



Michigan Association of Planning
A Chapter of the American Planning Association

Policy Guide on the Takings, Substantive Due Process, and Regulatory Takings Doctrines

Introduction

The *Preamble* to the United States Constitution reads:

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

From this beginning, the founders of our country established a form of government unique in the history of the world—the constitutional democracy. The constitution they crafted does two things: it constitutes the national government for the purpose of safeguarding a larger public welfare, and it constrains that government’s ability to limit the freedoms of its citizens. Each of the several states of the United States of America, including the State of Michigan, has adopted a state constitution that does the same two things. A fundamental difference between the national and state governments, however, is that the national (or “federal”) government is one of “enumerated” powers, authorized to exercise *only* those powers given to it by the U.S. Constitution, while the state governments are “plenary” powers, broadly authorized to act in order to promote the public welfare *except* when superseded by national law or constrained by their own state constitutions. Thus, in addition to establishing a constitutional democracy, the U.S. Constitution along with separate state constitutions also established a “federalist” form of government.

The founders did not design this unique experiment in self-governance from scratch. Rather, they built upon a well-established body of Anglo-Saxon law imported from Great Britain. Two of the well-settled powers of government that they incorporated into the new U.S. system were the power of eminent domain and the police power. The power of eminent domain is not expressly provided for in the U.S. Constitution, but the national government’s ability to exercise the power is expressly constrained by the Bill of Rights (this constraint is discussed in more detail below). Because of that constraint, the U.S. Supreme Court has held that national government’s power of eminent domain is necessarily implied by the Constitution. It is thus available to both the national and state governments. It describes the power of government to appropriate private property for public use. The police power, in contrast, is neither expressly nor impliedly provided for in the U.S. Constitution. It is available to the states, therefore, but not the national government. The police

power describes the power of state and local governments to regulate private behaviors, including the use of private property, for the purpose of promoting or safeguarding public health, safety, morals, and general welfare.

The availability of these two powers is vitally important for the healthy functioning of a system of self governance. Even so, those powers can be abused and should not be absolute. A defining attribute of the U.S. system is that the federal and state constitutions do not only provide for these powers, but they also place important constraints on their use. The U.S. Constitution checks the federal government's ability to exercise the power of eminent domain and its other enumerated powers through the Fifth Amendment, one of the amendments that comprise the Bill of Rights. This amendment reads, in part:

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

The first of these two clauses is referred to as the "due process" clause, while the second is referred to as the "takings" clause. The U.S. Supreme Court has held that the Fifth Amendment's takings clause also limits a state's ability to exercise the power of eminent domain by virtue of the "incorporation doctrine." In contrast, a state's ability to exercise the police power is constrained directly by the Fourteenth Amendment, one of the Civil Rights Amendments, which applies specifically to the states. It provides, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

State constitutions contain similar limitations. The Constitution of the State of Michigan incorporates a due process clause in Article I, Section 17, which is identical to the federal due process clause. Michigan's constitution also provides a takings clause in Article X, Section 2, which reads:

Private property shall not be taken for public use without just compensation therefore being first made in a manner prescribed by law.

Having recognized the power the eminent domain and the police power, and having constrained the use of those powers through the takings and due process clauses, the trick becomes to decipher what exactly the reach and limits of those two powers are, or stated another way, what the takings and due process clauses actually mean. The U.S. Supreme Court's adjudication of claims made under these two clauses over the years has established sets of rules that are known as the "takings doctrine" and the "due process doctrine." In addition, through its own adjudication almost a century ago, the Court established the so-called "regulatory takings doctrine." This doctrine does not apply to a direct appropriation of private property (i.e., through an act of eminent domain), but rather to a regulation enacted under the police power that nonetheless has the *effect* of appropriating private property for public use, for all intents and purposes.

Given this introduction, the purpose of this document is to provide brief background discussions of the takings, due process, and regulatory takings doctrines separately, and then to articulate policy

statements with regard to each of these doctrines. Before doing so, however, it would be helpful to briefly note two aspects of constitutional adjudication that are vitally important for understanding the application of these three doctrines.

The first of these is the separation of powers doctrine, which is embodied in the U.S. Constitution and the state constitutions through the establishment of co-equal branches of government: the legislative, the executive, and the judiciary. Early in the history of this country, the U.S. Supreme Court held that it has the final say when it comes to interpreting the U.S. Constitution, and this authority has never since been seriously contested. Even so, since the 1930s the Court has continually expressed great reluctance to set aside laws enacted by the federal or a state legislature, which can essentially amount to replacing its own judgment for the legislature's on what amounts to a good or poor public policy.

Because of this reluctance, the Court has developed different "tests" or levels of scrutiny that it applies when adjudicating constitutional claims. In general, it scrutinizes a governmental action more closely (i.e., giving less deference to legislative judgments) when the claim speaks to a fundamental right guaranteed by the constitution (e.g., a regulation that allegedly suppresses political speech or that was motivated by racial discrimination). Conversely, it scrutinizes a governmental action less closely (i.e., giving greater deference to legislative judgments) when a fundamental constitutional right is not implicated. For the most part, governmental regulations of economic activities that implicate the takings, due process, and regulatory takings clauses are treated deferentially by the courts, as will be discussed in more detail where appropriate below.

The second attribute of constitutional adjudication worth noting here stems from the so-called supremacy doctrine. This doctrine establishes the U.S. Constitution—along with the national laws properly enacted under it—as the supreme law of the land. The doctrine requires that a given state government (as well as its local governments) comply with the constitutional protections afforded both by the U.S. Constitution and by its own state constitution. In practice, this means that a state can never pass laws that abrogate federal constitutional rights. Moreover, a state supreme court can never interpret either its own laws or its own state constitution in a way that affords *less* protection to an individual than is provided by the U.S. Constitution (meaning, for example, that a state supreme court can never uphold a state law that violates the U.S. Constitution's takings clause). Sometimes, however, a state can provide state constitutional protections that are *more* stringent than those provided by the U.S. Constitution (finding, for example, that while a state or local regulation may not violate the U.S. Constitution's takings clause, it does violate the state constitution's takings clause). For the most part, the state supreme courts generally follow the lead of the U.S. Supreme Court in adjudicating constitutional protections, including those afforded by their own state constitutions. This is generally true for the Supreme Court of the State of Michigan, with one important exception, as is discussed in more detail with regard to the takings clause below.

Background

The Takings Doctrine

The power of eminent domain is the power of a governmental agency—national, state, or local—to take title to private property through the legal action of condemnation.¹ While it can do so even against the will of the property owner, however, this power is not absolute. The takings clause of the Fifth Amendment to the U.S. Constitution provides that government may not exercise the power of eminent domain unjustly. Under the U.S. Supreme Court’s takings doctrine, this clause is read to contain two basic elements: (1) property may be taken *only* for a public use; and (2) when it is taken, the government must provide just compensation. Of these two elements, the second has proven to be less problematic. While property owners may not always be happy, the Court has held that “just compensation” amounts essentially to the fair market value of the property at the time that the condemnation action is taken.

The first element of the takings clause, in contrast, has proven to be more problematic and controversial. The problem comes from deciding what amounts to a “public use,” which is for the most part a public policy decision. As such, the Court’s efforts to define “public use” for constitutional purposes necessarily raises the difficult question of whether and how far it should go in setting aside a legislature’s decision on what amounts to a public use. This question was at the core of a recent decision handed down by the U.S. Supreme Court in *Kelo v. City of New London*, 545 U.S. ___ (2005).

Traditionally, the courts have interpreted “public use” to encompass a taking of private property when that property will in fact be taken by a public agency for use by the public, “such as for a road, a hospital, or a military base” (*Kelo v. City of New London*, 545 U.S. at ___, O’Connor, dissenting). Similarly, the courts have recognized the transfer of property from one private party to another private party, often a “common carrier,” as a valid public use *if* the party taking the property will make it available for public use, “such as with a railroad, a public utility, or a stadium” (*id.*). Beyond those two situations, the courts haven even interpreted “public use” to encompass the transfer of property from one private party to another private party in “certain circumstances and to meet certain exigencies” (*id.*), the paradigmatic examples of “certain exigencies” being the need to address blight (*Berman v. Parker*, 348 U.S. 26 (1954)) and the need break apart harmful oligopolistic land ownership patterns (*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)).

A clearly established *limit* on the reach of “public use,” in contrast, is that government “may not take the property of A for the sole purpose of transferring it to B, even though A is paid just compensation” (*Kelo v. City of New London*, 545 U.S. at ___.) The hard cases arise when government uses the power of eminent domain to involuntarily transfer property from one private party to another in a way that yields some amount of private benefit to the taking party (as is typically the

¹ States have the power of eminent domain by virtue of their status as “plenary” powers or sovereigns, although the ability of any given state to exercise that power may be constrained by state constitutional or statutory provision. The courts have generally ruled that local governments, as so-called “creatures of the state,” have the ability to exercise the power of eminent domain only when that power is expressly delegated to them by the state through constitutional or statutory provision.

case) *and* where the public's actual use of the property or the existence of extenuating circumstances are not so clear. Because the transfer of property from one private party to another has long been permissible as long as there is a valid "public use" behind the taking, even if it has the secondary or unintended effect of enriching the party taking the property, the takings doctrine has generally been read to be very deferential toward legislative determinations about what amounts to a "public use." Even so, how deferential the court should be was essentially the key question addressed by the *Kelo* case, and the Court split on how that question should be answered.

Specifically, the issue in *Kelo* was whether the condemnation and transfer of property from one private party to another, as part of a comprehensive planning effort to promote economic development and revitalization *by itself* (i.e., without a demonstration of blight or other such exigencies, and where at least part of the property would not be open to public use), constituted a valid "public use" for the purposes of the takings clause. In a five-member majority opinion written by Justice Stevens, the Court concluded that it was. Pointing primarily to a longstanding policy of deference to legislative judgments and the difficulties of effecting a literal interpretation of the term "public use," the Court held that the takings doctrine encompasses a "broader and more natural interpretation of public use as 'public purpose'" (*Kelo v. City of New London*, 545 U.S. at ____).

In reaching this conclusion, the Court took pains to note that the City of New London was not condemning the property in question simply to confer a benefit on a private party, but was doing so pursuant to a well-developed, comprehensive plan for the economic revitalization of the entire planning area. In other words, a mere declaration on the part of government that a condemnation is required to yield some economic benefit, absent such a thorough and comprehensive planning justification, would not likely pass judicial muster.² It also rejected the use of a "bright-line" rule that would have declared any taking for the purpose of promoting economic development to be outside the reach of "public use," as well as a requirement that government be able to demonstrate with "reasonable certainty" that the expected public benefits of the taking would in fact accrue (both of these positions were called for by opponents of New London's condemnation action).

Altogether, the "takings doctrine" as it currently stands at the federal level allows public agencies to "take" private property through condemnation proceedings so long as it pays just compensation and the taking is made to advance some public use. The Court has declared that it will defer to legislative judgments and read "public use" broadly as "public purpose." That is, a taking will be deemed by the courts as an acceptable public use when the property in question will actually be made available for public use (i.e., either by the public agency or a private entity like a common carrier). It will also defer to the legislature when the condemnation is undertaken as a means to address "exigencies" like blight, or even for the sake of promoting economic development and revitalization, *so long as* the latter can be justified pursuant to a well-developed, comprehensive economic development and revitalization plan. Takings undertaken for the sake of promoting

² Justice Kennedy joined the majority opinion, but also wrote a concurring opinion to stress this point, asserting that judicial deference to a legislature should not be stretched too far and that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Kelo v. City of New London*, 545 U.S. ____, ____ (2005) (Kennedy, concurring).

economic development without such extensive justification will not likely receive such deferential treatment.

It is important to note that this summarizes the state of the *federal* takings doctrine, not the State of Michigan's takings doctrine. In the early 1980s, the Michigan Supreme Court handed down a decision that established a takings doctrine paralleling in many ways the *Kelo* decision just reached by the U.S. Supreme Court. *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 NW2d 455 (1981). The *Poletown* decision upheld the condemnation of private properties in the Poletown neighborhood of metropolitan Detroit by an economic development corporation so that the property could be transferred to the General Motors Corporation for the construction of a new manufacturing facility. The Michigan Supreme Court reasoned in *Poletown* that the "public use" constraint on the exercise of eminent domain was broad enough to encompass the kinds of economic benefits anticipated from the proposed development project.

The Michigan Supreme Court recently reversed itself, however, in the case of *Wayne County v. Hathcock*, ___ Mich. ___ (2004). In *Hathcock*, the Wayne County Commission attempted to condemn private properties located near to the Wayne County Metropolitan Airport so that those properties could be incorporated into an integrated redevelopment project that would create a business and technology park and conference center to be located adjacent to the airport. Relying heavily on the *Poletown* decision, the County Commission reasoned that the economic development benefits to be gained through this project constituted a valid "public use" for the purpose of exercising its eminent domain powers. The property owners contested the County's action.

In deciding *Hathcock*, the Michigan Supreme Court revisited the takings doctrine as provided for under the state constitution and identified three distinct situations encompassed by the "public use" requirement, including:

- Situations involving a "public necessity of the extreme sort otherwise impracticable" (*Wayne County v. Hathcock*, ___ Mich. at ___ (2004), citing *Poletown, supra* at 616 (Ryan, dissenting)). This addresses the taking of private property for the development of things like highways, railroads, canals, and other such "instrumentalities of commerce."
- Situations where the private entity "remains accountable to the public in its use of the property" (*Wayne County v. Hathcock*, ___ Mich. at ___ (2004), citing *Poletown, supra* at 677 (Ryan, dissenting)). This addresses the taking of private property, for example, to facilitate development of a petroleum pipeline that would remain subject to oversight by the Michigan Public Service Commission.
- Situations where the "selection of land to be condemned is itself the subject of public concern" (*Wayne County v. Hathcock*, ___ Mich. at ___ (2004), citing *Poletown, supra* at 680 (Ryan, dissenting)). This addresses the taking of property, for example, in order to eradicate blight.

Having identified these valid meanings of the “public use” requirement, the Michigan Supreme Court specifically rejected the argument that a “generalizable economic benefit” was among them. In other words, the court declared that the taking and transfer of property from one private party to another for the purpose of promoting economic development, even pursuant to a comprehensive planning effort, does not qualify as a “public use” under the state’s constitutional takings doctrine, and thus does not provide a sufficient justification for exercising the power of eminent domain. Concluding that the reasoning used in *Poletown* was an unwarranted departure from the state’s traditional constitutional doctrine, the court then specifically overruled the *Poletown* decision.³

In sum, the takings doctrine has undergone some refinement at the federal and especially the state level with several recent and important constitutional decisions. As it stands, the federal takings doctrine is somewhat broader, encompassing within the “public use” requirement things like broad economic development benefits when those benefits are pursued through a well-developed planning effort. In the State of Michigan, however, the state constitutional takings doctrine is more stringent, allowing the condemnation of private property only for “public uses” that are more narrowly confined and expressly do not include economic development benefits alone. This is a case where the state constitutional doctrine provides more constitutional protection of private property rights than does the federal, and as such takes precedent in the State of Michigan when it comes to adjudicating state or local efforts to exercise the power of eminent domain.

The Substantive Due Process Doctrine

As plenary authorities, state governments have the police power, which enables them to regulate land use for the purposes of promoting public health, safety, morals, and general welfare. Local governments have this power as well to the extent it is delegated to them by the state through constitutional or statutory provisions. This power to regulate the use of land, however, is qualified by the doctrine of “substantive due process.” Despite its unwieldy title, this doctrine is nothing more than a simple means-ends test derived from the due process clause of the U.S. Constitution’s Fourteenth Amendment.⁴ Under this test, courts require that governmental regulation bear a “reasonable relationship” to a “legitimate” state purpose. In effect, courts enforcing this doctrine ask two questions: first, whether the costs of the regulation are proportional to the ends to be achieved and, second, whether the end itself is one that the government is entitled to pursue. Since 1926, the Court has held that zoning regulations as a general matter meet this test. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In theory, however, the application of zoning ordinances to

³ It is interesting to note that the dissenting opinion in *Kelo*, written by Justice O’Connor and joined by the other three dissenting justices, would *not* have interpreted the “public use” requirement for the federal takings doctrine to encompass generalizable economic benefits, employing reasoning that roughly paralleled that used by the majority in the *Hathcock* decision in ruling on the state’s takings doctrine.

⁴ The due process clause of the Fourteenth Amendment is also the source of the “due process” doctrine—or more precisely the “procedural due process” doctrine—which essentially establishes a set of procedural rules that government must follow when undertaking some action (e.g., public notice and hearing procedures). While courts, litigants, and commenters are not always careful in drawing this distinction, the thrust of most of the due process claims of interest for purposes here are substantive in nature, as described in the text. For the sake of clarity, this policy statement focuses on those types of claims and uses the term “substantive due process” doctrine accordingly.

a particular parcel of land might be so irrational as to lack any reasonable relationship to a legitimate purpose.

It is easy to see that the doctrine of substantive due process is little more than an open-ended judicial inquiry into whether the benefits that a regulation yields justify the burdens that it imposes. As noted above, the U.S. Supreme Court has held since the 1930s that courts should defer to democratically accountable policymakers when applying such a test, as courts have no institutional advantage over politicians in deciding whether some regulation makes for wise policy. As a result, the federal courts overwhelmingly defer to state and local governments in assessing whether some regulation bears a reasonable relationship to a legitimate state end. Indeed, federal courts almost never strike down land use regulations as a deprivation of the “substantive” aspect of due process. In our federal system, however, state courts can enforce not only the U.S. Constitution but also their own state constitution’s due process clause as a limit on the power of government to regulate land. In contrast to the federal courts, they have tended to be more aggressive in assessing whether land use laws serve a legitimate state interest.

In the ordinary situation, both state and federal courts accord substantial deference to local land-use regulation. For instance, there is no doubt that government can use its regulatory powers to preserve neighborhood quality by, for example, prohibiting the operation of junkyards and auto repair shops in residential neighborhoods. However, some state courts have placed special limits on the regulatory power of local government using state constitutional doctrine, especially where there is a great risk of parochial or self-serving regulation that is burdensome to the greater region. For instance, in the famous *Mount Laurel* decision, New Jersey’s supreme court held that New Jersey’s state constitution required local governments to insure that their zoning ordinances provide for sufficient affordable housing to meet a “a fair share” of the “regional need” for such housing. *Southern Burlington County NAACP v Township of Mt Laurel* 336 A.2d 713 (N.J. 1975)). According to the *Mount Laurel* court, local governments too frequently promoted their own tax base and social prejudices by excluding low- and moderate-income households from the community through zoning ordinances. Such a parochial interest was not a “legitimate state interest” within the meaning of the state’s constitution, according to the court, because each local government had an obligation to consider the regional interest when regulating the use of land.

For the most part, the state courts in Michigan have not deviated significantly from the federal courts in interpreting the state’s substantive due process doctrine. Michigan, for example, has not followed New Jersey’s lead and imposed a “fair share” housing requirement through constitutional doctrine. While the state’s zoning enabling statutes do prohibit localities from completely zoning out less desirable land uses, this is a statutory provision, not a constitutional mandate. In the end, both the federal and state substantive due process doctrines require that state and local governments in Michigan exercising the police power through planning and land use regulation do so in a way that reasonably advances a legitimate public interest. As long as they can make out a good argument that they are doing so, the courts should treat their actions deferentially.

The Regulatory Takings Doctrine

In the context of the times at the founding of our country, the language of the Fifth Amendment's takings clause was clearly directed toward the actual seizure of private property for public use. In other words, it was intended from the beginning to serve as a constraint on the exercise of the power of eminent domain. Modern methods of eminent domain embody the principles set forth in the Fifth Amendment, allowing governmental bodies to claim private property when necessary for a "public use," but requiring that those entities pay "just compensation" when they do so, as discussed in more detail above.

In 1922, the U.S. Supreme Court extended that principle beyond the physical seizure of property, holding in a landmark decision by Justice Oliver Wendell Holmes that "[t]he general rule at least is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a 'taking.'" *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). This extension of the takings doctrine to incorporate the notion of a "regulatory taking" in effect serves as an additional constraint on the exercise of the police power (i.e., beyond the substantive due process doctrine). Specifically, it applies in situations where a government has effectively seized private property for all practical purposes (intentionally or not), but has done so through some type of regulatory action without taking title to the property or compensating the owner. Because such a regulation arguably takes private property without actually taking title, the action is often referred to in litigation as an "inverse condemnation."

Whether or not this expansion was provident at the time, the "regulatory taking" has since become a well-entrenched principle of the Supreme Court's larger takings doctrine. Even so, from its very inception, Court has struggled with the question of determining when a regulation "goes too far" and thereby constitutes a "takings" of private property. This may stem in part of the fact that the doctrine exists in a gray area between the use of the power of eminent domain and the police power. Perhaps as a result, the Court's attempts to provide guidance on answering the question of "how far is too far" over the years have often confused the reasoning and tests that it employs for addressing takings claims and due process claims, serving to muddle things more than to clarify. As may perhaps become evident below, the Court's "regulatory takings" doctrine is one of the murkier areas of constitutional doctrine.

There are two principles, however, that the Court frequently invokes as guidance to explain the doctrine. First, the Court has repeatedly noted that "[t]he Fifth Amendment's guarantee... was designed to bar the Government from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Second, the Court has held that whether a regulation effectively deprives the owner of property depends in part on the the "extent to which the regulation has interfered with distinct investment backed expectations" of that property owner. *Penn Central v. New York City*, 438 U.S. 104, 124 (1978). In short, the regulatory takings doctrine protects landowners from both majoritarian exploitation and unfair surprise.

Between 1922 and 1987, if a court determined that a regulation amounted to an unconstitutional taking, the normal remedy would be to enjoin the regulation, thus leaving the property owner free to do as he or she could have done before the new regulation was imposed. This remedy, however, did little to stop a government from re-enacting a new law very similar to the regulation enjoined by the court. By doing so, the government could force the landowner to re-litigate the issue of the law's constitutionality and, by protracting the costs of litigation, prevent landowners from obtaining effective relief from regulations deemed by the court to be unconstitutionally confiscatory.

Responding to this worry of bad-faith regulation by government, the U.S. Supreme Court held in 1987 (*First English Lutheran Church v County of Los Angeles*, 482 U.S. 304 (1987)) that, when the government's regulation of private property is deemed to be a 'takings,' it is not sufficient that the government simply rescind the regulation. Rather, government must also pay compensation for the period in which the confiscatory regulation was in place, compensating landowners for the temporary loss of the use of their property (commonly referred to as a "temporary taking"). *First English* thus clarified both that the appropriate remedy for a regulatory taking is compensation, not invalidation of the regulation, and that a government is liable for at least partial compensation even if it ultimately rescinds the offending regulation.

The "temporary takings" remedy helps ensure that landowners are not injured by the delay of litigation. However, the remedy places the burden of constitutional uncertainty on government, which could be obligated to pay large damages if its regulations turn out to effect a "taking" of property. To protect governments from this uncertainty, the Court held that the obligation to pay compensation did not run during the period of "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *First English*, 482 U.S. at 321. Thus, the government can place a moratorium on the development of a parcel while it studies how best to regulate the property without incurring an obligation to pay compensation during the period in which development is delayed by the need for good planning. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

Although mitigated somewhat by this ability to delay development of land to permit adequate land use planning, even the mandate that a government pay for a temporary taking is a sort of unfunded mandate. When a governmental agency enters into eminent domain proceedings, it typically does so in the context of a capital project budget (such as one for the construction of a road) and it has funds available to pay for the land taken. When it adopts a new regulation, however, a governmental agency is unlikely to set aside funds to buy the regulated property. Thus, a sudden court order requiring that it pay for land that it thought that it was simply regulating can be an unpleasant fiscal surprise for a governmental entity and its taxpayers.

Seeking at times to redress unfair actions of government and at other times perhaps to profit from an opportunity, landowners have brought many "takings" claims against entities of government. To date the Supreme Court has established four general rules that identify situations that amount to

regulatory takings. Each of these rules is associated with one or more landmark opinions, which are noted below.⁵

1. Cases in which a regulation has denied a landowner "all economically viable use" of his or her land, by, for instance, prohibiting the construction of any structure whatsoever on the land (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). This is a so-called "categorical rule." If a court finds that all economically viable use has been denied, then it must rule as a matter of law that the regulation amounts to a taking. In applying this particular rule, the Court has clarified that the "whole parcel" must be considered when determining whether all economically viable value has been denied, not just the portion of the land in question that is directly affected by the regulation itself.
2. Cases in which the regulation gives some non-owner the right to physically occupy the landowner's land, depriving that owner of exclusive physical possession (*Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982)). This is another categorical rule, and the Court has stressed that even a seemingly trivial physical occupation, as long as that occupation is not consented to by the landowner, qualifies as a taking.
3. Cases in which the government insists that the landowner accept some kind of an "exaction" or "dedication" requirement, effectively giving up some portion of economic value in the property or the right to exclusive physical possession (e.g., dedicating an easement), as a condition for relief from an otherwise constitutional form of regulation (e.g., obtaining a rezoning or a permit), *unless* there is a reasonable "nexus" or relationship between the condition demanded and the purpose served by the requirement (*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)) *and* the level of imposition created by that condition is "roughly proportional" to the harm to be avoided or the benefit to be gained by the requirement (*Dolan v. City of Tigard*, 512 U.S. 374 (1994)).
4. Cases in which the regulation deprives a landowner of his or her reasonable, investment-backed expectations, either by requiring the elimination of a use that pre-dated the regulation or by forbidding a use that, under all of the circumstances, a landowner would reasonably believe to be permitted (*Penn Central v. New York City*, 438 U.S. 104, 124 (1978)). This final category requires a court to engage in a case-specific balancing of interests to determine whether the regulation is somehow unjust or unfair in light of the economic harm done to the landowner, the landowner's *reasonable* investment backed expectations (i.e., not necessarily what that particular landowner expected, but what any reasonable landowner would expect given the situation), and the character or purpose of the governmental regulation itself. Often referred to as the *Penn Central* "ad hoc balancing test," it is the final analysis a court employs when considering a regulatory takings claim if none of the first three situations described above applies.

⁵ The Court recently clarified this doctrine in a unanimous opinion written by Justice O'Connor. *Lingle v. Chevron*, 544 U.S. ____ (2005).

Qualifying all of these doctrines is one significant exception. The Supreme Court has also said that if a regulation merely forbids a use of land that would otherwise be a nuisance, it should *not* be considered a taking. The Court's justification for this exception is that any use of land that constituted a nuisance could not form any part of anyone's property rights; instead, such a use would be a "takings" of the neighbors' property rights to quiet enjoyment of *their* land. Although that rule is some comfort for regulations that prevent serious air and water pollution that would clearly amount to nuisances if left unchecked, the police power has for seventy years extended beyond the mere prevention of nuisances. No reasonable court would hold that the definition of nuisance would include a high-rise apartment building or even a convenience store located in the middle of a neighborhood of single family homes. Under the police power, however, local governments carry out the wishes of homeowners by preventing such uses in single-family neighborhoods. Thus, this lone exception to the "takings" doctrine is logical and useful but not sufficient to protect the scope of normal activities carried out by many local governments to protect local citizens and property owners from unwanted intrusions into their neighborhoods.

Nonetheless, the courts tend to apply the "regulatory takings" doctrine in a way that is deferential to governmental decisions to regulate land, rarely finding that such regulations amount to a "takings," even when such regulations impose large costs on landowners. The courts have long been mindful of Justice Oliver Wendell Holmes' observation that "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." Even apart from nuisance law, land-use regulations – for instance, zoning codes – protect the value of property. Discouraging all such regulation would, therefore, erode property rights as much as advance them, by placing each landowner at the mercy of irresponsible neighbors.

Therefore, each of the four categories of takings doctrine described above has been construed by the Court to permit substantial uncompensated regulation. For instance, although the Court requires compensation when a regulation deprives a landowner of all economically viable use of their land, the Court has held that regulations of land are not "takings" of property even when they deprive a landowner of all use of some *portion* of the landowner's parcel, by, for instance, declaring that portion to be a wetland. In the end, state and local governments are well-advised to be careful and prudent when crafting regulations that constrain private property rights, but they are really only at risk *legally*—at least in terms of the regulatory takings doctrine—when they truly push their regulations "too far."