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Down-Zoning and Exclusionary Zoning in California Law

by Michael A. Willemsen* and Gail V. Phillips**

For many years virtually every community in California endorsed the philosophy of growth. Zoning ordinances in this milieu served merely to guide growth and eliminate nuisances. Within the past two decades, however, opposition to largely unrestrained growth has arisen and attained political power. In many communities the opponents of growth, seeking to preserve the natural and social environment and to reduce the burden on local government that accompanies growth, have succeeded in enacting zoning ordinances designed to severely limit future development. Similar restrictive provisions enacted by the state government have limited development along the Pacific Coast and in the Lake Tahoe Basin. The next few years may see the enactment of a statewide land use planning law which will further limit the conversion of undeveloped and agricultural land to residential or commercial use.

Restrictive zoning ordinances give rise to two distinct yet related issues. The first issue is one of "down-zoning": by limiting the landowner's use of property, the ordinance may invade constitutionally protected rights, either by restricting the use of property to uses less valuable than those previously permitted, or by threatening to deny any reasonable use whatsoever. The second issue is one of "exclusionary zoning": by limiting the construction of housing, a restrictive zoning ordinance may deny prospective immigrants the opportunity to live in the community. Although earlier cases evaluated the exclusionary

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character of zoning laws in terms of their impact on the landowner's property rights, recent decisions demonstrate that such laws must be tested instead by their impact on the welfare of the surrounding region. The exclusionary character of an ordinance thus presents an issue conceptually distinct from its effect on property rights.

This Article presents a critical analysis of current California law on the issues of down-zoning and exclusionary zoning. With respect to down-zoning, California law has taken a unique course, rendering decisions of other jurisdictions of little relevance to the California practitioner. There are, however, few California decisions on exclusionary zoning, so we discuss here the leading decisions of other jurisdictions which may prove influential in the development of California law. Finally, we consider the impact of recently enacted statutes and regulations requiring a housing element in city and county general plans upon future exclusionary zoning decisions.

**Down-Zoning**

Typically, complaints alleging that zoning restrictions violate landowners' rights arise when opponents of growth, having attained political power in the community, change the zoning on property to a classification barring valuable uses previously permitted. This change in zoning is known as "down-zoning." Since *HFH, Ltd. v. Superior Court*, however, California law has held that constitutional issues are raised by the character of the restrictions on land use, not the change in the zoning classification. A change in zoning from one reasonable use to another presents no controversy; an ordinance which permits no reasonable use raises substantial issues even though it represents no change from prior zoning. Nevertheless, because cases and commentators alike refer to zoning which unreasonably restricts the use of property as "down-zoning," that term is used in this Article.

The following discussion focuses on three major cases. The first, *HFH, Ltd. v. Superior Court*, represents the California approach to down-zoning. In simplest form, it stands for the proposition that mere diminution in value will not suffice to state a cause of action for inverse condemnation; that overly restrictive zoning is to be challenged by a writ of mandamus, not by an action for inverse condemnation. The

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5. Inverse condemnation is defined as a proceeding in eminent domain brought by the landowner rather than the city to force condemnation of the plaintiff's land or an interest in that land and payment of just compensation therefor.
second, *Eldridge v. City of Palo Alto,*\(^6\) held that a restrictive zoning law, although valid under the police power, could constitute a taking. That proposition was repudiated in the third case, *Agins v. City of Tiburon.*\(^7\) In *Agins*, the California Supreme Court definitively addressed certain questions left open by the *HFH* court,\(^8\) delineating both the appropriate remedy and theory upon which to challenge an unconstitutionally restrictive zoning ordinance.

**HFH, Ltd. v. Superior Court**

Discussion of down-zoning in current California law centers around the decision in *HFH, Ltd. v. Superior Court.*\(^9\) Plaintiffs sought a writ of mandate following an order sustaining a demurrer to their complaint. Plaintiffs agreed to purchase unimproved property in an agricultural zone on the condition that the seller procure commercial zoning. Commercial zoning was obtained and the sale consummated. When five years later plaintiffs had not developed the property, the city down-zoned the land to permit only residential use. Plaintiffs brought suit, alleging that their land was useless for residential purposes and that the down-zoning reduced its market value from $400,000 to $75,000, an eighty percent reduction. The issue before the appellate court was whether such allegations stated a cause of action for inverse condemnation. The court of appeal, in a split decision, overturned the trial court and held the complaint sufficient.\(^10\) Plaintiffs, the court ruled, had the right to prove at trial that the city's zoning action was not in the public interest or that the property owner was being "unfairly burdened with a cost of improving the public welfare which in justice ought to be borne by the public."\(^11\) In dissent, Justice Fleming argued that the owner's only remedy lay in an action for mandamus to invalidate the zoning,\(^12\) a theme to which this Article returns in discussion of *Eldridge* and *Agins.*\(^13\)

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7. 23 Cal. 3d 605, 591 P.2d 514 (1979).
8. For a discussion of the court of appeal cases since *Agins* see notes 71-85 & accompanying text *infra.*
11. *Id.* at 444.
12. *Id.* at 445 (Fleming, J., dissenting).
The California Supreme Court overturned the court of appeal and reinstated the trial court's ruling. The court rejected plaintiffs' allegation that they had been deprived of any "reasonably beneficial use" of their land "commensurate with its value"—the remaining value of $80,000 proved the land was not useless. Under federal and California precedent, the court observed, an allegation of mere diminution in value, even an eighty percent reduction, does not suffice to state a cause of action for inverse condemnation. Indeed, the court noted that in the leading case establishing civic authority to zone property under the police power, Euclid v. Ambler Realty Co., the United States Supreme Court sustained the ordinance despite allegation of a seventy-five percent reduction in value.

Justice Clark in his dissent in HFH maintained that the "taking or damaged" language of Article I, section 19 of the California Constitution required compensation whenever, because of down-zoning, land "has (1) suffered substantial decrease in value, (2) the decrease is of long or potentially infinite duration and (3) the owner would incur more than his fair share of the financial burden."

The majority rejected Justice Clark's formula for determining when to award damages for inverse condemnation. The majority's reasoning rests largely on the zoning-dependent value of real property. In recent years there has been a phenomenal increase in the value of unimproved land in urban regions of California, an increase attributable to the combined effects of inflation, immigration, and a growing scarcity of undeveloped property. To realize this increase in value by developing the land, the owner must obtain favorable zoning. When the municipal government grants a favorable change, it creates an instant windfall to the owner.

Occasionally a municipality may go too far in granting favorable zoning and decide that the public good requires it to down-zone property. In so doing, the government is destroying only a "paper value" which its prior decision created, and often simply restores the zoning which neighboring property already has. In view of the present fiscal

15. Id. at 514, 542 P.2d at 241, 125 Cal. Rptr. at 369.
17. 15 Cal. 3d at 526, 542 P.2d at 250, 125 Cal. Rptr. at 378 (Clark, J., dissenting).
restraints upon municipal governments in California, recognition of a right to inverse condemnation damages in a case such as *HFH* could lock a community into zoning decisions which later events might prove to be imprudent.

The principal objection to the foregoing reasoning is that the owner may have relied on the higher zoning classification when purchasing the property at an inflated price. Yet, as the majority in *HFH* points out, the rule is well settled that landowners have no vested right in existing or anticipated zoning; the purchaser of property with favorable zoning should be aware of that rule and discount the purchase price for the property accordingly. Thus, the majority concludes that the purchaser is, in effect, a speculator who wagers that the property will retain its present zoning, and cannot claim unfairness if the wager is lost.20

The *HFH* decision brings to attention the philosophical conflict which underlies this area of the law. Zoning restrictions, enacted pursuant to the police power, rest on the fundamental proposition that the state must be able to regulate land use to promote the general welfare. The principle that landowners have no vested right in existing zoning serves to avoid constraints that would deny government the flexibility necessary to this use of the police power. Most regulation of land use deprives some persons of valuable economic opportunities, but government could not function if it could not regulate under the police power without compensating all persons who suffer economic harm from that regulation.21

Very different theories underlie the constitutional requirement for payment of just compensation. The primary basis for the requirement is the equitable principle that an individual should not be required to bear a disproportionate burden of the cost of public improvements or regulations.22 The constitutional requirement of just compensation

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thus serves "to distribute throughout the community the loss inflicted upon the individual."23

The conflict between these contending policies, unfortunately, is not confined to unusual cases. To the contrary, a substantial percentage of land use regulations enacted by modern governments impose a burden which falls disproportionately upon a small portion of the community. Undiluted assertion of the principles underlying the police power in these cases, however, would vitiate the owner's right to just compensation.24 On the other hand, undiluted assertion of the principles of just compensation would limit the police power to those few measures which bear equally upon all members of the community.25 A compromise is essential. That compromise cannot be derived from analysis of the fundamental principles, but rather must be found in a political accommodation of competing values.

One possible compromise is that presented by Justice Clark's dissent in *HFH*, under which the right to compensation would depend largely on the substantiality of the loss and the duration of the restriction resulting from the change in zoning, rather than the severity of present use restrictions.26 The validity of Justice Clark's theory would seem to turn upon whether the owner justifiably relied on the prior higher zoning. Indeed, the question of whether an owner of undevel-


24. In recent years proponents of compensation for down-zoning have received further support from economic cost/benefit analysis. See generally E. FREUND, THE POLICE POWER 546-47 (1904); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 651, 663-69 (1958); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) [hereinafter cited as Ellickson]; Michelman, *supra* note 20; Zoning Developments, *supra* note 22, at 1486-1500, 1586-90. By requiring compensation for private loss, the theoreticians point out, courts compel the legislature to take account of such loss and thus deter enactment of economically inefficient programs. Id.

25. In many cases, if the government were compelled to take account of the private loss by compensating owners, it would not enact the programs, although that result may stem less from appreciation of the inefficiency of the program than from lack of money to carry it out.

26. The dissenting opinion urged compensation "when by public action land has (1) suffered substantial decrease in value, (2) the decrease is of long or potentially infinite duration and (3) the owner would incur more than his fair share of the financial burden." 15 Cal. 3d at 526, 542 P.2d at 250, 125 Cal. Rptr. at 378. This theory appears to distinguish between down-zoning and refusal to upzone property. In contrast, most other theories would reach the same result in cases of restrictive zoning regardless of how the property was previously zoned. See generally Ellickson, *supra* note 24; Michelman, *supra* note 20; Sax, *supra* note 22; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).
oped land can justifiably rely on present zoning may be the principal difference of opinion between Justice Clark and the HFH majority.

Three other compromises balancing the police power of the state against the landowners' right to just compensation have attained notoriety in the legal literature. One is the proposal of Professor Michelman, under which a zoning restriction requires compensation if it fails to meet either of two standards—"efficiency" and "horizontal equity." Efficiency refers to cost/benefit analysis; a regulation is economically efficient if its benefits exceed its costs. The Michelman test for horizontal equity states that requiring a person to bear a loss is fair if that person should be able to perceive that a general policy of refusing compensation to persons in the same situation is likely to promote the welfare of such persons in the long run.

No court has adopted the Michelman proposal, although it would be an interesting experiment. Cost/benefit ratios presumably could be derived with the aid of expert economic evidence, but one wonders what evidence would be admissible to prove that an enlightened owner would realize that persons like himself would benefit in the long run from a policy of refusing compensation.

Another proposal, that of Professor Costonis, advocates compensation based not on market value, but on the value of the most restrictive reasonable beneficial use. Costonis suggests that when compensation is awarded the state should be granted the right to develop the property, which right could be traded in a market for transferable development rights. The Costonis proposal is somewhat more

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27. Michelman, supra note 20, at 1173-76. Cf. Ellickson, supra note 24, at 414-15 (suggesting three principal goals for zoning ordinances: efficiency (cost/benefit analysis); horizontal equity (requiring the government to treat like persons alike); and vertical equity (fairness of the distribution of wealth among different income groups)).
28. See Ellickson, supra note 24, at 419; Michelman, supra note 20, at 1214.
29. Michelman, supra note 20, at 1223; Ellickson, supra note 24, at 415.
32. The proposal for transferable development rights may solve two of the difficult problems in inverse condemnation theory. The first is the problem of what interest the government acquires when it pays inverse condemnation damages of less than the value of the fee, and what it can do with the rights so acquired. Under the Costonis approach, the government in HFH would have acquired a commercial development right which it could sell to someone who wanted to develop some other property. As pointed out by Hagman and Misczynski, absent a method for recapturing zoning caused increases in land value, government acquisition of an interest in land is essential to prevent the landowner from receiving a
workable than Michelman's and has received the qualified endorsement of the New York Court of Appeals.\textsuperscript{33}

Finally, we note the proposal of Hagman and Misczynski,\textsuperscript{34} under which landowners would receive partial compensation for losses attributable to regulatory action but would pay an equivalent percentage of gains attributable to such action. The proposal envisions that legislatures instead of courts would take the leading part in enacting such a plan; indeed it seems doubtful if windfall recapture, an essential part of the plan, could be brought about by judicial decision alone.

A central question remains: whether any compromise position, however desirable in the abstract, is constitutionally compelled. Perhaps within the broad area in which principles of police power and inverse condemnation overlap courts should not impose specific formulas, but interpret the Constitution to give the legislature some freedom to select the basis for accommodation. That body can better take account of the fiscal resources, or lack of resources, available to pay damage awards. If the constitutional threshold for damage awards is too easily surpassed, inability to pay such awards in times of fiscal restraint may imperil needed police power measures; when revenue is ample, the state can then be more generous than the minimal constitutional requirements.

HFH specifies three circumstances under which regulation that falls short of actual seizure of possession may give rise to a cause of action for inverse condemnation. The first, exemplified by Klopping \textit{v. City of Whittier}\textsuperscript{35} and Peacock \textit{v. County of Sacramento},\textsuperscript{36} is the case of inequitable precondemnation activities.

In Klopping the condemning agency made a formal announcement that it intended to condemn plaintiff's land. It then unreasonably delayed commencement of eminent domain proceedings, which resulted in a decline in the market value of plaintiff's property. The court held that the condemnee was entitled to compensation for precon-

double recovery if the restrictions were later removed. D. Hagman & D. Misczynski, \textit{Windfalls for Wipeouts} (1979).

The second is the problem which arises when numerous properties are suitable for development, but public policy or market forces dictate that only one such property be developed. Rather than let one owner receive a windfall, while the others sue for inverse condemnation, Costonis would assign each partial development rights, and permit development to the party who buys up a sufficient number of such rights.

\textsuperscript{34} D. Hagman & D. Misczynski, \textit{Windfalls for Wipeouts} (1979).
\textsuperscript{35} 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).
demnation losses from the diminution in market value of the property attributed to unreasonable or unfair action of the condemning agency prior to formal condemnation.37

Similarly, in *Peacock* the county enacted a zoning ordinance pursuant to a publicly announced intention of acquiring land for an airport. The zoning ordinance as “applied to plaintiffs’ lands . . . deprived [them] of any practical, substantial or beneficial use thereof”38 for a period of five years, after which the county renounced its intention to acquire the land. The court found that the “[e]xceptional and extraordinary circumstances” enumerated constituted a taking of plaintiffs’ property.39

Recent decisions, however, have placed two practical limitations on the doctrine of inequitable precondemnation activities. First, even though the political steps leading to a decision to condemn property may paralyze the landowner’s ability to develop the land, the courts have declared that such steps cannot constitute an inverse condemnation.40 To hold otherwise would require a public entity to debate condemnation matters in secret lest the debate itself constitute a taking. Second, when a public entity embarks on a large scale project such as a freeway, it may condemn only a portion of the needed properties each year. Inevitably, the value of other properties on the freeway route will be depressed. Yet to hold that the designation of the route and the initiation of the purchase program constituted inverse condemnation would force the condemning agency to budget the entire purchase program for the initial year, which might render the project fiscally unsound. Recognizing this danger, the state supreme court, in *Jones v. People,*41 stated in dictum that route designation and commencement of a purchase program did not constitute a taking of the remaining properties destined for acquisition.42

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37. 8 Cal. 3d at 52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.
38. 271 Cal. App. 2d at 854, 77 Cal. Rptr. at 398.
39. *Id.*
42. *Id.* at 152, 583 P.2d at 170, 148 Cal. Rptr. at 645.

In Toso v. City of Santa Barbara, 151 Cal. Rptr. 912 (1979), decided after *Jones*, the court of appeal ruled that, even without a formal intent to condemn, the city’s refusals to rezone plaintiff’s property for resort hotel use, its actions looking to acquisition of the property, and other activities “intended to freeze or lower the value of the property,” amounted to the type of harsh and oppressive conduct which would entitle plaintiff to relief. 151 Cal.
The second circumstance which gives rise to a cause of action for inverse condemnation is the use of a zoning ordinance by a public agency to evade the requirement of acquisition and payment when the property is actually used for a public purpose. In *Sneed v. County of Riverside*, the leading California case exemplifying this form of condemnation, the court viewed the county's restrictions on Sneed's use of his property as the equivalent of a public taking of an air navigation easement over the land and concluded that his complaint stated a cause of action in inverse condemnation.

In a footnote to the *HFH* opinion, the supreme court suggested a third possible factual setting for an action in inverse condemnation, stating that "[t]his case [HFH] does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially all use of the land in question. We leave the question for another day." This footnote raised two related questions which became the focus of subsequent litigation. The first was a question of the appropriate remedy: should the landowner seek invalidation of the ordinance, damages for inverse condemnation, or both? The second was a question of substantive law, although it arose most often as an issue of pleading: what must the landowner allege and prove to sustain a cause of action on the theory that the zoning "forbade substantially all use" of the property?

**Eldridge v. City of Palo Alto**

When *HFH* was filed, these very questions were pending before the supreme court on a petition for hearing in *Eldridge v. City of Palo Alto*. The city had annexed 600 acres of largely undeveloped foothill land in 1968, zoned it for one-acre residential lots, and commenced a study of the property which eventually led to its rezoning as "open space." The later zoning permitted only one dwelling per ten acres and provided for public access via paths and trails. In an opinion pub-

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44. *Id.* at 212, 32 Cal. Rptr. at 322.
45. 15 Cal. 3d at 518 n.16, 543 P.2d at 245, 125 Cal. Rptr. at 372.
47. Two other actions arising from Palo Alto's open space zoning were filed in federal court. In *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974), the court ruled that the landowner's complaint stated grounds for an action in inverse condemnation. Subsequently, in *Arastra Ltd. Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975), the court found that the zoning was not a "bona fide attempt to impose limitations of the use
lished shortly before *HFH*, the court of appeal overturned the city's demurrer to a cause of action for inverse condemnation on the ground that whether a zoning restriction is so burdensome as to constitute a taking is a question of fact—not to be decided by demurrer but rather by a trial on the issue. Justices Sims, dissenting, argued that the owner's only remedy lay in an attack on the validity of the ordinance. By stipulating to its validity, plaintiffs, he claimed, had stipulated themselves out of court.

The supreme court granted a hearing in *Eldridge* and remanded the case to the court of appeal for reconsideration in light of *HFH*. On remand, the court of appeal consolidated the case with a similar suit, *Beyer v. City of Palo Alto*, which was filed by a neighboring landowner. The court of appeal, noting that *HFH* left the issue of the appropriate remedy open, reaffirmed its view that excessively restrictive zoning can constitute a taking and support an action for damages. Justice Sims dissented as to that point with respect to *Eldridge* on the grounds he had urged earlier.

Unlike the plaintiffs in *Eldridge*, however, the *Beyer* plaintiffs had not stipulated to the validity of the zoning, but sought as alternative relief a declaration that the ordinance was invalid. Turning, therefore, for the first time, to the issue of the constitutional validity of the ordinance, the court held the ordinance constitutional on the ground that it reasonably related to the legitimate civic goal of preserving open space and protecting the environment. Justice Sims again dissented, maintaining that Beyer's conveyance of the property subsequent to trial rendered plaintiffs' action moot in so far as it sought invalidation of the zoning. The supreme court denied the petition for hearing from the second *Eldridge* decision by a 4-3 vote.

of the property of the plaintiff, but rather the final step in a program designed to acquire rights over the property for the enjoyment and use of the public in general," and awarded damages for inverse condemnation. *Id.* at 978-79. *Arastra* was later vacated pursuant to a settlement agreement. 417 F. Supp. 1125 (N.D. Cal. 1976).

48. The original appellate decision in the *Eldridge* case, appearing at 124 Cal. Rptr. 547 (1975), was omitted from the official reports because hearing was granted by the California Supreme Court.

49. *Id.* at 558 (Sims, J., dissenting).
51. *Id.* at 633, 129 Cal. Rptr. at 587.
52. *Id.* at 638-39, 129 Cal. Rptr. at 590-91 (Sims, J., dissenting). See text accompanying note 49 supra.
53. 57 Cal. App. 3d at 631, 129 Cal. Rptr. at 585.
54. *Id.* at 653-55, 129 Cal. Rptr. at 601-02 (Sims, J., dissenting).
55. *Id.* at 655, 129 Cal. Rptr. at 602.
Eldridge addressed the questions left open by HFH. First, it answered the question of remedy: a landowner, aggrieved by an ordinance which deprived him or her of substantially all use of his or her property, may seek damages in an action for inverse condemnation instead of suing to invalidate the ordinance. Second, although the Eldridge opinion was unclear as to precisely what allegations were essential to support a cause of action in inverse condemnation, it necessarily held by implication that the allegations of lack of reasonable use tendered by Eldridge and Beyer were sufficient.

Agins v. City of Tiburon

The problem of the remedy for unconstitutionally restrictive zoning received a definitive answer in Agins v. City of Tiburon. The city zoned plaintiffs' five acres for single family dwellings with a maximum density of one dwelling per acre. Asserting that the zoning ordinance completely destroyed the value of their land, plaintiffs sued for inverse condemnation. The trial court sustained a demurrer without leave to amend.

The supreme court, affirming the decision below, made its position concerning the choice of remedy clear:

[A] landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt . . . to invalidate the ordinance as excessive regulation . . . . He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid . . . . To the extent that Eldridge v. City of Palo Alto . . . is contrary, it is expressly disapproved.

56. Id. at 621, 129 Cal. Rptr. at 579. Cf. Pan American Properties v. City of Santa Cruz, 81 Cal. App. 3d 244, 254, 146 Cal. Rptr. 428, 434 (1978) (interpreting Eldridge as standing for the proposition that “public entities may not use their zoning power as a subterfuge to take land for public purposes without the payment of just compensation”). But see Agins v. City of Tiburon, 23 Cal. 3d 605, 591 P.2d 514 (1979), disapproving Eldridge on this point. See also Note, Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?, 28 HASTINGS L.J. 1569, 1572 (1977).

57. 23 Cal. 3d 605, 591 P.2d 514 (1979).

58. Under the City of Tiburon's zoning, plaintiffs could build a maximum of five units or a minimum of one unit on their property, depending upon the architectural design and the environmental impact. Id. at 610, 591 P.2d at 516.

59. Id. at 612, 591 P.2d at 518. The Agins-defined remedy was reaffirmed in Furey v. City of Sacramento, 24 Cal. 3d 862 (1979). In this very recent supreme court case, plaintiffs owned land in the Natomas area of Sacramento County which was zoned agricultural. The county authorized the sanitation district to lay large sewer trunk lines and to build a sewage treatment plant to accommodate planned future residential and commercial growth. A total of $3,137,462.86 was assessed against plaintiffs' property for the sewer facilities. Subsequent to the enactment of state legislation designed to preserve open-space lands, however, the city
The court rejected the action for inverse condemnation on the ground that it would hamper local flexibility in land use planning and regulation. The establishment of community plans would be deterred if too specific a plan rendered the community liable for damages. Similarly, the exercise of police power would be inhibited if innovative measures might lead to unexpected liability. In light of the fiscal economies experienced in many California communities following the enactment of Proposition 13 in 1978, communities now must plan their budgets with special care and calculate their ability to acquire land by eminent domain with a recognition that they probably cannot raise taxes to finance the purchase. An unexpected inverse condemnation award could demolish all prior careful planning. To pay for an award, the community might have to cut expenditures for services or for acquisition of other land which it considers to have higher priority. If a zoning classification covering a large area were held unconstitutional, as happened in Eldridge, the award might be so sizable that the city could neither pay it out of current revenues nor raise taxes to meet the debt. Under these circumstances, prudent community leaders could not take the risk that an ordinance would be found to be a taking amended its general plan, providing for an open-space element. A zoning ordinance also was adopted, prohibiting any change of plaintiffs’ property from its agricultural classification and prohibiting any special use inconsistent with the open-space designation in the plan for a substantial period of time.

Plaintiffs brought an action alleging that the combined effect of the open-space element of the general plan and the open-space ordinance was inverse condemnation of their property, including the sewer facilities. Alternatively, plaintiffs asserted that defendants’ prior activities, including a general plan looking toward residential and commercial development and the installation of sewer facilities, estopped the city from designating plaintiffs’ property as open-space.

Citing Agins, the decision noted that an “aggrieved landowner is limited to showing, through an action for declaratory relief or mandate, that the legislation or regulation in question, viewed either on its face or as applied, is an invalid exercise of police power . . .” Id. at 871-72. Such invalid exercise can only be shown, however, if the landowner is deprived of substantially all reasonable use of his or her property. The continued availability of plaintiffs’ land for use as agricultural land was found to be reasonable.

Although plaintiffs in Furey were denied relief under a down-zoning theory, relief was available in the form of an equitable reassessment—apparently a refund to the extent plaintiffs did not realize the benefits of the original assessment. Id. at 877-78.

60. 23 Cal. 3d at 614-15, 591 P.2d at 519.
61. CAL. CONST. art. XIII A (West Supp. 1979). Section 1 of this article limits real property taxes to one percent of full cash value, a limit far below the prior prevailing tax rate.
63. See text accompanying notes 46-56 supra.
and the "chilling effect" cited by the court in *Agins*\(^{64}\) would be a realistic danger.\(^{65}\)

Because inverse condemnation is a matter of constitutional law, the question arises whether the new California approach is consistent with federal constitutional principles. The authors contend that the California court's rejection of the inverse condemnation remedy is constitutional.\(^{66}\) *Agins* holds in effect that any zoning which under constitutional standards constitutes a taking of property is, for that reason, an act in excess of the police power and hence invalid. If the public entity still wants to impose the restriction, it can do so directly by deliberate use of the eminent domain power. So long as the state affords the owner an adequate opportunity to remove the restriction from his or her property, we conclude that no taking compensable under the Fourteenth Amendment has occurred.

There is one practical problem with limiting the landowner to a suit to invalidate the restrictive zoning. A community determined to prevent development could resort to a protracted series of delaying tactics. If ten acre zoning was held invalid, the locality could enact a new nine and one-half acre law, and so on almost indefinitely. The courts of Pennsylvania previously have encountered this problem of community intransigence. After observing the success of delaying tactics in subverting court decisions, the courts countered by issuing judgments which did not merely strike down a zoning classification but mandated the issuance of the permits needed by the landowner to construct the project.\(^{67}\) But that remedy may be an overreaction. The fact that a particular zoning measure is invalid should not entitle the landowner to build without restraint; perhaps the city cannot enforce ten acre zoning but surely it could still ban commercial uses or high rise apartments on the property.

\(^{64}\) 23 Cal. 3d at 614, 591 P.2d at 519.

\(^{65}\) Hagman and Misczynski propose a program in which the government pays partial compensation for loss in land value caused by zoning but recaptures a portion of any increase in land value attributable to zoning. Such a program, by providing additional revenue set aside for compensatory payments, would make possible redress for losses impossible in the present fiscal setting. D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS (1978).

\(^{66}\) We argue that the *Agins* holding is constitutional, not that it represents the most equitable solution to the problem. As Hagman and Misczynski point out, most of the arguments which proved persuasive to the *Agins* court are objections to judicial action which converts intended regulatory measures into takings as a matter of constitutional law. An equitable statute which took into account gains as well as losses attributable to regulation could overcome these objections. *Id.* at 292, 303.

An alternative method of preventing delaying tactics would be for the court not only to declare the restrictive zoning invalid, but also to guide future zoning by declaring the maximum restrictive zoning which can constitutionally be applied to the land in question. That alternative, however, substantially increases the burden on the trial court. In many cases merely determining whether a particular ordinance lies beyond the line separating reasonable zoning regulations from that which unconstitutionally denies the owner substantially all use of land is difficult enough. Drawing that line with such precision that both the public entity and landowner will know precisely what regulation will be upheld in future cases is far more difficult.

If neither the Pennsylvania solution of mandating issuance of all needed permits, nor the foregoing proposal to determine the maximum permissible restriction is acceptable, then the least the trial court can do is to retain jurisdiction over the action until it can evaluate the public entity's response to its decision. If the entity enacts a new law which appears to be a palpable evasion of the court's ruling, the landowner could bring the matter to the court's attention more speedily and efficiently than if filing a new action were necessary. Continued delaying tactics by the community eventually would require more drastic court action.

*Agins* did not provide a definite answer to the second question left open by *HFH*: when will an ordinance be said to deprive the landowner of substantially all use such that it is an unconstitutional act in excess of the police power? The *Agins* decision touched on that issue only briefly, holding that conclusory allegations that the ordinance has destroyed completely the value of plaintiffs' property—when the ordinance on its face clearly permits residential development on that property—are insufficient to state a cause of action for inverse condemnation.

The *Eldridge* decisions had held a ten acre zoning law with provisions for public access to the property constitutional under the due process clause, but nonetheless a taking requiring compensation in an

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68. See Costonis, "*Fair*" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1049-55 (1975). Costonis favors damage awards in inverse condemnation as a remedy for overly restrictive zoning, but would base such awards not on the market value of the land prior to the zoning, but on the most restrictive reasonably beneficial use of the land. Thus his theory would require the court to determine also the maximum severity of restrictions constitutionally permissible for each property.

69. 23 Cal. 3d at 616, 591 P.2d at 520.
action for inverse condemnation. Since Agins struck down the latter holding, the correctness of the former also falls into question. If an action to invalidate the zoning is the landowner’s only remedy, the court might be less willing to hold that the zoning complies with constitutional requirements. Thus, neither Agins nor Eldridge offers clear guidance as to when a restrictive ordinance becomes so oppressive that it will be held invalid. In the three years since the Eldridge decision, however, a number of other court of appeal opinions have addressed the issue.

Court of Appeal Decisions Subsequent to Eldridge

In the first decision, Pinheiro v. County of Marin, the landowners alleged damage caused by rezoning, but failed to allege the lack of any remaining reasonable use. The court held that absent allegations of inequitable precondemnation activities, actual public use, or the elimination of any remaining reasonable use, the complaint failed to state a cause of action.

The next decision, Sierra Terreno v. Tahoe Regional Planning Agency, involved a land use ordinance of the Tahoe Regional Planning Agency which rezoned plaintiffs’ land from industrial and commercial classification to “general forest.” The court noted that although plaintiffs had alleged deprivation of all reasonable use, their pleadings conceded a remaining value of approximately twenty-five percent of the prior value, thus demonstrating that some substantial use of the property remained. Under the circumstances, the court of appeal found HFH controlling: “[M]ere diminution in value of property due to the rezoning of that property for less intensive uses does not give rise to an action in inverse condemnation.” The Sierra Terreno court

70. See text accompanying notes 46-56 supra.
72. In fact, plaintiffs admitted on the face of their complaint that the land had a fair market value of $210,000 subsequent to the zoning reclassification. Id. at 325, 131 Cal. Rptr. at 634.
73. Id. at 328-29, 131 Cal. Rptr. at 636-37.
75. Id. at 443, 144 Cal. Rptr. at 777. The opinion does not state what uses were permitted within the “general forest” classification.
76. Id. at 442, 144 Cal. Rptr. at 777. The court also concluded that the mere adoption of a general plan designating areas for acquisition cannot give rise to a claim for inverse condemnation, and that a party has no vested interest in a previous zoning classification. Id. See Jones v. People, 22 Cal. 3d 144, 583 P.2d 165, 148 Cal. Rptr. 640 (1978); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973). In Sierra Terreno, plaintiffs failed to allege that any existing use of their land had been terminated by the Tahoe Regional Planning Agency.
thus reiterated the holding in previous cases, stressing that it is the legislature which must resolve the present "perplexing problem of economic gain and loss" created by zoning and rezoning. Finally, the court emphasized that only within the limits set by HFH will the judiciary exercise its "duty to protect the individual from improper governmental taking of or damage to property."78

In Pan Pacific Properties, Inc. v. County of Santa Cruz79 plaintiffs challenged the validity of an ordinance zoning their property agricultural with one-acre minimum building sites. Plaintiffs sought a declaration that the ordinance was invalid as applied to their land or, if valid, that such zoning amounted to a taking of property without just compensation by depriving them of all reasonable and beneficial uses of their property. The court, however, failed to reach the merits of the plaintiffs’ attack on the validity of the ordinance for a variety of procedural reasons.80

In addressing plaintiffs’ inverse condemnation allegation, the court distinguished Eldridge, interpreting the case to stand for the proposition that "public entities may not use their zoning power as a subterfuge to take land for public purposes without payment of just compensation."81 No factual allegation in Pan Pacific demonstrated that the zoning ordinance in question was a device to acquire property instead of a regulation of the use of land. Mere conclusory allegations of the absence of reasonable or beneficial use, the court therefore concluded, were insufficient to support a cause of action for inverse condemnation.82

The rule set out in HFH was again found to be controlling in

77. 79 Cal. App. 3d at 443, 144 Cal. Rptr. at 777.
78. Id.
80. First, the court held that in not seeking a variance from the ordinance plaintiffs had failed to exhaust their administrative remedies, thus foreclosing any attack upon the substantive validity of the ordinance. Id. at 249, 146 Cal. Rptr. at 431. This case was distinguishable from Eldridge and Sneed where such application clearly would have been futile. Id. at 250, 146 Cal. Rptr. at 432. In fact, the ordinance rezoning the plaintiffs’ property in this case had always been interpreted as permitting single family residences on one-acre minimum building sites. Thus, from all indications, the county probably would have granted plaintiffs a variance had one been applied for. Id. at 251, 146 Cal. Rptr. at 432. Second, the court determined that the county’s thirty day statute of limitations barred the action. Finally, the court held that an action to challenge either the validity of an allegedly discriminatory zoning ordinance or its consistency with the county’s general plan must be brought by writ of mandamus and not by a claim of inverse condemnation. Id. at 251, 146 Cal. Rptr. at 433-34.
81. Id. at 254, 146 Cal. Rptr. at 434.
82. Id. at 254-55, 146 Cal. Rptr. at 435.
Friedman v. City of Fairfax. The case focused upon two competing interests in regulating the use of land: the interest of a city in preserving open-space land through the exercise of its police power, balanced against the individual's interest in maximizing the profitable use of private property.

As early as 1964, the city had expressed interest in acquiring plaintiff's property, a registered historical landmark, for preservation as a public park. In 1973, the city down-zoned plaintiff's land to private commercial recreational use. Although the change conformed with its then current use, plaintiff alleged that the action diminished the market value of the property by eighty percent. Plaintiff brought suit, seeking damages in inverse condemnation and a declaration of the invalidity of the ordinance. Plaintiff attacked the ordinance as inconsistent with the general plan and as improper "spot zoning."

The court of appeal reversed the judgment of the trial court, rejecting the lower court's finding of arbitrary and unlawful spot zoning:

Absent evidence of inequitable precondemnation activities, denial of any reasonably beneficial use, or public use, the proof considered by the court disclosed nothing more than a diminution in market value due to down zoning for which a cause of action in inverse condemnation will not lie . . . and a judgment awarding compensation on such theory may not stand. 84

Moreover, the appellate court concluded that while the open-space ordinance may confer a public benefit, "such an otherwise valid purpose and attendant result is not the equivalent of a public use requiring compensation. So long as a rational basis exists for a zoning decision, the purpose or motive of the organizing body becomes irrelevant to any inquiry into its reasonableness." 85

A Summary of Current California Law on Down-Zoning

From HFH, Agins, and the court of appeal cases we can draw some conclusions about the shape of California law on down-zoning. First, as a matter of substantive law, the landowner has a cause of action only if the zoning deprives the landowner of substantially all use of the property. The courts take this proposition literally: the landowner may suffer considerable loss if land is down-zoned from commercial to multiple unit residential, from multiple unit to single unit

84. Id. at 679, 146 Cal. Rptr. 695 (citations omitted).
85. Id. at 677, 146 Cal. Rptr. 694 (emphasis by the court).
residential, or from residential to agricultural, but as long as a substantial use remains, no cause of action arises.

Second, as a matter of pleading, conclusory allegations that the down-zoning results in no substantial remaining use often will not suffice. The court will take judicial notice of the ordinance and, if it permits a substantial use, reject the complaint. A landowner who wants to claim that a use permitted by the zoning ordinance is not a substantial or reasonable use would be well advised to explain the basis for this claim in the pleadings. Allegations that the property retains substantial value, unless that value is merely a speculative appraisal of the possibility that the restrictive zoning will be lifted, imply a substantial remaining use and may well be fatal to the complaint.

Third, as a matter of remedy, the landowner's only option, except in the unusual case of actual public use, is a suit to invalidate the restrictive zoning. In rejecting the remedy of damages for inverse condemnation, California courts have charted a unique course. Their decisions, although resting on principles of fiscal policy and flexibility in planning, put California at odds with some of the federal courts, particularly the Northern District of California. Consequently landowners are likely to file future inverse condemnation actions in federal instead of state courts, thus forcing the federal courts to face the question of whether to follow HFH and Agins or to adhere to federal precedents.

To explain the post-Agins California practice, consider how the courts would now decide the case of Eldridge v. City of Palo Alto. The facts of that case might still support a cause of action for inverse

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condemnation based on either of two theories: that the cities engaged in inequitable activities aimed at depressing the value of the land to facilitate purchase of that land as a public park, or that by requiring public access for hiking and riding trails, the city intended an actual public use of the Eldridge property. The landowners could not, however, state a cause of action for damages on the theory that they had been deprived of all substantial use of their land. If the ordinance had that effect, it would exceed the city's authority under the police power and therefore would be invalid. Thus, although in such a situation the plaintiffs in Eldridge could not prevail on a claim for damages on a theory of excessively restrictive zoning, they might well succeed in persuading a court to hold the ordinance unconstitutional.89

The principal effect of the line of decisions from HFH through Agins is to preclude inadvertent public liability for planning and zoning decisions. A public entity can decide what property it wishes to acquire by eminent domain, and how it will restrict the use of property retained in private ownership, without fear that courts will hold that the entity has "taken" and must pay for property which it does not wish to acquire. Although this freedom to regulate given the public entities may be susceptible to abuse,90 the greater danger at present lies in court decisions that may devastate budgetary planning of local entities and chill others from enacting effective land use ordinances. The California decisions serve to overcome that danger.

Exclusionary Zoning

"Exclusionary zoning" typically refers to zoning intended to exclude persons unable to afford detached, single family residences on large lots, although on occasion ordinances simply have excluded all potential immigrants. All zoning, of course, excludes some uses, and concern over exclusion of prospective residents arose slowly. In the past, most communities favored residential development, so that earlier cases often concerned the exclusion of commercial or industrial uses in favor of residential use.

89. One alternative to the Agins approach might be to permit a city, facing a judicial determination that a regulation is invalid under the police power, to elect between paying compensation or repealing the regulation. See MODEL LAND DEV. CODE, § 9-112(3) (1976). We reject, however, the suggestion, raised upon petition for rehearing in Agins, that the decision lacks needed flexibility because it does not offer the city an option of paying compensation. Under the Agins analysis, whenever a regulation is invalid under the police power the city necessarily retains the right to accomplish its end by use of the eminent domain power.

90. See text accompanying notes 67-68 supra.
When judicial concern began to center on zoning ordinances which aimed at excluding new residents, two problems became apparent in the selection of a standard by which to measure the validity of the ordinance. The first was the extent to which courts should defer to the judgment of the legislative body. The issue centered on whether the courts should uphold an ordinance whenever it bears some reasonable relationship to the general welfare. The second was the question of "whose general welfare," the people of the enacting community, or members of a larger, more amorphous community, had been affected by the ordinance. Both problems stem from the fact that exclusionary ordinances commonly are enacted by small municipalities in which prospective immigrants have no representation and which, unless restrained by judicial doctrine, may pay little attention to the welfare of those beyond their borders.

The Evolution of the Activist Approach

One of the earliest decisions to strike down a zoning ordinance as exclusionary was the 1959 decision of the Virginia Supreme Court in Board of County Supervisors of Fairfax County v. Carper. The undeveloped western region of the county was zoned agricultural, a classification which permitted one-half acre lots, when the board rezoned that region to residential zoning on two acre lots. In holding the ordinance invalid, the court noted plaintiffs' argument that the law was intended to exclude persons who could not afford larger lots, but did not expressly endorse that contention. Instead, the court ventured that the two year grace period in the ordinance, during which one-half acre development could continue, revealed that the supervisors did not really believe two acre zoning was necessary. The court, despite referring to no evidence other than the economic history of land development in the county, held that the evidence in the record sustained the finding of the trial court that the ordinance bore no reasonable or substantial relationship to the general welfare.

Six years later the Pennsylvania Supreme Court struck down the four acre zoning law of Eaton Township, a rural area at the margin of Philadelphia suburban expansion. The township sought to justify the law by claiming that substantial additional immigration into the township would create problems of sewage disposal and highway conges-

92. Id. at 662, 107 S.E.2d at 396.
93. Id.
tion. It pointed also to the desire of its residents to preserve a rural lifestyle and to the value of providing suitable settings for historic landmarks. The court rejected these arguments:

Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future.95

The basis asserted by the court—that zoning may not be used "to deny the future"—seems at first to be an overstatement of the constitutional principles. Why cannot zoning be used "to deny the future?" Government can ban cars from Mackinac Island, bar factories from locating in regions of unpolluted air96 and set aside vast regions as wilderness.97 If development is the mark of the future, then at least in selected areas and issues, the current and widely approved government policy is to deny the future. Moreover, such a policy is not necessarily inappropriate for Eaton Township. Rational arguments can be presented that the migration of the middle class into the suburbs is harmful to the general welfare: it places heavy fiscal burdens on the suburbs while eroding the fiscal base of the cities; it results in schools and neighborhoods segregated by race and wealth; it creates traffic jams, air pollution, and sewage disposal problems.98 In the long run Pennsylvania might be better off if Eaton and other townships around Philadelphia retained their rural character and the city retained its middle class residents.

Furthermore, even if we conclude that, in general, the region around Philadelphia should accommodate suburban growth, wise policy may make exceptions for regions of special scenic or historical significance. Should Eaton Township be such an exception? If the township, through its elected representatives, claims it should be an exception, on what basis can the court find its claim unreasonable?

95. Id. at 527-28, 215 A.2d at 610.
The answer of the Pennsylvania Supreme Court was that the township itself is not competent to decide such matters. In the case of *In re Kit-Mar Builders, Inc.*, 99 the court, striking down a two and three acre zoning law of Concord Township, stated that if Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make. 100

*Kit-Mar*'s assertion that local government is not competent to adopt exclusionary policies presents conceptual problems. The holding of the court was that the ordinance exceeded the constitutional limits of the police power, a holding which does not differentiate between local, regional, and statewide legislative acts. The language of the decision, however, implies that if a metropolitan regional body or the state itself had zoned Concord Township for two and three acre lots, that law would receive more favorable review than the identical decision by the township. 101 Yet the landowner's constitutional rights ordinarily would not depend upon which level of government invaded those rights. A law which exceeded the scope of the police power when enacted by the township would not become legitimate when enacted by a group of townships, or by the state itself.

A footnote in *Kit-Mar* pointed to an escape from this dilemma. So long as the court's focus is limited to the alleged abridgment of the property rights of the landowner, no distinction can be drawn between restrictions enacted by local bodies and those of regional or statewide bodies. The *Kit-Mar* court noted, however, that although prior cases have posed the issue "as involving the constitutional due process rights of the landowner whose property has been zoned adversely to his best interests, it cannot realistically be detached from the rights of other people desirous of moving into the area 'in search of a comfortable place to live.' " 102

Solving the dilemma, then, requires a practical constitutional test which accounts for the rights of prospective immigrants to the municipality in question. The New Jersey Supreme Court, in *Southern Burlington County NAACP v. Township of Mount Laurel*, 103 undertook to resolve that problem by severing the issue of exclusionary zoning from

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100. *Id.* at 474-75, 268 A.2d at 769 (emphasis added).
101. *Id.* at 476, 268 A.2d at 769.
102. *Id.* at 474 n.6, 268 A.2d at 768.
its anchor in private property rights and resting its decision on the effect of exclusionary zoning on the general welfare. The township of Mount Laurel zoned its undeveloped land for light industry and single family housing on half-acre lots. Compared to the two to four acre zoning held invalid in Pennsylvania cases, and the one acre zoning upheld in *Ybarra v. City of Town of Los Altos Hills*, the Mount Laurel ordinance seems relatively moderate. The ordinance faced review, however, by a court which had decided upon a radical new judicial intervention into zoning law.

The New Jersey court recognized the well settled principles that laws are presumed constitutional, that one attacking the validity of a law bears the burden of proof, and that ordinarily courts accord great deference to the determination of the legislative body that the enactment will promote the general welfare. It declined, however, to follow those traditional principles. Reversing the usual presumption of constitutionality, the court ruled that a township's zoning ordinance was presumptively invalid unless it provided a reasonable opportunity for an appropriate variety and choice of housing, including housing for persons of low and moderate income. To comply with this standard, the municipal zoning ordinance "must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning."

The township attempted to defend its restrictive zoning on grounds of fiscal frugality, arguing that low cost housing gives rise to public costs in excess of tax revenues, and that its ordinance would thus


105. 503 F.2d 250 (9th Cir. 1974). See notes 122-28 & accompanying text infra for a discussion of *Ybarra*.

106. Mount Laurel zoned approximately 30% of its area for light industry, slightly over 1% for retail stores, and the balance for single family residential development on medium-sized lots. Most of the undeveloped residential land was zoned for half-acre lots, but the ordinance permitted cluster development and planned unit developments.

107. The court noted that it had plainly warned in past cases that it would change its attitude of leniency toward municipal zoning restrictions when it concluded that changing land use required such judicial action. 67 N.J. at 176-77, 336 A.2d at 726.


109. 67 N.J. at 174, 336 A.2d at 724.

110. *Id.* at 187, 336 A.2d at 732.
result in lower property taxes.\textsuperscript{111} The benefits cited by the township, however, flowed only to its present residents, and the welfare of those residents, the courts declared, does not define the constitutional test. The relevant standard as defined by the court is not the welfare of the enacting municipality, but the welfare of the region from which the demand for housing arose. Measured by that standard, the Mount Laurel ordinance failed to promote the general welfare and hence, ruled the court, was invalid under both the state constitution and state statutes authorizing townships to enact zoning laws to promote the general welfare.

The \textit{Mount Laurel} decision puts forward some radical answers to the two issues noted earlier: the extent of judicial deference to legislative judgment and the question of whose welfare provides the constitutional measure. On the first issue, the traditional view has been that courts do not pass upon the desirability of legislation; even though the judges may believe the act will do more harm than good, they must defer to the legislative body unless the legislation lacks any reasonable relationship to promotion of the general welfare. The federal constitutional standard, established in \textit{Village of Euclid}, is that a zoning ordinance is invalid only if its “provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.”\textsuperscript{112} Subsequent Supreme Court decisions virtually have renounced judicial power to declare legislation invalid on the ground of substantive due process, regardless of its apparent unreasonableness.\textsuperscript{113} Moreover, legislation attacked under the due process clause enjoys a presumption of constitutionality; if its validity “be fairly debatable, the legislative judgment must be allowed to control.”\textsuperscript{114}

The New Jersey decision, however, affords the Mount Laurel ordinance no presumption of constitutionality. It evidences no deference to legislative judgment, no willingness to resolve debatable questions in favor of the ordinance. To the contrary, the court established a presumption that municipal ordinances which do not provide low and

\textsuperscript{111} \textit{Id.} at 185, 336 A.2d at 730-31.

\textsuperscript{112} Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).


\textsuperscript{114} Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).
moderate income housing opportunities "at least to the extent of the municipality's fair share of the present and prospective regional need" are contrary to the general welfare. Further, this assertion by the court of its power to invalidate laws with which it disagrees, was necessary to the Mount Laurel decision because, as observed earlier, reasonable arguments can be presented against development of metropolitan fringe areas. Thus, although the Mount Laurel decision arguably could be sustained on equal protection grounds because of the wealth discrimination inherent in the township's ordinance, it probably could not be sustained as a due process decision under the traditional standards calling for deference to legislative determinations.

The New Jersey court was equally explicit in its resolution of the second issue. In determining whether an ordinance promotes the general welfare, the appropriate measure is the welfare not of the enacting township but of the surrounding region. The court offered no confining definition of the applicable region, stating that the size of the region will "necessarily vary from situation to situation." Rejecting the suggestion that the "region" must be limited to a single county, the

115. 67 N.J. at 174, 336 A.2d at 724. See note 98 and accompanying text supra.
116. A similar argument could have been made in National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). Four acre zoning in Eaton Township was constitutionally suspect not merely because it excluded but because it did not exclude impartially. Those with money to buy four acre lots were welcome in Eaton Township, but all others were barred. The court's opinion, however, made no mention of the problem of wealth discrimination.
117. Addressing the question of judicial deference to legislative actions, the court in Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976), stated: "If ... a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation." Id. at 906 (citation omitted). See note 113 supra for Supreme Court cases demonstrating judicial deference to legislative determinations. See also Zoning Developments, supra note 24.

"Traditionally, the power to establish land use policy has been exercised primarily by local governments supervised by state courts. Because federal court adjudication of zoning cases may be said to infringe upon this area of local decision-making, federal courts ... have on occasion refused to consider fully zoning challenges otherwise properly before them ... ."

"Federal court reluctance to consider the merits of complicated exclusionary zoning cases is also motivated by doubts concerning judicial competence. Fearing that active judicial intervention will lead to an unlimited judicial reordering of legislative schemes, the Supreme Court has recently indicated that the federal judiciary should hesitate to find constitutional liability where broad social ills are implicated ... ." Id. at 1660-61. Contra, Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1304-05 (1976).
118. 67 N.J. at 190, 336 A.2d at 733.
court viewed the applicable region in the *Mount Laurel* case as the entire Camden metropolitan area extending to the Pennsylvania state line.

For each community to bear a proportionately equal share of every type of housing, however, may not be desirable or even rational regional planning. The New Jersey Supreme Court was sensitive to this problem, but concluded that "under present New Jersey legislation, zoning must be on an individual municipal basis, rather than regionally. So long as that situation persists under the present tax structure . . . we feel that every municipality . . . must bear its fair share of the regional burden."

The Conservative Position of the Federal Courts

The California courts, in contrast to those of Pennsylvania and New Jersey, have a long-established tradition of great liberality in upholding municipal zoning ordinances against almost any conceivable challenge. Consequently, many litigants attacking exclusionary zoning in California have filed their actions in federal court. That strategy, however, invariably has proved unsuccessful.

The first such suit, *Confederacion de la Raza Unida v. City of Morgan Hill* attacked restrictive zoning in the hilly region of a small suburban community. The case was particularly inappropriate for raising arguments of exclusion because the restrictive zoning encompassed only part of the community. Moreover, aesthetic and environmental justifications supported the more restrictive provisions for the hillside lots. The court accordingly rejected the plaintiffs' attack on the exclusionary features of the zoning without venturing into the difficult problems underlying the exclusionary zoning issue.

The next federal decision involving California zoning, *Ybarra v. City of Town of Los Altos Hills* concerned a suburban community which zoned all undeveloped land for one acre residential lots. Plain-

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119. *Id.* at 189, 336 A.2d at 732-33 (footnotes omitted) (emphasis added).
122. 503 F.2d 250 (9th Cir. 1974).
tiffs, who wanted to construct multifamily housing, claimed the ordinance was invalid on three grounds: (1) that it denied due process because it exceeded the community’s authority to regulate land use under the police power; (2) that it imposed an implicit wealth discrimination and thus denied the equal protection of the laws; and (3) that it did not contain a housing element which took account of the housing needs of nonresidents.123

Unsuccessful in the district court,124 plaintiffs appealed to the Court of Appeals for the Ninth Circuit. That court rejected each of plaintiffs’ contentions and affirmed the court’s decision below. The court’s opinion summarily dismissed plaintiffs’ due process argument, citing Village of Euclid125 as controlling. Turning to the equal protection issue, the Ninth Circuit court viewed the matter from a regional perspective, ruling against plaintiffs because they “failed to show that adequate low-cost housing was unavailable elsewhere in . . . [the] County in areas accessible to . . . [plaintiffs’] jobs and social services.”126 Finally, the court ruled that California Government Code section 65302, which requires the city’s general plan to include a housing element that “shall make adequate provision for the housing needs of all economic segments of the community”127 does not compel a city to provide for the housing needs of nonresidents.128

Although Ybarra resembles Mount Laurel in its use of a regional perspective, the ultimate conclusions of the Ninth Circuit court are antithetical to those of the New Jersey court. Under the Ybarra decision, Los Altos Hills clearly is not required to meet its fair share of regional housing needs; to the contrary, so long as other communities meet those needs, Los Altos Hills can ignore them. This decision, moreover, largely vitiated the usefulness of the required housing element. A wealthy and exclusive suburb like Los Altos Hills undoubtedly has few present residents living in overcrowded or inadequate housing. Thus,

123. California Government Code § 65302(c) requires that each community adopt a general plan that includes a housing element which “shall make adequate provision for the housing needs of all economic segments of the community.” CAL. GOV’T CODE § 65302(c) (West Supp. 1966-1978). For a discussion of the housing element and the community to be served see notes 170-203 & accompanying text infra. See generally Knight, California Planning Law—Requirements for Low and Moderate Income Housing, 2 PEPPERDINE L. REV. § 159 (1974); See Comment, A Regional Perspective of the “General Welfare,” 14 SAN DIEGO L. REV. 1227 (1977).
125. See note 112 & accompanying text supra.
126. 503 F.2d at 254.
128. 503 F.2d at 254.
if the housing element only requires attention to the needs of present residents, as *Ybarra* held, it imposes little or no obligation on such a community.

In the next case addressed in the Ninth Circuit, *Construction Industry Association of Sonoma County v. City of Petaluma* the court reiterated the same permissive attitude toward exclusionary zoning that it established in *Ybarra*. The City of Petaluma, a rural community facing accelerating growth from the expanding San Francisco metropolitan area, adopted a series of resolutions to limit projects involving five or more units to 500 dwelling units annually. Under the “Petaluma Plan,” permits are awarded to projects which meet various objectives, including provision for low and moderate income units. Developers must compete to determine which will receive permits from the limited number available.

The federal district court had concluded that the Petaluma Plan unconstitutionally impaired freedom of travel. Viewing that freedom as a fundamental right, it found no compelling interest to support the exclusionary provisions of the plan. The court of appeals, however, ruled that plaintiff, an association of builders, lacked standing to raise the right to travel issue. Relying on *Warth v. Seldin*, the court stated that although the builders were damaged by the restrictions of the plan, “their economic interests are undisputedly outside the zone of interest to be protected by any purported constitutional right to travel.”

The federal appellate court then turned to the question of whether the Petaluma Plan violated the plaintiff's due process rights. Relying on *Village of Belle Terre v Boraas* and its own decision in *Ybarra*, the court found no denial of due process. In direct opposition to the

129. 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).
130. Because the Petaluma Plan limits only multi-family units, it has no effect on construction of individual residences. Its effect on multi-family residences is mixed; evidence suggests that the number of units constructed would decline, but that the proportion of low and moderate cost units would increase. *Id* at 902.
132. 422 U.S. 490 (1975). *Warth* held that a person attacking exclusionary zoning must allege specific, concrete facts demonstrating that the practice inflicts personal harms, and that a tangible personal benefit will flow from judicial action. Applying this test of standing, the Supreme Court denied standing to the following: (1) low income residents of the excluding community; (2) taxpayers of that community; (3) a civic organization with resident and nonresident members; (4) an association of housing contractors; and (5) a metropolitan housing council.
133. 522 F.2d at 904.
134. 416 U.S. 1 (1974). *Belle Terre* upheld a village ordinance prohibiting rental of a residence to more than two unrelated persons. The Supreme Court held that the ordinance
Pennsylvania and New Jersey cases cited earlier, the court ruled that the plan need only bear a rational relationship to a legitimate state interest and held that preserving the rural character and environment of the community was such a legitimate interest. "If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region," the court concluded, "it is the state legislature's and not the federal courts' role to intervene and adjust the system."

For California opponents of exclusionary zoning, the federal cases represented a pattern of frustration. The courts' language did not absolutely bar attack on such zoning, but somehow the attacker could never put together the combination of the right plaintiff, the right arguments, and the right evidence. Perhaps this pattern was not accidental; if the federal courts had resolved not to involve themselves in what they considered a state legislative matter, a litigant who breached one line of resistance simply would encounter the next barrier. In *Ybarra*, for example, plaintiffs did not prevail ostensibly because they failed to present evidence from a regional perspective; however, when plaintiffs in the *Petaluma* case presented evidence of regional impact, they were told it was irrelevant.

The Compromise Position of the California Supreme Court

Despite the extensive litigation on exclusionary zoning in other states and the actions discussed above in the federal courts in California, as of 1975 no exclusionary zoning issue had ever come before the California appellate courts. The issue reached the state supreme court that year in a curious fashion. The court granted a hearing in three cases to decide the question of whether municipal voters could adopt zoning ordinances by initiative, a question irrelevant to the issues of exclusionary zoning, except for the fact that in two of the three cases the zoning initiatives were arguably of exclusionary character. The court selected *San Diego Building Contractors Association v. City Council*, the only case without an exclusionary issue, as its lead case and held that charter cities could zone by initiative. In the second case,
Builders Association of Santa Clara-Santa Cruz Counties v. Superior Court, the supreme court upheld the charter city of San Jose's initiative imposing a two year moratorium on rezoning of property to residential use in part of the city suffering from overloaded schools. The decision noted the builders' claim that the initiative denied due process of law and impaired a constitutional right to travel, but concluded that because the act imposed only a brief limitation on only a portion of the city, the case did not raise a question involving substantial abridgement of constitutional rights.

The remaining case, Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, primarily concerned the question of whether a general law city, as contrasted with a charter city, could zone by initiative. When the court ruled in favor of the city's power, however, it was then required to determine the validity of a city-wide prohibition on issuance of residential building permits of allegedly temporary, yet uncertain, duration.

The Livermore initiative prohibited issuance of further building permits until educational, sewage treatment, and water supply facilities complied with standards set out in the initiative. The developers attacked the initiative on two grounds: first, that it infringed a constitutionally protected right to travel, and second, that it exceeded the city's authority under the police power and thus constituted a deprivation of substantive due process.

If the ordinance abridged a fundamental right, current constitutional doctrine might invalidate it unless it was justified as necessary to

141. The court noted that "[t]he zoning freeze established by the initiative here at issue is limited to two years duration, and applies only to that portion of the city plagued with the problem of overcrowded schools. Even within that portion of the city, the ordinance permits rezoning if the developer will agree to assist the school district in meeting the need for additional facilities which his development has created. Consequently the initiative need not serve to exclude newcomers from San Jose; it may, instead simply divert some development to districts with adequate school facilities, while providing overcrowded districts with the means to accommodate the needs of new residents." Id. at 233, 529 P.2d at 587, 118 Cal. Rptr. at 163.
142. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
143. The court rejected the contention that the ordinance was void for vagueness. The vagueness issue arose because the ordinance prohibited issuance of building permits until the problem of overcrowded classrooms was solved, but did not define what would constitute an acceptable solution. The court found that the ordinance was probably intended to incorporate a definition of adequate classroom space contained in a local school district resolution. To uphold the constitutionality of the statute, the court interpreted its terms to incorporate the resolution's definition. Id. at 596-98, 557 P.2d at 481-82, 135 Cal. Rptr. at 49-50.
serve a compelling state interest. The court, however, held that the ordinance did not abridge a fundamental right to travel as the ordinance did not “directly burden” the right to travel by discriminating against nonresidents or newly arrived residents.

Turning to the due process issue, the Livermore court first reiterated the permissive test of past decisions—that an ordinance is valid if it has a “reasonable relation to the public welfare.” The decision nevertheless promptly set about to modify that standard. First, follow-

144. State or local action which infringes upon a fundamental right is judged by a “strict scrutiny” standard of review. Where fundamental rights are involved, i.e., the right to vote, the right to interstate travel, and the right to freedom of association, equal protection arguments are raised, and the state has the heavy burden of proving that the regulation serves a “compelling state interest.” This standard is to be contrasted with the lesser burden of showing that an ordinance bears “a rational relationship to a [permissible] state objective” normally invoked upon due process challenges. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)). For cases dealing with fundamental rights and strict scrutiny, see Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); NAACP v. Alabama, 357 U.S. 449 (1958) (right to freedom of association). See generally Gunther, The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8-18 (1972); Wilkinson, The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality, 61 VA. L. REV. 945, 950-54 (1975); Comment, Fundamental Personal Rights: Another Approach to Equal Protection, 40 U. CHI. L. REV. 807, 807-09, 812-17 (1973); Note, Legislative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123, 146-49 (1972).

145. 18 Cal. 3d at 602-04, 557 P.2d at 484-85, 135 Cal. Rptr. at 52-53. For cases invalidating legislation on grounds that it directly burdened the right to travel by discriminating against nonresidents and newly arrived residents see Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (residency requirements imposed to restrict eligibility for medical care); Dunn v. Blumstein, 405 U.S. 330 (1972) (residency requirements imposed to restrict eligibility for voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (residency requirements imposed to restrict eligibility for welfare); In re King, 3 Cal. 3d 226, 474 P.2d 983, 90 Cal. Rptr. 15 (1970) (penal code provision making the failure to provide support payments a misdemeanor when father resided in California, but imposing a felony when the father resided out of state). But see Califano v. Torres, 435 U.S. 1 (1978) (social security benefits denied to persons residing outside the United States does not abridge the right to travel); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (an ordinance which in effect limits migration to a community does not necessarily abridge a fundamental right to travel). See generally Note, The Right to Travel and Exclusionary Zoning, 26 HASTINGS L.J. 849 (1975); Comment, A Strict Scrutiny of the Right to Travel, 22 U.C.L.A. L. REV. 1129 (1975); Comment, The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?, 39 U. CHI. L. REV. 612 (1972).

ing the lead of the *Mount Laurel* decision, the court held that the ordinance must bear a reasonable relationship to the regional, not merely the municipal, welfare. Second, in an oblique reference to the California tradition of invariably upholding zoning ordinances attacked under the due process clause, the court stated that "it cannot be assumed that a land use ordinance can *never* be invalidated as an enactment in excess of the police power." The court noted "Judicial deference to legislative judgment is not judicial abdication. The ordinance must have a *real and substantial* relation to the public welfare."  

Having established its test of a real and substantial relationship to the regional welfare, the *Livermore* court found the record inadequate to determine the constitutionality of the initiative ordinance. Trusting that Livermore and regional agencies would attempt in good faith to provide necessary educational, sewage, and water facilities—and thus that the ordinance imposed only a temporary moratorium—the court called for evidence on the likely duration and effect of the moratorium and remanded the case for further proceedings.

As Justice Mosk pointed out in his dissent, the *Livermore* majority's presumption of good faith can be called into question. The ordinance itself contained no terms providing for construction of needed facilities. If the community really wanted to speed construction, a more rational method than a total moratorium would be to permit development which contributed toward construction of the facilities. In addition, one stated purpose of the initiative—preventing further air pollution—cannot be achieved by constructing new educational, sew-

147. See notes 103-19 & accompanying text *supra*.
148. 18 Cal. 3d at 609, 557 P.2d at 489, 135 Cal. Rptr. at 57.
149. *Id*. A comment in the *Livermore* decision may forecast a further expansion of judicial action in the exclusionary area. The court distinguished the activist approach of *Mount Laurel* and the Pennsylvania decisions on the ground that those cases involved "ordinances which impeded the ability of low or moderate income persons to immigrate to a community but permit largely unimpeded entry by wealthier persons." *Id*. at 606, 557 P.2d at 487, 135 Cal. Rptr. at 55. See discussion in Note, *The Need for Accommodation in Growth Control Ordinances: Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore*, 12 U.S.F. L. REV. 357, 372-75 (1978).

The Livermore ordinance, the court pointed out, lacked this characteristic. It barred all residential construction regardless of lot size, floor space, or single family character. But in this respect the Livermore ordinance is exceptional; most exclusionary zoning ordinances permit construction of expensive single-family residences on very large lots, thus presenting issues of wealth discrimination. The *Livermore* decision leaves open the possibility that such ordinances will not receive the judicial deference granted zoning ordinances in past decisions.

150. *Id*. at 622-23, 557 P.2d at 497, 135 Cal. Rptr. at 65 (Mosk, J., dissenting).
age, and water facilities, but only by excluding prospective residents indefinitely.

If viewed as an exclusionary measure of indefinite duration, the constitutionality of the Livermore ordinance would depend on whether a rational regional planning board would adopt such a measure. If viewed as an exclusionary measure of indefinite duration, the constitutionality of the Livermore ordinance would depend on whether a rational regional planning board would adopt such a measure. The objectives set out in the initiative's standards—improvement of schools, water supply, and sewage facilities—probably could be achieved through less drastic means, and thus might not justify a total ban on residential construction. The Livermore Basin, however, is known to have the worst air pollution problem in the San Francisco metropolitan area. Arguably a regional board, taking note of that problem might rationally decide to divert all new construction to other localities until some method is discovered for reducing the air pollution of the Livermore Basin.

The Livermore decision represents a compromise position on the issues of exclusionary zoning. On the one hand, it adopts the regional welfare approach of *Mount Laurel*, and warns that courts may use that test to strike down exclusionary ordinances; on the other hand, it adheres to the traditional "reasonable relation" test and to traditional respect for legislative judgment. A certain anomaly underlies this compromise, for *Livermore* entrusts local legislative bodies with the power to enact ordinances whose validity is measured by a regional welfare standard. The Pennsylvania and New Jersey courts were emphatic in their assertions that local bodies cannot be trusted to take regional needs into account. Future cases in California, perhaps coupled with the experience of New York courts operating under a similar precedent, will indicate whether the California court acted unrealis-

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152. See STANFORD ENVIRONMENTAL LAW SOCIETY, A HANDBOOK FOR CONTROLLING LOCAL GROWTH 90 (1973).

153. The *Livermore* compromise finds support in a decision of the New York court of appeal. In *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975), a decision roughly contemporaneous with the *Livermore* decision, the New York court reviewed a community zoning ordinance which made no provision for multiple family housing. The court reiterated its view that the purpose of zoning is to provide a "balanced, cohesive community which will make efficient use of the town's available land." *Id.* at 109, 341 N.E.2d at 242, 378 N.Y.S.2d at 680, (citing *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 378, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152 (1972), *appeal dismissed*, 409 U.S. 1003 (1972), the leading decision upholding a community plan providing for phased growth.) As did the California court in *Livermore*, the New York court reached beyond existing state precedent to add the requirement that communities must consider regional needs. The New York court, in explaining this requirement, noted that "a town need not
tically in its trust of local legislatures and, if that trust proves misplaced, whether judicial review under the *Livermore* precedent will suffice to correct the harm.

In the years since the *Livermore* decision, only one reported California decision has faced the problems of exclusionary zoning. The second decision by the court of appeal in *Eldridge v. City of Palo Alto*, a case most noted for its discussion of down-zoning issues, encompassed a related action, *Beyer v. City of Palo Alto*, which was consolidated with the *Eldridge* case at the appellate level. As noted in the previous discussion of *Eldridge*, the City of Palo Alto had zoned about 6000 acres of foothill land, most of the remaining undeveloped land in the city, as open space. The zoning permitted only one residence per ten acres and provided for public hiking access. Plaintiff Beyer, unlike Eldridge, asserted the ordinance was unconstitutional exclusionary zoning. The court of appeal majority rejected this contention, holding that the environmental purposes of the ordinance lay within the police power. The majority went on to emphasize that the law was beyond constitutional attack, except in proceedings for inverse condemnation.

permit a use solely for the sake of the people of the region if regional needs are presently provided for in an adequate manner." *Id.* at 111, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 681. This is essentially the holding of the Ninth Circuit in *Ybarra v. City of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974), and arguably inconsistent with the "fair share of the burden" approach of the New Jersey courts. See notes 103-19 & accompanying text supra. Finally, in a holding again parallel to *Livermore*, the New York Court of Appeal concluded that the record before it was inadequate to determine whether the zoning reasonably related to the regional welfare, and accordingly remanded the case to the trial court.


155. See text accompanying notes 45-56 supra.

156. Justice Sims, dissenting, noted the substantial issues of exclusionary zoning presented by the Palo Alto ordinance but concluded that Beyer, having sold his property during the litigation, lacked standing to raise them. 57 Cal. App. 3d at 653-55 & n.14, 129 Cal. Rptr. at 601-02 (1976).

The brevity of the court’s discussion of the *Beyer* issues obscures some of the interesting features of the case. The former zoning, which Beyer wanted restored, permitted one house per acre of land, a typical exclusionary zoning ordinance which serves to limit entry to the wealthy. The new open space zoning, however, despite its provision for one house per ten acres, was not designed to create an elite suburb for the super-wealthy. Instead, its primary purpose was the preservation of a fragile environment, and allowing one house for ten acres was probably a minimum concession designed to reduce the danger that the ordinance would be held unconstitutional taking.

Consequently, although Beyer raised issues of exclusionary zoning, the principal attack he and Eldridge leveled against the open space zoning was that the city was taking their land for a park without paying for it. When a city acquires a park, and refuses to sell or lease park land for housing, its acts are clearly exclusionary, but so far as we are aware it has never been suggested that such acts are unconstitutional. Yet if the primary purpose of
The supreme court's recent decision in *Agins* overruled *Eldridge* to the extent that the latter case conflicted with the *Agins* holding limiting a landowner's remedy for unconstitutionally restrictive zoning to an action to invalidate the ordinance.\(^{157}\) The *Eldridge* conclusion that the Palo Alto zoning was a valid exercise of the police power was superficially consistent with *Agins*, and thus was not expressly overruled. *Agins*, however, appears to rest on the theory that an ordinance so restrictive that it constitutes a taking is necessarily an act in excess of the police power. Under that theory a court could not hold, as *Eldridge* did, that the same restrictive zoning is both a taking and a valid exercise of the police power. To that extent the *Eldridge* court's conclusion that the extremely restrictive Palo Alto zoning was constitutional may be vitiated by the *Agins* decision.

**Inverse Condemnation as a Remedy for Exclusionary Zoning**

A number of writers have proposed that courts remedy exclusionary zoning by awarding damages in inverse condemnation to persons harmed by such zoning.\(^{158}\) The following discussion focuses on the most prominent of those proposals, that advanced by Professor Ellickson. Ellickson argues that under certain economic assumptions the economically optimum level of growth, and the most equitable distribution of the cost and benefits of growth, would result if cities paid to landowners damages attributable to restrictive measures. He first distinguishes between subnormal land use, defined as use less socially desirable than the norm permitted in the community, and normal or above normal use.\(^{159}\) When a government prohibits a subnormal use, the landowner recovers damages only upon proof that the restriction is grossly inefficient, i.e., that its costs vastly exceed its benefits.\(^{160}\) If the government prohibits a normal or above normal use, however, constitutional limits on exclusionary zoning is to protect interests of prospective residents and to safeguard the regional welfare, the fact that the landowner received just compensation for his property should be irrelevant.

\(^{157}\) *Agins v. City of Tiburon*, 23 Cal.3d 605, 612, 591 P.2d 514, 518 (1979). The language from *Agins* is quoted in text accompanying note 59 *supra*.


\(^{159}\) Ellickson, *supra* note 24, at 419 & n.86.

\(^{160}\) *Id.* at 419.
the landowner establishes a prima facie case by proving a substantial diminution in value. Under Ellickson's proposal, the municipality must then assume the burden of proving both that the restriction is economically efficient and that it is fair to the landowner. A restriction is fair whenever the landowner should be able to recognize that as a taxpayer his or her own long term self-interest in avoiding the administrative costs of minor compensatory payments makes it fair to deny compensation. Finally, he proposes a class action on behalf of consumers of housing in which plaintiffs must prove that the restrictive zoning increased regional housing prices. The city could defend by proving efficiency and fairness. Any award would compensate attorneys and households proving specific injury, with the balance escheating to the state.

There are, however, certain theoretical, practical, and procedural difficulties which argue against judicial adoption of this proposal. Many of these difficulties will have the effect of deterring cities from adopting restrictive measures even though such measures are necessary to achieve optimal economic efficiency and fairness under the model.

First, the model assumes that rational suburban landowners will pay higher taxes willingly to finance the damage awards occasioned by the suburb's restrictive measures, so long as the restrictions increase the owner's land value by more than the taxes. As a practical matter, most often the landowner taxpayer will not agree to such proposals. Increased taxes are immediate losses, while land appreciation is only speculative. More importantly, appreciation can be realized only on sale, and thus must be discounted by the costs and taxes incident to sale. Finally, many homeowners, for reasons both economic and noneconomic, are unwilling to sell. For them, land appreciation does not offset increased taxes. The fear that higher taxes, even if accompanied by appreciation, might compel landowners to sell was among the forces behind the passage of Proposition 13 in California. As a result,

161. Id.
162. Id.
163. Id. at 498-99.
164. Id. at 500.
166. Under Ellickson's model, a city's failure to impose zoning restrictions may result in construction of more housing than is economically optimal. The economic ideal, avoiding the economic costs of either too much or too little housing, under some circumstances can be achieved only if the city imposes restrictions and pays damages to the landowners affected. Ellickson, supra note 24, at 444-46.
landowners will discount the value of appreciation as against the cost of taxes and thus, under Ellickson’s model, impose less restrictive growth limitations than the economic optimum.

Second, Ellickson’s distinction between normal and subnormal uses will not commend itself to egalitarians. He defines a subnormal use as one less socially desirable than the norm permitted in the community. Thus, in Los Altos Hills, with uniform one acre zoning, half acre lots are subnormal. In Ellickson’s model, limiting or excluding newcomers is easier for the wealthy suburbs than for less wealthy suburbs, even though the latter are likely to be experiencing much greater congestion costs.

Third, the model necessarily assumes that a majority of landowners can raise taxes to pay damages awards. In post-Proposition 13 California, this is not the case. Knowing taxes cannot be raised and that a substantial award for interim damages will devastate an already tight budget, city councils will hesitate to enact any but the most innocuous restrictions.

Finally, Ellickson’s proposed consumer class action is questionable procedurally. Ellickson notes that the administrative costs of distributing the award to prospective consumers usually would be unacceptably high, but the problem goes deeper: how does one even identify the consumers who have a right of action? Would testimony by an economist that a suburb’s exclusionary policy has raised regional housing costs make all recent purchasers of houses, and their tenants, members of the plaintiff class? The proposed action may well be viewed by many jurisdictions as a suit on behalf of a nonascertainable class, the members of which cannot be notified at reasonable expense, and may thus be an improper class action.

The Housing Element in the Community General Plan; Its Future Impact on Exclusionary Zoning

California’s statutorily mandated housing element, Government

167. See note 62 supra.
168. Ellickson, supra note 24, at 500.
169. Federal Rule of Civil Procedure 23(a) states the initial prerequisites to a federal class action: “One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a).
Code section 65302(c),\textsuperscript{170} may serve as a basis for challenging exclusionary zoning ordinances. The California Zoning and Planning Law, Government Code section 65302, requires that every city and county adopt a comprehensive general plan which contains certain mandatory elements, including provisions for open space and housing. The law further requires that local zoning ordinances be consistent with the community's general plan, including the mandatory elements.\textsuperscript{171}

The housing element of the general plan consists of standards and plans for the improvement and adequate siting of housing. Under section 65302(c) that element must "make adequate provision for the housing needs of all economic segments of the community."\textsuperscript{172} Pursuant to regulations authorized by the statute, the 1977 Housing Element Guidelines (Guidelines) were adopted.\textsuperscript{173} These Guidelines, which are mandatory regulations to be followed in the development and implementation of the local housing element,\textsuperscript{174} require that localities com-

\textsuperscript{170} The statute in relevant part provides: "The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:

\begin{quote}
"(c) A housing element, to be developed pursuant to regulations established under Section 41134 of the Health and Safety Code, consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community." \textit{CAL. GOV'T CODE} § 65302 (West Supp. 1966-1978).
\end{quote}

\textsuperscript{171} \textit{CAL. GOV'T CODE} § 65860 (West Supp. 1966-1978). \textit{See id. §§ 65101(a), 65910.}

\textsuperscript{172} \textit{Id. § 65302(c).}

\textsuperscript{173} 25 \textit{CAL. ADMIN. CODE} §§ 6400-6478 (West 1977). The Housing Element Guidelines were developed pursuant to regulations established under § 41134 (renumbered § 50459) of the Health and Safety Code. \textit{See CAL. HEALTH & SAFETY CODE} § 50459 (West 1979). Final responsibility for their development, adoption, and review rests with the California Department of Housing and Community Development (HCD) as authorized by Health and Safety Code § 50456 and Government Code § 65302(c). \textit{See CAL. GOV'T CODE} § 65302(c) (West Supp. 1966-1978); \textit{CAL. HEALTH & SAFETY CODE} § 50456 (West 1979).

The original Housing Element Guidelines, adopted by the Housing and Community Development Commission in 1971 and promulgated as emergency regulations in August, 1977, were so terse that they were ineffective in carrying out the mandate of § 65302(c), the housing element. Knight, \textit{California Planning Law: Requirements for Low and Moderate Income Housing}, 2 \textit{PEPPERDINE L. REV.} S159, S163 (1974); Note, \textit{California Lower Income Housing Policy: At Legislative and Judicial Crossroads}, 29 \textit{HASTINGS L.J.} 793, 797 (1978). Moreover, since the commission failed to adopt the original Guidelines pursuant to the Administrative Procedure Act, they were not binding on the localities. \textit{See CAL. GOV'T CODE} §§ 11371, 11373-11374, 11420, 11423-11425 (West 1966 & Supp. 1978).

\textsuperscript{174} These Guidelines have been challenged on the grounds that they are not mandatory, but rather advisory. The opinions of the Attorney General indicate that they are to be binding regulations. 55 \textit{Op. ATT'Y GEN.} 380 (1972). Additional strength is added to this contention by the requirement that the procedure followed for adopting such Guidelines conform to the procedure outlined for promulgating mandatory regulations under the Cali-
ply with their provisions by mid 1979-1980, depending upon the region. The purpose of the Guidelines is to make specific the general legislative mandate of the housing element. As interpretative regulations, the Guidelines serve as a yardstick against which local housing compliance is measured to determine whether adequate provision has been made for all economic sectors of the community.

Because local housing policies and plans have regional as well as local impact, the Guidelines define a locality's responsibility to the community in terms of the housing needs of its resident population, analyzed under a regional framework. The localities share the collective responsibility of providing for the housing needs of all economic segments of the community within a general housing market area. This regional responsibility approach is similar to the standards set by the New Jersey court in Mount Laurel for determining the validity of a restrictive zoning ordinance. The Guidelines thus require that the housing element "be responsive to the housing needs of a fair share of those households who do not live in the locality but whose housing opportunities are affected by planning decisions of the locality."

Fair share allocation plans authorize the Department of Housing and Community Development to assist regional planning bodies in the preparation and evaluation of their fair share responsibilities. In


175. 25 CAL. ADMIN. CODE § 6478 (West 1977).
176. Id. § 6406.
177. Id.
178. Id. § 6418. "General housing market area" is defined as a regional geographic unit. Id. § 6410(f).
179. See text accompanying notes 103-19 supra. In fact, the Guidelines use language much like that of the New Jersey court in defining the community to be served by the local housing element as including a fair share of those persons "who would live within the local jurisdiction were a variety and choice of housing appropriate to their needs available." 25 CAL. ADMIN. CODE § 6418 (1977); See Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 179-81, 187-88, 336 A.2d 713, 728, 731-32, cert. denied, 423 U.S. 808 (1975).
181. Id. § 6420. If regional councils failed to allocate market area needs among the localities within the general area by the July 1, 1978, deadline, the Department of Housing and Community Development had authority to perform the allocation which had been delegated to the regional planning body. Id. § 6424.
providing for the economic needs of all segments of the community, the focus of the fair share allocation models is on nonmarket-rate (low-income) households. The plans provide localities with a general measure and presumptive identification of housing needs for which adequate provision must be made in the housing element. The fair share allocation plans must identify both the immediate and projected regional housing needs of nonmarket-rate households and assign to each locality a fair share of this estimated need. Finally, the Housing Guidelines adopt the language of Government Code section 65300.5 in requiring internal consistency among general plan elements.

The housing element of the general plan as defined by the Guidelines thus provides a statutory basis for challenging an exclusionary zoning ordinance. Moreover, it provides the courts with a criteria or standard against which local planning and zoning compliance may be measured, thus solving the problem of courts acting as zoning boards or "superlegislators," an area in which their competence is questionable.

To date, no court has interpreted section 65302(c), the housing element provision, in conjunction with the 1977 Guidelines. The

182. Low-income housing is referred to as "nonmarket-rate households" in the Guidelines. Id. § 6410(p).
183. For the purposes of the Guidelines, "Locality" means any county, city and county, or city including charter cities." Id. § 6410(k).
184. Id. § 6464.
185. It is of interest to note the comments of the authors of a 1974 work entitled In-Zoning: A Guide for Policy Makers on Inclusionary Land Use Programs. They note that Government Code § 65302 "might provide a model for [mandatory low-income housing] legislation if it were extended to land use enabling legislation and if regional considerations were made more explicit. But the policy of such a statute might still have to be vindicated through litigation in a locality that ignored its mandate." H. FRANKLIN, D. GALK & A. LEVIN, IN-ZONING: A GUIDE FOR POLICY MAKERS ON INCLUSIONARY LAND USE PROGRAMS 37, 48 n.28 (1974).
186. See note 117 supra. But see Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974). See text accompanying notes 122-28 supra. The specific Guidelines to which this Article refers, however, were not in effect at the time of Ybarra. Only the general mandate of § 65302(c) existed without specific, mandatory guidelines to define their scope. See note 3 supra. In fact, the Guidelines to which this Article refers will not become operative until mid 1979-1980, although earlier compliance, if practicable, is recommended. 25 Cal. Admin. Code § 6478 (1977). See also Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
187. The Ninth Circuit construed the housing element provision, Government Code § 65302(c), in Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974). Two other cases, Leonard v. City of El Cerrito, 1 Civ. No. 34763 (Ct. of Appeal, 1st Dist., filed Mar. 26, 1974), and Orange County Fair Housing Council v. City of Irvine, Civ. No. 225824 (Orange County Super. Ct., filed Mar. 5, 1975), also were concerned with the housing element. The El Cerrito decision was decertified for publication by the California
Guidelines themselves, however, provide for judicial review of the local housing elements.\textsuperscript{188} Under this statutory framework, challenges to exclusionary zoning ordinances may take several forms. Because section 65302 requires all localities to adopt a general plan which provides for the economic needs of all segments of the community, any regulation which is at variance with this mandate is open to challenge.\textsuperscript{189} Large lot zoning, which increases the cost of housing that can be built and thereby excludes all but expensive housing and affluent families, or which shifts a larger than proportionate burden of low-income housing to surrounding communities, may be viewed as inconsistent with the housing element's mandate. Further, the locality's plan itself provides a ready standard against which a court can measure zoning compliance.\textsuperscript{190}

A locality cannot avoid its planning obligation by failing to adopt one of the mandatory elements of the general plan. In \textit{Save El Toro Association v. Days},\textsuperscript{191} the city's failure to adopt a legally sufficient open space element as part of a comprehensive plan, and its failure to adopt a sufficient independent open space plan, barred the city from acquiring, regulating, or restricting open space land. The court noted that California law requires that a city's zoning ordinances be consistent with its general plan.\textsuperscript{192} Because the city had failed to adopt, \textit{inter alia}, the required open space element, its general plan was deficient.\textsuperscript{193} As zoning must be consistent with a valid general plan, and the city lacked a valid general plan, it legally could not regulate its open space lands.\textsuperscript{194}

\begin{footnotesize}
\textsuperscript{188} 25 CAL. ADMIN. CODE § 6474 (1977).
\textsuperscript{189} CAL. GOV'T CODE § 65860 (West Supp. 1966-1978). In addition, regulations must also be consistent with the Guidelines which define and interpret the housing element. \textit{Id.} § 65300.5; 25 CAL. ADMIN. CODE § 6464 (1977).
\textsuperscript{190} Since a locality's plan must be adopted in accordance with fair share allocation criteria and be based upon a regional perspective, it provides "presumptive indentification" of housing needs for which adequate provision must be made. 25 CAL. ADMIN. CODE § 6422 (1977).
\textsuperscript{191} 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977).
\textsuperscript{192} \textit{Id.} at 70, 141 Cal. Rptr. at 286 (citing CAL. GOV'T CODE § 65567 (West Supp. 1966-1978)).
\textsuperscript{193} 74 Cal. App. 3d at 72-73, 141 Cal. Rptr. at 287.
\textsuperscript{194} \textit{Id.} at 73, 141 Cal. Rptr. at 287. The city also could have adopted an open space plan independently of a general plan, but it failed to comply with the state requirements for such an open space plan. \textit{Id.} at 74, 141 Cal. Rptr. at 288.
\end{footnotesize}
The *El Toro* case offers, by analogy, a method by which one could challenge an exclusionary zoning ordinance in cases in which the city has failed to adopt either a valid housing element or a valid open space element in its general plan. Because zoning ordinances must be consistent with all mandatory elements of the general plan, the ordinance fails this consistency requirement if the plan is deficient in any respect.

The housing element and Guidelines, in addition to providing a statutory framework and criteria under which exclusionary practices may be challenged, impliedly expand the number of persons who will have standing to sue. The community to be served by the local housing element is defined as including a fair share of those persons "who would live within the local jurisdiction were a variety and choice of housing appropriate to their needs available." Therefore, any resident or property owner within a general housing market, not just the locality, may bring an action against a city which has failed to meet its fair share responsibility. Additionally, local housing policies necessarily have regional as well as local impact. Arguably, any adjacent city within a housing market area also could challenge a city's zoning practices if forced to bear a larger than proportionate share of the regional housing burden.

**Summary: The Present Status of Exclusionary Zoning**

The diverse positions taken by the courts in exclusionary zoning
cases reflect the fact that the problem presents substantial and genuine interests to be balanced. As described by Justice Tobriner in *Livermore*: "We allude to the conflict between the environmental protectionists and the egalitarian humanists," to the conflict between "[s]uburban residents who seek to . . . secure the 'blessing of quiet seclusion and clean air' and to 'make the area a sanctuary for people'" and "outsiders searching for a place to live in the face of a growing shortage of adequate housing." 200

All of the cases acknowledge, at least implicitly, the validity of these competing interests. They differ principally in their view of how the judiciary should respond to the traditionally legislative task of accommodating those interests. Some cases, notably the federal decisions, 201 take the position that the matter is one for decision by whichever body has legislative jurisdiction, and that the legislative body's decision is entitled to the full measure of deference and respect. In practice, this means that municipalities can exclude or not as they choose. That result would be intolerable if most chose to exclude, but so long as many favor expansion and development, it may provide a workable answer. If matters changed and exclusion became the rule, presumably the courts or, more likely, a superior legislative body such as a regional planning council, could then intervene.

Other decisions, principally those of New Jersey and Pennsylvania, refuse to entrust local legislative bodies with such discretionary power. 202 A true regional body, the courts intimate, would be allowed to weigh the competing interests, and render a decision entitled to judicial deference. Local bodies, however, are suspected of bias against outsiders, and can overcome this suspicion only by zoning to take their fair share of urban growth.

The two most populous states, California and New York, have adopted a compromise position, imposing a regional test yet entrusting local legislative bodies to implement it. 203 The theoretical appeal of this position is clear; there are, after all, substantial values at stake on both sides of this issue, and only a decision which recognizes and attempts to accommodate the competing values would appear to provide a satisfactory solution. In practice, however, this compromise position puts a great burden on the trial courts, which without explicit appellate

201. See text accompanying notes 120-38 supra.
202. See text accompanying notes 94-119 supra.
203. See text accompanying notes 139-57 supra.
guidance necessarily must evaluate a mountain of economic, demographic, and environmental data. The workability of this approach will turn on the ability of trial courts to digest the data and determine whether local exclusionary restrictions represent rational regional planning.

Finally, California's statutory requirement that a community's general plan include a housing element sensitive to regional needs may provide a legislative and administrative resolution to the issue of exclusionary zoning, removing the burden from the courts. The guidelines, however, have not yet been tested. We do not know how they will fare at the hands of hostile municipal governments, how they will survive litigation, or what the legislative response would be if the guidelines really proved effective in nullifying numerous restrictive ordinances.

We venture the prediction that decisions under the guidelines will not differ substantially from decisions based on judicial precedent. Most exclusionary zoning controversies present legitimate and substantial interests on each side of the controversy. A community plan which attempts in good faith to weigh and accommodate competing interests, on a regional as well as a local level, will survive attack. Plans which appear attuned only to local interests are in danger of invalidation.

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