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## Money Damages for Regulatory Takings

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## MONEY DAMAGES FOR REGULATORY 'TAKINGS'

ZONING—UNCONSTITUTIONAL TAKINGS WITHOUT JUST COMPENSATION, DAMAGES: An owner deprived temporarily of any economical use of property by a zoning regulation can claim damages under 42 U.S.C. § 1983 because the property was taken for public use without just compensation. *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert. denied* — U.S. —, 102 S.Ct. 1251 (1982).

*Hernandez v. City of Lafayette*<sup>1</sup> ended a half-century of debate about whether the excessive use of police power in a zoning regulation could lead to damages for an unconstitutional taking of private property for public use without just compensation.<sup>2</sup> The Fifth Circuit opinion confirmed that an unconstitutional taking could be distinguished from a due process violation resulting in invalidation of the challenged regulation. According to *Hernandez* a taking occurs when an owner is denied any economical use of his land in violation of the property clause of the Fifth and Fourteenth Amendments. The *Hernandez* opinion relied upon Judge Brennan's controversial dissent in *San Diego Gas and Electric Co. v. City of San Diego*<sup>3</sup> to establish that a regulatory taking *required* the payment of damages.<sup>4</sup> The Fifth Circuit extended *San Diego* by holding that 42 U.S.C. § 1983 afforded a cause of action in federal court for a plaintiff seeking such relief. Neither court applied due process analysis to reach its result. Both adopted a standard for a Fifth Amendment uncompensated taking, although the *Hernandez* test placed greater weight on a reduction in property value, while *San Diego* relied more heavily on a concern for fairness to the property owner. The assessment of damages against cities may place a considerable financial burden on local

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1. 643 F.2d 1188 (5th Cir. 1981), *cert. denied* — U.S. —, 102 S.Ct. 1251 (1982).

2. Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 166 (1974); Fulham & Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1445-46 (1974); Ryckman, *Land Use Litigation, Federal Jurisdiction and the Abstention Doctrines*, 69 CALIF. L. REV. 377, 387-88 (1981); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 13-14 (1971).

3. 450 U.S. 621 (1981).

4. The relevant portions of the 5th Amendment read "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The 5th Amendment is applied to the states through the due process clause of the 14th Amendment.

governments, resulting in a negative impact on planned growth in the future.

### THE HERNANDEZ CASE

Plaintiff James Hernandez filed a § 1983 claim<sup>5</sup> in federal district court in March of 1979 after repeated attempts to rezone sixteen acres of land in the City of Lafayette, Louisiana.<sup>6</sup> The plot was zoned for single family residential use, although it abutted a sewage treatment plant. The local planning commission recommended changes on several occasions starting in 1975, but the City Council failed to act affirmatively on the recommendation during the succeeding two and one-half years. One city councilman stated on the record that the City might have to pay more for a planned right-of-way across the Hernandez property if the Council approved a zoning change. After three years the Council did pass a zoning change, but the Mayor vetoed it. Hernandez then sought to compel a zoning change in state court and by mid-1979 reached a settlement agreement with the city. The agreement fell through when the Mayor refused to sign it. Shortly thereafter the Council passed another rezoning ordinance, but again the Mayor vetoed the bill. When Hernandez filed in federal court in 1979, the state claim was pending and the land remained zoned for single family residential use.<sup>7</sup>

In federal court, Hernandez filed a § 1983 action claiming that the City's zoning ordinance and its failure to rezone his land had deprived him of property without due process of law and without just compensation under the Fifth and Fourteenth Amendments.<sup>8</sup> The district court held that the City was immune from the § 1983 claim because the alleged deprivation resulted from City inaction, not from affirmative action, and because there was no valid claim of discrimination or equal protection.<sup>9</sup> The court held that the Mayor had absolute legislative immunity under § 1983 because he was acting in a legislative capacity.<sup>10</sup>

The Fifth Circuit affirmed the judgment in favor of the Mayor, but reversed as to the City.<sup>11</sup> To reach the 5th Amendment claims, the circuit court held that there was no absolute immunity for municipalities under § 1983, even though immunity did attach to the Mayor acting in a legislative capacity.<sup>12</sup> The court held that a government entity taking property

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5. 42 U.S.C. § 1983 (1978).

6. 643 F.2d at 1191.

7. *Id.*

8. *Id.* at 1189.

9. *Id.* at 1191.

10. *Id.* at 1191-92.

11. *Id.* at 1190.

12. *Id.* at 1193-94, 1196.

for public use by a zoning regulation must pay just compensation for the effective period of the taking. The taking begins when the municipality has notice of the deprivation and ends when it chooses to rescind or amend the regulation.<sup>13</sup> However, fluctuations in value of the property during the time that the municipality reviews and corrects the ordinance are mere incidents of ownership unless there is extraordinary delay.<sup>14</sup> The Fifth Circuit Court remanded the case to the federal district court to determine whether the City had denied plaintiff Hernandez any viable economic use of his property. If it had, Hernandez must receive damages equal to just compensation for the value of the property during the period of the taking.<sup>15</sup>

### THE ROAD TO *HERNANDEZ*

Theoretically, a property owner can challenge a zoning regulation either as a violation of due process or as an uncompensated taking. In practice courts rarely distinguish the two claims and merely invalidate a questioned regulation on "due process" grounds.<sup>16</sup> The property owner must show that the regulation unfairly interferes with the beneficial use and enjoyment of his property to prove either claim. In both, the courts weigh private rights and the public interest to make a determination of fairness.

In the early years of the twentieth century, municipalities turned increasingly to zoning ordinances to plan the orderly development of land within their borders.<sup>17</sup> Early justifications for zoning relied on the law of nuisance: the government regulated private uses of land which interfered with the rights of others to enjoy the benefits of their own property. Government regulation could protect the right of citizens to be free from the noxious operation of liquor establishments or fertilizer works in their

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13. *Id.* at 1200.

14. *Id.* at 1201.

15. *Id.* In April of 1981 the Louisiana Third Circuit Court of Appeals determined that the City had not deprived Hernandez of "all practical use" of his property and that therefore the denial of a zoning change was "not unreasonable, arbitrary or a denial of due process of law." The federal district court then granted the City summary judgment on the grounds of res judicata and collateral estoppel. On appeal the Fifth Circuit held that the ruling was correct. 649 F.2d 337 (1981). Such claims were affirmative defenses which must be pled in the trial court. The 5th Circuit refused speculation on whether res judicata or collateral estoppel would be valid affirmative defenses against the uncompensated takings claim.

16. Bumgardner, "Takings" Under the Police Power—The Development of Inverse Condemnation As a Method of Challenging Zoning Ordinances, 30 S.W.L.J. 723, 725 (1976). For examples see 1 NICHOLS, EMINENT DOMAIN § 1.42(1) (3rd. rev. ed. 1975); 6 NICHOLS, EMINENT DOMAIN § 6.2 (3rd. rev. ed. 1980); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 608-09 (1954); Haley, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315, 325 n. 47 (1979).

17. *Village of Euclid v. Ambler Co.*, 272 U.S. 365, 386 (1926).

own neighborhoods.<sup>18</sup> Eventually, zoning became a powerful tool used by city governments to plan for orderly growth. Zoning ordinances established residential, commercial, and industrial sectors within their borders in order to protect the public interest.<sup>19</sup>

Zoning regulations affected property values and the use to which an owner could put any particular piece of property. One response to a detrimental zoning regulation was to challenge it on due process grounds. The landowner claimed that the government regulation was arbitrary, unreasonable, or excessive.<sup>20</sup> The courts asked whether the ordinance served a valid public purpose within the police power of the legislating body; then they inquired whether the means employed bore a rational relationship to the achievement of those objectives. Often this determination required a balancing of private loss by the property owner against public gain;<sup>21</sup> mere reduction in the value of land due to a zoning regulation was not sufficient to violate due process. Sometimes there was no due process violation because courts reasoned that the property owner himself derived benefits from the orderly use of land; thus, the owner received "compensation" from a regulation enacted in the public interest.<sup>22</sup> However, courts agreed that excessive or arbitrary use of the police power through a zoning regulation did violate due process and thus would bring the invalidation of the regulation.

A property owner might also challenge a government zoning regulation as an uncompensated taking of property for public purposes. Here the courts had no clear test to apply. Again, a mere reduction in the value of the land did not equal an uncompensated taking.<sup>23</sup> In some cases the courts judged the reduction in value to be substantial and even very close to complete, and still found no violation of the takings clause.<sup>24</sup> Justice Holmes' famous opinion in *Pennsylvania Coal v. Mabon*<sup>25</sup> suggested that

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18. *Mugler v. Kansas*, 123 U.S. 623, 669-70 (1887); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667 (1878).

19. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125-26 (1978).

20. 272 U.S. 365, 397.

21. *Haley*, *supra* note 16 at 320.

22. 438 U.S. at 147.

23. *Fulham*, *supra* note 1 at 1439.

24. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Sax, Takings and the Police Power*, 74 *YALE L. J.* 36, 51-53 (1964); *Ryckman*, *supra* note 2 at 379, 388-89.

25. 260 U.S. 393, 415 (1922). The *Pennsylvania Coal Co.* conveyed to the plaintiff the right to the surface of certain land, but expressly reserved the right to remove sub-surface coal. Later an act of the Pennsylvania legislature forbade mining which would cause subsidence of any structure used for human habitation. The United States Supreme Court denied the plaintiff's request for an injunction against the mining operations of the coal company beneath his home. The Court held that the surface owner could not obtain greater rights through the statute than he had bought from the defendant. The legislature could regulate property only when it was warranted by a sufficient public need. If a regulation resulted in an actual taking, the government must pay compensation as required by the Fifth Amendment.

"if a regulation [went] too far it [would] be recognized as a taking." Holmes said that a taking occurred when the diminution in the value of property was great enough AND when "the statute [did] not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights."<sup>26</sup>

The foundation of the uncompensated takings clause was the historical right of the sovereign to confer ownership of property on individuals while preserving certain rights to the property in himself.<sup>27</sup> "Eminent domain" power was an inherent attribute of the sovereign.<sup>28</sup> The Fifth Amendment acknowledged the legitimate claim of the sovereign to property taken for public use; but it secured the rights of the property owner by commanding the sovereign to pay compensation when any individual owner bore an unfair burden for the public benefit. The property owner could seek compensation when the taking was an absolute conversion, an infliction of permanent injury, or the destruction of value.<sup>29</sup> Furthermore, the property owner could seek relief on the grounds that the sovereign claimed the property for private, not for public use.<sup>30</sup>

Undeniably, an uncompensated taking occurred when there was a physical invasion by the government for the public benefit under the well established principles of eminent domain and inverse condemnation.<sup>31</sup> However, courts and scholars have disagreed about whether a zoning regulation can ever constitute an uncompensated taking, and if it can, what test to apply to make the determination.<sup>32</sup> In *Penn Central Transportation Company v. City of New York*<sup>33</sup> the Supreme Court assessed the economic impact of a zoning regulation on the property owner and measured the extent of public benefit and private harm. The elements of the test resembled those used by Holmes in *Pennsylvania Coal*: the Court considered a diminution in value along with a balancing of public and private interests to determine if there was a taking. However, the recent case of *Agins v. City of Tiberon*<sup>34</sup> refuted any mechanical application of this two-part test. Instead it made either prong, by itself, sufficient to

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26. *Id.* at 414.

27. F. BOSSELMAN, D. CALLIES, & J. BANTA, *THE TAKING ISSUE* 82-104 (1973).

28. *U.S. v. Carmack*, 329 U.S. 230, 241-42 (1946).

29. *Pumeeilly v. Green Bay Cop.*, 80 U.S. 166, 177-78 (1871).

30. H. SCHEIBER, *Property Law, Expropriation, and Resource Allocation by Government*, 1789-1910, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 132, 137 (1978).

31. 438 U.S. at 124.

32. *Supra* note 2.

33. 438 U.S. 104, 138 (1979). The New York City Landmarks Preservation Commission designated the Grand Central Terminal as a "landmark" and refused the owner's plans to construct a 50-story office building on top of it. The United States Supreme Court held that there was no taking because the regulation did not interfere with the owner's present use, nor did it prevent him from realizing a reasonable rate of return on his investment.

34. 447 U.S. 255.

establish a regulatory taking. Justice Powell noted that an ordinance effected a taking if it did not substantially advance legitimate state interests or if it denied the owner economically viable use of his land.<sup>35</sup> Under *Agins* a sufficient decrease in the value of property could constitute a taking, even if the owner still had full use and enjoyment of it.

Under any test, the Fifth Amendment Property Clause protects the individual property owner from bearing the cost of government action on his own; the government must reimburse him when it takes property in the public interest.<sup>36</sup> As late as the *Agins* case in 1980, however, the Court had never awarded damages for a regulatory taking. In *Agins* the Court ruled that the property owner had shared with the public the benefits and burdens of the zoning regulation in question and had suffered no injustice or unfairness.<sup>37</sup> The Court refused to speculate whether damages would be available when an uncompensated taking did occur.<sup>38</sup>

Theoretically, then, due process analysis and uncompensated taking analysis should operate independently of each other to determine the validity of zoning ordinances. A regulation may violate rights given in both the due process clause and uncompensated takings clause, or it may deny rights in only one by itself. For example, a regulation serving no legitimate public purpose may be arbitrary or irrational, thus denying due process, without actually taking an individual's private property. A regulation may result in a taking if the practical effect is to deny a property owner any beneficial use of his land; yet if the regulation serves a legitimate public need, it will fall within the bounds of due process rationality. There is evident overlap in the fairness test which balances public benefit and private loss. A court may hold a regulation an "irrational" violation of due process because private loss outweighs public benefit. It may find an uncompensated taking when a property owner does not share the public benefits of a regulation and bears an inordinate proportion of its burdens. However, since the bifurcation of the *Pennsylvania Coal* standard in *Agins*, it is unclear whether the property owner need bear an unfair burden for a taking to occur; mere diminution in value may be enough. Both the *Hernandez* Court and the *San Diego* dissent address this problem.

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35. *Id.* at 260.

36. 438 U.S. at 125.

37. 447 U.S. at 262. The plaintiff purchased five acres of unimproved land in the City of Tiburon, California for residential development. Later a state law required the City to prepare a general plan governing land-use and the development of open-space land; the resulting City ordinance limited the number of residential one-family dwellings to five for the entire tract. The United States Supreme Court held that there was no taking because the zoning ordinances substantially advanced the legitimate state goals of assuring careful and orderly development of residential property. The ordinances neither limited the best use of the plaintiff's land nor extinguished a fundamental attribute of ownership. The plaintiff was free to pursue reasonable investment expectations.

38. *Id.* at 263.

## JUSTICE BRENNAN TAKES A STAND

In 1981 no clear precedent actually granted damages when a zoning regulation went "too far." The dissenting opinion of Justice Brennan in *San Diego Gas & Electric v. City of San Diego* followed the *Pennsylvania Coal* tradition in its definition of an uncompensated taking resulting from an excessive zoning regulation. It also demanded a remedy of damages consistent with remedies in eminent domain and inverse condemnation.<sup>39</sup>

*San Diego Gas and Electric* reached the U.S. Supreme Court after lengthy litigation in the California courts. The San Diego Gas & Electric Company owned a 412-acre parcel of land, part of which it held for use as the site of a nuclear power plant.<sup>40</sup> The City of San Diego rezoned the property, reducing the number of acres available for industrial use and designating a portion for acquisition by the City for open space. Voters turned down a bond issue to provide the open space funds, making the land unusable by the owners. Subsequently San Diego Gas & Electric Co. filed a claim in state court alleging that the City had taken its property without just compensation in violation of the Federal and State Constitutions. The trial court awarded damages for inverse condemnation, but refused a mandamus claim. The California Court of Appeals affirmed and the City appealed to the California Supreme Court. That court remanded the case to the appeals court for reconsideration in light of a recent state decision that the exclusive remedy for an excessive zoning regulation was invalidation through mandamus or declaratory relief. The Appeals Court then reversed the trial court's award of damages, but refused a mandamus or declaratory relief because some factual disputes were not addressed by the trial court. The California Supreme Court denied further review.<sup>41</sup>

San Diego Gas & Electric appealed to the United States Supreme Court rather than seek invalidation of the ordinance by the trial court. They asked whether the Fifth and Fourteenth Amendments required the payment of compensation when a regulation took private property for public use.<sup>42</sup> The company sought damages rather than the mere invalidation of the zoning regulation. However, the majority of the U.S. Supreme Court refused to reach the question of monetary relief; the Court held that a lower court had failed to establish the fact of a taking.<sup>43</sup> The Court noted in dicta that the question of a monetary remedy was not one to be cast aside lightly.<sup>44</sup> Justice Rehnquist, in a concurring opinion, agreed that

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39. 450 U.S. at 653.

40. *Id.* at 624.

41. *Id.* at 621.

42. *Id.* at 623.

43. *Id.* at 633.

44. *Id.*



there had been no final judgment, but he indicated tacit approval of the payment of damages for regulatory takings.<sup>45</sup>

Justices Brennan, Stewart, Marshall, and Powell did not agree that the California courts had failed to establish the fact of a taking.<sup>46</sup> Brennan's dissenting opinion argued that the State Court had nothing further to determine; thus the decision was a final judgment within the requirements of 28 U.S.C. § 1257.<sup>47</sup> Brennan then moved to the question before the Court and cited both the two part test of *Penn Central* and the bifurcated version of *Agins*.<sup>48</sup> Brennan did not dwell on either test. Instead, he relied on the principle from *Pennsylvania Coal* that a regulation which went "too far" effected a taking.<sup>49</sup> For Brennan that occurred when a restriction destroyed the use and enjoyment of property<sup>50</sup> and "the effects [of a regulation were to] completely deprive the owner of all or most of his interest in property."<sup>51</sup>

Brennan argued that after any taking, the Fifth Amendment *required* the payment of damages.<sup>52</sup> Regulatory takings might be temporary and reversible, but they still entitled the property owner to compensation for the period during which he suffered the detriment.<sup>53</sup> That period started with passage of the regulation and ended with rescission or amendment.<sup>54</sup> Justice Brennan chose not to identify such uncompensated takings as "de facto inverse condemnation," saying instead that the Court was concerned with a constitutional rule, not the means of implementation chosen by the states.<sup>55</sup>

#### THE HERNANDEZ DIFFERENCE

When the United States Supreme Court denied certiorari to *Hernandez* it incorporated some portions of the Brennan dissent in *San Diego* into law. The *Hernandez* opinion relied heavily on the statement by the *San Diego* dissent that a police power regulation effecting a taking required just compensation.<sup>56</sup> However, the two cases adopted different standards in defining an uncompensated taking. The *San Diego* dissent asked whether an uncompensated taking had occurred which "complete[ly] depriv[ed]

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45. *Id.* at 636.

46. *Id.* at 642.

47. *Id.* at 645-46.

48. *Id.* at 647-48.

49. *Id.* at 649.

50. *Id.* at 652.

51. *Id.* at 653.

52. *Id.*

53. *Id.* at 658.

54. *Id.*

55. *Id.* at 660.

56. *Id.* at 654.

the owner of all or most of his interest in the property."<sup>57</sup> This encompassed destroying the owner's use and enjoyment of the property in order to promote the public good.<sup>58</sup> The Fifth Circuit in *Hernandez* more specifically required that the owner be deprived of "any economically viable use" of his property.<sup>59</sup> Both allowed compensation for temporary takings, but the Brennan standard compensated for a loss of the benefits of use and enjoyment, while the Fifth Circuit would only provide reimbursement when the owner proved sufficient diminution in the value of the property.

The Brennan standard found its origins in nuisance law. He relied upon *United States v. General Motors Corp.*<sup>60</sup> for the proposition that a regulation may not deprive the owner of all or most of his interest in property. *General Motors* relied in turn upon earlier railroad nuisance cases holding that a homeowner and a church congregation could compel a railroad to pay damages or to purchase their property when noise and pollution denied them use and enjoyment.<sup>61</sup> In both cases the owners could not peacefully inhabit their property after the building of a railroad facility. Thus, the *San Diego* dissent would award just compensation when a zoning ordinance unfairly deprived an individual property owner of the beneficial use of his land. This lost use might or might not be associated with a *profitable* use of the land. Great diminution in value could help to prove loss of use, but presumably the owner might demand compensation from the government for the loss of beneficial use, even if he could sell the land for a profit or use it for financial gain.

The Brennan standard was consistent with the precedent established by Justice Holmes in *Pennsylvania Coal*. Brennan interpreted the Fifth Amendment to require more than a mere diminution of value to establish a taking. He included the fairness consideration: the property owner denied beneficial use should receive compensation for his losses rather than mere invalidation of the regulation.<sup>62</sup> The fairness consideration assured that the benefits and burdens of the public use of private property would be evenly distributed among citizens over the long run.<sup>63</sup> A property owner could not be asked to accept his interest in the public welfare as "compensation" when his own loss was too great or to bear more than his own fair share of the public burden.<sup>64</sup> A regulation might legitimately

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57. *Id.* at 653.

58. *Id.* at 652.

59. 643 F.2d at 1200.

60. 323 U.S. 373, 378 (1945).

61. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1913); *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*, 108 U.S. 317, 332 (1882).

62. 260 U.S. at 652.

63. See Sax, *supra* note 26 at 60; Ryckman, *supra* note 2 at 195-7; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1172 (1967).

64. 450 U.S. at 656.

prohibit the owner from using his property to injure the health, morals, or safety of the community without actually "taking" the property for public use.<sup>65</sup> It might reduce the dollar value of the property. But to Brennan a regulation went "too far" when it destroyed use or enjoyment, depriving the owner of most of his interest.<sup>66</sup>

*Hernandez*, however, adopted a narrower stance. It acknowledged that Brennan's reasoning was "applicable with equal force to the 1983 case."<sup>67</sup> Nevertheless the court adopted one of the two prongs of the bifurcated *Agins* test without explanation or notation. *Hernandez* held that an action for damages would lie when the zoning regulation denied the owner "any economically viable use" of this property. Although uncited, the language came directly from *Agins*;<sup>68</sup> *Agins* relied on a footnote in *Penn Central* for the proposition that there would be a regulatory taking when a use ceased to be "economically viable."<sup>69</sup> Under the *Hernandez* standard, use and enjoyment were of no concern; only sufficient diminution in value, whether temporary or permanent, was certain to bring damages and compensation. Nor did the *Hernandez* court mention balancing interests to achieve fairness. Presumably no public interest was great enough to justify depriving the owner of any economically viable use of property.

Furthermore, the *Hernandez* opinion left important questions unanswered when it adopted sufficient diminution-in-value as the standard for a taking. The court did not clarify whether diminution was the exclusive requirement for a taking, whether it was the major requirement, or whether it was one of several requirements, any of which could establish the taking. If the court was following *Agins*, there may also be a taking when a regulation does not substantially advance legitimate state interests, as required in the other prong of the *Agins* test. However, if the decision was based on the *San Diego* dissent, deprivation of any economical use might be one means of destroying use and enjoyment; presumably there would be other ways to do so not encompassed by the opinion. If the standard was derived from neither opinion, the Fifth Circuit may have relied instead upon mere reduction in value to the property owner as the requirement, thereby rejecting any weighing of public gain and private loss in the determination of a taking. Finally, it is possible that the court concluded that depriving the owner of any economical use was unfairness per se, outweighing any public need for regulation of the property. If this is true, a plaintiff restrained from a noxious use—such as running a house of prostitution in an isolated desert community—might claim a Fifth Amendment taking even if the property was otherwise of little value.

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65. 438 U.S. at 144; 260 U.S. at 413-14.

66. 450 U.S. at 653.

67. 643 F.2d at 1200.

68. 447 U.S. at 260.

69. 438 U.S. at 138 n. 36.

Moreover, the *Hernandez* conclusion was contrary to precedent holding that mere diminution in value was not enough to constitute a Fifth Amendment taking.<sup>70</sup> It ignored a long tradition of nuisance cases which inquired into the public need for a regulation. The opinion rode roughshod over *Pennsylvania Coal's* search for a public interest "sufficient" to destroy a property owner's rights.<sup>71</sup> It relied on a footnote in *Penn Central* related to economically viable use, but ignored that case's holding which concluded that restrictions imposed should be "substantially related to the promotion of the general welfare."<sup>72</sup> Nor did *Hernandez* make mention of Brennan's emphasis on the destruction of use and enjoyment. It will be difficult to measure the property owner's loss without knowing whether to include that destruction in the equation.

Additionally, neither the *Hernandez* opinion nor the *San Diego* dissent clarified the question left by *Pennsylvania Coal* of how far a regulation must go to go "too far." *Hernandez* never defined denial of any economically use; a precursor case of *Penn Central Transportation Co. v. City of New York* stated that such a denial was not present when an owner could make a "reasonable return" on his investment and could develop nearby parcels owned by him.<sup>73</sup> *Hernandez* claimed he could not make a profit on his land without a zoning change, but the trial court never made that factual determination. Moreover, in *San Diego* Justice Brennan failed to define what constituted depriving an owner of most of his interest in property. The city regulation preserving the land for open space rendered the property useless in the absence of bond monies; still the majority remanded the case for determination of the taking question.

*Hernandez* and the *San Diego* dissent are similar in their failure to apply traditional due process analysis. Neither asked whether the regulation in question was irrational, and neither acknowledged that an uncompensated taking could occur along with a due process violation. The *San Diego* dissent might have asked whether the same excessive unfairness to the property owner was a violation of due process, thus automatically invalidating the regulation and making damages available for the interim period. The *Hernandez* court might have stated that denial of any economical use demonstrated an illegitimate means of achieving a designated end, bringing the same result. Neither opinion went that far. *Hernandez* merely established that a temporary taking would begin when a municipality received notice of the loss of economically viable use and failed to respond reasonably to such notice.<sup>74</sup> *Hernandez* placed the burden

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70. *Supra* note 25.

71. 260 U.S. at 414.

72. 438 U.S. at 137, 138.

73. *Id.* at 136, 137. *But see* 438 U.S. at 149 n. 13.

74. 643 F.2d at 1200.

on the regulator, not the court, to invalidate a regulation which deprived a property owner of just compensation and due process.

Furthermore, both did conclude in footnotes that a regulation enacted with *no* legitimate "public use" could bring damages in a § 1983 due process action under the Fourteenth Amendment.<sup>75</sup> The property owner retaining possession of his land would suffer no uncompensated taking; still he could seek damages in addition to invalidation by proving that he had suffered the damages provided for by § 1983. Carried to their logical conclusion, both footnotes suggest that a property owner might seek damages for temporary losses caused by a regulation which violated his due process rights, even if there was no taking. No claimant has filed a § 1983 claim both for invalidation and for damages arising from a due process violation; if upheld, such claims will significantly alter due process property claims.

### PRACTICAL APPLICATION

As a practical matter, however, the future is uncertain for a property owner wishing to bring suit against a municipality due to an excessive zoning regulation. The traditionally successful method of attack has always been through the due process clause;<sup>76</sup> few cases alleging an unconstitutional taking through regulation have succeeded.<sup>77</sup> After *Hernandez* any action or inaction which makes land unusable until further government decisionmaking will fall in the group of potential claims for damages. The property owner may have the best chance of success when a city sets aside land for open space, but does not appropriate the necessary funds to purchase it.<sup>78</sup> Total failure to complete a zoning change or undue delay in responding to a zoning request also may pose clear risks of liability for a city, as might a regulation whose purpose is later public condemnation at a low price. It will be difficult, however, to prove municipal liability for damages in completed zoning actions which simply reduce the landowner's profit or merely "downzone." The courts will need to draw a new line somewhere between a regulation which causes a mere reduction in land value and one which makes land wholly unusable. The *Hernandez* case did little more than establish that judges could consider denial of any economical use when making the determination. The requirements are still ill-defined and only case by case litigation will reveal them.

Both *Hernandez* and *San Diego* are certain to elicit some concern in

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75. 450 U.S. at 656 n. 23, 643 F.2d at 1200 n. 26.

76. 450 U.S. at 630, 640.

77. Ryckman, *supra* note 2 at 388-90.

78. See the recent case of *Burrows v. City of Keene*, 121 N.H. 590, 432 A.2d 15 (1981).

the ranks of municipal government. For the first time cities will be liable for money damages when they enact zoning ordinances which go "too far"; in some instances, at least, they will be unable to rely on the remedy which invalidates the ordinance. Public officials will protest that the new uncertainty of financial liability may cause budget problems and may inhibit the exercise of effective land use planning for the public benefit. They will allege that those least needing compensation, the large land developers, will bring the majority of claims. Cities will have to guess at the dollar value of potential claims and either put the funds aside or make appropriate insurance arrangements.

Justice Brennan pointed out in *San Diego* that such concerns have no bearing on constitutional analysis.<sup>79</sup> The value placed on private property rights by the Constitution simply commands that municipalities raise the funds needed to purchase property for use in the public interest. Certainly the government may choose to act for the public good, but it must pay its way. Justice Brennan was uncertain that the probable consequences of the *San Diego* dissent would be to impede planners anyway. He thought it might minimize overzealous regulatory attempts and help produce more rational decisionmaking.<sup>80</sup>

Ultimately, the result of the reasoning in both cases may be the strengthening of individual rights against arbitrary government action. The tangible right to hold real property is secured by no fewer than two clauses in the Fifth Amendment, one protecting due process and the other forbidding the taking of property without compensation. Individually each citizen has greater protection from government action which "compensates" him merely by allowing him to partake of the public good. As a group all citizens undoubtedly will have to pay more in compensation to vested land interests to further legitimate and desired public objectives. Future cases will reveal how expensive it will be for a city regulating in the public interest to pursue publicly accepted goals. In the final analysis, however, that damage to the public good may be subtle and immeasurable in dollars. The *Hernandez* decision may hamper progressive land use planning attempts to make significant changes in the status quo of zoning in a growing or changing community.

### CONCLUSION

Despite inevitable difficulties of application, the *San Diego* and *Hernandez* cases establish the groundwork for major changes in property litigation. Property owners aggrieved by zoning regulations may choose among several courses: they may file an action in state court similar to

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79. 450 U.S. at 660-61.

80. *Id.* at 661 n. 26.

an inverse condemnation action or they may file a § 1983 action in state or federal court. The § 1983 action may proceed in federal court concurrently with the state cause of action. Any of these claims may seek relief by requesting damages equal to the value of the property or the economic harm done by a temporary taking, even if the regulation is reversed by later action. The aggrieved property owner may seek the damages for the uncompensated taking, but he may also claim them for a due process violation under § 1983. *Hernandez* suggests that property owners will prevail in the uncompensated taking claim when government action or inaction denies them the right to use their land. As yet undetermined is how extensive the interference must be to deny the property owner any economically viable use. Also untested is the application of § 1983 to a due process property claim.

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