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clude important exemptions, such as the Missouri homestead exemption,[63] the federal Social Security exemption, the federal limitations on wage garnishment,[64] and notice of specific procedures by which to claim an exemption.

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OPEN-SPACE ZONING AND THE TAKING CLAUSE: A TWO-PART TEST

Agins v. City of Tiburon[1]

The City of Tiburon, California rezoned the Agins' property to "RPD-1," a residential planned development and open-space zone, limiting uses to one-family dwellings, accessory buildings, and open-space uses. The new zoning restricted the density of construction, allowing the Agins to build up to five single-family dwellings on their five acre tract.[2] The Agins sued Tiburon seeking a declaratory judgment on the constitutionality of the zoning ordinace. They claimed that the city had "taken" their property in violation of the fifth and fourteenth amendments of the Constitution.[3] The Agins contended that rezoning the land "prevented . . . [its] development for residential" use and "completely destroyed the value of [appellants'] property for any purpose or use whatsoever."[4] The Califor-

63. RSMo §§ 513.475-.530 (1978).

64. Consumer Credit Protection Act, 15 U.S.C. § 1673 (1976 & Supp. III 1979). Other possible state exemptions to include are those for various retirement benefits (policemen under RSMo §§ 86.190, .353, .493, .563, .780 (1978); firemen under *id.* §§ 87.090, .365, .485; school teachers and employees under *id.* §§ 169.090, .380, .520, .587; other state employees under *id.* § 104.540.2); workmen's compensation benefits under *id.* § 287.260; unemployment compensation benefits under *id.* § 288.380(10); and the proceeds from some life insurance policies under *id.* § 376.560. Other possible federal exemptions to include are those for armed forces retirment benefits under 10 U.S.C. §§ 1440, 1450(i) (1976) and civil service retirement benefits under 5 U.S.C. § 8346 (Supp. III 1979).

1. 447 U.S. 255 (1980).

2. Agins' property was the highest priced suburban land in California and had been purchased by Agins to develop as an investment. *Id.* at 258.

3. "Taking" is the term used to describe the taking of property without just compensation in violation of U.S. CONST. amend. V, as applied to the states through the *id.* amend. XIV.

4. 447 U.S. at 258 (brackets in original).

nia Supreme Court declared that no taking resulted from the enactment of the zoning ordinances because the ordinance did allow limited development for residential uses.[5]

The United States Supreme Court affirmed the state court, holding that the zoning ordinances substantially advanced legitimate state interests and did not deny the owners economically viable use of their land. The Court further noted that the zoning ordinances benefitted the Agins' land, did not prevent the best use of the land, and did not extinguish a fundamental attribute of ownership; thus, the ordinances did not deny the "'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments."[6]

Agins marks the first time since *Village of Euclid v. Ambler Realty Co.*[7] that the Court has ruled on the facial constitutionality of a zoning ordinance.[8] In *Euclid,* the Court ruled that zoning ordinances were a valid exercise of the police power and were constitutional unless "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare."[9] *Agins* more sharply defined the *Euclid* test, changing it to "substantially advance legitimate state interests,"[10] and adding a second requirement that the ordinance not deny "an owner economically viable use of his land."[11]

Under the first part of the *Agins* test, the court asks whether a legitimate state interest is substantially advanced by the zoning regulation. In enunciating the test as "legitimate state interests," the Court replaced the specific terms of the *Euclid* test with a general term, but the practical difference may be slight because of the already broad interpretation given

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5. The California Supreme Court would not allow an inverse condemnation challenge of the zoning ordinances, but limited the landowners' remedy to mandamus and declaratory judgment. *Id.* at 259. The United States Supreme Court did not reach the issue of a state's ability to limit constitutional remedies. *Id.* at 263. The California limitation on remedies is rare, with only two states applying it. *See* Sproul Homes v. State Dep't of Highways, ____ Nev. ____, ____, 611 P.2d 620, 622 (1980); Eck v. City of Bismark, 283 N.W.2d 193, 200 (N.D. 1979).

6. 447 U.S. at 262-63.

7. 272 U.S. 365 (1926).

8. Since *Euclid*'s enunciation of the general test, most Supreme Court zoning decisions have focused on application of that test to a specific parcel of land. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Nectow v. City of Cambridge, 277 U.S. 183 (1928).

9. 272 U.S. at 395.

10. 447 U.S. at 260.

11. *Id.*

"general welfare" under the prior test.[12] In analyzing the legitimate governmental interest in the Tiburon zoning ordinance, the Court looked at the intent of the Tiburon city council and found the ordinance to be a valid protection "from the ill effects of urbanization."[13] This finding establishes that control of density is a legitimate state interest.[14]

The "substantial advancement" language of *Agins* and "substantial relation" language of *Euclid* are similar. It is not clear how this change of language will affect the Court's analysis in taking cases because the *Euclid* language itself was subject to diverse interpretation. In its early application of *Euclid*, the Court invalidated zoning ordinances when it found no substantial relation between the zoning of certain land and the promotion of public health, safety, and general welfare.[15] In dealing with purely economic interests, however, the court has retreated from the substantial relationship test to a rational basis test. This conclusion finds support in

12. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133 (1978) (landmark preservation); City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (historic preservation); Berman v. Parker, 348 U.S. 26, 33 (1954) (spiritual, physical, aesthetic, spacious, clean, and well-balanced are all values encompassed by general welfare).

13. 447 U.S. at 261 (citations omitted).

14. Until *Agins*, the Supreme Court had never ruled directly on the validity of density control or on the extent to which a municipality could regulate density. Nevertheless, control of density has long been considered by state courts to be a legitimate state interest. Consequently, there are zoning ordinances controlling density and open space throughout the country that could have been subject to challenge if the Court had ruled in favor of Agins. *See* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 3-1 n.1 (4th ed. 1976).

Zoning ordinances that control density have been challenged as being racially discriminatory by excluding low- and moderate-income housing. In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), the Court held that disproportionate impact must be accompanied by proof of intent to discriminate before a zoning ordiance will be overturned on equal protection grounds. State courts have responded to *Arlington Heights* by finding other grounds to invalidate exclusionary zoning. *See* Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum: City of Eastlake Revisited,* 7 ECOLOGY L.Q. 51, 70 (1978). One approach used was defining the public welfare as that of the region rather than that of the municipality. Under this approach, a zoning authority had to consider regional needs of low-income housing and could not adopt zoning that excluded more than its share of such housing. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied,* 423 U.S. 808 (1975).

15. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (zoning ordinance requirement of neighbor's approval for use of land as home for orphans and aged did not bear substantial relation to protection of general welfare); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (land as zoned could not be developed for residential uses because of location and uses of surrounding land).

Penn Central Transportation Co. v. New York City,[16] where the Court found the applicable analysis of zoning to be "whether the challenged restriction reasonably can be deemed to promote the objectives of the community."[17] Use of this broader test is not surprising. When zoning regulations have been challenged on constitutional grounds other than taking, the rational basis test almost always has been applied.[18] In fact, taking is one of only two areas where the Court goes beyond rational basis in zoning analysis.[19] While the *Agins* substantial advancement language appears to be a higher standard of review than the rational basis standard,[20] by upholding the *Agins* regulations, the Court nevertheless shows its extreme reluctance to interfere with zoning authorities.

The second part of the *Agins* test, the "economically viable use" portion, appears to promote language in a *Penn Central* footnote to black letter law.[21] The economically viable use test attempts to determine when the exercise of the regulatory power constitutes a taking. This determination was first broached in *Pennsylvania Coal Co. v. Mahon*,[22] where Justice Holmes recognized that when diminution in value "reaches a certain magnitude . . . there must be . . . compensation."[23] Since *Pennsylvania Coal*, the Court has recognized diminution in value as one factor in determining the limits of regulation, but not as the sole factor in establishing a taking.[24] In *Penn Central*, the Court focused on the "impact of [the]

16. 438 U.S. 104 (1978).

17. *Id.* at 133 n.29.

18. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976) (zoning of "adult" threatres not a violation of free speech); Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (defining "single-family" as no more than two unrelated persons not an infringement on freedom of association, right to travel, or a taking).

19. The other area is zoning regulations that usurp the right of privacy. *See* Moore v. City of East Cleveland, 431 U.S. 494, 500 (1977) (zoning ordinance defining "family" so as to preclude grandchild from living with grandparent was invalid intrusion into privacy of family).

20. The Court has used substantial relationship language to evaluate legislation under equal protection analysis of discrimination based on illegitimacy, Lalli v. Lalli, 439 U.S. 259, 264 (1978), and gender, Craig v. Boren, 429 U.S. 190, 199 (1976). The interpretation used by the Court since 1928, *see* note 15 *supra*, in upholding zoning ordinances is similar to the rational basis test used in equal protection analysis of economic regulation. *Compare* City of New Orleans v. Dukes, 427 U.S. 297, 304 (1976) *with* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 134 (1978); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

21. *See* 438 U.S. at 138 n.36.

22. 260 U.S. 393 (1922).

23. *Id.* at 413.

24. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 132 (1979);

regulation" on the land involved and changed the focus from diminution in value to limitations of existing uses of the land.[25]

In analyzing the economically viable use of the land, the *Agins* Court discussed three factors that had been used in *Penn Central*[26] to determine the impact of a zoning regulation: specificity of the harm, available use of the property, and appropriation.[27] In analyzing specificity of harm, the Court weighed the private and public interest and determined whether this parcel's proportionate share of the public benefit was significant. The *Agins* Court found that the ordinance benefitted Agins' property by "assuring careful and orderly development of residential property."[28] The benefit to Agins did not recompense the actual reduction in land value, but that there was any benefit at all tipped the balance in favor of the public interest.

To evaluate the available use factor, the Court asked whether the ordinance denies the owner the "best use" of his land. Because best use[29] in the context of zoning and land use has a variety of interpretations, the

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City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n.8 (1976); Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962).

While stating that diminution alone is not sufficient to establish a taking, the Court repeatedly has stated that it is not deciding whether a complete destruction of value is a taking. 447 U.S. at 260; City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n.8 (1976); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); United States v. Causby, 328 U.S. 256, 262 (1946). The Court had the opportunity to decide this issue in Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 37 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962). In that case, the value of the land had been diminished completely by a zoning ordinance because the land could not be used for the purpose allowed by the ordinance. Instead of deciding the issue, the Court dismissed the appeal for lack of a federal question. 371 U.S. 36 (1962). *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 43 (1964).

25. 438 U.S. at 137. The Court's early discussion of diminution focused on the inability of the landowner to earn an adequate return on his investment. *See* Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922). In determining diminution of value, the focus of the Court recently has not been on the value of property as a profitable investment, but rather on the value of the property in light of the uses remaining. *See* Andrus v. Allard, 444 U.S. 51, 66 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 141 (1978) (Rehnquist, J., dissenting); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n.8 (1976); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). One court has extended this shift in focus so far as to determine diminution in value of swampland on the basis of its natural condition, rather than its value as drained and filled for development. *See* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

26. 438 U.S. at 133-37.

27. 447 U.S. at 262.

28. *Id.*

29. *Id.*

Agins definition of best use is unclear. There are at least four possible interpretations: residential use, the investor's desired use, the existing use, and reasonable use. Residential use has been viewed as the best or highest use of land from society's perspective.[30] Using this definition, it would seem that as long as zoning allows land to be used for residential purposes, the owner is not denied economically viable use of the land, and government will have broad power in regulating land use. The *Agins* Court appears to support this interpretation by emphasizing that while Agins' options are reduced by the regulation, the land can be used for residential purposes.[31] The authority the Court uses in supporting its discussion of best use, however, does not involve any discussion of residential use.[32]

"Investment-backed expectation"[33] is another possible interpretation. This interpretation would limit governmental power to zone in any manner that would reduce the landowner's expectation of profit. It is given some support by *Agins*' reliance on *United States v. Causby*,[34] which found that a taking occurred when the land could not be used as the landowner desired, even though some value did remain.[35] In addition, the investment-backed expectation theory appears to conflict with other Court holdings that a taking does not occur even if the best use, from the investor's perspective, is prevented.[36] This apparent conflict might be reconciled by applying the third interpretation, "existing use," to *Agins*. The authority used by the Court focused on the inability of the landowner to use his land as he had used it prior to the government interferences, rather than on the expectations of the owner.[37] This is the interpretation

30. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 8.14 (1968).

31. 447 U.S. at 262.

32. The *Agins* Court found support in United States v. Causby, 328 U.S. 256 (1946). Causby could not use his land as a chicken farm because of low flights of military planes directly over his land. The Court noted that some use still remained in the land, but the limit in utility of the land did cause a diminution. *Id.* at 262. This was not the Court's reason for finding a taking. The taking occurred because of the quality of the interference (a physical invasion creating an easement) and not the quantity of the interference (diminution in value). *Id.* at 263. Thus, it is not clear why the Court in *Agins* relied on *Causby* to support the best use factor when the *Causby* decision apparently was based on an extinction of a "fundamental attribute of ownership." *See* note 42 and accompanying text *infra*.

33. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978). This interpretation is similar to the Court's early use of diminution of value. *See* note 24 *supra*.

34. 328 U.S. 256 (1946).

35. *See* note 32 *supra*.

36. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (ordinance preventing excavation below the water table did not constitute taking even though it closed mining operation).

37. *See* cases cited note 32 *supra*.

followed in analyzing *Penn Central.*[38] *Agins* appears to follow this interpretation by emphasizing that the landowner could still use the land for the same general purpose, *i.e.*, residential, he had intended before the rezoning, but not to the extent he had planned.[39]

The existing use interpretation, however, conflicts with decisions that hold down-zoning from existing uses not to be a taking.[40] Appropriate or reasonable use is the only interpretation that does not conflict with other Court decisions. It is a determination of whether the uses allowed by the zoning are appropriate for the land involved. If the remaining uses are not reasonable uses of the property, there is a taking.[41] Apparently the Court in *Agins* and *Penn Central* is stating merely that not only are the remaining residential uses reasonable and appropriate, but they are also the existing use and the best use from the investor's perspective.

The third factor analyzed in determining whether the owner was denied economically viable use of his land was whether there was an appropriation of land by the government. The Court used the term "extinguish a fundamental attribute of ownership,"[42] but did not define "fundamental attribute of ownership." Prior Court decisions make it clear that some traditional property rights can be destroyed without a taking occurring.[43] The authority relied on in *Agins* indicates that the property rights that are fundamental attributes of ownership are those property rights that, if extinguished, would result in a physical invasion of the land by the government.[44] A physical invasion of the land would in effect be the appropriation of an interest in the land by the government.[45]

Agins gives zoning authorities almost unlimited power in using zoning to control density and guarantee open space. It broadly interprets the scope of legitimate state interests and indicates that the Court is likely to uphold zoning regulations as a substantial advancement of those interests.

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38. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978).

39. 447 U.S. at 262.

40. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

41. C.F. Lytle Co. v. Clark, 491 F.2d 834, 838 (10th Cir. 1974); Kent Island Joint Venture v. Smith, 452 F. Supp. 455, 460 (D. Md. 1978).

42. 447 U.S. at 262.

43. *See* Andrus v. Allard, 444 U.S. 51, 65-66 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 n.27 (1978).

44. *See* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (right of exclusion is fundamental attribute of ownership because, if denied, physical invasion of land would occur); Andrus v. Allard, 444 U.S. 51, 65 (1979) (although some property rights were destroyed there was no taking because there was no physical invasion); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978) (Landmark Law not appropriation because it only prohibited use of air space and did not exploit land for city use); United States v. Causby, 328 U.S. 256, 265 (1946) (low flights over land is appropriation of use of land).

45. *See* cases cited note 44 *supra.*