

Understanding Takings

The Takings Clause of the Fifth Amendment to the U.S. Constitution reads: “nor shall private property be taken for public use, without just compensation.” Most jurists and legal scholars agree that the founding fathers intended the Takings Clause to apply only to direct expropriations or government-compelled permanent occupations of property. However, in the early part of the 20th century, the U.S. Supreme Court extended the principle beyond physical seizure of property, holding “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.” Takings law has become sufficiently complex that it is always wise to seek out competent legal advice. What we present here is intended to help provide a basic understanding of the concept of takings.

TAKINGS CAN TAKE A NUMBER OF FORMS

Direct Condemnation. Eminent domain is the most common type of taking. Eminent domain is a statutory process that requires the government to give notice to the property owner that it intends to take the property for a public purpose and offer just compensation based on several appraisals. The government and property owner may negotiate about the value of the property, but if no agreement is reached, the court will make the final determination about what compensation the property owner will receive.

Friendly Takings. In cases where a landowner has already agreed to sell property to the jurisdiction based on an agreed-upon price and the owner has less than a clear title, a jurisdiction may nevertheless proceed with eminent domain to clear the title.

Public Use Requirement. Eminent domain powers may only be used to acquire land, or rights in land such

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as easements, for public purposes. While the use of eminent domain usually involves clearly defined public uses—land for roadways, transit lines, schools, and parks—several jurisdictions have been challenged for expropriating property to implement economic development plans. In 2005, the U.S. Supreme Court affirmed in the *Kelo v. City of New London* decision that, “under the U.S. Constitution, the bottom line for planners is that comprehensive economic development plans, created through a carefully considered, publicly accessible planning process, can provide public benefits that justify the use of eminent domain.” This controversial decision, however, spurred a number of states to pass legislation restricting the use of eminent domain for economic development activities.

Inverse Condemnation. A taking by the government may be indirect, generally known as inverse condemnation. In contrast to direct takings, an inverse condemnation is typically inadvertent. Physical invasion takings and regulatory takings may occur when the actions of government unintentionally place a disproportionate burden on private property. Physical invasion takings occur when the government authorizes the physical occupation, or public use, of the private property, such as allowing a cable television operator to place wires on an apartment building (*Loretto Teleprompter Manhattan CATV Corp.* (1982)).

Regulatory takings may also occur when a government regulation either denies a property owner an economically viable use of the property (*Lucas v. South Carolina Coastal Council* (1992)), or the regulation is deemed so burdensome that it is analogous to an appropriation of private property. *Loretto* and *Lucas*-type takings are also known as *per se* takings. In each of these cases, the property owner seeks relief in court by filing a lawsuit seeking compensation for the taking. Takings may be permanent or temporary. For example, a condition of development approval might require the property owner to provide a bicycle path across her property in exchange for authorizing the expansion of her store (*Dolan v. City of Tigard* (1994)). A temporary taking might occur if the government enacts a regulation that is permanent or indefinite and then revokes it.

SUPREME COURT DECISIONS HAVE GENERATED MANY RULES AND TESTS REGARDING TAKINGS

Penn Central Test. The U.S. Supreme Court created this multifactor balancing test to analyze takings claims that do not fit into the *per se* categories established by *Loretto* or *Lucas*. A court using this test must consider the economic impact of the challenged government action, the landowner’s reasonable, investment-backed expectations, and the character of the government action (*Penn Central Transportation Co. v. New York City* (1978)).

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Whole-Parcel Rule. The whole-parcel rule is a doctrine in regulatory takings law that the economic impact of a regulatory restriction must be analyzed and measured based on the claimant's entire contiguous parcel, not just the portion of the property that is restricted by the regulation (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002)).

Rough Proportionality. This doctrine applies where a permit condition requires the landowner to dedicate a portion of the land to the public. To justify a compelled dedication, the government must also show that the compelled dedication is "roughly proportional" to the harm expected from the land-use proposal (*Dolan v. City of Tigard* (1994)).

Logical Nexus. This doctrine was established in *Nollan v. California Coastal Commission* (1987) and reaffirmed in *Dolan v. City of Tigard* (1994). It requires the government to show, when it seeks a dedication of land to the public as a permit condition, that the property owner's proposed land use would harm the public interest and that the dedication would help mitigate this harm. There must be a logical nexus between the proposed land use and the dedication.

Background Principles. When a property owner acquires property, there are existing laws and regulations in effect which form part of the owner's title—such as nuisance law—which can defeat a takings challenge against the government. These background principles can include state property law, certain federal laws, and common law doctrines such as the public trust doctrine.

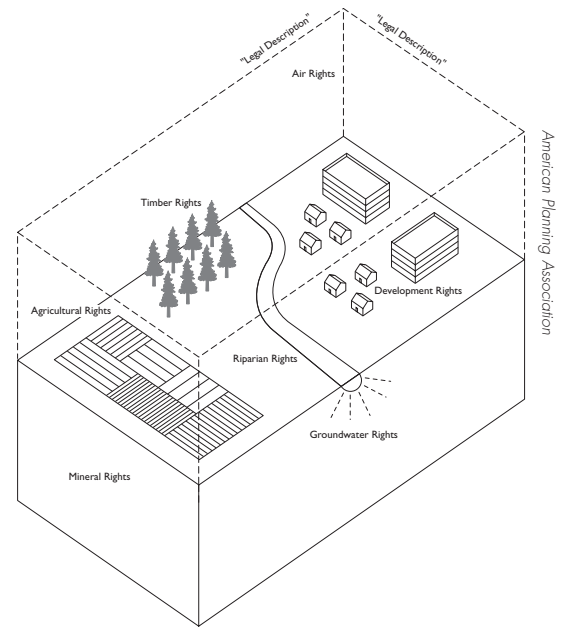
BALANCING ESSENTIAL REGULATORY TOOLS WITH PRIVATE PROPERTY INTERESTS

Land-use regulations such as ordinances governing zoning, land subdivision, and environmental quality are a legitimate use of a jurisdiction's police powers. These powers are essential to enduring the future quality of life in a community, protecting the environment, and protecting property values. Private property rights activists sometimes react to these local powers with legislative proposals or ballot box measures that seek to compensate landholders where government poses any limitation to the use of property. Such legislation—Oregon's Measure 37 (2005) is a prime example—undermines land-use controls in order to tilt the balance so that the benefits flow to property owner A, at the expense of property owners B, C, D, and the community as large. Well-crafted regulatory tools protect land values and the property rights of all citizens. Understanding the serious unintended consequences of Measure 37, Oregon voters passed Measure 49 in 2007, modifying the more egregious aspects of Measure 37.

Moratoria. A moratorium is a temporary freeze on new development to allow a community the opportunity to plan or revise land-use regulations. When a government establishes a moratorium, developers or property owners may claim a taking. The *Tahoe Sierra Court* in 2002 affirmed that a moratorium is a legitimate tool for successful development and is not a *per se* taking. Moratoria are generally supported by the courts when they are based on a real threat to health, safety, or general welfare, and when they are implemented for a defined period of time.

Strategies to Avoid Takings Litigation. Exposure to takings claims can be avoided by supporting land-use regulations with sound planning. Among other things, a sound planning framework addresses future infrastructure needs, identifies sensitive environmental areas, and establishes reasonable and impartial methods of calculating exactions and impact fees that compel developers to pay their fair share.

A Word About "Givings." Property owners pay nothing to the government for the gains in the value of their property they enjoy when their property benefits from land-use regulation. Regulations and land-use controls further the public interest by protecting the community from nuisances and even serious harms. So much attention is focused on takings that the "givings" resulting from many land-use controls are forgotten. Identifying "givings" in particular cases could help local officials educate the courts about the importance of planning and land-use controls.



Property rights may be viewed in terms of the separate land resources or uses to which they apply.



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