The Problem of Municipal Liability for Zoning and Land-Use Regulation

Jonathan B. Sallet
THE PROBLEM OF MUNICIPAL LIABILITY
FOR ZONING AND LAND-USE
REGULATION

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In each of its past two terms, the Supreme Court has considered whether
landowners should receive monetary damages if zoning and land-use regu-
lations “take” their property within the meaning of the fifth amendment.1
Neither Agins v. City of Tiburon2 nor San Diego Gas & Electric Co. v. City
of San Diego3 answered the question presented. In Agins, the Court did
not reach the question because it ruled that the challenged municipal ac-
tivities did not constitute a “taking.”4 In San Diego Gas & Electric Co., the
Court concluded that it did not have jurisdiction over the controversy.5
Nonetheless, the opinions in both cases, and especially Justice Brennan’s
dissent in San Diego Gas & Electric Co., shed significant light on the future
resolution of this issue.

The practical significance of the question was demonstrated by the filing
of numerous amici briefs in San Diego Gas & Electric Co. in support of the
city of San Diego’s contention that it need not pay monetary damages to a
landowner whose use of property is restricted by land-use regulation, at
least where the landowner has access to equitable remedies. The United
States, seventeen states, other California municipalities and state agencies,
and more than a dozen private conservation organizations supported the
city.6 These amici, along with the city, warned that the recognition of dam-
ages as a remedy would seriously threaten municipal and local budgets

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1. The fifth amendment provides, in relevant part, that private property shall not “be
taken for public use, without just compensation.” U.S. CONST. amend. V. The fifth amend-
ment applies to the states and local governments through the fourteenth amendment. U.S.
CONST. amend. XIV. See Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160
(1980).
4. 447 U.S. at 263.
5. 450 U.S. at 630.
6. Id. at 622-23 n.*.
and would inevitably deter local governments from fulfilling their responsibilities to regulate land use for the safety and well-being of their citizens.

The possibility that a municipality may incur substantial monetary liability because it has enacted a regulation that is subsequently determined to constitute a "taking" of property under the fifth amendment subsumes three issues, each of which has been discussed by the Supreme Court within the past two years. When landowners seek damages as a result of local restrictions on the use of land, a court must determine (i) whether the regulation is a "taking" within the meaning of the fifth amendment, (ii) whether monetary damages are an available remedy, and (iii) when the "taking" occurred.

I. THE "TAKING" ANALYSIS

The fifth amendment to the Constitution requires that private property may not be "taken for public use" without proper compensation. A determination that municipal regulations have resulted in a public taking of property is "in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." For example, when military aircraft flew so close to a chicken farm that the economic viability of chicken-raising was destroyed by the noise and light emanating from the aircraft, the Supreme Court held that the federal government had "taken" an easement on the land.

The application of the "taking" clause to municipal zoning has not resulted in particularly strict scrutiny of local decision-making by the Supreme Court. In its seminal decision in Village of Euclid v. Ambler Realty Co., the Court considered a constitutional challenge to a restriction on commercial development that, the Court conceded, devalued the property by seventy-five percent. Nonetheless, the Court, noting that the regulation bore a substantial relationship to the public welfare and did not inflict irreparable injury to the landowner, held that the zoning plan was constitutional.

Two modern decisions also illustrate the Supreme Court's unwillingness to conclude that zoning ordinances restrict constitutionally-protected property interests. In Goldblatt v. Town of Hempstead, the Court upheld a

7. U.S. Const. amend. V.
11. See id. at 384.
12. Id. at 395-97.
local ordinance that severely restricted preexisting commercial uses of land bordering on expanding residential neighborhoods. More recently, the Court, in *Penn Central Transportation Co. v. New York City*, rejected the contention that New York City's Landmarks Preservation Law restricting the use of air rights over the Grand Central Terminal constituted a "taking."

The opinion in *Agins v. City of Tiburon* provides the Court's most recent analysis of the constitutionality of land use regulations. The appellants in that case acquired five acres of unimproved land in Tiburon, California. According to the appellants, their land "possess[ed] magnificent views of San Francisco Bay and the scenic surrounding areas [and had] the highest market value of all lands [in Tiburon]." The appellants purchased the property with the intention of subdividing it into several residential properties. In 1973, Tiburon adopted two zoning ordinances in order to conform with a state requirement that the city prepare a general plan to govern land-use and the development of open-space land. The city classified the Agins' property as "RPD-1," a designation that permitted the land to be used for the construction of up to five single-family dwellings on the five-acre lot.

The appellants did not submit a specific proposal for development on their site. Instead, they brought suit in state court, challenging the constitutionality of the zoning ordinance. This decision, which was apparently based on the appellants' belief that the city would not approve the building of all five houses that could be permitted under local law, barred the appellants from arguing that the ordinance prohibited all development.

14. The facts of Goldblatt concerned a company that had mined sand and gravel on a 38-acre tract in the town of Hempstead, New York for more than 30 years when the town enacted a safety regulation that effectively shut down the mining operation. The Court held that the land-use regulation was a proper exercise of the town's police power and did not constitute a "taking." *Id.* at 594, 596-97.


16. The case arose after Penn Central's Grand Central Terminal was designated a "landmark" and the block it occupied a "landmark site" under New York City's Landmarks Preservation Law. As a result of the designation, Penn Central was refused permission to construct a 53 story office building above the terminal. In holding that the application of the New York law to Grand Central Terminal did not constitute a "taking," the Court emphasized that (i) the city had not forbade all construction above the terminal, and (ii) the city had allowed the property owners to transfer development rights over Grand Central Terminal to other properties in the immediate area. *Id.* at 136-37.


19. 447 U.S. at 262.

20. *Id.* at 257.

21. *Id.* at 260.
The Supreme Court held that "[b]ecause the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions."\(^2\)

The Agins Court did consider whether the enactment of the zoning ordinance on its face constituted a "taking" of the appellants' property. The Court recognized that no precise rule exists to weigh the private and public interests that must be balanced to determine whether public regulation has infringed private usage to an extent prohibited by the fifth amendment.\(^2\)

The Court, however, applied a three-part test to guide its consideration of this issue. The Court considered whether the zoning ordinance (i) substantially advanced legitimate governmental goals, (ii) benefited the appellants, and (iii) frustrated the appellants' reasonable investment expectations.\(^2\)

Applying the test to the facts in Agins, the Court was persuaded that the zoning ordinance substantially furthered legitimate governmental interests because of the existence of both state and local policies favoring the preservation of open-space land.\(^2\)

Next, the Court noted that the zoning plan provided benefits to the appellants by insuring the orderly development of surrounding property.\(^2\)

Finally, the Court noted that because the appellants' claimed that the best possible use of their land was residential, the zoning ordinance did not frustrate the appellants' reasonable investment expectations.\(^2\)

The Court's analysis provides considerable guidance to municipalities and local governments faced with fifth amendment challenges to zoning ordinances. Initially, local governments should be alert to the possibility that landowners have failed to take the necessary steps to ensure that a court is presented with a concrete controversy. In Agins, the failure of the appellants to submit a development plan prevented them from asserting

\(^{22\text{.} }&^{23\text{.} }\text{Id}.

\(^{24\text{.} }\text{Id. at 261-62.}\)

\(^{25\text{.} }\text{Id. at 261.} \text{In the course of adopting the zoning ordinances at issue in Agins, the Tiburon City Council adopted findings that facilitated the Supreme Court's analysis of the legitimacy of the ordinances. The City Council concluded that "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise, and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." Tiburon, Ca., Ordinance No. 124 N.S. § 1(c) (June 28, 1973), quoted in Agins v. City of Tiburon, 447 U.S. at 261 n.8.}\)

\(^{26\text{.} }447\text{ U.S. at 262.}\)

\(^{27\text{.} }\text{Id. at 263 & n.9.}\)
their claim that the inevitable effect of the local ordinance would be to prohibit any development of their land.\textsuperscript{28} Whether viewed as a ripeness or exhaustion requirement, the Court's holding requires landowners to follow local procedures before they may challenge the application of discretionary regulations.

A municipality should explicitly identify the interests of health and safety that support the land-use regulation. If the ordinance is reasonably designed to avoid the ill-effects of urbanization or to advance any other governmental interest in a safe and healthy community, it is unlikely that any federal court will determine that a local regulation fails to promote substantially a legitimate goal.\textsuperscript{29} Legitimate governmental interests are not confined, of course, to tangible problems of health and safety. The Supreme Court has recognized that aesthetic considerations also may support local regulation of property interests.\textsuperscript{30}

In addition, a municipality should emphasize that land-use planning that permits orderly growth may help maintain the property interest of the very landowners who challenge the regulations. In \textit{Agins}, for example, the zoning ordinance required that any plan of development be compatible with adjacent development.\textsuperscript{31} The city also stated that it would consider whether the density of new construction would be offset by adjoining open space.\textsuperscript{32} In this situation, where the appellants' property was within a general land-use plan, it appears that the city's careful consideration of adjoining development might well aid, rather than frustrate, appellants' attempts to develop their land and to convey high-priced residential property. The Court stated that "[i]n assessing the fairness of [a] zoning ordinance, these benefits must be considered along with any diminution in market value [suffered by the landowners]."\textsuperscript{33} Thus, the second \textit{Agins} factor gives municipalities a formidable offensive weapon. A municipality involved in litigation should not be content merely to rebut landowners'
charges that their land has been rendered valueless; it should attempt to
demonstrate that the regulation actually benefits the challenger.

Finally, a municipality must be aware that courts will scrutinize, al-
though without great vigor, whether regulation of property has
frustrated economic expectations. During its 1979 term, the Supreme
Court decided two cases in addition to Agins that provided substantial dis-
cussion of this issue. In Agins, the Court concluded that investment expec-
tations had not been unreasonably disturbed.\textsuperscript{34} In Andrus v. Allard\textsuperscript{35} and
Kaiser Aetna v. United States\textsuperscript{36} the Court took different, and perhaps in-
consistent, views of the effect of governmental regulation on economic
expectations.

In Andrus v. Allard, the Court faced the question whether federal laws
prohibiting the sale, but not possession, transportation or non-commercial
transfer, of eagle feathers constituted a “taking” of that property. The
Court recognized, in a phrase resplendent with understatement, that a ban
on the ability to sell property imposes a “significant restriction”\textsuperscript{37} upon the
property owner. But the Court asserted that “[a]t least where an owner
possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’
of the bundle is not a taking, because the aggregate must be viewed in its
entirety.”\textsuperscript{38} Apparently because the federal law did not wholly deprive the
eagle feathers of all economic value—the Court suggested that they might
be exhibited for an admission charge\textsuperscript{39}—the federal laws were held not to
be a “taking.”

In Kaiser Aetna v. United States\textsuperscript{40} the Army Corps of Engineers tried to
prevent the petitioners from excluding public access to their marina. The
petitioners, owners of a private pond, had invested millions of dollars to
develop the area into a marina community.\textsuperscript{41} The Court also noted that
petitioners had improved the pond so that it was navigable, and had done
so with the government's consent.\textsuperscript{42} Upon consideration of these factors,
the Court “[held] that the ‘right to exclude,’ so universally held to be a
fundamental element of the property right, falls within [the] category of
interests that the Government cannot take without compensation.”\textsuperscript{43}

\begin{itemize}
\item\textsuperscript{34} Id.
\item\textsuperscript{35} 444 U.S. 51 (1979).
\item\textsuperscript{36} 444 U.S. 164 (1979).
\item\textsuperscript{37} 444 U.S. at 65.
\item\textsuperscript{38} Id. at 65-66.
\item\textsuperscript{39} Id.
\item\textsuperscript{40} 444 U.S. 164 (1979).
\item\textsuperscript{41} Id. at 167-69.
\item\textsuperscript{42} Id. at 178-79.
\item\textsuperscript{43} Id. at 179-80 (footnote omitted). Despite this sweeping language, the Court held, in
The holding in *Kaiser Aetna* creates some tension with the broad language of *Andrus v. Allard* that suggests that the elimination of any single “strand” of the bundle of property rights cannot so frustrate a reasonable expectation of economic return as to effect a “taking.” The holdings can be reconciled to some extent by relying on the distinction between physical invasions of private property, at issue in *Kaiser Aetna*, and governmental regulation that does not involve physical invasion. Indeed, the *Allard* Court invoked just this difference in order to distinguish its holding from the decision in *Pennsylvania Coal Co. v. Mahon*, in which the Court held that a state law banning the mining of coal in a manner that would cause the subsidence of any house was a “taking.” The *Allard* Court emphasized that in *Pennsylvania Coal*, unlike in the present case, “the loss of profit opportunity was accompanied by a physical restriction against the removal of the coal.” Conversely, the Court in *Kaiser Aetna* stated that the government’s action in that case would “result in an actual physical invasion of the privately owned marina.”

The emphasis on physical invasion reinforces the impression left by the opinion in *Agins* that zoning and land-use regulation, which typically do not involve physical invasions, will seldom effect a “taking” of property. The Supreme Court’s analysis of such laws demonstrates that regulation is likely to be invalidated only if it severely and unreasonably limits any economically viable use of property.

In sum, the *Agins* three-part test provides municipalities and other local governments with considerable guidance on how to rebut challenges to the constitutionality of zoning and land-use regulations. But, neither *Agins* nor any other Supreme Court decision provides city planners with absolute

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44. 260 U.S. 393 (1922).
45. *Allard*, 444 U.S. at 66 n.22.
assurance that their regulations will not “take” private property. As the Supreme Court has emphasized, a determination of whether private property has been “taken” “calls as much for the exercise of judgment as for the application of logic.”47 Accordingly, local governments must pay considerable attention to the possible effects of a court judgment that local regulation has resulted in a “taking” under the fifth amendment.

II. THE AVAILABILITY OF A MONETARY REMEDY

The lawsuit in Agins v. City of Tiburon48 began when the landowners filed an action seeking $2 million in damages for inverse condemnation. Inverse condemnation is “a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property”49 when a government has not attempted to gain title to the property by eminent domain. “Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property.”50 In essence, the landowners in Agins were claiming that they were owed compensation for land that Tiburon had “taken” without judicial process.

The California Supreme Court held that an action for inverse condemnation would not lie.51 The court explained that landowners may not “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.”52 Because the United States Supreme Court in Agins determined that there was no taking, it did not consider the validity of the state supreme court's ruling.53

Six days after the decision in Agins, however, the Supreme Court agreed to review another case from California that presented the identical issue. In San Diego Gas & Electric Co. v. City of San Diego,54 a public utility challenged the actions of the city of San Diego. In 1966, the utility had acquired a parcel of land in San Diego for possible use as a nuclear power plant site. Two hundred and fourteen acres of that land, which formed the centerpiece of the lawsuit, were located in an estuary.55 That land was still unimproved in 1973 when the city rezoned portions of the utility's proper-

50. Agins, 447 U.S. at 258 n.2.
52. Id. at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.
53. 447 U.S. at 262.
55. Id. at 624.
ties, placing the land within the city's open-space area.\textsuperscript{56} Despite this designation as open-space land, the city stated that construction of a nuclear power plant on the site would not necessarily be impermissible under the new zoning designation.\textsuperscript{57}

In 1974, the utility instituted an action for inverse condemnation, charging that the city's action in 1973 deprived it of property without just compensation.\textsuperscript{58} In a nonjury trial on the issue of liability, the state trial court held in favor of the utility. It found that the open-space plan deprived the landowner "of all practical, beneficial or economic use of the property . . . ."\textsuperscript{59} In a subsequent jury trial to determine damages, the utility was awarded more than $3 million.\textsuperscript{60} After an initial affirmance by the California Court of Appeals,\textsuperscript{61} the state supreme court ordered reconsideration of the case in light of its decision in \textit{Agins v. City of Tiburon}.\textsuperscript{62} Upon reconsideration, the state court of appeals reversed the trial court's judgment.\textsuperscript{63} The state supreme court then declined review, and the case was appealed to the United States Supreme Court.\textsuperscript{64}

The briefs of the parties and amici before the Supreme Court indicated some confusion concerning the precise reason why the state supreme court in \textit{Agins}, and consequently the state court of appeals in \textit{San Diego Gas & Electric Co.}, had ruled that damages were not available to a landowner who challenges the constitutionality of a local zoning or land-use regulation. As noted above, the California Supreme Court held in \textit{Agins} that landowners may not sue in inverse condemnation, converting an excessive

\begin{footnotesize}
\textsuperscript{56} \textit{Id.} An open-space area was defined by the city as "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes." \textit{Id.} at 625.

\textsuperscript{57} \textit{Id.} The city did recommend that the land be acquired for use as a park land. Due to the failure of a bond referendum, this plan was never pursued. \textit{Id.}

\textsuperscript{58} \textit{Id.} at 625-26. The utility specifically identified the city's actions which deprived it of the beneficial use of the property as the adoption of the new zoning regulation and the open-space plan. \textit{Id.} at 626. The utility had, by this time, determined that the site could not be used as a location for a nuclear power plant. \textit{Id.} at 626 n.6.

\textsuperscript{59} \textit{Id.} at 626.

\textsuperscript{60} \textit{Id.} at 627.

\textsuperscript{61} 80 Cal. 3d 1026, 146 Cal. Rptr. 103 (1978)

\textsuperscript{62} 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr 372 (1979), \textit{aff'd}, 447 U.S. 255 (1980). On July 13, 1978, the California Supreme Court granted the city's petition for a hearing, an action which automatically vacated the court of appeal's decision. \textit{See Agins}, 450 U.S. at 628 (citing Cal. Rules of Ct. 976(c) and 977 (West 1981)). But, in June 1979, the court transferred the case back to the appellate court for consideration in light of \textit{Agins}, 450 U.S. at 629.

\textsuperscript{63} This appellate court decision is unpublished but quoted extensively by the United States Supreme Court. \textit{Id.} at 630.

\textsuperscript{64} \textit{Id.}
\end{footnotesize}
use of the police power into a compensable “taking.” 65

The utility company understood the state court to have ruled that exercise of a municipality’s police powers to regulate land-use may never constitute a “taking” for public use” under the fifth amendment. 66 The appellee’s brief for the city of San Diego apparently adopted the same approach by arguing that, although enactment of a local regulation may violate due process, such governmental action does not involve the “taking” clause unless property is physically invaded. 67 This theory is based on a view that property is not taken for public use unless control of private property is transferred to a government. Thus, a proceeding by eminent domain falls within the fifth amendment because a government explicitly seeks title to private property. But mere regulation, which does not disturb private ownership, does not “take” property for public use unless physical possession of property is actually disturbed.

The amicus brief for the United States, submitted by the Solicitor General, offered a different view of the state court’s position and a more sophisticated rationale in favor of the city. The Solicitor General did not dispute that local land-use planning may constitute a “taking” under the fifth amendment. Rather, the Solicitor General argued that restrictions on use of property by regulation are different than the traditional methods by which a government may exercise dominion over private property. When a local government brings proceedings in eminent domain, it uses judicial machinery to enforce its decision to acquire private property. Similarly, when a government physically invades property without the use of judicial proceedings, a private party may bring the traditional action for inverse condemnation in order to compel the government to pay for what it has obtained. 68

The Solicitor General contended, however, that a suit for damages based on land-use regulation differs in an important way from either eminent domain or inverse condemnation. When a land-use or zoning regulation is enacted, a local government does not “choose” to purchase land. To force a government to pay damages for “taking” property in such circumstances would compel it to pay for land it may never have wished to obtain. It is sufficient, argued the Solicitor General, merely to enjoin the

65. 24 Cal. 3d at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375 (1979).
66. See Brief for Appellant at 17, 31, 36, San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981); but see infra note 71 and accompanying text.
continued operation of any land-use plan that constitutes a "taking." In this manner, the court will vindicate the constitutional rights of a property owner without ordering unexpected and involuntarily public expenditures.69

The majority of the Supreme Court did not consider the merits of these arguments, for the Court held that the state court had not entered a "final judgment" in the case, which is a prerequisite for Supreme Court review.70 Justice Brennan, however, concluded that jurisdiction was proper and, therefore, confronted the merits of the case in his dissent.71 Joined by three other members of the Court72 and with the possible support of an additional justice,73 Justice Brennan concluded that the Constitution demands that governments pay monetary compensation for property "taken" by excessive land-use regulation.74

Justice Brennan first rejected the city's contention that zoning regulations may never constitute a "taking" within the meaning of the fifth amendment.75 His conclusion was substantially aided by the reasoning of Agins v. City of Tiburon, in which a unanimous Court implicitly rejected such an argument by holding that, on the facts of that case, the two zoning ordinances did not "take" property. The Court's analysis would have been unnecessary if the city of San Diego's contentions were correct and zoning ordinances could never constitute a "taking." In this regard, Agins scarcely broke new ground; the Court was merely applying Justice Holmes' adage that "while property may be regulated to a certain extent, if regulation

69. Id. at 28-31.
71. The disagreement between the Court and the dissent on whether the state courts had entered a final judgment centered on the proper interpretation of the state supreme court's opinion in Agins v. City of Tiburon. Justice Brennan, adopting the views of both of the parties, concluded that the state court had held that zoning ordinances would never constitute a "taking" under the fifth amendment. The Court's opinion rejected this characterization and read the California court to have held merely that damages may not be awarded for such a "taking." The Court's conclusion is supported by its earlier opinion in Agins v. City of Tiburon, which stated that "[t]he State Supreme Court determined that appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking." 447 U.S. at 263. It should be noted, however, that Justice Powell, the author of the Court's opinion in Agins, joined Justice Brennan's dissent in San Diego Gas & Elec. Co.
73. Justice Rehnquist indicated that if he believed that jurisdiction was proper in the Supreme Court, he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice BRENNAN." Id. at 633-34.
74. Id. at 658 (Brennan, J., dissenting).
75. Id. at 651-53.
goes too far it will be recognized as a taking.”

Justice Brennan next considered the Solicitor General’s argument that damages are not available, even if property is “taken” by land-use regulation. Justice Brennan identified two major flaws in the Solicitor General’s argument. First, a decision that some “takings” need not be compensated assumes a measure of judicial discretion that does not appear on the face of the fifth amendment. The Constitution expressly prohibits private property from being “taken for public use, without just compensation.”

Second, a decision in favor of the city would mean that, at least until the offending regulation was invalidated, landowners could be barred both from the full use of their land and compensation of their loss. Because the essential purpose of “taking” analysis is to assess whether “the public at large rather than a single owner, must bear the burden of an exercise of state power,” a decision that property may be “taken” for some period without being paid for by a government appears inconsistent with the purposes of the fifth amendment. Thus, Justice Brennan concluded that “once a court finds a police power regulation has effected a ‘taking,’ the government entity must pay just compensation for the period commencing on the date the regulation first effected the ‘taking’ and ending on the date the government entity chooses to rescind or otherwise amend the regulation.”

Justice Brennan’s analysis is likely to be persuasive to a majority of the members of the Supreme Court. He already has garnered the support of at least two, and perhaps three, other justices. More importantly, those justices who have expressed a view, however tentative, against the city of San Diego’s position—Brennan, Marshall, Powell and Rehnquist—span the

77. 450 U.S. at 653-60. See generally Amicus Curiae Brief for the United States, supra note 68, at 28-31.
78. 450 U.S. at 653-54.
79. U.S. CONST. amend. V.
80. 450 U.S. at 655-56 & n.22.
82. 450 U.S. at 658 (Brennan, J., dissenting) (footnote omitted). According to Justice Brennan, a landowner whose property has been temporarily “taken” would be due compensation only for the period of time during which he was deprived of the full use of his property. Id. at 659. The government also would retain the option, of course, to decide that it wishes to obtain the property permanently through eminent domain proceedings. Id. at 659-60.
83. See supra notes 72-73 and accompanying text.
ideological spectrum of the current Court. There is a great likelihood that one or more additional justices will join their view.

On a theoretical basis as well, Justice Brennan’s position has greater analytical force than do the contentions of the city of San Diego and the Solicitor General. The city’s contention that physical invasion or the invocation of eminent domain proceedings are the sole methods of “taking” is based on a distinction that is at odds with economic reality. Landowners whose properties are seized by the government may suffer no greater financial harm than landowners who are told, by means of open-space plans, that they may not develop their property in any manner.84 Yet, the city’s view of the fifth amendment would establish a constitutional distinction based precisely on that difference.

With the Solicitor General’s concession that land-use regulations may constitute a “taking,” his argument scarcely fares better since it is difficult to circumvent the relatively clear constitutional command that a government may not “take” property without just compensation. Although it may be argued with considerable force that state courts generally should be free to fashion different remedies for constitutional wrongs so long as some adequate remedy is provided,85 the just compensation clause is fundamentally distinct from the type of constitutional tort recognized, in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,86 to redress violations of the fourth amendment. The fourth amendment does not provide a remedy for its violation; the takings clause of the fifth amendment does so expressly.

It is unfortunate, nonetheless, that Justice Brennan gave scant attention to the policy considerations underlying the city’s and the Solicitor General’s views. The Solicitor General’s distinction between eminent domain and traditional inverse condemnation, on one hand, and the type of action typified by Agins and San Diego Gas & Electric Co., on the other, contains considerable practical wisdom. And the difference, as the Solicitor General recognized, is the likelihood that in the former cases, but not in the latter, a municipality or local government has made an explicit choice to allocate financial resources for the purchase of lands. The spectre inherent in both Agins and San Diego Gas & Electric Co. is the possibility that financially-

86. 403 U.S. 388 (1971).
strapped municipalities will hesitate to engage in beneficial land-use regulations because they may incur massive, and unforeseen, liabilities.

Justice Brennan did not give much credence to the possibility of financial disaster. Indeed, he wondered "as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners." An amici brief filed by the National Association of County Planning Directors provided some evidence on just this issue. That organization asked nearly 300 of its members whether they would adopt zoning regulations modeled on the provision upheld in _Goldblatt v. Town of Hempstead_, which closed a local sand and gravel mine. Forty-eight percent of those polled said they would adopt the scheme and risk its invalidation. When asked whether they would attempt to close the quarry if a successful suit by the landowner would result in an award of damages as well as invalidation of the regulation, only eight percent of the members polled said they would do so. According to this survey, therefore, about eighty-three percent of planners who favored adopting a zoning regulation would be "deterred" by the possibility of successful damages actions against the governmental fisc.

III. WHEN A "TAKING" OCCURS

Justice Brennan's dissent concludes that compensation must be paid "for the period commencing on the date the regulation first effected the 'taking.'" If his analysis were to be adopted by the Supreme Court, great importance would thereafter attach to determining the exact time at which a zoning regulation "takes" property. Although Justice Brennan did not specifically explain how courts are to decide this issue, he did state that "[n]othing in the Just Compensation Clause suggests that 'takings' must be

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87. 450 U.S. at 661 n.26.
88. The amicus brief was also joined by the National Trust for Historic Preservation, National Association of Counties, National Wildlife Federation, Preservation Action, and National Parks and Conservation Association.
89. 369 U.S. 590 (1962); see supra note 14.
91. One New York state case sheds additional light on the threat to municipal financial liability posed by Justice Brennan's views. Horizon Adirondack Corp. v. State, 88 Misc. 2d 619, 388 N.Y.S. 2d 235 (1976) was a suit filed against the State of New York, claiming $36 million damages for the "taking" of 24,000 acres of land in the Adirondack Mountains. That suit was dismissed on the rationale rejected by Justice Brennan in the San Diego case. If Justice Brennan's view had prevailed in that state court litigation, and if the challenged regulation had been found to be a "taking," the result, according to the state court, would have had "staggering implications upon the State budget and tax system." Id. at 244.
92. 450 U.S. at 653 (Brennan, J., dissenting).
permanent and irrevocable.” The implication is, therefore, that a “taking” occurs whenever governmental action affects the value of property. But such an assumption is demonstrably incorrect.

A line of Supreme Court and lower federal court cases clearly hold that a landowner may suffer temporary economic harm without being able to seek redress under the fifth amendment. These cases, from Danforth v. United States through Agins v. City of Tiburon, recognize that governmental planning activities do not, by themselves, constitute a “taking” of property, even if they affect landowners’ ability to realize their economic expectations.

This issue arose in Agins when the landowners claimed that an aborted eminent domain proceeding resulted in a “taking” of their land. Shortly after the city of Tiburon enacted the zoning ordinance upheld in Agins, it began eminent domain proceedings in order to secure possession of the appellant’s property. A year later, the eminent domain proceeding was ended by the city’s voluntary dismissal of its complaint. When the landowners subsequently filed their claims seeking damages, they alleged that the abandoned eminent domain action had destroyed the value of their property during the pendency of the proceeding and, therefore, constituted a “taking” of property. The California Supreme Court rejected their contention, and the United States Supreme Court affirmed.

The Supreme Court did not dispute the common-sense proposition that the appellants’ ability to sell their property may have been curtailed during the time that eminent domain proceedings were underway. Instead, the Court treated the fact as constitutionally irrelevant. The Court held that “[m]ere fluctuations in value during the process of governmental decision-making [sic], absent extraordinary delay are ‘incidents of ownership. They cannot be considered as a “taking” in the constitutional sense.”

93. Id. at 657 (Brennan, J., dissenting).
94. 308 U.S. 271 (1939).
96. The Agins Court relied on Danforth v. United States and the following lower court cases in support of the principle. See, e.g., Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784 (8th Cir.), cert. denied, 444 U.S. 899 (1979); Reservation Eleven Assoc. v. District of Columbia, 420 F.2d 153 (D.C. Cir. 1969); Virgin Islands v. 50.05 Acres of Land, 185 F. Supp. 495 (D.V.I. 1960). See 447 U.S. at 263 n.9.
97. 447 U.S. at 257–58 n.1. The city of Tiburon thereupon reimbursed the landowners for their costs incurred in defense of the action. Id. This fact was not relied upon by the Supreme Court in its Agins opinion.
98. Id. at 258 n.3.
99. Id. at 259 n.5, 263.
100. Id. at 657 (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)).
The holding in *Agins* quotes from, and follows, the earlier Supreme Court decision in *Danforth v. United States*. In that case, the United States instituted eminent domain proceedings to obtain land pursuant to the Flood Control Act of 1928. The landowner claimed that his property had been "taken" before commencement of the action when Congress enacted the statute contemplating the use of his land. The Court held that the institution of eminent domain proceedings, and the legislation authorizing them, does not result in a "taking" until title passes at the conclusion of the action. The Court noted that a different rule would force a government to "take" property before it could determine the cost of the "taking." The Court stated: "The determination of the award is an offer subject to acceptance . . . and thus gives . . . [the government] an opportunity to determine whether valuations leave the cost of completion within its resources."

Although both *Danforth* and *Agins* concerned aborted eminent domain proceedings, the scope of their holdings is not so limited. For example, in *Trager v. Peabody Redevelopment Authority*, plaintiff-landowners contended that a city council's designation of their property as "blighted" was unconstitutional. In the course of its decision, the district court relied upon *Danforth* to conclude that "the mere determination by a governmental authority that a particular area of real estate is 'blighted' as an initial step in an urban renewal project is not a constructive taking. This is so even though the determination of blight has an adverse effect on the value of the property."

Justice Brennan relied upon four cases to support his position that temporary activities may constitute "takings." In three cases, the United States government obtained through eminent domain proceedings the right to use buildings and property for a limited period of time. In the fourth case, *United States v. Causby*, the Court recognized that the government's taking of property by means of aircraft overflights might be either tempo-

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102. 308 U.S. 271 (1939); see supra notes 94-96 and accompanying text.
104. 308 U.S. at 281-282.
105. Id. at 284-85.
106. Id. at 284.
108. Id. at 1001.
109. Id. at 1002.
111. 328 U.S. 256 (1946).
Zoning and Land-Use Regulation

The conclusion that temporary governmental action may constitute a "taking" does not conflict with Danforth-Agins line of precedent. Some governmental action is so ephemeral and uncertain in its impact upon the landowner that it will never constitute a "taking." Other governmental action, such as the physical possession and use of real property and machinery for a number of years, constitutes a sufficient deprivation of property rights to invoke the fifth amendment, even if the government ultimately restores use of the property to the owner. The distinction between those temporary disruptions of economic expectations that constitute a "taking" and those that do not recognizes both the legitimate governmental interest in deferring compensation until the process of decision-making is complete and the degree to which a landowner's right to use his land is actually burdened.

The rule applied in Danforth and Agins serves an important governmental interest by ensuring that governments have the necessary flexibility to debate and assess the desirability of future land-use regulations before they go into effect. Until an eminent domain lawsuit is completed, title to the property resides in the landowner, and the government has taken no extra-judicial action inconsistent with the property rights of the landowner. As the Danforth court stated, and the Agins case illustrates, "[u]ntil taking the condemnor may discontinue or abandon his effort." Thus, even if, as alleged in the Agins case, property values are affected by the institution of an eminent domain proceeding or a proposal to adopt a land-use plan, those governmental activities do not pose a sufficiently concrete threat to the property rights of potentially affected landowners to be considered " takings."

In this sense, it may be proper to view the Danforth-Agins exclusion for "planning activities" as serving a purpose similar to that of the "ripeness" doctrine when applied to the judicial review of administrative action. The Supreme Court has explained that a basic rationale for the ripeness doctrine in that context is "to protect the agencies from judicial interference

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112. Id. at 267-68. The Court explained that "an accurate description of the property taken is essential" in order to compute properly the damages due the landowner. Id.
114. If a government takes physical possession of property before it institutes an eminent domain proceeding, however, the "taking" occurs at the time of the physical intrusion, not at the time when title passes as a result of the eminent domain proceeding. See United States v. Dow, 357 U.S. 17, 21-22 (1958).
115. Danforth, 308 U.S. at 284.
until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.  \footnote{Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).} Similarly, the statutory command of the Administrative Procedure Act, \footnote{5 U.S.C. § 551-706 (1976).} which allows judicial review of “final agency action,” \footnote{Id. § 704.} permits administrative agencies to correct their own mistakes and to apply their expertise before courts are called upon to determine the legality of administrative decisions. \footnote{F.T.C. v. Standard Oil Co., 449 U.S. 232, 242 (1980).} Application of the \textit{Danforth-Agins} principle, like the ripeness and finality requirements, insures that the fear of premature litigation will not deter governmental bodies from formulating public policy. In the zoning context, the possible chill to policy-making is particularly acute because the local government that considers enacting a land use regulation may face monetary liability as well as the prospect that the regulations will be invalidated.

The continued vitality of \textit{Danforth-Agins} does not cast doubt on Justice Brennan’s conclusions in \textit{San Diego Gas & Electric Co.} that land-use regulation may constitute a “taking” and that compensation must be paid once a “taking” occurs. But these cases do raise the question whether the mere enactment of a land-use regulation has a sufficiently concrete effect on landowners to be considered, in any circumstances, a “taking.” Given the potential public policy difficulties that municipalities would face if forced to formulate zoning ordinances without a clear idea of possible financial liability, it is tempting to embrace the position that enactment of a zoning ordinance alone, like the enactment of a law authorizing eminent domain proceedings, does not constitute a “taking” until a more concrete controversy arises between the government and an affected landowner and until the government can assess what its financial liability will be.

The Fifth Circuit has both considered and adopted such an approach to the problem of municipal liability under the Just Compensation clause. The case of \textit{Hernandez v. City of Lafayette}\footnote{643 F.2d 1188 (5th Cir. 1981).} concerned the efforts of a landowner to persuade a city to change the zoning designation applied to his land. The plaintiff, Hernandez, owned a tract of approximately seventeen acres in the city of Lafayette. The land was zoned for single family residential structures. Over the course of several years, the landowner tried without success to have his land rezoned to allow more valuable uses, such as a medical office complex or multifamily residential properties. \footnote{Id. at 1190.} After futile attempts to have the property rezoned, the plaintiff filed an action in
federal district court claiming that the city had refused his requests so that it could purchase a right-of-way through his land more cheaply. The city's continued decision to zone his land only for single family residential structures was thus alleged to be a "taking" of the property. Despite the plaintiff's allegations, the district court granted a summary judgment motion in favor of the city.

The court of appeals, taking the allegations of the plaintiff's complaint as true for purposes of the defendant's motion for summary judgment, held that the plaintiff had made out a claim that the city had "taken" his property. The court went on, however, to structure a novel fifth amendment requirement based on the Danforth-Agins principle:

"In cases such as the one before us, where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come to result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but the owner delays or fails to timely seek relief from such a classification, we conclude that a 'taking' does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity."

The court's conclusion was based squarely on the Danforth-Agins principle. The court applied the Agins axiom that "merely fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership,'" to the time during which proceedings "to review and correct" a zoning classification are pending. During that time, a zoning regulation will not, therefore, "be considered as a 'taking' in the constitutional sense."

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122. Id. at 1191.
123. Id. at 1189. The district court opinion is unreported.
124. Id. at 1200.
125. Id. (footnotes omitted).
126. Id. at 1201 (quoting Agins, 447 U.S. at 262-63 n.9; quoting Danforth, 308 U.S. at 285).
127. Id.
128. Id. (quoting Agins, 447 U.S. at 262-63 n.9; quoting Danforth, 308 U.S. at 285).

In a footnote, the court offered an alternative theory in support of its holding. The court of appeals stated that the government must have an "intention to appropriate" land in order for a "taking" to be effected. Id. at 1201, n.28 (quoting Porter v. United States, 473 F.2d 1329, 1336 (5th Cir. 1973)). In the court's view, "[t]he City of Lafayette under the circumstances of this case would lack an intention to deny plaintiff an economically viable use of his property until it was put on notice that its zoning regulations were effecting such a denial." Id. The court's reliance on the city's intent is a trifle obscure. It may be true, as the
The effect of the Fifth Circuit’s decision is to place a procedural burden upon a landowner who wishes to challenge the constitutionality of a zoning or land-use regulation. Even though a government may enact a zoning ordinance that, on its face, demands immediate compliance, the Fifth Circuit requires that the local government be given an opportunity to calculate the effect of its regulation on any particular landowner before a “taking” occurs. If the landowner raises an administrative challenge to the zoning ordinance, and his challenge is rejected, then he may proceed directly to court with his fifth amendment claim.\textsuperscript{129} If, however, the landowner fails to bring his claim to the government’s attention, then he will not be able to show that a “taking” has occurred until the government has had the opportunity “to review and correct” its zoning classification. Presumably, this phrase from \textit{Hernandez} contemplates that a government will have the chance, after a court rules that a zoning classification constitutes a “taking,” to rescind its regulation. The likely effect of the \textit{Hernandez} rule is, therefore, largely to eliminate the threat to the governmental fisc posed by Justice Brennan’s dissent in \textit{San Diego Gas & Electric Co.}

This reliance upon the \textit{Danforth-Agins} principle to advance the interests of local governments is entirely appropriate. \textit{Hernandez} merely extends to takings by regulation the rule \textit{Danforth} applied to eminent domain proceedings. The \textit{Danforth} court explicitly distinguished between the time when legislation authorizing condemnation is enacted and the time when an eminent domain proceeding results in a decree that informs the government of the cost of the property it seeks to acquire. The Court explained that “[c]ondemnation is a means by which the sovereign may find out what any piece of property will cost.”\textsuperscript{130} \textit{Hernandez} guarantees the same flexibility in governmental decision-making protected by \textit{Danforth} by sug-

\textsuperscript{129}\textsuperscript{129} A municipality may be able to assess its potential liability even if a landowner raises an administrative challenge. It is possible that a local government could then suspend operation of its land use regulation until it could seek a declaratory judgment that its regulation would not effect a “taking.” Once a particular landowner lodged an objection to the application of a regulation to his property, an actual conflict would be present between that landowner and the municipality. Accordingly, the municipality should be able to show a sufficiently concrete controversy to meet the federal standards for issuance of a declaratory judgment. \textit{See Aetna Life Ins. Co. v. Haworth}, 300 U.S. 227, 240-41 (1937).

\textsuperscript{130}\textsuperscript{130} \textit{Danforth}, 308 U.S. at 284.
gesting that a zoning regulation will not effect a "taking" until the
government has equally precise knowledge of the financial liabilities it will
incur.

Of course, Danforth and Agins are not on all fours. In an eminent do-
main proceeding, the landowner is under no legal compulsion until the
decree is entered; under the Hernandez rule, a statute that on its face man-
dates immediate compliance may still be held not to have taken property.
But, the Hernandez rule compensates for this distinction by employing a
burden-shifting device. Only if a landowner fails to raise an administrative
challenge will the effect of a statute be considered so attenuated as not to
constitute a taking. Hernandez simply balances the governmental interest
in planning for future financial liabilities against the individual's interest
in being free from untoward burdens on the immediate use of his property.
Hernandez presumes that any landowner who has not raised a specific ob-
jection in an administrative forum before proceeding to court has not been
so inconvenienced by governmental regulation as to require a finding that
a taking has occurred.

This presumption reflects the "ripeness" component of the Danforth-
Agins principle. As noted above, an inquiry into "ripeness" requires an
assessment of whether the effects of administrative action have been "felt
in a concrete way by the challenging parties." Application of the "ripe-
ness" doctrine to preenforcement review of administrative decisions is il-
ustrated by two leading Supreme Court cases. In Abbott Laboratories v.
Gardner, a group of drug manufacturers challenged a regulation
promulgated by the Food and Drug Administration (FDA) before the reg-
ulation had been enforced. The Court's holding that the controversy was
ripe was based, in part, on its conclusion that the regulation would have an
immediate and substantial effect on the drug companies. By contrast, in
Toilet Goods Association, Inc. v. Gardner, a companion case, the Court
held that preenforcement review of an FDA regulation was inappropriate
where a regulation would have only minimal impact on private parties.
The Hernandez Court implicitly concluded that a landowner who has not
bothered to challenge land-use regulations by administrative means is only
minimally burdened by the governmental action. Where the landowner

133. Id. at 152-54.
135. Id. at 164-65.
136. The Hernandez rule would presumably be controlled by the same reasoning that
renders the Danforth-Agins principle inapplicable in cases of "extraordinary delay," see
Agnis, 447 U.S. at 263 n.9, or where a municipality's planning activities amount to an
is not greatly burdened, it is appropriate to preserve the government's opportunity to discern whether its regulation is a taking and, if so, what its liability will be.

In sum, the holding of the Fifth Circuit in *Hernandez v. City of Lafayette* furthers the policy argument made by the Solicitor General in *San Diego Gas & Electric Co.* But, the *Hernandez* rule does not go so far as to conclude, as the Solicitor General urged, that zoning ordinances may never constitute a “taking.” Rather, *Hernandez* simply balances the respective private and public interests to conclude that the burden may be properly placed on an individual landowner to make a specific objection to a local government before it may be found that the landowner has been so burdened by regulation as to effect a “taking.”

**IV. Conclusion**

A review of two recent Supreme Court decisions concerning local zoning and land-use plans suggests that such activities will seldom constitute a “taking” within the meaning of the fifth amendment. But, if such plans are found to have “taken” private property, then it appears likely that a majority of the justices of the Supreme Court would be ready to rule that the local government must pay damages to the affected landowners. The anticipated detrimental effect of such a Supreme Court decision on local treasuries may be largely avoided, however, if courts adopt the Fifth Circuit decision in *Hernandez v. City of Lafayette*. The *Hernandez* decision limits liability by delaying the time when a “taking” would be deemed to have occurred until a local government has had the opportunity to consider fully whether land use or zoning regulations, as applied to any particular parcel of property, would constitute a “taking” within the meaning of the fifth amendment.

"abuse of the condemnation authority." *Thompson v. Tualatin Hills Park & Recreation Dist., 496 F. Supp. 530, 541 (D. Or. 1980); see Donahoe Constr. Co. v. Montgomery County Council, 567 F.2d 603, 609 (4th Cir. 1977); Richmond Elks Hall Ass'n v. Richmond Redevelopment, 561 F.2d 1327, 1331 (9th Cir. 1977); Benenson v. United States, 548 F.2d 939, 947-48 (Ct. Cl. 1977); Drakes Bay Land Co. v. United States, 424 F.2d 574, 586 (Ct. Cl. 1970); Foster v. City of Detroit, 254 F. Supp. 655, 663 (E.D. Mich. 1966), aff'd, 405 F.2d 138 (6th Cir. 1968). These cases stand for the proposition that planning activities, which normally do not constitute a taking, will be found to have taken property where burdens not normally associated with the pendency of planning activities have been placed on a landowner. Thus, a court will examine (i) the good faith of the government in beginning proceedings, (ii) whether the government took other actions during the pendency of the proceedings to interfere with or discourage the use of property, and (iii) the amount of time during which the proceedings were pending. See *Thompson*, 496 F. Supp. at 543-44.