional concerns).

60. *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954). (Dumont was not permitted to rezone in disregard to the impact upon adjoining boroughs). See also *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968) (granting standing to a local government in New Jersey to sue in federal court with respect to rezoning action taken by an adjoining New York municipality).

61. E.g., HAWAII REV. STAT. §§ 205-1 to 205-37 (1976); MINN. STAT. ANN. §§ 462.381 to 396 (West Supp. 1981); VT. STAT. ANN. tit. 10, §§ 6001-6091 (1973).

the New York Court of Appeals in *Golden v. Planning Board*⁶² and subsequently by the Ninth Circuit in *Construction Industry Association v. City of Petaluma*.⁶³ Not every such scheme will meet with court approval.⁶⁴ There are at least five basic requisites for approval: (1) the plan must be preceded by an extensive study relating to the intensity of population influx and housing demand, the effect of the same upon such public facilities as schools, firefighting units, parks and recreational facilities, the water and sewer system, police protection, traffic and street capacity, and the general ability of the city to cope from a planning standpoint; (2) the study must result in a plan which attempts to deal with the needs and concerns addressed by the study, but which is aimed toward providing the necessary facilities over a reasonable period of time and which limits population influx only as necessary to comply with a carefully conceived plan; (3) the undertaking must not be a "pie in the sky" proposal but must have the necessary financial support and commitment to make it function; (4) there must be "escape valves" or "safety hatches" through which developers or landowners may either obtain such special exceptions as may seem appropriate or may achieve compliance in some other way, as by personal financial commitments; and (5) population growth may not be halted and must be permitted to continue on a reasonable basis in conjunction with the plan. The cases approving devices of this type reject on the one hand the idea that such plans interfere with the right to travel or move from place to place,⁶⁵ and they implicitly reject the argument that growth can be prevented if local facilities are overburdened. The clear meaning is that subur-

62. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

63. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

64. Such plans cannot directly infringe upon the right to travel unhindered from state to state. *Edwards v. California*, 314 U.S. 160 (1941). *Cf.* *Associated Home Builders v. City of Livermore*, 18 Cal.3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (ordinance upheld). Moreover, both the New York Court of Appeals and the federal Ninth Circuit make it clear that such plans cannot amount to cleverly disguised schemes intended to exclude newcomers. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152; *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d at 906. *Compare* *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal. App. 2d 271, 63 Cal. Rptr. 889 (1967), which dealt with a plan which seems patently to be a scheme to limit growth severely, but which did not involve an area experiencing a rapid influx of population or a town in the path of outward urban growth.

65. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Edwards v. California*, 314 U.S. 160 (1941).

ban communities in the path of rapid expansion cannot prevent population influx, but they can reasonably regulate it. This device obviously takes into account regional problems, but the end result is to sanction a constitutionally limited, although seemingly reasonable, power of exclusion.

The foregoing exemplifies both the acceptance of exclusion and the attacks upon exclusion based upon (a) the fundamental concept that if a regulation is unreasonable, arbitrary and capricious, and amounts to a taking, then it is invalid; and (b) more recent arguments relating to constitutional questions such as racial discrimination and, with not the same degree of acceptance, economic discrimination. But the discussion would be incomplete without pointing out that certain uses have traditionally been preferred while others have been viewed essentially as nuisance-like in character. Ever since *Euclid*, the preferred and most protected use has been the single-family classification—a point that was reinforced in more recent years by the Supreme Court decision in *Village of Belle Terre v. Boraas*⁶⁶ and, if anything, was strengthened rather than weakened by a subsequent five-to-four Supreme Court decision invalidating an incredibly narrow and defective “single family” definition.⁶⁷ The felt need of the Court in *Euclid* to protect the single-family neighborhood from apartment houses was later manifested in the mobile home cases.⁶⁸ While more recent court decisions have tended to recognize the need to make provision for the use of mobile homes,⁶⁹ it would be foolish not to recognize that

66. 416 U.S. 1 (1974).

67. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977). Under this ridiculous ordinance, the word “family” was so rigidly circumscribed that some persons related by blood could not live together. Here, it was a crime for a grandmother to live with her grandson because his uncle and cousin lived there. An adult brother and sister could not share a household. The most noteworthy aspect of the case is that four Justices of the United States Supreme Court would have upheld an ordinance that should have failed on the basis of patent stupidity and irrelevancy to the police power prior even to arriving at other constitutional considerations. *Id.* at 521 (Burger, J., dissenting); *id.* at 531 (Stewart, J., joined by Rehnquist, J., dissenting); *id.* at 541 (White, J., dissenting).

68. One of the most obvious examples is the well-known case of *Vickers v. Township Comm. of Gloucester Township*, 37 N.J. 232, 181 A.2d 129, *appeal dismissed, cert. denied*, 371 U.S. 233 (1962), although the case is known principally for the dissent of Justice Hall, who later wrote the majority opinion in *Mount Laurel*. An opposite result to *Vickers*, and a more modern view of mobile homes, is found in *Town of Gloucester v. Olivo's Mobile Home Court*, 111 R.I. 120, 300 A.2d 465 (1973), where the court stated that today one out of every five new dwellings is a mobile home and that such parks can no longer be viewed as gathering places for nomads.

69. See *Town of Gloucester v. Olivo's Mobile Home Court*, 111 R.I. 120, 300 A.2d 465

this is a form of residential use that will be permitted, if at all, in the least desirable of residential zones and possibly in lower zones.

This patchwork of exclusion is readily illustrated by several other examples. Churches, for example, are viewed by some courts as not being subject to exclusion *at all* from residential areas on the ground that this would violate the First Amendment to the federal Constitution.⁷⁰ Other ordinances would permit churches as conditional uses in such areas⁷¹ or permit churches to be excluded where residential use is itself restricted and there are other satisfactory locations available for them in the area.⁷² The problem of how to deal with churches stems from the fact that some modern churches are huge conglomerations of churches, parish or recreational halls, gyms or athletic and recreational facilities and grounds, and parish schools. Thus, the potential impact of a "church" upon a neighborhood may be greater than that of some quiet commercial operations. Yet churches have always occupied a favored status. The same may be said for schools⁷³ and for historic

(1973); see also *Oak Forest Mobile Home Park v. City of Oak Forest*, 27 Ill. App. 3d 303, 326 N.E.2d 473 (1975) (ordinance held void where it prohibited trailer parks anywhere within the city); *Nickola v. Township of Grand Blanc*, 394 Mich. 589, 232 N.W.2d 604 (1975); *Smookler v. Township of Wheatfield*, 394 Mich. 574, 232 N.W.2d 616 (1975); *Sabo v. Township of Monroe*, 394 Mich. 531, 232 N.W.2d 584 (1975); *Green v. Township of Lima*, 40 Mich. App. 655, 199 N.W.2d 243 (1972); *Meyers v. Board of Supervisors*, 394 A.2d 669 (Com. Ct. Pa. 1978); *Board of Supervisors v. Barness*, 382 A.2d 140 (Com. Ct. Pa. 1978); *Nicholas, Heim & Kissinger v. Township of Harris*, 375 A.2d 1383 (Pa. Commw. Ct. 1977). Compare *Clackamas County v. Ague*, 27 Or. App. 515, 556 P.2d 1386 (1976) with *Columbia County v. Kelly*, 548 P.2d 163 (Ct. App. Or. 1976) (nuisance allegations with respect to mobile homes).

70. See *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W.2d 415 (1944). "To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community, and to relegate them to business and manufacturing districts could conceivably result in imposing a burden upon the free right to worship and, in some instances, in prohibiting altogether the exercise of that right. An ordinance fraught with that danger will not be enforced." *Id.* at 119, 183 S.W.2d at 417. *State ex rel. Synod v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942). "We seriously question the constitutionality of any enactment that seeks flatly to prohibit the erection of churches in residential districts." *Id.* at 240, 39 N.E.2d at 520. See also *Board of Zoning Appeals v. Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954).

71. See, e.g., *West Hartford Methodist Church v. Zoning Bd. of Appeals*, 143 Conn. 263, 121 A.2d 640 (1956); *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Or. 281, 330 P.2d 5 (1958); *State ex rel. Lake Dr. Baptist Church v. Village of Bayside*, 12 Wis. 585, 108 N.W.2d 288 (1961).

72. See, e.g., *Miami Beach United Lutheran Church v. City of Miami Beach*, 82 So. 2d 880 (Fla. 1955).

73. Compare *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal. 2d 325, 289 P.2d 438 (1955), and *Langbein v. Board of Zoning Appeals*, 135 Conn. 575, 67 A.2d 5 (1949),

landmarks. Historic preservation districts involve a form of exclusion throughout a substantial area.⁷⁴

On the other hand, such uses as funeral homes, guidance centers for the rehabilitation of criminal offenders, fraternities or clubs, and various types of homes or schools for juvenile delinquents or the mentally retarded are viewed as non-preferred uses or even as nuisances which should be eliminated from residential areas.⁷⁵ In the case of funeral homes, they are customarily regarded as nuisances in residential or predominantly residential areas.⁷⁶ Whether the courts say so or not, these other uses are viewed as having nuisance-like characteristics. Be that as it may, these are also illustrations of judicial acceptance of the concept of exclusion as well as the basic, underlying rationale. The device is an inextricable part of the fabric of planning and zoning.

with *Chicago v. Sachs*, 1 Ill. 2d 342, 115 N.E.2d 762 (1953), and *State ex rel. Wisconsin Lutheran High School Conf. v. Sinar*, 267 Wis. 91, 65 N.W.2d 43, *appeal dismissed*, 349 U.S. 913 (1954). While these cases illustrate different approaches taken by the courts to different types of schools (e.g., public versus private, pre-kindergarten school versus grade school or high school), the ordinances involved all illustrate the favored status of schools.

74. Laws preserving historic or cultural districts have generally been upheld. *City of New Orleans v. Levy*, 223 La. 14, 64 So. 2d 798 (1953), and *City of New Orleans v. Pergament*, 198 La. 852, 5 So. 2d 129 (1941) (the Vieux Carre); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 563 (1955) (Beacon Hill); *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N.E.2d 557 (1955) (Nantucket); *City of Santa Fe v. Gamble-Skogmo*, 73 N.M. 410, 389 P.2d 13 (1964) (Old Santa Fe). A somewhat unique case, *Rebman v. City of Springfield*, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969), created a four-block historic district to preserve and protect only one structure—Lincoln's home. The effect of these cases is to control the architecture and appearance of a substantial area and prevent discordant land uses.

75. See, e.g., *Powell v. Taylor*, 222 Ark. 896, 263 S.W.2d 906 (1954) (funeral home); *Fraser v. Fred Parker Funeral Home*, 201 S.C. 88, 21 S.E.2d 577 (1942) (funeral home); *Arkansas Release Guidance Foundation v. Needler*, 252 Ark. 194, 477 S.W.2d 821 (1972) ("half-way house"); *City of Schenectady v. Alumni Ass'n of Union Chapter*, 5 A.D.2d 14, 168 N.Y.S.2d 754 (1957) (23 members of *fraternity* held not to constitute a single family unit); *Wiltwyck School for Boys v. Hill*, 14 A.D.2d 198, 219 N.Y.S.2d 161 (1961) (school for delinquent or emotionally disturbed boys found to have potential for rehabilitation was prohibited in an area allowing private, parochial and public schools); but see *State ex rel. Cunningham v. Feezell*, 218 Tenn. 17, 400 S.W.2d 716 (1966) (crematorium not a nuisance in sparsely settled area); *Nicholson v. Connecticut Half-way House*, 153 Conn. 507, 218 A.2d 383 (1966) (half-way house not a nuisance); *Laporte v. City of New Rochelle*, 2 N.Y.2d 921, 141 N.E.2d 917, 161 N.Y.S.2d 886 (1957) (60 student members of a religious order occupying a Roman Catholic college building were single family unit).

76. See *Powell v. Taylor*, 222 Ark. 896, 263 S.W.2d 906 (1954); *Fraser v. Fred Parker Funeral Home*, 201 S.C. 88, 21 S.E.2d 577 (1942).

II. Exclusion as a Taking: Approaches and Viewpoints

If planning and its necessary handmaiden, zoning, are based largely on the power to exclude, then the essential question is how far that power extends before it constitutes confiscation of property. This taking issue is the traditional problem and remains of more immediacy in the vast majority of cases than the individual civil rights issues which arose in such cases as *Arlington Heights*,⁷⁷ *Mount Laurel*,⁷⁸ *Black Jack*,⁷⁹ *Gautreaux*,⁸⁰ and in a somewhat different context, *Petaluma*.⁸¹

A. The Traditional Conflict

It has been observed that nineteenth century America, for all of its emphasis on the rights which inhere in the ownership of property, was somewhat liberal in court interpretations of the limits of the police power.⁸² This is illustrated by a number of state court cases predating the Civil War and by the Supreme Court decision in *Mugler v. Kansas*,⁸³ mentioned earlier. This line of cases seemed to indicate that nothing less than a physical taking of property was required before the courts would invalidate statutes or ordinances based on the police power.⁸⁴

An exception to this line of cases is the opinion of Justice Holmes in *Rideout v. Knox*,⁸⁵ rendered while he was a justice of the Massachusetts Supreme Judicial Court. This case might be said to have presaged his viewpoint in *Pennsylvania Coal Co. v. Mahon*,⁸⁶ in which the Supreme Court concluded that if police power regulation was carried too far, it could constitute a taking.

77. *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252 (1977).

78. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 423 U.S. 808 (1975).

79. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1974).

80. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

81. *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

82. *See generally* F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 106-23 (1973).

83. 123 U.S. 623 (1887).

84. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 82.

85. 148 Mass. 368, 19 N.E. 390 (1889).

86. 260 U.S. 393 (1922).

This case was decided four years prior to *Euclid* and should be read in conjunction with *Nectow v. City of Cambridge*,⁸⁷ which followed shortly after *Euclid*. Taken together, they tell us this: Under *Euclid*, comprehensive zoning is deemed to be a valid exercise of the police power; under *Pennsylvania Coal*, the lengths to which a police power regulation may go until it constitutes a taking is a matter to be decided on a case-by-case basis because it depends on the particular facts involved; and under *Nectow*, a zoning ordinance which is so arbitrary as to amount to a taking is invalid as to that particular piece of property. This is basically the approach which has prevailed over the past fifty years or more.

Of the cases which form this equation, the most exasperating one to a number of scholars is *Pennsylvania Coal*.⁸⁸ Anyone seeking guidelines or any degree of certainty in determining when a police power regulation goes so far in its exclusionary aspects as to amount to a confiscation of property or an arbitrary and unreasonable diminution in value cannot find it in that case. He must instead argue by analogy from other cases or seize upon the comments of other courts. In the pursuit of elusive guidelines, scholars have periodically attempted to identify criteria which may be useful in predicting or determining the result.⁸⁹ Despite the lamentations of those seeking some more definite determinant of the question, this is about all that can be done under the state of the law now and in the foreseeable future. With that in mind, it is appropriate to categorize the identifiable criteria and provide some educated assessment of the relative importance or weight to be accorded to these considerations.

1. Market Value

In the best of all possible worlds, as viewed through the eyes of developers, the use of land would be at least as unfettered as it is in Houston, which has no comprehensive zoning. To some developers, it would be a blessing if the views of Mikhail Bakunin⁹⁰ rela-

87. 277 U.S. 183 (1928).

88. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 82, probably launched the most extensive attack of anyone.

89. See, e.g., Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

90. Bakunin was an influential anarchist of the nineteenth century who opposed Marxism but had no well-defined philosophy of government. 2 ENCYCLOPEDIA BRITANNICA

tive to organized society could at least be superimposed upon the police power. Then, a hamburger heaven or a pizza palace or a Colonel Chicken could blossom at will amidst costly single-family homes, expensive condominiums and country clubs. The market value would rule. If the "highest and best use" (a term which real estate interests translate from the law of eminent domain to apply to land use regulations in applicable situations) were to govern, then planning and zoning would be negated.⁹¹ Of course, a long line of case law points out that the mere fact that the landowner cannot obtain the most profit from his land is no basis for changing or invalidating the zoning classification.⁹² The question is whether the regulation is so arbitrary as to severely diminish the value or greatly impair the owner's ability to make reasonable use of the property. If the owner were unable to make use or reasonable use of the land, it would be invalidated as a taking.⁹³ While that is quite clear, it should be recognized that there are other cases which invalidate the regulation where the loss in value due to the regulation is deemed to be excessive or severe.⁹⁴ In this latter line of cases, the courts usually also find that there is little or no countervailing public need to be served as a result of the regulation.⁹⁵ Consequently, unless the ordinance vitiates any potential land use or renders the land potentially worthless as a result of the regulation, the end result of a substantial lessening in value must be viewed concomitantly with other factors. While those who prefer certitude or a litmus paper approach to the law may not like this, it would seem to be unavoidable. The law is after all a social

607 (15th ed. 1978).

91. Cf. Van Alstyne, *supra* note 89, at 36-37.

92. Cresko Zoning Case, 400 Pa. 467, 162 A.2d 219 (1960), points this out quite candidly in a case involving a variance. But Justice Sutherland's majority opinion in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, also rejects an argument that the market value for industrial use of certain land is about \$10,000 per acre while the market value for residential purposes is not more than \$2,500 per acre. *Id.* at 384. See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

93. This was the basis of *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), which followed on the heels of *Euclid*. See also *Hamer v. Town of Ross*, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963); *Chicago Title & Trust Co. v. Village of Wilmette*, 27 Ill. 2d 116, 188 N.E.2d 33 (1963); *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938).

94. See, e.g., *National Land and Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965) (the diminution caused by four-acre lot minimums reduced the value of the total land package from \$260,000 to \$175,000).

95. *Id.* See also *Duggan v. Cook County*, 60 Ill. 2d 107, 324 N.E.2d 406 (1975); *Langguth v. Village of Mount Prospect*, 5 Ill.2d 49, 124 N.E.2d 879 (1955).

process, not an exact science like chemistry.

Interrelated with this consideration, obviously, is the propriety of the existing zoning. The comprehensive plan for the area may no longer conform to the zoning and thus a rezoning of some kind would be appropriate.⁹⁶ This, of course, does not mean that the proposal of the landowner or developer would necessarily be appropriate. He might want to build a supermarket or a shopping center when an apartment or condominium development or a classification for neighborhood offices and small shops would be more suitable. It does mean, however, that the existing zoning might be incompatible with nearby uses and might be subject to invalidation on that basis.

2. *Public Harm and Public Benefit*

A case which thoughtfully illustrates these considerations is *Just v. Marinette County*,⁹⁷ in which the Wisconsin Supreme Court upheld a shoreland zoning statute and regulations pertaining thereto with respect to inland waterways. The effect of the statute was to require counties to adopt shoreland zoning ordinances which were subject to approval by a state agency. If a county did not enact an ordinance, the same state agency would provide it with one. The purpose was to protect the state's navigable waters and the rights of the public in these waters from deterioration due to uncontrolled shoreland development. The result of the Marinette County ordinance was to prevent the plaintiff from utilizing fill-dirt to convert a marshy area into land on which structures could be built. The basic issue was whether the restrictions on such wetlands amounted to a taking. The Wisconsin Court stated the issue in this way:

[I]t is a conflict between the public interest in stopping the despoliation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes. The protection of public rights may be accomplished by the exercise of the police power

96. While consideration of the surrounding area is an essential factor, *Duggan v. Cook County*, 60 Ill. 2d 107, 324 N.E.2d 406 (1975), Maryland evolved a peculiar rule to the effect that a zoning amendment was only appropriate when there had been a mistake in the original enactment or a sufficient physical and use change in the immediate area. *Finney v. Halle*, 241 Md. 224, 216 A.2d 530 (1966); see 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* §§ 6.06, 32.01 (1975).

97. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

unless the damage to the property owner is too great and amounts to a confiscation. The securing or taking of a benefit not presently enjoyed by the public for its use is obtained by the government through its power of eminent domain. . . . In the valid exercise of the police power reasonably restricting the use of property, the damage suffered by the owner is said to be incidental. However, where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense.⁹⁸

In further developing this line of thought, the court adopted a test employed many years before by Professor Ernst Freund who differentiated eminent domain and the police power in this manner: "the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful."⁹⁹ Thus, compensation is given for losses stemming from acquisition of a benefit not previously belonging to the public; and compensation is denied when the police power is employed to prevent a public harm.¹⁰⁰ Freund seemed not to be bothered by the taking question, if his language is accepted literally. Both were a kind of taking in the sense that certain rights were lost. But compensation was given only for acquisition of the property itself or of rights in the property. Preventing substantial public harm was noncompensable. Following this thinking, the Wisconsin court concluded that the state had a duty to prevent pollution of navigable streams, which amounted to the prevention of a public harm rather than the acquisition of rights not previously owned by the

98. *Id.* at 14-15, 201 N.W.2d at 767.

99. *Id.* (citation omitted).

100. Van Alstyne, *supra* note 89, in an article which predated *Just*, comments on this phenomenon: "Viewed in this way, the 'confiscation' theory emerges as a conventional balancing concept, with the variables of private loss and public benefit being weighed on the judicial scales. . . . [A] holding of invalidity is most likely when both variables tend to favor that result: 'If the gain to the public is small, from rezoning real estate, and the hardship to the owner is great, no valid reason exists for the exercise of such police power.' On the other hand, if the scales are not tipped in favor of invalidity in the manner just described, even a very substantial private loss may still be regarded by the courts as insufficient to justify invalidating an otherwise reasonable legislative judgment." *Id.* at 39 (citation omitted). In a case subsequent to *Just*, the Illinois Supreme Court listed as a factor to be considered the relative gain to the public as opposed to the hardship suffered by the property owner. *Duggan v. Cook County*, 60 Ill. 2d 107, 324 N.E.2d 406 (1975).

state.¹⁰¹

Just represents a rather uncommon effort on the part of a court to explain the rationale underlying the valid exercise of the police power. Scholars generally have found it necessary to probe collections of cases which *seem* to say something, which can be encapsulated in turn to shed some light on the question. In an article written prior to the *Just* decision, Professor Arvo Van Alstyne spoke of "governmental asset enhancement" as being an improper public objective.¹⁰² Thus, a regulation which limited a landowner to having certain property designated for use as a park, playground or school would not be appropriate.¹⁰³ Even where this action was a prelude to some indefinite future condemnation, it would not suffice to overcome the burden imposed upon private property. Even in situations in which public controls on land use attempt to address a particular public problem and in which a clear public interest is involved, the regulation must be sufficiently limited and narrowly enough defined that the courts do not feel that the regulation is excessive. Some of the better known floodplain cases are illustrative of this,¹⁰⁴ and in the *Just* case, the Wisconsin court went to some effort to distinguish these cases.

Obviously, what is involved in many of these cases is a balancing process involving the value judgments both of state and local governments on the one hand and the courts on the other. The importance to the public of averting some perceived harm clearly affects the outcome. The Wisconsin shoreland legislation and the case approving it came in a period in which there was a strong national preoccupation with problems relating to ecology and the environment. Although those sentiments remain, environmental concerns might not have quite as exalted a status today if pitted against public concerns relating to energy. The public harm to be

101. It would seem, however, that as the discussion under the preceding note indicates, we are still speaking of a process of weighing variables. The public harm to be prevented must be quite substantial unless the private loss is relatively small. Further, if the harm to be prevented is relatively insubstantial, but the private loss suffered is quite great, then the regulation would be unreasonable. In that situation, to follow Freund's analysis, it would seem that a public benefit was being acquired.

102. Van Alstyne, *supra* note 89, at 23.

103. *Id.*

104. See, e.g., *Dooley v. Town Planning & 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 (1963).

prevented as contrasted to the acquisition of a public benefit is something which may ebb and flow depending upon the particular situation or the felt needs of a given time. Moreover, as cases involving airports and airport zoning illustrate, judicial attitudes or value judgments may differ from those of legislative bodies or public agencies.¹⁰⁵

What this means also is that courts do not necessarily do what they purport to do. This comes as no revelation to lawyers, but it is unusually apparent in the regulation of land use. The majority of courts accord to zoning a *legislative* presumption—*i.e.*, the action will be sustained unless the governmental body acted in an arbitrary, capricious and unreasonable manner in doing or refusing to do what it did.¹⁰⁶ Some courts in recent years have recognized that this is nonsense.¹⁰⁷ When the issue involves a rezoning application or some administrative relief, as opposed to a comprehensive rezoning or a new zoning ordinance, the property involved almost invariably is a rather limited parcel of land. The action is an *ad hoc* administrative or quasi-judicial act which usually has little or nothing to do with broad public policy considerations. But if the action taken is given the benefit of the legislative presumption, as most courts purport to do, then the action taken must be judicially approved unless it is confiscatory or patently stupid and obviously erroneous. Courts in purporting to follow this principle have stated that if there is any room for doubt, the legislative presumption requires approval of the governmental action. But no one involved in this field can believe very seriously that courts do this in fact, and there is considerable doubt that they should. Abuses at the local

105. See, *e.g.*, *Jankovich v. Indiana Toll Rd. Comm'n*, 379 U.S. 487 (1965); *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964); *Yara Eng'r Corp. v. City of Newark*, 132 N.J.L. 370, 40 A.2d 559 (1945); see also R. WRIGHT, *THE LAW OF AIRSPACE* 192-93 (1968).

106. See *City of Phoenix v. Beall*, 22 Ariz. App. 141, 524 P.2d 1314 (1974); *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974).

107. In *South Gwinnett Venture v. Pruitt*, 482 F.2d 389 (5th Cir. 1973), *cert. denied*, 416 U.S. 901 (1974), the Fifth Circuit distinguished the adoption of a comprehensive plan or the original zoning ordinance from the process of rezoning, which amounted to administrative action. The concurring opinion in *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974), argued that rezoning was an *ad hoc* administrative process. *Id.* at 164, 215 N.W.2d at 190 (Levin, J., concurring). A leading case is *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973), in which the Oregon Supreme Court recognized that although most jurisdictions accord zoning and rezoning the legislative presumption, rezoning is actually something of a judicial process. See also *Chrobuck v. Snohomish County*, 78 Wash. 2d 858, 480 P.2d 489 (1971).

level, where developers and real estate interests overwhelm local officials and generally ravage the public interest, have led some courts to abandon the legislative presumption and point up the foolishness of its application.¹⁰⁸ But other courts which purport to follow the presumption have little difficulty in finding an action to be arbitrary and unreasonable if it offends values which they feel to be of higher priority. Thus, it is not difficult for a "property oriented" court, for example, to find an action to be arbitrary or confiscatory if it offends that particular court's attitude toward land use regulations.¹⁰⁹ Another obvious example is found in cases involving aesthetics. There is a marked difference in viewpoint between the expression of Justice William O. Douglas in *Berman v. Parker*¹¹⁰ (and the statements of other courts which adhere to the same view)¹¹¹ and the general rule that while aesthetic considerations may be taken into account, police power regulations cannot be grounded solely upon aesthetic considerations.¹¹² Judicial attitudes become even more apparent when one contrasts the general rule on aesthetic considerations with the cases which have almost uniformly upheld historic and cultural preservation ordinances.¹¹³ If aesthetics cannot stand alone as a valid objective of the police power, it must be pondered whether preservation of an historic district is somehow less aesthetic than the preservation or improvement of the general urban environment.

Clearly, then, terminology such as "public harm" to be prevented or "public benefit" to be acquired depends in its application upon the problems and circumstances of the times and the values or attitudes of those who pass judgment.

108. *Fritts v. City of Ashland*, 348 S.W.2d 712 (Ky. Ct. App. 1961); *Lowe v. City of Missoula*, 165 Mont. 38, 525 P.2d 551 (1974); and cases cited note 107 *supra*.

109. This illustrates the problem with courts engaging in what might generally be called "judicial zoning." For one state's experience, see Gitelman, *Judicial Review of Zoning in Arkansas*, 23 ARK. L. REV. 22 (1969). In invalidating zoning regulations, the Arkansas court often resorts to the hyperbole of the Arkansas Constitution: "The right of property is before and higher than any other constitutional sanction." ARK. CONST. art. 2, § 22.

110. 348 U.S. 26 (1954).

111. See *State v. Diamond Motors*, 50 Hawaii 33, 429 P.2d 825 (1967); *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965).

112. See *Mayor & City Council of Baltimore v. Mano Swartz*, 268 Md. 79, 299 A.2d 828 (1973); *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *Farley v. Graney*, 146 W. Va. 22, 119 S.E.2d 833 (1960).

113. See cases cited at note 74 *supra*.

3. *The Interests of Other Landowners*

It is an oversimplification from a practical standpoint to speak only in terms of the public interest or of the interest of one landowner as opposed to the public interest. Theoretically, this is all that is involved. The interests and views of neighboring landowners are taken into account in considering the interests of the public and the conformity of the action taken in relation to the plan of development in the area involved. But no one who has ever had much experience with these matters as they operate on the local level believes that the process is that simple.¹¹⁴ Therefore, unless we are to ignore reality, we must recognize that neighboring landowners affect the outcome and thereby form part of the equation.

Scholars have written, from time to time, on the effect that neighboring landowners have on the zoning or rezoning process.¹¹⁵ Without replowing that ground extensively, it should suffice to say that when a substantial number of people protest a proposal it is far more likely to be denied either at the planning commission level or city council level, or both, than is the case if no one objects. This is particularly true at the city legislative level, which is generally more politically oriented than the planning commission. Nor should it be assumed that this factor is lost on courts. It is not unusual for an appellate court to comment on whether the neighboring property owners protested or not and, if they did, the numbers involved.¹¹⁶ If politics can be set aside (or to the extent that that is possible), the unarticulated theory seems to be something like this: (a) many property owners protested, and therefore, since they view their property as being harmed, this proposal may be deemed to be detrimental to the public generally and approval of it would be arbitrary and unreasonable; or (b) no one protested, and therefore, since no one in the area thought his property was affected, this proposal may be deemed to be appropriate in terms

114. The author has for several years served as a member and now vice-chairman of the City of Little Rock Planning Commission and as chairman of its Zoning Committee.

115. See Gitelman, *The Role of the Neighbors in Zoning Cases*, 28 ARK. L. REV. 221 (1975).

116. See, e.g., *Bartram v. Zoning Comm'n*, 136 Conn. 89, 68 A.2d 308 (1949); *Cresko Zoning Case*, 400 Pa. 467, 162 A.2d 219 (1960); *Application of Devereaux Foundation, Inc.*, 351 Pa. 478, 41 A.2d 744, *appeal dismissed*, 326 U.S. 686 (1945); see also the Arkansas cases cited in Gitelman, note 115 *supra*, particularly *Olsen v. City of Little Rock*, 241 Ark. 155, 406 S.W.2d 706 (1966) (no neighbors protested) and *City of Jonesboro v. Arnold*, 255 Ark. 939, 504 S.W.2d 351 (1974) (no protests).

of the public interest and denial of it would be arbitrary and unreasonable.

From a legal standpoint, this is nonsense. If someone owns land which cannot be developed under the existing zoning, the desire of the neighboring landowners to retain it as open space cannot be honored no matter how many people object to a different classification. What the neighbors want in that situation is obviously arbitrary, unreasonable and confiscatory. On the contrary, merely because no one objects to a proposal does not render it irrational to deny rezoning or administrative relief if it would in fact violate the comprehensive plan for the area or have adverse effects on the neighborhood.

Why, then, should we concern ourselves at all with this consideration? Obviously, if it *does* affect the outcome, then past or present scholarly preaching cannot excise it. It is what might be called a legally invalid consideration which acquires its validity from the fact that it influences the result. It is an otherwise illegitimate consideration, legitimated by its effect. To the extent that it has any legitimacy, it would have to stem either from the facts produced by protesting neighbors or from a judicial assumption or inference that if so many people believe they are being harmed, then perhaps they are.¹¹⁷

4. *Facts Specifically Related to the Property*

This final consideration is actually interrelated with the first one on market value. If the property in question is not suitable for the use for which it is zoned, this will obviously diminish the market value substantially and probably cause a denial of rezoning to be viewed as arbitrary. Some writers, however, deal with this as a separate question.¹¹⁸ It would seem to be merely another facet which bears upon the market value.

Another factor which bears upon market value also, but which

117. Would not this cast some doubt as to the validity of referendums, which only arise when a number of people (even though relatively small) are sufficiently aroused, thereby causing other voters who are unschooled in the issues or the comprehensive plan to vote against the challenged action of the city? Yet referendums seem to occupy an unreasonable and unjustified judicial sanctity. See *James v. Valtierra*, 402 U.S. 137 (1971); *Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors*, 108 Ariz. 449, 501 P.2d 391 (1972).

118. See P. ROHAN, *ZONING AND LAND USE CONTROLS* §1.05[1], 1-85 (1978).

is sometimes treated separately,¹¹⁹ is the zoning classification and the land use pattern in the immediate area. The reasonableness of the application may well hinge on this factor, and courts properly give it substantial weight. One major problem which arises in considering this question is whether the rezoning of an exterior lot will result in a domino-like effect with regard to other property, as where the incursion of a commercial zone across a primary or arterial street would result in the ultimate deterioration of a settled residential area. Courts are often inclined to deny the rezoning request in such situations in spite of the economic consequences to the exterior landowners.¹²⁰ On the other hand, if the surrounding area has changed substantially since the original zoning classification, the shift in its nature may mandate rezoning.¹²¹

A further factor which bears upon the reasonableness of the request relates directly to the parcel itself. If it has remained undeveloped for many years while the balance of the area has developed or has grown in a manner incompatible with the vacant property, then this may be viewed as at least some evidence that the existing zoning is improper.¹²² It is simply one factor, of course, since there may be other reasons for the nondevelopment of the parcel.

Although these considerations all bear upon the question of market value, in one way or another, any one of them might affect the reasonableness of the decision, and thus the taking issue, without regard to the effect of the classification on market value.

Finally, aside from the state of development of the property or its relation to other property in the area, there is the question of the economic effect of publicly imposed conditions, independent of zoning, which affect the feasibility of development. A subdivision developer may find no problem with a single-family zoning classification because that is in accord with his plans. However, there are additional costs which will coincide with the development as a result of what are commonly called "subdivision exactions." The development of the law pertaining to subdivision exactions has been

119. *Id.*

120. See *Board of County Comm'rs v. Farr*, 242 Md. 315, 218 A.2d 923 (1966); *Wrigley Properties v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963); *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954).

121. See *Bartram v. Zoning Comm'n*, 136 Conn. 89, 68 A.2d 308 (1949).

122. See *LaSalle Nat'l Bank v. County of Cook*, 60 Ill. App. 2d 39, 208 N.E.2d 430 (1965).

a creeping process. No one would think very much today about a requirement that streets in a subdivision be paved, curbed and guttered or that adequate water and sewer facilities be provided—but these are examples of older forms of subdivision exactions.¹²³ Both the older forms and more recent nuances are predicated on the idea that this is the price that the developer pays to have his plat approved and recorded and to receive the benefits and services of being part of the municipal corporation.¹²⁴ The developers, of course, simply pass the added costs along to the land purchasers or home buyers and take pleasure in the general attractiveness and utility of the development. In more recent years, however, the exactions have become more costly and less directly related to such fundamental needs as the movement of traffic, water and whatever passes through a sewer. Some ordinances have required that the developer provide land for open space, parks, playgrounds or schools, or, in lieu thereof, pay a fixed amount of money to the city for the purpose of defraying the ultimate cost of such public facilities which might be attributable to increased population growth resulting from the subdivision. Courts have both approved¹²⁵ and invalidated¹²⁶ such requirements. The law regarding when such requirements go so far as to be deemed arbitrary and unreasonable or to constitute a taking, however, is still developing and unsettled.¹²⁷ Consider the following:

(a) A subdivision of any size increases traffic substantially in its general area and places an added burden on the city with re-

123. See, e.g., *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); *Allen v. Stockwell*, 210 Mich. 488, 178 N.W. 27 (1920); *Mefford v. City of Tulare*, 102 Cal. App. 2d 919, 228 P.2d 847 (1951).

124. See, e.g., *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

125. See *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442, *appeal dismissed*, 385 U.S. 4 (1966).

126. See *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); *Coronado Dev. Co. v. City of McPherson*, 189 Kan. 174, 368 P.2d 51 (1962). See also *Divan Builders v. Planning Bd.*, 66 N.J. 582, 334 A.2d 30 (1975).

127. The test applied in *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961), and adopted in *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442, *appeal dismissed*, 385 U.S. 4 (1966), was whether (assuming the power was within the legislative authority given local governments by statute or otherwise) the burden placed upon the subdivider was "uniquely attributable" to his subdivision. If not it would be a taking. In another case, the builders were entitled to recover that amount of the subdivision exaction (paid under protest) that exceeded the portion of the improvement properly allocable to the developers. *Divan Builders v. Planning Bd.*, 66 N.J. 584, 334 A.2d 30 (1975).

spect to the ultimate widening of major streets. Can the city require subdividers to dedicate land along the edges of the subdivision for the widening of major streets or to pay a fixed amount for the widening of streets outside of but leading into the subdivision? Is this reasonable or is it so onerous as to be considered arbitrary and possibly a taking? If it is acceptable to require dedication of land or the payment of a fixed amount to subsidize the city for future park needs, then why is it any less reasonable to exact money from subdividers to assist in alleviating problems that they create outside of the subdivision but resulting from the development?¹²⁸ Obviously, this would increase the costs of land development, but otherwise, is not the municipality subsidizing the subdividers?

(b) If a developing subdivision in a suburban community is so large as to increase substantially the need for more police and firefighting personnel and apparatus, would it not be reasonable to exact a fee from the developers to compensate for that increased burden?

(c) If a subdivision causes the city to have to replace or enlarge the water and sewer capacity in that area of the city leading into the subdivision, is it not reasonable to exact a fee from the developers to aid in compensating for that additional cost, which otherwise would fall on the taxpayers in general? Otherwise, is not the municipality subsidizing the subdivider?¹²⁹

It is apparent that there are countervailing arguments to the foregoing which do not relate to the taking issue but pertain to the potentially enormous cost of development which could result in the stifling of growth. Thus, subdivision exactions in themselves could become exclusionary devices by reason of the high cost of subdivision development and the resulting high cost of land or homes in such developments. Such exactions could become more burdensome economically than large lot zoning if they were carried to an extreme. It would also seem apparent that with regard to facilities

128. The *Divan* court would approve a requirement pertaining to off-site improvements to the extent that the subdivision is specially benefitted. *Divan Builders v. Planning Bd.*, 66 N.J. 584, 334 A.2d 30 (1975). The suggestion is made in *Jordan* that fees which are paid must be used in such a manner as to benefit the subdivision which generated the fees. *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442, *appeal dismissed*, 385 U.S. 4 (1966).

129. This is certainly the conclusion of the New Jersey court in *Divan Builders v. Planning Bd.*, 66 N.J. 584, 596-97, 334 A.2d 30, 37-38 (1975).

and services outside of the subdivision, which serve other areas as well, there is a serious taking question involved. If the "public harm" and "public benefit" test is employed, it seems rather clear that a public benefit is being derived at the expense of developers. The argument to the contrary is that, but for the development, the municipality would not have had to widen the arterial street going in that direction or expand the sewer and water capacity. That this argument is of doubtful validity is illustrated by the indication from the cases that if fees paid in lieu of dedication of park land or open space may be diverted to other uses or to other areas of the city, then such fees are invalid.¹³⁰ In short, under the test which courts have applied, the validity of exactions hinges upon their necessity being specifically attributable to the subdivision and upon their use in benefiting the inhabitants of the subdivision.

In any event, the proliferation of the subdivision exaction device offers yet another instance in which the police power may be carried to the point of becoming a taking.

B. The Continuing Imprecision of the Taking Issue.

Legal scholars still are in search of a set of rules or a formula which will lend precision to a process which is doomed to imprecision by the state of the law. It is not a situation which is subject to solution by a statute because about all the statute could accomplish would be to identify issues to be addressed or criteria to be applied by the courts.¹³¹ It is the result of the fundamental rule stemming from *Pennsylvania Coal Co. v. Mahon*,¹³² which condemns the process to permanent imprecision. Since a constitutional right is at stake, only a change in the interpretation of the police power by the Supreme Court could lead to a more precise rule.

130. See *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442, appeal dismissed, 385 U.S. 4 (1966).

131. But cf. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of the Police Power*, 19 STAN. L. REV. 727 (1967) (suggesting that legislation of standards would aid in distinguishing between a valid police power regulation and a taking). It seems dubious, however, that such statutes could go very far beyond providing general definitions and identifying already discernible criteria. Presumably, the scope of inquiry in these cases might be narrowed, the type of evidence employed might be better identified, and some greater judicial precision achieved.

132. 260 U.S. 393 (1922).

The possibility that the Supreme Court would state that the police power is to be upheld unless there is an actual physical taking, which some have advocated,¹³³ seems unlikely. The trend of the law of eminent domain, particularly in the inverse condemnation cases, has been in the other direction.¹³⁴ Examples of what may or may not constitute a taking have been expanded rather extensively in recent years.¹³⁵ It would seem unlikely that in view of the increased protection accorded property rights in condemnation litigation, the courts would move in the opposite direction in enlargement of the police power at the expense of landowners. After all, eminent domain and the police power are not that far apart. A police power regulation results in a permitted, uncompensated taking in the sense that it is a diminution of the total property rights of a landowner. It is distinguishable only on the theory that it is in the interest of all the people and does not seriously affect the rights of any individual, while a condemnation action is clearly di-

133. See F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 255 (1973). See also CITIZEN'S ADVISORY COMM., *ENVIRONMENTAL QUALITY TASK FORCE ON LAND USE AND URBAN GROWTH, THE USE OF LAND* 174-75 (1973).

134. This is particularly true in regard to transportation cases, with particular reference to those involving airports or aviation. This is illustrated by the airport cases cited in note 105 *supra*, but it is highlighted in numerous other cases as well. For example, cases in recent years have held that noise, dust, lights, gases, particulates and the like may not only constitute a nuisance but may under certain circumstances amount to a taking. *United States v. Certain Parcels of Land in Kent County*, 252 F. Supp. 319 (W.D. Mich. 1966) (involving a freeway); *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962) (involving an airport and non-trespassory flights); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964) (also involving an airport). See also *Batten v. United States*, 292 F.2d 144 (10th Cir. 1962), *cert. denied*, 371 U.S. 955, *rehearing denied*, 372 U.S. 925 (1963) (involving damage caused by sonic booms in the Topeka, Kansas area around Forbes Air Force Base; the court denied recovery).

135. Recent California cases illustrate this trend. Thus, in *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), a personal injury suit by homeowners based on nuisance allegations relating to excessive noise from aircraft using the city airport was permitted by the supreme court, which held the city not to be immune from nuisance liability. See also *San Diego Unified Port Dist. v. Superior Court*, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (1977), *cert. denied sub. nom. Britt v. San Diego Unified Port Dist.*, 434 U.S. 859 (1977) (federal law preempts some state tort law). A measurable reduction in market value due to operation of the airport in such a way that aircraft noise substantially interferes with the use and enjoyment of property is compensable. See *Aaron v. City of Los Angeles*, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974). Damages may be recovered in inverse condemnation for unreasonable precondemnation activities by the city. See *Toso v. City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980). Acquiring the rights of billboard owners may require payment of just compensation. See *People ex rel. Dep't of Pub. Works v. Ryan Outdoor Advertising*, 39 Cal. App. 3d 804, 114 Cal. Rptr. 499 (1974). But compare *Metromedia v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), approving a reasonable amortization period.

rected at a specific landowner and is for the purpose of transferring all or a substantial part of his rights to the public, thereby transferring a privately owned asset to public ownership.

It is possible, of course, but not likely, that renewed attention may be given to an infrequently employed and seemingly incongruous device—zoning with compensation.¹³⁶ This seems to be a rather peculiar concept because the valid exercise of the police power through zoning does not require compensation, and compensation is based on the idea that there has been a taking.¹³⁷ Also, as a practical matter, the vast majority of municipalities cannot afford to pay for their zoning activities and must let a zoning or rezoning action stand or fall on the reasonableness of it under the police power. Thus, this seemingly strange but appealing device seems unlikely to gain ground.

One approach that may be applied in limited situations and which will probably be used more in the future, if the courts permit it, is the transfer of development rights or "TDR" device.¹³⁸ A

136. See *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 144 Minn. 1, 174 N.W. 885, 176 N.W. 159 (1919); and *City of Kansas City v. Kindle*, 446 S.W.2d 807 (Mo. 1969), for a discussion of this device. See also F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 302-17 (1973).

137. *Kindle* explains it in this way: "Zoning with compensation is a joint exercise of the power of eminent domain and the police power. It is zoning with extraordinary consideration for the property owners involved for it compensates those whose property rights are taken in the process, whereas in conventional zoning the individual who suffers hardship because of special circumstances receives no compensation. While unusual, zoning with compensation is not without precedent in this state and elsewhere, and we find no constitutional or statutory provision which prohibits the blending of the two powers (eminent domain and police power) in the same legislative enactment if it is otherwise done in a constitutional manner." *City of Kansas City v. Kindle*, 446 S.W.2d 807, 813 (Mo. 1969).

138. This device is discussed at length in *THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION* (Rose ed. 1975). See also *WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION* 532-52 (D. Hagman & D. Mischynski eds. 1978); Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35 (1974). The TDR device was considered by the New York Court of Appeals in *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), and found wanting. The ordinance in that case would have allowed transfer from a park area in Manhattan to other areas in mid-town Manhattan, within certain boundaries. But the court viewed the rights thus transferred as "floating development rights" which existed only as abstractions until attached to specific property which had not then been identified and was subject to contingent future approval by administrative agencies. *Id.* at 597-98, 350 N.E.2d at 387-88, 385 N.Y.S.2d at 11-12. There was potential for genuine economic loss, which the court regarded to be a taking. *But see Penn Cent. Transp. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), in which the court took note of the earlier transfer of rights relative to Grand Central terminal in New York City through the grant of rights in airspace and its diminished

developer may agree to maintain certain land in an undeveloped state or in its current state or to develop on a low density basis in return for development rights on some other piece of property more amenable to intense development. One problem with this is readily apparent—it has the earmarks of contract zoning, which is both a form of spot zoning and an improper surrender of legislative authority by the municipality, and is thus invalid.¹³⁹ Other obvious problems are that it may “float” until it finds a designated spot and that landowners at the second location may have little to say about it.¹⁴⁰ The benefits of the TDR, however, include the flexibility that the device provides and its potential use in connection with the preservation of historic sites or monuments.¹⁴¹

In the end it would seem that we are left with simply identifying the criteria utilized by courts and building upon them on a case-by-case basis. That is the legacy of *Pennsylvania Coal*.

III. Compensation for a Taking Under the Police Power

It has been said repeatedly by the courts that if the exercise of the police power goes so far as to constitute a taking, it will not be

economic value in weighing the question of preserving the terminal as a landmark and transferring development rights elsewhere.

139. Contract rezoning is clearly invalid. See *Montgomery County v. National Capital Realty Corp.*, 267 Md. 364, 297 A.2d 675 (1972). But some courts have distinguished conditional zoning from contract zoning and have upheld the former, which involves unilaterally imposed conditions in a non-bargaining process. See *Arkenberg v. City of Topeka*, 197 Kan. 731, 421 P.2d 213 (1966); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *Church v. Town of Islip*, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960); *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970). The TDR device bears some similarity to contract zoning in that the city is trading rights in another perhaps indefinable or unspecified area for non-development in the area involved. Aside from the problem that these rights may be of such uncertain value as to constitute a “taking,” there is no certainty that the development rights, if and when exercised in the second area, will conform to the comprehensive plan to the extent desired. Moreover, the process is akin to a “deal” between the city and the developer to permit him to develop at point “B” if he will agree to forego development at point “A.” See *Fred R. French Investing Co. v. City of New York*, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (1973).

140. See *Fred F. French Investing Co. v. City of New York*, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (1973).

141. See *Penn Cent. Transp. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977). For opposing views on the TDR device, see Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974); Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972).

permitted. Courts have traditionally applied that rule to invalidate the particular zoning ordinance as applied to the particular property in question. This approach is the general interpretation of both *Euclid* and *Nectow*.

In California, however, there have been in recent years a substantial number of inverse condemnation cases where the landowners sought damages because of the effect of a zoning ordinance on the property in question. The leading case, which denies such relief and holds to the traditional view, is *Agins v. City of Tiburon*.¹⁴² *Agins* holds that a landowner who alleges a deprivation of substantially all of the use of his property may seek to have the ordinance declared invalid, but may not seek damages in an inverse condemnation action and "thereby transmute an excessive use of police power into a lawful taking for which compensation in eminent domain must be paid."¹⁴³

Agins stated what most lawyers had always believed—that when the United States Supreme Court or state appellate courts speak of a police power regulation as being so excessive as to be confiscatory or to amount to a "taking," this simply provides a basis for invalidation of the regulation. To do what landowner Donald W. Agins argued would have an opposite effect in that it would allow the regulation to stand and would require the court to award just compensation for the loss the landowner would suffer (or the court might alternatively invalidate the regulation as of that time and compensate the landowner for his loss, if any, during the time the regulation was in effect). Presumably, Agins had in mind the former, that is, the recovery of full damages for his loss. This would drastically change the nature of the game and the stakes involved. It would not simplify this area of the law but complicate it. It would retard the use of the police power to a very substantial degree and probably to the point of rendering it too risky for cities to try anything other than conservative, established forms of zoning regulation. Zoning, rezoning and other forms of administrative relief would be applied at the peril of the municipality. The undertaking of any inventive scheme of regulation would have to be underwritten in the sense that the local government would have to have enough funds available to pay for the conse-

142. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

143. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

quences of a successful inverse condemnation action. Developers and landowners, on the other hand, would have a very powerful new weapon in their arsenal to assist them in achieving their goals. Since the planning and zoning process is presently weighted in favor of the developers and real estate interests (which fact is acknowledged by some courts),¹⁴⁴ and the competing interests are not equal, the burden on local and regional planning and zoning would become unbearable. Thus, Agins' failure to prevail on this point in the California Supreme Court was a most important decision from a public policy standpoint.

This is not the only recent case in California, by any means, in which a property owner or developer has sought damages through allegations of inverse condemnation. One of the reasons would appear to be, as illustrated by *Toso v. City of Santa Barbara*,¹⁴⁵ that damages are recoverable for inequitable precondemnation activities on the part of the municipality. Moreover, in another court of appeal decision, *San Diego Gas & Electric Co. v. City of San Diego*,¹⁴⁶ it was held that a compensable taking had occurred due to a combination of down zoning, the inclusion of the property in an open space zone, lack of consistency by the city in following its general plan, and overtures by the city to purchase the property for open space. All of these elements taken together were deemed sufficient to declare this to constitute a taking.¹⁴⁷ The same court of appeal, however, denied damages in an inverse condemnation proceeding against San Diego brought because of floodway and floodplain ordinances and the state's activities in connection with plans for a specific project relating to a channel.¹⁴⁸

144. See, e.g., *Kropf v. City of Sterling Heights*, 391 Mich. 139, 164, 215 N.W.2d 179, 190 (1974) (Levin J., concurring); *Fritts v. City of Ashland*, 348 S.W.2d 712 (Ky. Ct. App. 1961).

145. 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980).

146. 80 Cal. App. 3d 1026, 146 Cal. Rptr. 102 (1978).

147. The case was appealed to the California Supreme Court, which remanded it to the court of appeal for reconsideration in light of *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980). The court of appeal, in an unpublished decision, disallowed a damages remedy for inverse condemnation and the case was appealed to the United States Supreme Court. The Court dismissed the case for want of federal jurisdiction because the court of appeal had failed to determine whether a taking, requiring invalidation of the ordinance as applied to the utility, had occurred. 49 U.S.L.W. 4317, 4320 (1981).

148. *Helix Land Co. v. City of San Diego*, 82 Cal. App. 3d 932, 147 Cal. Rptr. 683 (1978).

Other recent California cases, preceding *Agins* and involving inverse condemnation, include suits by coastal landowners because they were denied a permit to develop coastal property;¹⁴⁹ a suit seeking to invalidate the definition of "family" in the Santa Barbara ordinance;¹⁵⁰ an action for inverse condemnation because of a declaration of intent by the city to amend its general plan;¹⁵¹ damages sought for the redesignation of property from residential and commercial to agricultural open space, including compensation for sewer facilities which the city had earlier required to be installed;¹⁵² an inverse condemnation suit based on foothill land being placed in a permanent open space classification requiring ten-acre homesites and public access;¹⁵³ an allegation that a rezoning was for the purpose of acquiring open space at no cost to the county;¹⁵⁴ an open space restriction in which the court noted the fact that the property was used as a golf course and was leased for that purpose until the year 2011;¹⁵⁵ an inverse condemnation action challenging code provisions on sewage disposal in the Lake Tahoe watershed;¹⁵⁶ a case in which the California Supreme Court held that a lot which had decreased in market value due to the adoption of a general plan was not taken or damaged under the state constitution;¹⁵⁷ an action challenging certain cease and desist orders issued by the water quality control board for the San Francisco bay area;¹⁵⁸ the challenge of exclusive agriculture zoning with minimum 18-acre sizes where a prior recorded plat permitted 2½-acre parcels;¹⁵⁹ an action against a county, alleging that zoning based upon a floodplain ordinance amounted to a taking;¹⁶⁰ and a

149. *State v. Superior Court*, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974); *Briggs v. State*, 98 Cal. App. 3d 190, 159 Cal. Rptr. 390 (1979).

150. *City of Santa Barbara v. Adamson*, 90 Cal. App. 3d 606, 153 Cal. Rptr. 507 (1979).

151. *Orsetti v. City of Fremont*, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978).

152. *Furey v. City of Sacramento*, 85 Cal. App. 3d 464, 149 Cal. Rptr. 541 (1978).

153. *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

154. *Pinheiro v. County of Marin*, 60 Cal. App. 3d 323, 131 Cal. Rptr. 633 (1976).

155. *Dale v. City of Mountain View*, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976).

156. *Fallen Leaf Protection Ass'n v. South Tahoe Pub. Util. Dist.*, 46 Cal. App. 3d 816, 120 Cal. Rptr. 538 (1975).

157. *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

158. *Morshead v. California Regional Water Quality Control Bd.*, 45 Cal. App. 3d 442, 119 Cal. Rptr. 586 (1975).

159. *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

160. *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972).

suit involving the rezoning of land near an airport from residential to industrial use.¹⁶¹

Although these cases in large measure refuted as a remedy recovery of damages through inverse condemnation, some California cases over the past fifteen years held that where the effect of the action was to render the land valueless or practically so, a compensable taking had occurred. Thus, in one case in which land adjacent to an airport had been rezoned and the restrictions had been continued beyond a certain date, this amounted to a taking.¹⁶² The result was to freeze development. As previously noted, airport zoning ordinances have been considerably less effective than zoning in general, and it is not unusual for a court to view such ordinances as a substitute for purchasing avigation easements or condemning adjoining land. The orthodox approach, however, is to strike down the ordinance. In addition to the airport situation, the California Court of Appeal has held that a restriction which is intended to depress property value because of contemplated eminent domain proceedings would amount to inverse condemnation.¹⁶³ This is a form of "precondemnation activity" which is impermissible.

Generally speaking, however, California, prior to *Agins*, had not accepted the inverse condemnation approach to land use regulations. As one court of appeal case stated, recognized exceptions to the requirement that compensation be paid for damage to property exist (a) when the damage results from the proper exercise of the police power, and (b) when a public entity has the legal right to cause damage to property to the same extent as a private person.¹⁶⁴ The California Supreme Court had long held, prior to *Agins*, that in the use of "the right of eminent domain, private property may not be taken without compensation therefor, whereas, in the exercise of the police power, the use of the property may be restricted or it may even be destroyed, and no legal liability arises to compensate the owner therefor."¹⁶⁵

Thus, it would seem that despite these recent inverse condem-

161. *Smith v. County of Santa Barbara*, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966).

162. *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).

163. *See Department of Pub. Works v. Southern Pac. Transp. Co.*, 33 Cal. App. 3d 960, 109 Cal. Rptr. 525 (1973).

164. *See Amador Valley Investors v. City of Livermore*, 43 Cal. App. 3d 483, 117 Cal. Rptr. 749 (1974).

165. *Patrick v. Riley*, 209 Cal. 350, 355, 287 P. 455, 456 (1930) (citing *Gray v. Reclamation Dist.*, 174 Cal. 622, 638, 163 P. 1024, 1031 (1917) and other cases).

nation suits, the California courts have rather steadily adhered to the policy enunciated in the *Agins* decision. It would, moreover, appear that this is the wiser and better approach. To do otherwise would serve to vitiate most of the reasoned efforts on the part of planners to cope with the increasing public need to regulate land for the public benefit.

Conclusion

Adoption of the legal concept that damages can be awarded in an inverse condemnation suit as the result of the exercise of the police power would result in a very substantial diminution in the use of the police power and in the ability of the public to control land development and to impose requirements for the public welfare. The California Supreme Court in *Agins v. City of Tiburon*¹⁶⁶ quite properly denied this form of relief.

Moreover, the arguments of *Agins* and of other California plaintiffs with regard to inverse condemnation obfuscate the taking issue rather than offer a solution to it. The question of when exercise of the police power extends so far as to constitute a taking would still remain under the existing case law. The upholding of *Agins*' position would have had only the effect of making local governments or public entities very cautious in the use of the police power. They would retreat to the safety of proven regulations sanctioned by *stare decisis*. If this had been the meaning of *Euclid* and *Nectow*, very likely no one would have proposed the planned unit development, the cluster zone, or the floating zone, and even if those efforts had received the prior blessing of developers, it is highly unlikely that environmental concerns or regulation of coastal and inland waterways would ever have been risked.

The price that *Agins* urged and California rejected is too high to pay. To condone the concept of inverse condemnation in this area of the law is to deny the very first of the maxims of equity, which recognizes that the public interest must be the first concern of the law.¹⁶⁷

Moreover, in dealing with land use regulations, it must be

166. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd* 447 U.S. 255 (1980).

167. *Salus Populi Est Suprema Lex*. "Regard for the public welfare is the highest law." H. BROOM, *LEGAL MAXIMS* 1 (10th ed. 1939).

remembered that this is a process dependent entirely on the ability to exclude certain uses. To be sure, such exclusion cannot be motivated by racial considerations. New Jersey is at least correct that the process should not be directly affected by economic considerations.¹⁶⁸ Exclusion should not operate as a device to penalize or deprive anyone. But exclusionary regulations are an essential component of land use regulation, and the ability to exclude should not be vitiated by the necessity of making retribution in damages for a resultant mistake. There is an historic difference in the law of eminent domain and the police power, and it must continue to be recognized if any effective power is to be left to employ for the public welfare.

168. *South Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975).