SECTION 4

REGULATORY TAKINGS AND RELATED ISSUES AND DEFENSES

"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*."[1]

[1] Pa. Coal v. Mahon, 260 U.S. 393, 415–16, 43 S. Ct. 158, 160, 67 L. Ed. 2d 332, 326 (1922) (Holmes, J.) (emphasis supplied).

A. INVERSE CONDEMNATION CLAIMS FOR REGULATORY TAKING

A.1. Regulation Under the Police Power

Eminent domain, as stated, is the right of the government to take private property for public use.[2] When private property is taken for public use, however, just compensation is required to be paid to the owner.[3] As addressed more fully in Section 1.D.3, *supra*, the police power is the exercise of the sovereign right of a government to promote "order, safety, health, morals, and the general welfare of society within constitutional limits."[4] The exercise of the police power may give rise to a claim that the landowner has suffered a diminution in value of his or her property because of the subject regulation, ordinance, or statute. The police power is a broad one, giving government a very effective tool with which to govern. Unlike the exercise of eminent domain, an exercise of the police power does not give rise to the property owner's right to compensation. However, as "'[b]road and comprehensive as are the police powers of the state…it may not successfully be contended that the power may be so exercised as to infringe upon or invade rights safeguarded by constitutional provisions.'"[5]

With respect to both the exercise of the power of eminent domain and of the police power, both must be exercised for a public use, although the concept of what is a public use has been defined broadly.[6] The difficulty lies in determining where the police power ends and eminent domain begins. If the government has taken or damaged an owner's property in the constitutional sense, the property owner may institute an action in inverse condemnation and claim compensation in the same manner as if the government had brought a condemnation proceeding to take the subject property.

It should be noted, as discussed in Section 1.G, *supra*, that what constitutes a compensable taking may differ under various state laws and decisions and may differ as well from federal standards. Moreover, the discussion of state cases herein does not include the views of all the states on a given issue but rather provides examples of how some states have resolved a particular issue.

A.2. Recent Decisions Regarding Alleged Regulatory Takings

As explained in the next subsections, the U.S. Supreme Court has defined takings that may give rise to an inverse condemnation claim as categorical or *per se* takings and as noncategorical takings. However, regardless of the type of regulatory taking alleged by property owners, claimants appear to have been unsuccessful for the most part. With respect to such claims against transportation departments for regulatory takings, in a 2006 Illinois case a state statute allowed the state transportation agency to prepare and record maps setting forth a right-of-way for a proposed highway.[7] The statute also required property owners within the proposed right-of-way to give notice if they planned to develop their property so that the department would be able to exercise its option to commence eminent domain proceedings. After a landowner's required notification to the department, the department had up to 165 days to decide whether to acquire the owner's property by purchase or condemnation.[8] During the statutory period for the department to make its decision, the landowner was not allowed to pursue development.[9] The court ruled that the statutory procedure was not a regulatory taking.[10] Likewise, in a 2005 Wisconsin case it was held that the transportation department's enactment of setback restrictions was not a taking.[11]

With respect to various kinds of land-use regulations, a number of claims based on an alleged regulatory taking recently have been unsuccessful. For instance, claimants in Minnesota were not successful in establishing an unconstitutional taking with respect to the enactment of land-use regulations classifying wetlands near the subject property as a natural environment lake and the imposition of a temporary moratorium on construction in a 100-year flood plain.[12] Elsewhere, a 21-month moratorium on building permits did not constitute a taking as mere government decision-making is not a taking.[13] In New York a town planning board's conditioning of approval for a proposed building site on acceptance of a conservation restriction on development was not a taking.[14] In California, the imposition of a condition on the property owner's request to activate a well, which limited the amount of

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[2] *See* MacVeagh v. Multnomah County, 126 Or. 417, 270 P. 502 (1928).

[3] *See* discussion in § 1.D, *supra*.

[4] Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 149 Neb. 507, 523, 31 N.W.2d 477, 487 (1948), *aff'd*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949) (*quoting* 16 C.J.S., *Constitutional Law* § 174).

[5] Colman v. Utah State Land Bd., 795 P.2d 622, 627 (Utah 1990) (*quoting* Bountiful City v. De Luca, 77 Utah 107, 119, 292 P. 194, 199–200 (1930)).

[6] *See* discussion in § 1.G, *supra*.

[7] Davis v. Brown, 221 Ill. 2d 435, 851 N.E.2d 1198 (2006).

[8] *Id.* at 445, 851 N.E.2d at 1205.

[9] *Id.*

[10] *Id.* at 447, 851 N.E.2d at 1206.

[11] Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 505, 702 N.W.2d 433, 448 (2005).

[12] Miskowiec v. City of Oak Grove, 2004 Minn. App. LEXIS 1236, at *16 (Mich. App. 2004) (Unrept.).

[13] Wild Rice River Estates, Inc. v. City of Fargo, 2005 N.D. 193, *P14, 705 N.W.2d 850, 855 (2005).

[14] Smith v. Town of Mendon, 4 N.Y.3d 1, 14, 822 N.E.2d 1214, 1221, 789 N.Y.S.2d 696, 703 (2004).

water that the owner could extract from the aquifer beneath the owner's property, was not a taking.[15] It was not a regulatory taking in Georgia when a property owner consented to the deposit of sludge on the owner's property without knowing that the county had begun depositing not just sludge but toxic waste on the property.[16] In California a county range ordinance forcing property owners to accept the physical invasion of their property by their neighbors' cattle did not constitute a taking where the owners had the right to keep cattle off their property with a lawful fence.[17]

In other recent claims for alleged regulatory takings, property owners appear to have been mostly unsuccessful. In a California case, property owners were not entitled to recover lost rental income when the owners were prevented from charging increased rent by a rent control ordinance that was later determined to be unconstitutional. The reason was that during the period the rent control ordinance was in effect, the owners had not been denied a reasonable rate of return.[18] In Michigan it has been held that the government's alleged failure to abate a fire hazard is not a regulatory taking.[19]

Inverse condemnation claims for regulatory takings have failed also when the property right allegedly taken was held not to be a property right for takings analysis. Thus, state law may be relevant in such cases on what constitutes property. For example, a state license is not a property right protected under a takings clause; moreover, an intangible interest in a business is not a proper subject of a claim for an alleged regulatory taking.[20]

Finally, for there to have been an unconstitutional taking, the taking must be a continuous and permanent invasion or interference with an owner's property right. As held in Pennsylvania and other states, a temporary delay is not a taking for the period of time that the government was successful at the trial court level in enjoining the owners from developing their property without the municipality's approval.[21] As seen in subsections B.12 and B.13, *infra*, other forms of government delay, as well as temporary takings, are not takings.

[15] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th 1261, 1279–80, 42 Cal. Rptr. 3d 122, 136 (Cal. App. 4th Dist. 2006), *review denied,* 2006 Cal. LEXIS 9142 (Cal., July 26, 2006), *cert. denied*, 127 S. Ct. 960, 166 L. Ed. 2d 706 (2007).

[16] McElmurray v. Augusta-Richmond County, 274 Ga. App. 605, 607, 618 S.E.2d 59, 62 (Ga. Ct. App. 2005).

[17] Herzberg v. County of Plumas, 133 Cal. App. 4th 1, 17, 34 Cal. Rptr. 3d 588, 599 (Cal. App. 3d Dist. 2005).

[18] Hillsboro Prop. v. City of Rohnert Park, 138 Cal. App. 4th 379, 41 Cal. Rptr. 3d 441 (Cal. App. 1st Dist. 2006).

[19] Safeco Prop. & Casualty Ins. Co. v. City of Detroit, 2006 Mich. App. LEXIS 705, at *4 (Mich. Ct. App. 2006) (Unrept.).

[20] Kafka v. Mont. Dep't of Fish, Wildlife and Parks, 2005 Mont. Dist. LEXIS 729, at **43, **54 (12th Judicial Dist., Hill County 2005).

[21] *In the Matter of Condemnation of Certain 3.5 Acres Land*, 870 A.2d 400, 409–10 (Commw. Ct. Pa. 2005).

A.3. Categorical Takings of Private Property

"Almost all of the Supreme Court's holdings on regulatory takings involve the adoption of ordinances, regulations, or other legislation that limit development or regulate land use."[22] The Supreme Court of Idaho has observed that "courts have long held that governmental conduct not involving the physical appropriation of property may so interfere with private interests in property as to constitute a taking."[23]

It was in 1922 in *Pennsylvania Coal Co. v. Mahon*[24] that Justice Holmes sought to articulate a test for regulatory takings when he wrote that "if regulation goes too far it will be recognized as a taking."[25] Later Supreme Court cases have explained that *categorical* or *per se* takings occur when there is a permanent invasion by the government of an owner's property no matter how slight[26] or when a regulation "'denies all economically beneficial or productive use of land.'"[27] Furthermore, *noncategorical* or "case-specific takings …involve consideration of the economic impact of the regulation, the [regulation's] interference with reasonable investment-backed expectations, and the character of the regulation."[28]

The Wisconsin Court of Appeals[29] deems there to be four categories of takings: 1) those requiring an owner to suffer a permanent physical invasion of his or her property (e.g., *Loretto*[30]); 2) those that are not a permanent physical invasion of the owner's property, as in *Loretto*, *supra*, but that deprive an owner of *all* "economically beneficial use" of his or her property (e.g., *Lucas*[31]); 3) those that are case specific and require an *ad hoc* balancing of factors under the U.S. Supreme Court's holding in *Penn Central Transportation Co. v.*

[22] STS/BAC Joint Venture v. City of Mt. Juliet, Tenn., 2004 Tenn. App. LEXIS 821, at *15–16 (Tenn. App. 2004).

[23] City of Coeur d'Alene v. Simpson, 142 Idaho 839, 846, 136 P.3d 310, 318 (2006) (*citing* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15, 43 S. Ct. 158, 67 L. Ed. 322 (1922)).

[24] 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 2d 332 (1922).

[25] *Mahon*, 260 U.S. at 415, 43 S. Ct. at 160, 67 L. Ed. 2d at 326.

[26] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

[27] Miskowiec v. City of Oak Grove, 2004 Minn. App. LEXIS 1236, at *8 (*quoting* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798, 812 (1992)).

[28] *Id.* (*citing* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978); *see also* Agins v. City of Tiburon, 447 U.S. 255, 261–62, 100 S. Ct. 2138, 2141–42, 65 L. Ed. 2d 106 (1980)).

[29] *See* discussion in Wis. Builders Ass'n v. Wis. Dep't of Transp., 285 Wis. 2d 472, 702 N.W.2d 433 (2005).

[30] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 880 (1982).

[31] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016, 112 S. Ct. 2886, 2894, 120 L. Ed. 2d 798, 813 (1992).

City of New York;[32] and 4) those that involve land-use exactions (e.g., *Nollan*[33] *and Dolan*[34]).

The subsections that follow embrace the Wisconsin court's analysis above by discussing two forms of categorical takings, noncategorical takings that do not come within the previous categories that must be evaluated based on a balancing of the *Penn Central* factors, and exactions as a specific form of regulatory takings.

A.3.a. Direct Appropriation or Physical Invasion of Private Property by Government: The Loretto Holding

As stated, there are two kinds of categorical takings. The first type of categorical taking in which compensation is required is when there is a "direct governmental appropriation or physical invasion of private property,"[35] such as occurred in *Loretto v. Teleprompter Manhattan CATV Corp.*[36] In *Loretto* a New York law required a landlord to permit a cable television company to install its cable facilities on the landlord's property, for which the landlord, pursuant to a ruling of the State Commission on Cable Television, could charge no more than $1.00.[37] The Supreme Court held that the cable installation on the property as required by law constituted a taking under the traditional test that a "permanent physical occupation" of private property as required by the government in that case is a taking.[38]

As stated in *Brown v. Legal Foundation of Washington*,[39]

> "'[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner…regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary…. Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants…; or when its planes use private airspace to approach a government airport…, it is required to pay for that share no matter how small.'"[40]

Therefore, if the government physically possesses or invades private property, "the government has a 'categorical duty' to compensate the owner for a taking."[41] Even a temporary invasion or appropriation of property by the government is compensable, because "[i]t is now well settled that a temporary, non-final deprivation of property is…a 'deprivation' within the terms of the Fourteenth Amendment."[42] Thus, for instance, it has been held that a "[t]emporary loss of use of the remainder area is treated in the same manner as a permanent loss" for which compensation is required.[43]

Finally, a majority of the cases hold that government agencies having the power of eminent domain may enter private property for the purpose of conducting examinations and surveys.[44] Such authority is often granted by statute. However, a condemnor should acquire a temporary easement if land is being entered for the purpose of drilling holes and removing soil samples or if other invasive acts are to be performed that do not come within the definition of a survey.[45]

A.3.b. Deprivation of All Economically Beneficial Use of the Property: The Lucas *Test*

"A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial use' of [the] property."[46] When governmental regulations go too far and become too "onerous," the "'effect is tantamount to a direct appropriation and ouster…and…such regulatory takings may be com-

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[32] 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978).

[33] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[34] Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[35] Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d at 128 (*quoting* Lingle v. Chevron USA, Inc., 544 U.S. at 536, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887).

[36] 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 868 (1982).

[37] *Id.* at 421, 423-24, 102 S. Ct. at 3169, 73 L. Ed. 2d at 874.

[38] *Id.* at 428, 437, 102 S. Ct. at 3172, 3177, 73 L. Ed. 2d at 877, 883–84.

[39] 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003).

[40] *Id.* at 233–34, 123 S. Ct. at 1418, 155 L. Ed. 2d at 393 (emphasis supplied) (citations omitted) (*quoting* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–23, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

[41] Herzberg v. County of Plumas, 133 Cal. App. 4th 1, 13, 34 Cal. Rptr. 3d 588, 596 (Cal. App. 3d Dist. 2005) (*citing* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 887 (2005); Brown v. Legal Found. of Wash., 538 U.S. 216, 233, 123 S. Ct. 1406, 155 L. Ed. 2d 376, 393 (2003); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 880 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332, 344 (1979) (*per se* rule recognizes owner's right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

[42] 1A NICHOLS ON EMINENT DOMAIN § 4.5[2], at 4-27, 28 (3d ed. 2007).

[43] 4A NICHOLS ON EMINENT DOMAIN § 14A.01[1], at 14A-3.

[44] 9 NICHOLS ON EMINENT DOMAIN § 32.06, at 32-25.

[45] *Id.* at 32-27–28. *See id.* § 6.01 [16][a]. *See also* Robinson v. Ark. Game & Fish Comm'n, 263 Ark. 462, 565 S.W.2d 433 (1978) (reversing a trial court's order requiring a landowner to allow the Commission's employees to enter the owner's property in connection with the Commission's plan to construct a new lake bordering the owner's property); Cathey v. Ark. Power & Light Co., 193 Ark. 92, 97 S.W.2d 624 (1936) (holding that highway department's right-of-way did not authorize an electric power company to erect lines in the right-of-way without paying damages as the owner was entitled to damages for each additional "servitude").

[46] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th at 1270, 42 Cal. Rptr. 3d at 128 (emphasis in original) (*quoting Lingle*, 544 U.S. at 538, 125 S. Ct. at 2081, 161 L. Ed. 2d at 888 (*quoting Lucas,* 505 U.S. at 1019, 112 S. Ct. at 2895, 120 L. Ed. 2d 814) (some internal quotation marks omitted).

pensable under the Fifth Amendment.'"[47] Although there is no "exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property."[48]

In *Lucas v. South Carolina Coastal Council,*[49] discussed in more detail below, a landowner challenged regulations intended to prevent erosion that restricted private development on state beaches. The U.S. Supreme Court held that compensation could be required "if, on remand, the state court found that the development regulations were restrictive enough to amount to a taking of the beachfront property."[50]

However, prior to the U.S. Supreme Court's decision in *Lucas*, *supra*, the Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.*[51] The First English Evangelical Lutheran Church of Glendale owned land in Los Angeles County on which it operated a campground called Luther Glen as a retreat area and recreational center for handicapped children. In 1978 a flood destroyed all of the buildings in the campground. Thereafter, Los Angeles County adopted an interim ordinance, prohibiting the construction or reconstruction of any building in an interim flood protection area, including the campground.[52] Shortly after the adoption of the ordinance, the landowner filed suit in inverse condemnation seeking compensation, alleging that the ordinance deprived the church of all use of the campground.[53] The trial court granted summary judgment to the county on the inverse condemnation claim based on the Supreme Court's holding in *Agins v. Tiburon.*[54] The California Court of Appeals affirmed and the California Supreme Court denied review.

The U.S. Supreme Court addressed the issue solely on the basis of the pleadings. The Court left for a decision on remand the issue of whether the landowner had been deprived of all use of the property but held that "invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy."[55] On remand the California Court of Appeals held that there was no taking because the interim ordinance did not deny the owner all uses and protected the highest of public purposes in prevention of death and injury.[56]

Returning now to the discussion of the seminal *Lucas* case, *supra*, the Supreme Court in *Lucas* affirmed its earlier holdings in both *Agins* and *First English Evangelical Lutheran Church of Glendale*. In *Lucas* the landowner purchased two lots in 1986 on a South Carolina barrier island with the intention of building single-family homes. In 1988 the state legislature enacted the Beachfront Management Act, which barred the landowner from erecting any habitable structures on the land.[57] The landowner filed an inverse condemnation action, claiming that the state's action was a taking because it deprived the owner of all economic use of the property.

The purpose of the South Carolina legislation was to protect the beaches from erosion from the ocean, wind, and various other causes.[58] According to a lower court, the landowner's lots had been rendered valueless by the state's enforcement of the Act.[59] In upholding the Act, the Supreme Court of South Carolina applied the principle of "harmful" or "noxious" use and held that the Act was merely an exercise of the state's police power to mitigate harm to the public interest that did not result in an unconstitutional taking.[60]

The Supreme Court reversed and remanded. The Court recognized that there is often no distinction between a "harm-preventing" regulation that is noncompensable and a "benefit-conferring" regulation that is compensable.[61] The Court held, however, that

> [w]hen it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our *categorical rule that total regulatory takings must be compensated*. If it were, departure would virtually always be allowed.[62]

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[47] *Id.* (*quoting Lingle*, 544 U.S. at 537, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887).

[48] Steel Assocs., Inc. v. City of Detroit, 2005 Mich. App. LEXIS 2553, at *3 (Mich. Ct. App. 2005) (citations omitted), *appeal denied*, 2006 Mich. LEXIS 530 (Mich., Mar. 27, 2006).

[49] 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[50] *See* Manning v. Mining and Minerals Div., 140 N.M. 528, 531, 144 P.3d 87, 90 (N.M. 2006) (*citing Lucas*, 505 U.S. at 1027-30, 112 S. Ct. 2886, 120 L. Ed. 2d 798), *cert. denied*, 127 S. Ct. 663, 166 L. Ed. 2d 513 (2006).

[51] 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

[52] *Id.* at 307, 107 S. Ct. at 2381, 96 L. Ed. 2d at 259.

[53] *Id.* at 308, 107 S. Ct. at 2382, 96 L. Ed. 2d at 259.

[54] Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980).

[55] 482 U.S. at 322, 107 S. Ct. at 2389, 96 L. Ed. 2d at 268.

[56] First English Evangelical Lutheran Church of Glendale v. County of L.A., 210 Cal. App. 3d 1353, 1372, 258 Cal. Rptr. 893, 905 (Cal. App. 2d Dist. 1989).

[57] Lucas v. S.C. Coastal Council, 505 U.S. at 1006, 112 S. Ct. at 2889, 120 L. Ed. 2d at 808.

[58] *Id.* at 1022, 112 S. Ct. at 2897, 120 L. Ed. 2d at 817.

[59] *Id.* at 1007, 1009, 1019–1020, 112 S. Ct. at 2890, 2896, 120 L. Ed. 2d at 809, 815.

[60] *Id.* at 1020, 112 S. Ct. at 2896, 120 L. Ed. 2d at 816 (*citing* Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887)).

[61] *Id.* at 1024, 1025, 112 S. Ct. at 2897, 2898, 120 L. Ed. 2d at 818.

[62] *Id.* at 1026, 112 S. Ct. at 2898–99, 120 L. Ed. 2d at 819 (some emphasis in original; some emphasis supplied).

In determining how to distinguish between "harm-preventing" regulations and "benefit-conferring" regulations, the Court turned to the common law.

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved…—though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title…. We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[63]

The result of the Court's decision was that South Carolina could not impose the regulation on the land unless it could meet the above test. On remand the Supreme Court of South Carolina held that "the sole issue on remand from this Court to the circuit level is a determination of the actual damages Lucas has sustained as the result of his being temporarily deprived of the use of his property."[64]

A balancing of factors, as required in a situation of a noncategorical, *Penn Central*-type taking, discussed below, is not required "where a governmental regulatory action permanently eliminates an economic value from an entire piece of property by prohibiting all economically beneficial use"; such an action is a "*per se*" or "total regulatory taking."[65] However, as explained in subsection B.5, *infra*, in the absence of a *Lucas* total taking of all economically viable use of the property, the *Penn Central* analysis is to be applied in a "fact specific inquiry" into the alleged taking.[66]

In 2004 in *Miskowiec v. City of Oak Grove, supra,* the Minnesota Court of Appeals distinguished an ordinance and moratorium from South Carolina's Beachfront Management Act that was at issue in the *Lucas* case, because in *Miskowiec* the appellants' "property ha[d] several productive uses."[67] Indeed, "the district court found that instead of a decline in value, the property actually appreciated in value since appellants purchased it."[68] (Interestingly, however, the property "was unbuildable" even before the enactment of the subject regulation affecting the property.[69])

As explained in the next subsection, there has not been a *Lucas*-type taking unless the government regulation at issue deprives the owner of all economically viable use of his or her property. Regulation that diminishes, even destroys, the value of a business operated on the owner's property also typically is not a taking within the meaning of *Lucas*. A Montana court recently considered the meaning of *Lucas* in 2005 in *Kafka v. Montana Department of Fish, Wildlife and Parks,*[70] observing that the Supreme Court "explicitly distinguished cases like the one at bar, in which the effect of the regulation fell on the *commercial viability of a business*,"[71] and stating that "lower courts have recognized that *the categorical taking rule applies only to claimed takings of land*."[72]

A.4. Maps of Reservation and Deprivation of Economically Viable Use

Many courts have dealt with the issue of whether maps of reservation are constitutional.[73] Under *Lucas*, of course, the critical question is whether a challenged regulation has "deprived landowners of 'all economically viable use' of their property."[74] Most courts that have considered statutes and ordinances authorizing maps of reservation such as those used by transportation departments or other government agencies have held that the laws are not *facially* unconstitutional.[75] However, "nearly every reported case has found that the reservations as *applied* preclude any economically viable use of the mapped lands and constitute a taking without just compensation."[76]

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[63] *Id.* at 1028–29, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821 (citations omitted) (footnote omitted).

[64] Lucas v. S.C. Coastal Council, 309 S.C. 424, 427, 424 S.E.2d 484, 486 (1992).

[65] STS/BAC Joint Venture v. City of Mt. Juliet, 2004 Tenn. App. LEXIS 821, at *12 (Tenn. Ct. App. 2004).

[66] *Id.* at *12–13.

[67] 2004 Minn. App. LEXIS 1236, at *16. (See note 27, *infra*.)

[68] *Id.*

[69] *Id.*

[70] 2005 Mont. Dist. LEXIS 729, at **54–55 (12th Judicial Dist., Hill County 2005).

[71] *Id.* at **55 (emphasis supplied).

[72] *Id.* (emphasis supplied) (*citing* Unity Real Estate Co. v. Hudson, 178 F.3d 649, 674 (3d Cir. 1999), *cert. denied*, 528 U.S. 963, 120 S. Ct. 396, 145 L. Ed. 2d 309 (1999)).

[73] It should be noted that pre-1999 cases on the subject may have been superseded by decisions of the U.S. Supreme Court. *See* 8A NICHOLS ON EMINENT DOMAIN § 17.04[1], at 17-42 (3d ed. 2008) (also noting that in the 5-year period prior to 1999 there were virtually no cases of right-of-way reservations other than the exaction cases that usually involve requirements for outright dedication).

[74] Smith v. Town of Mendon, 4 N.Y.3d at 9, 822 N.E.2d at 1217, 789 N.Y.S.2d at 699 (*quoting* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720, 119 S. Ct. 1624, 1644, 143 L. Ed. 2d 882, 912 (1999)). *See also Lucas,* 505 U.S. at 1019, 112 S. Ct. at 22895, 120 L. Ed. 2d at 815 ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.")).

[75] 8A NICHOLS ON EMINENT DOMAIN § 17.04[2][a], at 17-43 (3d ed. 2008) ("Only three states have held these laws to be unconstitutional on their face.")

[76] *Id.*

According to *Nichols on Eminent Domain,* "[t]he few map statues that have been held not to constitute a taking (1) limit the duration of the reservation and (2) allow the owner an opportunity to develop the mapped lands by obtaining a variance."[77] Furthermore, "the courts have focused on whether the particular reservation imposes a 'reasonable' burden on the affected landowner."[78] The shorter the length of the reservation, then the more likely it is that the reservation will be held to be reasonable. "The cases generally find that a complete prohibition on development, even for a one year period, is a taking for which compensation must be paid."[79] The majority of cases have held the mapping statutes to be unconstitutional.[80] For example, in New York such statutes consistently have been held to be unconstitutional.[81] On the other hand, the Wisconsin Supreme Court has upheld Wisconsin reservation statutes "but expressly noted that [the] statutes did not completely forbid private development on reserved land."[82]

In 2006 in *Davis v. Brown,*[83] the Supreme Court of Illinois upheld a provision of the Illinois Highway Code that authorized the state transportation agency to prepare and record maps that established the approximate location and widths of rights-of-way for future highway projects.[84] In *Davis* the Department of Transportation prepared and recorded such a map. With respect to Section 4-510 of the statute the

> plaintiffs allege[d] that…those landowners whose property falls within the right-of-way established by a map must give notice to the Department if they plan to develop their property; that once a landowner has so notified the Department, the Department has the option to commence eminent domain proceedings against the landowner; that this "option to take" has "no time constraints"; and that no compensation is provided to landowners under the statute for the creation of the "option to take." Two plaintiffs…further allege…that they would like to develop their property but have not done so for fear that if they give notice to the Department, as required by section 4-510, the Department will commence eminent domain proceedings against them.[85]

The landowners challenged the constitutionality of the statute facially and as applied, complaining that the landowners received "no compensation for the creation of the 'option to take'" for the benefit of the transportation department.[86] However, the department "maintain[ed] that section 4-510 imposes no economic restrictions on any landowner's property."[87] The court, however, disagreed, finding that the rights created under the statute that benefited the state imposed a "potential economic restriction" on a landowner's property.[88] Nevertheless, the court agreed with the reasoning of a New Jersey appellate court, which had dealt with a similar statutory scheme emphasizing a beneficial policy that was designed to reduce the cost of public acquisition and that also had a limited time frame.[89] The Supreme Court of Illinois held "that under section 4-510 the limited reservation period which follows a landowner's notification to the Department does not constitute a regulatory taking."[90]

Furthermore, the court held that the section was not facially unconstitutional. The court explained that

> [t]o establish the facial invalidity of section 4-510, plaintiffs must show that the statute has an effect on the economic viability of every parcel of land that might fall under a right-of-way map. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295, 69 L. Ed.2d 1, 28, 101 S. Ct. 2352, 2370 (1981) (in a facial takings challenge, the question is whether the "'mere enactment'" of the statute constitutes a taking). Plaintiffs have not met this standard.[91]

The court held that the statute was not a *per se* taking:

> [T]he most that can be said with respect to the facial impact of section 4-510, that is, the impact the statute has on every landowner in every right-of-way map, is that the statute creates the *possibility* of a 165-day reservation period. We cannot say, as a matter of law[] that the mere potential of a 165-day reservation period amounts to a *per se* regulatory taking for every landowner who falls within a right-of-way map. Accordingly, we reject plaintiffs' facial takings challenge to section 4-510.[92]

A.5. Noncategorical Takings: The *Penn Central* Test

In addition to the two categorical types of takings discussed previously, a third category of regulation may constitute a taking. Indeed, "[m]ost regulatory takings claims are of the non-categorical type, which have been analyzed under rules set out by the United States Supreme Court in *Penn Central*."[93]

In brief, in *Penn Central Transportation Co. v. New York City*, *supra*, the Landmarks Preservation Commission denied Penn Central's application to build an office atop its property, Grand Central Terminal in New York, by reason of New York City's Landmark Preservation Law. Previously the terminal and location had been designated a landmark and a landmark site respec-

[77] *Id*.

[78] *Id*.

[79] *Id.*

[80] *See id*. § 17.04[2][b][i], at 17-44, *et seq*.

[81] *Id*. § 17.04[2][b][i].

[82] *Id*. § 17.04[2][c], at 17-53.

[83] 221 Ill. 2d 435, 851 N.E.2d 1198 (2006).

[84] *Id.* at 437, 851 N.E.2d at 1200.

[85] *Id.* at 440, 851 N.E.2d at 1202.

[86] *Id.*

[87] *Id.* at 445, 851 N.E.2d at 1205.

[88] *Id.*

[89] *Id.* at 446, 851 N.E.2d at 1206 (*citing* Kingston East Realty Co. v. State, 133 N.J. Super. 234, 336 A.2d 40 (1975)).

[90] *Id.* at 447, 851 N.E.2d at 1206.

[91] *Id.*

[92] *Id.* at 448, 851 N.E.2d at 1207.

[93] City of Coeur d'Alene v. Simpson, 142 Idaho at 847, 136 P.3d at 318.

tively under the applicable New York City laws.[94] Penn Central challenged the denial in the courts but the U.S. Supreme Court affirmed the judgment below that Penn Central's property had not been taken without just compensation.

In part, the Court held that

> New York City law does not interfere in any way with the present uses of the Terminal….
>
> [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights….
>
> [T]he application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.[95]

Thus, in light of *Penn Central* and its progeny, for a noncategorical taking, the owner must show "the magnitude" of a regulation's economic impact and the degree to which it interferes with legitimate property interests.[96] There is "no precise rule" in cases involving land-use regulations; "a weighing of private and public interests" is required to determine whether a regulatory taking has occurred.[97]

As observed in *County of Alameda, supra,*

> [w]here government action merely regulates the use of the property, "'compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.'" There is no precise rule for determining when land use regulations effect a taking of property, and the answer to the question requires a weighing of private and public interests…. Determining whether the challenged regulatory restriction constitutes a compensable taking necessitates "[a]n individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest…."[98]

In a noncategorical taking, as a result of the Supreme Court's decision in *Penn Central*, regulations affecting an owner's property may be subject to "*ad hoc*, factual inquiries" under the so-called *Penn Central* factors.[99]

> Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations…." In addition, the 'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred…. The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.[100]

The *Penn Central* factors or inquiries seek to

> "identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights."[101]

Thus, if there is not a physical invasion of the owner's property or a regulation imposed on it that "deprive[s] the property owner of all economic use of the property," the offending regulation must be evaluated using the *Penn Central* factors.[102] However, "*Penn Central* emphasized three factors in particular: (1) '[t]he economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'"[103]

The California Supreme Court has identified other nonexclusive factors based on *Penn Central* and other U.S. Supreme Court cases that may be relevant considerations in a particular case of an alleged *Penn Central* regulatory taking.[104] These include:

> "(1) whether the regulation 'interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes'…; (2) whether the regulation affects the existing or traditional use of the property and

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[94] Penn Cent. Transp. Co. v. N.Y. City, 438 U.S. at 115, 98 S. Ct. at 2655, 57 L. Ed. 2d at 645.

[95] *Id.* at 136–38, 98 S. Ct. at 2666, 57 L. Ed. 2d at 657.

[96] City of Coeur d'Alene v. Simpson, 142 Idaho at 853, 136 P.3d at 324.

[97] County of Alameda v. Superior Court, 133 Cal. App. 4th 558, 566, 34 Cal. Rptr. 3d 895, 900 (Cal. App. 1st Dist. 2005) (citations omitted).

[98] *Id.* (emphasis in original) (*quoting* Hensler v. City of Glendale, 8 Cal. 4th 1, 10, 876 P.2d 1043, 1048 (1994) (*quoting* Yee v. Escondido, 503 U.S. 519, 522–23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992))), and *citing* Milagra Ridge Partners, Ltd. v. City of Pacifica, 62 Cal. App. 4th 108, 116, 72 Cal. Rptr. 2d 394 (1998); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 106 S. Ct. 2561, 2566, 91 L. Ed. 2d 285, 294 (1986) (noting that the Court has no "set formula" to determine where regulation ends and a taking begins)).

[99] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th at 1270, 42 Cal. Rptr. 3d at 128.

[100] *Id.* at 1270–71, 42 Cal. Rptr. 3d at 128–29 (*quoting Lingle*, 544 U.S. at 539, 125 S. Ct. at 2081–82, 161 L. Ed. 2d at 888) (some internal quotation marks omitted).

[101] *Id.* at 1271, 42 Cal. Rptr. 3d at 129 (*quoting Lingle,* 544 U.S. at 542, 125 S. Ct. at 2082, 161 L. Ed. 2d at 888).

[102] *Id.* at 1277, 42 Cal. Rptr. 3d at 133.

[103] *Id.* (*quoting* Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761, 775, 941 P.2d 851 (1997). In regard to the *Penn Central* factors, *see also STS/BAC Joint Venture,* 2004 Tenn. App. LEXIS 821, at *13–14.

[104] Herzberg v. County of Plumas, 133 Cal. App. 4th 1, 14, 34 Cal. Rptr. 3d 588, 597 (Cal. App. 3d Dist. 2005).

> thus interferes with the property owner's 'primary expectation'…; (3) 'the nature of the State's interest in the regulation'…and, particularly, whether the regulation is 'reasonably necessary to the effectuation of a substantial public purpose'… (4) whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader…; (5) whether the government is acquiring 'resources to permit or facilitate uniquely public functions,' such as government's 'entrepreneurial operations' …; (6) whether the regulation 'permit[s the property owner]…to profit [and]…to obtain a "reasonable return" on…investment'…; (7) whether the regulation provides the property owner benefits or rights that 'mitigate whatever financial burdens the law has imposed'…, (8) whether the regulation 'prevent[s] the best use of [the] land'…; (9) whether the regulation 'extinguish[es] a fundamental attribute of ownership'…; and (10) whether the government is demanding the property as a condition for the granting of a permit…."[105]

The purpose of *Penn Central* balancing is "to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[106] Thus, under a *Penn Central* "ad hoc factual inquiry" the court may find "that a particular regulation 'goes too far' and constitutes a taking."[107]

In the context of an alleged regulatory taking, a property right in the form of a business conducted on the owner's property is not accorded the same treatment as a property right in the land. A government regulation may diminish or destroy the value of an ongoing business without giving rise to a regulatory taking and a requirement of compensation. "[T]he fact that a regulatory change may impair a business, or even force it into bankruptcy, is not conclusive evidence that a taking has occurred."[108]

Although an owner must recognize that a "new regulation [may]…render his property economically worthless," the rule is different with respect to land.[109] If government regulation destroys all economically viable use of land the regulation will give rise to a *Lucas*-type regulatory taking. However, real property is subject to regulation without the government necessarily having to pay compensation as a consequence of regulating the property. It is recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community…."[110] Nevertheless, regulation may only go so far, because "[i]n the case of land…the notion that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause…."[111]

Depending on the circumstances, a significant diminution in value of a property caused by a regulation may or may not constitute a taking.[112] In a case of less than a total taking of property caused by government regulation, under *Penn Central* there must be a factual inquiry based on the "'the owner's entire property holdings at the time of the alleged taking, not just the adversely affected portion.'"[113] As another court emphasizes, the issue is "'whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable use of the property.'"[114]

As for one of the *Penn Central* factors—economic impact—in *Allegretti, supra,* involving a government permit issued to an owner to activate a well but which limited the amount of water the owner could extract beneath the owner's property, a California court found that the owner had "not demonstrated any economic impact from the limitation other than unspecific lay testimony regarding reduced profits…."[115] Moreover, the owner had "not demonstrated compensable interference with 'distinct investment backed expectations,' another of the *Penn Central* factors.[116] As for loss of profits as a result of a permit restriction, the "claim of loss of anticipated profits or gain is not compensable," as the claim shows no more than a "'possible restriction upon

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[105] Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761, 775, 941 P.2d 851, 860 (1997) (internal citations omitted).

[106] Herzberg v. County of Plumas, 133 Cal. App. 4th at 15, 34 Cal. Rptr. 3d at 598 (*quoting* Palazzolo v. Rhode Island, 533 U.S. 606, 617–18, 121 S. Ct. 2448, 2457–58, 150 L. Ed. 2d 592, 607 (2001) and *citing* Yee v. City of Escondido, 503 U.S. 519, 522–23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)).

[107] Kafka v. Dep't of Fish, Wildlife & Parks, 2005 Mont. Dist. LEXIS 729, at **58.

[108] *Id.* at **59.

[109] *Id.* at **60–61 (citation omitted).

[110] Paradise, Inc. v. Pierce County, 124 Wash. App. 759, 772, 102 P.3d 173, 180 (2004), *review denied*, 154 Wash. 2d 1027, 120 P.3d 73 (2005) (citations omitted).

[111] 2005 Mont. Dist. LEXIS 729, at **61 (citation omitted).

[112] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th at 1278, 42 Cal. Rptr. 3d at 135 (*citing* Concrete Pipe and Products of Cal., Inc. v. Constr. Laborers Pension Trust for Southern Cal. 508 U.S. 602, 645, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993) (*citing* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926) (approximately 75 percent diminution in value); Hadacheck v. Sebastian, 239 U.S. 394, 405, 36 S. Ct. 143, 60 L. Ed. 348 (1925) (92.5 percent diminution)). *See also* Long Beach Equities, Inc. v. County of Ventura, 231 Cal. App. 3d 1016, 1036, 282 Cal. Rptr. 877 (Cal. App., 2d Dist. 1991).

[113] *Id.* at 1277, 42 Cal. Rptr. 3d at 134 (*quoting* Buckley v. Cal. Coastal Comm'n, 68 Cal. App. 4th 178, 193, 80 Cal. Rptr. 2d 562, 572 (1998) (*citing* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 107 S. Ct. 1232, 1248, 94 L. Ed. 2d 472 (1987)).

[114] Paradise, Inc. v. Pierce County, 124 Wash. App. at 768, 102 P.3d at 178 (*quoting* Edmonds Shopping Ctr. Assocs. v. City of Edmonds, 117 Wash. App. 344, 362, 71 P.3d 233, 241 (2003)).

[115] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th at 1278, 42 Cal. Rptr. 3d at 135.

[116] *Id. at* 1279, 42 Cal. Rptr. 3d at 135 (citations omitted).

more economic uses of [the] property.'"[117] As explained in Section 4.A.8, *infra*, an owner when seeking compensation for a regulatory taking may not separate his or her rights in the property to show damage and a taking. That is, the regulation must be shown to damage the owner's entire property, not just one of the owner's rights appurtenant to the property.

A.6. Application of the Consequential Damages Rule

In 2005 the Iowa Supreme Court applied the consequential damages rule in finding that a rezoning of business property had not resulted in an unconstitutional taking of the owners' property. Although recognizing the *Penn Central* and *Lingle v. Chevron USA Inc*.[118] cases, as well as *Griggs v. County of Allegheny*,[119] the court stated that

> [t]he consequential damages rule provides that "in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." *N. Transp. Co. of Ohio v. City of Chicago*, 99 U.S. 635, 642, 25 L. Ed. 336, 338 (1878); *see also Barbian*, 694 F.2d at 486 n.8; *Hansen v. United States*, 65 Fed. Cl. 76, 102-06 (2005) (recognizing that takings jurisprudence relies on general tort concepts such as causation to evaluate liability and holding that for a taking to be cognizable, causation, "that is a direct, as opposed to an indirect or consequential, appropriation or seizure of property," must be shown; "test simply requires proof that the government is the cause-in-fact of the harm for a taking to occur").[120]

The court held that "the consequential damages rule applies here," as the damage about which the owners complained was not the rezoning of the property but the later action of a business causing a nuisance.[121]

A.7. The Supreme Court's Rejection of the "Substantially Advances a State Interest" Test: The *Lingle* Holding

Whether the government's action or regulation "substantially advances a state interest" is no longer the court's standard to access an unconstitutional taking.[122]

In *Agins v. City of Tiburon,*[123] the U.S. Supreme Court had held that a regulatory taking may occur when an "ordinance does not substantially advance legitimate state interests."[124] In *Agins* the landowners sought to have city zoning ordinances declared unconstitutional because they effected a taking of their property without just compensation. The ordinances in question placed the landowners' property in an area to be devoted to single-family housing and open space. The density restriction would have permitted the landowners to build between one and five single-family residences on their 5-acre tract.[125] The landowners contended that the land in Tiburon had the highest value of suburban property in the state of California and that their land had the highest value of all.[126] The landowners further alleged that the rezoning prevented its development for any purpose.[127]

The California Supreme Court had affirmed the dismissal of the case for failure to state a cause of action, holding that the zoning ordinances had not deprived the landowners of their property without compensation and that the city had acted reasonably in making municipal-planning decisions.[128] The U.S. Supreme Court, which affirmed the decision, held that "the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner…. In this case, the zoning ordinances *substantially advance legitimate governmental goals*."[129]

In *Agins* the Court approved a two-prong test for regulations to be noncompensable: 1) they must bear a relationship to the public welfare, and 2) they must substantially advance legitimate governmental "interests" or "goals."[130] In upholding the decision of the California Supreme Court, the *Agins* Court further stated:

> The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential…. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments.[131]

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[117] *Id.* at 1279, 42 Cal. Rptr. 3d at 136 (*quoting* Terminal Plaza Corp. v. City and County of San Francisco, 177 Cal. App. 3d 892, 912, 223 Cal. Rptr. 379, 391 (Cal. App. 1st Dist. 1986)).

[118] 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[119] 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962).

[120] Harms v. City of Sibley, 702 N.W.2d 91, 100 (Iowa 2005).

[121] *Id.* at 101.

[122] Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th at 1280, 42 Cal. Rptr. 3d at 136.

[123] 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). *See also* Wild Rice River Estates, Inc. v. City of Fargo, 2005 N.D. 193, at *P13, 705 N.W.2d 850, 854, *cert. denied*, 2006 U.S. LEXIS 3923 (2006) (also noting that *Lingle* disavows the "stand alone" regulatory takings test announced in *Agins*).

[124] *Id.* at 261, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 112 (1980) (overruled as discussed in § 4).

[125] *Id.* at 257, 100 S. Ct. at 2410, 65 L. Ed. 2d at 110.

[126] *Id.* at 258, 262, 100 S. Ct. at 2140, 2142, 65 L. Ed. 2d at 110, 113.

[127] *Id.* at 258, 259, 100 S. Ct. at 2140, 2141, 65 L. Ed. 2d at 110, 111.

[128] Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25 (1979).

[129] 447 U.S. at 261, 100 S. Ct. at 2142, 65 L. Ed. 2d at 112 (citation omitted) (emphasis supplied).

[130] *Id.*

[131] *Id.* at 262–63, 100 S. Ct. at 2142, 65 L. Ed. 2d at 113 (citation omitted).

Some decisions after *Agins,* but preceding the Supreme Court's decision in *Lingle*, discussed below, state that "when something less than all economically viable use has been destroyed," a "government regulation may still constitute a taking if such regulation 'does not substantially advance legitimate state interests.'"[132]

In contrast, in 2004 in a pre-*Lingle* case, the New York Court of Appeals in *Smith v. City of Mendon*[133] reviewed the development condition at issue (the conditioning of approval for a proposed building on the owner's site on the owner's acceptance of a conservation restriction on any development) based on the standard articulated by the Supreme Court in *Agins, supra.* The *Smith* court considered whether "the conservation restriction at issue substantially advances a legitimate government purpose—environmental preservation," but held that "a regulatory action need only be reasonably related to a legitimate governmental purpose to satisfy the 'substantially advance' standard,"[134] language that appears to have been a departure from the *Agins*' holding.

The New York Court of Appeals may have been prescient, because in 2005 in *Lingle v. Chevron USA Inc.,*[135] the Supreme Court disavowed the *Agins'* test of whether a government action that "substantially advance[s] state interests" is valid as a "stand-alone regulatory takings test."[136] In *Lingle,* involving a statute in Hawaii that capped the rent that oil company Chevron could charge to dealers leasing oil company-owned service stations, the Supreme Court made it very clear that the *Agins'* "'substantially advances' formula is not only *doctrinally* untenable as a takings test—its application as such also present serious practical difficulties."[137] The Court's holding in *Lingle* applies to all manner of takings regardless of whether they are categorical as in *Loretto* or *Lucas* or noncategorical as in *Penn Central*.[138] Thus, as to all takings of a regulatory nature, the *Agins'* formula "is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation."[139]

Although some courts may opine that the *Agins'* formula still applies in cases involving exactions,[140] the Supreme Court in *Lingle* was very clear in explaining that although it may appear that the *Agins'* formula "played a role in our decisions in *Nollan*…and *Dolan*," the court "did not apply the 'substantially advances' test that is the subject of today's decision."[141] Furthermore, the Court took care to explain that "[a]lthough *Nollan* and *Dolan* quoted *Agins'* language…the rule those decisions established is entirely distinct from the 'substantially advances' test we address today."[142]

> [W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.[143]

As a Wisconsin court affirmed, "[i]n light of *Lingle*, the theory that a regulation effects a taking for Fifth Amendment purposes if it does not substantially advance a legitimate state interest is no longer valid."[144] Likewise, in discussing a regulatory taking and the applicability of the *Penn Central* factors, the Supreme Court of Iowa has explained that

> [i]t should be noted that in Lingle v. Chevron USA, the Supreme Court removed from the takings inquiry the "substantially advances" test, articulated in *Agins v. City of Tiburon*…relied on by the district court in this case as part of its analysis under Penn Central. That test derived from due process, not takings, principles and thus "is not a valid method of discerning whether private property has been 'taken' for purposes of the *Fifth Amendment*…." The regulatory takings tests, expressed in Loretto….Lucas…and Penn Central…"aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain…." By contrast, the "substantially advances" test "probes the regulation's underlying validity…." Whereas the takings clause allows property to be taken for public use in exchange for just compensation, "no amount of compensation" can authorize a regulation that is "so arbitrary as to violate due process…." Accordingly, Agins' "substantially advances" test "has no proper place in our takings jurisprudence…." It was apparently the "character of the governmental action" prong of the Penn Central test which courts read to justify inquiry into the relative goodness of the action. In fact, in the context in which that phrase is found, "character of the governmental action" referred to whether the alleged taking was via regulation or a physical invasion….This is what the Court corrected in Lingle.[145]

In sum, in *Lingle* the Supreme Court held that whether a governmental regulation substantially ad-

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[132] *STS/BAC Joint Venture*, 2004 Tenn. App. LEXIS 821, at *15 (*quoting Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 705, 119 S. Ct. at 1636, 143 L. Ed. 2d at 902 (1999)).

[133] 4 N.Y.3d 1, at 14, 822 N.E.2d at 1221, 789 N.Y.S.2d at 703.

[134] *Id.*

[135] 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[136] *Id.* at 540*,* 125 S. Ct. at 2083, 161 L. Ed. 2d at 889.

[137] *Id.* at 544, 125 S. Ct. at 2085, 161 L. Ed. 2d at 892 (emphasis in original).

[138] *See id.* at 538–39, 545, 125 S. Ct. at 2081, 161 L. Ed. 2d at 887.

[139] *Id.* at 545, 125 S. Ct. at 2085, 161 L. Ed. 2d at 892.

[140] *See, e.g.*, Herzberg v. County of Plumas*,* 133 Cal. App. 4th at 14, n.9, Cal. Rptr. 3d at 597, n.9 (observing that "outside the land use exaction context the 'substantially advances' formula is not a valid takings test").

[141] Lingle v. Chevron USA*,* 544 U.S. at 546, 125 S. Ct. at 2086, 161 L. Ed. 2d at 893.

[142] *Id.* at 547, 125 S. Ct. at 2086, 161 L. Ed. 2d at 893.

[143] *Id.* at 548, 125 S. Ct. at 2087, 161 L. Ed. 2d at 894.

[144] Wis. Builders Ass'n v. Wis. DOT*,* 285 Wis. 2d at 501, 702 N.W.2d at 447.

[145] City of Coeur d'Alene v. Simpson, 142 Idaho at 847, n.5, 136 P.3d at 318, n.5 (citations omitted) (emphasis supplied).

vances governmental interests or goals is neither a stand-alone nor an otherwise proper test for determining whether a challenged regulation constitutes an unconstitutional taking.

A.8. The "Whole Parcel" Rule in Defining the Relevant Property

The effect of a regulation alleged to constitute a taking must damage all of the owner's rights in his or her parcel property, regardless of whether the taking is a categorical or a noncategorical taking.

In *Wild Rice River Estates, Inc. v. City of Fargo,*[146] involving a 21-month moratorium on the issuance of building permits, the court stated that it had "adopted the parcel-as-a-whole rule";[147] thus, "'in determining whether a restriction constitutes a taking, courts look to the effect of the restriction on the parcel as a whole, rather than to the effect on individual interests in the land.'"[148] As stated in *Smith, supra,* involving a town planning board's conditioning of approval for a proposed building site on the owners' acceptance of a conservation restriction,

> the Supreme Court has been reluctant to engage in spatial "conceptual severance" in determining whether a regulation or government action deprives a property owner of all economically viable uses of the property.... Hence, we look to the effect of the government action on the value of the property *as a whole*, rather than to its effect on discrete segments of the property....[149]

The *Smith* court held that the conservation restriction was not a dedication of the type found in the exaction cases, as there was no actual dedication of the owner's property.[150] Thus, as the *Smith* case preceded the *Lingle* case in 2005, the *Smith* court applied the *Agins*' standard in finding that there had been no constitutional taking, but also found that there had been no taking under the *Penn Central* holding.[151]

In *City of Coeur d'Alene v. Simpson,*[152] the issue was whether a categorical *Lucas* or a noncategorical *Penn Central* taking had occurred. The case illustrates that the whole parcel approach may be complicated by transfers of parcels that may or may not have been *bona fide*. The case involved city ordinances prohibiting construction of fences and other structures within 40 ft of the shoreline. The city had issued a stop-work order on construction that was within 40 ft of the shoreline of Lake Coeur d'Alene in violation of city ordinances called the "Shoreline Regulations," which regulated construction and placement of objects on the area south of Lakeshore Drive.[153] The affected property consisted of two tax lots of several parcels each separated by Lakeshore Drive that from 1928 to 2001 had been conveyed together and that shared a single street address. The parcel north of Lakeshore Drive consisting of four lots was referred to as the "upland parcel."[154] The trial court had concluded that the 40 ft setback requirement did not constitute a taking but there was a question of fact "whether the ordinance deprived the property of all economically viable use."[155] Afterwards, one of the Simpsons formed a corporation called Beach Brothers and named the Simpsons' adult sons as sole shareholders; the parents then quitclaimed the "waterward" parcel, the parcel south of Lakeshore Drive, to Beach Brothers. In another opinion, the trial court ruled, *inter alia*, that there had been no taking because when the upland and waterward parcels were considered together, "they retained value" and served the legitimate purpose of preserving the shoreline's aesthetic features.[156]

Among the issues the Supreme Court of Idaho had to consider were the value of the property taken and "how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"[157] That is, the issue was "what constitute[d] the relevant property."[158]

The fact of the transfer of the property to Beach Brothers was not the issue: "[T]he fact that an owner acquires property after a regulation has been enacted does not necessarily bar a claim that the regulation has effected a taking."[159] (*See*, however, discussion of the standing doctrine in Section 4.C.3, *infra*.) However, in finding that there had been no taking the trial court had decided that the transfer to Beach Brothers had no effect, because "the transfer to Beach Brothers, Inc. was to benefit the Simpsons as the owners of the upland parcel.... [T]he real property is in fact owned and operated as a conceptual and practical unit."[160] The Supreme Court of Idaho did consider the Beach Brothers transaction to have a potential effect on the decision.[161]

Although the city argued that the waterward parcel enhanced the value of the upland parcel, the court stated that "any benefit the waterward parcel confers upon the upland parcel will not be seen by Beach Brothers."[162] There was no evidence of an "illegal split,"

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[146] 2005 N.D. 193, 705 N.W.2d 850 (2005), *cert. denied*, 547 U.S. 1130, 126 S. Ct. 2039, 164 L. Ed. 2d 783 (2006).

[147] *Wild Rice River Estates, Inc.,* 2005 N.D. 193, *P17, 705 N.W.2d at 856.

[148] *Id.* (*quoting* Grand Forks-Trail Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987)).

[149] Smith v. Town of Mendon, 4 N.Y.3d at 14, 822 N.E.2d at 1221, 789 N.Y.S.2d at 703 (emphasis in original) (*citing* Dist. Intown Props. Ltd. P'ship v. Dist. of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999); *Penn Central,* 438 U.S. at 130–31, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)).

[150] *Id.* at 11, 822 N.E.2d at 1219, 789 N.Y.S.2d at 701.

[151] *Id.* at 14–15, 789 N.E.2d at 1221, 789 N.Y.S.2d at 703.

[152] 142 Idaho 839, 136 P.3d 310 (2006).

[153] *Id.* at 842, 136 P.3d at 313.

[154] *Id.*

[155] *Id.* at 843, 136 P.3d at 314.

[156] *Id.* (*citing Lucas*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)).

[157] *Id.* at 847–48, 136 P.3d at 318–19 (citation omitted).

[158] *Id.* at 848, 136 P.3d at 319 (citation omitted).

[159] *Id.*

[160] *Id.*

[161] *Id.* at 849, 136 P.3d at 320.

[162] *Id.*

as Beach Brothers was a separate entity and the transaction was made with estate planning and personal liability issues in mind.[163] However, in remanding the case, the court held that "the circumstances of the transfer may be entirely relevant to the denominator inquiry,"[164] the numerator-denominator approach being discussed in the next subsection.[165]

The court directed that on remand the trial court would need to weigh a variety of factors concerning the transfer to Beach Brothers to determine what constituted the relevant property. Among the factors were the timing of the transfer,[166] the extent to which the property was to be developed as a whole,[167] the economic independence of the parcel of property,[168] the presence of a road dividing the parcels,[169] the separate treatment of the parcels for tax purposes,[170] and other factors discussed in the opinion.[171]

Another example of the whole parcel approach is *Allegretti & Co. v. County of Imperial*. A property owner may have the right to draw water from his property but a permit restriction on the amount that may be withdrawn from a well to be activated by the owner does not constitute a taking.[172] "Importantly, the basis for this factual inquiry 'is the owner's entire property holdings at the time of the alleged taking, not just the adversely affected portion….' Thus the relevant parcel is Allegretti's 2,400 acres, and not merely its right to draw water from it…." [173]

In sum, the relevant parcel is the owner's entire property, not just one of the owner's rights in the property.

A.9. The Numerator-Denominator Approach

As observed in one case involving an application for a game-farm license, "[t]he Supreme Court has described takings analysis by analogy to a fraction in which the denominator is the value of the land prior to the regulation and the numerator is its value afterward."[174] In *City of Coeur d'Alene, supra,* the case involving city ordinances prohibiting construction of structures within 40 ft of a lake's shoreline, it was observed that there is much difficulty "in ascertaining any definitive test for defining the denominator parcel."[175] Thus, "[i]dentifying the denominator parcel is no easy task."[176] However, as long as the value of the numerator of the fraction is more than zero, a categorical claim fails under *Lucas*.[177] That is, a "categorical taking claim" fails if land retains "substantial economic value."[178]

Courts have rejected the "conceptual severance" theory pursuant to which "whole units of property may be divided for the purpose of a takings claim."[179] As discussed above, a single parcel is not to be divided to determine "'whether rights in a particular segment have been entirely abrogated.'"[180] The affected interest must be "considered in light of established principles of state property law."[181] As discussed in Section 4.A.8, *supra*, in *City of Coeur d'Alene*, the court had to consider the effect of the transfer of a parcel to a separate family corporation. Because of the court's remand, the city would be afforded an opportunity to present evidence on several factors, but the Idaho Supreme Court did hold that the record on appeal had "not support[ed] the district court's conclusion that the denominator consisted of

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[163] *Id.*

[164] *Id.*

[165] The court explained that the transaction appeared to be a regular one, but the court could not

> say, however, that the transfer and fact of separate ownership by themselves necessarily end the inquiry. Indeed, the City has questioned the purpose of the transfer and we believe the circumstances of the transfer may be entirely relevant to the denominator inquiry. To explain: a rule that separate ownership is always conclusive against the government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis. It is not pure fantasy to imagine a scenario wherein halfway through a takings suit, Landowner agrees with Company to transfer a parcel of Beachacre–which appears, as the waterward parcel does here, to be separate from Landowner's other parcel–with a wink-and-a-nod agreement to transfer back after the suit or to jointly manage, use, and develop the property.

Id.

[166] *Id.* at 850, 136 P.3d at 322.

[167] *Id.* at 851, 852, 136 P.3d at 322, 323.

[168] *Id.* at 852, 136 P.3d at 323.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] 138 Cal. App. 4th 1261 at 1278, 142 Cal. Rptr. 3d at 134.

[173] *Id.* at 1277, 42 Cal. Rptr. 3d at 134 (*citing* Buckley v. Cal. Coastal Comm'n*,* 68 Cal. App. 4th 178, 193, 80 Cal. Rptr. 2d 562 (Cal. App. 2d Dist. 1998) (*citing* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)); *see* Fla. Rock Indus. Inc. v. United States*,* 45 Fed. Cl. 21, 33 (1999).

[174] Kafka v. Dep't of Fish, Wildlife & Parks, 2005 Mont. Dist. LEXIS 729, at **56 (*citing* Keystone Bituminous Coal Ass'n, 480 U.S. at 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)).

[175] City of Coeur d'Alene v. Simpson, 142 Idaho at 848, n.6, 136 P.3d at 319, n.6 (*citing* John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994) (noting the courts' failure to explain the basis for their methodology and their inconsistent application of factors)).

[176] *Id.*

[177] Kafka v. Dep't of Fish, Wildlife & Parks, 2005 Mont. Dist. LEXIS 729, at **57.

[178] *Id.* (*citing Tahoe Sierra Pres. Council*, 535 U.S. at 330, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (*citing Lucas*, 505 U.S. at 1019, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (*Lucas* rule limited to cases of "complete elimination of value")); *and Palazzolo*, 533 U.S. at 631, 121 S. Ct. at 2464, 150 L. Ed. 2d at 616 ("A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property economically idle.").

[179] City of Coeur d'Alene v. Simpson, 142 Idaho at 848, 136 P.3d at 319.

[180] *Id.* (*quoting Penn Central*, 438 U.S. at 130, 98 S. Ct. at 2662, 57 L. Ed. 2d at 652).

[181] *Id.*

both parcels at issue" (referred to in the opinion as the upland and waterward parcels).[182]

A.10. Property Rights Not Considered as Property in a Regulatory Taking Claim

Although the meaning of property is discussed elsewhere in this digest, (*see* Section 1.F, *supra*), "[a] threshold inquiry into an owner's title is generally necessary to the proper analysis of a takings case, whether of a regulatory or physical nature…."[183] Although property rights may be property rights within the meaning of the Due Process Clause, such rights may not be considered necessarily to be property rights in a takings analysis.[184] Something less than a property right in fee simple, of course, may be a property right subject to a taking. For example, an easement, whether express or implied, across property is a property right for which a claim may be asserted in an inverse condemnation action.[185] Other kinds of rights may not be property rights for which compensation is required in the event of a regulatory taking. As one court emphatically stated, for takings purposes licenses "are privileges and not vested rights…. A license that is subject to revocation or modification is not property protected by the Taking Clause."[186]

As explained in *Kafka*, *supra,* "[t]he Taking Clause has been interpreted by the United States Supreme Court in *Lucas* to protect those interests in property that were elements of ownership of the property at common law."[187] Thus, "[a]n intangible interest in a business has never been held to be a proper subject of a regulatory taking claim."[188]

> Courts have not viewed a business as the property subject to a taking claim. Rather, they have viewed the ability to carry on a business as one of the elements of an interest in other property such as real estate or goods. One probable reason for this view is that, as Plaintiffs' experts appear to believe, the only basis for valuing the damages arising from a taking of the business would revolve around estimation of future profitability of the business.[189]

In *Kafka* the court held that a game-farm license "was never part of the common law property right that inhered" in the owner's land."[190] The state does not owe "compensation for injury to the value of a business that exists only because the legislature allowed [the business]."[191]

A.11. Public Nuisance Exception to Claims for Regulatory Takings

Under the *Lucas* holding, "a regulation does not result in a compensable taking if the state can demonstrate that [a] regulation only bans conduct that constitutes a public nuisance pursuant to 'background principles of nuisance and property law.'"[192] Although in an Arizona case the property owners argued that the nuisance exception was inapplicable in a partial regulatory taking subject to "*Penn Central*'s ad hoc balancing test," an appellate court disagreed.[193] The court held that the nuisance exception was "equally applicable to all takings claims, including partial regulatory takings that would otherwise be analyzed pursuant to the *Penn Central* test."[194] Thus, "the nuisance exception is a complete bar to a Fifth Amendment Takings claim."[195] For there to be a taking, the "protected property interest…[must be] one that inhered in the title acquired by the claimant when he purchased the property…."[196] Thus, a defense based on the nuisance exception to regulatory takings is a "threshold matter before reaching the *Penn Central* analysis."[197] In applying the exception, "[t]he relevant question is whether [a property

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[182] *Id.* at 849, 136 P.3d at 320.

[183] Kim v. City of N.Y., 90 N.Y.2d 1, 6, 681 N.E.2d 312, 314, 659 N.Y.S.2d 145, 147 (1997).

[184] Kafka v. Dep't of Fish, Wildlife & Parks, 2005 Mont. Dist. LEXIS 729, at **45–46 (*citing* Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1075 (11th Cir. 1996), *cert. denied*, 522 U.S. 981, 118 S. Ct. 441, 139 L. Ed. 2d 378 (1997) (right to complete construction project not property under Taking Clause) and Pittman v. Chicago Bd. of Educ*.,* 64 F.3d 1098, 1104 (7th Cir. 1995), *cert. denied*, 517 U.S. 1243, 116 S. Ct. 2497, 135 L. Ed. 2d 189 (1996) (teacher tenure not property under the Taking Clause)).

[185] Colman v. Utah State Land Bd, 795 P.2d at 922 (1990).

[186] Kafka v. Dep't of Fish, Wildlife & Parks, 2005 Mont. Dist. LEXIS 729, at **46. *See also* Conti v. United States, 291 F.3d 1334, 1340 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 1112, 123 S. Ct. 904, 154 L. Ed. 2d 785 (2003) (revocation of gillnetting permit not a taking); Allied-General Nuclear Servs. v. United States, 839 F.2d 1572, 1577 (Fed. Cir. 1988), *cert. denied,* 488 U.S. 819, 109 S. Ct. 61, 102 L. Ed. 2d 39 (1988) (refusal to process construction permit for nuclear plant not a taking).

[187] *Id.* at **47 (*citing Lucas*, 505 U.S. at 1027–31, 112 S. Ct. 2886, 120 L. Ed. 2d 798).

[188] *Id.* at **49.

[189] *Id.* at **50.

[190] *Id.* at **52.

[191] *Id.*

[192] Mutschler v. City of Phoenix, 212 Ariz. 160, 164, 129 P.3d 71, 75 (Ariz. App., 1st Div. 2006) (citation omitted).

[193] *Id.*

[194] *Id.* (*citing* Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1347 (Fed. Cir. 2004) ("It is a settled principle of federal takings law that under the *Penn Central* analytic framework, the government may defend against liability by claiming that the regulated activity constituted a state law nuisance without regard to the other *Penn Central* factors."); Raceway Park, Inc. v. Ohio*,* 356 F.3d 677, 683 (6th Cir. 2004) (noting, before engaging in *Penn Central* analysis, that "we could appropriately end our Takings Clause analysis here, as there is no taking if there is no private property in the first place."); Machipongo Land & Coal Co. v. Dep't of Envtl. Protection, 569 Pa. 3, 43, 799 A.2d 751, 774 (2002) ("If the Commonwealth is able to show that the Property Owner's proposed use of the stream would unreasonably interfere with the public right to unpolluted water, the use, as a nuisance, may be prohibited without compensation.")).

[195] 212 Ariz. at 165, 129 P.3d at 76.

[196] *Id.*

[197] *Id.*

owner] could have been restrained from operating [its] business in a common-law action for public nuisance."[198] In sum, "public nuisances are not protectable property interests under the Fifth Amendment" and thus may not serve as a basis for a claim for an unconstitutional taking.[199]

A.12. Whether Delay Caused by Litigation Concerning a Regulatory Taking Is a Taking

Government decisions asserting jurisdiction or requiring permits contested by landowners may result in litigation and lengthy delays. Even if a landowner prevails in the litigation, the owner is unlikely to have a claim for a taking caused by a delay stemming from the government's action and the subsequent successful litigation opposing the government's position. As stated by the Supreme Court in *First English Evangelical Lutheran Church of Glendale, supra,* "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" usually will not constitute a taking.[200]

In *Landgate, Inc. v. California Coastal Commission,*[201] the court "consider[ed] whether a delay in the issuance of a development permit partly owing to the mistaken assertion of jurisdiction by a government agency is a type of 'temporary taking' contemplated in *First English*."[202] The court stated that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking,"[203] and that "virtually every court that has examined the issue has concluded, for various reasons and under various theories, that a regulatory mistake resulting in delay does *not*, by itself, amount to a taking of property."[204]

In *Landgate* the critical difference between that case and *First English Evangelical Lutheran Church of Glendale* was that in *Landgate*, "'the mere assertion of regulatory jurisdiction by a government body does not constitute a regulatory taking.'"[205] In contrast to *First English,*

> [h]ere, there was a postponement of development pending resolution of a threshold issue of the development approval process—whether the lot was legal—and not a final decision denying development. In *First English*, on the other hand, the Supreme Court assumed that the ordinance in question categorically denied all property owners within its purview the right to develop their property. Development was assumed to be denied in *First English*, in other words, even though there was no dispute about a threshold issue in the development approval process, as there was in this case, that would be a legitimate basis for postponing approval of development. The postponement of Landgate's development therefore does not constitute a temporary taking of property as that doctrine was conceived in *First English*.[206]

In *Allegretti, supra,* the court held that "[t]he permit condition [at issue], imposed under [the] County's police power for the purpose of conserving groundwaters and preventing their undue waste, had an objectively sufficient connection to that valid governmental interest"[207] and that "such lengthy [litigation] delays can be part of the normal regulatory process."[208] Therefore, as held in *Allegretti*, "[a] landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits."[209]

The fact that the government's assertion of jurisdiction may have been erroneous does not in and of itself give rise to an unconstitutional regulatory taking: "litigation is a normal part of the regulatory process when the public agency prevails but a per se temporary taking when the public agency loses has no basis in either logic or Supreme Court precedent."[210]

A.13. Claims for Regulatory Takings Based on a Government Moratorium or Delay

In the context of regulatory takings, the issue has arisen as to whether a government moratorium or the government's delay in making a decision affecting a

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[198] *Id.* Therefore, a city ordinance that made the operation of a live sex act business illegal as a public nuisance was not a regulatory taking. 212 Ariz. at 167; 129 P.3d at 78.

[199] *Id.* at 167, 129 P.3d at 78.

[200] First English Evangelical Lutheran Church of Glendale, 482 U.S. at 321, 107 S. Ct. at 2389, 96 L. Ed. 2d at 268. *See also Allegretti*, 138 Cal. App. 4th at 1282, n.11, 42 Cal. Rptr. 3d at 137, n.11.

[201] 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841, 953 P.2d 1188 (1998), *cert denied,* 525 U.S. 876, 119 S. Ct. 179, 142 L. Ed. 2d 146 (1998).

[202] *Id.* at 1010, 953 P.2d at 1190. The case centered on the plaintiff's effort to build a large home in Malibu Hills.

[203] *Id.* at 1017, 953 P.2d at 1195 (*citing* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985)).

[204] *Id.* at 1018, 953 P.2d at 1195 (emphasis in original) (*citing* Littoral Dev. Co. v. S.F. Bay Conservation etc. Comm'n*,* 33 Cal. App. 4th 211, 221–22, 39 Cal. Rptr. 2d 266 (Cal. App. 2d Dist. 1995); Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 1080, 37 Cal. Rptr. 2d 677 (Cal. App. 4th Dist. 1995); Jacobi v. City of Miami Beach, 678 So. 2d 1365, 1367 (Fla. App., 3d Dist. 1996); Cannone v. Noey, 867 P.2d 797, 801 (Alaska 1994); Dumont v. Town of Wolfeboro, 137 N.H. 1, 622 A.2d 1238, 1244 (1993); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 801–02 (Fed. Cir. 1993); Steinbergh v. City of Cambridge, 413 Mass. 736, 604 N.E.2d 1269, 1274–77 (1993); Smith v. Town of Wolfeboro, 136 N.H. 337, 615 A.2d 1252, 1257–58 (1992); Lujan Home Builders v. Orangetown, 150 Misc. 2d 547, 568 N.Y.S.2d 850, 851 (Sup. Ct. Rockland County 1991)).

[205] *Id.* at 1027, 953 P.2d at 1201 (*quoting Riverside Bayview Homes, Inc.,* 474 U.S. 121, 126, 106 S. Ct. 455, 459, 88 L. Ed. 2d 419, 426 (1985).

[206] *Id*. at 1029–30, 953 P.2d at 1203.

[207] Allegretti and Co. v. County of Imperial, 138 Cal. App. 4th at 1283, 42 Cal. Rptr. 3d at 138.

[208] *Id.* at 1283, 42 Cal. Rptr. 3d at 139 (*citing* Calprop Corp. v. City of San Diego, 77 Cal. App. 4th 582, 600–01, 91 Cal. Rptr. 2d 792 (Cal. App. 4th Dep't 2000)).

[209] *Id.* at 1284–85, 42 Cal. Rptr. 3d at 140.

[210] Landgate, Inc. v. Cal. Coastal Comm'n. 17 Cal. 4th at 1031, 953 P.2d at 1204.

property owner may be compensable as a temporary taking. Regulations may result in temporary interference with an owner's property right and give rise to a claim for compensation for a temporary taking. Except in the most unusual circumstances, an owner is not likely to recover for an alleged regulatory taking caused by a reasonable moratorium or delay.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency,* [211] the Tahoe Regional Planning Agency imposed two moratoria totaling 32 months on development in the Lake Tahoe Basin while it was formulating a comprehensive land-use plan for the area. The petitioners argued that the *Lucas* categorical rule applied, i.e., that a taking occurs when a regulation deprives an owner of "all economically beneficial uses" of his land.

The Supreme Court held that the government-imposed moratoria at issue in the case did not constitute a taking.

> It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, *we could not possibly conclude that every delay of over one year is constitutionally unacceptable. Formulating a general rule of this kind is a suitable task for state legislatures*. In our view, *the duration of the restriction is one of the important factors that a court must consider* in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the "temptation to adopt what amount to *per se* rules in either direction must be resisted."[212]

In *Wild Rice River Estates*, *supra*, the Supreme Court of North Dakota dealt with an inverse condemnation claim arising out of the city's 21-month moratorium on the issuance of building permits and held that that the moratorium did not constitute a taking of the plaintiffs' property.[213] The court affirmed the trial court's analysis that focused in part on the fact that the moratorium did not "single out" the plaintiffs' property but was temporary "until local, State and Federal officials could adequately review a flood plain management [plan] for the area so devastated by the 1997 flood."[214] The court in *Wild Rice River Estates* quoted the Supreme Court's decision in *Tahoe-Sierra Preservation Council*: "[M]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense."[215] Nevertheless, implicit in the *Wild Rice River Estates* case is that there may be situations of temporary takings that could be compensable. "An extraordinary delay in governmental decisionmaking coupled with bad faith on the part of the governmental body may result in a compensable taking of property."[216]

In *In the Matter of Condemnation by the Municipality of Penn Hills of Allegheny County, Etc.*,[217] the property owners sought to recover damages "for the period of time during which Penn Hills had prevailed in the trial court, which had enjoined Property Owners from developing their property without Penn Hills' approval."[218] However, "[a] temporary restriction on an owner's use of his property is…*not a total taking*."[219]

The *Penn Hills* court held that "'[a] taking does not result merely because a regulation deprives an owner of the most profitable use of his or her property…. [A] moratorium on development does not constitute a per se taking of property requiring compensation.'"[220] The court held that the trial court's order under review "did not totally forbid construction on the Property; rather, it required that Property Owners obtain the approval of both municipalities in which the property was located…."[221] Furthermore, "'a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.'"[222]

In *Hillsboro Properties v. City of Rohnert Park,*[223] the court sustained the trial court's dismissal of an inverse condemnation action in which landlords sought to recover rents in excess of the rent control ceiling for a period during which an ordinance, later held to be unconstitutional, was in force.[224] The appellate court held that a regulation that "bears 'a reasonable relation to a proper legislative purpose' so long as the law does not

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[211] 535 U.S. 302, 306, 122 S. Ct. 1465, 1470, 152 L. Ed. 517, 530.

[212] *Id.* at 341–42, 122 S. Ct. at 1489, 152 L. Ed. 2d at 552–53 (footnotes omitted) (emphasis supplied) (*quoting Palazzolo,* 533 U.S. at 636, 121 S. Ct. at 2467, 150 L. Ed. 2d at 619 (O'Connor, J., concurring)).

[213] Wild Rice River Estates v. City of Fargo, 2005 N.D. 193, at *P1, 705 N.W.2d at 852.

[214] *Id.* at *P23, 705 N.W.2d at 858.

[215] *Id.* at *P18–19, 705 N.W.2d at 858 (*quoting Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332, 122 S. Ct. at 1484, 152 L. Ed. 2d at 546).

[216] *Id.* at *P26, 705 N.W.2d at 859 (*citing* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1366 (Fed. Cir. 2004); Wyatt v. United States, 271 F.3d 1090, 1098 (Fed. Cir. 2001); Apollo Fuels, Inc. v. United States, 54 Fed. Cl. 717, 737 (2002); Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (S.C. 2005)).

[217] 870 A.2d 400 (Pa. Commw. Ct. 2005).

[218] *Id.* at 401.

[219] *Id.* at 408 (emphasis in original) (*citing Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332, 122 S. Ct. at 1484, 152 L. Ed. 2d at 546).

[220] *Id.* at 409 (*quoting* Nolen v. Newtown Township, 854 A.2d 705, 708 (Pa. Commw. Ct. 2004)).

[221] *Id*.

[222] *Id.* at 409 (*quoting Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332, 122 S. Ct. at 1484; 152 L. Ed. 2d at 546).

[223] 138 Cal. App. 4th 379, 41 Cal. Rptr. 3d 441 (Cal. App. 1st Dist. 2006).

[224] *Id.* at 384, 41 Cal. Rptr. 3d at 444.

deprive investors of a 'fair return' and thereby become 'confiscatory'"[225] is not an unconstitutional taking.

There is authority that if a regulation deprives the owner or owners of all economically beneficial use of their property as occurred in the *Lucas* case, discussed in subsection B.2.b, *supra*, there may be a claim for a temporary taking. Following the U.S. Supreme Court's reversal and remand in *Lucas,* the Supreme Court of South Carolina dealt with the issue of whether Lucas was entitled to damages for the temporary period Lucas was denied all beneficial use of his property.[226] In its decision on remand, the court stated that in the absence of the U.S. Supreme Court's "intervention and reversal Lucas would have been unable to obtain further state-court adjudications with respect to a temporary taking."[227] Furthermore, the court stated that the Supreme Court's decision "created for Lucas a cause of action for the temporary deprivation of the use of this property" and that "Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas' desired use of his land."[228] The court's remand to the circuit level directed that the parties could "present evidence of the actual damages Lucas has sustained as a result of the State's temporary nonaquisitory taking of his property without just compensation."[229] The court did not "dictate any specific method of calculating the damages…."[230]

Depending on the circumstances, it may be possible for a claimant to obtain compensation for a lengthy, temporary delay as a result of government action in situations bordering on a total or permanent taking. For example, in 2005 in *Steel Associates, Inc., supra,* the plaintiff "submitted evidence that the city took affirmative acts that interfered with plaintiff's ability to do business under its lease."[231] The evidence showed that "between 1992 and 2003, because of its inability to modernize, the value of its business diminished substantially,"[232] evidence that was sufficient for the jury to conclude that the city's affirmative actions were a "substantial cause of plaintiff essentially going out of business."[233] A verdict of $4 million was upheld.[234]

[225] *Id.* at 384, 41 Cal. Rptr. 3d at 445 (*quoting* Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761, 771, 66 Cal. Rptr. 2d 672, 941 P.2d 851 (1997)).

[226] Lucas v. S.C. Coastal Council, 309 S.C. 424, 424 S.E.2d 484 (1992).

[227] *Id.* at 426, 427, 424 S.E.2d at 486.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] Steel Assocs., Inc. v. City of District, 2005 Mich. App. LEXIS 2553, at *4 (Unrept.).

[232] *Id.* at *6–7.

[233] *Id.* at *7.

[234] "Where there has been a permanent taking, the fair market value of the land is often appropriate compensation…. For a temporary taking, there are 'five basic rules for measuring damages[:] …rental return, option price, interest on lost profit, before-after valuation, and benefit to the government.'" *Id.* at *19–20 (citations omitted).

B. "EXACTIONS" OF PROPERTY RIGHTS AS COMPENSABLE REGULATORY TAKINGS

Exactions are defined as "land-use decisions conditioning approval of development on the dedication of property to public use."[235] An exaction is a forced dedication of property, usually by a developer who is required to dedicate some of the land to acquire a permit or to gain approval of a development plan.

Although exactions are not new to the law, they came into prominence after World War II in the United States as a result of the mass movement of people from the cities to the suburbs. As large cities began to lose population, the governments of smaller cities and towns were confronted with rapidly expanding population. The governments needed to find new sources of revenue to meet the necessary outlays for capital improvements. One means widely used by governments and accepted by the courts was the requirement of a developer's dedication of land or payment of money before receiving approval of a development plan. Depending on the terms of the enabling act and the scope of the regulations under the act, governments required dedications for streets, storm and sanitary sewers, water mains, curbs and gutters, and drainage systems, as well as for sites for schools, playgrounds, parks, and recreational areas. Although exactions most often relate to right-of-ways, exactions also may be required for parks and green space and to meet other public needs.

By regulation or by imposition of a condition, a government entity may exact a concession in real property before granting an application, for example, to partition or develop land. Thus, "when a landowner proposes to develop private property in a way that would create a burden on a public interest, the government generally may, by exercise of the police power, prohibit the development."[236] A land-use regulation that is prohibitory in nature does not amount to a taking if it does not "'deny an owner economically viable use of his land.'"[237] On the other hand, the government may "protect the public interest at risk by conditioning approval of the development on some concession by the landowner—such as a concession of property interests–that mitigates the public burden" of the proposed development.[238]

Two important cases that establish a two-pronged "nexus" and "rough proportionality" test applicable to whether there has been a regulatory taking resulting from an exaction are *Nollan v. California Coastal*

[235] City of Monterey, Ltd. v. Del Monte Dunes*,* 526 U.S. 687, 702, 119 S. Ct. 1624, 1635, 143 L. Ed. 2d 882, 900 (1999)).

[236] Hammer v. City of Eugene, 202 Or. App. 189, 192, 121 P.3d 693, 694 (Or. Ct. App. 2005) (*citing Nollan*, 483 U.S. at 834–36, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)).

[237] *Id.* at 202, 121 P.3d at 695 (*quoting* Nollan v. Cal. Coastal Comm'n*,* 483 U.S. at 834, 107 S. Ct. at 3147, 97 L. Ed. 2d at 687) *(quoting Agins,* 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 112 (1980)).

[238] *Id.* at 192, 121 P.2d at 695.

Commission[239] and *Dolan v. City of Tigard*.[240] In *Nollan* the Court considered a case in which the landowners applied to the California Coastal Commission for a permit to rebuild a house located between two public beaches. The Coastal Commission granted the permit upon the condition that the landowners grant an easement to the public allowing the public to pass across the landowners' land between the two public beaches.[241] The landowners challenged the condition that the trial court struck down but the California Court of Appeal reinstated on the basis that the condition did not violate the Fifth Amendment.[242]

In reversing, the U.S. Supreme Court held that

> the *lack of nexus* between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."[243]

As seen, under the *Nollan* decision a government regulation must bear some logical nexus to the condition imposed before it will pass constitutional muster. In *Dolan* the Court refined the *Nollan* nexus test. In *Dolan* the city, in reviewing an application from the landowner to redevelop her site to nearly double the size of her store, conditioned "approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements."[244] In imposing the requirements, the City Planning Commission found it to be "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development…."[245] The Commission further stated that "anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and flood plain…."[246] Based on these findings the Commission found that these requirements were relevant to the landowners' plan to intensify development on the site. After the Oregon Supreme Court upheld the requirements, the U.S. Supreme Court granted *certiorari*.

In reversing the decision below, the Supreme Court rejected the "reasonable relationship" doctrine adopted by many jurisdictions prior to its review of the *Dolan* case.

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.*[247]

In reaching the above holding, the *Dolan* Court concluded that the city had not met the burden of showing that the additional vehicle and bicycle trips generated by the development reasonably related to the required dedication.[248]

With respect to the *Nollan* and *Dolan* precedents, it is important to recall that in 2005 in *Lingle v. Chevron USA Inc.*[249] the Supreme Court held that the *Agins'* "substantially advance legitimate state interests" test[250] was no longer valid.[251] The *Lingle* Court made it clear, as discussed in Section 4.A.7, *supra*, that its reversal of course with respect to the *Agins'* test did not affect its decisions in *Nollan* and *Dolan*. Thus, "[i]n light of *Lingle*, the theory that a regulation effects a taking for Fifth Amendment purposes if it does not substantially advance a legitimate state interest is no longer valid," but the *Nollan* and *Dolan* cases "establish a distinct test for a regulatory taking that remains viable."[252]

To summarize briefly, in the *Nollan* and *Dolan* cases the Supreme Court developed a two-prong test for exaction cases: "The first prong concerns simply whether the exaction and prohibition share a common purpose, …whether they have an 'essential nexus.'"[253] The second prong is the rough proportionality test; that is, the "exaction and the projected impact of the proposed development [must] be similar in magnitude."[254] With an exaction, a city, for example, "must make some sort of

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[239] 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[240] 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[241] Nollan v. Cal. Coastal Comm'n, 483 U.S. at 827, 107 S. Ct. at 3143, 97 L. Ed. 2d at 683.

[242] *Id.*

[243] *Id.* at 837, 107 S. Ct. at 3149, 97 L. Ed. 2d at 689 (citations omitted) (emphasis supplied).

[244] Dolan v. City of Tigard, 512 U.S. at 377, 114 S. Ct. at 2312, 129 L. Ed. 2d at 311.

[245] *Id.* at 381, 114 S. Ct. at 2314, 129 L. Ed. 2d at 314.

[246] *Id.* at 382, 114 S. Ct. at 2315, 129 L. Ed. 2d at 314.

[247] *Id.* at 391, 114 S. Ct. at 2319, 129 L. Ed. 2d at 320 (emphasis supplied).

[248] *Id.* at 395–96, 114 S. Ct. at 2321–12, 129 L. Ed. 2d at 323.

[249] 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[250] Agins v. City of Tiburon, 447 U.S. at 260, 100 S. Ct. at 2141, 65 L. Ed. 2d at 112.

[251] Lingle v. Chevron USA Inc., 544 U.S. at 545–46, 125 S. Ct. at 2085–86, 161 L. Ed. 2d at 892–93.

[252] Wis. Builders Ass'n v. Wis. DOT, 285 Wis. 2d at 501, 702 N.W.2d at 447.

[253] Hammer v. City of Eugene, 202 Or. App. at 193, 121 P.2d at 695 (*quoting Nollan*, 483 U.S. at 837, 107 S. Ct. 3148, 97 L. Ed. 2d at 689).

[254] *Id.*

individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[255] As the court explained in the Hammer Case, when "a conveyance of property interests that is required by the government as a condition to approval of a development application…furthers the same end that would justify prohibiting the proposed development and is roughly proportional to its projected impact," the required conveyance by the landowner is not a taking.[256]

The question has arisen, however, whether the absence of the government's rough proportionality findings prior to a regulatory exaction establishes *ipso facto* that an unconstitutional taking has occurred. In *Hammer v. City of Eugene,*[257] the city had not made its rough proportionality finding prior to the imposition of a land-use condition. The city argued that "when a property owner brings an action for inverse condemnation after the government has conditionally approved a development proposal," the government may demonstrate "after the fact that rough proportionality existed at the time of the exaction" in part because the claimant did not pursue an administrative appeal.[258] The *Hammer* court agreed, echoing the Supreme Court's opinion in *Lingle*, *supra*, because the Takings Clause does not include any procedural requirements.

> We cannot conclude that the Court intended to create a rule with such profound consequences merely by implication and in a case in which the rule had no application.
>
> We also reject plaintiff's underlying premise that the Takings Clause itself compels the government to make rough proportionality findings at the time that it imposes an exaction on a development application….
>
> If the framers had intended for the Takings Clause to include a procedural requirement, there would have been no need to prohibit deprivations of property "without due process of law…."
>
> [T]he *Takings Clause* is concerned not with process, but rather with substantive restrictions on government authority…. [P]laintiff's argument that the government is required to follow particular procedures when imposing exactions sounds in due process, not in takings jurisprudence.[259]

In *Hammer* the court made an observation that may be relevant to other inverse condemnation actions: "an inverse condemnation claimant cannot prevail merely by showing that the government failed to follow condemnation procedures; he or she must show that the government actually took property."[260]

As stated, in *Smith v. Mendon*, *supra*, the New York Court of Appeals declined "to extend the concept of exaction [to a situation] where there is no dedication of property to public use and the restriction merely places conditions on development."[261] The *Smith* court held that the government's requirement in that case was "a modest environmental advancement at a negligible cost to the landowner [that] does not amount to a regulatory taking."[262]

Consistent with *Smith, supra*, the Court of Appeals of Wisconsin stated, in holding that certain regulations of the Department of Transportation were not unconstitutional takings:

> Wisconsin Builders, in essence, is arguing for a significant extension of Nollan and Dolan, but the Supreme Court has at least twice emphasized that it has not extended the standard applied there beyond the specific context of those cases. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702, 143 L. Ed. 2d 882, 119 S. Ct. 1624 (1999) ("we have not extended the rough-proportionality test of Dolan beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use"); and *Lingle*, 125 S. Ct. at 2086 (citing Del Monte Dunes approvingly on this point). We decline to extend the *Nollan/Dolan* standard to a context far removed from the facts of those cases.
>
> We also observe that the rough proportionality standard of Dolan requires that, in an adjudicative context, the government make "an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391. This standard does not, by its very terms, appear to apply to the facial challenge to a regulation, where there are no facts regarding any individual landowner. Wisconsin Builders does not present an argument that resolves this incompatibility.
>
> We conclude that the *Nollan/Dolan* standard does not apply to Wisconsin Builders' facial challenge to the setback restrictions. We therefore do not take up DOT's argument that the special exception condition is permissible under that standard.[263]

Thus, it appears that the *Nolan* and *Dollan* two-prong test has not been applied outside the context of exactions.

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[255] Dolan v. City of Tigard*,* 512 U.S. at 391, 114 S. Ct. at 2319–20, 129 L. Ed. 2d at 320.

[256] 202 Or. at 193, 121 P.3d at 695.

[257] 202 Or. App. 189, 121 P.3d 693 (2005).

[258] *Id.* at 194, 121 P.3d at 696.

[259] *Id.* at 196, 121 P.3d at 697 (citations omitted) (emphasis supplied) (*citing* Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 n.14, 105 S. Ct. 3108, 3121, n.14, 87 L. Ed. 2d 126, 144, n.14 (1985) (Court noting that unlike the Due Process Clause, the Takings Clause "has never been held to require pretaking process….").

[260] 202 Or. App. at 197, 121 P.3d at 697 (*citing* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986) ("Appellant must establish that the regulation has in substance 'taken' his property….").

[261] 4 N.Y.3d at 12, 822 N.E.2d at 1219, 789 N.Y.S.2d at 701.

[262] *Id.* at 15, 822 N.E.2d at 1221, 789 N.Y.S.2d at 703.

[263] Wis. Builders Ass'n v. Wis. DOT, 285 Wis. 2d at 503–04, 702 N.W.2d at 448 (emphasis supplied).

C. DEFENSES AND OTHER ISSUES RELATING TO INVERSE CONDEMNATION

C.1. Statute of Limitations

The applicable statute of limitations for a claim in inverse condemnation will vary from state-to-state. Thus, state statutes and judicial decisions must be consulted.

In *Department of Forests, Parks and Recreation v. Town of Ludlow Zoning Board,*[264] the landowner Lysobey sought to obtain year-round access to his property, which abutted a public road on land leased by the Department of Forest, Parks and Recreation to Okemo Mountain, Inc., for use as a ski trail during the ski season.[265] However, as explained by the court, the evidence established that Lysobey's access rights had been taken decades earlier in the 1960s and before Lysobey owned the property.[266] Thus, the court agreed that

> *because the taking occurred* many years before Lysobey purchased his property and *more than six years* before he sought redress for being denied winter vehicular access to the property, he is foreclosed from obtaining damages for the alleged deprivation by both his lack of standing and the expiration of the applicable limitations period.[267]

Similarly, in a California case it was held that an inverse condemnation brought 20 years after a prior owner's dedication of land made at the time of a condition placed on a permit for development was time barred.[268]

The problem is not only in knowing the proper time in a particular state within which a claim in inverse condemnation must be filed but also in knowing when the statute actually commences to run. The "general rule is that when the government takes possession of property before it acquires title to that property, the former event constitutes the act of taking the property"; it is the interference with the property right that creates a right to commence inverse condemnation proceedings, "'not the realization of the extent of damages'";[269] and "[t]he takings date in an inverse condemnation action involving loss of access to property is the date on which the government physically interferes with the access."[270]

The date that is determined to be the date of the taking is crucial. The determination of the "takings date" is a question of fact. In 1993 the Missouri Supreme Court held that in an inverse condemnation action the statute began to run not with the end of the project but when the landowner first should have been aware of the taking.[271] Later, in *Randolph v. Missouri Highways and Transportation Commission,*[272] an appellate court affirmed a trial court's ruling that a subsequent flooding did not constitute a new cause of action because "'a cause of action for inverse condemnation accrues once the fact of damage is capable of ascertainment,'" i.e., in that case when the first flooding occurred as a result of a highway construction project.[273]

Finally, it should be noted that if property is taken as a result of administrative action, "[c]ompliance with procedural writ requirements 'remains a necessary predicate to institution of inverse condemnation proceedings.'"[274] Furthermore, "the absence of a timely writ petition by the prior owner 'results in a waiver of any inverse condemnation and related claims' for the successor in interest."[275]

C.2. Ripeness Requirement

Although an action may be filed too late and be barred by the applicable statute of limitations, it is possible also for a claimant in inverse condemnation to file too soon, *i.e.*, before a claim is ripe. The issue of ripeness may arise in the context of an alleged regulatory taking resulting from administrative action, because a property owner normally must avail himself or herself of any administrative procedures, reviews, or appeals applicable to the challenged regulation or condition. In general, "ripeness is a prerequisite to justicibility"; thus, for example, "where a zoning ordinance includes a procedure for obtaining a variance from the prescribed requirements, a regulatory takings claim is not ripe until the landowner has requested and has been denied the variance."[276] "[A] regulatory takings claim does not become ripe upon enactment of the regulation" at issue.[277] A claim "remains unripe until the landowner

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[264] 177 Vt. 623, 869 A.2d 603 (2004).

[265] *Id.* at 623, 869 A.2d at 604.

[266] *Id.* at 625, 869 A.2d at 606.

[267] *Id.* (emphasis supplied).

[268] Serra Canyon Co., Ltd. v. Cal. Coastal Comm'n*,* 120 Cal. App. 4th 663*,* 666, 16 Cal. Rptr. 3d at 110, 111 (Cal. App., 2d Dist. 2004), *review denied*, 2004 Cal. LEXIS 10222 (Cal. 2004), *cert. denied*, 544 U.S. 1044, 125 S. Ct. 2251, 161 L. Ed. 2d 1079 (2005) (*citing* Ojavan Investors, Inc. v. Cal. Coastal Comm'n, 26 Cal. App. 4th 516, 32 Cal. Rptr. 2d 103 (1994)).

[269] Dep't of Forests, Parks & Recreation v. Town of Ludlow Zoning Bd., 177 Vt. at 625, 869 A.2d at 606 (*quoting* Beer v. Minn. Power & Light Co., 400 N.W.2d 732, 735 (Minn. 1987)).

[270] *Id.* (*citing* De Alfy Props. v. Pima County, 195 Ariz. 37, 985 P.2d 522, 524 (Ariz. App. 2d Div. 1998) (holding that inverse condemnation claim for taking of property owner's right of access accrued when government cut off or substantially impaired access); Kirby Forest Indust., Inc. v. United States, 467 U.S. 1, 5, 104 S. Ct. 2187, 2191, 81 L. Ed. 2d 1, 7 (1984) (holding that a landowner "has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government").

[271] Heins Implement Co. v. Mo. Highways and Transp. Comm'n, 859 S.W.2d 681 (Mo. 1993) (en banc).

[272] 224 S.W.3d 615 (Mo. App. W. Dist. 2007).

[273] *Id*. at 618 (citing Shade v. Mo. Highways and Transp. Comm'n, 695 S.W.3d 503, 514 (Mo. App. W. Dist. 2001).

[274] Serra Canyon Co., Ltd. v. Cal. Coastal Comm'n, 120 Cal. App. 4th 663, at 669, 16 Cal. Rptr. 3d 110, at 114 (citations omitted).

[275] *Id.* (citations omitted).

[276] City of Coeur d'Alene v. Simpson, 142 Idaho at 845, 136 P.3d at 316.

[277] *Id.* at 846, 136 P.3d at 317.

takes the reasonable and necessary steps to allow the regulating agency to consider development plans and issue a decision, thereby determining the extent to which the regulation actually burdens the property."[278]

As a California appellate court observed in *Serra Canyon Co., Ltd., supra*, "an unjust takings claim ripens when (1) the administrative agency makes a final decision regarding the property owner's ability to develop the land, and (2) the property owner timely sought recompense through available state procedures."[279]

A recent example of when a landowner's inverse condemnation action was not ripe is *County of Alameda*, *supra*. The case involved a landowner's failure to submit a development proposal following passage by county voters of an initiative to preserve open space in the county. The question was whether the owner's "regulatory taking action [could proceed] before the County ha[d] the opportunity to decide and explain the reach of" the initiative.[280] The owner argued that the initiative, known as Measure D, "deprived it of *all* economically viable uses of its property" and that "it was excused from the usual requirement of submitting a development application…."[281] The court, however, held that

> "[a] final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property…or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred…." Simply put, a court cannot say whether a regulation goes too far in restricting the use of property unless it knows how far the regulation goes….[282]

The lack of ripeness is not cured because of an intervening preliminary injunction. In *Murray v. Oregon*,[283] the landowners did not complete the regulatory process and pursue all available administrative remedies for approval of the development of their property. When the government obtained an injunction against the property owners because of their unauthorized mining activities,[284] it was held that "the issuance of the injunction did not cause plaintiff's inverse condemnation claim to become ripe."[285]

> Before it can be determined…if government regulations have gone so far as to constitute a taking, there must be a final decision from the government regulatory body regarding the application of the regulations to the property at issue…. [I]t follows from the nature of a regulatory claim that an authoritative determination of how the regulation applies to the property is an essential prerequisite to asserting a takings claim in court. If there are available administrative procedures through which landowners may seek to modify the effects of regulations on the use of their property and those procedures provide a possibility that development could occur on the property, the land owners must pursue those administrative procedures before a takings claim may be considered "ripe."[286]

A property owner, as in *County of Alameda, supra,* may argue that an application or appeal is not necessary because such action is futile; for example, because an "ordinance leaves the [government] with no discretion to permit any other uses."[287] Not only is it the plaintiff's burden to demonstrate futility,[288] but also the "futility exception is 'extremely narrow.'"[289] The exception "is not triggered by the mere possibility, or even the probability, that the responsible agency will deny the requested development permit."[290] In *County of Alameda* the submission of an application was not excused based on the futility exception to the ripeness requirement, because "the County has not had the opportunity to explain the reach of the challenged regulation, and [the court] was not persuaded that all possible uses of the Property are in fact known."[291]

However, as "the law does not require the doing of a futile or useless act,"[292] it may be possible for a property owner to show that pursuing other nonjudicial avenues prior to the inverse condemnation claim would have been futile. In a Michigan case involving an alleged taking of the plaintiff's leasehold interest in property located adjacent to the Detroit City Airport, the court stated that "it was clear from the evidence that the city was not going to permit any new construction or remod-

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[278] *Id.* (citation omitted).

[279] Serra Canyon Co., Ltd. v. Cal. Coastal Comm'n, 120 Cal. App. 4th at 671, 16 Cal. Rptr. 3d at 115 (*citing* Williamson County Reg'l Planning Comm'n, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) [*superseded by statute as stated in* Sprint Spectrum L.P. v. City of Carmel, 361 F.3d 998 (7th Cir. 2004)]; Daniel v. County of Santa Barbara, 288 F.3d 375, 381 (9th Cir. 2002); Hensler v. City of Glendale, 8 Cal. 4th 1, 10–11, 876 P.2d 1043 (1994)).

[280] County of Alameda v. Superior Court, 133 Cal. App. 4th 558, at 566, 34 Cal. Rptr. 3d 895, at 900.

[281] *Id.* at 564, 34 Cal. Rptr. 3d at 898 (emphasis in original).

[282] *Id.* at 567, 34 Cal. Rptr. 3d at 901 (citations omitted).

[283] 203 Or. App. 377, 124 P.3d 1261 (Or. Ct. App. 2005), *review denied,* 340 Or. 672, 136 P.3d 742 (2006).

[284] *Id.* at 384, 124 P.3d at 1265.

[285] *Id.* at 391, 124 P.3d at 1269.

[286] *Id.* at 390–91, 124 P.3d at 1268–69 (some internal quotation marks omitted) (*citing* Boise Cascade Corp. v. Bd. of Forestry, 164 Or. App. 114, 129, 991 P.2d 563 (Or. Ct. App. 1999), *rev. denied*, 331 Or. 244, 18 P.3d 1099 (2000), *cert. denied*, 532 U.S. 923, 121 S. Ct. 1363, 149 L. Ed. 2d 291 (2001); Nelson v. City of Lake Oswego, 126 Or. App. 416, 421, 869 P.2d 350 (Or. Ct. App. 1994)).

[287] County of Alameda v. Superior Court, 133 Cal. App. 4th at 568, 34 Cal. Rptr. 3d at 902.

[288] Murray v. Oregon, 203 Or. App. at 392, 124 P.3d at 1270.

[289] 133 Cal. App. 4th at 568, 34 Cal. Rptr. 3d at 902 (citation omitted).

[290] *Id.*

[291] *Id.* at 569, 34 Cal. Rptr. 3d at 902.

[292] Steel Assocs., Inc. v. City of Detroit, 2005 Mich. App. LEXIS 2553, at *16 (citation omitted).

eling on the property" that would have enabled the plaintiff to process larger coils of steel."[293]

C.3. Lack of Standing

According to one court, citing numerous authorities, "it is well-settled law that the right to recover damages in condemnation proceedings 'belongs solely to the person owning or having an interest in the land at the time of the taking and it does not run with the land.'"[294]

The court explained that the rule's rationale is that

> "['w]hen the government interferes with a person's right to possession and enjoyment of his property to such an extent so as to create a 'taking' in the constitutional sense, a right to compensation vests in the person owning the property at the time of such interference. This right has the status of property, is personal to the owner, and does not run with the land if he should subsequently transfer it without an assignment of such right. The theory is that where the government interferes with a person's property to such a substantial extent, the owner has lost a part of his interest in the real property. Substituted for the property loss is the right to compensation. When the original owner conveys what remains of the realty, he does not transfer the right to compensation for the portion he has lost without a separate assignment of such right. If the rule were otherwise, the original owner of damaged property would suffer a loss and the purchaser of that property would receive a windfall. Presumably, the purchaser will pay the seller only for the real property interest that the seller possesses at the time of the sale and can transfer."[295]

However, the court in *City of Coeur d'Alene*, *supra*, stated that "the fact that an owner acquires property after a regulation has been enacted does not necessarily bar a claim that the regulation has effected a taking."[296]

It may be noted also that in *Loretto*, *supra*, the case involving New York's requirement that landlords permit installation of cable television cables on their property, the appellant did not discover the existence of the cable until after she had purchased the property but there does not seem to have been an issue regarding whether the subsequent purchaser Loretto had standing to challenge a taking that occurred before her acquisition of the affected property. Indeed, the issue of appellant's standing to bring the claim is not discussed. Although not directly on point, the court did state that "[i]t is constitutionally irrelevant whether appellant (or her predecessor in title) had previously occupied this space, since a 'landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.'"[297]

C.4. Doctrine of *Res Judicata*

The doctrine of *res judicata* in the context of eminent domain and inverse condemnation means that when a condemnation proceeding is tried, all issues and damage to the property are deemed to have been litigated and determined and, thus, a subsequent inverse condemnation action will not lie against the condemning authority. Thus, the general rule is that in a partial taking an award for the landowner is a bar to the owner's subsequent claim for consequential damages to the remainder. Typically, for the *res judicata* doctrine to apply there are four elements that must be satisfied to preclude a later action. It must be shown that

> (1) the prior action was decided on the merits, (2) there was a final decision entered in the prior action, (3) the matter contested in the second case was or could have been resolved in the first case, and (4) the two actions involve the same parties or their privies.[298]

In eminent domain and inverse condemnation proceedings, however, whether the *res judicata* doctrine applies depends on whether damages allegedly incurred after the original taking were foreseeable at the time of the original taking. *State v. Parchman*[299] is illustrative. The *Parchman* controversy had begun as an ordinary condemnation in which Parchman opposed a proposed drainage channel across his property. Although Parchman testified that the channel would damage his property, he testified only in general terms. The state's highway engineer, apparently in the course of explaining the proposed construction, specifically negated the likelihood of overflows from the channel. After the prediction proved to be incorrect, the property owner began the instant suit because of flooding. The *Parchman* court permitted a second recovery on these facts on the basis that the damage was not such that the plaintiff "ought reasonably to have foreseen the alleged conse-

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[293] *Id.*

[294] Dep't of Forests, Parks, & Rec. v. Town of Ludlow Zoning Bd., 177 Vt. at 626, 869 A.2d at 607 (*quoting* 11A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 32.132, at 269 (3d ed. 2000)); *see also* NICHOLS ON EMINENT DOMAIN § 5.01[5][d], at 5-37 ("[I]f the parcel of land from which the taking is made changes hands after the taking has occurred but before compensation has been paid, the right to receive the compensation does not run with the land."); Canney v. City of St. Petersburg, 466 So. 2d 1193, 1195 (Fla. Ct. App. 2d Dist. 1985) ("Damages to compensate for the taking of land or for injury to land not taken belong to the one who owns the land at the time of the taking or injury."); Crede v. City of Oak Grove, 979 S.W.2d 529, 534 (Mo. App. W. Dist. 1998) (damage claim based on inverse condemnation does not pass to subsequent grantees of land); Riddock v. City of Helena, 212 Mont. 390, 687 P.2d 1386, 1388 (Mont. 1984) ("The only person entitled to recover damages for condemnation is the owner of the land at the time of the taking."); Hoover v. Pierce County, 79 Wash. App. 427, 903 P.2d 464, 469 (Wash. Ct. App. 1995) ("Because the right to damages for an injury to property is a personal right belonging to the property owner, the right does not pass to a subsequent purchaser unless expressly conveyed.").

[295] *Id. (quoting* Brooks Inv. Co. v. City of Bloomington, 305 Minn. 305, 232 N.W.2d 911, 918 (Minn. 1975)).

[296] City of Coeur d'Alene v. Simpson, 142 Idaho at 848, 136 P.3d at 319 (citation omitted).

[297] 458 U.S. at 438, n.16, 102 S. Ct. at 3177, n.16, 73 L. Ed. 2d at 884, n.16 (citation omitted).

[298] Steel Assocs., Inc. v. City of Detroit, 2005 Mich. App. LEXIS, at *10.

[299] 216 S.W.2d 655 (Tex. Civ. App. 1948).

quential damages to the remainder of the land by reason of the overflows."[300]

In *Wright v. Jackson Municipal Airport Authority,*[301] involving a *de facto* taking by an airport authority of an avigation easement and a later condemnation of the owner's land by the authority, the court held that the doctrine of *res judicata* did not apply, because "[t]he two actions involved different issues, burden of proof and evidence."[302]

More recently, in *Steel Associates, Inc., supra,* the court also denied the applicability of the doctrine of *res judicata* in an inverse condemnation action. Although the first two prongs[303] of the *res judicata* test were satisfied, the third and fourth[304] prongs were not.

> [T]he present claims could not have been litigated in *Merkur I* because the city successfully foreclosed litigation of those claims. While Merkur could have cross-appealed that issue, as the city now argues, the fact remains that the *Merkur I* trial was concluded without plaintiff's rights being presented and protected.[305]

The *res judicata* doctrine also arises in direct condemnation proceedings. It has been held, however, that the doctrine may not apply if there are "changed circumstances."

> Although the doctrine of *res judicata* applies to condemnation actions, the doctrine is not readily applicable to those cases in which a condemning authority seeks to bring a second condemnation action to acquire a part of the same land for which the courts in a prior condemnation action against the same party determined that the condemning authority had failed to prove a public use or public necessity. Those cases possess a unique character to which the doctrine is not readily applied—in that, as time passes from the entry of the judgment in a condemnation action, changes may occur which would add new and important factors to be considered in a determination of whether a proposed taking in a subsequent action is for a public purpose and whether the particular land sought is necessary for that public purpose. The change in circumstances may present an entirely new case for determination even though the same issues involving public use and public necessity had been determined in a prior condemnation action between the same parties involving the same land.[306]

In a case in which a public agency was unsuccessful in a prior condemnation proceeding because the agency was unable to show that the taking was for a public purpose, the agency was not barred from commencing a second action soon thereafter to acquire the land or a portion thereof. The court was persuaded that the second action was in good faith and that there had been a change of circumstances.[307] Besides the "substantial reduction" in the parcel sought to be taken, the "mere passage of time [and] changes in the use and requirements of an airport facility" may constitute the necessary changed circumstances that preclude the application of the doctrine of *res judicata* to a second proceeding involving the same property.[308]

C.5. Doctrine of Sovereign Immunity

A few of the recent cases reviewed for this report presented a question of sovereign immunity in the context of regulatory takings.

According to the Supreme Court of New Mexico in 2006, in a case involving mining regulations, although the *Lucas*, *Palazzolo*, and *Tahoe-Sierra Preservation Council*, *Inc.* cases, *supra*, "did not explicitly address the issue of state sovereign immunity, these three cases demonstrate the Court's thinking, and inform our own on that subject, because in each case the possibility of a compensatory claim against the state was at the center of the controversy."[309] As for other authority,

> [i]n *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 n.9, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), the Supreme Court suggested that the Fifth Amendment's Takings Clause trumps state sovereignty. *See generally* 1 Laurence H. Tribe, *American Constitutional Law* § 6-38, at 1272 (3d ed. 2000) (suggesting that based on *First English* the Takings Clause "trumps state (as well as federal) sovereign immunity"). The Court made clear that "the compensation remedy is required by the Constitution," and rejected the argument that the Takings Clause could only be enforced by injunctive relief.[310]

The New Mexico Supreme Court held that both U.S. Supreme Court precedents and "New Mexico constitutional and statutory law…support[] the proposition that sovereign immunity does not bar takings claims when asserted against the state for just compensation, at least in certain situations."[311] In so holding, the court rejected the state's argument that "if the agency is not given the power of eminent domain…but is guilty of a

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[300] *Id*. at 656.

[301] 300 So. 2d 805 (1984).

[302] *Id.* at 808.

[303] Steel Assocs., Inc. v. City of Detroit, 2005 Mich. App. LEXIS, at *10 ("(1) the prior action was decided on the merits, (2) there was a final decision entered in the prior action….").

[304] *Id.* at *10–11 ("(3) the matter contested in the second case was or could have been resolved in the first case, and (4) the two actions involve the same parties or their privies").

[305] *Id.* at *12–13 (footnote omitted).

[306] Oakes Mun. Airport Auth. v. Wiese*,* 265 N.W.2d 697, 700 (N.D. 1978).

[307] *Id.* at 701.

[308] *Id.*

[309] Manning v. Mining & Minerals Div.*,* 140 N.M. 528, 531, 2006 NMSC 27, at **16, 144 P.3d 87, at 90.

[310] *Id.* at 532, 2006 NMSC 27, at **17, 144 P.3d at 91 (citation omitted). The *Manning* court did recognize that

> [i]n a later case, a plurality of the Supreme Court noted it was not yet decided if sovereign immunity was a bar to Takings Clause claims. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 714, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (plurality opinion) (citing *First English*, 482 U.S. at 316, n. 9). *See generally* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1077 (2001) (arguing that the Supreme Court has left the issue open).

Id., n.3.

[311] *Id.* at 532, 2006 NMSC 27, at **19, 144 P.3d at 91.

regulatory taking…, then the private individual is without a remedy in state court, even though both the State and Federal Constitutions obligate the State to pay."[312] In rejecting the sovereign immunity defense the court stated that

> such legislation cannot insulate the state from providing just compensation for takings that do not involve formal eminent domain powers…. If we were to relieve the state from paying for takings when agencies do not have statutory eminent domain authority, then paradoxically we would bar practically every regulatory taking claim against a state agency.[313]

In an earlier case, the Supreme Court of Utah held that the State and Southern Pacific Railroad did not have sovereign immunity for an inverse condemnation claim that arose out of the alleged destruction of an underwater brine-canal that the owner of an easement maintained on the bed of the Great Salt Lake.[314]

In 2006 in *Manning v. Mining and Minerals Division, supra,* a sovereign immunity defense was advanced by the State based on the U.S. Supreme Court's decision in *Alden v. Maine*.[315] The *Alden* decision did not arise under the Fifth Amendment, however. The issue in *Alden* was whether an individual's claim for damages against the State under the Fair Labor Standards Act was barred by sovereign immunity. Although the *Alden* Court "held that a private individual cannot sue an unconsenting state in state court for money damages under a law created by Congress pursuant to its Article 1 powers, such as the FSLA,"[316] no such issue was presented in the *Manning* case because "the just compensation claim stems directly from the text of the Constitution through the Fifth and Fourteenth Amendments."[317] The *Manning* court held that "*Alden* did not alter the historical practice of applying the Takings Clause to the states, and nothing in that opinion permits a state to bar a claim for 'just compensation' from its courts."[318] The court stated that "no other jurisdiction post-*Alden*, federal or state, has held that Takings Clause claims are barred by state constitutional sovereign immunity."[319] Also rejected was the state's claim "that there must be a specific waiver of immunity before the state can be sued for 'just compensation' under the Takings Clause…. [T]he Fifth Amendment is 'self-executing.'"[320]

Property owners who seek to recover damages for a *negligent* taking or damaging of property may be faced with the defense of sovereign immunity. In *Evatt v. Texas Department of Transportation,*[321] the homeowners in Texas contended that their homes were flooded as a result of the transportation department's construction methods on a nearby construction project.[322] The court recognized that under the doctrine of sovereign immunity, "the state and its agencies cannot be sued in the courts of Texas without the consent of the state in the form of a constitutional or statutory exception."[323] As discussed in subsection A.1, *supra*, the *Evatt* court held that *negligence* that contributes to property damage does not amount to a taking, that only an *intentional* act by the government may give rise to an inverse condemnation action.[324]

C.6. Inverse Condemnation and Other Remedies

A condemnor generally is required to pay compensation to owners for all property the condemnor takes or damages,[325] whether the damage is temporary or permanent[326] or whether a taking was legal or illegal.[327] Whenever it is alleged that an activity of a transportation department or other government agency has caused damage to an owner's property, depending on applicable law of the state in question, the property owner may seek damages in an action for nuisance or

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[312] *Id.* 2006 NMSC 27, at **20, 144 P.3d at 91.

[313] *Id.* 2006 NMSC 27, at **21, 144 P.3d at 91.

[314] Colman v. Utah State Land Bd., 795 P.2d at 630, 634.

[315] 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (holding, *inter alia*, that states' sovereign immunity from suit neither derives from nor is limited by the terms of the Eleventh Amendment but rather is a fundamental aspect of the sovereignty enjoyed by the states before the Constitution that the states continue to retain; neither the structure of the Constitution nor the powers delegated to Congress under Article I of the Constitution include the power to subject nonconsenting states to private suits for damages in the states' own courts).

[316] As quoted in the *Manning* case, 140 N.M. at 533, 2006 NMSC 27, at *24, 144 P.3d at 92.

[317] *Id.* at 534, 2006 NMSC 27, at *26, 144 P.3d at 93.

[318] *Id.* at 535, 2006 NMSC 27, at *32, 144 P.3d at 94.

[319] *Id.,* 2006 NMSC 27, at *33, 144 P.3d at 94 (*citing* Benson v. State, 2006 S.D. 8, 710 N.W.2d 131 (2006); *Boise Cascade*, 164 Or. App. 114, 991 P.2d 563 (Or. Ct. App. 1999) [*review denied,* 331 Or. 244, 18 P.3d 1099 (2000), *cert. denied,* 532 U.S. 923, 121 S. Ct. 1363, 149 L. Ed. 2d 291 (2001)]; SDDS, Inc. v. State, 2002 SD 90, 650 N.W.2d 1, 9 (S.D. 2002) (both holding that sovereign immunity does not bar just compensation claims brought against the state in state court, even after the *Alden* decision). *See also* First Union Nat. Bank v. Hi Ho Mall Shopping Ventures, Inc., 273 Conn. 287, 295, 869 A.2d 1193, 1197–98 (Conn. 2005) (holding that a foreclosure claim on a municipal tax lien asserted against the state was barred by sovereign immunity, but sovereign immunity would not bar the bank from seeking "just compensation for the state's taking of its property as a result of the allegedly unpaid taxes" under the Takings Clause as applied to the states under the Fourteenth Amendment)).

[320] *Id.* at 538, 2006 NMSC 27, at *43, 144 P.3d at 97; *see also Colman*, 795 P.2d at 630 (holding that Utah Const. art. I, § 22 is self-executing, meaning it does not require legislative enactment to be recognized by the courts).

[321] 2006 Tex. App. LEXIS 4268 (Tex. App. 11th Dist. 2006), *review denied*, 2006 Tex. LEXIS 854 (Tex. 2006).

[322] *Id*. at *1.

[323] *Id.* at *4.

[324] *Id.* at *8, 9.

[325] 6A NICHOLS ON EMINENT DOMAIN § 28.03[1], at 28-71.

[326] *Id*.

[327] *Id.* § 28.03[2], at 28-71.

trespass;[328] in tort, for example, as provided by statute in California for a dangerous condition of public property with a claim in inverse condemnation;[329] in a statutory action for inverse condemnation; or in a constitutional action for inverse condemnation.[330]

Inverse condemnation, however, fills the gap for landowners who have no remedy in tort and did not receive compensation in a condemnation action. That is, if sovereign immunity has not been waived for a specific action in tort, the landowner in all likelihood will be left with an inverse condemnation as the sole remedy. In *Heins Implement Co., supra,* the landowner suffered flooding as a result of the improper design of a drainage structure, causing more frequent and deeper flooding than before.[331] The court stated that

> the record reflects that the cause was tried and submitted as an inverse condemnation claim. As it happens, [the] submission was entirely correct, because MHTC is empowered to exercise the right of eminent domain….
>
> [W]e hold that when, as a result of a public works project, private property is damaged by an unreasonable diversion of surface waters, whether by design or by mistake, the owner may bring an action for inverse condemnation.[332]

In *George Ward Builders, Inc. v. City of Lee's Summit,*[333] the plaintiff alleged "that the lighting system at a park located next to its properties creates an extreme level of light pollution that interferes with the use and enjoyment of its properties."[334] The court relied on *Heins Implement Co., supra,* and *Byrom v. Little Blue Valley Sewer District*[335] in holding that if a public entity has the power of eminent domain, the "proper remedy for damage to private property caused by a nuisance maintained [by such public entity] is an action in inverse condemnation."[336] As held in *Shade v. Missouri Highway & Transportation Commission,*[337] "[t]he effect of the court's holding in *Heins* was to remove inverse condemnation actions from the realm of tort liability and set them in a constitutional context, *i.e*., preventing the taking of private property for public use without compensation."[338]

C.7 Injunctive Relief as an Alternative to Compensation

Eastern Enterprises v. Apfel[339] illustrates that remedies other than money, such as a declaratory judgment and injunctions, may be available when a regulation results in an unconstitutional taking. In 1992 Congress enacted the Coal Industry Retiree Health Benefit Act of 1992, which retroactively imposed an obligation on the Eastern Enterprises to pay retirement benefits to retired coal miners.[340] Eastern Enterprises Petitioner had not been in the coal mining business since 1965 but was being billed over $5 million as its share for the first year of the Act. Even though the case dealt with interpretation of contracts, due process, and retroactivity, the Supreme Court ultimately concluded that the law effected a taking of the Petitioner's property that entitled the Petitioner to a declaratory judgment and an injunction enjoining the law's application to the Petitioner.[341]

More recently, in 2005 in *Albahary v. City of Bristol*,[342] an award of injunctive relief in lieu of monetary damages to compensate property owners in an inverse condemnation proceeding barred the owners from litigating a claim subsequently for monetary damages for the same taking under the doctrines of *res judicata* and collateral estoppel or issue-preclusion.

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[328] "[A] continuing trespass or nuisance may ripen into a constitutional taking of property within the ken of constitutional provisions prohibiting the taking of property without the payment of just compensation." City of Jacksonville v. Schumann, 167 So. 2d 95, 102 (Fla. App. 1st Dist. 1964) (holding that residents could bring an action for inverse condemnation against a city for the expanded use of an airport that caused a nuisance to residents and resulted in a loss of their property values). *See also* 3 NICHOLS ON EMINENT DOMAIN § 8.01[4][a], at 8-30.

[329] Smith v. County of Los Angeles, 214 Cal. App. 3d 266, 262 Cal. Rptr. 754 (Cal. App. 2d Dist. 1989) (affirming judgment for damages against county and county waterworks district for homeowners whose homes were destroyed by a landslide after construction of a roadway near their homes for inverse condemnation, dangerous condition of public property, and nuisance). *See also* Morris v. California*,* 89 Cal. App. 3d 962, 153 Cal. Rptr. 117 (Cal. App. 2d Dist. 1979) (explaining that "[g]overnmental monetary liability in tort in this state is exclusively statutory in origin" and that

> [g]enerally speaking, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes: (1) the property was in a dangerous condition at the time of the injury; (2) the injury was proximately caused by the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred; and (4) the public entity had actual or constructive notice of the dangerous condition under section 835.2, a sufficient time prior to the injury, to have taken measures to protect against the dangerous condition).

[330] Dishman v. Neb. Pub. Power Dist., 240 Neb. 452, 454, 482 N.W.2d 580 (1992). *See generally* 6A NICHOLS ON EMINENT DOMAIN § 28.01, *et seq*. ("Remedies of Owners").

[331] Heins Implement Co v. Mo. Highway & Transp. Comm'n*.,* 859 S.W.2d 681, at 691.

[332] *Id.* (citations omitted) (footnote omitted) (emphasis supplied).

[333] 157 S.W.3d 644 (Mo. App. W.D. 2004).

[334] *Id.* at 646.

[335] 16 S.W.3d 573 (Mo. 2000) (en banc).

[336] 157 S.W.3d at 646.

[337] 69 S.W.3d 503 (Mo. App. W.D. 2002).

[338] *Id.* at 510.

[339] 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998).

[340] 524 U.S. at 513, 118 S. Ct. at 2141, 141 L. Ed. 2d at 464.

[341] 524 U.S. at 522, 118 S. Ct. at 2145, 141 L. Ed. 2d 470.

[342] 276 Conn. 426, 444, 886 A.2d 802, 813 (2005).