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Agins v. City of Tiburon

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Discuss with San Diego case 79-678 (If we take either one, this is better case) — List 3, sheet 1, pg. 10 — Discuss — Note

Petr's land over-looking San Francisco Bay was rezoned to single family dwellings, depreciating its value.
Petr sought compensation on the theory of a "taking".
Calif S/Ct held that alternative remedy was available to challenge validy of ordinance by mandamus or declaratory judg., & that this sufficed. Const. doesn't require a damage remedy.

PRELIMINARY MEMORANDUM

January 4, 1980 Conference
List 5, sheet 1

No. 79-602-ASX	APPEAL from S.Ct. Cal. (Richardson, for court; Clark, dissenting)
AGINS, et ux.	
v.	
CITY OF TIBURON	State/Civil Timely

SUMMARY: Whether, consistent with the Fifth and Fourteenth Amendments, a state court may limit to prospective declaratory and mandamus relief the remedies available to a landowner whose land becomes subject to a zoning ordinance that deprives it of value to an extent that would constitute a taking if the zoning restrictions persevered, and may preclude damages suits brought under a theory of inverse condemnation.

FACTS: Appellants own five choice acres of undeveloped "ridgelands" overlooking San Francisco Bay that are located within the city of Tiburon -- pop. 6,209; total area 1,676

(over)

acres. In June of 1973 the city passed zoning ordinances creating an "RPD-1" zoning classification and classifying appellants' and other parcels of land in this category. The RPD-1 classification permits use of the land for (1) one family dwellings; (2) open space uses; and (3) accessory buildings and accessory use. Density is limited to not less than .2 nor more than 1 dwelling unit per gross acre.

Appellants made no application to use or improve their property following adoption of the ordinances. Instead, they filed an administrative claim against the city in Oct. 1973 seeking $2 mil. for the taking of the land. The city rejected the claim in Nov. 1973.

In Dec. 1973, the city acted under its eminent domain authority pursuant to its comprehensive development plan and filed suit to condemn appellants' land. However, in Nov. 1974 the city withdrew the suit, content to rely upon the RPD-1 zoning classification to preserve the beneficial qualities of the property for the community. After withdrawl of the suit, the city paid appellants $4,500 pursuant to statute for appellants' necessary expenses incurred during the pendency of the action, which sum did not include damages for financial impairment during pendency of the eminent domain action of the owner's right to sell.

In June 1975, appellants filed a complaint in county court alleging (1) a claim sounding in inverse condemnation that the city's actions had constituted a taking for which judgment for just compensation should be granted, and (2) a claim for declaratory relief that the offensive ordinances were invalid because they were confiscatory and in excess of the city's

authority. The city demurred to the complaint and the court dismissed both causes of action. The Cal. Ct. of Appeals reversed the dismissal on the inverse condemnation cause of action, but affirmed the dismissal of the complaint for declaratory judgment.

HOLDING BELOW: The Cal. S.Ct. ruled that a landowner aggrieved by a zoning ordinance that substantially limits use of his property may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, but he may not recover damages on the theory of inverse condemnation. The Ct. acknowledged the "clear, direct, and unquestionable constitutional basis for the protection of private property" found in the Fifth Amendment and in the state constitution. These provisions placed substantive limitations on the exercise of the police power but did not require that a remedy be provided which would "transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." It was a sufficient remedy to allow mandamus and declaratory relief to invalidate excessive zoning ordinances.

The Court saw the availability of an inverse condemnation remedy as a threat to legislative control over appropriate land-use determinations, which took the weighing of costs and benefits out of legislative hands and placed control of the expenditure of public funds in the hands of the judiciary. Quoting one commentator:

"Determining that a particular land-use control requires

compensation is an appropriate function of the judiciary, whose function includes protection of individuals against excesses of government. But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses."

Since the inverse condemnation remedy was not available, the S.Ct. dismissed the complaint as to that cause of action. Turning to the facts of this case to determine if declaratory relief was appropriate, the Ct. found no excessive use of the zoning power. The Ct. ruled that a "zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property." Applying this test, the limitation of development by the challenged ordinance to one family unit per acre did not constitute a taking violative of the federal or state constitutions.

The dissenting Justice relied on both state and federal constitutional grounds. Under the state constitution, "private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." Cal. Const., art. I, § 19. The dissent found the injury here to constitute "damage" to the property within the meaning of the state constitution. The dissent also asserted that application of federal S.Ct. precedent would find a taking in the circumstances of the case.

CONTENTIONS: Appellants paint a bleak picture, informing the Court that in the area of inverse condemnation "there is abroad an intellectual vacuum of principle. This Court has entertained cases of this type so infrequently, and disposed of them with such paucity of doctrinal principle applicable to

Yes

diverse factual situations, as to provide the lower courts around the country with precious little reliable precedential guidance." Appellants invite the Court to fill the vacuum, arguing that "there comes a point where even bad law is better than uncertain law that only serves to fuel acrimonious disputes. . . ." There is no indication what approach appellants recommend, other than the ad hoc methodology employed to date.

On the question of the choice of remedies available for unconstitutional takings, appellants point out the conflict among the state courts as to the correct solution. Appellant also cite to a conflict between the Cal. rule in this case and Fresno v. California, 372 U.S. 627 (1963), Dugan v. Rank, 372 U.S. 609 (1963), and Hurley v. Kincaid, 285 U.S. 95 (1932), which held that inverse condemnation damages, not invalidation or injunction constitute the remedy for Fifth Amendment violations of this type. Other instances are cited where this Court refused to invalidate legislation based on the claim that it effected an unconstitutional taking but rather found it consistent with legislative intent to remit the plaintiff to his money damages remedy. E.g., Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); United States v. Gerlach Livestock Co., 339 U.S. 725 (1950).

Appellants forewarn that since federal authority still grants a remedy of damages for unconstitutional takings, the effect of the Cal. S.Ct. decision will be to transfer all suits by aggrieved landowners to the federal courts where they may obtain the desired damages remedy.

Appellants also argue that the alternative remedy of

declaratory or mandamus relief is inadequate to give effective relief and thus denies due process. This result flows from the asserted ability of zoning authorities to thwart mandamus actions by delay tactics and to circumvent declaratory judgment actions by altering the challenged regulations during pendency of the suit.

Appellee counters that governmental action that effects a taking without compensation is unconstitutional and that this infirmity can be removed either by awarding compensation or by invalidating the governmental action, but there is no constitutional requirement that enforced compensation be the remedy. Appellee argues that the practice of the federal cases of awarding money damages rather than enjoining governmental action proceeds from an interpretation of legislative intent, not from a constitutional mandate.

On the facts of this case, appellee defends the Cal. S.Ct. ruling that there was no taking because the limitation of land use to one family dwellings did not deprive it of sufficient value to violate the Constitution.

DISCUSSION: The cases do not indicate that the Fifth Amendment requires a remedy of an action for inverse condemnation. That provision places a limitation on governmental power, which must be observed, and may be complied with either by the award of compensation or the invalidation of legislative action. The choice of remedies is one of discerning legislative intent. It is, of course, a question of state law whether the Cal. S.Ct. correctly interpreted the intent of the state and local legislatures when it provided an exclusive remedy of declaratory and mandamus relief.

On the merits of the taking claim, the Cal. S.Ct. is well in line with precedent to rule that no taking has occured where previously undeveloped suburban land is limited to development for single family or limited multi-family dwellings.

Since appellants did not attempt to obtain administrative authorization to build, they cannot establish a complete taking of their property by claiming that had they applied for construction permits the same would have been denied for improper reasons. It must be presumed at this stage that the remedy of mandamus is sufficient to ensure that appellants will be able to realize the development allowed by the regulations. ?

There is no reason to believe that in cases arising from Cal. zoning ordinances the federal courts will refuse to follow the rule of the Cal. S.Ct. that unconstitutional regulations are to be invalidated, rather than compensation be awarded. There should be no flood of such litigation in federal courts.

The question whether the Fifth Amendment mandates a compensation remedy does not seem to have been definitively answered by existing precedent. A similar question was raised in Webber v. City of Sacramento, No. 79-579, but the case was handled with a D&D at the Dec. 3 Conference. The question also is raised in San Diego Gas & Elec. Co. v. City of San Diego, No. 79-678 (Jan. 4, 1980 Conference). The posture of this case may be somewhat better than the San Diego case and presents an opportunity for the Court to make it clear whether optional remedies are available to cure Fifth Amendment violations.

There is a motion to dismiss or affirm and two amicus briefs in support of appellants.

12/17/79 Friedman Op. in JS

On the remedies issue, I think that the Constitution requires a State to provide an adequate remedy for every constitutional violation, but I do not think a State is required to provide additional remedies as a matter of constitutional law. In this case, California appears to have provided an adequate remedy in the form of a request for declaratory relief.

The taking issue itself seems unexceptional.

I would deny. Jon

January 4, 1980

Court .... *Voted on*................, *19*...

Argued ...., *19*... *Assigned* ...., *19*... No. 79-602

Submitted ...., *19*... *Announced* ...., *19*...

AGINS

vs.

CITY OF TIBURON

Byron White view is substantial Q.
There are two questions -
both substantial

Noted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.				✓									
Brennan, J.						✓							
Stewart, J.						✓							
White, J.				✓									
Marshall, J.						✓	join 3						
Blackmun, J.													
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.						✓							

Reviewed 4/13

1. Taking? David says no "taking" because as zoned prior to '72, Appellant (owner of five acres) could only build 5 residences - one per acre. and Calif S/Ct found that under '72 rezoning appellant could build "one to five" residences - depending upon approval of City Commission & Environmental factors.

Appellant not well postured to support his argument of "total destruction" of value since he has not sought approval for 5 residences

DOS

BENCH MEMORANDUM

(my doubt about this easy answer concerns practicalities. No one would buy & pay full mkt. value for 5 acres until under this issue is resolved. And it can't be resolved until Appellant produces architects plans at considerable expense - & these could eliminate prospective purchasers who preferred to develope their own plans)

TO: Mr. Justice Powell

FROM: David

DATE: April 4, 1980

RE: No. 79-602, Agins v. City of Tiburon

QUESTIONS PRESENTED:

1) Did the actions of the City of Tiburon in promulgating zoning regulations so diminish the value of appt's land as to constitute a taking?

2) Do the Fifth and Fourteenth Amendments prohibit the California S. Ct. from holding that only injunctive relief -- not damages -- is available when state regulatory action deprives an owner of land of all its value and use?

2. Mandamus remedy, precluding a damage remedy. David thinks this is adequate for Court. purposes. It is not adequate in fact. No jury & may tie prop. up for years

BACKGROUND:

In my view, the facts of this case are crucial, and to some extent call into question whether the Court should have noted probable jurisdiction. Petrs own five acres of vacant land on a ridge in posh Tiburon, a peninsula from Marin County into San Francisco Bay. When the events in this case began, the land was zoned for one-acre residential development. In 1972, the City began planning under a state program to preserve "open space." Consultant

studies' pinpointed the Agins' property for purchase as open space lands with money from a special bond issue. In 1973, the City promulgated a new zoning ordinance that, as applied to the Agins' property, permits a minimum of one and a maximum of five residences on the five acres. According to the Calif. S. Ct., how many buildings will be permitted "will depend upon the particular architectural design contemplated and the results of the required environmental impact report." App. to Juris. St., at 3. Petrs have never applied to improve their land under this zoning ordinance.

In October, 1973, the Agins' filed a claim with the City for $2 million, alleging that the zoning ordinance completely destroyed the value of their land. The City rejected the claim, and in December, 1973, filed an eminent domain action against the Agins' property. Eleven months later, however, the City abandoned that effort, and in May, 1975, the city paid petrs $4,500 for their expenses during the pendency of the eminent domain proceeding. In June, 1976, petr presented two claims against the city in state court: 1) a claim in inverse condemnation for $2 million in damages; 2) a request for declaratory relief that the zoning ordinance achieved an unconstitutional taking. The city's demurrer to both claims was sustained, and the Calif. S. Ct. affirmed that decision.

DISCUSSION:

My initial problem with this case focuses on whether there was actually a taking. The Agins' land is currently under use restrictions that are very similar -- if not identical -- to those that originally applied. Petrs argue that since their complaint

alleged the complete destruction of land values, and since the case went off on the pleadings, we must accept as true that assertion of no value. Yet, the Calif. S. Ct. squarely found that the under the current zoning ordinance -- of which it took judicial notice -- plaintiffs may build "between one and five residences on their property. This belies plaintiffs' claim that development of their land is forever prevented." App. to Juris. St., at 13. That certainly sounds correct to me.

The issue then is whether that determination disposes of the case. The Calif. S. Ct. decided the damages question first, ruling that the Agins had no damages remedy. Then, it turned to the request for injunctive relief and found no taking. I would be inclined to reverse the order in which the issues are considered. I would first address whether there was arguably a taking, whether the plaintiffs had a cause of action. The City insists that the California court's interpretation of the zoning ordinance is binding on this Court as an interpretation of state law. Eastlake v. Forest City Enterprises, 426 U.S. 668, 674 (1976). This seems correct. If there is no taking, then there is no reason to reach the remedies issue.

Because the Court presumably granted cert to decide the remedies question, it may well adopt the somewhat inverted approach of the state court. In the expectation of that outcome, I will address the remedies question.

The Calif. S. Ct. offered only two (really one) reasons for holding that an injunctive remedy was sufficient for a landowner whose property was "taken" by an overdrawn zoning ordinance. 1) To avoid "chilling" the "exercise of police regulatory powers"; since we

wish local bodies to be creative and resourceful in zoning for the benefit of the community, we should not create monetary liability when the local government louses up. Such liability will only deter the full exercise of local powers. (This argument clearly parallels the justification behind immunity in §1983 actions.) 2) By imposing inverse condemnation remedies, the judiciary would usurp legislative functions by intruding on the budgetary process. This variant of the first reason simply recognizes the separation of powers implications of a damages remedy.

Appellants attack this reasoning. They argue that the courts intrude more directly in the local decisionmaking process when they provide injunctive relief against a government program, rather than simply provide compensation. Moreover, they insist that the practical effect of an injunction is to give the local governments a second shot at zoning the poor landowner out of his property. (The appellants' brief is a bit strident; at one point, it likens the legal position property owners in California in the 1980s to that of blacks in Mississippi in the early 1960s.)

Yes

Two lines of analysis occur to me. The first, and most obvious, is to focus on the requirements of the Fifth and Fourteenth Amendments. Despite this Court's consistent whittling away at the just-compensation clause, it still requires that no property be taken by the government without the payment of just compensation. It has been recognized at least since Pennsylvania Coal Co. v. Mahon that a government regulation may be so overarching as to achieve a taking. Yet I think that the injunctive remedy satisfies the Constitutional requirement. If the government regulation is enjoined, then there is

no taking. Thus, the Calif. S. Ct. would seem on solid ground. Whether or not an injunctive or damage remedy is more or less intrusive on executive decisions is a decision that state courts should make according to their best judgment. It is not implicated in the Fifth Amendment issue in this case.

There is the niggling question of the restrictions on land use during the interim between promulgation of the regulation and its abolition by the courts. The California court found that that could not be a taking, and I suppose I agree. That temporary loss of value must be viewed as part of the price paid for belonging to organized society that attempts positive governmental action.

It could "niggle" for years of litigation.

A final series of thoughts centers on the practical features of the case. Ideally, the sort of arrangement you want is one that permits the local government the freedom to choose between altering its land use regulation and actually acquiring the land. Some have suggested a sort of "contingent" action for inverse condemnation. If the landowner won the inverse condemnation suit, the municipality would be given a certain period of time to either initiate eminent domain proceedings or revise its regulations. Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L.J. 385, 507-509 (1977). That sort of flexible remedy certainly seems preferable. In an amicus brief, the SG insists that the Calif. S. Ct.'s decision will lead to that result. The SG argues that after a zoning ordinance is struck down, the town will have the choice of filing appropriate condemnation proceedings, reenacting the ordinance with a compensation provision, or abandoning the regulation. Although this prediction is pleasant enough, I am not sure that the

SG's prediction

SG fully appreciates the possible instransigence of a local government. In any event, I do not see how the Constitution mandates the type of remedy that would explicitly provide the Ellickson-type policy.

David

79-602 Agins v. City of Tiburon appeal from S/Ct Calif Argued 4/15/80

Q - Was there a "taking" by appellee's rezoning of appellant's 5 acres of valuable land resulting in drastic loss of value

Shute (for City)

~~Thailand~~

Could take up to one year to approve a plan for use of prop.

P.S. called attention to ¶ IX of Complaint & to Demurrer, & asked why there shouldn't have been a trial. See Demurrer p 25.

JPS says only issue is facial validity of ordinance.

Calif. S/Ct did not reach the "as applied" argument.

This was not "spot" zoning.

Prior zoning was one house/one acre. There was the same environmental requirement so that there was no certainty under prior zoning.

(If we Hold for City, I think we should leave open Q of validity of action finally by City – e.g. if it allowed only one or two houses)

Shute (cont.)

Argues that Calif. form of relief is ~~requiring suit for damages rather than~~ Mandamus or Declaration, & no suit for damages. ~~etc~~

?

Kanner (Petr)

Case comes to us on Complaint and Demurrer. Thus no ev. & no facts other than those admitted by Demurrer.

Petr was never permitted to put on any ev. or ~~to~~ even to amend Complaint. Relies on denial of D/P in that had no opportunity to put on ev.

1st cause of action was for damages. Calif S/Ct held there was no such cause of action.

2nd cause of action was for declaration that Ord. was invalid.

One house in the 5 acres would be ~~economically~~ economically impossible. Cost a fortune to plant & maintain 5 acres.

Concedes would settle case for a stipulation that 5 houses could be built.

Affirm 7 - 2

79-602 Agins v. City of Tiburon Conf. 4/18/80

The Chief Justice Dismiss FWSFQ or affirm
Allegation of "total destruction" is false. Was conceded in argument to be the situation(?)
Judge was not bound to accept a pleading that is facially false - even on demurrer.
No exhausting of adm. remedies.

Mr. Justice Brennan DFWSFQ or affirm
Q whether this ordinance effected a taking.
The Calif S/Ct's finding of right to build one to five house. Thus no taking

Mr. Justice Stewart Reverse
On demurrer issue.

Mr. Justice White Affirm

Demurrer admits only well pleaded facts.

Calif ct found no taking, relying on ordinance.

Would not reach in-verse condemnation issue.

Mr. Justice Marshall Dismiss for Want or affirm

Mr. Justice Blackmun Affirm or Dismiss

We should have taken San Diego case where there was a taking

Mr. Justice Powell Affirm

Calif Ct. should have addressed the "taking" issue first. It then would not have reached Const. issue.

We shouldn't have taken this case. On its facts, the case doesn't present the Q I ~~thought we~~ would reach: Whether a principled line can be drawn as to when zoning accomplishes a "taking".

Here we don't know whether there will be a taking. The case should not have been [^] been decided on demurrer. But I think Cal S/Ct was justified in looking at ordinance

Mr. Justice Rehnquist Reverse

The demurrer should not have been sustained.

Appellant was entitled to some hearing. He received none.

Mr. Justice Stevens DFWSFQ or Affirm

lfp/ss 5/23/80

MEMORANDUM

TO: Jon DATE: May 23, 1980

FROM: Lewis F. Powell, Jr.

79-602 Agins v. Tiburon

I have reviewed the Chambers Draft. Although I think we are fairly "close in" to a circulation draft, I continue to find this - as you have - such a simple case that it is difficult to write.

A part of the difficulty is that almost every statement we make in Part II will become, or already is, a part of this troubling area of the law. With this in mind, I am inclined to make changes along the following lines:

1. Add a note defining "inverse condemnation". I believe we defined it in the case from Alaska decided earlierthis Term.

2. The next to last sentence on page 2 now reads as follows:

> "It held that landowners may not recover damages for land taken by a municipality."

Read literally, this would mean that if the city had acquired appellant's land through eminent domain proceedings, it would not have been obligated to pay any damages. Try reframing this sentence.

3. Note my editing in pencil on page 3.

4. On page 4 the draft states that a zoning law "effects a taking" if it "deprives a landowner of significant economic value", citing _Penn Central_. This is a bit ambiguous. Read one way, it is clear that the landowner in _Euclid_ was deprived of "significant economic value" when his property was devalued by 75%. The substance of what was said in _Penn Central_, as I recall, was that there has been no Fifth Amendment taking so long as the landowner is left with significant economic value. You might try reframing it in the interest of clarification.

Indeed, this paragraph in the opinion troubles me a good deal, perhaps became there never has been a satisfactory formulation of any standard or rule. Also, I am not at all sure that depriving an owner of 75% of the value of his property, if this could be proved (as distinguished from a mere allegation), is the sort of taking that should be imposed on a single unlucky individual rather than on the community as a whole.

Do you think that _Kaiser-Aetna_ can be read as at least tilting toward a more protective view than _Euclid_? What would you think of trying to work something out along the following lines:

The power of eminent domain always is available to

government. When this power is exercised by a complete taking the just compensation clause of the Fifth Amendment indemnifies the property owner. The theory is that the public or the community at large, rather than a single owner, should bear the burden of an exercise of state power in the public interest. But absent a complete taking as typically is the situation under a zoning ordinance, the law provides no precise rule or standard for determining when the public generally rather than the affected individuals should bear such economic loss as may be inflicted by such an ordinance. In the seminal decision of Village of Euclid v. Ambler Co., 272 U.S. 365 (1926) it was held that there was no compensable taking even though the owner alleged that the land-use restrictions would devalue one portion of his property by 75%. Id., at 384. Despite this alleged diminution in value, the Court held that the zoning ordinance was facially constitutional. In the recent case of Kaiser-Aetna, 444 U.S. 164 (1979) (here, Jon, summarize briefly what we held in Kaiser-Aetna which, as I recall, was a good deal more sensitive to the interest of the affected property owner than some of the earlier cases). Although our cases afford little guidance as to exactly where to draw the line, it is at least clear that the question whether there has been a taking requires a weighing of the private and public interests

involved. There are easy cases at either extreme of the spectrum. The diminution in value may range from slight and speculative to great and permanent. It is relevant, in some circumstances, whether the burden falls only on a limited number of property owners rather than a substantial area that may be rezoned in the public interests. This case, in its present posture, presents few of the difficulites that often attend claims of inverse condemnation."

The foregoing may try to state too much. I am dictating this. I am sure that with your sharp pencil, you can do do better. If language can be drawn from Kaiser-Aetna or other decisions, this might be helpful either in the text or in a note.

5. Consider changing the last paragraph on the bottom of page 5 to read substantially as follows:

> "Even if it were shown that the market value of appellant's property was diminished by the zoning regulations, they were intended and designed, as the city council stated, to assure high quality residential development. This purpose would benefit appellant as well as the public generally. Land use restrictions of this kind ensure orderly and careful development of a residential area, and the preservation of some open space land now recognized as important to such development. There is no indication that appellant's five-acre tract is the only property affected by the ordinances.

Appellants therefore will share with other owners the benefits and burdens of this exercise of the city's police power."

6. The first sentence under Part III may require some elaboration. The California court, as I understand it, held that the proper remedy would not be one in damages butrather a declaration that the ordinance in invalid, either on its face or as applied, amd enjoining its application. Although this has been made clear earlier, I think it would be well to repeat it in this concluding paragraph.

L.F.P., Jr.

ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: MAY 27 1980

Recirculated: ____________

5-26-80

First 2nd ~~CHAMBERS~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-602

Donald W. Agins et ux., Appellants, v. City of Tiburon. } On Appeal from the Supreme Court of California.

[June —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a municipal zoning ordinance took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments.

I

After the appellants acquired five acres of unimproved land in the city of Tiburon, Cal., for residential development, the city was required by state law to prepare a general plan governing both land-use and the development of open-space land. Cal. Govt. Code § 65302 (a) & (e) (West Supp. 1979); see *id.*, § 65563. In response, the city adopted two ordinances that modified existing zoning requirements. Tiburon, Cal., Ordinances Nos. 123 N. S. and 124 N. S. (June 28, 1973). The zoning ordinances placed the appellants' property in "RPD-1," a Residential Planned Development and Open Space Zone. RPD-1 property may be devoted to one-family dwellings, accessory buildings, and open-space uses. Density restrictions permit the appellants to build between one and five single-family residences on their five-acre tract. The appellants never have sought approval for development of their land under the zoning ordinances.[1]

[1] Shortly after it enacted the ordinances, the city began eminent domain proceedings against the appellants' land. The following year, however, the

The appellants filed a two-part complaint against the city in State Superior Court. The first cause of action sought $2 million in damages for inverse condemnation.[2] The second cause of action requested a declaration that the zoning ordinances were facially unconstitutional. The gravamen of both claims was the appellants' assertion that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments. The complaint alleged that land in Tiburon has greater value than any other suburban property in the State of California. App. 3. The ridgelands that appellants own "possess magnificant views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands" in Tiburon. *Id.,* at 4. Rezoning of the land "forever prevented [its] development for residential use. . . ." *Id.,* at 5. Therefore, the appellants contended, the city had "completely destroyed the value of [appellants'] property for any purpose or use whatsoever. . . ." *Id.,* at 7.[3]

The city demurred, claiming that the complaint failed to state a cause of action. The Superior Court sustained the demurrer,[4] and the California Supreme Court affirmed. 24 Cal. 3d 266, 598 P. 2d 25 (1979). The State Supreme Court first considered the inverse condemnation claim. It held that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby

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city abandoned those proceedings, and its complaint was dismissed. The appellants were reimbursed for costs incurred in connection with the action.

[2] Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. *United States* v. *Clarke,* — U. S. —, — (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.,* at —.

[3] The appellants also contended that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings. JA10.

4. FN4 from Page 3.

transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Id.*, at 273, 598 P. 2d, at ——. The sole remedies for such a taking, the court concluded, are mandamus and declaratory judgment. Turning therefore to the appellants' claim for declaratory relief, the California Supreme Court held that the zoning ordinances had not deprived the appellants of their property without compensation in violation of the Fifth Amendment.[5]

We noted probable jurisdiction. 444 U. S. 1011 (1980). We now affirm the holding that the zoning ordinance on its face does not take the appellants' property without just compensation.[6]

---

[4] The State Superior Court granted the appellants leave to amend the cause of action seeking a declaratory judgment, but the appellants did not avail themselves of that opportunity.

[5] The California Supreme Court also rejected appellants' argument that the institution and abandonment of eminent domain proceedings themselves constituted a taking. The court found that the city had acted reasonably and that general municipal planning decisions do not violate the Fifth Amendment.

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The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." The appellants' complaint framed the question as whether a zoning ordinance that prohibits all development of their land effects a taking under the Fifth and Fourteenth Amendments. The California Supreme Court rejected the appellants' characterization of the issue by holding, as a matter of state law, that the terms of the challenged ordinance allow the appellants to construct between one and five residences on their property. The court did not consider whether the zoning ordinance would be unconstitutional if applied to prevent appellants from building five homes. Because 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. See *Socialist Labor Party* v. *Gilligan,* 406 U. S. 583, 588 (1972). See also *Goldwater* v. *Carter,* 444 U. S. 996, 997 (1979) (POWELL, J., concurring). Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *City of Cambridge,* 277 U. S. 183, 188 (1928), or denies a owner economically viable use of his land, see *Penn Central Transp. Corp.* v. *New York City,* 438 U. S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking 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. Although no precise rule determines when property has been taken, see *Kaiser Aetna* v. *United States,* 444 U. S. 164 (1979), the question

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necessarily requires a weighing of private and public interests. The seminal decision in *Village of Euclid* v. *Ambler Co.,* 272 U. S. 365 (1926), is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner. *Id.,* at 395–397.

In this case, the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses." Cal. Govt. Code § 65561 (b) (West. Supp. 1979).[7] The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization.[8] Such governmental purposes long have been recognized as legitimate. See *Penn Central Transp. Co.* v. *New York City, supra,* at 129; *Village of Belle Terre* v. *Boraas,* 416 U. S. 1, 9 (1974); *City of Euclid* v. *Ambler Co., supra,* at 394–395.

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"[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 the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." Ordinance No. 124 N. S. § 1 (c).

uses. Construction is not permitted until the builder submits a plan compatible with "adjoining patterns of development and open space." Tiburon, Cal., Ordinance No. 123 N. S. § 2 (F). In passing upon a plan, the city also will consider how well the proposed development would preserve the surrounding environment and whether the density of new construction will be offset by adjoining open spaces. *Ibid.* The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' five-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with any dimunition in market value that the appellants might suffer.

Although the ordinances limit development, they neither prevent the best use of appellants' land, see *United States* v. *Causby,* 328 U. S. 256, 262, and n. 7 (1946), nor extinguish a fundamental attribute of ownership, see *Kaiser Aetna* v. *United States,* 444 U. S., at —. The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential App. 3-4. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build State, and that the best possible use of the land is residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. See *Penn Central Transp. Co.* v. *New York City,* 438 U. S., at 124.[9]

as many as five houses on their five acres of prime residential property.

[9] Appellants also claim that the city's precondemnation activities con-

III

The State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation.

The judgment of the Supreme Court of California is

Affimed.

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stitute a taking. See nn. 1, 3, and 5, *supra*. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. See also *City of Walnut Creek* v. *Leadership Housing Systems, Inc.*, 73 Cal. App. 3d 611, 620–624, 140 Cal. Rptr. 690, 695–697 (1977). Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth* v. *United States*, 308 U. S. 271, 285 (1939). See *Thomas W. Garland, Inc.* v. *City of St. Louis*, 596 F. 2d 784, 787 (CA8), cert. denied, — U. S. — (1979); *Reservation Eleven Associates* v. *District of Columbia*, — U. S. App. D. C. —, 420 F. 2d 153, 157–158 (1969); *Virgin Islands* v. *50.05 Acres of Land*, 185 F. Supp. 495, 498 (VI 1960); 2 Nichols, Eminent Domain § 6.13 [3] (3d ed. 1979).

[MAY 27, 1980]

Mr Justice:

Perhaps it would alleviate Justice Rehnquist's fears if the attached changes were made on pp. ~~3~~ 4+5.

Jon

Jon - See draft of letter to WHR attached. I prefer not to make ~~the~~ changes unless we lose our votes.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

5-27-80

From: Mr. Justice Powell
MAY 27

Circulated: ______________

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SUPREME COURT OF THE UNITED STATES

No. 79-602

Donald W. Agins et ux., Appellants, v. City of Tiburon. } On Appeal from the Supreme Court of California.

[June —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a municipal zoning ordinance took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments.

I

After the appellants acquired five acres of unimproved land in the city of Tiburon, Cal., for residential development, the city was required by state law to prepare a general plan governing both land-use and the development of open-space land. Cal. Govt. Code § 65302 (a) & (e) (West Supp. 1979); see *id.*, § 65563. In response, the city adopted two ordinances that modified existing zoning requirements. Tiburon, Cal., Ordinances Nos. 123 N. S. and 124 N. S. (June 28, 1973). The zoning ordinances placed the appellants' property in "RPD-1," a Residential Planned Development and Open Space Zone. RPD-1 property may be devoted to one-family dwellings, accessory buildings, and open-space uses. Density restrictions permit the appellants to build between one and five single-family residences on their five-acre tract. The appellants never have sought approval for development of their land under the zoning ordinances.[1]

[1] Shortly after it enacted the ordinances, the city began eminent domain proceedings against the appellants' land. The following year, however, the

The appellants filed a two-part complaint against the city in State Superior Court. The first cause of action sought $2 million in damages for inverse condemnation.[2] The second cause of action requested a declaration that the zoning ordinances were facially unconstitutional. The gravamen of both claims was the appellants' assertion that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments. The complaint alleged that land in Tiburon has greater value than any other suburban property in the State of California. App. 3. The ridgelands that appellants own "possess magnificant views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands" in Tiburon. *Id.*, at 4. Rezoning of the land "forever prevented [its] development for residential use. . . ." *Id.*, at 5. Therefore, the appellants contended, the city had "completely destroyed the value of [appellants'] property for any purpose or use whatsoever. . . ." *Id.*, at 7.[3]

The city demurred, claiming that the complaint failed to state a cause of action. The Superior Court sustained the demurrer,[4] and the California Supreme Court affirmed. 24 Cal. 3d 266, 598 P. 2d 25 (1979). The State Supreme Court first considered the inverse condemnation claim. It held that

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city abandoned those proceedings, and its complaint was dismissed. The appellants were reimbursed for costs incurred in connection with the action.

[2] Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. *United States* v. *Clarke*, — U. S. —, — (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.*, at —.

[3] The appellants also contended that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings. JA10.

[4] The State Superior Court granted the appellants leave to amend the cause of action seeking a declaratory judgment, but the appellants did not avail themselves of that opportunity.

a landowner who challenges the constitutionality of a zoning ordinance 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." *Id.*, at 273, 598 P. 2d, at 28. The sole remedies for such a taking, the court concluded, are mandamus and declaratory judgment. Turning therefore to the appellants' claim for declaratory relief, the California Supreme Court held that the zoning ordinances had not deprived the appellants of their property without compensation in violation of the Fifth Amendment.[5]

We noted probable jurisdiction. 444 U. S. 1011 (1980). We now affirm the holding that the zoning ordinance on its face does not take the appellants' property without just compensation.[6]

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[5] The California Supreme Court also rejected appellants' argument that the institution and abandonment of eminent domain proceedings themselves constituted a taking. The court found that the city had acted reasonably and that general municipal planning decisions do not violate the Fifth Amendment.

[6] The appellants also contend that the state courts erred by sustaining the demurrer despite their uncontroverted allegations that the zoning ordinance would "forever prevent . . . development for residential use," App. 5, and "completely destro[y] the value of [appellant's] property for any purpose or use whatsoever . . . ," *id.*, at 7. The California Supreme Court compared the express terms of the zoning ordinances with the factual allegations of the complaint. The terms of the ordinances permit construction of one to five residences on the appellants' five-acre tract. The court therefore rejected the contention that the ordinances prevented all use of the land. Under California practice, allegations in a complaint are taken to be true unless "contrary to law or to a fact of which a court may take judicial notice." *Dale* v. *City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976); see *Martinez* v. *Socoma Cos., Inc.*, 11 Cal. 3d 394, 521 P. 2d 841, 844 (1974). California courts may take judicial notice of municipal ordinances. Cal. Evid. Code § 452 (b) (West 1966). In this case, the State Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under review. The appellants' objection to the State Supreme Court's application of state

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In this case, the zoning ordinances are substantially ~~advance~~ related to legitimate governmental goals. The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses." Cal. Govt. Code § 65561 (b) (West. Supp. 1979).[7] The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization.[8] Such governmental purposes long have been recognized as legitimate. See *Penn Central Transp. Co.* v. *New York City*, *supra*, at 129; *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 9 (1974); *City of Euclid* v. *Ambler Co.*, *supra*, at 394–395.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

5-27-80

From: Mr. Justice Powell

Circulated: MAY 27 1980

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[8] The City Council of Tiburon found 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 the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." Ordinance No. 124 N. S. § 1 (c).

uses. Construction is not permitted until the builder submits a plan compatible with "adjoining patterns of development and open space." Tiburon, Cal., Ordinance No. 123 N. S. § 2 (F). In passing upon a plan, the city also will consider how well the proposed development would preserve the surrounding environment and whether the density of new construction will be offset by adjoining open spaces. *Ibid.* The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' five-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with any dimunition in market value that the appellants might suffer.

Although the ordinances limit development, they neither prevent the best use of appellants' land, see *United States* v. *Causby,* 328 U. S. 256, 262, and n. 7 (1946), nor extinguish a fundamental attribute of ownership, see *Kaiser Aetna* v. *United States,* 444 U. S., at —. The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential App. 3–4. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. See *Penn Central Transp. Co.* v. *New York City,* 438 U. S., at 124.[9]

---

[9] Appellants also claim that the city's precondemnation activities con-

III

The State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation.

The judgment of the Supreme Court of California is

Affimed.

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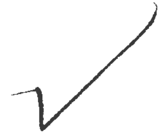
stitute a taking. See nn. 1, 3, and 5, *supra*. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. See also *City of Walnut Creek* v. *Leadership Housing Systems, Inc.*, 73 Cal. App. 3d 611, 620–624, 140 Cal. Rptr. 690, 695–697 (1977). Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth* v. *United States*, 308 U. S. 271, 285 (1939). See *Thomas W. Garland, Inc.* v. *City of St. Louis*, 596 F. 2d 784, 787 (CA8), cert. denied, — U. S. — (1979); *Reservation Eleven Associates* v. *District of Columbia*, — U. S. App. D. C. —, 420 F. 2d 153, 157–158 (1969); *Virgin Islands* v. *50.05 Acres of Land*, 185 F. Supp. 495, 498 (VI 1960); 2 Nichols, Eminent Domain § 6.13 [3] (3d ed. 1979).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



May 27, 1980

Re: 79-602 - Agins v. City of Tiburon

Dear Lewis:

Please join me.

Respectfully,

Mr. Justice Powell

Copies to the Conference

Post 6/8/80

TWO VIEWS

Suit by Landowners Scares Nature Lovers

By Fred Barbash and Cynthia Gorney
Washington Post Staff Writers

TIBURON, Calif. — The Tiburon ridge stretches out in a long golden curve, rocky and bright with wildflowers. To the east, one can see small sailboats cutting fine white lines through the blue-gray stillness of San Francisco Bay. To the west, lit by the sun when the fog burns away, the Golden Gate Bridge spans the whitewater where the bay meets the Pacific.

A fine setting for a house, thought Donald and Bonnie Agins when they bought five acres here in 1968—a dream house with a dream view.

But it was also an environmental gem, not just a view but a "viewscape" as the planners would call it later, when they moved to preserve it from development.

Now the property is the focus of a potentially far-reaching showdown before the U.S. Supreme Court that has generated an avalanche of legal briefs rivaled only by the abortion funding controversy. The showdown is between the environmental movement and a growing number of landowners and developers who consider themselves its victims.

The briefs make clear both sides' belief that a decision in favor of the Agins could deal a devastating blow to environmental and land-use planning across the nation. And the case has become a vehicle for those who

See TIBURON, A5, Col. 1

By David Powers for The Washington Post

Donald and Bonnie Agins own five acres overlooking San Francisco Bay but dare not build.

Supreme Court Showdown Pits Landowners, Environmentalists

TIBURON, From A1

hope for such a decision and those who fear it.

The Agins hoped to sell four acres of their land for construction of four houses and use the proceeds to finance their own home. Twelve years later, there is still no house here.

After the zoners and planners finished their work, the family would have needed to spend thousands of dollars on environmental impact statements and master plans before they could even apply to build. And approval would still not be a certainty.

Believing the property worthless to them, the Agins sued the city of Tiburon for $2 million in 1975. Tiburon, they argued, effectively took their land and should pay for it.

To environmentalists this was an outrageous proposition which they accurately predicted would be thrown out by the California courts.

They did not, however, expect the Supreme Court to accept the case. Now, as the environmentalists tell it, the future of land use regulation is at stake, not to mention hundreds of millions of dollars in claims by landowners like the Agins around the country.

In the past decade, state after state has enacted programs to preserve open space. They survive only because the courts have generally held that the "public good"—a pretty view, a park, a wildlife area preserved—overrides the interests of individual landowners in the affected areas.

But as the environmental movement has grown, so has the class of aggrieved landowners. Many are now demanding compensation for what they believe has been taken from them in the name of the public.

If the landowners win a solid Supreme Court victory in the Agins case, environmentalists, state governments and the U.S. government agree that land use regulation will become, like everything else, too expensive.

California, for example, says it has $350 million worth of Agins-type claims in the courts now. Three other claims pend at the U.S. Supreme Court, awaiting a decision on review:

- San Diego Gas and Electric Co. is claiming $3.1 million from the California city for rezoning to open space a property intended for a power plant.
- Developers in the state of Washington are seeking compensation from the government of Thurston County for blocking plans to develop 14 acres along Lake Lawrence in order to preserve a feeding ground for bald eagles.
- Carl Lange and his family are demanding about $1 million from San Juan County, Wash., for adding their property to a "conservancy inventory" for preservation years after they purchased it.

These protesters and others before them have generally been on the losing side in the courts. The Fifth Amendment to the Constitution forbids the taking of private property for public use "without just compensation." The problem for the landowners has been the definition of a "taking." Over the years, most zoning and land use regulations have been upheld as something other than a taking—the exercise of police power—and thus requiring no compensation.

But the Supreme Court has never directly confronted the kind of complicated multitiered zoning and land use programs enacted by states in recent years.

The property owners believe that if ever there was a year for victory, this is it. In December, the Supreme Court ruled that the U.S government had "taken" the property of a Hawaii developer, Kaiser Aetna Co., by requiring public access to a marina on Oahu developed on private property with private funds.

And then, a month later, in an action that surprised and panicked the environmental movement, the justices agreed to review the Agins case.

"You are now entering Agins Acres," says slender, red-haired Bonnie Agins, as she opens her arms to the spectacular panorama around her. "See what we're fighting for?"

Bonnie and Donald Agins, a dentist, found their Tiburon land 12 years ago, when they decided that, with five children at home, they had outgrown their house in the nearby suburb of Lucas Valley.

"We came up and looked at the property and fell in love with it," Bonnie Agins said as she sat on a flat rock in the midst of the wild yellow grasses.

An architect had walked the open land with the couple, rhapsodizing about its possibilities, and the Agins envisioned just what they wanted: a wood house, maybe solar heated, with lots of glass to catch the views, and a swimming pool.

It was an expensive project, but the Agins had decided how they would pay for it. "The attractive part of this property," she said, "was that we could build our own house and sell the part of the property that we didn't want, to help finance our own house."

They figured they would sell four acres—one house per acre.

Zoning then permitted just such development. The Agins paid $50,000 for the land and held it for several years, until they felt ready to begin building.

During the same period, municipalities in California came under a state legislative mandate to begin preserving open space. The beauty of the state and its coastline was threatened by its population boom.

The city raised $1.2 million to buy property—including the Agins'—along Tiburon Ridge in order to presserve it for open space. But by the time they got around to Agins Acres, the money was exhausted. The city then rezoned the Agins property to a completely new category under an ordinance designed "to protect and preserve open space land as a limited and valuable resource."

The new zoning might still allow the Agins to build one to five unit on their five acres. But they estimate that it could cost up to $50,000 in fee to consultants and planners to asses the effect on the view and on th flora and fauna of the Tiburon ridge And to submit this costly impac statement was no guarantee of a proval.

The Agins never submitted a re quest for their project. After listenin to city officials and the advice of thei lawyer, they decided there was n chance of approval for the five house they wanted to build. "It didn't see to make any sense to go through a that if they told you ahead of tim you couldn't," said Donald Agins.

"I think when people want som thing," he said, "they should be wil ing to pay for it. They shouldn't e pect you to donate your propert when they want to acquire op space.

"Maybe the city should have shorten its sights a little bit and rea ize they can't have everything th want if they can't pay for it. There's lot of things I want but can't affor That's just the way it goes."

See TIBURON, A6, Col. 1

Ti bu ron

lfp/ss 6/9/80 79-602, Agins v. City of Tiburon

This case is here on appeal from the Supreme Court of California. The appellants own five acres of scenically located land in Tiburon, California, overlooking San Fran. Bay. The City rezoned the land exclusively for single-family residences, accessory buildings, and open-space use.

The appellants filed suit in state court alleging that the zoning change constituted a taking of their land without just compensation in violation of the Fifth and Fourteenth Amendments. The appellants sought $ 2 million in damages.

The California Court held that, under the terms of the ordinance, appellants could build between one and five residences on their property. But they had not filed an application with the city requesting the right to build any residences. Although appellants argued that the practical effect of the ordinance was to inhibit altogether the use or sale of their property for residential purposes, the California Court disagreed. It held that there had been no "taking".

We agree with the Calif Ct on this issue.

We agree with the California Court on this issue. The case presents only a facial attack on the zoning ordinance. As the ordinance has been construed to allow at least one residence, and possibly five, we hold there has been no taking under the Fifth and Fourteenth Amendments.

A zoning law, enacted to further legitimate state interests, does not effect a taking so long as the property owner is not deprived of an economically viable use of his land. In this case, no showing has been made that this will result from the ordinance before us.

The California Court also held that even had there been a taking, appellants' remedy would have been injunctive relief rather than a suit for damages. In view of our decision, we do not reach ~~this~~ question.

In sum, the judgment of the Supreme Court of California is affirmed by a unanimous Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 28, 1980

Re: 79-602 - Agins v. City of Tiburon

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1980

RE: No. 79-602 Donald W. Agins et ux. v. City of Tiburon

Dear Lewis:

I agree.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 28, 1980

Re: No. 79-602 - Agins v. City of Tiburon

Dear Lewis:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice Powell

cc: The Conference

May 29, 1980

79-602 Agins v. Tiburon

Dear Bill:

Thank you for your letter advising that my opinion satisfies you on the demurrer issue.

I would prefer not to quote any particular language from Euclid. This Court has decided a host of zoning cases, and I thought it best not to quote selectively from them. I have, however, referred to Euclid as the "seminal" decision and also have twice referred to page 395 of that case - where the language you like appears.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 29, 1980

Re: No. 79-602 Agins v. Tiburon

Dear Lewis:

My recollection of the vote at Conference is that Potter and I were the only ones who disagreed with the result which your opinion reaches, and that our feeling was based on the fact that the sustaining of a demurrer to a complaint which alleged that a zoning ordinance had completely destroyed the value of the plaintiffs' property must mean that the Superior Court, affirmed by the Supreme Court of California, thought that this was permissible under the Eminent Domain Clause of the United States Constitution as applied to the states. Your treatment of the California practice in your presently circulating draft has convinced me, however, that California courts in passing on demurrers may take judicial notice of local ordinances, even though the ordinance as construed is contrary to the allegations in the complaint. I am therefore now quite prepared to go with you on that point.

I am somewhat uneasy about the latitude which your treatment of federal constitutional review of local zoning ordinances on pages 5 and 6 of your present draft appears to give federal courts. I realize that it is not easy to simply plug in a quotation to an opinion which you have already edited and structured in the manner that seems best to you, but my concerns along this line could be completely allayed if you could see fit to put in somewhere in the opinion the following quotation from what you describe as the "seminal" case of Euclid v. Ambler Co., 272 U.S. 365, 395:

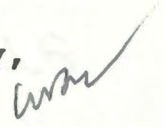
> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude

> us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

This may be just a difference of nuance, but it seems to me that it allows the states somewhat more latitude than your implicit requirement on page 5 that a zoning ordinance to be constitutional "substantially advance legitimate governmental goals".

If you would prefer to leave the opinion as is, I will simply write a short separate concurrence, quoting the language from Euclid, joining at least in the judgment and probably in the opinion.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 29, 1980

Re: 79-602 - Agins v. Tiburon

Dear Lewis:

Footnote 6 of your proposed opinion takes care of the basic problem I had with this case. Therefore, subject to being persuaded by whatever anybody else may write separately, I join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 29, 1980

Re: No. 79-602 - Agins v. Tiburon

Dear Lewis:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1980

Re: No. 79-602 Agins v. Tiburon

Dear Lewis:

The "nuance" which troubles me is probably not worth a separate concurring opinion in this case. I am sufficiently in agreement with both the reasoning and result that you may count me as a "join".

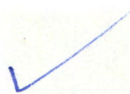
Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE



June 4, 1980

RE: 79-602 - Agins v. Tiburon

Dear Lewis:

I join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

2 copies to Mr. Lind 5/28/80

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
						4/25/80		
Join LFP 6/4/80	agree 5/28/80	Join LFP 5/29/80	Join LFP 5/28/80	Join LFP 5/28/80	~~Join LFP 5/29/80~~	1st Draft 5/27/80	Join LFP 5/30/80	Join LFP 5/27/80
					Join LFP 5/29/80			

79-602 Agins v. City of Tiburon

ued: "no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given Miranda warnings. Consequently, the fundamental unfairness present in Doyle is not present in this case."

In dissent, Associate Justices Thur-

Tahoe gambling casinos. Some of the casinos now in Nevada could conceivably have found themselves in California had the Justices accepted certain of California's counter-arguments. Justice Brennan's opinion described the efforts of a series of hapless surveyors, beset by such difficulties as shifting river beds, to fix the interstate border.

NY Times 6/11/80

High Court Backs Zoning Curbs Passed to Preserve Environment

By LINDA GREENHOUSE

Special to The New York Times

WASHINGTON, June 10 — A zoning ordinance that limits development in the name of conservation does not necessarily violate the constitutional rights of affected property owners, the Supreme Court ruled unanimously today.

The Court rejected the argument of a California couple that environmental restrictions placed on their five acres of vacant land overlooking San Francisco Bay constituted a "taking" of the property without the compensation required by the Fifth Amendment.

The Justices agreed with the California Supreme Court that no unconstitutional "taking" had occurred when the City of Tiburon enacted the open space zoning ordinance in 1973, five years after the couple bought the land.

"The State of California has determined that the development of local open-space plans will discourage the premature and unnecessary conversion of open-space land to urban uses," Associate Justice Lewis F. Powell Jr. wrote for the Court. "The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization. Such governmental purposes long have been recognized as legitimate."

Environmental Groups Involved

The case, Agins v. City of Tiburon, No. 79-602, attracted the attention of environmental groups, including the National Audubon Society, the Sierra Club and the National Wildlife Federation. They argued as friends of the court that a ruling in favor of the property owners would jeopardize land-use regulation around the country. The Federal Government also entered the case on behalf of the city.

Justice Powell's opinion was narrowly written and did not resolve all the issues that had made the case such a focus of concern. But coming a day after the Court rejected a shopping center owner's argument that his property rights entitled him to ban petitioning on his property, the opinion clearly signaled the Court's continued willingness to look beyond private property rights to the broader social policies that sometimes require infringing on those rights.

Justice Powell said that while the "mere enactment" of the ordinances was constitutional, the Court could not decide whether the restrictions had been unconstitutionally applied to the couple who brought the suit. That was because the couple, Bonnie and Donald Agins, had never actually applied for approval to develop the land. The ordinances allow up to five homes to be built on the five acres, with approval contingent on the environmental impact of the particular plan.

"At this juncture, appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials," Justice Powell said.

Wide Benefit Found

He said that the ordinances "benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas."

The couple had sought $2 million in damages from the city on a legal theory called inverse condemnation, arguing that the city should reimburse them for rendering their property economically useless. The California Supreme Court held that damages were never available in such a case and that the most a successful plaintiff could achieve would be a judicial declaration that the challenged ordinance was invalid.

The Aginses appealed this part of the ruling as well, but Justice Powell said that because the restrictions did not involve a "taking," the Court had no occasion to decide the availability of inverse condemnation.

The opinion therefore deferred to another day both the questions of damages and of the constitutionality of a rezoning that gave the property owners virtually no chance to use their land.

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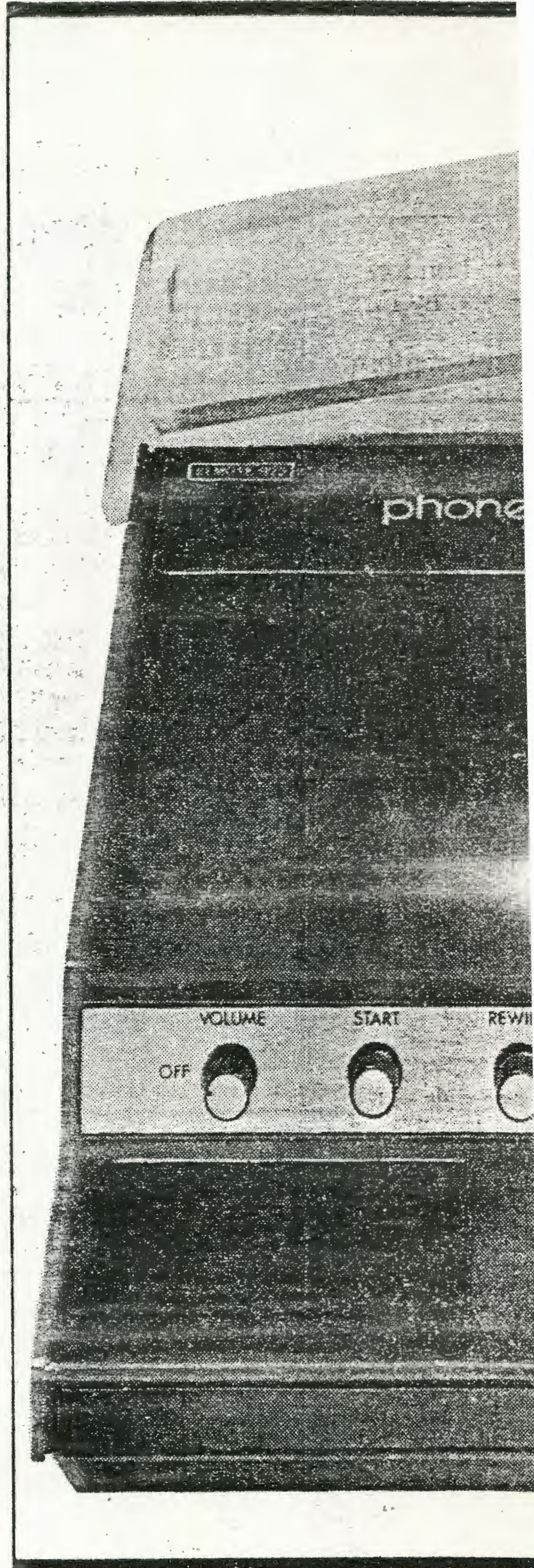

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