Notes

The Money Damages Issue: Arizona Takes a Stand*

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For decades cities and counties have imposed zoning restrictions on private property in an attempt to organize and beautify their municipalities. However these restrictions have at times become overburdensome and even confiscatory; consequently, property owners have sought remedies for such illegal zoning practices. The most common remedy available to the injured property owner has been a mere invalidation of the zoning restriction as it applies to his land. Recently, however, property owners have also attempted to sue the zoning bodies for damages caused by the unconstitutional restriction. Such a damages remedy, however, has received a mixed reception; thus, courts have had to decide whether a real property owner can receive money damages for an unconstitutional zoning restriction enforced on his land.

In *Corrigan v. City of Scottsdale*[1], the Arizona Supreme Court decided the money damages issue—one the United States Supreme Court has failed to rule on four times since 1980.[2] In *Corrigan*, the Supreme Court of Arizona overruled one of its previous decisions and held that under the Arizona Constitution, money damages, in addition to invalidation, is an appropriate remedy for a real property owner whose land has been unconstitutionally confiscated by a zoning ordinance which amounted to a temporary taking.[3]

This Note shall first examine two theories which property owners have used to obtain money damages for unconstitutional restrictions on their real

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* As this issue went to print, the United States Supreme Court handed down First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S.L.W. 4781 (U.S. June 9, 1987) (No. 85-1199). This decision echoes the Arizona Supreme Court case discussed in this Note by holding that temporary denials of use of land by governmental regulation constitute "takings" of property, and thereby require the government to pay the landowner monetary compensation.

1. 149 Ariz. 538, 720 P.2d 513 (1986).

2. The United States Supreme Court repeatedly denied the opportunity to decide whether money damages is an appropriate remedy for an unconstitutional regulatory taking. *See* Agins v. City of Tiburon, 447 U.S. 255, 263 (1980); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 623 (1981); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 105 S.Ct. 3108, 3116 (1985); MacDonald, Sommers & Frates v. County of Yolo, 106 S.Ct. 2561, 2568 (1986). However, the Supreme Court recently granted certiori to the case First English Evangelical Lutheran Church of Glendale v. City of Los Angeles, 106 S.Ct. 3292 (1986). That case involves the precise issue the Court previously refused to decide in the above cited cases.

3. *Corrigan*, 149 Ariz. at 543, 720 P.2d at 518.

property, and how the courts and scholars have responded to these. The Note will then discuss *Davis v. Pima County*,[4] the case which the *Corrigan* decision overruled. Lastly, the *Corrigan* decision and its likely effect on land use planning in Arizona will be presented.

THEORIES FOR MONEY DAMAGES

42 U.S.C. section 1983

Recently, some courts have interpreted the Civil Rights Act of 1871 to provide a cause of action, and possible money damages to property owners injured by an overrestrictive land regulation. The Act of 1871 is now codified at 42 U.S.C. § 1983.[5]

During recent years, section 1983 has experienced an evolution dramatically expanding its scope. Although expansion of liability under section 1983 has many facets, the 1972 United States Supreme Court decision of *Lynch v. Household Finance*[6] made section 1983 particularly helpful to property owners. In *Lynch*, the Court explicitly held that section 1983 was enacted to protect property rights as well as the civil rights which the courts had customarily associated with section 1983.[7] The *Lynch* decision partially created a method in which property owners could employ section 1983 to challenge land use regulations. At the time, however, the effectiveness of this newly developed weapon was limited by governmental immunity to section 1983 suits.[8]

Later, this immunity was abrogated by the Supreme Court's holding in *Monell v. Department of Social Services*.[9] In *Monell*, the Court held that a local government can be a "person" liable under section 1983 for the deprivation of rights secured by that provision.[10] Thus, it became possible for property owners to sue their local governments for an invalid application of

4. 121 Ariz. 343, 590 P.2d 459 (Ct. App. 1978), *cert. denied*, 442 U.S. 942 (1979).

5. 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

There are two primary elements to a claim under § 1983. First, the plaintiff must allege that a person has deprived him of a federal constitutional or statutory right; and second, that the person who has deprived him of that right was acting under the color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Additionally, if the plaintiff is seeking monetary damages, he must allege that the deprivation resulted in an actual injury. Carey v. Piphus, 435 U.S. 247, 266 (1978).

6. 405 U.S. 538 (1972).

7. *Id.* at 543-44. In *Lynch*, the plaintiff's savings account was garnished prior to any notice or service of process. The plaintiff alleged that the Connecticut statutes authorizing such garnishment were invalid under 42 U.S.C. § 1983. The Supreme Court agreed, per Justice Stewart, and held: "This Court has traced the origin of § 1983 and its jurisdictional counterpart to the Civil Rights Act of 1966.... That Act guaranteed 'broad and sweeping protection' to basic civil rights. Acquisition, enjoyment, and alienation of property were among those rights." (citations omitted) *Id.*

8. Monroe v. Pape, 365 U.S. 167 (1961).

9. 436 U.S. 658, 663 (1978).

10. *Id.* at 690-91. The Court, however, restricted the scope of a local government's liability under § 1983 by stating that responsibility under § 1983 is invoked only when a local government executes its official policies or customs. "A local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id.* at 694.

a land planning device. Indeed, this possibility became reality in *Lake Country Estates v. Tahoe Regional Planning Agency*[11] where the Court held that section 1983 could be used to challenge land use regulations.[12]

Despite the fact that local governments may be liable under section 1983 for depriving a plaintiff of his property rights, monetary damages as compensation for the deprivation are not always assured. Section 1983 allows injunctive and declaratory relief as well as damages to be awarded; however, the court only needs to award that remedy it deems most appropriate.[13] For purposes of this Note, it is assumed that a plaintiff-property owner has alleged and proven a claim under section 1983. Thus, the issue arises: how have courts responded to a plea for money damages based on a properly pled section 1983 claim?

The leading case is *Hernandez v. City of Lafayette*[14]. In *Hernandez*, the plaintiff petitioned the city several times to rezone his property.[15] The city, however, refused for two and one-half years to grant the rezoning because of pending plans by the city to build a parkway which would bisect the plaintiff's land.[16] The city foresaw that if it granted the rezoning request, a higher price would have to be paid during condemnation proceedings.[17] Recognizing this scheme, the plaintiff brought a suit for damages against the city under 42 U.S.C. § 1983. He claimed that the city, by refusing to make a final decision on rezoning his land, held the value of his land to a minimum to facilitate its appropriation for the planned parkway.[18] The Fifth Circuit agreed that such an act by the city constituted a taking,[19] and the appropriate remedy for such a taking under section 1983 was money damages.[20]

Later that year the Fifth Circuit again held that money damages is an appropriate remedy under section 1983 for a regulatory taking. In *Wheeler v. City of Pleasant Grove*,[21] the plaintiff property owner brought suit under

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11. 440 U.S. 391 (1979).

12. *Id.* at 399-400. California and Nevada created the Tahoe Regional Planning Agency to adopt and enforce a regional land use plan for the Lake Tahoe Basin Resort Area. Property owners in the Basin area challenged the land use plan as a violation of § 1983. The Supreme Court agreed and held that the property owners did state a claim under § 1983. *Id. See also* Martino v. Santa Clara Valley Water District, 703 F.2d 1141, 1148 (9th Cir. 1983) (following the holding in *Lake Country Estates*).

13. 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, § 46.06[2][f][ii] (4th ed. 1986). *See also* 7 P. ROHAN, ZONING AND LAND USE CONTROLS, § 52A.04[4][b] (1986). ("Although monetary damages as well as injunctive relief are permitted under Section 1983, there is no *right* to damages as a remedy. The most appropriate remedy is based on the merits of the case.")

14. 643 F.2d 1188 (5th Cir. 1981), *reh'g denied*, 649 F.2d 336 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

15. *Id.* at 1190-91.

16. *Id.* at 1191.

17. *Id.* at 1190. Indeed, one councilman was recorded as saying: "[I]f we change zoning to another classification we are going to have to pay more money when we create a right-of-way." *Id.*

18. *Id.* at 1191.

19. *Id.* at 1197.

20. *Id.* at 1200.

> [A]n action for damages will lie under, § 1983 in favor of any person whose property is taken for public use without just compensation by a municipality through a zoning regulation that denies the owner any economically viable use thereof. The measure of damages in such a case will be an amount equal to just compensation for the value of the property during the period of the taking.

Id.

21. 664 F.2d 99 (5th Cir. 1981). The plaintiff was issued a building permit upon which he

section 1983 claiming that the revocation of his building permit was a confiscatory taking for which he was entitled to damages.[22] The Fifth Circuit affirmed the lower court's decision that the city's revocation constituted a taking.[23] Additionally, the court determined that the city was liable for money damages.[24]

A more recent case granting damages for a taking under section 1983 was *Sheerr v. Township of Evesham*.[25] In *Sheerr*, the defendant city had zoned the plaintiff's property restricting it to uses only which promoted environmental protection.[26] The plaintiff claimed that these restrictions constituted a taking of her property for which she was entitled to damages under section 1983.[27] The New Jersey court agreed, and held that the city's restrictions constituted a taking under section 1983 entitling the plaintiff to damages as relief.[28]

Although the cases discussed above granted the plaintiff-property owner money damages under section 1983, there have been some section 1983 cases denying the damages remedy. One of the leading cases to deny money damages to a property owner under section 1983 is *Jacobsen v. Tahoe Regional Planning Agency*.[29] In *Jacobsen* the petitioner claimed that regulations imposed on his land by the Tahoe Regional Planning Agency[30] violated his property rights under section 1983 and sued for damages.[31] The court, however, refused to grant money damages under section 1983, and held that declaratory and injunctive relief were adequate.[32]

Money damages were similarly denied in *Urbanizadora Versalles, Inc. v. Rivera Rios*[33] where property owners alleged that the government of Puerto Rico had essentially "frozen" their land for fourteen years.[34] The plaintiffs-

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relied to begin constructing an apartment complex. This construction, however, was met with overwhelming opposition by neighbors in the area. In response to the outcry, the city revoked the plaintiff's permit. *Id.* at 100.

22. *Id.*

23. *Id.*

24. *Id.* at 101.

25. 184 N.J. Super. 11, 445 A.2d 46 (1982).

26. *Id.* at 18, 445 A.2d at 49.

27. *Id.* at 19, 445 A.2d at 50.

28. *Id.* at 59, 445 A.2d at 71. "In the present case Evesham's regulations accomplished a taking under the Fifth Amendment. They therefore satisfy damage criteria applicable to civil rights actions, entitling plaintiffs to relief on the basis of their alternative theory [§ 1983]." *Id.*

29. 474 F. Supp. 901 (D. Nev. 1979), *aff'd.*, 661 F.2d 940 (9th Cir. 1981). This case arose from a remand and second amended complaint from a sole defendant which had been part of *Lake Country Estates. See supra* notes 11-12 and accompanying text.

30. *See supra* note 12.

31. *Jacobsen*, 474 F. Supp. at 902.

32. *Id.* at 903. "[I]n a variety of situations the remedy of damages should be denied and that a ruling by the Supreme Court that federal jurisdiction of a claim for relief lies under 42 U.S.C. § 1983 . . . does not imply that damages is an appropriate remedy. Injunctive and declaratory relief are adequate." *Id.*

33. 701 F.2d 993 (1st Cir. 1983).

34. *Id.* at 994-95. The Puerto Rico Department of Public Works had drawn up an official map which designated the plaintiff's land as the site for a proposed highway. This designation did not result in a condemnation of the plaintiff's land; however, it did put the plaintiff on notice that any improvement constructed by him on his land would not be compensated for once the government did decide to condemn. This designation continued fourteen years until 1981. In 1981 the plaintiff claimed that despite repeated requests to the government over the last fourteen years, the government had still not decided whether to formally condemn the plaintiff's property. *Id.*

property owners sued the government and claimed they were entitled to damages for the taking under section 1983.[35] The First Circuit agreed that such a "freezing" of the property was a taking, and granted injunctive relief.[36] The court failed, however, to grant or even address the issue of money damages.

Exactly what entitles an injured plaintiff-property owner to money damages under section 1983 is not clear. As discussed above, cases have gone both ways on similar fact situations. A detailed reading of the cases, however, reveals that a section 1983 claim is oftentimes used as an alternate theory to inverse condemnation or temporary taking claims.[37] Therefore, if a court determines whether money damages are available in an inverse condemnation or temporary taking claim, a similar decision will be implied for whether to allow money damages under section 1983.

Inverse Condemnation and Temporary Taking

Federal and state constitutions require that private property not be taken for public purposes without the government first paying just compensation.[38] Typically, this requires a government entity to initiate condemnation proceedings before it exercises its power of eminent domain.[39] Governmental entities occasionally take private property without first initiating these proceedings. In response to this improper taking, private property owners have brought suits in inverse condemnation. Commonly such suits are brought to redress an overrestrictive government regulation of private property which results in a taking without just compensation.[40]

Once the property owner proves a taking of his property has occurred, the question again arises as to what the appropriate remedy is. Strictly speaking, the theoretically proper remedy for a successful inverse condemnation action is for the government to gain title to the land, and in return provide full payment to the property owner.[41] However, courts have rarely used this remedy.[42] Traditionally, courts have simply invalidated the zoning restriction.[43] But neither of these remedies is adequate when one considers a

35. *Id.*

36. *Id.* at 999.

37. Indeed, successful § 1983 land regulation suits for money damages are becoming less and less common, and even fewer are successful.

38. The Fifth Amendment to the United States Constitution states, in pertinent part: "private property [will not] be taken for public use without just compensation." Similarly, the Arizona Constitution states that "[n]o private property shall be taken or damaged for public or private use without just compensation having first been made. . . ." ARIZ. CONST., art. II, § 17.

39. A. RATHKOPF, *supra* note 13, at § 46.03.

40. *Id.*

41. *Id.* at 46-23.

42. *Id.* at 46-22. This remedy would require the government to pay the full price for a piece of property it probably does not want, and the owner is probably unwilling to release.

43. HFH Ltd. v. Superior Court of Los Angeles County, 15 Cal.3d 508, 519, 542 P.2d 237, 245, 125 Cal. Rptr. 365, 373 (1975), *cert. denied*, 425 U.S. 904 (1976). "[B]oth constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state." *See also* Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 157 Cal.Rptr. 372 *aff'd on other grounds*, 447 U.S. 25, 255 (1980); Davis v. Pima County, 121 Ariz. 343, 590 P.2d 459 (Ct. App. 1978).

taking which was the result of a *temporarily* overrestrictive regulation.[44] Consequently, the theory of damages for temporary takings emerged.

The theory of providing damages for temporary takings was first proposed by Donald Hagman and Dean Miczynski.[45] They advocated a remedy whereby once a court determined that a taking had occurred, the court would require the governmental entity to pay damages for the period in which the overrestrictive regulation was in force.[46] This theory was first adopted by the judiciary in Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[47]

In *San Diego Gas & Electric Co.* the Supreme Court held that the case had not been appealed from a final judgment.[48] Therefore, the Court refused to render a decision on the issue of whether monetary damages was an appropriate remedy for a regulatory taking.[49]

Nevertheless, Justice Brennan, in his dissent, seized upon the issue and supported a money damages remedy for a temporary taking. He proposed a rule that would require a government entity to pay just compensation to a landowner whose land had been unconstitutionally taken through an overrestrictive zoning ordinance. However, the government entity would only have to pay compensation for the interim period beginning from when the regulation first effected a taking, to the date when the restriction was amended or rescinded.[50]

Three Justices formally concurred in Justice Brennan's dissent.[51] Additionally, Justice Rehnquist, in his concurring opinion, stated that if he were satisfied that the case had come from a final judgment or decree, he would have "little difficulty" in agreeing with what was said in Justice Brennan's dissent.[52]

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44. Consider the case where a municipal zoning ordinance effectively restricts the use of a piece of property for five years. At the end of the fifth year the ordinance is challenged and declared confiscatory. Simple repeal of the ordinance will not adequately compensate the property owner who has been effectively without the use of his property for five years. Yet, it would be similarly unfair to require the municipality to pay for the entire property when it only "took" it for five years.

45. D. HAGMAN & D. MICZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978).

46. *Id.* at 296.

47. 450 U.S. 621, 636-661 (1981) (Brennan, J., dissenting). The petitioner purchased a 412 acre parcel of land northwest of San Diego as a potential site for a nuclear power plant. At the time of purchase the existing zoning provided for industrial uses, compatible for such a power plant; however, the City of San Diego rezoned a portion of the petitioner's acreage to open space uses only. This new zoning classification required a number of new approvals and clearances the petitioner would need to secure before he could utilize the land as intended. *Id.* at 623-25.

48. *Id.* at 633.

49. *Id.*

50. *Id.* at 658-59.

> The constitutional rule I propose requires that, once a court finds that 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. . . . Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a "taking".

Id.

51. *Id.* at 636. Justices Marshall, Stewart and Powell concurred in Justice Brennan's dissent.

52. *Id.* at 633-34. "If I were satisfied that this appeal was from a 'final judgment or decree' . . .

Since five of the nine Supreme Court justices went on record as supporting money damages for a temporary taking, many commentators and courts have reacted with fervor—both positively and negatively.

A plethora of articles have been written concerning Brennan's dissent in *San Diego Gas & Electric Co.* and temporary taking damages. Some commentators have opposed the theory by stating that although a monetary damages remedy has intuitive appeal, relief by injunction alone is equally effective.[53] Others in opposition have proclaimed that a damages remedy for temporary takings would cause a highly suspect shift in power from local governments to landowners and developers.[54] Those same opponents also claim that such a remedy would place an unmanageable burden on local governments already in financial distress.[55]

However, a majority of commentators have supported a temporary taking theory. A leading authority in zoning and planning law, Arden H. Rathkopf, has written that while mere invalidation does not adequately compensate landowners, the traditional inverse condemnation remedy is fraught with problems. The temporary damages remedy may overcome these problems and encourage a more conscientious application of land use controls.[56] Another supporter of the temporary damages remedy states that simple invalidation of an overrestrictive regulation "is akin to saying the only remedy available to an assault victim is a judicial declaration that the assailant ought to cease his unlawful ways."[57] Still another states that temporary damages "at least assure[s] some meaningful remedy for many otherwise uncompensated constitutional injuries."[58] The remedy has also been described as an adequate balance between public and private interests;[59] an

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I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." *Id.*

53. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 515 (1981).

54. Williams, Smith, Siemon, Mandelker and Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 244 (1984). For an interesting response to that article, see Berger & Kanner, *Thoughts on "The White River Junction Manifesto": A Reply to the Gang of Five's Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685 (1986).

55. Williams, Smith, Siemon, Mandelker and Babcock, *supra* note 54, at 207.

56. A. RATHKOPF, *supra* note 13, at § 46.04.

> Mere invalidation of the regulation, the traditional remedy for unduly harsh restrictions, according to this view, does not adequately compensate landowners for an economic loss suffered as a result of so-called "regulatory takings." The inverse condemnation remedy, while providing compensation, is fraught with conceptual and practical problems. These can largely be overcome, though, by a temporary damages remedy. . . . The existence of some damages liability may serve to encourage more conscientious application of land use controls.

Id. See also Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517, 543-44 (1981) (A temporary damages remedy would assure compensation for most losses suffered by landowners, but would have a less "chilling" effect on local governments than inverse condemnation.).

57. Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Restrictions*, 29 U.C.L.A. L. REV. 711, 735-36 (1982).

58. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 193 (1984).

59. Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 ARK. L. REV. 612, 645 (1983).

> This approach [providing damages for temporary takings] adequately balances public interest against private interests by requiring compensation for regulatory takings while lim-

insurance to landowners against the adverse effect of governmental regulation;[60] and what Mr. Justice Holmes would have done[61] following his decision in *Pennsylvania Coal Co. v. Mahon*[62].

In summary, a majority of commentators have supported a damages remedy for temporary takings. The acceptance by the courts, however, has not been as pervasive.

Three federal circuit courts have accepted money damages as an appropriate remedy for a temporary taking. The Fifth Circuit, in *Hernandez v. City of Lafayette*[63] held that even though the case was brought under section 1983, Justice Brennan's reasoning in *San Diego Gas & Electric Co.*[64] applied with equal force.[65] Later, in *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*,[66] the Sixth Circuit reasoned that with Justice Rehnquist's approval of Justice Brennan's dissent in *San Diego Gas & Electric Co.*,[67] the temporary taking damages was espoused by a majority of the members of the Court.[68] Therefore, the Sixth Circuit held that it also agreed with Justice Brennan's reasoning "that compensation must be paid for a temporary taking."[69]

Recently, the Eighth Circuit followed the "constructive majority" of *San Diego Gas & Electric Co.*,[70] with its holding in *Nemmers v. City of Dubuque (Nemmers I).*[71] In *Nemmers I*, the court first recognized that the Fifth

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iting that compensation to actual losses for temporary takings. Such a balance between public and private interests will not be achieved by the extreme approach of denying all compensation for regulatory takings and limiting landowners to injunctive and declaratory relief.

Id.

60. Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 571 (1984).

61. Roberts, *Mining with Mr. Justice Holmes*, 39 VAND. L. REV. 287, 304 (1986). "I believe that Mr. Justice Holmes really did believe that there was a moral lesson inherent in his decision in Pennsylvania Coal Co. v. Mahon. If necessary, I cannot help but believe that he would inflict casualties in order to drive home that lesson." *Id.*

62. 260 U.S. 393. In this landmark case, Justice Holmes set forth a rule to test whether an overrestrictive government regulation amounted to a taking. "The general rule, at least, is that while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.* at 415.

63. *See supra* notes 14-20 and accompanying text.

64. *See supra* notes 48-52 and accompanying text.

65. Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir. 1981). For an interesting discussion of the case from the viewpoint of counsel for the City of Lafayette, see R. BABCOCK, THE ZONING GAME REVISITED, ch. 10 (1985).

66. 729 F.2d 402 (6th Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 3108 (1985). On appeal, the Supreme Court, in an opinion by Justice Blackmun, held that the question of money damages "must be left for another day" since the respondent's claim was premature. *Id.* at 3116. The Court's holding in this case is the subject of an excellent discussion in G. BAUMAN, 1986 ZONING AND PLANNING LAW HANDBOOK, at 83.

67. *See supra* note 52.

68. *Hamilton Bank*, 729 F.2d at 408.

69. *Id.* at 409. In *Hamilton Bank*, the developer had received preliminary and final plat approvals for his cluster residential development, in compliance with the city's 1973 applicable ordinance. However, in 1979, after the developer had spent between three to five million dollars on the development, the city changed its policy and required the developer to meet the new 1979 zoning regulations. Under these new regulations the developer's plat application was disapproved. *Id.* at 403-04. Had the developer readjusted his plat to meet the city's' newly imposed regulations, he would have incurred a one million dollar loss. G. BAUMAN, *supra* note 66, at 87.

70. *See supra* notes 48-52 and accompanying text.

71. 764 F.2d 502 (8th Cir. 1985). In *Nemmers I* the appellant purchased 135 acres. Fifty-five

Amendment to the Federal Constitution requires that private property shall not "be taken for public use without just compensation."[72] Then the court assented to the holding in *San Diego Gas & Electric Co.* and held that "for a temporary taking, the government is responsible for compensating the owner for the interim period during which the taking is effected."[73]

The temporary taking theory proposed by Justice Brennan has been the basis for three federal circuit courts to grant money damages for unconstitutional temporary takings. The acceptance of this theory, however, has not been limited to the federal courts. State courts, in growing numbers, have also accepted the damages for temporary taking concept.

State courts have granted aggrieved property owners money damages for the time their land was temporarily taken by the government. The Texas Supreme Court, in *City of Austin v. Teague*,[74] preceded Brennan's dissent in *San Diego Gas & Electric Co.*, and held that a developer's temporary loss of use of his land is compensable in money damages.[75]

Later, the New Hampshire Supreme Court, in *Burrows v. City of Keene*,[76] cited at length the Brennan dissent in *San Diego Gas & Electric Co.*. The court also held that the city was liable for damages during the interim period in which it had taken the plaintiff's property.[77] Similarly, a New Jersey court in *Sheerr v. Evesham T.P.*,[78] followed what it believed to be a majority view in *San Diego Gas & Electric Co.* It held that a landowner whose property had been "taken" by an overly restrictive zoning ordinance was entitled to money damages from the time of the enactment of the ordinance to the time the town chose to repeal it.[79]

Other states have also adopted a damages for temporary taking rule. In *Rippley v. City of Lincoln*[80] the North Dakota Supreme Court awarded damages to the plaintiff-landowner during the time the overly restrictive ordi-

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of those acres were annexed by the appellee. Pending final annexation, the appellant invested in a light industrial park for the property. However, upon annexation, the appellee-city zoned the property for agricultural use only, contrary to the appellant's expectation. The Eighth Circuit had earlier held that a taking had occurred. *Nemmers I*, 716 F.2d 1194, 1197-99. This second appeal was to determine the issue of whether the appellant could recover money damages. *Nemmers II*, 764 F.2d at 503-04.

72. *Nemmers II*, 764 F.2d at 504.

73. *Id.*

74. 570 S.W.2d 389 (1978). In City of Austin v. Teague, a developer sought a permit to rechannel two small tributaries which ran across his land. Although the developer complied with the city's requirements for such a permit, the city refused to issue it in response to public outcry. Consequently, the developer sued the city for money damages for loss of use of his property from June 26, 1975 (when his permit was improperly denied) to November 1, 1976 (the date the city issued a permit in response to a court order). *Id.* at 390.

75. *Id.* at 394.

76. 121 N.H. 590, 432 A.2d 15 (1981). The City of Keene incorporated part of the plaintiffs' land into a conservation zone. The plaintiffs claimed that this new restriction on their property essentially deprived them of all reasonable use of their property; thus, they brought an action to recover money damages against the city. *Id.* at 595, 432 A.2d at 17.

77. *Id.* at 599, 432 A.2d at 20.

78. *See supra* notes 25-28.

79. *Sheerr*, 184 N.J. Super. at 63-4, 445 A.2d at 74.

80. 330 N.W.2d 505 (N.D. 1983). The City of Lincoln zoned 20 acres of the plaintiff's land for "public use." The purpose of this zoning was to "hold" the property until the city could later build a school, fire station, and city hall on the land. However, the city never initiated condemnation proceedings. Thus, the plaintiff brought this action for damages against the city. *Id.* at 506.

nance was in effect and "took" his land. However, the court limited this temporary taking remedy to cases where the taking was reversible, and not permanent.[81] Also, in *Zinn v. State of Wisconsin*,[82] Wisconsin's Supreme Court granted the plaintiff monetary compensation for the period during which she was deprived of all or substantially all beneficial use of her property by means contrary to the Federal and Wisconsin Constitutions.[83] And the Oregon Supreme Court decided in *Suess Builders v. City of Beaverton*[84] that "governmental conduct which takes property for a public use constitutionally implies the obligation to pay for such a taking, somewhat analogous to an obligation to pay for unjust enrichment."[85]

From the foregoing cases one can surmise that it is often difficult to determine when money damages for a taking will be awarded. At least one commentator has suggested that the decision oftentimes turns on governmental motives. If the motivation is merely regulatory, then no money damages remedy will be made; but, if the government has an acquisitory motive to gain private property for a public benefit, compensation will lie.[86] Nevertheless, the Supreme Court of Arizona ended this guessing game for Arizona property owners and land planners when it took a bold stand and decided the controversial money damages issue. The next section of this Note will examine that decision and its implications.

CORRIGAN V. CITY OF SCOTTSDALE[87]

Joyce M. Corrigan is the owner of 5,738 acres of undeveloped land in and around the area of the McDowell Mountains.[88] In 1963, while the property[89] belonged to Corrigans' predecessors in title,[90] the City of Scottsdale annexed the land.[91] Consequent to the annexation, Scottsdale zoned the land R-1-35.[92] Later in 1977, after Ms. Corrigan purchased the property, the City of Scottsdale enacted a new zoning ordinance which affected Ms. Corrigan's 4800 acre parcel. The ordinance[93] was essentially divided into two parts, a hillside conservation area, and a hillside development

81. *Id.* at 510-11.

82. 112 Wis.2d 417, 334 N.W.2d 67 (1983). The plaintiff owned all the land surrounding Lake McConville. Pursuant to a request from the plaintiff's neighbor, the state reevaluated and raised the "ordinary high water mark" of the lake. This new figure included 200 acres of the plaintiff's property and thus required her to deed these acres to the state. In response, the plaintiff sued the state for loss of use of her property and riparian rights. *Id.* at 420-22, 334 N.W.2d at 69-70.

83. *Id.* at 426-29, 334 N.W.2d at 72-73.

84. 294 Or. 254, 656 P.2d 306 (1982). The plaintiffs claimed the City had temporarily taken their property by designating their land as the site for a future park. *Id.* at 256, 656 P.2d at 607-08.

85. *Id.* at 268, 656 P.2d at 315.

86. *See generally* D. HAGMAN & D. MICZYNSKI, *supra* note 45, ch. 10-11.

87. 149 Ariz. 538, 720 P.2d 513 (1986).

88. *Id.* at 539, 720 P.2d at 514.

89. "Ms. Corrigan's property is divided into three parcels, a large 4800 acre parcel, a 608 acre parcel which adjoins the large parcel at its northwest corner, and a 330 acre parcel which adjoins the large parcel at its southwest corner." *Id.*

90. Ms. Corrigan's property had previously been part of the D.C. Ranch, which was owned by Ms. Corrigan's father and E.E. Brown. *Id.*

91. *Id.*

92. *Id.* An R-1-35 zoning classification allows only one single family residence dwelling unit per every lot of at least 35,000 square feet.

93. Scottsdale Ordinance 455, § 6.800-6.807.

area.[94] These two areas were divided by a "no development line."[95] Above the no development line—the conservation area—no development was allowed.[96] Instead, land in the conservation area was to be used solely for the conservation of open space.[97] Below the no development line—the development area—land could be developed subject to limitations which took into account the city's desire to preserve the land in its natural state.[98]

Seventy-four to eighty percent of Ms. Corrigan's 4800 acre parcel lay above the no development line, or conservation area.[99] Consequently, Ms. Corrigan was prohibited from developing any of this land. In response to this restriction, Ms. Corrigan filed suit against the City of Scottsdale to have the ordinance declared unconstitutional, and to claim money damages for the temporary taking of her property.[100]

The trial court held that no taking had occurred, and dismissed Ms. Corrigan's claim for damages.[101] On appeal, the Arizona Court of Appeals reversed and held that the ordinance resulted in an unconstitutional taking of Ms. Corrigan's property.[102] But the court of appeals upheld the trial court's dismissal of the damages claim.[103] The Supreme Court of Arizona then granted Ms. Corrigan's petition for review.[104] However, the court limited its review of the court of appeals decision to one issue: to determine whether money damages is an appropriate remedy for a temporary unconstitutional taking of a person's real property.[105]

Legal Background of Corrigan

The issue of whether money damages is an appropriate remedy for an unconstitutional taking is not one of first impression in Arizona. Earlier, an Arizona court had decided that exact issue in *Davis v. Pima County*.[106]

In *Davis* the appellant-landowner petitioned the Pima County Board of Supervisors to rezone his property to allow him to build single family residences and mobile home pads.[107] The Board of Supervisors refused.[108] The landowner then sought building permits under the existing zoning regula-

94. *Corrigan*, 149 Ariz. at 539, 720 P.2d at 514.

95. *Id.*

> This line is located wherever one of the following conditions is first encountered: unstable slopes subject to rolling rocks or landslides; bedrock areas; slopes of fifteen percent or more; or shallow, rocky mountain soils subject to severe erosion. This line, under certain conditions, may be adjusted to where two of the enumerated conditions are present.

Id.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* As stated *supra* note 95, certain adjustments could be made to the no-development line. Therefore, depending on the adjustments made to the line, seventy-four to eighty percent of Ms. Corrigan's 4800 acre parcel was restricted as a conservation area. *Id.*

100. *Id.*

101. *Id.*

102. Corrigan v. City of Scottsdale, 149 Ariz. 553, 565, 720 P.2d 528, 540 (Ct. App. 1985).

103. *Id.* at n.14.

104. *Corrigan*, 149 Ariz. at 538-39, 720 P.2d at 513-14.

105. *Id.*

106. 121 Ariz. 343, 590 P.2d 459 (Ct. App. 1978).

107. *Id.* at 344, 590 P.2d at 460.

108. *Id.*

tions. The permits were also denied until the Board of Supervisors agreed to change the zoning.[109] The landowner filed suit against Pima County claiming that the county's refusal to change the zoning of his land resulted in an unconstitutional taking of his property.[110] Therefore, the landowner claimed he was entitled to an invalidation of the existing ordinance, and the money damages incurred as a result of the refusal to rezone.[111]

The court of appeals affirmed the trial court's decision that the county's denial to rezone constituted an illegal taking.[112] Then, the court defined the appropriate remedy for a landowner whose property has been unconstitutionally taken. The court stated very explicitly that invalidation, not money damages, is the proper remedy when a board of supervisors acts wrongfully in its legislative capacity.[113] The *Davis* decision clarified that invalidation, not money damages, was the appropriate remedy for a landowner whose property had been unconstitutionally taken through an overly restrictive zoning ordinance. Indeed the court of appeals in *Corrigan* specifically heeded the ruling in *Davis* when it denied Ms. Corrigan money damages.[114]

The issue has not been equally as clear in this country's highest court, though. Indeed the United States Supreme Court's unwillingness to decide this issue may be one of the reasons the Arizona Supreme Court reevaluated its earlier decision in *Davis*. In 1980 the United States Supreme Court heard the case, *Agins v. City of Tiburon*,[115] in which the Court held that a specific ordinance, enacted to preserve open space, did not constitute a taking. Thus, the Court never reached the money damages issue.[116] Later, in *San Diego Gas & Electric Co.*[117] the issue of money damages was again before the Court, but as stated earlier, the issue was left undecided for lack of a final judgment from the lower court.[118] The issue was again presented to the Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[119] and again the Court refused to decide; the claim was premature.[120] Most recently, the Supreme Court sidestepped the issue in *MacDonald, Sommers & Frates v. County of Yolo* because it held that there was not a final decision that a taking had occurred.[121]

The Corrigan *Decision*

Despite the United States Supreme Court's repeated refusals to decide

109. *Id.* Evidently, the landowner felt that certain building permits under the existing zoning would allow him to build what he intended. *Id.*
110. *Id.*
111. *Id.* at 344-45, 590 P.2d at 460-61. The landowner claimed that the delay in securing the right to build on the property cost him $67,035 in loss of value during the delay period, and $95,180 for the loss of an "aid-in-construction" agreement. *Id.*
112. *Id.* at 345, 590 P.2d at 461.
113. *Id.*
114. Corrigan v. City of Scottsdale, 149 Ariz. at 565 n.14, 720 P.2d at 540 n.14.
115. 447 U.S. 255 (1980).
116. *Id.* at 263.
117. 450 U.S. 621, 623 (1981).
118. *Id.* at 633.
119. 105 S. Ct. 3108, 3116 (1985).
120. *Id.*
121. 106 S.Ct. 2561, 2568 (1986).

the issue, the Arizona Supreme Court reevaluated *Davis* and redecided the money damages issue for Arizona. In *Corrigan*, the court ultimately held that invalidation is not the only remedy available to an injured property owner; instead, the plaintiff is entitled to money damages from the time the regulation was challenged.[122]

This holding was based on several rationales. First, the court limited its decision to takings which were temporary and reversible.[123] Second, the court grounded its decision on article II, section 17 of the Arizona Constitution.[124] Article II states that private property shall not be taken or damaged without full compensation first being paid in money.[125] The court concluded that this provision applied to all takings, both temporary and permanent, mandating money damages.[126]

Third, the court followed the "simple logic" of Justice Brennan's dissent in *San Diego Gas & Electric Co.*. The court agreed with Justice Brennan that invalidation alone is not an adequate remedy for the economic loss suffered during the period of the taking.[127] Fourth, the court concurred with Justice Brennan in holding that if a regulation constitutes a taking, the public should bear the cost of the benefits during the period the restriction is enforced.[128] Therefore, if an injured property owner is granted money damages for the interim period his property was unconstitutionally taken, the property owner is placed where he would have been economically had the taking not occurred.[129]

Finally, the court dealt with three commonly expressed reasons for denying money damages. The first of these objections is that by granting money for a regulatory taking of property, a court "usurps a legislative function."[130] Because zoning applies the police power, it is often deemed a legislative function.[131] Therefore, it is argued that by allowing courts to grant money damages, the legislative body is denied the opportunity to decide if

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122. *Corrigan*, 149 Ariz. at 543, 720 P.2d at 518.

123. *Id.* at 540-41, 720 P.2d at 515-16. The court correctly recognized that a zoning body should not have its ordinance invalidated, and then additionally have to pay the full condemnation value of the property when the taking was only temporary. Such a result is only available under a permanent taking through inverse condemnation. *See San Diego Gas & Elec. Co.*, 450 U.S. at 658. (Brennan, J., dissenting).

124. *Corrigan*, 149 Ariz. at 540, 720 P.2d at 515. By basing its decision on the Arizona Constitution, the court was able to protect its holding from an inevitable United States Supreme Court decision on the same issue. Such a practice by state courts is common. *See, e.g., Burrows, supra* notes 76-77; Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

125. Article 2 of the Arizona Constitution states in pertinent part:

> No private property shall be taken or damaged for public or private use without just compensation having first been made . . . [and] until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury . . . .

ARIZ. CONST., art. 2, § 17.

126. *Corrigan*, 149 Ariz. at 541, 720 P.2d at 516.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Corrigan*, 149 Ariz. at 542, 720 P.2d at 517.

131. *Davis*, 121 Ariz. at 345, 590 P.2d at 461.

the regulation is appropriate when money damages might be paid.[132] In responding that such an argument is incorrect,[133] the court held that despite the fact that damages may be awarded for an unconstitutional temporary taking, no legislative function is usurped.[134] The zoning body can still weigh the value of the regulation, and its policy options for the future. Thus, no alternatives are closed to the regulator.[135] The court's holding merely forces cities and counties to consider the possible damages they must pay if their decision results in a temporary taking.

A second commonly asserted objection to awarding money damages is that "it threatens substantial fiscal liability on local governments."[136] To this protest the court retorted that a local government will only be liable if "it irresponsibly impose[s] staggering losses onto a private citizen by its land [use] regulation."[137]

A third objection to the money damages remedy is that "it would inhibit governmental land planning."[138] The court responded to this by stating that its decision does not inhibit, but rather advocates, responsible governmental planning.[139] In this respect, the court observed that the mere invalidation of an unconstitutional ordinance does not provide as an effective deterrent against acquisitorial government planning as the money damages remedy.[140]

Based on these premises and rationales, the *Corrigan* court held that invalidation is not the sole remedy; instead, a landowner whose property has been temporarily taken through an unconstitutional zoning ordinance may also receive money damages.[141] But, once the court determined that money damages were awardable, the next step was to determine what the measure of damages should be.[142] The court listed five possible alternative rules to measure money damages: rental return, option price, interest on lost profit,

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132. *Corrigan*, 149 Ariz. at 542, 720 P.2d at 517.

133. *Id.*

134. *Id.*

135. *Id.* "The legislative body may pay to acquire the land outright, agree to pay the landowner a certain amount in order to continue the regulation, or simply abandon the regulation altogether." *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. The court, in footnote 2, cited an amusing example to illustrate the impotence of mere invalidation. It stated:

> At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice: *If all else fails, merely amend the regulation and start over again* (emphasis in original). If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra "goodies" contained in the recent [California] Supreme Court case of Selby v. City of San Buenaventura, 10 Cal.3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.
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> * * * *
>
> See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. "Good luck". *Id.*

141. *Corrigan*, 149 Ariz. at 543, 720 P.2d at 518.

142. *Id.* This Note, like the holding in *Corrigan*, will not explore the measure of money damages for an unconstitutional taking in any detail. However, for an excellent examination of the possible

before-after valuation, and benefit to government.[143] However, because the court held that every factual situation presents its own peculiar circumstances, the court did not decide which approach was best;[144] rather, "the proper measure of damages in a particular case is an issue to be decided on the facts of each individual case."[145]

Despite the court's decision not to rule on the proper measure of damages, the court did emphasize that a limitation was to be placed on any damages recovered. The court made it very clear that property owners could only recover actual damages which are proven to a reasonable certainty.[146] The court reasoned that such a limitation would allow compensation for losses actually suffered, while at the same time help to avoid windfalls to plaintiffs at the expense of government liability.[147]

Consequent to its principles concerning the proper measure of damages, the court refused to decide which measure was proper for the facts presented in *Corrigan*.[148] Thus, the case was remanded to the trial court to determine the proper measure of damages in accordance with the court's decision.[149]

APPLICATION OF *Corrigan*

The Arizona Supreme Court's opinion in *Corrigan* will have a profound impact on land planning in Arizona, and perhaps the country. As stated earlier in this Note, the issue presented in *Corrigan* is one which the United States Supreme Court has failed to decide on numerous occasions. By deciding to allow money damages for unconstitutional temporary takings, the Arizona court has thrown its weight into the momentum of the movement to make Justice Brennan's reasoning in his *San Diego Gas & Electric Co.* dissent a majority philosophy of the Court.

The decision's effect in Arizona, however, will be even more recognizable. As the court stated in its opinion, "[g]overnmental entities should be as mindful of a person's constitutional rights as anyone else."[150] From now on, with the potential loss to local government coffers, land planners and city and county administrators will pay very close attention to the zoning and other land use restrictions they place on private property. No longer can zoning boards, city councils and county boards "try, try again" until they succeed, ignoring constitutional rights as they proceed. With the threat of

measures for money damages, see Hagman, *Temporary or Interim Damage Awards in Land Use Control Cases*, 1982 ZONING AND PLANNING LAW HANDBOOK.

143. *Id.*

144. *Id.* The court stated that each taking case has its own special facts and problems to deal with in determining the proper measure of damages. These problems may include: whether the losses were speculative; when the actual taking occurred; whether it caused any damages and whether it was an acquisitory or nonacquisitory setting. *Id.*

145. *Id.*

146. *Corrigan*, 149 Ariz. at 544, 720 P.2d at 519. The court based this limitation on the United States Supreme Court decision in Carey v. Piphus, 435 U.S. 247 (1978).

147. *See also City of Austin*, 570 S.W. 2d at 395, and Wright, *supra* note 59, at 637-39.

148. *Corrigan*, 149 Ariz. at 544, 720 P.2d at 519.

149. *Id.*

150. Indeed, a recent Arizona Court of Appeals decision applied the ruling in *Corrigan* to allow money damages. Ranch 57 v. City of Yuma, 1 CA-CIV 8150 (1986); and Ranch 57 v. County of Yuma, 1 CA-CIV 8631 (1986).

money loss, the municipalities and counties will now have to get it right the first time, or suffer the consequences. This threat to local governments will also signal to developers and other property owners that it is less likely they will have to spend needless time and money litigating a local government's overly restrictive regulation. A money damages remedy, has added teeth to the "toothless tiger"[151] which guards property owners against excessive governmental land use regulation.

CONCLUSION

In *Corrigan v. City of Scottsdale*,[152] the Arizona Supreme Court joined other state and federal courts in deciding an issue the United States Supreme Court has repeatedly failed to decide. By overruling its prior decision in *Davis v. Pima County*,[153] and holding that a property owner can obtain money damages for a temporarily overly restrictive zoning regulation, the court has signaled to planners and local governments that they must seriously consider the effects of their regulations before implementing them, or suffer the harsh consequences.

151. *Corrigan*, 149 Ariz. at 543, 720 P.2d at 518.
152. *See* Note, *supra* note 57, at 734.
153. *Corrigan*, 149 Ariz. at 543-44, 720 P.2d at 518-19.