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## Property Taking, Types and Analysis

Bringing Knowledge to Life!

*“Thirty seven million acres is all the Michigan we will ever have.”*

Former Governor William G. Milliken

Michigan State University Extension, Greening Michigan Institute, Government and Public Policy Team

“If you do not give me the zoning permit, I’ll sue you for taking my property” is a statement that might be made at a more contentious planning commission meeting. The statement may make planning commissioners nervous. The statement may be made by an angry citizen knowing that private property is protected by the U.S. Constitution.

But regulatory taking claims are often more effective politically, rather than being based on a solid legal foundation. For a start on the legal foundation: statements about private property rights are in both the U.S. Constitution and in the Michigan Constitution:

No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.<sup>1</sup>

. . . private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.<sup>2</sup>

Neither constitution prohibits government from taking property, but both provide some protection against governmental abuse. These provisions require that when government takes property, it must do so in a fair way (due process), it must do so only for a “public use,” and it must compensate the property owner a fair amount for the property interest taken (taking).

The taking clause was originally understood to apply only to actual taking—that is, when government condemns land by exercising its powers of eminent domain. The clause has since been accepted by the courts as applying to regulations as well, after the U.S. Supreme Court ruled in *Pennsylvania Coal Co. v Mahon* that “if regulation goes too far it will recognized as a taking” (260 U.S. 393, 415 (1922)).

### Authors

Co-Author: Richard K. Norton, Ph.D., J.D., ASSOCIATE PROFESSOR AND CHAIR, URBAN AND REGIONAL PLANNING PROGRAM

Taubman College of Architecture and Urban Planning, University of Michigan.

Co-Author: Kurt H. Schindler, AICP, SENIOR EDUCATOR, LAND USE; MSU Extension, Greening Michigan Institute.

Phone: (231)882-0026

eMail: SCHINDL9@anr.msu.edu

Overland mail:

MSU Extension, Benzie County

448 Court Place

Beulah, Michigan 49617

Assistance from Dean Solomon, Senior Educator, Land Use; MSU Extension, Charlevoix County

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<sup>1</sup> Fifth Amendment of the U.S. Constitution.

<sup>2</sup> Article 10§2; 1963 Michigan Constitution.

## Four Types of Taking

Since the *Pennsylvania Coal* case the courts have been working out what it means for a regulation to go “too far.” There are four categories of regulatory taking and they explain a thought process to evaluate if such a taking has occurred or not:

- First, a regulatory taking occurs when the government regulates property to the point that it results in a total economic loss for the private property owner. The U.S. Supreme Court decision that established this rule is *Lucas v South Carolina Coastal Council*.<sup>3</sup> This is called a “total economic deprivation,” taking completely the right to use one's property. This is the first of two kinds of “categorical” taking (i.e., if the condition or category applies—such as total economic loss—then it's a taking, without consideration of other factors).
- Second, a regulatory taking occurs when the government regulation compels a private property owner to allow others to enter upon his or property. The U.S. Supreme Court decision that established this rule is *Loretto v Teleprompter Manhattan CATV Corp.*<sup>4</sup> This is called a “permanent physical invasion” or “ouster,” taking completely the right to exclude others from one's property. This is the second kind of categorical taking.
- Third, a regulatory taking may have occurred when government regulates such that part, but not all of the private property owner's use of the property is diminished. In these situations the taking claim is settled on a case-by-case review, as each situation will be different. The court strives to balance the interests of the public (government actions) with the interests of the private property owner. The U.S. Supreme Court decision that established this rule is *Penn Central Transportation Co. v New York*

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<sup>3</sup>*Lucas v South Carolina Coastal Council*; 505 US 1003 (1992).

<sup>4</sup>*Loretto v Teleprompter Manhattan CATV Corp.*; 458 U.S. 419; 423 N.E.2d 320 (1982).

*City*.<sup>5</sup> This is referred to as the “ad hoc balancing test,” and it is always decided on a case-by-case basis given the particular facts of the case and the interests at stake.

- Finally, a regulatory taking may have occurred when government demands that a property owner convey either a property interest or in lieu payments (“dedications” or “exactions”) in exchange for some type of governmental permit or decision that would allow the development to proceed. These kinds of dedications and exactions are actually quite limited in Michigan because of statutory enabling limits imposed through the Michigan Land Division Act and the Michigan Zoning Enabling Act. When such a dedication is legitimately applied, however, then the courts will assess whether it amounted to a regulatory taking nonetheless by applying the U.S. Supreme Court decisions of *Nollan v California Coastal Commission*,<sup>6</sup> and *Dolan v City of Tigard*.<sup>7</sup> These decisions demand that there be an “essential nexus” or reasonable connection between the dedication being imposed and the harm being addressed (*Nollan*), and that the cost of that dedication to the property owner be “roughly proportional” to the scope of that harm prevented (*Dolan*).

## Taking Questions

Finding the balance between constitutional principles designed to protect people from unfair governmental action and the need to allow government to engage necessary regulatory powers results in a series of questions: When have government's actions gone “too far?” What amount of the property is included? What should the

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<sup>5</sup>*Penn Central Transportation Co. v New York City*; 438 US 104 (1978).

<sup>6</sup>*Nollan v California Coastal Commission*; 485 US 825; 107 L Ed 2d 3141 (1987).

<sup>7</sup>*Dolan v City of Tigard*; 512 US 374; 114 S Ct 2309; 129 L Ed 304 (1994).

remedy be? And who decides if a taking has occurred?

## Who Decides?

One simply cannot assert that a regulatory taking has happened, and a government never intends to initiate or impose a regulatory taking (as it would with a condemnation). Rather, the decision that a regulatory taking occurred is made by a judge, following a court case on the matter. That means generally that the regulation believed to have created a taking has already occurred, and the court is reviewing what happened after-the-fact.<sup>8</sup>

## Amount of Property Included?

The whole parcel is included, not just a part of the parcel. The review looks at the ability to use one's entire parcel of land. For example if a regulation prevents development of a wetland, but the wetland is only 10 percent of the entire parcel, then the impact of the government's regulation would be measured as only impacting 10 percent of the land (i.e., the regulation will not amount to a *Lucas* "total economic deprivation," even for that 10 percent portion of the land because the whole parcel encompasses potentially developable land). Conversely if the entire parcel is wetland, then the impact of the government's actions would be measured as impacting 100 percent of the land.<sup>9</sup>

## Remedy?

Whenever a court determines that a regulatory taking has occurred, the government will always be liable for the "temporary taking" that necessarily occurred between when the regulation was adopted and when the court's decision was made. In general, the government will need to compensate the landowner for the "fair rental value" of the land

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<sup>8</sup>*Marbury v. Madison* (5 US 137 (1803)), *Pennsylvania Coal v. Mahon* (260 US 393 (1922)).

<sup>9</sup>*Penn Central Transportation Co. v. New York City* (438 US 104 (1978)), *Palazzolo v. Rhode Island* (533 U.S. 606 (2001)), *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (122 S. Ct. 1465, 32 ELR 20627 (2002)).

during that period of time. Beyond that, the government then generally has two choices:

1. It can buy the land outright, essentially condemning it and paying for the taking.
2. It can repeal the regulation that caused the taking and not pay any additional compensation.

If the government chooses to take title to the land and retain the regulation, then the amount of compensation owed the landowner will generally be the fair market value of the land (i.e., its value before the regulation was enacted).<sup>10</sup>

A regulatory takings claim, like any zoning decision, "runs with the land." So if the property is purchased by another owner, that new owner also can pursue a takings court case.<sup>11</sup>

## How far is "too far?"

Not every regulation amounts to a regulatory taking, and short of a total economic deprivation, loss of economic value by itself doesn't constitute a taking. The constitution doesn't guarantee that someone can make as much profit as he or she would like through the use of his or her private property, only that it can be put to some reasonable use. Sometimes even regulation that appears to result in a total economic deprivation may not be a taking. In many ways, modern zoning laws codify historic nuisance common law principles that date back many years, even centuries. Property ownership brings with it inherent limits on engaging uses that would violate those principles—such as limits on nuisance-like harms to neighboring properties. If the regulation merely codifies a limit on use that already existed through those "background principles," then the owner never had those rights in the first place and nothing was taken—that is, no regulatory taking. This principle was established by the *Lucas* decision, noted above.

But there are times when one party may

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<sup>10</sup>*First English Evangelical Lutheran Church v. County of Los Angeles*, (482 U.S. 304 (1987)), *Penn Central Transportation Co. v. New York City* (438 US 104 (1978)).

<sup>11</sup>*Palazzolo v. Rhode Island*; 533 U.S. 606 (2001).

believe government's actions did take their property. In those instances there needs to be a finding that the government may have gone "too far." Over time courts have handed down the case law described above and used that case law to provide a means for analyzing if government actions have gone far enough to become a taking.

## Taking Analysis

When a regulatory taking case goes to court, the analytical process usually used by the court might be outlined in the following way. Keep in mind this explanation is brief, and far more detail will occur with individual court cases.

The first question asked is whether there are other constitutional claims that could apply to the regulation in question, such as procedural due process, substantive due process, equal protection, etc. One constitutional requirement, for example, is that property cannot be regulated without due process of law. So if due process was not followed, the court will focus on that. If there were such problems, then there is a very good chance the court will not deal with the regulatory taking claim at all.

Second, if other constitutional claims do not apply, the court will determine if the regulation amounted to one of the two types of categorical regulatory taking described above (i.e., a total economic deprivation or an ouster). If it did, then the task is to determine the value of the property interest taken and order the government to pay the private property owner that dollar amount.

Third, if the regulation did not amount to a categorical taking, the court will apply the "ad hoc" balancing test to determine whether it amounted to a regulatory taking nonetheless, given the facts of the particular case. In doing this, the court's job is to balance the interests of the public (government's regulation) with the interests of the private property owner. The court looks at the following three factors:

- Reasonableness of the owner's investment-backed expectations.
- Reasonableness of the government's

regulation.

- Severity of the economic impact on the private property owner.

The result under this ad hoc balancing test is that most regulations are found not to amount to a regulatory taking because of their relatively minor impact on the property owner and the government regulation's importance to society. But there will also be cases where the impact on the property owner is significant, or the government's regulation is highly questionable. In those cases, a regulatory taking may have occurred. If a court determines that it has, as with the other ways to get here, its task is to then determine the value of the property interest taken and order the government to pay the private property owner that dollar amount.

Finally, if it was not a regulatory taking, the court will determine if the governmental regulation involves a dedication or exaction requirement, and if that dedication or exaction requirement was indeed statutorily enabled. The court will apply the *Nollan* and *Dolan* tests to ensure that there was a reasonable connection between the dedication required and the harm that would have been caused by the development, and that the cost to the developer is roughly proportional to the scope of the harm avoided. (If the dedication or exaction requirement was not enabled in the first place, then it would be struck down on that ground alone, before getting to a regulatory taking claim.)

## Other Resources

Also Michigan State University Extension has additional fact sheets on taking on this topic. *Land Use Series* "Summary of Property Takings Case Law" by Christopher Grobbel, Ph.D. (2002) reviews court cases on taking law. The *Land Use Series* "A Behavioral Approach to Avoid Regulatory Takings" by Joseph F. Galvin, Esq. and Kurt H. Schindler, AICP, focuses on behaviors by local officials which can get their government into problems with regulatory taking.

These can be found at [lu.msue.msu.edu](http://lu.msue.msu.edu).

# Train of Thought for Property Taking Case

A question is raised in a lawsuit about if there is a taking of private property without compensation.

1. Do other constitutional claims apply? (E.g., procedural due process, substantive due process, equal protection, etc.)

No, go to the next question.

Yes. Then the court case is decided on those other constitutional claims.

2. Is it one of two types of categorical taking (total economic deprivation, ouster)?

No, go to the next question.

Yes. The court focuses on determining the just compensation owed for the taking (e.g., fair market value of the property) and the case is over.

3. Is it the second of two types of categorical taking (ouster or physical invasion)?

No, go to the next question.

Yes. The court focuses on determining the just compensation owed for the taking (e.g., fair market of the invaded property) and the case is over.

4. Is it a *Penn Central* regulatory taking, a situation that is case-specific (a balance by use of a three-part “ad hoc” test)?

- Reasonableness of the owner's investment-backed expectations.
- Reasonableness of the government's regulation.
- Severity of the economic impact on the private property owner.

No, go to the next question.

Yes. The court focuses on determining the just compensation owed for the taking, and the case is over.

5. Is it an exaction or dedication? (two considerations)

- Essential nexus
- Rough proportionality

No. The court rules it is not a taking and the case is over.

Yes. The court focuses on determining the just compensation owed for the taking, and the case is over.