



TAKINGS OVERVIEW

INTRODUCTION



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BACKGROUND PRINCIPLES

FEDERAL CONSTITUTION'S FIFTH AMENDMENT

“Takings Clause” or
“Just Compensation
Clause”

- Gov’t cannot take “private property...for public use, without just compensation.”
 - Gov’t’s power to take property (or lesser interests in property) = “eminent domain”
 - Exercise of eminent domain also called “condemnation”
 - “Just compensation” has been interpreted to mean FMV for property taken
- **Fundamental principle: Avoid unfairly burdening some individuals with expense of accomplishing public purposes**

ALASKA CONSTITUTION'S ARTICLE 1, SECTION 18

- “Private property shall not be taken or damaged for public use without just compensation.”

BACKGROUND PRINCIPLES

(CONT'D)

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- A taking can only occur where a private property interest exists.
 - People own property subject to government's reserved power to reasonably regulate
 - Nonetheless, a regulation of property still can go too far and become an indirect taking
 - Excessive government regulation of property can amount to compensable taking (i.e. “**Regulatory taking**” / “inverse condemnation”)

TAKINGS

DOES A REGULATION AMOUNT TO AN
ACT OF EMINENT DOMAIN REQUIRING
COMPENSATION?

Significant “Takings” Cases

- ***Pennsylvania v. Mahon (1922)***: Excessive gov’t regulation could amount to a compensable taking.
- ***Penn Central Transportation v. New York City (1978)***: Delineated factors determining when gov’t regulation evolve into a taking: (1) the regulations economic impact on the property, (2) the extent to which the regulation has interfered with distinct investment-backed expectations and (3) the character of the government’s action. (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” ... “where State “reasonably conclude[s] that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land,” compensation need not accompany prohibition.”)
- ***Nollan v. California Coastal Commission (1987)***: an excessive exaction amounts to taking if there is no nexus between the condition and the purpose of the restriction/exaction. (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest[,]’ [but] [t]hey have made clear ... that a broad range of governmental purposes and regulations satisfy these requirements”)
- ***Lucas v. South Carolina Coastal Council (1992)***: Total deprivation of productive or economically beneficial use of land requires compensation. (“regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm”)
- ***Dolan v. City of Tigard (1994)***: excessive exaction (green space dedication and pedestrian plan required for permit approval) gov’t may not condition a permit on certain requirements unless those requirements have a “rough proportionality” to the proposed development’s impacts.

Types of “Takings”

- A Plaintiff seeking to challenge a government regulation as an uncompensated taking of private property must allege one of the following:
 - 1) A “Physical” taking
 - 2) A “*Lucas*-type” total regulatory taking
 - 3) A “*Penn Central* taking”
 - 4) A land-use exaction violating *Nollan* and *Dolan* “*per se* physical taking”

EXCESSIVE REGULATION = COMPENSATORY TAKING

- Regulation requires property owner to submit to **physical invasion of land/permanent physical occupation** of real/personal property
 - Right to exclude others is fundamental to private property ownership
- (Case is *Loretto*)
- Regulation deprives property owner of **all economically beneficial/productive** use of the land
- Even if it is, still may be justified by background principles of property law/nuisance law
- (Case is *Lucas*)

NOLLAN & DOLAN'S UNIQUE CIRCUMSTANCES: EXACTIONS

- “**Exaction**” = conditioning approval of development on dedication of property to public use, and they also can include conditioning development approval, e.g., permit subdivision plat, etc., upon developer making some financial commitment, such as requiring construction of public street, this is known as a “monetary exaction”.
- The term “**exaction**” encompasses both requirements that land be dedicated for street rights-of-way, parks, or utility easements and requirements that developers pay “impact” or “facility” fees reflecting their respective prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area.

Nollan

- Gov't conditioned development request on condition the owner give the gov't unrelated property interest
- U.S. Supreme Court:
 - Exaction is unconstitutional if it doesn't somehow mitigate public harms that would justify outright denial of permission
 - *Dolan* calls this the “nexus” requirement

Dolan

- Exaction required property owner to dedicate land to the public for a bike and pedestrian path in order to obtain permission to expand owner's store
- Explained *Nollan* as an application of “unconstitutional conditions doctrine”:
 - Gov't can't require property owner to surrender constitutional right in exchange for discretionary public benefit
- U.S. Supreme Court said an exaction must:
 1. Mitigate harms of the proposed development (the “nexus” requirement from *Nollan*);
and
 2. Condition must also be roughly proportional to public harms threatened by proposed development.

*OTHERWISE,
THERE'S NO
DEFINITE LINE.*

Difficulty is determining when a regulation is “excessive”, requiring compensation

- Requires complex consideration of various factors
- “Ad hoc” / case-by-case determination
- But, the **greater the negative economic impact of the regulation, the more likely courts will consider it a taking**

HOW WILL COURTS ANALYZE A REGULATION THAT'S NOT SO CLEARLY DEFINED?

- *Penn Central's* balancing test:
 - **The character of the governmental action involved in the regulation;**
 - Remember, if the government's action is a physical action, rather than a "regulatory invasion", then the action is almost certainly a taking.
 - **The extent to which the regulation has interfered with the owner's reasonable investment-backed expectations for the parcel as a whole; and**
 - **The regulation's economic impact on the affected property owner.**

A FINAL CONSIDERATION: THE “NOXIOUS USE” TEST

- If a regulation adopted under the police power to protect the public health, safety or welfare, courts have said it is not a taking, even if the taking reduces the value of the property.



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CONCLUSION/QUESTIONS