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NOTE

INVERSE LIABILITY OF THE STATE OF WISCONSIN FOR A *DE FACTO* "TEMPORARY TAKING" AS A RESULT OF AN ERRONEOUS ADMINISTRATIVE DECISION: *ZINN V.* *STATE*¹

This Note examines *Zinn v. State*, a Wisconsin Supreme Court decision, which held that plaintiff stated a claim for inverse condemnation against the State of Wisconsin when, as a result of an erroneous quasi-judicial decision by the DNR, plaintiff lost the use of her property for a little longer than a month. This Note takes the position that *Zinn* represents the growing tendency among courts to enlarge the scope of fact situations in which they will find a taking. Given this tendency, and given that the substantive test in Wisconsin of what constitutes a taking is identical whether a taking occurs as a result of the police power or power of eminent domain, this Note argues that the remedy of inverse condemnation should also be extended to police power takings when the latter produce the same benefits to the Government and cause the same harm to the property owner as would have occurred if the Government had used its power of eminent domain.

I. INTRODUCTION

The "taking issue" continues to bedevil the courts.² As regulatory³ and non-regulatory⁴ governmental activities become more pervasive and impinge on private property values, the contexts in which the taking issue can arise become more numerous,⁵ and some-

1. 112 Wis. 2d 417, 334 N.W.2d 67 (1983).

2. Since 1977, the United States Supreme Court has faced the taking issue four times. *San Diego Gas & Elect. Co. v. City of San Diego*, 450 U.S. 621 (1981) (compensability of regulatory takings discussed but declined for lack of final judgment); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (zoning ordinance effected no taking); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (complaint stated a claim for relief under section 1983); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (historic landmark preservation regulation effected no taking).

3. See, e.g., *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981) (enforcement of Housing Code resulted in a compensable taking of leasehold rights); *McMahon v. City of Telluride*, 79 Colo. 281, 244 P. 1017 (1926) (property of owner destroyed under mistaken belief that it was a nuisance).

4. See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Lynah*, 188 U.S. 445 (1903).

5. "The categories of regulation that have often generated litigation are those restricting mining, regulations for the preservation of open spaces, regulations that seek to eliminate existing uses, regulations of flood prone areas, wetlands, estuarine and beachlands, and a variety of regulatory deterrents to urban growth." F. BOSSELMAN, D. CALLIES & J. BANTA,

times unpredictable.⁶ At the same time, this contextual variety has rendered unsuccessful the judicial effort to formulate satisfactory standards for determining when governmental action, which has caused loss to a property owner, constitutes a taking.⁷ Nevertheless, because of the commands of the fifth amendment to the United States Constitution⁸ and the various state constitutions,⁹ if governmental action results in a "taking" of property, "just compensation" must be paid.

Ordinarily, a compensable taking occurs when a government agency or private entity, which has been given express legislative authority,¹⁰ exercises its power of eminent domain to take private property without the owner's consent.¹¹ In such cases, the public agency brings judicial action against the owner, and the value of the owner's property is determined before title to property is transferred to the agency. Occasionally, however, the government will take private property without the exercise of formal eminent domain (condemnation) proceedings.¹² In such a case, the property owner is entitled to bring an action called inverse condemnation to recover just compensation.¹³ Although there appears to be no single, settled defi-

THE TAKING ISSUE 141 (1971).

6. In *Rostker v. Goldberg*, 453 U.S. 57 (1981), for example, plaintiffs contended, *inter alia*, that the Military Service Act, 50 U.S.C. app. §§ 451-454, which requires the registration of every male citizen and resident, amounted to a "taking" of property without due process of law. *Rostker*, 453 U.S. at 61 n.2.

7. See Van Alstyne, *Taking or Damaging by the Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1971). See also Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA L. REV. 1, 13-15 (1967).

8. The fifth amendment provides: "nor shall property be taken for public use without just compensation." U.S. CONST. amend. V. This provision is made applicable to the states by the due process clause of the fourteenth amendment. See *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897).

9. The constitutions of twenty-three states are broader than the fifth amendment in that they require compensation when private property is "taken or damaged." See Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1439 n.3 (1974).

10. The procedure for the appropriation of land for public use depends entirely upon statutory law. See generally, 1 NICHOLS' THE LAW OF EMINENT DOMAIN § 24.1 (J. Sackman, rev. 3d ed. 1980) [hereinafter cited as NICHOLS']. See also *Blair v. Milwaukee Elec. R. & L. Co.*, 187 Wis. 552, 555, 203 N.W. 912, 913 (1925); *In re Milwaukee Elec. R. & L. Co. v. Becker*, 182 Wis. 182, 186, 196 N.W. 575, 577 (1923).

11. "Eminent domain is the power of the sovereign to take property without the owner's consent." 1 NICHOLS', *supra* note 10, at § 1.11, 1-7; See Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 556-69 (1972).

12. See *United States v. Causby*, 328 U.S. 256 (1946); *Zinn v. State*, 112 Wis. 2d 417, 432, 334 N.W.2d 67, 74 (1983). Chapter 32 of the Wisconsin Statutes provides the procedure which the government must follow in condemning property for public use. WIS. STAT. §§ 32.01-.09 (1981-82).

13. See *Causby* 328 U.S. 256; *Zinn*, 112 Wis. 2d at 432, 334 N.W.2d at 74.

inition of the concept of inverse condemnation, generally it "describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of this property under the fifth amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity."¹⁴ Thus, a claim in inverse condemnation may arise if some governmental activity, either by physical interference or regulation, deprives the owner of the use and enjoyment of his property such as to constitute a *de facto* taking of the property.

In *Zinn v. State*,¹⁵ the Wisconsin Supreme Court was presented with an unusual case sounding in inverse condemnation. The plaintiff sought to recover damages for the "temporary taking," on paper, of her property by the Wisconsin Department of Natural Resources (DNR).¹⁶ The alleged temporary taking occurred as a result of an erroneous determination by the DNR¹⁷ that the ordinary highwater mark (OHWM)¹⁸ of a certain lake, completely surrounded by plaintiff's property, was ten feet higher than it actually was.¹⁹ The DNR ruling, therefore, increased, on paper, the size of the lake from fourteen acres to one thousand and nine hundred acres, two hundred of which had belonged to the plaintiff.²⁰

The plaintiff petitioned for and obtained a rehearing from the DNR, which resulted in a new ruling withdrawing and rescinding the original ruling. However, the rescission was not completed until nearly two years after the original ruling.²¹ Therefore, the plaintiff

14. *San Diego Gas & Elect. Co. v. City of San Diego*, 450 U.S. 621, 638 n.2 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2 (1980); *United States v. Clarke*, 445 U.S. 253, 257 (1980); *see also*, *Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 288 N.W.2d 794 (1980) (refusal of city to relicense a theatre entitles lessee to bring inverse condemnation claim).

15. 112 Wis. 2d 417, 334 N.W.2d 67 (1983).

16. *Id.* at 421-22, 334 N.W.2d at 69-70.

17. This determination was made in a contested proceeding under WIS. STAT. § 227 (1981-82). *See infra* note 98. In a contested case the parties are given reasonable notice, and an opportunity to present evidence and to rebut, or offer countervailing, evidence. The agency or hearing examiner makes its determination on the basis of the record before it. The record includes applications, pleadings, motions, intermediate rulings, exhibits, admissions and stipulations. *See* WIS. STATS. § 227.07 (1981-82).

18. OHWM means the point at which the "presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of vegetation or other easily recognized characteristic." *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816, 820 (1915) (citing *Lawrence v. American W.P. Co.*, 144 Wis. 556, 562, 128 N.W. 440, 441 (1911)).

19. *Zinn*, 112 Wis. 2d at 421, 334 N.W.2d at 69.

20. *Id.*

21. *Id.*

sued the State to recover damages and compensation for the period in which the original ruling had been in effect.²²

The State moved to dismiss the complaint for failure to state a claim upon which relief could be granted.²³ The trial court denied the motion. The State appealed the ruling. The court of appeals reversed and granted the State's motion.²⁴

The Wisconsin Supreme Court granted plaintiff's petition for review and held that the complaint stated a claim for a temporary taking for which compensation is compelled under the Wisconsin Constitution. In so holding, the court rejected policy arguments the State advanced to preclude a finding of a taking in a quasi-judicial context. It also found irrelevant that the State had not consented to be sued in *Zinn*.

This Note will examine the *Zinn* decision and show that, although the substantive test in Wisconsin of what constitutes a "taking" is rather restrictive, *Zinn* represents the growing tendency among courts to enlarge the scope of fact situations in which courts will award damages for a taking. The court's finding of a taking in this unusual context, its articulation of when a taking occurs, its willingness to award damages for a very temporary taking, coupled with its unequivocal rejection of the defense of sovereign immunity to a taking in violation of the state constitution, indicate this tendency. Part II of this Note will set forth the substantive standards in Wisconsin governing a claim for a taking, and then discuss their application to the *Zinn* case. Part III will discuss the remedies for a taking under the Wisconsin Constitution. In particular, this part will discuss the inverse condemnation remedy in Wisconsin and will examine the implications of *Zinn* for the status of this remedy in police power "taking" cases in light of developing federal law and the competing policies militating in favor of and against this particular remedy. The Note will then conclude that, on balance, the Wisconsin Supreme Court's apparent inclination to grant monetary relief to owners whose property is unconstitutionally interfered with, even for a very temporary period and in an unusual context, is justified on principle and warranted in practice.

22. *Id.* at 422, 334 N.W.2d at 70.

23. *Id.*

24. *Id.*

II. THE WISCONSIN APPROACH TO INVERSE CONDEMNATION

Unlike many other states,²⁵ yet like the Federal government,²⁶ Wisconsin is a "taking" state.²⁷ This means that, unlike those states whose constitutions provide for compensation for a "taking or damaging" of property, just compensation is due in Wisconsin only when a "taking" occurs. Consequently, in those instances in which an owner claims that governmental activities has so affected the use and value of his or her private property as to have, in effect, constituted a "taking," courts must determine whether such activity may be characterized as the legal equivalent of the formal exercise of the power of eminent domain. However, while a formal *de jure* taking can usually be easily identified by its procedural characteristics,²⁸ a claim of *de facto* taking, for which an owner seeks the remedy of inverse condemnation, presents the difficult constitutional problem of whether a "taking" has actually occurred and, if so, exactly when it occurred. To further complicate the problem, courts traditionally have distinguished between the power of eminent domain which, when it is used, compels "just compensation," and the police power, the excessive use of which, apparently, can be counteracted by a granting of injunctive relief.²⁹ Assuming that the distinction between the two powers is always rational or justified, determining the point at which the police power ends and eminent domain begins is often difficult.³⁰ In general, the distinction between the two traditionally has lain in the fact that police power involves the public regulation of property to prevent its use in a manner detrimental to

25. See *supra* note 9.

26. See *supra* note 8.

27. The Wisconsin Constitution provides: "[t]he Property of no person shall be taken for public use without just compensation." WIS. CONST. art. I, § 13.

28. See WIS. STAT. §§ 32.01-.09 (1981-82). The procedure set forth in WIS. STAT. § 32.05 is for the use of condemnors acquiring property for "public alleys, streets, highways, airports, mass-transit facilities, or other transportation facilities, or storm sewers and sanitary sewers or watercourses." *Id.* Condemnations for all other purposes are carried out under the procedures set forth in WIS. STAT. § 32.06. For a description of the various steps involved in the process of acquiring title under these two procedures and related matters, see B. SOUTHWICK, 6 WISCONSIN PROPERTY LAW SERIES (1981).

29. See generally Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1973); Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964); Stoebuck, Police Power, Takings and Due Process, 37 WASH. & LEE L. REV. 1057 (1980).

30. The difference between the eminent domain and police power is a matter of degree and not of kind. *Just v. Marinette County*, 56 Wis. 2d 7, 15, 201 N.W.2d 761, 767 (1972). "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See also *infra* notes 173-78 and accompanying text.

the public interest, whereas eminent domain involves the acquisition of possessory or other legal rights in property for public use.³¹

Since Wisconsin is a taking state, judicial determination of inverse condemnation claims is based on a construction of the eminent domain clause of its constitution.³² This is true even when an inverse condemnation action is based on the claim that the condemnor has refused to exercise its power of eminent domain and pay compensation despite the fact that it is "occupying" the plaintiff's property within the meaning of Wisconsin Statute section 32.10.³³ Although the standard of proof required under both provisions is the same,³⁴ under sec. 32.10 possession by the defendant of the power of eminent domain is a prerequisite to maintaining an action in inverse condemnation.³⁵

In the circumstances of *Zinn v. State*,³⁶ the DNR did not have the power of condemnation nor the intention to condemn the plaintiff's property.³⁷ Nevertheless, the supreme court analyzed and decided the case according to the usual test applicable to an inverse condemnation claim. In the process, the court clarified some of the ambiguities surrounding taking jurisprudence in Wisconsin.

31. 1 NICHOLS', *supra* note 10, at § 1.42, 1-127.

32. See Mandelker, *Inverse Condemnation: The Limits of Public Responsibility*, 1966 WIS. L. REV. 340-43.

33. WIS. STAT. § 32.10 (1981-82) provides:

If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced. The petition shall describe the land, state the person against which the proceedings are instituted and the use to which it has been put or is designed to have been put by the person against which the proceedings are instituted. A copy of the petition shall be served upon the person who has occupied petitioner's land, or interest in land. The petition shall be filed in the office of the clerk of the circuit court . . . If the Court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of [Chap. 32] assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same and assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied.

34. Proof that there has been an "occupation" within the meaning of WIS. STAT. § 32.10, and a "taking" under WIS. CONST. art. I, § 13 are functionally and legally equivalent. See *Howell Plaza, Inc. v. State Highway Comm'n*, 66 Wis. 2d 720, 723, 226 N.W.2d 185, 186-87 (1975) (*Howell Plaza I*); *Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 388, 288 N.W.2d 794, 800 (1980). The reason for the legal equivalence of the two terms is that "occupation," itself under § 32.10 is based on a construction of the eminent domain clause. See *Howell Plaza I*, 66 Wis.2d at 723, 226 N.W. at 186-87 (1975).

35. The agencies or persons who may effect a "taking" under § 32.10 are specifically enumerated in the statute itself.

36. 112 Wis. 2d 417, 334 N.W.2d 67 (1983).

37. See *infra* notes 148-60 and accompanying text.

A. The Wisconsin Test of What Constitutes "Taking"

The test for what constitutes a "taking" under Wisconsin law traditionally has been rather restrictive. This restrictive test is not solely explained by the fact that Wisconsin is a "taking" state (i.e. Wisconsin requires proof of a taking to justify compensation), unlike those states whose constitutions allow recovery for a "taking or damaging." Other taking states have construed their eminent domain provisions to permit a liberal approach to recovery.³⁸

1. PHYSICAL INVASION

In the past, the sole test for taking in Wisconsin required a showing that the government had actually physically occupied or possessed the plaintiff's property. Thus, in one of the first cases construing an earlier inverse condemnation statute, the Wisconsin Supreme Court held that "it is only where those authorized to exercise the power of eminent domain are actually in possession of or enjoying the use of [plaintiff's] property . . . that the owner will be entitled to sue in inverse condemnation."³⁹ This rather strict test had been previously articulated by the United States Supreme Court in *Pumpelly v. Green Bay Co.*,⁴⁰ where the State of Wisconsin had authorized the construction of a dam which caused the flooding of plaintiff's land.⁴¹ Essential to the physical invasion test is the

38. For example, although Michigan is a taking state, its courts have interpreted that term liberally. "[T]he term 'taking' shall not be used in an unreasonable or narrow sense . . . [I]t should include cases where the value [of property] is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any appurtenances thereto." *Thom v. State Highway Comm'r*, 376 Mich. 608, 613, 138 N.W.2d 322, 323 (1965) (quoting *Pearsall v. Board of Supervisors*, 74 Mich. 558, 42 N.W. 77 (1889)) (road closing case). Thus, even damaging of property constitutes a taking under the Michigan approach. *Id.* at 562, 42 N.W. at 78. For a discussion of the liberality of this approach compared to the restrictiveness of the New York approach, see Note, *De Facto Taking and the Pursuit of Just Compensation*, 48 FORD. L. REV. 334, 346-68 (1979). See also *Washington Market Enterprises v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975).

39. *Muscoda Bridge Co. v. Worden-Allen Co.*, 196 Wis. 76, 88, 219 N.W. 428, 433 (1928). In *Muscoda*, the court was construing an inverse condemnation statute similar to Wis. STAT. § 32.10, *supra* note 33. However, it held that a taking occurs only when the governmental entity actually physically possesses or occupies the plaintiff's property. The Court thereby implied that nothing the entity does outside the boundaries of the property, however severe, may constitute a taking. Obviously, this is in sharp contrast to the Michigan approach, *supra* note 38.

40. 80 U.S. (13 Wall.) 166 (1871).

41. In *Pumpelly*, *id.* the U.S. Supreme Court equated the effect of the backflow of water from the dam with taking (even though there was no formal act of appropriation by the defendant company) and found the defendant inversely liable for, in effect, destroying the plaintiff's property. *Id.* For an analysis of this case, see Mandelker, *supra* note 32, at 40-41.

finding that "the public or its agents have physically used or occupied something belonging to the claimant."⁴² Thus, under this test governmental activity which does not result in physical possession, interference or occupation does not constitute a taking regardless of the fact that the governmental activity has deprived the plaintiff of all the beneficial use of his property.

In much of the litigation that raises the taking issue, as in the field of zoning, the physical invasion test is of little value since there is no interference with property rights in a physical or possessory sense. Nevertheless, the United States Supreme Court has recently indicated that "a 'taking' may more readily be found when the interference can be characterized as a physical invasion by government."⁴³

Even where physical interference with property rights has occurred, recovery under an inverse liability theory in Wisconsin is anything but certain. Under Wisconsin property law, governmental activity which "merely causes damage" is noncompensable when the damage is deemed to be "indirect" or "consequential" and therefore *damnum absque injuria*.⁴⁴ Although what is regarded as indirect or consequential damage is uncertain, "[t]he distinction seems to be between less and more remote damage and, in the last analysis, seems to be purely a matter of degree."⁴⁵ In general, the term *damnum absque injuria* refers to damage to property when no part of it is taken by the government.⁴⁶ In spite of the fact that there is no bright line distinguishing between governmental actions merely causing consequential damage and those resulting in a compensable taking, the Wisconsin Supreme Court has steadfastly held to that distinction.⁴⁷ This rather conservative approach adopted by the court has substantially limited the basis of recovery for inverse liability. This limitation may be illustrated by two cases decided nearly two decades apart.

42. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1965).

43. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The Court stated, however, that it was not "embrac[ing] the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." *Id.* at 123 n.25.

44. 2A NICHOLS', *supra* note 10, at § 6.31, 6-210. See also *More-Way North Corp. v. State Highway Comm'n*, 44 Wis. 2d 165, 173, 170 N.W.2d 749, 753 (1969) (citing 2 NICHOLS', *supra* note 10, at § 6.4432(1), 6-503) (change of grade resulting in loss of 42 parking stalls constituted consequential damage not a "taking"); *Randall v. Milwaukee*, 212 Wis. 374, 383, 249 N.W. 73, 76 (1933) (obstruction of egress and ingress merely consequential damage and not a "taking").

45. 2A NICHOLS', *supra* note 10, at § 6.31, 6-210.

46. *Id.*

47. See *infra* notes 48-50 and accompanying text.

In *Wisconsin Power & Light Co. v. Columbia County*,⁴⁸ the plaintiff alleged that its tower was taken when the defendant county, in the course of relocating a trunk highway, deposited a large amount of sand and gravel near the plaintiff's power line. The sand and gravel sank into the swamp and the plaintiff's tower was twisted and bent and thereby rendered useless.⁴⁹ The court determined that this was a case of mere consequential damage, not a taking, and therefore denied recovery. In so concluding, it found:

[T]hat the tower had no utility, direct or indirect, to the highway project, that the county did not need or desire the tower or the land on which it rested and did not intend to acquire or affect either the tower or the land, that the public obtained no benefit from injuring it, that the county had no reason to anticipate that damage would result from its acts, and that the injury to the tower was purely accidental.⁵⁰

Strictly applied, this opinion would deny almost all inverse liability and erect a rule of absolute immunity for all consequential damage caused by governmental action.⁵¹ From the point of view of the owner, the lack of intention on the part of the defendant county to injure the property interest of the plaintiff is irrelevant. Yet the *Columbia County* court found the absence of "need or desire" signifi-

48. 3 Wis. 2d 1, 87 N.W.2d 279 (1958).

49. *Id.* at 3, 87 N.W.2d at 280.

50. *Id.* at 7, 87 N.W.2d at 282. The court appears to be drawing a line between governmental action which amounts to a tort and one which is a taking, leaving open the question of whether the aggrieved party may recover under a tort theory, when it states that "the County may or may not be liable in tort depending on such factors as negligence and sovereign immunity; but plaintiff's property is not taken for public use within the meaning of Sec. 13, art. 1, Wis. Const."

51. See Mandelker, *supra* note 32, at 45. The view expressed in *Columbia County*, was affirmed in *Hoene v. City of Milwaukee*, 17 Wis. 2d 209, 116 N.W.2d 112 (1962) where plaintiffs sued for damages to their house which allegedly resulted from heavy traffic on an adjacent highway. They claimed that the city's failure to construct and repair the highway was responsible for the damage. In denying inverse recovery the court stated: "[c]ertainly the appellants' property was not 'taken' for public use in the usual sense of the word. Neither title nor possession was appropriated by the city. The appellants' property was not needed by the city to operate its street. This court has previously stated that 'mere consequential damage to property resulting from governmental action is not a taking thereof'" (citing *Wisconsin Power & Light Co. v. Columbia County*, 3 Wis. 2d at 6, 87 N.W.2d at 281). *Hoene*, 17 Wis. 2d at 217, 116 N.W.2d at 116. But see *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N.W.2d 380, (1970) which has modified the harshness of the rule regarding consequential damages. In *Luber*, the court held that rental loss suffered by a condemnee in connection with a taking of his property is an "interest" requiring compensation, and is therefore not mere consequential damage. The court stated that, "[t]he rule making consequential damages *damnum absque injuria* is under modern constitutional interpretation, discarded and sec. 32.19(4) insofar as it limits compensation is invalid." *Id.* at 283, 177 N.W.2d at 386.

cant in absolving the defendant of liability under an inverse condemnation theory.⁵²

In *Public Service Corporation v. Marathon County*,⁵³ the court did allow recovery under an inverse liability theory, finding a "taking." In that case, the defendant county had ordered the plaintiff to remove its utility lines along a town road and relocate them underground so that the county could build an additional airport runway. The court noted initially that even this arguably clearer case presented a borderline situation.⁵⁴ However, it found that the county's *intention* to take the plaintiff's easement and the benefit the public derived from the enlargement of the airport tipped the balance in favor of finding a "taking."⁵⁵

The role of acquisitory intention has never been clear. The court in *Marathon County* did not explicitly proclaim that acquisitory intent or public use is the standard by which a "taking" is to be distinguished from "mere consequential damage." Nevertheless, the weight it assigned to both factors distinguishes this case from *Columbia County*. Indeed, there is language in the federal cases suggesting that the "weight of authority [in this country is] . . . that in order to constitute a taking, the condemnor must have an intention to appropriate. . . ."⁵⁶

Yet in *Zinn v. State*,⁵⁷ the court appears to have moved away from the above line of cases to bolster the position of claimants in inverse liability. In *Zinn*, the court rejected as irrelevant the State's contention that the DNR had no intention to take private property. In declaring that intention has no place in taking jurisprudence, the court quoted approvingly from Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*:⁵⁸ "the Constitu-

52. 3 Wis. 2d at 7, 87 N.W.2d at 282.

53. 75 Wis. 2d 442, 249 N.W.2d 543 (1977).

54. *Id.* at 449, 249 N.W.2d at 546. The court viewed the case as presenting a borderline situation between taking and mere consequential damage resulting from the exercise of the police power. The fact that the utility retained its interest in the property, the court reasoned, could be viewed as mere police power regulation of the location of power lines. Yet, the court found the fact that the forced removal of the utility was useful to the public sufficient to make the exercise more like a taking than a police power regulation. *Id.*

55. *Id.* at 448, 249 N.W.2d at 545.

56. *Porter v. United States*, 473 F.2d 1329, 1336 (5th Cir. 1973); *accord*, *J.J. Henry Co. v. United States*, 441 F.2d 1246 (1969). *See also* *B. Amusement Co. v. United States*, 180 F. Supp. 386 (1960); *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio, 1967). *But see* *San Diego Gas & Elect. Co. v. City of San Diego*, 450 U.S. 621, 652-53 (Brennan, J., dissenting).

57. 112 Wis. 2d 417, 334 N.W.2d 67.

58. 450 U.S. 621, 632 (1960). Although the majority in *San Diego* determined that there was no "final judgment" and therefore refused to reach the merits, four Justices dissented and found a taking and a fifth Justice stated he would have agreed with the dissenters if

tion measures a taking of property not by what a state says, or what it intends, but by what it does."⁵⁹

2. LEGAL RESTRICTION AND SUBSTANTIAL DEPRIVATION

Conscious of the restrictive nature of the physical invasion test, the Wisconsin Supreme Court recently has modified the physical invasion test to temper its harshness.⁶⁰ Under the new test, the plaintiff need not prove that his property has been physically invaded. It is enough that the defendant has placed upon the plaintiff's property a restriction which "practically or substantially renders [the property] useless for all reasonable purposes."⁶¹

Although the current test was apparently first announced in the context of litigation involving zoning,⁶² its meaning in the context of inverse condemnation proceedings was tested in *Howell Plaza, Inc. v. State Highway Commission (Howell Plaza I)*.⁶³ This case raised the issue of inverse condemnation for a *de facto* taking which allegedly occurred by reason of the threat of condemnation.⁶⁴ The

there had been a final judgment. Thus, if the Court had reached the merits, it would have found a taking. See *infra* note 189.

59. *San Diego*, 450 U.S. at 652-53 (quoting *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring)).

60. See *Howell Plaza, Inc. v. State Highway Comm'n*, 92 Wis. 2d 74, 284 N.W.2d 887 (1979) (*Howell Plaza II*).

61. *Buhler v. Racine County*, 33 Wis. 2d 137, 143, 146 N.W.2d 403, 406 (1966) (zoning). See also *Just v. Marinette County*, 56 Wis. 2d 7, 15, 201 N.W.2d 761, 767 (1972) (zoning of wetlands).

62. *Buhler v. Racine County*, 33 Wis. 2d 137, 146 N.W.2d 403 (1966).

63. 66 Wis. 2d 720, 226 N.W.2d 185 (1975).

64. The term "condemnation blight" has been coined to denote "the debilitating effect upon value of a threatened, imminent or potential condemnation." 4 NICHOLS', *supra* note 10, at § 12.3151[5], 12-475. Condemnation blight occurs when:

[t]he advance planning necessary for public improvements . . . results in postponements and delays in condemnation proceedings. Long periods of time lapse between the initiation of a project and the actual award of compensation to the property owner. As this delay continues, property values in the area set off for the public improvement sometimes rapidly depreciate, because the tenants relocate in other areas and property owners are reluctant to spend money on repairs. There can be a substantial loss of financial return from such property, while the cost of maintenance continues. . . . The law of eminent domain has found this a difficult problem to resolve.

Howell Plaza I, 66 Wis. 2d at 727-28, 226 N.W.2d at 189 (quoting the trial court). The crucial issue in cases raising the condemnation blight problem is whether the conduct or activity of a condemning authority constitutes a *de facto* taking or merely condemnation blight. If the former, compensation is awarded as of the date the condemnor somehow interfered with the owner's enjoyment of his property, regardless of when title vested in the condemnor. Thus the date of taking is moved forward to coincide with the actual taking even though formal or legal taking occurs later. Under the condemnation blight concept, on the other hand, the date of taking remains the same, but the owner is compensated for the loss of value to his property as

plaintiff in *Howell Plaza I* alleged that the pre-condemnation activities of the defendant constituted a *de facto* taking. It alleged that the defendant had sent notices to tenants and property owners in the area informing them of the imminence of condemnation and that the City of Oak Creek, at the "insistence" of the defendant, had urged the plaintiff to withhold development of its land because of the upcoming condemnation for the purpose of building the freeway system. Further, the defendant allegedly had advised the plaintiff that its property might be acquired and that it had informally approved acquisition of the plaintiff's property.⁶⁵ As a result of these activities, the plaintiff argued that it was unable to develop its land and attract tenants to its property.⁶⁶ Moreover, the plaintiff claimed that the city planning office had informed it that the city would not grant a building permit due to the freeway project.⁶⁷

The trial court found the complaint sufficient to constitute a claim for a *de facto* taking.⁶⁸ It reasoned that the long periods of time between the announcement of public improvements and the actual commencement of condemnation proceedings often result in substantial hardship and unfairness to property owners.⁶⁹

On appeal, the supreme court found the trial court's reasoning "highly persuasive."⁷⁰ Nevertheless, concerned that inverse condemnation in these circumstances would in effect transfer property to an unwilling buyer which had not yet exercised its legislative function of deciding whether to condemn the property, the court held that in order to state a cause of action under section 32.10 of the Wisconsin Statutes, the property owner must allege facts in its complaint that it had been "deprived of all, or substantially all, of the beneficial use of [his] property or of any part thereof."⁷¹

The court's opinion in *Howell Plaza I* left unclear the elements of the substantial deprivation test. First, while the opinion sug-

a result of the condemnor's value-depressing acts. 4 NICHOLS', *supra* note 10, at § 12.3151[5], 12-475.

65. *Howell Plaza II*, 92 Wis. 2d 74, 97, 284 N.W.2d at 888 (1979).

66. *Id.*

67. *Howell Plaza I*, 66 Wis. 2d at 722, 226 N.W.2d at 186.

68. *Id.*

69. *See supra* note 64.

70. *See Howell Plaza I*, 66 Wis. 2d at 727, 226 N.W.2d at 189, where the court indicates that it agrees with the trial judge's concern that "there may be a fundamental unfairness in permitting a public agency to deal with property owners in such a way that they cannot make the optimum and normal use of their property. . . ."

71. *Id.* at 730, 226 N.W.2d at 190. In so holding the court stated, "we conclude that there need not be an actual taking in the sense that there be a physical occupation or possession by the condemning authority, and to that extent we modify the rule stated in *Muscoda Bridge Co. v. Worden-Allen Co.*" *Id.*

gested that a showing of substantial deprivation of beneficial use *alone*, without a further showing of a legal restriction placed on the use of the property, is not enough to constitute a taking, the actual holding is not couched in such terms. Second, the opinion left vague whether the inability of the property owner to develop his land only for a temporary period is constitutionally significant. Finally, the opinion was unclear as to whether a legal restriction must emanate from an authority with the power to impose such a restriction.

The court, however, clarified these issues in *Howell Plaza II*.⁷² The *Howell Plaza II* court acknowledged the ambiguities in its first opinion, noting that the test under *Howell Plaza I* was arguably "broad enough to allow the finding of a 'taking' whenever a property owner is unable to beneficially use his property, even where this is only an indirect result of governmental action."⁷³ Thus, in order to narrow the test, it adopted two further requirements. First, "[a] taking can occur absent physical invasion only where there is a legally imposed restriction upon the property's use."⁷⁴ Second, the legal restraint must issue from an authority with the power to do so.⁷⁵

Under this test, the outcome of *Howell Plaza II* was almost a foregone conclusion. Since the Highway Commission neither imposed any legal restriction upon the plaintiff's property, nor had the authority to do so, short of actually condemning the property, the court found two major elements of the test unsatisfied. The court noted that in many jurisdictions in the country "the mere plotting or planning of a public improvement" does not constitute a *de facto* taking.⁷⁶

It is important to understand the requirement that a restriction must issue from an agency with the legal authority. As long as the condemnor issues no restriction there will be no taking despite the

72. 92 Wis. 2d at 87, 284 N.W.2d at 893.

73. *Id.* In other words, the court treated the appellant's loss as "mere consequential damage." The New York Court of Appeals had previously adopted a similar test in *City of Buffalo v. J.W. Clement Co., Inc.*, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971), where it declared that "... a de facto taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property." *Id.* at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357. For a criticism of the *Clement* rule see Note, *supra* note 38. Under a somewhat similar situation the New Jersey Supreme Court has granted recovery. See *Washington Market Enterprises v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975).

74. *Howell Plaza II*, 92 Wis. 2d at 88, 284 N.W.2d at 893.

75. *Id.* at 86, 88, 284 N.W.2d at 893.

76. *Id.* at 82, 284 N.W.2d at 891. See 37 A.L.R.3d 127, 132 (1971). But see *Washington Market Enterprises v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975); *Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

debilitating effects of its activity and its intention to condemn an owner's property. Thus, in *Howell Plaza II*, even though the court found that the city planner had informed the plaintiff that its application for a building permit would be denied,⁷⁷ the court held that this amounted to no restriction because the city planner had no legal authority to restrain the plaintiff from developing its land. Likewise, even though the Commission had informally approved the acquisition of plaintiff's property as a "hardship" case and had appointed appraisers for that purpose,⁷⁸ the court concluded that these activities were insufficient to constitute a restriction.⁷⁹

B. Application of the Taking Test to ZINN V. STATE

Zinn presented the Wisconsin Supreme Court with a major opportunity to clarify the meaning of *Howell Plaza II*, albeit in a most unusual context. Specifically, *Zinn* provided the court with an occasion to apply the *Howell Plaza II* test in a non-condemnation, non-zoning, quasi-judicial context, and to determine what type of governmental interference with property is sufficient to constitute a compensable taking, and at what point a governmental action may be said to have effected a taking. In *Zinn*, the court was confronted with the difficulty of fitting the unusual facts of that case into the requirement of "restriction," as enunciated in *Howell Plaza II*, and the uncertainty regarding the compensability of a temporary inability to develop one's land as a result of governmental action left unclear in *Howell Plaza II*. In order to better demonstrate the difficulty of applying the *Howell Plaza II* test to contexts other than its own, it is necessary at this point to set forth in some detail the facts of *Zinn*.

1. THE FACTS OF *ZINN*

Rose Zinn was the owner of a parcel of land which completely surrounded McConville Lake in Washington County.⁸⁰ She thus had sole riparian rights to the lake. In January, 1976, a neighbor of Zinn filed a petition for a declaratory ruling with the Wisconsin Department of Natural Resources (DNR) to obtain a determination of the ordinary highwater mark (OHWM) of the lake.⁸¹ Accordingly,

77. *Howell Plaza II*, 92 Wis. 2d at 84, 284 N.W.2d at 891.

78. *Id.* at 78, 284 N.W.2d at 888.

79. *Id.* at 86, 284 N.W.2d at 893.

80. *Zinn*, 112 Wis. 2d at 420, 334 N.W.2d at 69.

81. *Id.* at 420-21, 334 N.W.2d at 69.

on June 13, 1977 the DNR held a hearing on the petition. At the hearing, the hearing examiner received in evidence the testimony of a DNR employee as to the location of the OHWM.⁸² Based on the record thus developed, the hearing examiner issued a ruling on July 22, 1977, placing the OHWM of the lake at an elevation corresponding to Contour 990 on the United States Geological Survey.⁸³

As a result of the ruling, the surface of the lake increased from about fourteen acres to more than nineteen-hundred acres.⁸⁴ Zinn's two-hundred acres of dry land now became part of the lake bed. The ruling also meant that abutting property owners, including Zinn's neighbor, would have riparian rights which had belonged solely to Zinn.⁸⁵

Faced with losing her land and her sole riparian ownership, Zinn petitioned for a rehearing.⁸⁶ The DNR granted the petition on August 29, 1977. Almost two years later, on March 14, 1979, the hearing examiner issued a new ruling, rescinding his previous order.⁸⁷ The new ruling established the OHWM at Contour 980.3 (mean sea level datum) as it always had been.⁸⁸

Zinn commenced a suit in inverse condemnation seeking damages against the State of Wisconsin alleging an unconstitutional taking of her property in that the State of Wisconsin deprived her of "all or substantially all the beneficial use" of her property including the right to convey the same or to develop it during the period of the taking.⁸⁹ The State moved to dismiss on several grounds including failure to state a claim and the doctrine of sovereign immunity. The trial court denied the motion and the State appealed. The court of appeals reversed, holding that Zinn failed to state facts sufficient to constitute a taking. The supreme court, however, reversed the appellate court and held that the DNR's original ruling constituted a taking.

82. *Id.* at 421, 334 N.W.2d at 69.

83. *Id.*

84. *Id.* See also, Respondent-Petitioner's brief at 3, *Id.*

85. See *infra* notes 102-03 and accompanying text.

86. *Zinn*, 112 Wis. 2d at 421, 334 N.W.2d at 69.

87. *Id.*

88. *Id.*

89. *Id.* at 421-22, 334 N.W.2d at 69-70. See Respondent-Petitioners brief at 10-11, *Id.*

2. WHAT CONSTITUTED A TAKING IN *ZINN*

In holding that Zinn failed to state a claim, the court of appeals relied on language in *Howell Plaza II*⁹⁰ that a temporary inability to develop one's property as a result of governmental action is insufficient to constitute a taking.⁹¹ The court reasoned that since the *granting of the petition* for rehearing (one month after the original DNR ruling) nullified whatever effects the original ruling might have had, the erroneous determination was for such a brief period that it could not constitute a taking.⁹² More importantly, the court found that the pleadings failed to show any "restriction" that the State placed upon the property either as a result of the original ruling or at anytime thereafter.⁹³ Finally, the court pointed out that once a rehearing was granted, the DNR would have had no legal authority to restrain development even if it sought to do so.⁹⁴

In reversing, the Wisconsin Supreme Court approached Zinn's taking claim differently. At the outset, the court identified the issue to be whether an erroneous administrative decision by the DNR can ever result in a taking.⁹⁵ The court found the resolution of the issue to be a function of three basic determinations. The first involved whether the DNR had the authority to make the declaratory ruling which might effect a taking.⁹⁶ In order to find a basis for that authority, the court turned to the nature of a DNR administrative proceeding. It found that the DNR is authorized by law to make determinations concerning the location of the OHWM of navigable lakes and streams.⁹⁷ Further, the court found that the DNR has the

90. 92 Wis. 2d 74, 284 N.W.2d 887 (1979) discussed *supra* notes 72-76 and accompanying text.

91. *Zinn v. State* (Wis. Ct. App. Dist. II, 1982) (unpublished opinion) *reprinted in* Respondent-Petitioner's brief, at App. 114, 117-18, *Id.*

92. *Id.* at App. 119.

93. *Id.*

94. *Id.*

95. *Zinn*, 112 Wis. 2d at 424, 334 N.W.2d at 71.

96. *Id.*

97. *Id.* at 429, 334 N.W.2d at 71 (citing WIS. STAT. § 30.10(1), (4)(b) (1981-82). Section 30.10 entitled *Declarations of navigability* provides in pertinent part:

(1) Lakes: All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters.

(4) *Interpretation . . .*

(b) The boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters shall be determined in conformity with the common law so far as applicable, but in the case of a lake or stream erroneously meandered in the original U.S. government survey, the owner of title to lands adjoining the meandered lake or stream, as shown on such original survey, is conclusively presumed to own to the actual shore lines unless it is first established in a suit

authority to make binding declaratory rulings.⁹⁸ Since the DNR determined the OHWM of McConville Lake and issued a binding declaratory ruling pursuant to law, the court held that the DNR did have the requisite authority to issue a legal restriction on the plaintiff's use of property.⁹⁹

Second, the court had to determine whether the DNR ruling in *Zinn* amounted to a legal restriction. It found that, prior to the DNR ruling, the ordinary highwater mark of the lake had been at contour 980.3.¹⁰⁰ After the original ruling, the mark was placed at contour 990, which in effect placed about two-hundred acres of plaintiff's dry land within the highwater mark of the lake.¹⁰¹ Under Wisconsin law, all land below the ordinary highwater mark is titled to the State of Wisconsin.¹⁰² This meant that Zinn lost her sole riparian rights, and her shoreland became open to public use under the "trust doctrine."¹⁰³ Therefore, the court concluded that the failure of the plaintiff specifically to allege "actual restriction on the use of [her] land as a result of the ruling" was not fatal to her claim.¹⁰⁴

Finally, the court had to determine whether the DNR's lack of "intent and authority" to take private property under the circumstances of the *Zinn* case could preclude a taking. Finding intent to be legally insignificant, the court found the "effect" of the DNR's action and the "impact" of that action upon the plaintiff determinative.¹⁰⁵ For the court, it was sufficient that the legal effect of the

in equity, brought by the U.S. government for that purpose, that the government was in fact defrauded by such survey. If the proper claims of adjacent owners of riparian lots of lands between meander and actual shore lines conflict, each shall have its proportion of such shore lands.

In Wisconsin, "[w]hen it is said that a water is navigable it is merely a different way of saying that it is public—public not only for navigation, but for hunting, fishing, recreation and for any other lawful purpose." *Muench v. Public Service Comm'n*, 261 Wis. 429, 506, 53 N.W.2d 514, 519 (1952) (quoting *Kanneberg, Wisconsin Law of Waters* 1946 Wis. L. REV. 345, 347). This access to public waters is known as the "public trust doctrine."

98. *Zinn*, 112 Wis. 2d at 425-26, 334 N.W.2d 71-72 (citing WIS. STAT. § 227.06 (1981-82)). Section 227.06 provides in relevant part:

(1) Any agency may, on petition by any interested person, issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. . . . A declaratory ruling shall bind the agency all parties to the proceedings on the statement of facts alleged. . . .

99. *Zinn*, 112 Wis. 2d at 426-27, 334 N.W.2d at 72.

100. *Id.*

101. *Id.*

102. *Muench v. Public Service Comm'n*, 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40 (1952); *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393 (1923).

103. *Zinn*, 112, Wis. 2d at 426, 334 N.W.2d at 71.

104. *Id.* at 427, 334 N.W.2d at 72.

105. *Id.* at 430, 334 N.W.2d at 73. Similarly, with regard to the DNR's authority to take private property, the court found that its authority to issue a legally binding ruling

DNR's decision was to vest title to two-hundred acres of Zinn's property in the State regardless of what the State said about its action.¹⁰⁶

While the force of the logic of the *Zinn* court to find a taking is considerable, the State and court of appeal's position concerning the import of "legal restriction" is understandable. The notion of legal restriction implies that the defendant must have *prevented* the plaintiff from developing her land. In *Zinn*, however, the State contended that the DNR ruling, though erroneous, applied to and was binding upon the parties only as to matters within the jurisdiction of the DNR.¹⁰⁷ To be sure, the DNR had jurisdiction to determine the location of the OHWM of the lake but not to determine title between parties¹⁰⁸ — a power reserved only to the courts. Nevertheless, the role the supreme court gave to the *effect* of the DNR decision in *Zinn* determined the outcome of the case. Thus, even though it is unlikely that Zinn could have been legally prevented from developing her land, on the basis of the DNR ruling alone, the ruling would have been sufficient legal authority to authorize Zinn's neighbors to obtain permits to build structures,¹⁰⁹ piers,¹¹⁰ docks and to carry on dredging¹¹¹ on her shoreline.

3. OFFICIAL IMMUNITY AND THE TEMPORARINESS OF THE TAKING

Zinn establishes that the immunity of officials when acting in a quasi-judicial context does not preclude the finding of a taking. *Zinn* raises the important question of whether, as a matter of policy, a taking should be found in a quasi-judicial context. The State contended that since decisions by administrative agencies are made objectively on the basis of the records before them and the evidence presented to them by the disputing parties, the State should not be

which had the *effect* of giving title to the State was sufficient authority to constitute a taking. *Id.*

106. *Id.* In imposing such absolute liability, the court seems to have broken away from its earlier position in *Wisconsin Power & Light Co. v. Columbia County*, 3 Wis. 2d 1, 87 N.W.2d 279 (1957) and *Public Service Corporation v. Marathon County*, 75 Wis. 2d 442, 249 N.W.2d 543 (1977). See *supra* notes 48-56.

107. *Zinn*, 112 Wis. 2d at 426, 334 N.W.2d at 71.

108. Moreover, administrative agency decisions generally do not have *res judicata* effect. *Fond du Lac v. Dept. of Natural Resources*, 45 Wis.2d 620, 173 N.W.2d 605 (1970); *Board of Regents v. Wisconsin Personnel Comm'n*, 103 Wis. 2d 545, 309 N.W.2d 366 (Ct. App. 1981). As such, Zinn would have been free to defend her title in court if the DNR laid claim to title on the basis of its ruling.

109. WIS. STAT. § 30.12 (1981-82).

110. WIS. STAT. § 30.13 (1981-82).

111. WIS. STAT. § 30.20 (1981-82).

liable for erroneous determinations resulting from the insufficiency of the record developed by the parties.¹¹² Moreover, the policy of maintaining the integrity of the administrative adjudicatory process should preclude the finding of a taking.¹¹³ In support of this contention, the State relied on the decision of the United States Supreme Court in *Butz v. Economou*.¹¹⁴ That case involved the issue of whether, to what extent, and what type of federal officials were entitled to immunity from damage suits for constitutional violations in the discharge of their official duties. The Court found that the need for immunity for federal officials varied with the nature of their functions and with the safeguards built into the execution of those functions to guard against unconstitutional acts.¹¹⁵ Finding that "adjudication within the federal administrative agency shares enough of the characteristics of the judicial process" and further finding that there exist a number of safeguards as a concomittant of this process, the Court held that federal adjudicators should be absolutely immune from damage suits.¹¹⁶

The court in *Zinn* found the holding of *Butz*, and the rationale upon which it rested, entirely inapposite to the State's contention against the finding of a taking. The court correctly determined that the issue in *Zinn* did not involve the civil immunity of the individual examiner for engaging in a governmental action which resulted in a taking even though it was done in good faith and non-negligently.¹¹⁷ As the court reasoned, if the possible civil liability of the individual official was to affect the outcome of a "taking" determination, surely the same rationale could serve to preclude the finding of an unconstitutional taking under an ordinance or statute enacted by legislators.¹¹⁸

The court also found unpersuasive the State's contention that a finding of a taking in this context would chill agency decision-making.¹¹⁹ The court determined that "[t]he applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches."¹²⁰ Moreover, since the notion of official immunity

112. Appellant's brief, at 14-15, *Zinn*.

113. *Id.*

114. 438 U.S. 478 (1978).

115. *Id.* at 512. These safeguards include insulation from political influence, precedent, the adversary nature of the process and the correctability of error on appeal. *Id.*

116. *Id.* at 512-13.

117. *Zinn*, 112 Wis. 2d at 430-31, 334 N.W.2d at 74.

118. *Id.*

119. *Id.*

120. *Id.*

would appear to be designed precisely to prevent the chilling effect, if any, of civil liability, the State's contention was misplaced.

Zinn also establishes that a taking is no less a taking because a governmental entity's power to undo what it did tends to make the taking temporary. Yet the court's previous statement in *Howell Plaza II* that the plaintiff "had been unable to develop [sic] his land only temporarily"¹²¹ seems to give precisely that implication. Thus, since the DNR ruling did not prevent Zinn from developing her land, the State argued that the DNR's restraint on Zinn's property was insufficient to constitute a taking and the court of appeals accepted this as one basis for dismissing Zinn's complaint for a failure to state a claim.¹²²

While it is true that the significance of the *Howell Plaza II* court's reference to the temporariness of the alleged taking is unclear and can be misleading, the brevity of the alleged taking was certainly not the basis of the outcome of the decision.¹²³ Even if it could be argued that this decision rested on the temporariness of the injury, however, the court's holding in *Zinn* has swept away this aspect of the *Howell Plaza II* decision. Even though the *Zinn* court found it clear that the taking was only temporary, because the DNR had later rescinded its original ruling, it quoted the opinion of Justice Brennan in *San Diego Gas & Electric v. City of San Diego*¹²⁴ for the broad proposition that the temporary or permanent nature of a taking, regardless of its context, is irrelevant to the issue of whether a governmental action has effected a taking. Quoting from that opinion, the court stated:

The fact that a regulatory "taking" may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional "taking." . . . This Court more than once has recognized that temporary reversible "takings" should be analysed according to the same constitutional framework applied to permanent irreversible "takings."¹²⁵

The predicate of the court's agreement with this opinion was its determination that the test for a reversible taking in Wisconsin is the

121. See *Howell Plaza II*, 92 Wis.2d 74, 86, 284 N.W.2d 887, 893 (1979).

122. *Zinn*, 112 Wis. 2d at 427, 334 N.W.2d at 72.

123. Even though the court in *Howell Plaza II* had stated "[a]t most, petitioner has been unable to develop his land only temporarily," its decision rested "[m]ore importantly [on the fact] that the commission did not impose any such legal restraint upon petitioner or its property." *Howell Plaza II*, 92 Wis. 2d at 86, 284 N.W.2d at 893.

124. 450 U.S. 621, 632.

125. *Zinn*, 112 Wis. 2d at 428-29, 334 N.W.2d at 73 (quoting *San Diego*, 450 U.S. at 657 (Brennan, J., dissenting)).

same as for an irreversible taking: the substantiality of the property owner's loss of beneficial use of her property regardless of the length of period during which she suffered such loss.¹²⁶ In other words, it is the quantum of harm and its impact upon the property owner rather than the length of time within which the harm occurred that is determinative to the taking issue. And as the court reasoned, the fact that a plaintiff regains the full use of his property by reason of the government's decision to change its position is irrelevant to the taking issue.¹²⁷ The court pointed out, however, that the length of the taking period may be a factor in determining whether there was a taking in the first place.¹²⁸ Implicit in this statement is the court's recognition that the longer the period, the greater the harm and the more likely that a taking will be found.

4. WHEN DID THE TAKING OCCUR IN *ZINN*?

Another significant aspect of the *Zinn* decision involves the question of when a taking occurs. The significance of this question should be apparent from the closing statements of the preceding Section. Because the length of period during which a taking allegedly occurs is itself an important factor in determining whether a property owner suffered a substantial deprivation constituting a taking, the point of time as of which a taking is reckoned affects the amount of deprivation and therefore also affects the question of whether there is a taking. Moreover, the point at which a taking occurs affects the amount of compensation because that point determines the length of the period for which compensation must be paid.¹²⁹

In *Zinn*, the court of appeals determined that the DNR's granting of the plaintiff's petition for a rehearing suspended whatever effect the original ruling may have had.¹³⁰ Therefore, it found that the original ruling was in effect only for slightly more than one month.¹³¹ The court based its conclusion on the provisions of section 227.12(2) of the Wisconsin Statutes.¹³²

126. *Zinn*, 112 Wis. 2d at 429, 284 N.W.2d at 73.

127. *Id.*

128. *Id.* at 427 n.5, 334 N.W.2d at 72 n.5.

129. *Id.*

130. *Zinn v. State* (Ct. App. Dist. II, 1982) (unpublished opinion) reprinted in Respondent-Petitioner's brief at App. 114, 118.

131. *Id.* at App. 119, *Zinn*.

132. WIS. STAT. § 227.12(2) (1981-82) provides:

The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

The plaintiff's claim for compensation, on the other hand, was for a much longer period. She alleged that the effect of the original ruling on the use of her property remained until the DNR rescinded its ruling more than a year and a half later.¹³³

The Wisconsin Supreme Court did not determine whether the alleged taking remained in effect until the DNR made its second determination and rescinded its original ruling.¹³⁴ However, for purposes of ruling on Zinn's appeal, the court found it sufficient that there was at least a temporary taking.¹³⁵ In reaching this result, the court quoted the rule that Justice Brennan proposed in *San Diego* to govern regulatory as well as other takings:¹³⁶

[O]nce a court establishes that there was a regulatory "taking," the Constitution demands that the government entity 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.¹³⁷

On the basis of this rule, the *Zinn* court held that Zinn lost title to her property for one month as of the original ruling and had her title clouded for the balance of the period ending on the date on which the DNR rescinded its ruling.¹³⁸ This must mean that the date of legal restriction in *Zinn* coincided with the date on which the DNR made its original ruling. It must also mean that as of that date Zinn began to suffer the impact of the legal restriction on her power to use her property.

The Brennan rule which the *Zinn* court cited, however, is ambiguous.¹³⁹ In the context of a zoning regulation, for example, the date on which a regulation "effects" a taking can be three points of time: 1) the date on which the regulation is enacted; 2) the date on which the owner is denied a variance or permit; and 3) the date on which the regulation is actually enforced. Since the general rule is that one must exhaust administrative remedies before bringing a suit for a taking,¹⁴⁰ the mere enactment of a regulation cannot effect a taking.

133. *Zinn*, 112 Wis. 2d at 427 n.5, 334 N.W.2d at 72 n.5.

134. *Id.* at 427-28 n.5, 334 N.W.2d at 72 n.5. The court remanded the factual determinations of the length of the taking and the damages flowing therefrom to the trial court. *Id.*

135. *Id.* at 427, 427 n.5, 334 N.W.2d at 72, 72 n.5.

136. *Id.* at 428, 334 N.W.2d at 72.

137. *San Diego*, 450 U.S. at 653-54.

138. *Zinn*, 112 Wis. 2d at 427 n.5, 334 N.W.2d at 72 n.5.

139. See *supra* note 125 and accompanying text.

140. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, 4 ZONING & PLAN. L. REP. 129, 135 (1981). But see, *Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416, 254 N.W.2d 310 (1977), where the Wisconsin Supreme Court recognized a "well-defined

In the administrative context too, three points of time can be relevant: 1) the date of an original ruling; 2) the date of rescission or modification; and 3) the date of actual enforcement. Justice Abrahamson's concurring opinion in *Zinn*¹⁴¹ seems to point up the significance of the ambiguity in Justice Brennan's rule as it relates to the doctrine of exhaustion of administrative remedies.¹⁴² Justice Abrahamson reasoned that the fact that the DNR had the right to reconsider its original ruling and that it granted Zinn a rehearing may mean that the DNR ruling was always subject to modification. This inchoate quality of the ruling, the Justice continued, may therefore never have given the ruling that degree of "finality" needed to effect a taking.¹⁴³ Thus, the Justice concluded that, even though Zinn survived the motion to dismiss, the trial court may still determine that under applicable law¹⁴⁴ the DNR's original ruling might never have taken effect.¹⁴⁵ Justice Abrahamson's concurrence is consistent with the general rule in eminent domain cases that the time of taking and evaluation of the award stems from the date that a governmental entity acquires effective dominion and control over the owner's property and not from the announcement or enactment of an ordinance or plan.¹⁴⁶

III. WHAT REMEDY IS COMPELLED ONCE A "TAKING" IS FOUND?

In the past, the finding of a taking in Wisconsin did not necessarily compel the remedy of compensation or money damages. Two questions have often surrounded this remedy. The first question is

distinction in applying this judicial policy [of exhaustion of remedies] to the statutory administrative remedies in zoning cases. . . . [A] challenge to the constitutional validity of a zoning ordinance presents a question of law. Such a challenge may properly be made by commencing an action for declaratory judgment and the doctrine of exhaustion of remedies is not applicable." *Id.* at 426, 254 N.W.2d at 316 (quoting *Kmiec v. Town of Spider Lake*, 60 Wis. 2d 640, 645, 211 N.W.2d 471, 473 (1973)). "The reason for this exception is that an appeal to an administrative agency would not have afforded the party adequate relief since the administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which the board derives its existence." *Id.*

141. 112 Wis. 2d at 438, 254 N.W.2d at 77.

142. See *supra* note 125 and accompanying text.

143. *Zinn*, 112 Wis. 2d at 438, 334 N.W.2d at 77.

144. Wis. STAT. § 227.12 (1981-82).

145. *Zinn*, 112 Wis. 2d at 427, 334 N.W.2d at 72.

146. *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); *City of Buffalo, v. J.W. Clement Co.*, 28 N.Y.2d 241, 255 N.E.2d 896, 321 N.Y.S.2d 345 (1971). In the official map cases too, the courts have held that no taking occurs until an owner applies for a permit on a mapped street. *Platt v. City of New York*, 276 A.D. 873, 93 N.Y.S.2d 738 (1949). See generally *Kucirek & Beuscher, Wisconsin's Official Map Law*, 1957 Wis. L. REV. 176.

associated with the police power/eminent domain distinction¹⁴⁷ while the second is predicated on the doctrine of sovereign immunity and its effect on the availability of the inverse condemnation remedy provided in section 32.10 of the Wisconsin Statutes.

A. Statutory Inverse Condemnation and Sovereign Immunity

The rule in Wisconsin is that "[i]n order to commence inverse condemnation proceedings, . . . a property owner must demonstrate that there has been either an occupation of his property within the meaning of sec. 32.10, Stats., or a taking, which must be compensated under art. I, sec. 13, of the Wisconsin Constitution."¹⁴⁸ Although the court has modified the test for what constitutes "occupation" to dispense with the traditional requirement of a showing of "physical occupation or possession" and has made occupation legally synonymous with taking, the claimant in inverse condemnation under sec. 32.10 must nonetheless additionally show that the governmental entity "occupying" his property is one with the power of condemnation.

One of the major issues that the *Zinn* case raised therefore was whether a sec. 32.10 remedy can apply against the State, or in the circumstances of this case, against the DNR. In *Konrad v. State*¹⁴⁹ the court addressed this precise question, under chapter 32 of the statutes, as it then existed, for the damming of a stream by the Conservation Commission which effected a taking of plaintiff's land by flooding it. Even though the court found that the State was a "person" within the meaning of the statute, it held that since the State was not expressly named as one of the entities who may condemn property the State could not be sued in inverse condemnation.¹⁵⁰ Despite its holding that the State was an improper party in matters of inverse condemnation under the statute, it found that the plaintiff could recover compensation by proceeding against the Conservation Commission itself. Consequently, it held that the existence of the statute entitling the plaintiff to proceed against the State agency satisfied the Constitutional guarantee of art. I, sec. 13 of the Wisconsin Constitution.¹⁵¹

147. See *infra* notes 173-81 and accompanying text.

148. *Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 388, 288 N.W.2d 794, 800; accord, *Howell Plaza I*, 66 Wis. 2d at 726, 730, 266 N.W.2d at 188, 190.

149. 4 Wis. 2d 532, 91 N.W.2d 203 (1958).

150. *Id.* at 538-39, 91 N.W.2d at 206.

151. *Id.* at 539, 91 N.W.2d at 207.

The Wisconsin Supreme Court has steadfastly held to its position that inverse condemnation under the statute is inapplicable against the state unless the state is specifically mentioned. Thus in *Herro v. Wisconsin Fed. Surp. P. Deve. Corp.*,¹⁵² the court stated that "[i]nverse condemnation does not apply against the state because the state has not consented to be sued."¹⁵³ While the meaning of this statement is not entirely clear, it seems to say that the state is immune from a suit in inverse condemnation unless there is a statute expressly waiving this immunity and permitting such suits according to conditions and procedures prescribed therein.

As in *Konrad*, so in *Zinn*, the court accepted the State's contention that the Wisconsin eminent domain law, embodied in chapter 32, by itself does not authorize an inverse condemnation suit directly against the State.¹⁵⁴ As in *Konrad*, so also in *Zinn*, the court found that sec. 32.02 which expressly names the agencies to which the legislation has delegated condemnation powers excludes the State from that list despite the fact that sec. 32.01 defines the term "person" as including the State.¹⁵⁵ Thus, the court was unwilling to broaden the scope of the inverse condemnation remedy under sec. 32.10 beyond that expressly permitted by the legislature, since to do so would have subjected the state to suit without its consent as legislatively expressed and as embodied in art. IV, sec. 27¹⁵⁶ of the Wisconsin Constitution. "Under this provision the legislature has the exclusive right to consent to suits against the state."¹⁵⁷

152. 42 Wis. 2d 87, 166 N.W.2d 433 (1969).

153. *Id.* at 117, 116 N.W.2d at 449.

154. *Zinn*, 112 Wis. 2d at 434, 334 N.W.2d at 75. However, WIS. STAT. § 32.02(12) (1981-82) would seem to allow inverse condemnation suits directly against the state because that section refers to any "person" which, under § 32.01, covers also the state.

155. See *Zinn*, 112 Wis. 2d at 434, 334 N.W.2d at 75.

156. WIS. CONST. art. IV, § 27 provides:

The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

157. *Zinn*, 112 Wis. 2d at 434-35, 334 N.W.2d at 75 (citing *Fiala v. Voight*, 93 Wis. 2d 337, 342, 286 N.W.2d 924, 927 (1980) (wrongful conversion of plaintiff's fish by DNR officers)). See also *Cords v. State*, 62 Wis. 2d 42, 49-50, 214 N.W.2d 405, 409 (1974). The doctrine of sovereign immunity is procedural in nature and when successfully raised deprives the court of personal jurisdiction over the state. Consequently, the state cannot be sued without its consent. *Lister v. Board of Regents*, 72 Wis. 2d 282, 291, 240 N.W.2d 610, 617 (1976). On the other hand, the court has abrogated the so-called governmental immunity defense of the state or any of its political subdivisions for tort actions, among others, on the theory that this immunity, unlike sovereign immunity, was judicially created, and therefore could be abolished notwithstanding legislative inertia to correct inequities and anomalies of the doctrine. *Hoeytz v. Milwaukee*, 17 Wis. 2d 26, 37, 115 N.W.2d 618, 623 (1962).

Similarly, the court found the same barrier also precluded a suit against the DNR.¹⁵⁸ Although the DNR has the power of condemnation in limited circumstances, which requires the consent of the legislature,¹⁵⁹ that was not the situation here. Thus, unlike the situation in *Konrad*, where the court found that the plaintiff's right to sue the state agency provided the necessary remedy, in *Zinn* the barrier of sovereign immunity stood as a total bar leaving the plaintiff without any remedy.¹⁶⁰ *Zinn*, therefore, urged the court to reconsider the interpretation it had placed on sec. 32.10 in *Konrad*.¹⁶¹ She argued that the State, as sovereign, has a plenary power of condemnation as an attribute of its sovereignty, and as such the legislative exclusion of the State from those empowered to condemn should not be a limitation on the State's liability.¹⁶²

The plaintiff's logic has an apparent compelling force; after all, the state *qua* state is the ultimate possessor and fountain of the power of condemnation. However, while this is true as an abstract proposition, historically the power of eminent domain has been an exclusively legislative function.¹⁶³ The legislature, as the representative of the people, must in the first instance determine who may be empowered to condemn, for what purposes, and under what procedures. Otherwise, the courts would be usurping legislative functions. This explains why the courts faithfully repeat the generally accepted axiom of law that "[e]minent domain statutes are in derogation of the common law rules and must be strictly construed."¹⁶⁴

There are limitations, however, to the prerogative of the legislature to hide behind the shield of sovereign immunity, as embodied in art. IV, sec. 27 of the Constitution, and to its exclusive power to determine the circumstances under which an inverse condemnation

158. *Zinn*, 112 Wis. 2d at 434, 334 N.W.2d at 75. The court's ruling is consistent with generally prevailing law in all jurisdictions because "the remedy of inverse condemnation, by the very premise which gives rise to it, is available only as against defendants who possess the power of eminent domain." 3 NICHOLS', *supra* note 10, at § 8.1[4], 18-39. *But see* *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982) where a contrary result was reached.

159. See WIS. STAT. § 32.02 (1981-82) entitled *Who May Condemn*, provides: The department of natural resources with the approval of the appropriate standing committees of each house of the legislature was determined by the presiding officer thereof and as authorized by law, for acquisition of lands.

160. *Zinn v. State* (Ct. App. Dist. II, 1982) (unpublished opinion) reprinted in Respondent-Petitioner's brief at App. 114.

161. *Id.* at 17-20.

162. *Id.* at 21.

163. See *Stoebeuck*, *supra* note 11, at 569.

164. *Maxey v. Redevelopment Authority of Racine*, 94 Wis.2d 375, 399, 288 N.W.2d 794, 805.

remedy will lie against the state. To deny such a remedy on the basis of sovereign immunity or the inadequacies of sec. 32.10 would have rendered nugatory the compensation clauses of the federal and state constitutions. Consequently, the court in *Zinn* was forced to reinterpret, or at least clarify, the import of *Konrad* and the relationship between art. IV, sec. 27 and art. I, sec. 13 of the state constitution. Accordingly, it concluded that the failure of the legislature to make provisions for the payment of compensation when property is taken is immaterial. "If there is no legislation that makes provision for compensation for property taken, '[t]he Constitution does; and that is enough'"¹⁶⁵ because compensation for property taken "[i]s a constitutional necessity rather than a legislative dole."¹⁶⁶

The court found an implicit "waiver" to the bar of sovereign immunity, and thus found that the State had consented to suit, in the "self-executing" nature of the constitutional guarantee of just compensation.¹⁶⁷ It reasoned that the doctrine of sovereign immunity and the just compensation clause must be read together. While the legislature has the sole power to provide specific procedures governing recovery in inverse condemnation, thereby implementing art. IV, sec. 27, where no such remedy is available under a statute the injured owner is free to base his suit directly under art. I, sec. 13 of the Constitution.¹⁶⁸ Therefore, the court concluded that the reach of art. IV, sec. 27 is limited by art. I, sec. 13, and held that Zinn stated a claim directly under the latter provision, which permits compensation.¹⁶⁹ Thus, Zinn was allowed to prove damages at trial on remand.

B. The Implications of ZINN for an Inverse Condemnation Remedy in Police Power "Takings"

In holding that Zinn was entitled to prove damages at trial, the court rejected the State's contentions that the exclusive method of error correction (administrative rescission) lay within the quasi-ju-

165. *Zinn*, 112 Wis.2d at 436, 334 N.W.2d at 76 (quoting *Laurel, Inc. v. State*, 169 Conn. 195, 200, 362 A.2d 1383, 1387 (1975)). See also *SBR v. Board of Cty. Comm'rs of Larimer*, 43 Colo. App. 14, 18-19, 601 P.2d 1082, 1085 (1979) (residence destroyed by government while coping with flood emergency is a taking).

166. *Zinn*, 112 Wis. 2d at 436, 334 N.W.2d at 76 (quoting *Luber v. Milwaukee County*, 47 Wis. 2d 271, 277, 177 N.W.2d 380, 383 (1980)).

167. *Id.* at 435, 334 N.W.2d at 76 (quoting RESTATEMENT (SECOND) OF TORTS § 895B comment a (1977)).

168. *Id.* at 437-438, 334 N.W.2d at 77.

169. *Id.*

dicial structure¹⁷⁰ and that creating a cause of action for an error in such a context has serious negative financial implications for the state coffer.¹⁷¹ The court, however, found persuasive Justice Brennan's opinion in *San Diego* regarding the following three propositions. First, the fifth amendment requires compensation for any sort of taking, whether it is accomplished through formal condemnation, physical invasion, occupancy, or police power regulation. Second, the obligation to compensate arises as soon as the taking occurs. Finally, mere invalidation of an offending police power regulation is insufficient to meet the compensation requirement.¹⁷²

The court's agreement with these propositions raises the question whether the court will treat police power "takings" in the same way as it treated the taking in *Zinn*. In the past, although the courts have frequently recognized the difficulty of drawing a sharp line between the police power and eminent domain,¹⁷³ they have just as frequently distinguished between the remedies available for constitutional violations of the two powers.¹⁷⁴ The remedies have been different, notwithstanding the fact that courts have found police power actions to be "takings." Thus, in the context of land use regulations, the usual remedy has been invalidation of an overly regulatory restriction.¹⁷⁵

170. Appellant's brief at 17, *Zinn v. State*, 112 Wis. 2d 417, 334 N.W.2d 67 (1983) (citing *Metzger v. Dept. of Taxation*, 35 Wis. 2d 119, 129, 150 N.W.2d 431, (1967)); *Kosmatka v. DNR*, 77 Wis. 2d 558, 253 N.W.2d 887 (1977); *Sewerage Comm'n of Milwaukee v. DNR*, 102 Wis. 2d 613, 621, 297 N.W.2d 40 *reh. denied*, 104 Wis. 2d 182, 307 N.W.2d 189 (1981).

171. Appellant's brief at 20-23 *Zinn*.

172. *Zinn*, 112 Wis. 2d at 428-31, 334 N.W.2d at 72-74.

173. For example:

The distinction between the exercise of the police power and condemnation has been said to be a matter of degree or damage to the property owner. In the valid exercise of the police power reasonably restricting the use of the property, the damage suffered by the owner is said to be incidental. However, where the restriction is so great that the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense. *Just v. Marinette County*, 56 Wis. 2d 7, 15, 201 N.W.2d 761, 767. *See also* *Stefan Auto Body v. State Highway Comm'n*, 21 Wis. 2d 363, 369, 124 N.W.2d 319, 323 (1963).

174. *See French v. City of New York*, 385 N.Y.S.2d 5, 350 N.E.2d 381, 39 N.Y.2d 589 (1976). The court there described the gravement of a regulatory "taking" challenge as being based on the invalid exercise of the police power under the due process clause rather than on an actual taking under the eminent domain clause. Similarly, the California Supreme Court refused to equate excesses of police power use with "the lawful taking of property by eminent domain. . . ." *Agins v. City of Tiburon*, 24 Cal.3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979).

175. For a recent example of an ordinance which was struck down because it effected a taking under the guise of the exercise of the police power, see *Nagawicka Island Corp. v. City of Delafield*, 117 Wis. 2d 23, 343 N.W.2d 816 (Ct. App. 1983). In that case, the Court of

Courts have refused to award compensation in police power taking cases on the theory that a purported exercise of the police power is different in kind from "[a]n actual appropriation . . . by title or governmental occupation."¹⁷⁶ On the other hand, they have been quick to find and award compensation for takings where governmental activity has caused physical damage to property or has interfered with property rights.¹⁷⁷ The courts have supported the award of compensation in the latter cases on the theory that injunctive relief is either against the public interest or insufficient to remedy a harm that the owner has already suffered.¹⁷⁸

The doctrinal distinction between the police power and eminent domain has been used to foreclose the inverse condemnation remedy in land use regulation cases raising the taking issue. Thus, in *Agin v. City of Tiburon*,¹⁷⁹ the California Supreme Court held that the only remedy open to a landowner aggrieved by a harsh land use regulation is to challenge the constitutional validity of the ordinance or the manner of its application to his property through mandamus or declaratory judgment; he may never seek compensation on the theory of inverse condemnation, however.¹⁸⁰ Indeed, the New York Court of Appeals has stated that the cases which have referred to a "taking" in the context of an invalid exercise of the police power were using the term only "metaphorically."¹⁸¹

In the past, the Wisconsin Supreme Court itself seems to have intended a similar metaphor. To be sure, it has acknowledged that the argument that a police power regulation will *never* constitute a taking, "[c]arried to its ultimate conclusion would make unneces-

Appeals invalidated the city's A-1 agricultural classification which required a minimum lot of three acres before any building could take place in an agricultural zone. Since the island property involved only two acres, the classification effectively prevented the owners from building on their property. The court held that the city's asserted justifications of health, safety and welfare were insufficient to sustain "complete confiscation" of the owners' land use. *Id.* at 28, 343 N.W.2d at 849.

176. *French v. City of New York*, 39 N.Y.2d 587, 595, 350 N.E.2d 381, 386, 385 N.Y.S.2d 5, 9-10 (1976).

177. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, illustrates the physical damage proposition while *United States v. Causby*, 328 U.S. 250 (1946) exemplifies the interference with title doctrine.

178. "Inverse condemnation . . . provides the remedy where an injunction would not be in the public interest. . . ." *Thornburg v. Port of Portland*, 233 Or. 178, 81-82, 376 P.2d 100, 106 (1962).

179. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

180. *Id.* at 273, 598 P.2d at 29-30, 157 Cal. Rptr. at 375.

181. *French*, 385 N.Y.2d 5, 9, 350 N.E.2d 381, 385, 39 N.Y.S.2d 587, 594. The source of confusion regarding the question whether the excessive use of the police power can ever result in a "taking" is Justice Holmes' dictum in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 443 (1922). See *supra* note 30.

sary the power of eminent domain."¹⁸² However, it has never awarded compensation for an unconstitutional regulation amounting to a "taking."

In one of the earliest cases which raised the taking issue in the context of a police power regulation creating without compensation a wild-life refuge on the defendant's property, the Wisconsin Supreme Court found the legislative act invalid insofar as it amounted to a "taking" of property in violation of the state constitution.¹⁸³ The court has consistently found such acts violative of the State constitution.¹⁸⁴ In the zoning field, the court has stated in dictum that, "[i]f the limitation on use is in the nature of a taking in whole or in part for public purposes, then the constitution requires compensation to be paid, as otherwise there is a taking without compensation."¹⁸⁵

Yet never before has the Wisconsin Supreme Court gone beyond voiding unconstitutional regulations to require the payment of compensation for the period in which an offending police power regulation was in effect.¹⁸⁶ This judicial reluctance to order damages during the interim period that a landowner's property may have been taken by an excessive use of the police power can sometimes produce harsh results. Yet, when the courts void an excessive regulation or order an injunction it is because it would otherwise result in a taking.

Under traditional doctrine, the facts of *Zinn* fit more the concept of eminent domain than that of the police power. In the typical regulatory taking case, title or possession remains with the owner. In *Zinn*, on the other hand, the court accepted the plaintiff's allegation that title or possession passed to the State, or at least that the

182. *State v. Herwig*, 17 Wis. 2d 442, 447, 117 N.W.2d 335, 338 (1962).

183. *Id.* In that case, the State, using its police power, created a game refuge over defendant's land which the defendant contended resulted in a taking without compensation. The State contended that the regulations in question, which forbade the defendant from shooting any game on his land despite the damage the latter caused to him, were in the interest of wild life conservation. The court rejected the State's contention and concluded that the state could accomplish its purpose only by purchase, lease or condemnation because the use of its police power in this case exceeded proper limits.

184. *See, e.g., Bino v. Hurley*, 273 Wis. 10, 76 N.W.2d 571 (1956) where the court held unconstitutional, because it constituted a "taking" without compensation, an anti-pollution ordinance which prohibited owners of land surrounding a lake from bathing, boating, or swimming in it.

185. *Buhler v. Racine County*, 33 Wis. 2d 137, 143, 146 N.W.2d 403, 406 (1966).

186. *See City of Kansas City v. Kindle*, 446 S.W.2d 807 (Mo. 1969) (discussing the old compensatory zoning approach); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978); *Ventures in Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (1979); *Brazil v. City of Auburn*, 23 Wash. App. 390, 598 P.2d 1 (1979).

State interfered with the plaintiff's title or possession. While this circumstance may distinguish *Zinn* from regulatory taking cases, the court found persuasive Justice Brennan's proposition in *San Diego* that the manner and context of the taking were constitutionally irrelevant.¹⁸⁷

In *San Diego*, Justice Brennan laid bare the doctrinal asymmetry implicit in the judicial willingness to find an unconstitutional regulatory "taking" and yet the judicial reluctance to award compensation in such cases. That case raised the issue of whether an inverse condemnation remedy is available to redress overly restrictive zoning regulations. The Supreme Court declined to rule on the issue because it determined that there was no final judgment from the state appellate court and dismissed the appeal for want of jurisdiction.¹⁸⁸ However, four Justices dissented and, finding that there was a final judgment, reached the merits.¹⁸⁹ On the merits, the dissent concluded that the "open space" zoning involved in the case effectively took the beneficial use of plaintiff's property.¹⁹⁰ As such, since "[n]othing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable,"¹⁹¹ the dissent concluded that the Just Compensation Clause compels the payment of damages for a temporary reversible police power taking.¹⁹²

Justice Brennan's conclusion in *San Diego* is based on two major premises. First, both as a logical and practical matter, the payment of compensation is necessary to make the landowner whole for the period during which he suffered harm as a consequence of a taking.¹⁹³ Implicit in this is the recognition that the traditional invalidation remedy is inadequate to make a landowner whole. Second, from the government's point of view, the benefit it derives from the regulation is no less than the benefit it would have acquired had it proceeded in formal condemnation.¹⁹⁴

187. *Zinn*, 112 Wis. 2d at 429, 334 N.W.2d 72-73.

188. 450 U.S. 621, 633 (1981).

189. *Id.* at 637. Justices Stewart, Marshall and Powell joined Brennan's dissent. In a concurring opinion, Justice Rehnquist stated that if he "were satisfied that this appeal was from a final judgement or decree of the California Court of Appeals . . . I would have little difficulty agreeing with much of what is said in the dissenting opinion of Justice Brennan." *Id.* at 633-34.

190. *Id.* at 652-53.

191. *Id.* at 657.

192. *Id.*

193. *Id.* at 655, 657.

194. *Id.* at 652-53. Justice Brennan recognized, however, that "[a] different case may arise where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no 'public use.'" *Id.* at 656 n.23. Nevertheless,

Justice Brennan's opinion in *San Diego* has begun to play a significant role in recent developments in the "takings" area.¹⁹⁵ In *Hernandez v. City of Lafayette*,¹⁹⁶ the Fifth Circuit Court of Appeals applied the Brennan rule as if it were a holding. *Hernandez* was a section 1983¹⁹⁷ claim by a landowner against the city and its mayor for alleged deprivation of property without due process of law and without compensation in violation of the fifth and fourteenth amendments as a result of the city's failure to rezone the plaintiff's land. Even though the court noted that *San Diego* was a suit under state law, it found Justice Brennan's reasoning equally applicable to a section 1983 suit.¹⁹⁸ It concluded that the plaintiff was entitled to

even in such a case, a landowner may bring an action under section 1983 for a fourteenth amendment due process violation. *Id.* See also *infra* note 78 and accompanying text.

195. *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981), expressly relied on Justice Brennan's opinion to hold that a regulatory taking of plaintiff's leasehold rights is compensable under the fifth amendment. In so holding, the court rejected the City of Milwaukee's argument that, since the plaintiffs in the case were tenants of uninhabitable tenements, the latter had no enforceable rights to begin with. It also rejected the City's argument that police power enforcement of a housing code does not result in a taking which is subject to compensation. See also *Burrows v. City of Keene*, 121 N.H. 590, 432 A.2d 15 (1981) where the court again relying on Justice Brennan's opinion held that the City's zoning of plaintiff's property such as to include it in a conservation district constituted a compensable regulatory taking.

196. 643 F.2d 1188, reh'g denied, 649 F.2d 336 (5th Cir. 1981).

197. 42 U.S.C. § 1983 (1976) (amended in 42 U.S.C. § 1983 (1979)) provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of State or Territory, 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 action at law, suit in equity, or other proper proceeding for redress.

The term "person" includes municipalities and other local governing bodies. See *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978). Section 1983 applies to zoning cases. In *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the court also denied eleventh amendment immunity to the Tahoe Regional Planning Agency (an interstate compact agency) but held that the agency members are absolutely immune from a damage suit when they act in a legislative capacity. Section 1983, however, does not provide a cause of action against the state because of the state's eleventh amendment immunity. See *Quern v. Jordan*, 440 U.S. 332 (1979). The holding of *Quern*, therefore, protects state land use regulation from attack. It should be noted that a section 1983 damage claim is, of necessity, different from an inverse condemnation claim. Although the measure of damages in a section 1983 claim includes the damages caused a landowner by his inability to develop or use his property during the period an unconstitutional action was in force, it does not seek forced compensation for the property. Nevertheless, a section 1983 claim parallels an inverse condemnation claim. See Stubbs, *Use of Civil Rights Law by Property Owners*, 1981 INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN, SOUTHWESTERN LEGAL FOUNDATION 213, 225; see also Bley, *Use of the Civil Rights Acts to Recover Money Damages for the Overregulation of Land*, 14 URB. LAW. 223 (1982).

198. *Hernandez*, 643 F.2d at 1200.

prove damages "in an amount equal to just compensation for the value of the property during the period of the 'taking.'"¹⁹⁹

Although the *Hernandez* court found the Brennan rule applicable to section 1983 suits, it introduced a major modification to it. It questioned the wisdom of establishing as, Justice Brennan proposed, the date of taking as the date of the enactment of an ordinance. Therefore, it stated that a taking does not occur "until the municipality's governing body is given a realistic opportunity and a reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity."²⁰⁰

The *Hernandez* modification of the Brennan rule is reasonable and accords with the notion of exhaustion of administrative remedies.²⁰¹ First, until a landowner has applied for a variance or permit, it is difficult to determine whether he has suffered any harm to begin with. Second, considering the pervasiveness and importance of land use regulations, the regulating authorities should be given an opportunity to consider the effects of a regulation on a particular individual and to make particularized determinations. Finally, such a rule would, on the one hand, offer a governmental agency an opportunity to save itself from potential financial liability by acting expeditiously and, on the other hand, would enable property owners to force reasonably quick decisions by the government.

The Brennan rule as modified by *Hernandez* is sound and should be adopted in Wisconsin. Hazardous and premature as it may be to predict in this murky area, the Wisconsin Supreme Court's willingness to find a compensable temporary taking in an unprecedented context and its unqualified agreement with Justice Brennan's rule may well indicate the path taking jurisprudence will take in Wisconsin. Moreover, quite apart from the court's further agreement with Justice Brennan that, ". . . the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches,"²⁰² the policy arguments themselves do not conclusively militate against requiring the payment of compensation in police power taking cases.

199. *Id.*

200. *Id.*

201. See Freilich, *Solving the "Taking" Equation: Making the Whole the Sum of its Parts*, 15 URBAN LAW 447, 473 (1983).

202. *Zinn*, 112 Wis. 2d at 431, 334 N.W.2d at 74 (quoting *San Diego*, 450 U.S. at 661 (1980)).

C. *The Contending Policy Considerations*

The notion of allowing the remedy of inverse condemnation²⁰³ for police power regulations, particularly those involving zoning, has been questioned on various policy grounds.

The California Supreme Court²⁰⁴ has noted some of these concerns: 1) the threat of monetary relief will have a chilling effect on police power regulatory functions and discourage innovative planning; 2) inverse condemnation awards will saddle local governments with unlimited financial burdens and thereby render budgeting processes difficult; 3) a court to grant monetary relief in such cases "seems" an usurpation of legislative power; 4) determining the amount of compensation will be difficult; and 5) placing the plaintiff in the position he would have been before the zoning ordinance by issuing an injunction is a sufficient remedy.²⁰⁵

As persuasive and strong as these considerations may be, they can be countered with equally strong—perhaps even stronger—countervailing policies. First, underlying the taking test in Wisconsin is a fundamental policy judgment that weighs public benefits against individual losses. In other words, as the court has steadfastly said, where the burden of a police power restriction on an individual for the benefit of the public is so great that it is more than he should bear as a member of the public, the restriction will be held to constitute a constructive taking.²⁰⁶ Implicit in this balancing process is some notion of fairness²⁰⁷ which protects the individual from

203. Hagman, *supra* note 140, suggests a "third alternative," i.e., payment of "interim damages."

204. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979). See also Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1450 (1974); Baumgardner, "Takings" Under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances, 30 S.W.L.J. 723, 736-38 (1976).

205. *Agins*, 24 Cal. 3d at 275-77, 598 P.2d at 30-31, 157 Cal. Rptr. at 377-78. See also, Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L. Q. 491, 499 (1981). In this commentator's view, the position that equates excessive land use regulations with eminent domain takings and compels compensation in both cases suffers from a "compensation syllogism." *Id.* at 498. The weakness of this position, however, is that its doctrinaire and dogmatic adherence to the police power/eminent domain distinction compels it to elevate form over substance: that is, to deny compensation just because a case presents the exercise of the police power even when its effects are as harsh as when eminent domain is involved is to deny the fundamental policies served by the Just Compensation Clause. See also *infra* note 207.

206. *Just v. Marinette County*, 56 Wis. 2d 7, 15, 201 N.W.2d 761, 767 (1972).

207. As Justice Frankfurter said in *United States v. Dickinson*, 331 U.S. 745, 748 (1947): "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure. . . ." Professor Costoñis has also suggested that a so-called "accommodation power" looks to "fairness" as the most reasonable means of reconciling the police power's

the excesses of governmental action, even when done in the name of the public good. That excess is measured by the taking test which requires a determination whether a restriction deprives a property owner "of all or substantially all beneficial use of his property."²⁰⁸ At the same time, as the court indicated in *Howell Plaza I*, one major reason that a claimant in inverse condemnation in public improvement cases must allege loss of all or substantially all of the use of his property is precisely to allow a governmental entity to exercise its legislative judgment.²⁰⁹

Implicit in the test, then, is the conviction that beyond a certain point the policy of protecting a government entity's legislative function collides with the constitutional guarantees of the taking and compensation clauses. Significantly, that point of collision, absent physical invasion, is the same whether the case involves police power regulations or condemnation blight. It would thus be anomalous and unfair to deny recovery in police power taking cases simply because police power and eminent domain may be different or have differing doctrinal bases.

Second, assumptions to the contrary notwithstanding, the mere repeal or judicial invalidation of a police power regulation does not compensate a landowner for the loss, no matter how great, that he may have suffered as a result of the regulation.²¹⁰ The argument that cautions against imposing considerable liabilities against the government ignores the staggering losses that overly harsh regulations can impose on landowners.²¹¹

Third, the present structure of remedies, which is cast in terms of a total win or loss, is destructive of a comprehensive zoning plan since, under the present system, if a landowner successfully attacks a zoning law, his land goes completely unregulated.²¹² If inverse condemnation or interim damages were allowed, however, the pres-

absence of compensation and the eminent domain's requirement of "Just Compensation." Costonis, *supra* note 29 at 1049-60.

208. *Just v. Marinette County*, 56 Wis. 2d at 15, 201 N.W.2d at 767.

209. *Howell Plaza I*, 66 Wis. 2d at 728-29, 226 N.W.2d at 189-90.

210. In *San Diego*, 450 U.S. at 655 n.22, Justice Brennan indicates: "[t]he instant litigation is a good case in point. The trial court, on April 9, 1976, found the city's actions effected a 'taking' of appellant's property on June 19, 1973. If true, then appellant has been deprived of all beneficial use of its property in violation of the Just Compensation Clause for the past seven years." Moreover, "[i]nvalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity." *Id.* Indeed, according to the advice of a California city attorney to fellow city attorneys, if the battle is lost in the courts, the war outside is not: "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN." *Id.*

211. Hagman, *supra* note 140, at 134.

212. Baumgardner, *supra* note 204, at 737.

sure on the landowner to have a restriction on his land lifted and the pressure on the courts to do so would be minimized.²¹³

Fourth, the threat of financial liability may also help to induce governing bodies and citizens to consider carefully and seriously the consequences of a land use restriction and produce more rational bases of decisionmaking. If the consequences of a zoning restriction are to be felt only by the few, however, the majority are not likely to consider them with care, responsibility, and fairness.²¹⁴

Fifth, the fear that local governments will be faced with unlimited liability can be mitigated by adopting the "reasonable time" standard that the *Hernandez* court enunciated. Moreover, the fact that the taking will be found only when there is a total or substantial loss suggests that few takings requiring compensation are likely to be found. Also, since the measure of damages is the difference between the value of the property as regulated and its value as it could have been constitutionally regulated,²¹⁵ the possible financial exposure of the government will be greatly reduced. Finally, proof that the restriction was the proximate cause of the substantial or total loss of a landowner's property, apart from other factors such as inflation, can be difficult.

The contending policies reviewed above indicate that the case against inverse condemnation or interim damages for police power takings is not justified in principle or practice. Since the fifth amendment and its Wisconsin counterpart are designed to bar the government from imposing public burdens on a few people, and since the police power and eminent domain both can secure public benefits, denial of inverse condemnation recovery in police power cases merely because police power is the theory for the recovery is an argument based on formal distinctions rather than on substance. *Just v. Marinette County*²¹⁶ is instructive on this point. The court upheld the ordinance in that case in order to preserve the environment in its natural and pristine state. While environmental preservation is surely a laudable goal, it need not have been achieved by, in effect, forcing the landowner to dedicate the land to public use. An alternative would have been to uphold the ordinance but to compensate the owner for his permanent loss. The solution was probably not avail-

213. *Id.*; see also Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U.L. REV. 1238, 1253 (1960).

214. Dunham, *supra* note 213, at 1253-54.

215. Hagman, *supra* note 140, at 132.

216. 56 Wis. 2d 7, 201 N.W.2d 761 (1972). The court has since limited the force of its holding in that case to the special concerns of environmental legislation. See *Howell Plaza II*, 92 Wis. 2d at 85, 284 N.W.2d at 892.

able to the court because the taking jurisprudence dogmatically associates one remedy with one form of power or other. This persistence in an all or nothing approach, however, can drain the federal and state guarantees of compensation of their content in particular cases.

IV. CONCLUSION

Zinn presented the Wisconsin Supreme Court with an unprecedented "taking" question. It thus provided the court with a major opportunity to clarify some of the ambiguities of prior case law. *Zinn* has established that a taking is no less a taking because it is temporary. It has further established that once a taking is found, albeit temporary, the Constitution demands payment of compensation and that the doctrine of sovereign immunity is no bar to a claim of taking. Furthermore, although the test for taking in Wisconsin is rather restrictive, *Zinn* stands for the propositions that the test is uniform and that the context of the taking is constitutionally irrelevant.

The *Zinn* court's adoption of a unitary test for a variety of contexts, absent physical invasion, and its finding of a compensable temporary taking in an unusual context suggest that *Zinn* may have implications on the compensability of regulatory temporary takings. The court's broad agreement with the *San Diego* dissent regarding the constitutional irrelevance of the context and duration of taking makes the suggestion even stronger.

Awarding compensation for temporary takings is bound to expand to some degree the scope of inverse liability of the state as well as some local governments. For that reason, some have advanced policy grounds to limit the remedy for regulatory takings to mere invalidation of a police power regulation. While the force of these policies is considerable, equally forceful are the policies militating in favor of compensation in order to protect landowners from severe uncompensated losses. In Wisconsin, moreover, since the restrictiveness of the taking test is itself a product of these same competing policies, and allows a finding of taking only in extreme cases, it would be unfair to leave the individual owner with all the losses despite "express" constitutional guarantees, simply because a piece of legislation happens to be enacted under the police power. Therefore, in the future, courts should drop the "taking" metaphor and the all-or-nothing approach to remedies and allow inverse condemnation recovery even in zoning cases once they have determined that a regulation has resulted in a taking.

Finally, whether or not *Zinn* governs regulatory cases, the *Zinn* opinion and that of *San Diego* are bound to send a powerful message both to the regulators and the regulated. The enhancement of the protection of private property that these two opinions represent is likely to encourage landowners to seek damages instead of injunctions they have sought in the past. At the same time, if a regulatory taking is held to be compensable, the regulators will be more likely to plan carefully and within constitutional limits than they have been heretofore.

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