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Devines v. Maier: The Seventh Circuit Extends the Right of Just Compensation to Tenants for the Taking of Their Leasehold

INTRODUCTION

In Devines v. Maier, the Seventh Circuit Court of Appeals held that tenants ordered by the City of Milwaukee to vacate their apartments due to uninhabitable building conditions have a constitutional right to just compensation for the taking of their leasehold interests. The court recognized that the city's order to vacate the premises placed a significant economic burden upon the tenants. Consequently, the court determined that the fairness dictated by the "takings clause" of the fifth amendment mandated that this burden, which resulted from the valid exercise of a state police power, be distributed among the public as the beneficiaries of state action.

Traditionally, the protection of the "takings clause" in a rental context has been afforded only to commercial tenants with long-term leases. Devines is constitutionally significant because it is the first case to extend the reach of the "takings clause" to residential tenants with month-to-month tenancies who face the prospect of displacement from their neighborhood as a result of the valid exercise of a state police power. Devines may have a substantial impact upon municipalities because a precedent

1. 665 F.2d 138 (7th Cir. 1981).
2. Id. at 146.
3. The fifth amendment provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
5. Devines, 665 F.2d at 146.
6. See, e.g., Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295 (1976); United States v. General Motors Corp., 323 U.S. 373 (1945). Month-to-month tenancies, such as those involved in the Devines case, have historically been considered to be non-compensable when taken by the government. 2 M. Friedman, Friedman on Leases 505 (1974).
7. The concept of compensation for the taking of private property by the state had its origins in England. In response to pressures from owners of freeholds who were fearful of expropriation of their land by the King, a compensation provision was included as Chap.
requiring governments to pay to residential tenants damages flowing from the enforcement of valid building code regulations now exists.\(^8\)

While the Seventh Circuit clearly recognized the plaintiffs’ constitutional right to just compensation, the court did not address the issue of what the appropriate measure of just compensation should be for the taking.\(^9\) Rather, the court delegated this task to the district court for determination on remand. Due to the dissatisfaction of both parties with the subsequent determination by the lower court, the question of damages is currently pending before the Seventh Circuit on the basis of cross-appeals from the district court’s order.\(^10\)

This note will discuss the implications of the *Devines* decision from both a constitutional perspective and from the standpoint of damages. After reviewing the law concerning police power takings, the constitutional significance of *Devines* will be analyzed. Second, the note will examine the question of what compensation is just for the taking of plaintiffs’ leasehold interests. The note will conclude with a discussion of the potential impact *Devines* could have upon urban housing policy.

### The Taking Clause and Police Power Regulations

The dispute over whether just compensation for a taking of private property is constitutionally mandated when the govern-

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\(^9\)The potential for municipal liability is far-reaching. If the measure of compensation recommended by the plaintiffs in *Devines* were accepted, each class member could recover up to $4,500.00 over four years in just compensation. See infra notes 125-35 and accompanying text.

\(^10\)Timely appeals of the district court’s order, which was entered on January 21,
ment destroys the value of the property while regulating in the public interest has raged for sixty years. In Pennsylvania Coal v. Mahon, the majority opinion of Justice Holmes and the dissent of Justice Brandeis eloquently articulated both sides of the issue. Justice Holmes wrote that in certain instances government must pay just compensation for costs borne by private parties as a result of valid public regulation. Justice Brandeis countered that the fifth amendment only dictates just compensation when government acquires property for a public purpose.

Some commentators and courts argue that Justice Brandeis was correct in concluding that a valid exercise of state police power can never accomplish a taking. These critics of the Pennsylvania Coal decision look to the Supreme Court case of Mugler v. Kansas to support their view that the Framers of the Constitution did not intend to extend the protection of the “takings clause” to those economically burdened by valid police power regulations. The existence of two lines of cases in the area of police power takings, one inspired by Pennsylvania Coal and the other by Mugler, helps to distinguish a non-compensable regulation from a compensable taking, “(t)he lawyer’s equivalent of the physician’s hunt for the quark.”

Mugler v. Kansas is the leading case holding that police power regulation of property and governmental acquisition of property represent differences of kind, the former non-compensable under the fifth amendment and the latter compensable. In Mugler, a brewery owner challenged a Kansas statute which made criminal the manufacture or sale of intoxicating liquors. The brewer claimed that the regulation rendered his business valueless and sought just compensation. The Supreme

11. 260 U.S. 393 (1922). Pennsylvania Coal has been called, “the keystone of all subsequent ‘taking’ law.” F. Bosselman, D. Callies & J. Banta, supra note 7, at 126.


13. Id. at 417 (Brandeis, J., dissenting).

14. “Although fifty years have passed, it is not too late to recognize that Justice Brandeis was right.” Citizens Advisory Comm. on Envtl. Land Use and Urban Growth, The Use of Land 174-75 (1973). See also Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149-50 n.5 (1971).

15. 123 U.S. 623 (1887).


17. 123 U.S. 623 (1887).

18. Id. at 669.
Court denied the claim on the ground that the state law was a valid police power regulation to abate a public nuisance.\textsuperscript{19} The first Justice Harlan reasoned for the Court that the states, in ratifying the fourteenth amendment, did not intend to bargain away their inherent police powers.\textsuperscript{20} Because public nuisance abatement was a legitimate exercise of Kansas' police power, the Court held that a prohibition on use of the brewery did not constitute a taking.\textsuperscript{21} For the Court, the fundamental distinction between a non-compensable police power regulation and a compensable acquisition of property by government was that, when regulating property, the state was not appropriating property for its own use as it was in a proceeding to acquire title to property.\textsuperscript{22} 

\textit{Mugler} established the constitutional principle that police power regulations abating public nuisances arising on private property are non-compensable so long as the government does not acquire title to property.\textsuperscript{23} Commentators have termed this principle the "noxious use" exception to the requirement of just compensation for a taking.\textsuperscript{24} Underlying this exception is the theory that parties who are at fault for creating a nuisance should not be able to recover just compensation when the government acts to protect the public from harm for which the private party is responsible.\textsuperscript{25} The Supreme Court has determined that

\begin{itemize}
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id. at 664.
\item \textsuperscript{21} Id. at 669.
\item \textsuperscript{22} Id. Eight years after \textit{Mugler}, in the case of \textit{Sweet v. Rechel}, 159 U.S. 380 (1895), Justice Harlan found a compensable taking occasioned by a Boston ordinance passed pursuant to Boston's police power. The ordinance authorized Boston to take temporary title to swampy land for the purpose of filling it in. Justice Harlan found a taking because the owners were deprived of all use of their property by the regulation, whereas the brewer in \textit{Mugler} had the option to convert the brewery into a legal use. \textit{Id.} at 407.
\item \textsuperscript{23} 123 U.S. at 669.
\item \textsuperscript{25} Michelman, \textit{supra} note 24, at 1196-1202. The so called "fault rationale" for the "noxious use" exception to the just compensation clause was established by Justice Harlan in \textit{Mugler}.
\end{itemize}

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not, and . . . cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason
several types of land-use regulations abating public nuisances are non-compensable on the basis of the “noxious use” exception.\textsuperscript{26}

\textit{Pennsylvania Coal v. Mahon,\textsuperscript{27}} while not reversing \textit{Mugler} and its progeny, adopted a different standard for determining whether a government may confiscate private property under the aegis of exercising its police power. \textit{Pennsylvania Coal} involved a claim by the plaintiff company that Pennsylvania, by enacting the Kohler Act, a statute barring coal exploration underneath homes, took the company’s property without just compensation. The Supreme Court found the Kohler Act unconstitutional for its failure to provide just compensation.\textsuperscript{28}

Justice Holmes stated the oft-quoted rule: “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.”\textsuperscript{29} For Justice Holmes, the key factors in determining whether a regulation went too far were the extent of the diminution occasioned by the regulation and the sufficiency of the public interest involved.\textsuperscript{30} In \textit{Pennsylvania Coal}, he found that the Kohler Act totally diminished the value of the company’s mining rights and that this diminution outweighed the public interest in maintaining the Mahon’s home.\textsuperscript{31}

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\textsuperscript{26} See, e.g., Goldblatt v. Hempstead, 369 U.S. 590 (1962) (no compensation is owed to owner due to regulation forbidding use of land as a gravel pit); Miller v. Schoene, 276 U.S. 272 (1928) (regulation compelling owner to cut down diseased cedar trees without just compensation is not a taking); Hadachek v. Sebastian, 239 U.S. 394 (1915) (regulation forbidding owner to operate a brickworks is not a taking).
\textsuperscript{27} 260 U.S. 393 (1922).
\textsuperscript{28} Id. at 414.
\textsuperscript{29} Id. at 415. The \textit{Pennsylvania Coal} standard is critiqued by Bosselman, Callies, and Banta, supra note 7, at 238-39. They contend: “The idea that too extensive regulation of the use of land could constitute a taking was an invention of the early twentieth century...” and is not grounded in historical analysis of the Constitution. Id.
\textsuperscript{30} 260 U.S. at 414.
\textsuperscript{31} Id. at 414-15. In a famous dissent, Justice Brandeis argued that the Just Compensation clause of the fifth amendment protects owners only from the seizure of their fee interest in land by the government. Valid police power regulations which are appropriate means to achieve a legitimate public end, in Brandeis’ view, could never accomplish a taking. Id. at 417. Brandeis asserted:
\end{flushright}
The Pennsylvania Coal analysis of police power takings, therefore, differs radically from the Mugler analysis. Justice Holmes did not view governmental acquisition of property and police power regulations as two separate kinds of government action as Justice Harlan did. Rather, Justice Holmes placed regulations affecting private property upon the same continuum as governmental acquisition and measured the compensability of a regulation by its proximity to the acquisition end of the continuum. Under the Holmes formulation, one whose property loses value due to regulation has the possibility of recovering just compensation in some instances. In contrast, under Harlan's analysis in Mugler, the party injured by a valid regulation has no hope of recovering just compensation.

A spate of municipal zoning and land use regulation in the 1960's and 1970's spawned a number of Supreme Court cases relying upon Pennsylvania Coal to analyze police power/taking issues. Of these cases Pennsylvania Central Transportation Co. v. New York City presents the most complete analysis of the police power/taking issue since Pennsylvania Coal. Penn Central challenged New York City's Landmark Preservation Law because, pursuant to the law, New York City denied Penn Central permission to develop the airspace above Grand Central Station. Penn Central contended that the denial constituted a taking.

Every restriction upon the use of property imposed by the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the state of rights in property without just compensation. But restriction imposed to protect public health, safety or morals from dangers threatened is not a taking.

Id.

32. Justice Holmes first framed the issue of whether police power regulation differs from governmental acquisition of property as a matter of degree or kind when he sat on the Massachusetts Supreme Court. Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889) (upholding state law prohibiting fences over six feet as a noncompensable police power regulation). See also Sax, supra note 14, at 149; F. Bosselman, D. Callies & J. Banta, supra note 7, at 321.

33. 260 U.S. at 415.


36. New York City's Landmark Preservation law regulated architectural changes to structures designated as historic sites. Owners of historic buildings were required to submit any proposed alterations in their structure to a Landmarks Commission for approval. The Commission denied Penn Central's proposed alteration to Grand Central Station. Id. at 116-17.
taking of private property requiring just compensation.

The Supreme Court found no compensable taking because the regulation did not totally destroy the value of Grand Central Station to Penn Central.\(^{37}\) Justice Brennan, writing for the majority, stated that there is no set formula for determining when justice and fairness require just compensation in the case of police power regulation.\(^{38}\) Echoing Holmes, he labeled the determination of whether compensation is due an "ad hoc factual inquiry."\(^{39}\) The two key factors in the inquiry are: the economic impact of the regulation on the claimant and the character of the governmental action.\(^{40}\)

To prevail on a taking claim, the plaintiff must, according to \textit{Penn Central}, demonstrate that the challenged state action completely destroys the reasonable value of the property.\(^{41}\) While the character of the governmental action at issue was identified by the \textit{Penn Central} Court as an important consideration in determining when a taking occurs, the Court did state in a footnote that one form of government action, nuisance abatement, may no longer be entitled to its status as an exception to the requirement of just compensation.\(^{42}\) The footnote indicates that fault in creating a nuisance, which was key to the \textit{Mugler} Court's decision to deny the brewer compensation, should no longer be a jus-

\footnotesize{
37. 438 U.S. at 137.
38. \textit{Id.} at 124.
39. \textit{Id.} In \textit{Pennsylvania Coal}, Justice Holmes stated that "the question [of whether a compensable taking has occurred] depends upon the particular facts." 260 U.S. at 413.
40. 438 U.S. at 124.
41. \textit{Id.} at 137. The test enunciated in \textit{Penn Central} for determining whether there is a taking involves two steps: first a court must examine the character of the governmental regulation to ensure that the regulation in question is a valid means for achieving a legitimate governmental goal. If the regulation is valid the court proceeds to the second step which is to determine the nature and extent of the interference with the plaintiff's "distinct investment-backed expectations." \textit{Id.} at 124. Compensation is required if the impact of the regulation is so severe as to destroy the plaintiff's property interest. \textit{Id.} at 136. The \textit{Penn Central} test has been applied in five recent Supreme Court cases: San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting and expressing the view of at least five members of the Court as to the merits) (taking found when city rezoned utility's land from industrial to recreational use); Agins v. City of Tiburon, 447 U.S. 255 (1980) (no taking found when city rezoned plaintiffs valuable development parcels from one structure per acre to one structure per five acres); Prune-yard Shopping Center v. Robins, 447 U.S. 74 (1980) (no taking found in requirement that shopping center owners allow petitioning on their property); Andrus v. Allard, 444 U.S. 51 (1979) (no taking found when state law limited the commercial sale of rare bird artifacts); Kaiser-Aetna v. United States, 444 U.S. 164 (1979) (taking found when federal government required public access to private marina).
42. 438 U.S. at 133 n.30. See supra notes 23-26 and accompanying text.
}
tification for denying recovery of compensation in a police power/taking case.\(^{43}\)

The *Penn Central* analysis was recently applied by the Supreme Court in *San Diego Gas & Electric Co. v. City of San Diego*.\(^{44}\) The City of San Diego rezoned land owned by the plaintiff company from industrial use to recreational use.\(^{45}\) The company asserted that the zoning ordinance rendered their investment in the site valueless and made a fifth amendment claim for just compensation. The California Court of Appeals, in the spirit of Justice Brandeis' dissent in *Pennsylvania Coal*, denied the company's claim and declared that a party deprived of property by a valid police power regulation is never entitled to just compensation.\(^{46}\) The company appealed the case to the United States Supreme Court.

Curiously, Justice Brennan's dissent in the case furnishes the only discussion of takings law since the majority held that the case was not ripe for decision.\(^{47}\) Because a combination of five concurring and dissenting justices expressed support for Justice Brennan's treatment of takings law in the dissent, his opinion is instructive.\(^{48}\) In his treatment of the merits, Justice Brennan

\(^{43}\) 438 U.S. at 133 n.30. The footnote states that cases denying just compensation which have been traditionally termed "noxious use" exception cases should not be understood as resting on the noxious quality of the prohibited use. Rather, compensation was denied in these cases upon the ground that the restrictions involved were reasonable, produced a widespread public benefit, and were applicable to all similarly situated property. *Id.*

\(^{44}\) 450 U.S. 621 (1981).

\(^{45}\) *San Diego Gas & Electric Co.* acquired 412 acres of land in 1966 for the purpose of constructing a nuclear power plant. In 1973, the San Diego City Council rezoned 39 of the acres for agricultural use and designated the entire parcel as an open-space area. Under the city's open-space plan only 50 of the original 412 acres were zoned for industrial use.

\(^{46}\) *San Diego Gas & Elec. Co. v. City of San Diego*, 81 Cal. App. 3d 844, 146 Cal. Rptr. 103 (1978). In holding that there can be no taking when the state destroys private property pursuant to a valid police power, the appeals court relied on precedent of the Supreme Court of California. In *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), the Supreme Court of California held that the exercise of the state's police power in the form of valid regulation (in this case a zoning law) could never accomplish a taking within the meaning of the fifth and fourteenth Amendments. 24 Cal. 3d at 272, 598 P.2d at 28, 157 Cal. Rptr. at 372.

\(^{47}\) A majority of five justices refused to decide the merits of the case on the ground that *San Diego Gas & Electric* was not appealing from a final judgment in accord with 28 U.S.C. § 1257 (1976). *San Diego Gas & Elec.*, 450 U.S. at 633. Justice Brennan dissented and was joined by three justices in his argument that the case was ripe for decision. *Id.* at 639.

\(^{48}\) In his concurring opinion Justice Rehnquist indicated that he agreed with the
Devines v. Maier

stated that the California finding that regulatory takings are non-compensable "flatly contradicts clear precedents of this Court." He noted that a taking typically involves formal condemnation proceedings and subsequent acquisition of title by a governmental entity. Justice Brennan specified, however, that a taking can occur without governmental acquisition when a land use regulation destroys a property owner's use or enjoyment of property in order to promote the public good. In summary, he posited: "It is only logical, then, that governmental action short of eminent domain can be a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property."

San Diego Gas & Electric clearly demonstrates that at least five members of the Court have no desire to overrule or modify the line of regulatory takings cases that have their origin in Pennsylvania Coal v. Mahon. State and local governments, as the City of Milwaukee discovered in Devines v. Maier, will continue to be exposed to liability for just compensation when they enforce valid land use regulations that render certain property interests valueless to their owners.

DEVINES V. MAIER

The District Court Decision

Devines involved a class action suit brought in federal court by four tenants forced to vacate their apartments by Milwaukee building inspectors due to uninhabitable living conditions. The position that the case was not ripe for decision by the Supreme Court. Id. at 633. However, Justice Rehnquist went on to write that if he were to reach the merits of the case, he would "have little difficulty agreeing with what is said in the dissenting opinion of Justice Brennan." Id. On the basis of this expression of support by Justice Rehnquist, the Brennan dissent has been interpreted as reflecting the thinking of at least five members of the Court on the issue of police power takings.

49. Id. at 647.
50. Id. at 651.
51. Id. at 652.
52. Id. at 653.
54. 665 F.2d 138 (7th Cir. 1981).
55. Suit was brought in the United States District Court for the Eastern District of Wisconsin by four named plaintiffs: Delores Devines, Antoinette Stokes, Sarita Beanson, and Nick Sutherland. The plaintiffs were represented by Lawrence Albrecht, Thomas Donegan, and Louis Mestre of Legal Action of Wisconsin, Inc., a grantee of the Legal
four named plaintiffs brought suit on behalf of a class of 390 other predominantly low income, month-to-month tenants who were forced to vacate their dwellings by Milwaukee authorities between 1975-1978. The class members all resided in communities the City of Milwaukee had targeted for intensive code enforcement. Defendant Maier was sued individually and in his official capacity as Mayor of Milwaukee. Four other city officials who held housing-related policy-making positions were joined as defendants, as was the City of Milwaukee itself. Plaintiffs' primary claim was that defendants' order to vacate pursuant to state and local laws violated plaintiffs' fifth amendment rights by taking their leasehold interests for a public purpose without just compensation. Upon the defendants' motion for summary judgment on the plaintiffs' taking claim, however, the district court dismissed the case. 

Although the court accepted the plaintiffs' view that leasehold

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56. The certified class consisted of "all tenants who are or will be displaced from their homes by order of the Milwaukee Department of Building and Safety Engineering (BI/SE) who fail to receive financial compensation to which they are legally entitled." Brief for the Appellant at 3, Devines v. Maier, 665 F.2d 138 (7th Cir. 1981). 
57. Pursuant to Title I of the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5320 (1976), Milwaukee received Community Development Block Grant funds for use to improve targeted low income communities. Milwaukee allocated a portion of these funds for an Intensive Code Enforcement Program (ICEP). In addition, Milwaukee funded a companion project to ICEP, the Code Enforcement Relocation Project (CERP). CERP funding was only available to tenants who were forced to move because their building was to be demolished. The plaintiffs in Devines were tenants who were forced to vacate their apartments as a result of ICEP but were ineligible for CERP relocation funding because their buildings had not deteriorated enough to be demolished. Brief for the Appellant at 8-9, Devines v. Maier, 665 F.2d 138 (7th Cir. 1981). 
58. The four city officials joined as defendants were: Wallace Burkee, Director of the Community Development Agency; William Drew, Commissioner of the Department of City Development; Gerald Anderson, Department of City Development Relocation Officer; and Leonard Sloane, Deputy Inspector of Buildings. 
59. The plaintiffs also made a claim for just compensation under § 32.19 of the Wisconsin Statutes which provides, in pertinent part: 

The legislature declares that it is in the public interest that persons displaced by any public project be fairly compensated by payment for the property acquired . . . as the result of programs designed for the benefit of the public as a whole. Wis. Stat. §§ 32.19 (1977). 

60. 494 F. Supp. 992 (E.D. Wis. 1980).
interests are compensable property interests within the meaning of the fifth amendment, the value of which were effectively destroyed by the city's action in vacating the buildings, on the strength of Mugler v. Kansas, it determined that the destruction of a recognized property right did not give rise to a claim for just compensation. Chief Judge Reynolds viewed Milwaukee's action as a valid exercise of its police power to abate a nuisance which could never be compensable regardless of the extent to which the state action destroyed a valid property interest. He stated that the burden of paying just compensation was not required because such payment would deter governments from fulfilling their obligation to protect public safety.

The chief judge buttressed his position with two arguments. First, he found that building code regulations could not take private property because the intent of such regulations was not to appropriate private property but to protect public health and safety. Second, Chief Judge Reynolds pointed out that building owners are not compensated when their buildings are razed or vacated due to code violations. He saw no reasons why tenants should be treated any differently.

The Seventh Circuit Opinion: The Constitutional Issue

The tenants appealed the district court's decision to the Seventh Circuit. They contended that the district court erred in holding that a taking can never occur when property is destroyed by the valid exercise of a state police power. In addition, the plaintiffs claimed that they were victims of a taking and, as a consequence, Milwaukee owed them damages. The appellate

63. Devines, 494 F. Supp. at 995.
64. Id.
65. Id. In so concluding the district court relied on the finding of Justice Harlan in Mugler v. Kansas that the fourteenth amendment was not intended to provide citizens with a means of challenging the nearly plenary state police power. See supra text accompanying notes 17-25. It should be noted that the district court decision in Devines was rendered before the Supreme Court's decision in San Diego Gas & Electric. See supra text accompanying notes 44-52.
67. Id.
68. Brief for Appellant at 10, Devines v. Maier, 665 F.2d 138 (7th Cir. 1981).
The court reversed the lower court's finding that valid police power regulations could never take private property and reached the merits of the plaintiffs' fifth amendment claim.69 The court found that the plaintiffs' fifth amendment right to just compensation for a taking of private property had been violated by the defendants.70 The appellate panel then remanded the case to the district court to determine the appropriate measure of just compensation.71

The Seventh Circuit unequivocally rejected the argument made famous by the Brandeis dissent in Pennsylvania Coal and reiterated by the district court that valid police power regulations can never take private property.72 The court relied upon San Diego Gas & Electric Co. v. City of San Diego73 to support its view that in some instances the enforcement of police power regulations can constitute compensable de facto takings of private property.74 The standard adopted by the Seventh Circuit to determine when a de facto taking has occurred was the "extent of diminution" in value test utilized by the Supreme Court in Penn Central Transportation Co. v. New York City.75 According to the Seventh Circuit, when a regulation interferes totally with an owner's use and enjoyment of a valid property interest there is a compensable regulatory taking.76

The appellate court also held that the district court's arguments concerning intent and the inability of landlords to recover just compensation were unfounded. First, Milwaukee's intent in
passing a housing code was irrelevant because a taking of property is measured by what government does, not what it intends. 77
Second, whether a landlord would be able to recover just compensation if the city vacated her building was irrelevant to the Seventh Circuit. The court viewed the respective property rights of landlords and tenants as distinct. The impact of a vacate order upon tenants and landlords must be separately considered, according to the Seventh Circuit, because the order causes tenants to lose their property interest while landlords retain a residual interest in the property itself. 78

In treating the merits of the case, the Seventh Circuit first considered whether the plaintiffs possessed a legitimate property interest in light of the defendants’ contention that the plaintiffs had no legally cognizable property interest taken by the city. 79 The defendants alleged that the fifth amendment only compensates holders of valid leases and that plaintiffs’ leases were invalid because the city inspectors’ determination of uninhabitability made continued occupancy of the apartments illegal pursuant to state law. 80

The court found that the defendants’ argument could not be accepted without “obliterating the Fifth Amendment protection
against regulatory takings that benefit the public at the expense of the individual." All police power regulations, the court reasoned, make certain uses of property "illegal." If the defendants' view were to be adopted, the court believed that no person unfairly burdened by a police power regulation would ever be compensated.

Having determined that the city's action affected a legitimate property interest of the plaintiffs, the court then resolved the essential issue of whether a compensable taking had occurred. Guided by the Penn Central Court's emphasis upon the extent to which the challenged regulation interfered with private property, the Seventh Circuit found a taking in this instance. By forcing the plaintiffs to move, the city's vacate order totally destroyed their legitimate property interest. Once the city acted to vacate an apartment the tenant's right to occupy the premises was taken, leaving the tenant with no legal claim to occupancy. The majority stated, "the tenants whose right to occupy the premises is extinguished has nothing left and the impact of the regulation on his or her rights could not be more severe."

The final issue the court addressed in considering the plaintiffs' constitutional claim concerned the question of whether the tenants' property interest was taken for a public purpose as the fifth amendment requires. The defendants argued that no compensation was due to the plaintiffs because the vacate order was

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81. Devines, 665 F.2d at 143.
82. In Pennsylvania-Coal v. Mahon, for example, the Kohler Act made it illegal for the coal company to exercise its right to mine coal below the Mahon's home. This fact did not preclude the company from having a right to just compensation. See also Kaiser-Aetna v. United States, 444 U.S. 164 (1979).
83. The defendants attempted to distinguish the Devines case from other regulatory taking cases involving "illegal uses" on the ground that the tenants had notice, prior to the posting of vacate orders, that their apartments were uninhabitable. 665 F.2d at 143. City and state laws prohibiting occupancy of uninhabitable dwellings, defendants alleged, provided notice to the tenants of their "illegal use." Accordingly, in the defendants' view, these laws served to extinguish the tenants' property rights at the moment the apartment in question became uninhabitable, not at the time the authorities declared them uninhabitable. Id.

The court found this argument wanting because the laws that defendants claimed provided prior notice to the tenants were not self-executing. The laws in question provided for a determination of uninhabitability at the discretion of the building inspector. Id. at 144. The court held that until a proper authority (in this case, a building inspector) made a formal judgment of uninhabitability and notified the tenants of this finding, the plaintiffs possessed a legally cognizable property interest. Id.
84. Id. at 142.
85. Id.
of primary benefit to the plaintiffs and of only incidental benefit to the public.\textsuperscript{86} The Seventh Circuit termed this assertion "overt paternalism."\textsuperscript{87} Relying upon the statement of purpose of Milwaukee's housing code,\textsuperscript{88} the court found that the city terminated plaintiffs' valid leasehold rights to occupy their homes in order to promote the public good.\textsuperscript{89}

\textbf{The Constitutional Implications of Devines}

In \textit{Penn Central}, Justice Brennan noted that the character of challenged governmental action in a taking claim was a factor of particular importance in determining whether a compensable taking has occurred.\textsuperscript{90} The \textit{Devines} decision is constitutionally significant because the character of the government action at issue, namely the valid enforcement of building code regulations, involved an essential governmental function in abating public nuisances in the area of housing.\textsuperscript{91} Traditionally, such government action has been held to be non-compensable on the strength of the "noxious use" exception to the taking clause.\textsuperscript{92} The \textit{Devines} decision is a clear indication that at least one federal circuit considers this exception, first articulated in \textit{Mugler v. Kansas},\textsuperscript{93} to no longer be good law.

\begin{itemize}
  \item \textsuperscript{86} \textit{Id.} at 144-45.
  \item \textsuperscript{87} \textit{Id.} at 144.
  \item \textsuperscript{89} \textit{Devines}, 665 F.2d at 146. The court noted that the city's enforcement program placed the burden of moving on those members of the community who had "little or no choice but to live in low cost, often substandard housing." \textit{Id.} In rejecting the defendants' contention that the plaintiffs benefited from the city's action, the court pointed out that in some cases the named plaintiffs were forced to leave their homes immediately while others were given 72 hours or seven days to leave. Some of those who failed to comply because they could not find new housing were criminally prosecuted. \textit{Id.} at 144. One family forced to move could not afford to pay for movers and moved their belongings in 20 trips in the snow with the aid of a child's coaster wagon. Brief for the Appellant at 5, \textit{Devines v. Maier}, 665 F.2d 138 (7th Cir. 1981).
  \item \textsuperscript{90} \textit{Penn Central}, 438 U.S. at 124.
  \item \textsuperscript{91} See, e.g., Grigsby, \textit{supra} note 88; Meeks, Oudekerk, & Sherman, \textit{supra} note 88.
  \item \textsuperscript{92} See \textit{supra} notes 23-26 and accompanying text.
  \item \textsuperscript{93} 123 U.S. 623 (1887).
\end{itemize}
The district court in *Devines* relied upon *Mugler* to support its conclusion that a valid police power regulation to abate a public nuisance could never take private property. The Seventh Circuit failed even to distinguish *Mugler* or other "noxious use" cases in holding that it is the impact of building code regulation upon the tenant's property interest, not the intent of the regulation to protect public safety, which is dispositive in finding a taking. The Seventh Circuit did not find the character of the government action to be an important consideration. Rather, the economic impact of the regulation upon the tenants' property interest in and of itself was determinative in finding a taking.

The Seventh Circuit's emphasis upon the economic impact of the regulation, and its relative lack of concern for the character of the government action involved, can be traced to the court's reliance upon Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego* for guidance in the area of police power takings. This dissent is crucial to the development of takings law because it measures de facto police power takings solely by the extent to which the regulation deprives the owner of his or her interest in the property. The fact that the Seventh Circuit followed the *San Diego Gas & Electric* dissent is a sign that this dissent will have an important impact upon takings law.

By eliminating the character of the regulation in question from consideration in determining a police power taking, *San Diego Gas & Electric* and *Devines* signal the demise of the "noxious use" exception precursed by the Supreme Court in the *Penn Central* case. Apparently, if *Devines* is followed, governments will not be shielded from liability for just compensation resulting from regulations that abate public nuisances. Unfortunately, the failure of the Seventh Circuit to distinguish *Mugler*, a case that has never been overruled by the Supreme Court, makes a more definite statement difficult to make. Until the Supreme Court

94. See *supra* notes 62-67 and accompanying text.
95. 450 U.S. 621, 639 (1981) (Brennan, J., dissenting and expressing the view of at least five members of the Court as to the merits).
96. *Id.* at 652.
97. One commentator has stated that the *San Diego Gas & Electric* dissent enshrined the concept of de facto police power takings as the takings law of the 1980's. *Oakes, supra* note 24, at 620. See also Kmieć, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 Ind. L.J. 45 (1982).
98. See *supra* notes 42-43 and accompanying text.
clarifies the continuing validity of Mugler the law of police power takings will remain somewhat uncertain.

DETERMINING THE APPROPRIATE MEASURE OF JUST COMPENSATION

The majority opinion of the Seventh Circuit in Devines was limited to the consideration of whether the plaintiffs possessed a constitutional right to just compensation. The crucial task of determining the appropriate measure of just compensation was delegated to the district court for decision on remand. Insight into the measurement of damages was given by Judge Fairchild in his concurring opinion. Judge Fairchild concluded his discussion of damages by noting that the amount of damages "may not amount to very much." The Devines decision will be of little practical importance to tenants or municipalities if Judge Fairchild's observation is correct. A review of the legal principles governing just compensation for the taking of a leasehold interest will provide a framework for understanding the competing arguments put forth by the parties in Devines on the issue of damages.

The Law of Just Compensation

The Supreme Court has stated that the constitutional requirements for measuring just compensation derive as much from the basic equitable principles of fairness as they do from the technical concepts of property law. Because the fifth amendment provides no definite standards of fairness to measure just compensation, the Court has adopted practical standards to do substantial justice. The two primary standards the Court has

99. See infra notes 125-35 and accompanying text.
100. In addressing the issue of just compensation, Judge Fairchild identified what he considered to be the elements of a month-to-month tenant's compensation. These elements were: the right to occupy the premises for the balance of the month when the vacate order is entered and for the succeeding month (subject to the payment of rent), moving costs, and the costs of locating comparable living quarters. In addition, a tenant may be able to show a value for the probability of staying in the future (subject to the payment of rent) and for the loss of potential damages for poor conditions recoverable from the landlord which the tenant is losing by moving. Devines, 665 F.2d at 149 (Fairchild, J., concurring).
101. Id.
developed are fair market value and indemnification.

Fair market value is a technical concept of property law which measures the value gained by the party who acquires the property in question.\textsuperscript{104} Indemnification, on the other hand, is an equitable principle which measures the economic loss suffered by the owner of the property acquired.\textsuperscript{105} Although the Supreme Court has applied both standards in different cases to measure the value of a leasehold interest, the fair market value standard is considered the traditional measure of just compensation.\textsuperscript{106}

The fair market value of a leasehold interest is its bonus value over the unexpired term.\textsuperscript{107} This measure of value is computed by determining the present or discounted value of the amount by which the market rental for the balance of the term exceeds the tenant's rental obligation for the period.\textsuperscript{108} If the market rental

\textsuperscript{104} Fair market value in the context of a leasehold has been defined as "the amount of money which a purchaser willing but not obligated to buy the property would pay to an owner willing but not obligated to sell it, taking into consideration all the uses to which the land was suited and might in reason be applied." 4 P. NICHOLS, LAW OF EMINENT DOMAIN § 12.2 [1] (1981).

\textsuperscript{105} The theory of indemnification in the context of just compensation for a leasehold, while not susceptible to precise definition, has been best expressed by the Supreme Court as "the full and perfect equivalent in money of the property taken. Owners are to be put in as good position pecuniarily as they would have occupied if their property had not been taken." United States v. Miller, 317 U.S. 369 at 373 (1943). See also United States v. New River Colliers, 262 U.S. 341, 344 (1923); Seabord Airline Ry. v. United States, 261 U.S. 299, 304 (1923).


Kanner best articulated the "fundamental clash" between the principles of fair market value and indemnification when he wrote: "Does the compensation payable to the owner represent a monetary equivalent of what the taker acquires, or does the word 'just' import into the economic equation an ethical principle requiring that the owner be indemnified for the economic detriment caused to him or her by the taking." Kanner, \textit{supra}, at 781.


\textsuperscript{107} 2 M. FRIEDMAN, \textit{supra} note 6, at 504.

\textsuperscript{108} \textit{Id.}
value of the leasehold does not exceed the agreed upon rent, the lease has no compensable value.\textsuperscript{109} Consequential damages suffered by the leaseholder, such as moving expenses, are not recoverable under the fair market value standard.\textsuperscript{110}

Indemnification for the loss of a leasehold, in contrast, involves no rigid formula for determining damages.\textsuperscript{111} Courts will indemnify tenants for their losses, in some cases, when the fair market value standard would leave the tenant with no recovery. The purpose of indemnification is to ensure that victims of takings are left in the same position as they would have been absent a taking.\textsuperscript{112} Therefore, consequential damages flowing from the taking are recoverable under the indemnification standard.\textsuperscript{113}

Many commentators have noted that the fair market value standard of formulating just compensation is anything but fair when utilized to value the leasehold of an urban, residential tenant.\textsuperscript{114} The standard has become inapplicable in urban settings, the commentators contend, for several reasons. First, the urban housing market is not a true arms-length market in which landlords and tenants bargain on equal footing to arrive at a fair rent.\textsuperscript{115} Second, the fair market value of a month-to-month tenancy in a substandard building in most cases will not exceed the rent reserved in the lease.\textsuperscript{116} Consequently, the tenant will be

\begin{footnotes}
\item[109] L. ORGEL, I VALUATION UNDER THE LAW OF EMINENT DOMAIN § 126 (2d ed. 1953).
\item[110] M. FRIEDMAN, supra note 6, at 515.
\item[111] See supra note 105.
\item[112] There is precedent for the application of the principle of indemnification for the taking of a leasehold interest. United States v. General Motors, Inc., 323 U.S. 373 (1944). Cf. United States v. Petty Motor Co., 327 U.S. 372 (1946). In the General Motors case the Supreme Court stated:

\begin{quote}
In the ordinary case, for want of a better standard, market value, so called, is the criterion of that value (the value which will return the aggrieved party to the status quo). In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value.
\end{quote}

323 U.S. at 379.
\item[113] In United States v. General Motors Corp., 323 U.S. 373 (1944), the Supreme Court awarded General Motors damages to indemnify the company for the moving costs it incurred as a result of the taking of its lease.
\item[114] See e.g. Bigham, supra note 105, at 65; Jones, supra note 105, at 6; Kanner, supra note 105, at 780; Pinsky, supra note 106, at 80. Pinsky wrote: “The traditional rule [of market value as the standard for just compensation] has had a particularly inequitable impact on tenants.” Id.
\item[115] Leary & Turner, supra note 105, at 12. For a comprehensive analysis of the inequality in bargaining power between urban tenants and landlords, see Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).
\item[116] Leading authorities in the area of eminent domain law contend that month-to-
\end{footnotes}
left with no recovery. Third, the fair market value standard excludes recovery for consequential damages which flow from a taking, such as moving expenses and the cost of finding new housing. In most cases consequential damages form the bulk of the damages suffered by the urban tenant. Fourth, the fair market value standard does not compensate urban tenants for their expectancy interest in continual use and enjoyment of the premises pursuant to their fulfillment of leasehold obligations.

While courts have not abandoned the fair market value standard in the urban housing context, Congress and state legislatures have recognized the injustice to displaced tenants inherent in the fair market value measure of just compensation. In response to the inequity of the fair market value standard in the urban context, relocation acts that indemnify tenants for the losses suffered from the taking of their leasehold interests have been passed. One commentator has argued that the various relocation acts are an attempt by the legislatures to fill the “gap”

month tenancies are non-compensable per se. Nichols writes: “As a practical matter a tenant from month-to-month suffers only nominal damage upon a taking for public use and compensation has been rightfully denied in such a case, since a month-to-month tenant has no unexpired term.” 12 P. NICHOLS, LAW OF EMINENT DOMAIN 788 (3d ed. 1981).

117. The phenomenon of fair market value being less than the rent is termed a “negative leasehold.” See Note, Condemnation, Compensation, and Negative Leaseholds, 43 FORDHAM L. REV. 841, 842 (1975). Negative leaseholds are likely in month-to-month tenancies for substandard housing because poor building conditions tend to make a lease of little value in the “marketplace.”


119. See Comment, The Pennsylvania Eminent Domain Code: A Bittersweet Nostrum for the Residential Tenant, 84 Dick. L. Rev. 499, 509 (1980); Pinsky, supra note 106, at 81. Pinsky argued that the fundamental flaw in the fair market value standard is jurisprudential because the common law has not placed any value upon rootedness. Id.

120. Congress addressed the issue of inadequate just compensation for tenants in takings cases by passing the URA, supra note 59. The URA establishes standardized payments to persons displaced by federally-assisted programs. For a discussion of the statutory benefits offered to displaced tenants under the URA, see infra note 124 and accompanying text.

between the tenant's actual damages resulting from a taking, and the minimal protection the fair market value standard of just compensation affords tenants. The Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (URA) is the model for many state relocation enactments. The URA compensates tenants for the damages suffered as a consequence of their involuntary displacement.

Significantly, none of the elements of compensation mandated by the URA are recoverable when the fair market value standard of just compensation is applied. This demonstrates the radical difference between the common law approach to just compensation and the recent legislative response which indemnifies tenants for the losses they suffer due to takings. To a large extent the significance of the Devines case will depend upon the issue of whether the Seventh Circuit will see fit to abandon the fair market value standard of just compensation in favor of indemnification.

The District Court's Formulation of Damages on Remand

After considering memoranda and oral argument on the question of damages owed to the tenants, the district court entered an

All 50 states and the District of Columbia have passed statutes authorizing various types of relocation assistance to displaced persons. These statutes vary widely in the scope of their coverage. In 1976, over half of the states had relocation statutes that did not require relocation payments when people were displaced by state or local governmental activity involving no federal assistance. Pearlman & Baar, Beyond the Uniform Relocation Act: Displacement By State and Local Government, 10 CLEARINGHOUSE REV. 329, 330 (1976). For a chart outlining the provisions of each state's relocation laws, see id. at 344-45. Pearlman and Baar's study revealed that the relocation statutes of nine states and the District of Columbia specify that persons displaced as a result of code enforcement are eligible for relocation assistance. See, e.g., HAWAI I REV. STAT. § 111-2 (1976). Ten states specifically excluded code enforcement displaces from coverage.

121. Jones, supra note 105, at 6. The Wisconsin Supreme Court, in upholding the validity of Wisconsin's relocation assistance law, noted that: "Many states, realizing the injustice of denying recovery for other than the fair market value of the physical property actually taken, have created statutes such as § 32.19 (Wisconsin's relocation statute)." Luber v. Milwaukee County, 47 Wis. 2d 271, 279, 177 N.W.2d 380, 385 (1970).


123. For example, approximately four-fifths of the states have adopted the URA's definition of a "displaced person." Pearlman & Baar, supra note 120, at 330.

124. Tenants are displaced within the meaning of the URA when they move: "... as a result of the acquisition of... real property... or a written order of the acquiring agency to vacate." 42 U.S.C. § 4601(a) (1976).

The URA provides displaced tenants with compensation for moving expenses of not more than $300.00 and a "dislocation allowance" of $200.00. 42 U.S.C. § 4622 (1976). In
order governing the payment of just compensation. The order can only be adequately described as inconsistent and confusing. One paragraph of the order called upon the defendants to pay the measure of damages that the plaintiffs had proposed. According to this paragraph, the defendants were to pay damages of up to $4,500.00 over four years to each displaced tenant pursuant to Wisconsin’s relocation law. Another paragraph of the same order specified that the defendants’ proposed measure of just compensation should be the basis for determining damages. If the defendants’ formula were followed, the tenants would recover much less than the relocation statute provides.

These conflicting provisions within the same order left the parties with very little guidance on the issue of damages, and both plaintiffs and defendants have filed appeals to the Seventh Circuit for clarification. A discussion of the arguments made by the parties before the district court on remand provides insight into the important issues currently before the Seventh Circuit.

Plaintiffs called for the application of the Wisconsin relocation statute as the basis for just compensation on the ground that the court should be guided by the public policy enunciated by elected

addition, tenants who have occupied their apartments for at least 90 days prior to the commencement of federal acquisition are eligible for a rental subsidy to enable them to rent safe, decent replacement housing. The replacement housing allowance is not to exceed $4,000.00 nor is it to be paid for more than four years. 42 U.S.C. § 4624 (1976). Tenants are aided in locating relocation housing through the provision of relocation advisory services. 42 U.S.C. § 4625 (1976).

In Devines, the Seventh Circuit denied the plaintiffs’ claim for relocation assistance under the URA, see supra note 59, because the court did not consider the plaintiffs to be “displaced persons” within the meaning of the statute. The court, relying on Alexander v. HUD, 441 U.S. 39 (1979), held that the plaintiffs were not entitled to URA benefits because their property was not acquired by the federal government. Devines, 665 F.2d at 146.

The relevant subsections of § 32.19 outlining the benefits to persons eligible under the act are § 32.19(3)(b) (moving expenses and relocation allowance of up to $500.00) and § 32.19(4)(3)(b) (replacement housing allowance of up to $4000.00).

125. Order, C.A. No. 78-C-742, entered January 21, 1983 (E.D. Wis.).
126. Wis. Stats. § 32.19 (1977) [hereinafter referred to as § 32.19]. In Devines, § 32.19 formed the basis of the plaintiffs’ state constitutional claim of a taking which the district court heard under its pendent jurisdiction. See supra note 59. The district court held for the defendants on this claim for the same reasons the court denied plaintiffs’ claim under the United States Constitution. The Seventh Circuit reversed on the ground that § 32.19 was Wisconsin’s legislative implementation of the just compensation clause of the fifth amendment to the United States Constitution. Devines, 665 F.2d at 146.

127. See infra notes 133-35 and accompanying text.
128. See supra note 10.
officials to fairly compensate households displaced by public programs. Furthermore, the plaintiffs contended that the court should follow the legislative formula of the relocation law so that public officials could accurately assess the costs of pursuing public programs with some degree of accuracy.

Defendants vigorously opposed plaintiffs' contention that the state relocation law provided the applicable measure of just compensation. They argued that the statute is only applicable when the government acquires property. If the government deprives owners of the beneficial use of their property, but does not acquire title to it, defendants contend that compensation is not due under the state relocation law.

As an alternative to recovery under state law, defendants proposed a formula of just compensation for "eligible tenants" which included some of the elements of compensation proposed by Judge Fairchild in his concurring opinion: the difference in rent for the unexpired lease term between the rent in the vacated building and the rental for the new premises, moving costs and costs incurred in the search for new housing. The defendants' proposed formula goes beyond the narrow confines of the fair market value standard by compensating tenants for some consequential damages. However, the proposal falls far short of the compensation available under the state relocation law because the rent differential offered by the defendants is only available for the unexpired lease term (usually one month), whereas the

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129. Plaintiffs' Memorandum in Support of Motion for Summary Judgment on Just Compensation at 2-5, Devines v. Maier, 665 F.2d 138 (7th Cir. 1981) [hereinafter cited as Plaintiffs' Memorandum].

130. Id.

131. Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment on Just Compensation, Devines v. Maier, 665 F.2d 138 (7th Cir. 1981) [hereinafter cited as Defendants' Brief].

132. Id. at 21. Defendants supported their argument by pointing out that the language of § 32.19 parallels the language of the URA. See supra notes 59, 124. Because the Supreme Court has stated, in Alexander v. HUD, 444 U.S. 39 (1979), that URA benefits are not recoverable when the government does not acquire property, defendants contended that recovery should not be permitted under § 32.19. Defendants' Brief, supra note 131, at 23.

133. Defendants would deny any recovery to tenants living in buildings that any reasonable person would find to be uninhabitable. Defendants' Brief, supra note 131, at 25-27. Defendants would also automatically deny compensation to any tenant found to be responsible for the dilapidated condition of their apartment. Id.

134. Id.
relocation statute provides rent differential payments for up to four years.\textsuperscript{135}

\textit{Analysis of the Just Compensation Debate}

It is likely that the plaintiffs argued for application of state relocation law in order to avoid the harsh impact of the federal common law of just compensation upon urban tenants.\textsuperscript{136} It is highly unlikely that the market value of the plaintiffs' leases would exceed the value of the rent reserved in their lease at the time of the taking. Consequently, if the common law were applied by the court, the plaintiffs would in all likelihood recover nothing.

The most significant aspect of the just compensation debate in \textit{Devines} is that the defendants' proposed measure of just compensation offers more to the plaintiffs than would be provided at common law. Instead of arguing that the plaintiffs should only recover the fair market value of their lease, the defendants proposed that consequential damages (for moving expenses and the cost of seeking new housing) be paid as well. The inclusion of consequential damages by the defendants signals a recognition by those responsible for compensating the plaintiffs that payment of fair market value alone is not sufficient. While the defendants' proposed formula will not indemnify tenants for all losses flowing from their displacement, it will give the Seventh Circuit the opportunity to abandon fair market value as the urban tenant's sole measure of just compensation.\textsuperscript{137}

The plaintiffs' proposal that Wisconsin's relocation statute provides the appropriate measure for just compensation is also significant and would have substantial consequences if adopted. Most importantly, plaintiffs would be eligible for benefits of up to

\textsuperscript{135} See \textit{supra} note 126.
\textsuperscript{136} See \textit{supra} notes 115-19 and accompanying text.
\textsuperscript{137} One law review article notes that the judiciary has lagged behind the legislative branch in acknowledging and rectifying the injustice the fair market value standard represents to urban tenants. The authors wrote:

Significantly, the response [to indemnify tenants] had to be legislative. The ponderous process of judicial reform requires imaginative advocacy on the part of those representing the poor. It costs money to litigate in the highest courts in the land, and until recently, such services were not available at a price which the poor could pay.

\textit{Leary & Turner, supra} note 105, at 37.
$4,500.00 over a four year period.\textsuperscript{138} Such a result would add cre-
dence to the defendants' claim that payment of just compensa-
tion would have a "chilling effect" upon the exercise of valid
police power regulations.\textsuperscript{139} Second, by adopting the statutory
formula the court would abandon the common law. Implicit in
this abandonment would be a judicial determination that the
common law of fair market value is unfair to urban residential
tenants.\textsuperscript{140}

Regardless of whether the Seventh Circuit adopts the plain-
tiffs' or the defendants' formulation of just compensation, that
the plaintiffs will, at a minimum, recover the fair market value
of their leases and some consequential damages appears clear.
For plaintiffs living at or near the poverty level, as so many dis-
placeses are, this recovery will be of great importance.\textsuperscript{141} For munici-
palities, the payment of just compensation will create new
administrative and fiscal burdens in a time when public resour-
ces are increasingly scarce. For the first time, cities in circuits
following Devines will be forced to plan for a cost attached to the
valid enforcement of building codes.

\textbf{THE IMPACT OF \textit{DEVINES} UPON URBAN HOUSING POLICY}

The \textit{Devines} decision will alter the housing policies of munici-
palities in circuits where the decision is followed. For most large
cities the power to vacate substandard dwellings is an important
sanction in strategies to "improve" the quality of urban housing

\begin{footnotes}
\item[138] See infra notes 142-54 and accompanying text.
\item[139] See infra note 146 and accompanying text.
\item[140] The abandonment of common law formulations of just compensation for statu-
tory formulations would break with precedent established by the Supreme Court in 1893.
In the case of Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), the
Supreme Court held that the determination of the measure of just compensation is for the
judiciary, not the legislature. \textit{Id.} at 327. The Court reasoned that because the legislative
branch passes laws that take property, it would be a conflict of interest for the legislature
also to set the level of just compensation. \textit{Id.} The implication is that the legislatures
would be inclined to set artificially low measures of compensation. Ironically, the judi-
ciciary has been the one to cling to the fair market value standard of just compensation,
while the legislatures have tended to abandon fair market value in the leasehold context
as an artificially low standard. See supra note 137.
\item[141] See supra note 89. The availability of attorneys at no charge is essential if claims
under \textit{Devines} are to be pursued as most tenants displaced by code enforcement cannot
afford private counsel. It is quite probable that tenants who are forced to move from
substandard housing will be eligible for free legal services from Legal Services Corpora-
tion grantees or other free legal service programs.
\end{footnotes}
Municipalities will have a financial incentive, after *Devines*, to utilize other sanctions short of vacating buildings to maintain safe and sanitary housing.

One of the less drastic sanctions available to municipalities is efficient and vigorous code enforcement in the early stages of building deterioration. Such enforcement of the building code may be complemented by ordinances that attempt to guarantee code compliance. For example, rent withholding ordinances and ordinances authorizing the city to make essential system repairs at the negligent landowner's expense may help prevent buildings from falling into disrepair.143 In addition, municipalities may provide for the appointment of receivers to manage buildings that owners have allowed to deteriorate. Finally, a strictly enforced system of fines against recalcitrant landlords may be instituted.144

Municipalities, as the *Devines* case itself indicates, will strongly oppose efforts by tenants to bring claims for just compensation.145 Governments are likely to view the exposure to potential

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143. For a comprehensive discussion of code enforcement alternatives designed to improve building conditions while maintaining occupancy, see generally Abbott, *supra* note 142, 1-138. Abbott critiques vacate orders as a tool in urban housing policy:

The order to vacate ... is a drastic remedy; it removes dwelling units from the housing stock, temporarily or permanently, and leaves the tenants homeless. Unless the community has standard relocation housing into which displaced families can move, their eviction may be politically unpopular and futile in improving their housing conditions.

*Id.* at 49-50.

144. *Id.*

145. A claim for just compensation under *Devines* has been brought in Chicago involving a tenant who was forced by the City of Chicago to vacate her federally subsidized apartment. *City of Chicago v. Goldstein & Williams*, No. 82-2562 (Ill. Ct. App. 1982). The trial court, which entered the vacate order, denied Williams' claim leave to just compensation. Williams has appealed the denial of leave to file her taking claim to the Illinois Court of Appeals, First District, where it is currently pending. Williams is represented by The Legal Assistance Foundation of Chicago.

In this case, one issue on appeal of widespread significance is whether the *Devines* decision is applicable to cases involving vacate orders entered by a judge rather than by an administrative authority (as in *Devines*). This issue is important because most municipalities, including Chicago, enter the vast majority of their vacate orders through judicial process as opposed to administrative authority. In Chicago, for example, vacate orders are entered pursuant to the Illinois Municipal Code, Ill. Rev. Stat. ch. 24 11-13-15 (1981). This statute grants the circuit courts jurisdiction to utilize equitable power to prevent the occupancy of buildings in violation of local housing codes. If judicial vacate orders are found to be outside the scope of the *Devines* decision, the impact of the decision will be diminished.
Devines v. Maier

liability as imposing a "chilling effect" upon their nearly plenary

Devines involved the determination by Milwaukee's building inspection authorities that the plaintiffs' apartments were unfit for human habitation. The Devines court held that the plaintiffs had a legal right to occupy their dwellings until those rights were terminated by an administrative official's discretionary enforcement of the city's building code. Devines, 665 F.2d at 144. In so concluding, the court relied on a finding that the laws which gave the city authority to act were not self-executing, and therefore the plaintiffs had no prior notice that occupancy of their apartments violated state and local laws. Id. at 148.

An analysis of the Devines opinion reveals that there is no language which limits its holding to administrative vacate orders. The court held that the City of Milwaukee terminated plaintiffs' leasehold rights for a public purpose, thus placing a disproportionate burden on the plaintiffs who had no choice but to live in substandard housing. Id. at 146. The holding does not specify that the city terminated the leasehold rights through administrative action as opposed to judicial action. What appears to be dispositive to the Devines court is not that administrative action was involved but that the state action terminating plaintiffs' leasehold rights involved discretionary judgment. Id. at 144. The existence of discretionary judgment is vital to the court because so long as the tenants had no knowledge prior to the posting of the vacate order that they were living in illegal conditions, they possessed a compensable leasehold interest.

There is a significant element of discretionary judgment involved in the case of judicial vacate orders. The judge replaces the building inspection official as the individual authorized by the state to determine whether a particular premises is uninhabitable within the meaning of applicable state and municipal laws. A vacate order is entered on the motion of a state official, namely municipal corporation counsel, and the judge exercises considerable discretion in deciding whether to grant the motion.

Clearly the fact that the judge makes the legal determination of uninhabitability does not transform the applicable building code laws into self-executing statutes. Just as the tenant in Milwaukee whose apartment is adjudged uninhabitable by the building inspector enjoys the legal right to occupancy until the administrative determination of uninhabitability is made, a tenant in Chicago has a legal right of occupancy until a judge determines uninhabitability. Therefore, at the time a judicial vacate order is entered the tenant possesses a legally compensable property interest.

The primary argument for limiting the Devines decision to administrative vacate orders finds its source in Judge Fairchild's concurring opinion. See supra note 100. If one accepts his premise that there is no taking when a reasonable person would find a dwelling uninhabitable, a judicial vacate order could be viewed as "the mere adjudication of that status" of uninhabitability referred to by Judge Fairchild. Devires, 665 F.2d at 148 (Fairchild, J., concurring). Such an adjudication by a court would not constitute a compensable taking under this analysis because no discretion would be involved—the court would be acting only because the tenants were unreasonable in having failed to move on their own volition when the building became uninhabitable.

Arguably, there is a qualitative distinction between an administrative and a judicial vacate order. Some would see a judge as a more neutral party than a building inspector because the judge could sift evidence and apply the law fairly. A building inspector, on the other hand, would be more likely to abuse discretion because he might act unilaterally without due process to the owner or the tenants. In a court setting, the inspector must report the building conditions to the judge. The owner, if represented, could challenge the inspection and contest the entry of a vacate order. The tenants, if aware of the proceeding, could intervene to protect their interests. Therefore, a judicial proceeding would be less likely to result in capricious discretionary decisions to vacate buildings than an administrative proceeding.
police power. Public bodies will argue that it is inimical to public policy for cities to pay for validly exercising their police power in the area of housing maintenance. Financially-strapped governments will point to the burden of paying just compensation to convince courts that they will be deterred from

The case for limiting the scope of Devines to administrative action is not a strong one. A judicial vacate order involves a discretionary judgment on the part of the judge that a building is uninhabitable. While a judge's discretion may be less likely to be abused than that of an administrative official, due to the procedural safeguards inherent in the judicial process, the judge's decision is nonetheless discretionary. Devines did not find administrative vacate orders to be compensable takings because discretion was abused, but because the laws that authorized the vacate orders were not self-executing.

An analysis of Devines dictates the conclusion that any vacate order entered for a public purpose pursuant to laws which are not self-executing gives rise to a cause of action for just compensation under the fifth amendment. Administrative and judicial vacate orders are merely different means by which the state achieves its end of promoting the public health and safety by vacating uninhabitable buildings. Both types of vacate orders enforce statutes which are not self-executing. Both involve discretionary judgment. In both cases the tenants' right to occupy the premises exists until the order is entered. Finally, in both cases, the state action of entering a vacate order totally extinguishes the legally compensable property rights of tenants.

The state police power is one of the least limitable powers of the state. Comment, The Landlord's Economic Inability to Meet Housing Code Requirements: The 'Hot Bath' Ordinance, an Illustration, 23 ST. LOUIS U.L.J. 163 (1979)

It is significant for the future of "takings" law that the Devines decision makes no mention of the potential financial burden just compensation will place upon municipalities for the valid enforcement of building code regulations. The district court was clearly swayed by the defendants' argument that a finding of a taking resulting from a vacate order would place such a substantial financial burden upon the city that it would be deterred from enforcing valid regulations. See supra text accompanying note 65. This policy argument, supported by the precedent of Mugler v. Kansas, 123 U.S. 623 (1887), did not move the Seventh Circuit.

One explanation for the Seventh Circuit's failure to discuss the policy issue of whether the cost of just compensation to municipalities would prevent necessary enforcement of building codes lies in Justice Brennan's dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego. 450 U.S. 621 (1981). San Diego Gas & Electric was the Supreme Court "takings" case of greatest significance to the Devines court. See supra note 97 and accompanying text. In San Diego Gas & Electric, Justice Brennan did not lend a sympathetic ear to San Diego's policy argument that payment of just compensation would deter the city from enacting valid land use laws pursuant to its police power. Justice Brennan stated that the vindication of constitutional guarantees is not a matter to be decided on the basis of policy judgments and that the vindication of such rights cannot depend upon the expense of doing so. 450 U.S. at 661. See also Kniec, supra note 97, at 52 (1982); Oakes, Property Rights in Constitutional Analysis Today, 56 WASH.L. REV. 583 (1981).

The extent to which the Seventh Circuit was influenced by San Diego Gas & Electric bodes ill for municipalities if the court's reliance precurses the reliance of other high courts on San Diego Gas & Electric for guidance in the area of police power takings. As noted earlier, San Diego Gas & Electric is not binding on the circuits. See supra notes 47-48 and accompanying text. The fact that the case is not binding, however, does not
effectively enforcing their housing code.\textsuperscript{148} However, there is considerable support for the view that the burdensome cost of just compensation is not a permissible consideration in a court's determination of a takings question. Justice Holmes noted in \textit{Pennsylvania Coal v. Mahon}\textsuperscript{149} that there is no short cut around payment of just compensation when a regulation goes so far as to take private property.\textsuperscript{150}

The \textit{Devines} decision will also influence the burgeoning urban tenants movement that has developed in large part due to the phenomenon of urban displacement.\textsuperscript{151} Intensive code enforcement has been used at times as an alternative to full-scale urban renewal as cities have utilized vacate orders to remove tenants from an area in order to make way for economic development.\textsuperscript{152}
On the strength of *Devines*, tenants will be in a position to compel municipalities to pay just compensation when they are forced to move by vacate orders. By exercising their right to just compensation tenants in circuits that follow *Devines* will be able to deter municipalities from utilizing code enforcement as a pretext for achieving a governmental goal of displacing low income people from “desirable” urban neighborhoods.\(^{153}\)

The political lobbying efforts of the tenant movement will also be strengthened by the *Devines* decision. By pointing to the prospect of costly compensation when vacate orders are entered, tenants will have leverage in influencing politicians to implement policies encouraging maintenance of existing apartments in habitable condition.\(^{154}\) City officials who know that tenants are aware of their right to just compensation will be more likely to respond positively to tenants’ lobbying efforts on behalf of programs, laws, and policies designed to prevent the substandard conditions that necessitate vacate orders.

**CONCLUSION**

Although the *Devines* decision is not a panacea for the tenants movement, the case has important consequences for low income tenants and for urban policymakers. For the first time, a court has recognized that tenants displaced by municipal code enforcement have fifth and fourteenth amendment rights to just compensation for the taking of their leasehold interests. This finding is made more significant by the fact that code enforcement involves nuisance abatement, an area of municipal activity traditionally considered to be non-compensable when abatement of a nuisance results in the destruction of private property.

\(^{153}\) Tenants have a strong interest in preventing involuntary displacement by vacate orders for two reasons. First, the human cost of being forced to move is tremendous. Loss of neighborhood ties, new school assignments for children, and the anxiety of being poor and homeless all represent substantial human costs exacted by a vacate order. See *supra* note 89. Second, housing costs invariably increase for all tenants when other tenants are displaced by a vacate order. When units are taken off the rental market by vacate orders, housing becomes more scarce and rents inevitably increase. Pinsky, *supra* note 106, at 97.

\(^{154}\) See *supra* text accompanying notes 142-44. See also Abbott, *supra* note 142, at 56-60.
While the formula for measuring plaintiffs' just compensation is yet to be conclusively determined, it appears likely that, at a minimum, tenants displaced by code enforcement will recover their moving expenses and the costs incurred in the search for replacement housing. This recovery will be important to tenants because, for the most part, tenants who are forced to vacate their dwellings due to substandard conditions are poor. The prospect of paying just compensation will encourage municipalities to promote the maintenance of housing stock in habitable condition in order to avoid the burden of liability for enforcing vacate orders.

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