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Takings Law in Plain English

by Christopher J. Duerksen and Richard J. Roddewig

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by Christopher J. Duerksen and Richard J. Roddewig

Foreword

At the very beginning of our nation, Americans decided that the enjoyment of our property was among the most important rights possessed by citizens.

Just as the Declaration of Independence announced that life, liberty, and the pursuit of happiness were the birthright of us all, the Bill of Rights guaranteed us freedom of speech, freedom of religion, and, yes, freedom from interference with our homes and neighborhoods. The Fifth Amendment in the Bill of Rights promises that government may not take our land for public purposes without paying for it.

Over the generations, Americans have joined forces time and time again to build clean, safe, and prosperous communities and to protect our enjoyment of them. The fishermen who seek to save a river full of great bass, the neighborhood association that works to revitalize the area's historic homes, and the activists who strive to give us cleaner air—all have the need and the right to use the legal tools which can keep our nation a decent and healthy place.

In modern times, these common efforts at building better communities are often under assault from those who seek only individual advantage. Most Americans see the Fifth Amendment as a shield protecting us from government overreaching. Others seek to use it as a sword–a weapon against efforts to conserve what is special about this land.

Americans who are committed to building better communities must understand the role of law and the takings clause of the Fifth Amendment if they are to be effective builders. Unfortunately, the legal thicket of explanations by the U.S. Supreme Court and other courts is difficult to access and harder to master. Moreover, there has never been a shortage of misinformation about the meaning of this critical piece of our legal history.

Christopher Duerksen and Richard Roddewig, two of the most able people in this field, provide in this book the keys to understanding the legal history and its import for modern Americans. People who take the time to absorb this straightforward explanation of the law of takings will assuredly be better prepared to protect what is special in our nation.

Randall T. Shepard
Chief Justice, Indiana Supreme Court
Trustee Emeritus, National Trust for Historic Preservation

An Overview of Takings Law

> "... nor shall private property be taken for public use, without just compensation."

With these few words, the framers of the United States Constitution enshrined in the Fifth Amendment one of the most fundamental of individual rights to own property free of the threat of seizure by government, unless the government pays for it. This basic property right was derived from 17th- and 18th-century English legal tradition that prohibited the king from taking a subject's property except by a duly enacted law of the land and with full indemnification.

Historical records show that what the drafters of the Bill of Rights had in mind when they adopted the "just compensation" or "takings" clause was to permit the government to take private property for public use—for example, land needed for a public highway—but only upon payment of compensation. Today, we call this government action exercising the right of eminent domain or condemnation. Thus once again, the framers demonstrated their genius in balancing the rights of the individual with the clear need of the people—government—to undertake public projects for everyone's benefit. It is hard to imagine how the nation could have grown or society would have functioned without the ability to judiciously exercise the power of eminent domain to build roads, dams, parks, and other projects. Indeed, hardly any reasonable person would quarrel with that notion.

Cover: Americans who are committed to building better communities must understand the role of law and the takings clause of the Fifth Amendment if they are to be effective builders.

— Photo: National Trust for Historic Preservation.

How then has the just compensation clause of the Fifth Amendment become the center of a controversy that lawyers like to call the "takings" issue—which has little to do with the actual seizure of property or exercise of the power of eminent domain as our forefathers understood it?

Historically, a corollary of the right to hold property has been a duty to refrain from using it in a manner that would cause harm or injury to neighboring landowners or the general public. Because the use of land invariably affects neighbors and the community health and welfare, *absolute* use has never been considered a protected property right.

This principle is exemplified in numerous decisions of the U.S. Supreme Court and the high courts of the individual states. To cite just one example, in 1908 the Maine legislature asked the Maine Supreme Court whether the state could regulate the cutting or destruction of trees on private land for a variety of environmental purposes, including erosion control, without paying compensation. Focusing on the goal of the legislation to prevent use of private property that would be injurious to citizens generally, the court affirmed the authority of the state to adopt the law, quoting the following language from earlier decisions of the U.S. Supreme Court:

> We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that use of it may be so regulated that it shall not be injurious... to the rights of the community. *In re Opinion of the Justices* (Maine 1908).

These types of enactments raised the question to what extent government can *regulate* the unbridled use of private property to protect the public health and the investment of neighbors and the community without having to pay a landowner to refrain from certain undesirable activities. By judicial decision in the early 1920s, the U.S. Supreme Court expanded the scope of the Fifth Amendment property clause from addressing the narrow circumstance of the actual seizure or physical taking of land into a more far-reaching provision that confines the permissible reach of land-use and environmental regulations.

Courts in recent years have struggled to find an equitable balance between the rights of the public to a healthy environment and livable communities and the rights of landowners. Because of the enormous stakes involved, this constitutional quarrel is far more than an intellectual exercise. The health of our environment and quality of our communities are at stake.

The Courts Reshape the Constitution

Interestingly, early experience from England and Colonial America does not suggest that by simply regulating, the government could "take" someone's property. Indeed, there are many examples of strict government regulation of land during this period where there is no hint that anyone expected compensation to be paid. These cases reflect the American tradition of landowner responsibility to use property prudently. For example, after the great fire in Boston in the late 17th century, a series of laws were enacted directing the use of brick or stone in buildings. No dwelling house could be constructed otherwise upon threat of serious fine. A later act declared that any building that did not meet these standards was a nuisance subject to demolition.

Where landowners sought compensation, courts typically were unsympathetic. For example, in *Hadacheck v. Sebastian* (1915), the City of Los Angeles banned brick making—an industrial operation that spewed "fumes, gases, smoke, soot, steam and dust" into the air—from certain areas of the city to protect surrounding residential neighborhoods, even though the plaintiff's brickyard was built before people moved into the area. The factory owner sued, arguing a taking had resulted because the value of his property was reduced from $800,000 to $60,000. The U.S. Supreme Court rejected this argument, balancing the needs of the public against the harmful or inappropriate use of land. The city was promoting a legitimate public need, and the property owner could still use the parcel, even if for a different purpose.

The general rule was that "acts done 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."

The clear line between actual physical takings and regulatory takings began to blur in the 1920s. In a case called *Pennsylvania Coal Company v. Mahon* (1922), the U.S. Supreme Court accepted the notion that regulations can cause a taking even if there is no actual physical invasion of the property in question. The State of Pennsylvania had passed a law forbidding coal

mining that would cause buildings or streets on the surface to subside, or sink, into the mine shafts—even though the coal mining companies retained that right when they sold the surface rights to individual landowners.

While the Supreme Court found that the law served a valid public purpose, the only constitutionally acceptable method to accomplish that goal was for the government to buy the property interest held by the coal company. Since the state law did not authorize compensation, only regulatory control, the Court struck down the legislation, and Justice Oliver Wendall Holmes said:

> The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Just how far was too far? The cases that provided the setting to address that key question revolved around the then-novel idea of zoning.

At the behest of the business community, which was concerned about the disorderly development of the nation's cities and the need to protect economic investments, the U.S. Department of Commerce promulgated a model zoning act which was adopted by many communities. In *Village of Euclid v. Ambler Realty Co.*, (1926), the Supreme Court gave its approval to an early zoning ordinance in a Cleveland suburb—despite an argument by the plaintiff landowner that the government should have to pay for prohibiting industrial development on his land, which reduced its value by 75 percent (from $10,000 to $2,500 per acre).

Shortly thereafter, however, in a case titled *Nectow v. Cambridge* (1928), the Supreme Court made it clear that under certain circumstances zoning ordinances may in fact go "too far." In that case the Court struck down a zoning ordinance that allowed only residential use for property that was under contract to be sold for industrial use. This time the Court said that, under the particular facts of the case, "no practical use [could] be made of the land in question for residential purposes," since "there would not be adequate return on the amount of any investment for the development of the property."

The Court went on the same year to uphold a Virginia law requiring the destruction of disease-carrying red cedar trees because of potential damage to nearby apple orchards—all without compensation. Having established the principle of considering both the economic impact of a regulation on a landowner and the need to protect or benefit the public, the Supreme Court then retired from the "takings" field for the next 50 years or so, leaving it to the lower federal and state courts to work out the rules on a case-by-case basis.

The Takings Inquiry

In literally thousands of cases over the ensuing decades, state and federal courts were called upon to determine whether a particular environmental or zoning regulation was overly burdensome and violated the takings clause. Judges considering these cases had considerable difficulty in establishing hard and fast rules—largely because each situation involving the use of land is unique, both as to the economic impact of regulation, and the impact of unregulated use on neighboring property owners and the public generally. Nonetheless, these various court cases have outlined several broad factors to be considered on a case-by-case basis in determining if a taking has occurred:

1. What is the economic impact of the regulation on the property owner?

The economic impact of a particular regulation is obviously an extremely important factor in determining whether the regulation has resulted in a taking. At times, courts have focused on the decrease or diminution in property value before and after the regulation is applied. At other times, courts have focused on whether the owner is left with any "reasonable economic use" of the property. (As discussed below, this latter formulation has been used by the U.S. Supreme Court in its most recent decisions in the takings area.) Regardless of approach, however, the decisions of the courts make it clear that economic impact must be extreme in order to result in a taking.

Those courts that have focused on the reduction in value caused by a governmental regulation have typically required an almost total elimination of value before they find a regulatory taking. As the Supreme Court has observed, "the cases are legion that sustained zoning against serious economic damage." More recently, courts have shown an increasing inclination to reject challenges despite large reductions in value. For example, in *William C. Haas & Co. v. City and County of San Francisco* (1979), a California federal court approved a local regulation that reduced the allowable height for a future residential high-rise building on the

As long as a historic building can be rented out profitably, denying the owner the ability to demolish it for a high-rise office building does not give rise to a takings claim.

— Photo: National Trust for Historic Preservation.

plaintiff's property from 300 to 40 feet, despite a reduction in the speculative value of the property from $2 million to $100,000. In so ruling the court cited the substantial public benefit of reducing congestion in the neighborhood, preserving light and air available to neighbors, and serving esthetic values of the city as a whole.

It is clear that there are no hard and fast numerical formulas to determine when a regulatory taking has occurred—it is a question that must be decided on a case-by-case basis depending on the facts of each situation. Indeed, several studies that attempted to identify a mathematical formula for the amount of loss in land value that courts will accept have proved unsuccessful and inconclusive.

Most courts in recent years have assessed the economic impact of a land-use regulation by determining whether the owner is left with a reasonable economic use of the property. Simply denying the so-called "highest and best use" of a property does not give rise to a taking. For example, if a historic building can be rented out profitably, then denying the landowner the ability to demolish it to make way for a high-rise office building, thereby reducing the parcel's speculative value, does not give rise to a taking.

What constitutes a reasonable economic use is determined on a case-by-case basis. Many courts have upheld strict floodplain and wetlands regulations because an owner is still able to pursue farming and recreational uses that could produce a reasonable economic return. A few courts have struck down regulations in similar circumstances. The outcome will depend on specific facts: When were the regulations adopted? Did the owner know of the regulations when the property was purchased? Is the loss claimed by the owner the speculative value of future development? Could the owner make a reasonable return under the property's current use, or some other allowed use?

2. Does the regulation promote a valid public purpose?

In reviewing a health and safety, land-use, environmental, or similar regulation under the takings clause, courts pay heed not only to the economic impact on the owner but also to the public purposes being served by the regulation. In fact, a few courts have combined these two inquiries into a single examination, often referred to as "balancing of public benefit against private loss."

Typically, courts grant great deference to elected officials in determining what is a valid public purpose for regulation. Attempts by property owners to hold governments to a more onerous standard or burden of proof have been almost uniformly rejected in a regulatory context (as opposed to instances of actual seizures of property).

Recent cases from the Supreme Court and the states show a continuing expansion of what are considered permissible public goals for land-use and environmental regulations. These goals include open-space and agricultural land protection, landmark preservation and design controls, and protection of environmentally sensitive areas such as wetlands and floodplains, all of which reflect society's growing concern about the impact of people's activities on our air, water, and land—and a determination to bequeath a healthy, livable environment to our children. Only in special instances, such as

In 1978 the U.S. Supreme Court upheld New York City's denial of peromission to construct a 55-story office tower on Grand Central Terminal in the landmark decision, Penn Central Transportation Co. v. City of New York.

— Photo: National Trust for Historic Preservation.

where land-use regulations are used to exclude from a community special groups like the mentally handicapped or group homes, have the courts insisted on a higher standard of proof.

3. What is the character of the government action?

Courts have been particularly sensitive to government regulations or actions that can be characterized as efforts to obtain public access to private property. For example, in *Allingham v. City of Seattle* (1988), the Washington Supreme Court struck down a local greenbelt protection ordinance, heavily influenced by the fact that when the city ran out of funds for greenbelt acquisition, it resorted to a regulatory program to accomplish the same ends. Similarly, in *Kaiser Aetna v. United States* (1979), the Supreme Court held the government's attempt to require the property owner to allow public access to a private pond to be a taking.

In 1994, the nationally accepted practice of requiring developers and landowners to provide public open space and trails on their property came under close scrutiny by the U.S. Supreme Court. In many cases, these conditions on development have characteristics comparable to a physical "taking," that is, by allowing public access to private land. In *Dolan v. City of Tigard* (1994), the Court recognized that conditions on development are legal so long as there is a sufficient relationship between the needs created by a project and the amount of land or type of access the developer is required to provide. The Court, however, invalidated a land dedication requirement for public access, because the dedication was *disproportionate* to the need for access generated by the project.

The 1978 Penn Central Decision

In the late 1970s, the Supreme Court agreed to consider another major land-use takings case. By that time, the proper steps in the takings balancing act, while not always uniformly applied by the lower courts, were generally understood by governments and property owners alike.

The Penn Central Test

The Supreme Court has identified three factors for determining whether governmental regulation has resulted in an unconstitutional taking. This case-by-case inquiry examines:

1. the character of the governmental action;
2. the economic impact of the regulatory action on the claimant; and
3. the effect of the contested action on the claimant's distinct investment-backed expectations.

The first prong focuses on whether the action merely restricts development or constitutes a physical invasion of property. The second prong considers whether the claimant is left with a reasonable use of or return on the property. The third prong factors in the claimant's actual investment in the property, his or her expectations at the time of the investment, and the reasonableness of those expectations in view of the economic circumstances and "regulatory regime in place" at the time of the investment. Governments cannot be required to compensate property owners for speculative investments gone sour.

Moreover, of the thousands of land-use cases heard by the courts, only a relatively small percentage raised the takings issue (perhaps reflecting the difficulty in succeeding on that theory). Many more of these cases were decided on other grounds, such as failure to follow required procedures for hearings.

In 1978, in *Penn Central Transportation Company v. New York City*, the Supreme Court reaffirmed the accepted takings analysis that an owner must be denied all reasonable use of a property for a taking to occur. The Court also set forth basic principles to guide communities, property owners, and reviewing courts in evaluating the constitutionality of regulatory acts in specific situations. What are these principles? Briefly, that—

- Communities clearly have the authority to adopt laws and regulations that are designed to protect and enhance the quality of life of their citizens.
- The regulation of private property will not constitute a taking, as long as: (1) the regulation advances a legitimate governmental interest; and (2) the property owner retains some viable use of the property (particularly as measured by the owner's reasonable investment-backed expectations).
- Property owners may *not* establish a taking "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development."
- In deciding whether a particular governmental action has caused a taking, a reviewing court must examine the effect of the regulation on the *entire* property, and not focus on any one specific segment or interest.

The *Penn Central* decision placed the regulation of historic structures on firm legal ground, by upholding local historic preservation ordinances as a valid government tool. Even more importantly, the decision established the framework for evaluating takings challenges in *all* types of land-use actions. In addition to historic preservation, the *Penn Central* principles have been applied to a variety of public interest laws, including environmental controls, wetlands and natural habitat protections, health and safety regulations, and a variety of land-use and zoning regulations.

The Takings Issue in the Following Decades

Historians are already characterizing the 1980s as the decade when profit took precedence over people. The guiding philosophy seemed to be "live for today; tomorrow will take care of itself." Fueled by easy money from savings and loan institutions and generous federal tax benefits, real estate development boomed in many places. Public lands were increasingly drilled, logged, and mined. That boom ran head on into growing public concern over the need to protect the public health, the environment, and the character of our communities. Industry and real estate developers chafed under laws that had been put in place in many communities and states during the 1970s designed to guard the public against health risks from air and water pollution and to preserve wildlife habitats and other sensitive natural areas and cultural resources. Not surprisingly, real estate developers and resource development companies fought in the courts to weaken resource protection laws and land-use planning.

The major thrust of these challenges revolved around the takings issue. Frustrated by their general lack of success in winning takings claims, representatives of landed interests—real estate developers, mining companies, forest and timber firms, and kindred businesses—attempted to persuade a newly realigned Supreme Court to change the painstakingly developed balancing rules and move the takings line in their favor. A close examination of the Supreme Court's takings decisions over the past 25 years or so, however, shows that the general principles of takings

law, as reflected in the *Penn Central* decision, remain essentially unchanged. During that period, however, the Court defined some important rules on the fringes of the takings issue—most notably related to remedies.

The first major takings case of the 1980s in which the Supreme Court actually reached a decision on the merits of a takings claim was *Keystone Bituminous Coal Association v. DeBenedictis* (1987). In that case, the Court rejected a takings claim brought by a consortium of coal companies in a fact situation remarkably similar to the *Pennsylvania Coal* case decided in the 1920s. The state of Pennsylvania had again enacted a mining safety act to protect the public against the environmental and economic damage from surface subsidence that occurs when companies removed coal from subsurface seams. The law in question required that coal operators leave in place 50 percent of coal beneath public buildings, homes, and cemeteries to provide surface support. Several coal companies sued, claiming the restrictions amounted to a taking. The Court rejected that argument, pointing out that the mining regulations did not deny the mine operators all "economically viable use" of their land.

Importantly, the Court also rejected the mining companies' argument that it should focus only on the restricted portion of their property—the coal they had to leave in the ground and their "support estates" (a distinct property interest recognized under Pennsylvania law)—and find that all viable economic use of those restricted portions had been taken by the act. Instead, the majority reaffirmed the rule laid down in *Penn Central*:

> "Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses both on the character of the action and on the nature of the interference with the rights *in the parcel as a whole*." (Emphasis added by the Court.)

Not to be deterred, industry and real estate development advocates took a different tack—they argued that if a taking occurred, simply invalidating the offending regulation was not enough. They maintained that the regulating authority had to pay money damages for the full value of the property—in effect, "you overregulated my property, so you bought it." Part of the strategy was to discourage governments from regulatory activities because of the potential for large compensation awards from takings claims.

Again, the Supreme Court rejected this extreme position, although it did crack the door open a bit by holding that if a taking can be proved, damages might be due for a temporary taking during the time when the offending regulations were in place. In *First English Evangelical Lutheran Church v. County of Los Angeles* (1987), the plaintiff church argued that interim floodplain development restrictions imposed by Los Angeles County amounted to a taking for which payment was due. (The floodplain regulations in question prohibited reconstruction of buildings in a church-owned campground for handicapped children that had been earlier swept by killer floods.) The California Supreme Court denied the church's takings claim, relying on its earlier decisions that only invalidation, not

During the real estate development boom at the end of the 20th century, landowners repeatedly challenged laws designed to limit development in environmentally-sensitive areas as unlawful takings.

— Photo: National Trust for Historic Preservation.

Regulations aimed at protecting the environment and the public from serious harm, such as regulating shorefront development after a destructive hurricane, serve a valid public purpose.

— Photo: U.S.D.A Soil Conservation Service.

money damages, is available when a regulation goes too far. On appeal, the U.S. Supreme Court did not determine whether a taking had occurred in the case, but agreed with the principle that the remedy for a taking includes compensation for the period the taking is in effect:

> "We merely hold that, where government's activities have already worked a taking of *all* use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (Emphasis added.)

It is important to be clear that the *First English* decision only addressed the question of available *remedies*, and not whether the regulation at issue actually resulted in a taking—a point that is often misunderstood about the case. Indeed, on remand to the lower courts to decide whether a taking had actually occurred, the church lost and never recovered any money damages, because the public necessity of keeping handicapped children out of harm's way was found to outweigh the alleged economic impact on the landowner.

It is particularly important to emphasize that the Court in *First English* rejected the notion that the sole remedy for a taking is payment of the *full* value of the property affected. Where a taking is temporary—for example where the regulation causing the taking is later withdrawn or invalidated—only temporary damages are due.

Finally, the Court stated that its focus on "temporary takings" was not intended to refer to "normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." The Supreme Court clarified this position in a later case involving a development moratorium, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), explaining that *First English* "surely did not approve, and implicitly rejected," the view that a regulation that *temporarily* denies an owner all use of his or her property is automatically a taking.

Since First English, the Supreme Court has handed down a steady procession of takings decisions, some of which have been claimed as significant victories for real estate development interests. A close analysis reveals, however, that the decisions continue to reflect a balanced approach by the Court on the takings issue, favoring *Penn Central*'s ad hoc, three-factor framework for addressing takings claims, (rather than per se rules) namely, an examination of the character of the government's action, the owner's distinct investment-backed expectations regarding the property, and the economic impact of the government's action on the owner.

In the first of these post-*First English* cases, *Nollan v. California Coastal Commission* (1987), the Court addressed the growing practice by local governments of requiring land or other contributions from developers to offset the cost of public facilities created by their projects. In this case, the state demanded that the plaintiffs allow public access across their private beach in return for a building permit for a three-bedroom vacation home.

In considering the matter, the Supreme Court made it clear that such development conditions

(or "exactions") will be upheld—even if they amount to a permanent physical occupation of land—so long as they further valid governmental interests, and are adopted to respond to the burdens or needs created by the development. The Court, however, struck down the specific exaction in the case as not being reasonably related to the burden imposed by the development, finding it "impossible to understand" how public access *along* the beach could help to remedy the burden imposed by the proposed development upon access *to* the beach.

In *Nollan*, the Court again focused on the relationship between public needs and private economic impact. Thus, if a development creates a need for a two-lane road to connect to a nearby highway, the local government can fairly require that the developer pay for such an improvement. However, the local government cannot insist that the developer build at his sole expense a four-lane parkway that would serve other developments as well.

A second highly publicized decision of the Court involved the regulation of development in a coastal hazard zone, in a case entitled *Lucas v. South Carolina Coastal Council* (1992). This case involved the adoption of strict shoreline development regulations by the state in the wake of devastating hurricanes. The regulations made building on the plaintiff's beachfront lots very difficult if not impossible, despite the fact that surrounding property owners had built homes on their land before the regulations went into effect. (When Lucas acquired the land, residential development was allowed.) In addition, there were no provisions in the law when it was first adopted to provide relief if the balancing test showed too significant of an adverse economic impact on any particular property owner.

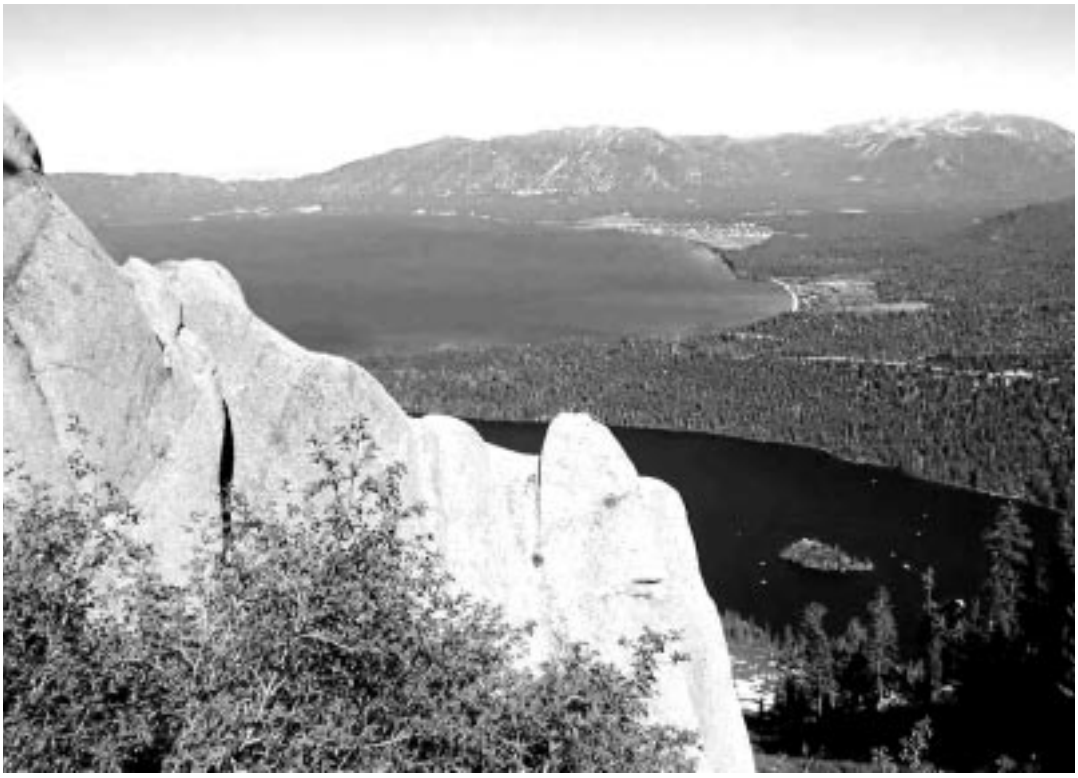
In Washington, D.C., a federal appeals court rejected an attempt to obtain compensation for the denial of permission to develop the newly subdivided lawn of a historic apartment building under a "total taking" theory.

— Photo: National Trust for Historic Preservation.

In *Lucas*, there was no dispute that the regulations served a valid public purpose or that the economic impact was severe—if not a complete "wipe-out" of the developer's financial interest in the property (as was concluded by the lower court in the case). However, the state argued that when a regulation is aimed at protecting against extraordinarily serious harm to the environment or the public (in this case, by preventing construction of buildings that might be destroyed in a storm along with their owners, or that might wreak havoc by being tossed by waves into other homes), then it can never give rise to a taking. Legal scholars refer to this theory as the "nuisance exception" to the takings clause.

The Supreme Court refused to completely dismantle the nuisance exception, recognizing that uses of property that amount to a nuisance may be forbidden despite a complete deprivation of economic use. The Court, however, limited the rule somewhat, by saying that in the "relatively rare" instance where a regulation goes so far as to deny *all* economic use of property, it will generally be considered a taking *unless* the prohibited use is "barred by existing rules or understandings" derived from background principles of property law or nuisance. This reformulation of the "nuisance exception," however, is not likely to have much effect in practical terms, particularly in light of the Court's express recognition that a total economic wipe-out is an "extraordinary circumstance."

Indeed, just one year later, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust* (1993), a



In the Tahoe case, a group of property owners affected by a series of moratoria on development in the Lake Tahoe Basin argued unsuccessfully that compensation was due for the 32-month period in which the moratoria were in effect.

— Photo courtesy of USGS.

case involving application of the Multiemployer Pension Plan Amendments of 1980, the Supreme Court unanimously rejected an attempt to "shoehorn" a takings claim into a "total" taking of economic use under *Lucas*, explaining that property cannot be separated into parcels for purposes of artificially characterizing regulation affecting the use of *some* portion of the property as the unlawful taking of an entire parcel. Rather, the Supreme Court applied *Penn Central*'s three-part test for analyzing takings claims and ultimately concluded that an unconstitutional taking had not resulted.

Indeed, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), the Supreme Court characterized *Lucas* as a "narrow exception to rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use." In both *Tahoe-Sierra Preservation Council, Inc., and Palazzolo v. Rhode Island*, (decided in 2001 and discussed later in this booklet), the Supreme Court rejected invitations to expand *Lucas* beyond the very narrow circumstances of that case.

Other courts have also resisted attempts by property owners to obtain compensation for "total takings." The U.S. Court of Appeals for the D.C. Circuit in *District Intown Properties Ltd. Partnership. v. District of Columbia* (1999), for example, rejected an attempt to obtain compensation for the denial of permission to develop the newly subdivided lawn of a historic apartment building under *Lucas*. Adhering to *Penn Central*'s "parcel as a whole" rule, the court refused to separate the undeveloped portion of the property from the developed portion and thus concluded that a "total wipe-out" had not occurred. Ultimately, the court also rejected the owner's takings claim under *Penn Central*, since the apartment building provided the owner with a reasonable use of his property. In the end, most commentators expect that the *Lucas* decision will affect only a tiny number of land-use and environmental regulatory actions.

In *Dolan v. City of Tigard* (1994), the Supreme Court again addressed the practice of development conditions or exactions, this time focusing on the common practice of requiring a public dedication of land in return for development approval. In this case, the plaintiff had applied for a permit to expand her hardware business. The city, as a condition of permit approval, required dedication of a floodplain area to handle increased storm water runoff.

The Supreme Court had no problem with this exaction, finding it was reasonably related to a need created by the development. The Court balked, however, at the city's additional requirement that the property owner open the floodplain corridor to public access for a bicycle and pedestrian trail. The Court ruled that the city had failed to show that either the floodplain or transportation impact of the expanded business was reasonably related in "rough proportion" to the requirement of public access.

The *Dolan* decision, while not altering the basic takings analysis used by the Court, did place a greater burden on local governments to justify land dedication requirements—imposed on an ad hoc basis and not as part of a comprehensive legislative program—especially those requiring public access.

In the five years that followed, developers pressed hard for an expansion of the Supreme Court's

ruling in *Dolan*, arguing that the increased evidentiary burden placed on local governments when imposing land dedication conditions on property owners should also apply to standard permitting cases. This notion was squarely addressed, and rejected, by the Court in *City of Monterey v. Del Monte Dunes at Monterey Ltd.* (1999).

In *Del Monte Dunes*, a California jury had awarded a developer $1.45 million in damages in a takings lawsuit brought against the City of Monterey under 42 U.S.C. § 1983 for its refusal to grant a permit to develop a portion of a large oceanfront site, despite the developer's submission of 19 different site plans to address the various concerns raised by the city regarding, among other things, the need to preserve and restore the area's natural habitat for the endangered Smith Blue Butterfly. The Supreme Court upheld the Ninth Circuit's affirmation of the jury verdict as well as the developer's right to a jury trial under the Seventh Amendment. But in doing so, the Court relied on the specific instructions given to the jury, rather than the higher standard of review based on concepts of "rough proportionality." Indeed, the Court firmly stated that *Dolan*'s "rough proportionality" test does not extend to situations involving the "denial of development."

Two years after *Del Monte Dunes*, the Supreme Court in *Palazzolo v. Rhode Island* (2001), clarified that the "categorical takings" concept of *Lucas* applies only in the extreme situation where a "total wipe-out" has occurred and reaffirmed *Penn Central* as the controlling case for analyzing takings claims. Property owner, Anthony Palazzolo, had sued the state of Rhode Island because of its refusal to authorize the development of 18 acres of state-protected salt marshes under its coastal resources act. The owner demanded compensation for the "total taking" of his property even though the state would allow the construction of at least one house on his land. Uncon-vinced by Palazzolo's argument that the remaining value of the land was so nominal that a *Lucas*-type taking had occurred, the Court stated that "a regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"

The *Palazzolo* Court did, however, provide some degree of clarification regarding the issue of whether takings claims can be defeated by the presence of laws or restrictions on development in place when the property was acquired. The Court, in a highly splintered ruling, concluded that a landowner's right to assert that a regulation amounts to a takings claim does not disappear simply because the regulation predated the owner's acquisition of title. This does not mean, however, that the presence of restrictions on development at the time of acquisition has no bearing on whether a taking has occurred. Under *Penn Central*, the timing of a regulation's enactment is germane to the owner's "distinct investment-backed expectations." Thus, a pre-existing legal restriction may be a relevant, but not determinative, factor in establishing a takings claim.

The following year, the Supreme Court underscored its ruling in *Palazzolo*, once again stating that, outside of the exceptional "wipe-out" situation, takings claims must be analyzed under *Penn Central*'s ad hoc,

Penn Central's Preservation Legacy

The Supreme Court's affirmation of the right of local governments to landmark and regulate changes to historic structures has had a profound effect on the field of historic preservation. Statistics alone give some indication of this: Before the Court's decision, the number of local preservation ordinances numbered fewer than 500 across the country. Today, there are well over 2,000 communities in the United States that regulate to protect historic properties. And this number does not tell the story completely, since the most recent trend is the incorporation of landmark protections into comprehensive land-use regulations at the state and local levels.

The effect of *Penn Central* on the field of preservation is not just the result of the essential holding of the case—that New York City's refusal to permit construction of an office tower atop Grand Central Terminal did not amount to a taking without compensation. It is a result of the principles that can be drawn from Justice Brennan's opinion:

- Historic preservation is a valid basis for exercising the police power.
- A preservation ordinance may affect properties differently, but this does mean that it is unconstitutional.
- The diminution of property values—even if substantial—is not equivalent to a taking.
- The effect of a preservation regulation must be measured in terms of the entire parcel, and not just one property interest.
- The availability of incentives that offset regulatory burdens resulting from landmarks laws can be an important factor in evaluating takings claims.

Penn Central's enduring legacy—it remains as valid today as it did in 1978—underscores the soundness of these principles and assures the continued viability of preservation protection programs in communities today as well as the future.

Paul Edmondson, Vice President and General Counsel
National Trust for Historic Preservation

multi-factored framework. In doing so, the Court declined to expand *Lucas* to create a categorical rule requiring compensation whenever the government imposes a moratorium on development. Instead, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), the Court reiterated the general rule that land-use actions, including moratoria, are "best analyzed" by looking at "the landowner's investment-backed expectations, the actual impact of the regulation on any individual, the importance of public interest served by the regulation, [and] the reasons for imposing the temporary restriction."

In the *Tahoe* case, a group of property owners affected by a series of moratoria on development in the Lake Tahoe Basin sought compensation for a *per se* regulatory taking under *Lucas v. South Carolina Coastal Council*. Relying on *First English Evangelical Lutheran Church v. County of Los Angeles* (1987), for the position that compensation is required for temporary takings, the property owners had argued that compensation was due for the 32-month period in which the moratoria were in effect.

In deciding the case, the Supreme Court found that the owners' attempt to carve out the 32-month period of the moratoria from the remainder of their fee simple estates for purposes of establishing a *Lucas*-type taking "ignore[d] *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'" Once again, the Court declared that the impact of a governmental action must be examined by looking at the entire parcel of property interests, rather than discrete segments (including temporal segments), for purposes of determining whether a taking has occurred.

In the end, the *Tahoe* Court reaffirmed *Penn Central* as the "polestar" for evaluating takings claims. Despite all the media attention and misunderstanding surrounding the *First English, Nollan, Lucas, Dolan, Del Monte Dunes,* and *Palazzolo* decisions, the rules of the balancing act articulated by the Court in 1978, when it decided the *Penn Central* case continue to apply today.

In addition to the decisions discussed above, the Court also decided a series of less celebrated, but extremely important, land-use takings cases, which are proving to have equal if not more relevance in day-to-day circumstances. These cases, *Agins v. City of Tiburon* (1980), *San Diego Gas & Electric v. City of San Diego* (1981), *Williamson Co. Regional Planning Commission v. Hamilton Bank* (1985), and *MacDonald, Sommer & Frates v. County of Yolo* (1986), establish important "ripeness" standards that must be met before an aggrieved party can pursue a takings claim in court. The requirements derived from these 1980s cases have continued to be expounded on by the Court, for example, in *Suitum v. Tahoe Regional Planning Agency* (1997), and *Palazzolo v. Rhode Island* (2001) (discussed below).

The ripeness standards laid out by the Supreme Court make clear that if a restriction on development is being challenged, an actual development plan must first be filed; no theoretical challenges are allowed except in unusual circumstances. Second, if the development proposal is rejected, the project proponent must pursue available avenues of administrative relief such as seeking a variance in the regulations. (A case may be considered ripe, however, if the governmental agency charged with reviewing the application is without discretion to issue the permit; or "the permissible uses of the property are known to a reasonable degree of certainty.") In other words, reviewing courts will not entertain a takings claim unless the government has reached a final decision regarding (1) the application of the regulations at issue and (2) the extent to which development of the land will otherwise be permitted under the laws that apply.

In *Agins*, the plaintiffs, who owned extremely valuable land in upscale Marin County, Calif., challenged a zoning change of their property that limited the number of residential structures that could be built on their five-acre lot. The landowners claimed that they were entitled to money damages for a taking; however, the Court refused to address the damage issue, because it found that no taking had occurred. The landowners jumped the gun—they had not filed a development plan, and the ordinance on its face allowed some residential use that might be profitable. As discussed later, *Agins* and others in this line of cases have been often embraced by many lower courts in rejecting takings claims.

Apart from the basic rule that the availability of variances, special exceptions, state inverse condemnation actions, and other types of *discretionary* relief must be exhausted before a takings claim may be pursued, a court may allow a case to go forward in certain circumstances. If a landowner's ability to develop a site is completely denied, as in the *Lucas* case, a reviewing court is likely to determine that the ripeness requirement has been

met, even if some continued use may be made of the property through, for example, transferable development rights (TDRs). Moreover, as the Supreme Court explained in *Suitum v. Tahoe Regional Planning Agency* (1997), a case may be considered ripe in situations where no discretionary action remains. Thus, the *Suitum* Court concluded that a landowner's failure to sell TDRs available from her non-developable lot did not prevent her from asserting a takings claim, since the value of the TDRs was "simply an issue of fact about possible market prices," which a reviewing court could consider in its evaluation of that claim. The *Suitum* situation, however, does not change the basic rule that the availability of variances, special exceptions, and other types of discretionary relief must be exhausted before a takings claim may be pursued in court.

Most recently, the Court recognized in *Palazzolo v. Rhode Island* that a takings case is likely to have ripened "once it becomes clear that the permissible uses of the property are known to a reasonable degree of certainty." In that case the Rhode Island Coastal Resources Management Council had made it clear that the coastal regulations barred Palazzolo from filling in or developing wetland areas. Therefore, the Court reasoned that further permit applications would not be necessary since there was no ambiguity about the extent of development that would be permitted.

Real Estate Economics and the Takings Issue

In considering specific takings claims, and in applying the judicial precedents described in the previous chapter, a growing number of courts in recent years have applied standard principles of real estate analysis in handling and analyzing takings cases, particularly in measuring the economic impact of land-use or environmental regulation. Application of these principles is useful in answering three of the central questions of the takings inquiry:

- What is the property interest alleged to be affected by the regulation?
- What is a reasonable use of or return on property?
- In the rare event that a taking has occurred, how should damages be measured?

What Property Interest Has Been Affected?

First-year law students learn that owning real estate is like owning a bundle of sticks. The "sticks" in the bundle are the various rights that accompany property ownership. For example, on the simplest level, a property owner may personally "use" it, let family members "use" it, "lease" it, "mortgage" it, join with others to "develop" it, "bequeath" it to heirs, or "sell" it. Each of those simple uses can be accomplished in an endless variety of ways.

For obvious reasons, real estate and other development interests want the courts to focus on the individual sticks rather than the entire bundle. However, one of the most basic rules of takings law is that the focus of the inquiry must be on the entire "bundle," not the individual sticks. If a regulation destroys the opportunity to use one or more of the sticks, but the remaining sticks give value to the bundle as a whole, no taking has occurred. This rule was set forth by the U.S. Supreme Court in *Penn Central* (1978) ("'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated..."). It was later reaffirmed in *Keystone Bituminous Coal* (1987), *Concrete Pipe and Products v. Construction Laborers Pension Trust* (1993), *Palazzolo v. Rhode Island* (2001), and again in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002).

The only exception to the rule is where a governmental action amounts to a compelled physical occupation of land, in which case a court will look at the specific impact, no matter how small.

The Supreme Court has repeatedly resisted efforts to modify the "parcel as a whole" rule since its annunciation in 1978. In *Penn Central*, the Supreme Court examined the entire tax parcel owned by the developer, not only the air rights that had allegedly been taken. In the 1987 *Keystone* case, the Supreme Court focused on the total coal owned by the company, not simply the portion of the coal required to be left in the ground by the regulation. Then in 1993, the Supreme Court in *Concrete Pipe and Products*, a non-land use case, stated that "the claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking."

Standing by its "parcel as a whole" rule in the 2001 *Palazzolo* case, the Supreme Court refused to focus solely on the portion of the parcel on which development had been denied in applying its takings analysis. More recently, in *Tahoe-Sierra Preservation Council, Inc.* (2002), the Supreme Court stated that the 32-month period during which no development was allowed under the planning

A basic rule of takings law is that the focus of any takings inquiry is on the entire property interest, not just one portion of the property or ownership interest.

— Photo: National Trust for Historic Preservation.

agency's moratoria on development, could not be severed "from the remainder of each landowner's fee simple estate" for purposes of establishing a categorical taking.

In identifying the relevant "property interest" for purposes of establishing a takings claim, it is important to understand that only legally recognized property interests will be considered to be protected by the Constitution. In addition, a reviewing court is unlikely to find a taking where the asserted property interest is speculative, or it is but one of many interests that give value to the property as a whole. Thus, in *Tahoe-Sierra Preservation Council, Inc.*, the Supreme Court explained that "a permanent deprivation of the owner's use of the entire [geographic] area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not." "Logically," the Court stated, "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."

What Is a Reasonable Use or Return?

As discussed above, one of the key factors considered by the courts to determine if a taking has occurred is whether the owner is left with a reasonable use of or return on the property. The most complete discussion of this part of the takings inquiry can be found in various decisions by former Justice William Brennan. In the 1978 *Penn Central* decision, Justice Brennan, writing for the majority, focused on the ability of landowners to enjoy "both a 'reasonable return' on their investment and maximum latitude to use their parcels for purposes not inconsistent" with the public interest. Justice Brennan also included among the relevant factors in reviewing takings claims "[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...." But Brennan also warned that property owners may not establish a taking "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development."

This economic theory of takings as explained in *Penn Central* and elsewhere thus focuses on the following key questions:

- Can the property owner continue to use the property productively even after enactment of the challenged regulation?
- If there has been an "investment" in the property, can the owner still obtain a reasonable return on that investment after enactment of the challenged regulation?

In some takings cases, such as *Penn Central*, reviewing courts simply analyze the past use or uses of the property to see if any or all such uses can continue unaffected by the regulation. In other takings cases, the courts engage in a more complicated economic analysis of the impact of the regulation. Typically, the starting point is to compare the value of the property *before* the challenged regulation was adopted to the value of the property *after* the regulation was adopted. The court may factor in the owner's actual investment in the property, and consider the owner's reasonable expectations in light of the broader economic environment and the comparative risk of the investment. In any event, as discussed above, the

economic impact must be extremely high before the "takings" threshold is crossed.

Nothing in the Supreme Court's 1992 *Lucas* decision changed any of the economic principles of takings analysis. Justice Antonin Scalia, writing for the majority in *Lucas*, stated that a categorical taking may exist "where regulation denies all economically beneficial or productive use of land," and then continued by paraphrasing the Brennan takings formulation as stating that "total deprivation of beneficial use" is a taking. In fact, the case only reaffirms a conclusion reached by most legal analysts long ago—if a regulation totally deprives an owner of *all* use of a property, it will more than likely be found to be a taking.

Indeed, since *Lucas*, the Court has twice adhered to the strict boundaries established by its "total taking" rule, refusing to adopt a categorical rule in cases involving partial takings. In both *Palazzolo v. Rhode Island* (2001) and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), the Court declared that virtually all takings claims must be resolved on a case-by-case basis under the multi-factor test set forth in *Penn Central*.

Finally, in *Concrete Pipe and Products v. Construction Laborers Pension Trust* (1993), the Supreme Court provided some additional guidance on the issue of "reasonableness," in the context of a claim that a regulation amounts to an "interference with reasonable investment-backed expectations." The Court noted that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." It went on, quoting from several earlier decisions, to say that "those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." According to the Court, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations...."

In the Rare Event that a Taking Occurs, What is the Measure of Damages?

There is little or nothing in the land-use decisions of the U.S. Supreme Court that helps in understanding how to measure damages should a taking actually occur. The issue, however, is a significant one: If the amount of potential liability is great—even if the risk that a court will find a taking is relatively small—there will be a natural tendency on the part of communities to refrain from any type of activity that could invoke a takings claim. As explained below, however, the potential liability is generally smaller than most people associate with the concept of "takings."

In examining this issue, it is important to understand the difference between a temporary and a permanent taking. If a regulatory taking is "permanent," that is, the regulations are not temporary, or cannot be undone—then the appropriate compensation to the property owner would be the full value of the property, as determined by well-accepted real estate valuation principles. If a regulatory taking is "temporary"—that is, the regulation is subsequently lifted by a court's action in striking it down, or if it is withdrawn by the government—compensation would only be due for the period the regulation was in place, and will be far less. The significance of this difference is that, while *any* type of regulatory taking is rare, in most such cases the offending regulation may either be withdrawn by the court or by the government itself—limiting the taking to a temporary period. The corresponding liability for temporary damages is considerably smaller than that of a permanent "taking."

How, then, *are* damages measured in the case of a regulatory taking? Although the few courts that have addressed this issue have taken no consistent approach, two main alternative methods have emerged from two federal appeals court decisions. Under the first, based on *Nemmers v. City of Dubuque* (1985), the government is required to pay a percentage (reflecting a reasonable annual rate of return) of the loss of value of the property for the period of time that it was covered by the regulation. Under the second, based on *Wheeler v. City of Pleasant Grove* (1990), the government is required to pay a percentage (again, reflecting a reasonable rate of return) of the amount of investment the landowner would have put into the property had development not been prohibited by the regulation—but, again, only for the period the regulation was actually in effect.

Most analysts favor the *Nemmers* test, since *Wheeler* has been subject to criticism that it overstates the true economic impact on a piece of property. In either case, the *entire* loss of value or investment is not required to be repaid, since both value and investment potential are restored to the owner once the regulation is lifted.

An example of how these damages principles apply in a given case can be found under Principle 8. For a more detailed discussion of this issue, see R. Roddewig &

The practice of requiring developers and landowners to provide public open space and trails on their property has been upheld under the U.S. Constitution as long as there is a sufficient relationship between the needs created by the project and the amount of land or type of access required.

— Photo: National Trust for Historic Preservation.

C. Duerksen, "Measuring Damages in Takings Cases: The Next Frontier," 15 *Zoning & Planning Law Report* 49 (Clark Boardman Callaghan, New York 1992).

Takings Law in Summary with Examples

Given the flurry of Supreme Court land-use cases over the past quarter century, what are the Fifth Amendment rules that have been established to strike a fair balance between public need, as embodied in governmental, environmental, and land-use restrictions, and private economic interests?

Here is a plain English summary, with some illustrations:

PRINCIPLE No. 1 No Absolute Right of Use

No one has an absolute right to use his or her property in a manner that may harm the public health or welfare, or damage the interests of neighboring landowners or the community as a whole.

Example: The owner of a petroleum refinery, once located far from any city or town, has watched over the years as development from the nearest metropolitan area has crept closer and closer. The refinery was once surrounded by open fields, but is now surrounded by residential subdivisions, shopping centers, and schools. The local community has grown concerned that smoke and other pollutants from the factory are having an adverse effect on the health of local residents, as well as the economic health of the community as a whole. The county council finally decides enough is enough, and adopts a law that prohibits emission levels above certain amounts. The owner says that he cannot afford the necessary emission controls, and will be forced to close the plant if required to comply with the law. He claims that the result would be a taking.

Analysis: Communities have the right to stop harmful activities of individual landowners. This is the case even for activities that have been carried out for many years, since changes in circumstances will permit changes in the general law to protect the public interest. In almost every instance, the property in question may be put to other uses, including—as in this case—property developed for residential or other low-impact uses. Even where no other use is possible, however, compensation will not be due if the prohibition is based on established principles of the law of property and nuisance.

PRINCIPLE No. 2: Reasonable Return or Use

Property owners have a right to a reasonable return or use of their land, but the U.S. Constitution does not guarantee that the most profitable use will be allowed.

Courts continue to insist on a high threshold for takings claims. All or virtually all reasonable use or return must be denied the property owner before a court will find a taking. A significant reduction in value does not necessarily give rise to a taking. A governmental action that restricts the value (or valuable uses) of land is not a taking, so long as it

advances a legitimate public interest, and so long as some reasonable use of the property remains.

Example: A dilapidated building in a large city is designated as a local historic landmark, due both to its architectural significance and its historic importance as the early residence of an internationally-known author. Current zoning of the area permits a wide variety of low- and high-density uses, and a number of properties adjacent to the landmark have been developed as high-rise office towers. However, the local landmark law prohibits demolition or major changes to the building except as approved by a local landmarks commission, under very strict criteria. The landmark is purchased by a developer, who seeks permission to demolish it in order to develop another office tower. At the hearing, the developer submits uncontroverted evidence that the current value of the property is about $100,000, but that it would be worth over $2 million if it could be developed to its "highest and best" use. The landmarks commission nonetheless denies the demolition application; the developer claims that the severe diminution of value amounts to a taking. Is he right?

Analysis: No. The U.S. Supreme Court has repeatedly held that the mere diminution of property values is insufficient to demonstrate a taking. This principle goes back to the early zoning cases that upheld the imposition of new zoning regulations that instantly decreased property values because of the loss of development potential. In this case, there are likely to be a number of other, lower-density uses to which the property can be put, and which would not necessitate the demolition of the existing structure.

The Supreme Court has ruled that local governments can require developers to pay for improvements, such as roads, that are needed for the new development.

— Photo by James Lindberg.

PRINCIPLE No. 3: Furthering the Public Interest

Courts have and are continuing to sustain a wide variety of purposes as valid reasons for enacting environmental and land-use regulations.

Natural resource protection, agricultural land preservation, historic preservation, scenic view ordinances, design controls, protection of environmentally sensitive areas such as wetlands and floodplains—all these are valid purposes for land-use regulation. Importantly, basing regulations upon a well-thought-out comprehensive plan helps to clarify the reasons for citizens and protect government actions against takings claims.

A variety of public interest laws, such as environmental controls and wetlands and natural habitat protections, have been upheld under Penn Central *principles.*

— Photo: National Trust for Historic Preservation

Example: A coastal state is concerned about the continuing loss of life and property that occurs whenever a major hurricane strikes. After an extensive period of study, the state enacts a comprehensive package of laws to restrict the type and place of development along the state's beaches and barrier islands. The law effectively zones development in coastal areas, requires stricter building codes in certain high-danger areas, and limits new construction within a set-back zone along the beach. A series of permit requirements are set in place, with appropriate variance measures comparable to those under zoning law. A property owner, who would like to build a vacation home within the set-back zone, claims that the Supreme Court struck down this type of law in the *Lucas* case. Will he win?

Analysis. It is unlikely. The Supreme Court did not strike down the coastal zone law at issue in *Lucas*. In fact, the Court recognized that the government has broad authority to regulate the use of land both to confer benefits on the public and to prevent harm. Coastal zone laws, like numerous other environmental and land-use laws, have been upheld as a valid basis for regulation.

The issue in *Lucas* was whether the law, even as a valid exercise of regulatory power, would require compensation if it denied a property owner all use of his property. (The Court said it would, unless the ban was justified by principles of nuisance and property law.) In the example above, the incorporation of a variance provision makes it less likely that a taking will arise in any given case. The law in *Lucas* did not include a variance provision until one was added after the property owner had initially been denied the right to build; he applied for permits under the amended law (and received them) only after the Supreme Court had issued its opinion.

PRINCIPLE 4: Consider the Parcel as a Whole

The focus of a takings inquiry continues to be on the entire property interest.

A severe adverse impact of a regulation on one portion of a property or ownership interest is not enough to constitute a taking, if the property as a whole continues to have a reasonable economic use.

Example: A county in a western state has had a water shortage for a number of years and needs additional sources to provide drinking water to its residents. A lake in one part of the county has never been tapped for drinking water because of high pollution levels, primarily from run-off from adjacent development. The county decides that, in order to ensure the availability of the lake as a source of drinking water, it will establish a 100-foot buffer zone around the lake shore, within which no new construction or ground-disturbing activity will be permitted. A lakeside property owner, who had hoped one day to develop his rustic campground into a commercial marina complex, claims that the government has effectively condemned a 100-foot swath of his property.

Analysis: Assuming that the county can demonstrate that the 100-foot buffer is necessary to achieve the legitimate public need for a pure water source, the real issue here is the residual use of the parcel affected by this regulation. Contrary to popular belief, takings law does not look primarily at the portion of the land that is restricted, but rather on the remaining use of the entire parcel. If the landowner

Points to Remember

As discussed in further detail in this publication, the courts have laid out a number of general principles that should be kept in mind by those wishing to understand the law of takings:

- No one has an absolute right to use his land in a way that may harm the public health or welfare, or that damages the quality of life of neighboring landowners, or of the community as a whole.

- Historical precedent and recent case law make clear that reasonable land-use and environmental regulations will have little trouble withstanding constitutional scrutiny in the vast majority of cases. Only in rare instances will such regulations be deemed so onerous as to effect a "taking" under the Fifth Amendment to the U.S. Constitution, which holds that private property shall not be taken for public use without just compensation.

- Courts have outlined several broad factors to be considered on a case-by-case basis in determining if a taking has occurred, including: the economic impact of the regulation on the property owner; the public purpose for which the regulation was adopted; and the character of the government action. Generally, a regulation will be upheld if it (1) furthers a valid public purpose; and (2) leaves a property owner with some viable economic use of the property.

- Property owners have a right to a reasonable return or use of their land, but the U.S. Constitution does not guarantee the most profitable use.

- Courts have upheld a wide variety of purposes as valid reasons for enacting environmental and land-use regulations—including pollution prevention, resource protection, historic preservation, design controls, and scenic view protection.

- Communities can legitimately insist that development pay its own way. Land dedications or mandatory exactions are valid, assuming that they are adopted to respond to the demands created by the project.

- Before a landowner or developer can bring a lawsuit to claim a taking, a development plan must be submitted for review and all administrative avenues of relief must be exhausted.

- The focus of the takings inquiry is the entire property interest. A severe adverse impact of a regulation on one portion of the property or ownership interest will not amount to a taking if the property as a whole continues to have a reasonable economic use.

- On the rare occasion that a taking is found to have occurred, the community does not have to buy the entire property. Damages are payable only for a temporary taking for the period in which the regulations were in effect. Generally, the measure of damages will take into account the difference in value of the property without the offending regulations in place and with them, an appropriate interest rate to be applied for the temporary loss of value, and the length of time the regulations were in effect.

- As part of legislation, lawmakers should include an administrative process that allows those who administer the law to consider the specific effect of the law on an individual landowner, and—consistent with the interest of the public being protected—afford an administrative relief process for undue economic hardship.

Temporary controls or delays on proposed development projects enacted for discrete periods of time and necessitated by environmental concerns are constitutionally valid

— Photo: National Trust for Historic Preservation

retains a reasonable use of the property—here the continuation of a valid existing use or the development of some other portion of the property—the lot as a whole can continue to be viably used, and there is no taking.

PRINCIPLE 5: No Speculative Plans

A developer must actually submit a development plan and pursue all administrative remedies after denial of that plan before filing a takings claim in court.

It is worth noting, however, that a variance or hardship procedure would protect the county against takings claims by providing a means to alleviate any hardship that might exist on a case-by-case basis due to unusual topography or other circumstances. It is also worth noting that, as explained below in Principle 9, the justification for a development ban in this case, if supported by background principles of nuisance law, may cause the restriction to be upheld even if all use of the parcel is prohibited.

A takings claim cannot be asserted over a speculative development concept. In addition, government officials must be given a chance to provide relief to an aggrieved property owner through the regular administrative process.

Example: A developer purchases a 20-acre tract on the outskirts of a metropolitan area in the Northwest with the intent of building a large residential development. The land is mountainous, and each house will have a large deck with mountain views as a selling point. During the period in which the developer is drawing up plans and beginning to arrange financing, a comprehensive state study is issued that concludes that steep slope development has a devastating effect on the environment, and substantially contributes to mudslides. The local government responds by amending the applicable zoning law to limit development in certain steep slope zones, including much of the developer's land. While some amount of construction would be permitted, the developer does not bother trying to devise a plan that would comply, since he contends that the effect on his total investment in the property is so severe that it amounts to a taking.

Analysis: Until the developer actually files a development plan that is considered and rejected by the local municipality, any claim that his property has been taken is not ready for judicial review. A basic rule in takings law is that the controversy must be "ripe" or ready to be reviewed. To understand the rule, think about the court's dilemma: How can it determine exactly what use can be made of the property, and hence determine the effect of the regulation, if a development plan has not been submitted and acted upon? To permit judicial review at this point would preclude the local government from considering the actual application of the law to the property—including any available variance, special exception, or administrative appeals process. Courts are highly reluctant to dream up alternate development plans and then second guess whether a local body would approve them.

PRINCIPLE 6: Ordinary Delays Not Considered
Normal delays in the review of applications for environmental and zoning permits, or in adopting changes to the law, do not create temporary takings.

Also, temporary moratoria that limit development while a community formulates laws and policies to protect the public interest will be upheld in most instances.

Example: A rural county in the South is encountering major development pressures, largely due to the completion of a new highway through the area. New requests for development approvals are overwhelming the planning staff. The community, however, is growing more and more concerned about the effects of sprawling development. In addition, state and federal officials have identified potential wetland sites, and a preservation group claims that important Civil War trenches exist in the vicinity.

The county commissioners agree that new controls are necessary, but estimate that it would take six months for an environmental consultant to complete a review of the county's needs, and another six months to write and adopt new laws. Accordingly, the commissioners enact a one-year interim moratorium during which the county will not consider any new development plan. This is not good news for one local developer, who was in the process of completing plans to obtain the necessary county permits for a large commercial project. He files a lawsuit claiming damages for the one-year period during which he will not be permitted to develop his property. Will he prevail?

Analysis: No. There is a common misconception that the *First English* case ruled that damages are due whenever total use is prohibited during any temporary period in which development is restricted. This misconception was dispelled by the U.S. Supreme Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002). Not only did the Court clarify that temporary restrictions on development are not automatic takings, it underscored the validity of moratoria and normal delays in obtaining building permits and variances as permissible exercises of the police power. While a taking could be established in extreme situations, courts are cognizant of the need for governments to maintain the status quo pending study and resolution of important land-use issues. Temporary controls or delays enacted for discrete periods of time and necessitated by sound planning or environmental concerns are constitutionally valid.

PRINCIPLE 7: Having Development Pay Its Way
Local communities can insist that developments pay their own way.

Mandatory dedications or exactions are permissible, so long as they respond to the specific burdens imposed by a development.

Example: A county on the outskirts of a major mid-Atlantic city has recently been approached by a sports and entertainment promoter with a proposal: the creation of a large new stadium in the county, which would bring millions of tourist dollars annually, and thousands of jobs. The county's infrastructure, however, cannot currently support the project; in particular, the main highway through the county is already over capacity, and the water treatment plant can barely meet existing demands. In addition, neighbors have objected to the visual and noise impacts of the proposed development.

The county decides that it cannot permit the development without major public improvements, including a highway extension and interchange to join the stadium to the main highway, and lane additions to the existing highway to meet increased traffic flow. The county will also need to upgrade its water treatment plant to meet the demands of the thousands of tourists who will come to the facility. Can it require the developer to pay for these improvements as a condition of development? The developer contends that these are public functions, and it would be a taking to make the corporation pay.

Analysis: Assuming that the county can demonstrate that these improvements are necessary to meet public needs caused by the stadium—for example through traffic and environmental studies—than requiring the developer to pay for all or portions of them as a condition of building the stadium will not amount to a taking. The county may also require the developer to set aside open space to leave a wooded buffer between the stadium and adjacent residential areas. Where the condition or exaction becomes more speculative or where public access is required, however, a court can be expected to scrutinize the justification more closely. For example, the county may find it harder to justify a requirement that the open space buffer be accessible to the general public for recreational use.

PRINCIPLE 8: How Much Is Due?
If a government entity does overregulate, it will not have to buy the entire property.

In the extremely rare case that a regulation amounts to a taking, the government may be liable for damages—but only for the actual time the regulations were in effect. If the regulation is invalidated, withdrawn, or amended to permit use of the property, only temporary damages will be due.

Example: A builder has obtained a permit for a commercial development and has started construction, only to have the local government, in a large-scale rezoning, restrict the use of his property to agricultural uses only. The builder requests a variance, but the request is rejected. Evidence proves that the rezoning has effectively decreased the value of the property from $500,000 to $25,000. Assume also that, in this particular case, a reviewing court decides that the destruction of the owner's investment-back expectations, based on his reliance on the existing permit and his reasonable assumptions about the property's worth, is enough to cross the threshold and create a taking.

Analysis: The court, in finding a taking, will not force the local government to buy the land, and thus will not require the government to compensate the landowner for the entire decrease in value. Instead, the taking is likely to be rendered temporary, either by the court's action in invalidating the rezoning, or by the local government's own action in restoring the original zoning in response to the court's decision. In either case, the compensation due is for the owner's temporary loss, between the time his original permit was finally denied and the time that his use of the property was restored.

Under the principles set out in *Nemmers v. City of Dubuque* (1985), this temporary taking is measured in the following way: the temporary decrease in value ($475,000) is multiplied by an appropriate annual rate of return on lost value as set by the court (assume in this case that the rate is 10 percent). If there was a one-year period between the time that the development permit was finally denied and the date when the court invalidated the rezoning and found a taking, the local government owes compensation to the owner in the amount of $47,500 (10 percent times $475,000).

PRINCIPLE 9: Protection from Serious Harm
If a proposed use amounts to a public nuisance, then it may be forbidden without compensation—despite a complete elimination of use or value.

As is the case with lesser restrictions, tough laws designed to prevent serious harm to the environment or public health will generally be upheld, except in "relatively rare" circumstances when they deny an owner all economic use of his property. Even then, however, a total ban may be justified if the harmful use may be prohibited under background principles of nuisance and property law.

Example: A church owns a tract of land alongside a river in the Midwest, which it uses for a campground for underprivileged children. The land, however, is located entirely in a floodplain, and the adjacent river in this area is susceptible to flash floods. One year, a flood wipes out the campground, killing a child and destroying several camp buildings. The following year, the county in which the campground is located adopts a new land-use law that designates certain areas as "flood danger zones," and prohibits all permanent construction in those areas. Most of the church's land is within one such danger zone, and the church is effectively prohibited from rebuilding its campground. The church claims that the county's actions amount to a taking of all economic use of its property, and seeks compensation.

Analysis: The church will lose. Laws that are reasonably designed to address valid public health and safety concerns or serious environmental conditions will be upheld against takings claims in almost every instance. In this case, a reviewing court is likely to find that the church retains some viable use of the property, even if no permanent structure is permitted—for example, for tent encampments, or even for agricultural uses. However, even if a court were to agree that the flood control law denies the church *all* economic use of the land, public safety is likely to be considered a valid basis under underlying principles of the law of property to justify an outright ban. Other public concerns (for example, flooding of neighboring property) may also justify a ban on development under nuisance law principles, even if no public safety issue exists.

A Practical Guide for Responding to the Takings Issue

There are a number of different ways in which communities concerned about fairness and balance for all citizens in addressing the takings issue can protect themselves against potential takings claims. These include the following:

1. Establish a sound basis for land-use, preservation, and environmental regulations through comprehensive planning and background studies. A thoughtful comprehensive plan or program that sets forth overall community goals and objectives and which establishes a rational basis for land-use regulations helps lay the foundation for a strong defense against any takings claim. Likewise, background studies of a community's historic resources, and how new development and pollution would affect these resources, can build a strong foundation for historic preservation or environmental protection measures.

2. Ensure that zoning, subdivision, and historic preservation laws are in sync with one another as well as the comprehensive plan. Potential lawsuits can be avoided by eliminating the possibility that property could be developed in a way that is inconsistent with other land-use programs. For example, a property owner may be far less likely to assert a takings claim if the land within a designated historic district is zoned in a manner consistent with that of existing historic buildings.

3. Institute an administrative process that gives decision-makers adequate information to apply the takings balancing test by requiring property owners to produce evidence of undue economic impact on the subject property prior to filing a legal action. Much of the guesswork and risk for both the public official and the private landowner can be eliminated from the takings arena, by establishing administrative procedures for handling takings claims and other landowner concerns before they go to court. These administrative procedures should require property owners to support claims by producing relevant information, including an explanation of the property owner's interest in the property, price paid or option price, terms of purchase or sale, all appraisals of the property, assessed value, tax on the property, offers to purchase or rent, income and expense statements for income-producing property, and the like. Historic preservation ordinances, for example, frequently include "economic hardship" provisions that allow takings claims to be addressed administratively.

4. Establish an economic hardship variance and similar administrative relief provisions that allow the possibility of some legitimate economically beneficial use of the property in situations where regulations may have an extreme result. These procedures help to avoid conflicts in the first place by allowing for early consideration of alternatives that may be satisfactory to all concerned. However, relief should be granted only upon a positive showing by the owner or applicant that there is no reasonable economic use of the property, as witnessed by producing the types of evidence outlined in No. 3 above. Remember that the landowner has the burden of proof on hardship and takings issues.

5. Take steps to prevent the subdivision of land in a way that may create economically unusable, substandard, or unbuildable parcels. Subdivision controls and zoning ordinances should be carefully reviewed, and should be revised if they permit division of land into small parcels or districts that make development very difficult or impossible—for example by severing sensitive environmental areas or partial property rights (such as mineral rights) from an otherwise usable parcel. Such self-created hardships should not be allowed to develop into a takings claim.

6. Make development pay its fair share, but establish a rational, equitable basis for calculating the type of any exaction, or the amount of any impact fee. The U.S. Supreme Court has expressly approved the use of development conditions and exactions, so long as they are tied to specific needs created by a proposed development. The use of nationally accepted standards or studies of actual local government costs attributable to a project, supplemented by a determination of the actual impact of a project in certain circumstances, may help to estab-lish the need for and appropriateness of such exactions.

7. Avoid any government incentives, subsidies, or insurance programs that encourage development in sensitive areas such as steep slopes, floodplains, and other high-hazard areas. Noth-ing in the Fifth Amendment requires a government entity to promote the maximum development of a site at the expense of the public purse or to the detriment of the public interest. Taxpayers need not subsidize unwise development.

8. Provide relief from regulatory action through the use of tax incentives and other programs. In some situations, regulatory approaches alone cannot achieve necessary objectives without severe economic impact in individual situations. While not a legal requirement, administrative relief programs can help take the sting out of tough, but necessary, preservation or land-use controls. Transferable development right programs and property tax programs, for example, are commonly used measures that provide relief in individual cases yet allow communities to benefit by having good land-use programs overall.

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Further information on the takings issue can be obtained directly from these organizations.

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