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Reexamination of the Line Between Governmental Exercise of the Police Power and Eminent Domain

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Ross D. Netherton. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

In the past, papers such as this were published in addenda to *Selected Studies in Highway Law* (*SSHL*). Volumes 1 and 2 of *SSHL* dealt primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covered government contracts. Volume 4 covered environmental and tort law, intergovernmental relations, and motor carrier law. Between addenda, legal research digests were issued to report completed research. The text of *SSHL* totals over 4,000 pages comprising 75 papers. Presently, there is a major rewrite and update of *SSHL* underway. Legal research digests will be incorporated in the rewrite where appropriate.

Copies of *SSHL* have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel of the highway agency. The intended distribution of the updated *SSHL* will be the same.

APPLICATION

The purpose of this study is to re-exanimate the issue of where to draw the line between the governmental exercise of police powers for which the government does not have to compensate the affected property owners, and eminent domain. Eminent domain involves restricting, denying, destroying, invading, or appropriating the use and value of private property and for which the property owner is entitled to compensation.

Case law in this area has evolved substantially over the past 20 years. Transportation officials should be aware of these changes. They should also know when their actions constitute a taking for which their agency may be required to compensate affected property owners.

Their report should be useful to attorneys, legislators, land use specialists, planners, policy officials, transportation administrators, and right of way and zoning officials.

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REEXAMINATION OF THE LINE BETWEEN GOVERNMENTAL EXERCISE OF THE POLICE POWER AND EMINENT DOMAIN

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I. PROBLEM STATEMENT

A persistent feature of the legal context of surface transportation programs is the "takings issue," or, stated otherwise, the question of where to draw the line between governmental exercise of police powers and eminent domain. It had been considered earlier in studies by the Highway Research Board during the years when land acquisition for the nation's major highway modernization program was at its height. And later it was addressed in several places in the Transportation Research Board's *Selected Studies in Highway Law*. The most recent study of takings issue developments in this series was published in 1980.[1]

Since that time substantial and significant new interests have emerged in connection with surface transportation systems and been reflected in the legal and administrative framework of those systems. The purpose of the present study is to review these developments, to reexamine the court decisions and legislation connected with them, and to indicate the point at which government must compensate for actively "affecting" (restricting, denying, destroying, invading or appropriating) the use and value of private property. The specific objectives of this study report are to review the case law and takings legislation applicable to federal and state transportation law that defines the line between valid exercise of the police power, for which no just compensation is due, and eminent domain, for which a landowner is entitled to just compensation for property taken or damaged; and to do this with special reference to the actions of governments and governmental agencies that are responsible for designing, constructing, and maintaining public surface transportation systems.

II. SCOPE OF REPORT

This study deals with the substantive standards that have been applied in situations where there is reason to believe that governmental agencies may have taken private property for public use in violation of the Fifth Amendment of the United States Constitution or as applied to state governments by virtue of the Fourteenth Amendment of the Constitution, or similar provisions of state constitutions. Such taking of private property may occur through excessive use of the government's police power or through an improper use of the power of eminent domain. Where such takings occur, "just compensation" must be paid to the aggrieved property owner. Avoidance and resolution of disputes over application of the Takings Clause of the Constitution calls for observing as closely as possible the fine line that constitutional doctrine maintains between governmental exercise of its police power and eminent domain.

Doctrine for dealing with these situations, which collectively have been called the "takings issue," does not presently offer a rule or formula for readily determining what governmental actions should be treated as valid within the constitutional limits of the police power—that is, legitimate regulation of the use and enjoyment of private property, for which a property owner cannot claim compensation for loss of value of his property incidental to the regulation of its use—and what must be treated as a "taking" within the scope of applicable constitutional authority, for which the owner must be compensated.

Historically, standards for designating a line between governmental exercise of the police power and eminent domain have come from judicial interpretation of the Constitution. Since 1990, however, state and federal legislation has offered both policy and procedural guidance for assessing regulatory impacts on private property rights and for compensation for property values lost as a result of regulatory actions. This study surveys the contributions of both sources, noting also some of the principal initiatives taken by executive and administrative authorities. Particular attention is given to the guidelines that have been promulgated by the Attorneys General in states where legislation now requires that regulatory impact assessments be prepared for certain types of governmental action.

The report also surveys the application of current judicial doctrine to functions of surface transportation programs in which the takings issue is regularly encountered. These functions include (1) regulation of highway traffic operations; (2) construction in public rights-of-way; (3) control of highway access; (4) regulation of roadside development through the Highway Beautification Act of 1965; (5) regulation of land-use and transportation development through the Intermodal Surface Transportation Efficiency Act of 1991; and (6) regulation and relocation of public utilities in surface transportation programs.

The study does not attempt to deal in detail with procedural aspects of the takings issue. Although these matters may affect a property owner's ability to obtain

[1] Robert F. Carlson, *Where Does Police Power End and Eminent Domain Begin?* in SELECTED STUDIES IN HIGHWAY LAW 1 (1976; Supp. 1980).

In the years following *Pennsylvania Coal,*[32] economics and politics both pushed the courts toward a merger of the concepts of public use and use for a public purpose. By mid-20th-century, a broadened view of the public's interest had evolved as depression, the New Deal, and war and rehabilitation combined to force legislatures at all levels to accept responsibility for a new generation of public interests and to stretch the concept of public purpose to meet those needs.[33] Despite initial reluctance, the Supreme Court followed these trends and accommodated a broadened view of the public's interests, generally with deference to legislative judgment as to what was necessary to preserve or advance the public welfare.[34]

Although judges never abandoned their responsibility for ultimately deciding constitutional questions, variations in their points of view were reflected in the extent to which they subjected legislative judgments to scrutiny on judicial review. So in 1961 the Supreme Court in *Goldblatt v. Town of Hempstead*[35] upheld a prohibition of excavations below the water level within the town. The ordinance was challenged as an unreasonable exercise of the police power that served no public purpose, but it was sustained by reference to the long standing doctrine that "debatable questions as to reasonableness are not for the courts but for the legislatures."[36] More to the point, it declared that "exercise of the police power will be upheld in any state of facts either known or which could be reasonably assumed affords support for it."[37]

By the 1980s, however, judicial scrutiny of the basis for legislative findings that an exercise of the police power was for a public purpose was noticeably more thorough. Comparison of *Keystone Bituminous Coal Association v. DeBenedictis* and *Nollan v. California Coastal Commission* illustrates this changing view of public purpose and public use in takings cases.[38]

Keystone Bituminous involved state legislation to prevent subsidence of land in which subsurface mining operations were being carried on. And, as in *Pennsylvania Coal*, it was charged that this constituted a taking of property. But the Supreme Court denied the claim for compensation, and distinguished it from *Pennsylvania Coal* with the following comment:

> We do not suggest that courts have "a license to judge the effectiveness of legislation" ... or that courts are to undertake "least restrictive alternative analysis" in deciding whether a state regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land-use regulation may be somewhat over-inclusive or under-inclusive is, of course, no justification for rejecting it (citation omitted). But, on the other hand, *Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature.[39]

The concept of public purpose occupies a central role in cases where comprehensive zoning ordinances or land-use and resource management plans are implemented by police power regulations. A series of cases, including *Agins, Nollan,* and *Dolan v. City of Tigard,*[40] has developed the most recent refinements in the doctrine of the Takings Clause on the requirement that a public purpose must be served where land use is regulated by police power action.

In *Agins* the land-use restriction in question included a density limit of one to five homes on the landowner's 5-acre parcel of land. It was challenged as substantially preventing further development of this land for its highest and best use, and so destroying its value. In determining whether this restriction amounted to a compensable taking, the Supreme Court declared that application of a general zoning law—in this case the city's planned development and open space zoning ordinance—to particular property would be a compensable taking if it did not substantially advance legitimate state interests, or if it denied an owner the economically viable use of his land.[41]

Using this test, the Court held that the city's zoning law bore a "substantial relationship to the public welfare, and...inflicted no irreparable injury upon the landowner."[42] It noted that the city's purpose of protecting its residents from the ill effects of urbanization had long been accepted as a legitimate exercise of the police power, notwithstanding that it might not allow landowners to proceed immediately to utilize opportunities for highly profitable development projects. "Reasonable investment expectations" could still be enjoyed by landowners under the terms of the ordinance, and

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ent places. The damage is not common or public...It is our opinion that this act cannot be sustained as an exercise of the police power. 260 U.S. at 413–14.

[32] 260 U.S. 393 (1922).

[33] *See, e.g.,* Phillip Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615 (1940); Suzanne LeBerge, *The Public Use Requirement in Eminent Domain: A Constantly Evolving Doctrine,* 14 STETSON L. REV. 749 (1985); Mark C. Landry, *The Public Use Requirement in Eminent Domain: A Requiem,* 60 TUL. L. REV. 419 (1985).

[34] *E.g.,* Hawaii Land Reform Act, (Act 307) HAW. REV. STAT. (1976), cl. 516, enabling tenants in residential buildings to initiate proceedings for converting their leaseholds into fee interests. The public purpose served by this means was to achieve wider ownership of land. *See also* Berman v. Parker, 348 U.S. 26 (1954).

[35] 369 U.S. 590 (1961).

[36] Id., at 595 (citation omitted).

[37] 369 U.S. 590, 596, citing United States v. Carolene Products Co., 304 U.S. 144 (1938).

[38] Keystone Bituminous Coal Ass'n v. DiBenedictis, 480 U.S. 470 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[39] 480 U.S. at 487, n.16.

[40] Agins v. City of Tiburon, 447 U.S. 254 (1980); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

[41] 447 U.S. 254, 260 (1980), citing Nectow v. Cambridge, 277 U.S. 183 (1928) and Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

[42] 447 U.S. at 261.

ultimately the benefits of carefully planned residential development could be shared by all members of the community.[43]

The same rationale that justifies general zoning in accordance with a comprehensive land-use plan or a resource management process as a facially legitimate exercise of the police power may not, however, sustain it in its various applications to particular property.[44] It is essential that applications demonstrably serve the public purpose of the legislation in question. This was the central issue in *Nollan,*[46] where the owner of beachfront property sought permission to replace an existing house on his property with a larger one. This raised the issue of public access to the beach, a requirement that was mandated by State law and which the Coastal Commission managed by its regulations. Since the landowner's new house would become a substantial addition to a row of residential structures parallel to the beach, the Coastal Commission conditioned the issuance of its permit on the owner's dedication of an easement of light, air, and view across his property so that the public would not be prevented from realizing psychologically that the beach was located on the other side of that property and was available for public use and enjoyment.

The Court held that, as applied to the Nollans' property, the requirement to dedicate an easement constituted a compensable taking. Referring to the same two-step test originated in *Agins* and reaffirmed in *Keystone Bituminous,* Justice Scalia's opinion for the Court commented as follows:

> Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfy these requirements.[48]

Dissenting opinions attacked the Court's demand for what they described as "a degree of exactitude that is inconsistent with our standard of reviewing the rationality of a State's exercise of its police power for the welfare of its citizens,"[47] or, in this case, for demanding that the burden of the public access condition imposed by the state must be identical with the burden on access created by the landowners. Citing earlier decisions from *Lawton v. Steele* [48] to *Minnesota v. Clover Leaf Creamery Company,*[49] Justice Brennan stated "It is...now commonplace that this Court's review of the rationality of a State's exercise of its police powers demands only that the State 'could rationally have decided' that the measure adopted might achieve the State's objective."[50]

Acknowledging that governmental actions may be valid exercises of the police power and still violate other specific provisions of the Constitution, he continued:

> Our consideration of factors such as those identified in *Penn Central*...provides an analytical framework for protecting the values underlying the Takings Clause, and other distinctive approaches are utilized to give effect to other constitutional provisions. This is far different, however, from the use of different standards of review to address the threshold issue of the rationality of government action.[51]

Whether the Court, speaking through Justice Scalia in *Nollan,* was indeed announcing a new test for the Takings Clause, or was merely restating with emphasis what was already implicit in the obligation of judicial review where regulatory takings are concerned, commentary on the Court's decision took it as a notice that henceforth the insistence on a credible nexus between a regulatory action and the public purpose that it served would require courts to be satisfied that a "substantial advancing" of a legitimate state interest is called for.[52] Judicial acceptance of *Nollan* has been to read that decision as not abandoning for due process cases the standard that demands only that a 'rational relationship" exist.[53]

In 1994 the Supreme Court reviewed *Dolan,*[54] another case involving exactions. Here the city adopted a comprehensive plan that contemplated a number of improvements in the flood plain of a creek near the

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[43] The City of Tiburon's stated purpose was that

> [i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards relating to geology, fire, and flood, and other demonstrable consequences of urban sprawl. 447 U.S. at 261, n.8 (1980).

[44] The rationale that all members of a regulated community or activity share in "an average reciprocity of advantage" that the regulations impose originated in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), and sustained the zoning ordinance in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[45] 483 U.S. 825 (1987).

[46] 483 U.S. at 834.

[47] *See* 483 U.S. at 842, 843.

[48] 152 U.S. 133, 137 (1894).

[49] 449 U.S. 456, 466 (1981).

[50] 483 U.S. at 843. The strongest of the cases cited for Brennan's view were, not unexpectedly, from the 1950s, when deference to legislative judgment was high. *E.g.,* Day-Brite Lighting Inc. v. Mo., 342 U.S. 421, 423 (1952):

> Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy expressed offends the public welfare...[S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare.

[51] 483 U.S. at 844.

[52] *See* Nathaniels Lawrence, *Means, Motives, And Takings: The Nexus Test of Nollan v. California Coastal Commission,* 12 HARV. ENVIR. L. REV. 231 (1988), citing 483 U.S. at 841.

[53] Builders Serv. v. Planning & Zoning Comm'n of East Hampton, 208 Conn. 267, 545 A.2d 530 at 539 (1988); Blue Sky Bar, Inc. v. Town of Stratford, 203 Conn. 14, 523 A.2d 467 (1987).

[54] 512 U.S. 374 (1994).

location of the plaintiff Dolan's property. These included keeping the area free of structures and preserved as a greenway to minimize flood damage. As a measure to reduce vehicular congestion, the plan recommended that a pathway for pedestrian and bicycle travel be constructed. Plaintiff's plan to improve her property was approved subject to her dedication of land in the flood plain as open space and a 15-foot wide strip along the edge of the property for a pedestrian-bicycle pathway.

The Court acknowledged that this offering might satisfy the requirement for a nexus between the permit conditions and the legitimate governmental purposes for exercise of the police power, but it held that the nature and extent of the exactions demanded by the city's permit conditions did not bear the required relationship to the projected impact of the landowner's proposed development.[55] The Court declared that there must be a "rough proportionality" between these two elements before the nexus between them could be considered sufficient to avoid a compensable taking. Elaborating, the opinion stated: "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[56]

In the evolution of the Taking Clause doctrine, *Dolan* raised the level of scrutiny that courts must expect to give where conditions are exacted from landowners in the process of qualifying them for permission to develop land, and it shifted to the government the burden of proving that its action is an appropriate exercise of the police power and not an improper use of eminent domain. Details as to how this burden of proof should be met were not forthcoming from the Court at the time, but comments on the Court's opinion suggested that State courts may well become the laboratories for developing a consensus on this matter.

3. Physical Invasions and Occupations

Historically, doctrine on the takings issue has consistently stated that the physical invasion and permanent occupation of land by the government are actions of such a unique character and so inconsistent with the rights of private ownership that they must be considered as a taking without regard to other factors that a court might ordinarily examine. This was decided in *Pumpelly* in 1871.[57] Unusual fact situations, sometimes involving complex technology in densely developed urban centers, have, however, stretched the concept of physical invasion and occupation. Illustrative of this is the U.S. Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corporation.*[58] Here a New York State law authorized cable television companies to attach cables and boxes containing cable TV equipment to the walls of apartment buildings throughout the companies' service areas. Cable lines could be attached either for service to the building tenants or to provide "crossovers"—i.e., cable lines extending from one building to another to reach other groups of tenants. A State cable television regulatory commission, established to oversee cable TV service, set the fees that apartment owners could charge tenants for cable hookups, and allowed landlords to require either the cable companies or tenants to bear the costs of installation and to indemnify damage caused by the installation. The stated purpose of the New York statute regulating cable operations was to protect the public from price gouging and monopolistic practices by cable TV companies and apartment owners and to make cable services available in an orderly and efficient manner.

An apartment owner who did not discover these installations until after purchasing her building brought action for trespass and taking property for public use without compensation. The Supreme Court ruled that installation of the cable equipment constituted a compensable taking since it involved a physical invasion and permanent occupation of private property to the exclusion of the owner's rights.

A dissenting opinion, speaking for three Justices, chided the Court for first acknowledging its historic rule against use of a set formula to determine when a taking occurs, and then "in almost the same breath.... [applying]... a rigid *per se* takings rule," namely:

> "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." To sustain its rule....the Court erects a

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[55] 512 U.S. at 389-90, commenting on the tests that had been used elsewhere, Justice Scalia explained that while the "reasonable relationship" standard was closest to federal due process needs, it would be "confusingly similar" to the "rational basis" that describes the minimal level of scrutiny that courts customarily applied in equal protection cases under the 14th Amendment.

[56] 512 U.S. at 391. The Court noted at 512 U.S. 389–90 that currently some states appear to require only very generalized statements as to the necessary connection between required dedications and development proposals. *E.g.:* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (NY 1966). At the other extreme, some states insist on what is described as the "specific and uniquely attributable test" in which a government agency must show that its exaction is "directly proportional to the specifically created need." *E.g.*: Pioneer Trust & Sav. Bank v. Mount Prospect, 176 N.E.2d 799 (1961); JED Assoc. Inc. v. Atkinson, 432 A. 2d 12 (1981); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (1971). Other states have taken an intermediate position requiring governmental agencies to show a "reasonable relationship" between required dedications and the impact of a proposed development. *See* Simpson v. North Platte, 292 N.W.2d 297 (Neb. 1980); Call v. West Jordan, 606 P.2d 217 (Utah 1979); College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984). *See also* Morosoff, *"Take" My Beach Please! Nollan v. California Coastal Commission and a Rational Nexus Constitutional Analysis of Development Exactions,* 69 BOSTON U. L. REV. 823 (1989).

[57] 80 U.S. 166 (1871).

[58] 458 U.S. 419 (1982).

strained and untenable distinction between "temporary physical invasions," whose constitutionality concededly "is subject to a balancing process," and "permanent physical occupations," which are "taking[s] without regard to other factors a court might otherwise examine."[59]

In addition, the dissent noted, the physical invasion associated with cable TV hookups was a very minor one which was more likely to enhance instead of diminish the value of the property and which left its owners' "reasonable investment-backed expectations" unaffected.[60]

The decision in *Loretto* prompts the question of how important the distinction between "permanent" and "temporary" invasions continues to be as a serious factor in the Takings Clause doctrine. Justice Blackmun's dissent appealed for recognition that the extent to which government may injure private interests currently depends so little on whether physical contact is authorized or not that the distinction between physical and nonphysical invasion contributes nothing to the takings issue.

The cases that go so far as to accept the precept that any form or extent of physical invasion constitutes a taking appear to be persuaded by the rationale that a physical invasion deprives the owner of his right of exclusive possession, use, and disposition—three rights that are regarded as absolutely essential in the concept of property ownership.[61] This was illustrated in 1987 in *Nollan*[62] and in 1994 in *Dolan*,[63] where easements of passage were exacted from landowners as part of the government's development approval process, and the Court regarded them as "permanent physical occupations" of the property in question despite the prospect that public use of the easement would be neither heavy nor frequent.[64]

The same reasoning was used to find that a taking occurred in *Hendler v. United States*,[65] where a landowner challenged the right of the Environmental Protection Agency (EPA) to install ground water testing wells to monitor pollution from an adjacent hazardous waste site. The federal court held that the action in question constituted a taking of private property for public use. Notwithstanding that visits by the EPA inspectors were brief and intermittent and the very small monitoring "wells" did not restrict the use of the land, the court held that "one of the most valued [attributes of ownership] is the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government."

4. Temporary Takings

Some governmental actions that deny private landowners the right or ability to use their property for temporary periods of time generally have been treated as legitimate exercises of the police power and not compensable takings. Interim zoning, emergency land-use restrictions, delays in completing the procedures of planning and development review processes, denial of private access while public works or other activities are underway, and extreme natural conditions have, at times, imposed burdensome and costly limitations on private property owners. Where temporary interference with an owner's use of his property turns out to be for an unreasonably long time or the use restrictions are deemed to be outside the legitimate purview of the police power, the result generally has been to declare the regulation invalid but not necessarily to award compensation.

The rationale for this view, which prevailed widely in mid-20th-century land-use zoning cases, emphasized that the restrictive action was a good-faith effort to protect the best interests of the public, that to allow actions for compensation would unduly burden state and local governments with litigation and costs that could jeopardize essential public services, and that invalidation and revocation of an action that "goes too far" was an adequate response to any mischief that may have been done.[66] The way was opened to changing this rule on temporary takings in 1981 by a forceful dissent in *San Diego Gas & Electric Co. v. City of San Diego.*[67] Here a change in municipal zoning designated for future public parkland a tract of industrial land being held by its owner for industrial development. It was challenged as a taking, but was upheld as a noncompensable land use regulation during the site's transition to parkland. A dissenting opinion by Justice Stewart, however, argued that for the purpose of the Takings Clause there was no difference between a direct taking by formal condemnation and an indirect taking by a zoning restriction. The government should pay just compensation for the period from the date the regulation first effected the taking until the date the

[59] 458 U.S. at 442.

[60] 458 U.S. at 444 and 445, citing Prune Yard Shopping Center v. Robbins, 447 U.S. 74 (1980), where a privately-owned shopping center prohibited soliciting signatures on its premises, the court held there was no violation of the Fifth Amendment since it was not shown that the "right to exclude others" is so essential to the use or economic value of the property in question that the state-authorized prohibition amounts to a constitutional taking. 447 U.S. at 83-84.

[61] Ray Mulligan, *Loretto v. Teleprompter Manhattan CATV Corp.: Another Excursion into the Takings Dilemma,* in RICHARD HILL (ed.), REGULATORY TAKING: THE LIMITS OF LAND-USE CONTROLS, (1990), 129–54. *See also* United States v. General Motors Corp., 323 U.S. 373, 378 (1944).

[62] 483 U.S. 825 (1987).

[63] 512 U.S. 374 (1994).

[64] Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987), stating "We think a 'permanent occupation has occurred' where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."

[65] 952 F.2d 1364 (Fed. Cir. 1991).

[66] NICHOLS, EMINENT DOMAIN, (3d ed.), § 1.42[10][b].

[67] 450 U.S. 621 (1981).

government chose to rescind or otherwise amend the regulation.[68]

This question of a temporary taking came to the Court again in 1987, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,*[69] an inverse condemnation action asserting that an ordinance designating an "interim flood plain protection area" on land owned by the church effectively deprived it of all beneficial use of that land, and entitled it to damages as an uncompensated taking. The land in question was a campground, operated by the church, that had been wiped out by a flash flood. When the church sought to rebuild its campground, it was prevented from doing so by the county's flood control ordinance.

At the state level, the California court had followed the holding in *Agins*[70] in not allowing an action for compensation, since the Constitution does not require it as a remedy for temporary regulatory takings. The U.S. Supreme Court, however, held that a compensatory remedy was available to property owners when temporary takings denied them all use of their property. Such situations are not different in kind from permanent takings, for which the Constitution clearly requires compensation.[71]

The Court in *First English* dealt only with the availability of compensation as a remedy available through inverse condemnation for temporary takings when they occur. It did not find that a taking had occurred or advise on determining when a taking would occur. And, indeed, on remand the state court found that no taking had occurred here since the flood control ordinance was clearly justified as a measure to protect the health and safety of the children using the campground, and that outweighed any monetary benefit to the landowner.

Despite its limitations, *First English* clarified several issues associated with temporary takings. It ended the debate that had started with Brandeis' dissent in *Pennsylvania Coal* as to whether the proper remedy for a regulatory taking was compensation or solely the invalidation of the restrictive regulation. It rejected the notion that the sole remedy for a temporary taking was payment of the full value of the property in question, and ruled instead that compensation would address only the time the restriction was in effect and applied to the claimant landowner to its detriment. And, finally, the Court noted that "normal delays in obtaining building permits, zoning changes, variances, and the like" were not within the scope of its ruling.[72]

It has been suggested, therefore, that the long-term importance of *First English* may be as a logical extension of long-recognized constitutional doctrine,[73] and that this may indeed be all that was sought by the Court in that case or by the dissent in *San Diego Gas*. Its application in the decade that followed seemed to show that the distinction between compensable permanent restrictions and noncompensable temporary regulations for valid public purposes was carefully maintained. On remand from the U.S. Supreme Court, the California appellate court[74] held that the ordinance prohibiting construction in the flood plain area on an interim basis was not an unconstitutional taking of all use of the property in question and, further, was not an unconstitutional temporary taking since it only imposed a reasonable moratorium for study and determination of what uses were compatible with public safety.[76]

5. Economically Viable Use

When the Supreme Court opened the subject of regulatory taking in *Pennsylvania Coal,*[75] it did not offer advice as to when regulatory action went too far. Holmes' opinion, however, gave an indication of where the answer to this question might be found when he introduced the proposition that property must be considered as "taken" when its owner is denied the ability to use it or benefit from its use. Later cases attempted with varying success to use this factor in analyzing regulatory impacts, and produced the formulas utilized in *Penn Central* [77] and *Agins*.[78] Most recently, however,

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[68] 450 U.S. at 653–56; also observing that "Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary 'takings' involving formal condemnation...occupations and physical invasions, should provide guidelines to the courts in the award of compensation for a regulatory taking." 450 U.S. 658

[69] 482 U.S. 304 (1987).

[70] 24 Cal. 3d 266; 598 P.2d 25 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980), holding that a landowner could not maintain inverse condemnation to review a "regulatory" taking, since only declaratory relief was available for that purpose.

[71] 482 U.S. at 318.

[72] 482 U.S. at 320–21.

[73] NICHOLS, EMINENT DOMAIN, (3d ed.), § 1.42[10][b], n.59, 126.

[74] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (Cal. App. 2d Dist. 1989).

[76] 258 Cal. Rptr. at 906. *See also* Sun Ridge Dev. v. City of Cheyenne, 787 P.2d 583 (Wyo. 1990), construction moratorium to enforce drainage regulations held reasonable; Westgate Ltd. v. State, 843 S.W.2d 448 (Tex. 1992); New Jersey Shore Builders Ass'n. v. Mayor & Township Comm., 561 A. 2d 319 (N.J. Super. L. 1989); Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989). *And see* NICHOLS, EMINENT DOMAIN (3d ed.), § 24.04[3], "In temporary regulations the test is whether the regulation left a reasonable use for a reasonable period of time. Applying this rule, properly enacted growth management interim controls and developmental moratoria will be valid." *Compare* City of St. Petersburg v. Brown, 675 So. 2d 626 (Fla. App. 2d Dist. 1996) and Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (1990).

[75] 260 U.S. 393 (1922).

[77] 438 U.S. 104 (1978).

[78] 447 U.S. 255 (1980).

in *Lucas v. South Carolina Coastal Council,*[79] the Court concluded that a compensable taking occurred where the effect of the regulatory impact was to deprive the owner of "all economically beneficial or productive use of land."[80]

Justice Scalia's opinion in *Lucas* offered only a preliminary explanation of the concept of economically viable land-use, saying:

> We have never set forth the justification for this rule. Perhaps it is simply ... that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of physical appropriation...[R]egulations that leave the land without economically beneficial 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.[81]

Efforts to synonymize the term have resulted in suggestions that it might be equated to full "economic potential" or "highest and best use" or "commercially impracticable to continue in business."[82] These suggestions aside, the considered view of commentators is that the categorical taking rule regarding "economically viable use" applies only to claims where property value is destroyed permanently, completely, unconditionally, and entirely.[83]

In *Lucas*, further discussion of this point by the Court was avoided by its reliance on the trial record and the jury's finding that Lucas' beachfront lots had no value after the disapproval of his building plan.[84] But for courts that lacked the advantage of such a clear-cut record, or had the responsibility of seeing that one is prepared, hard cases were presented where claims continued to be brought by owners alleging they had been deprived of making the "best" use (i.e., most profitable use) of their property, although not necessarily the only conceivable use.[85] These difficulties have led to handling the "economically viable use" factor somewhat differently when government action is challenged, because "on its face" it is seen to have features that makes it unconstitutional under any and all circumstances, as contrasted to actions that are unconstitutional only "as applied" to a complaining property holder's particular situation—so-called "facial takings" and "as applied" takings. Noting initially that the precise meaning of "economically viable use" is "elusive" and has not been clarified by the Supreme Court, the 9th Federal Circuit[86] has stated that generally the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property.[87] And, where a General Plan and Land Use Ordinance formed the context of a challenged action (i.e., denial of a development permit for a private recreational vehicle club), the court ruled that

> [the landowner had not shown] that a dude ranch in combination with other uses (other than a working ranch) was not economically viable. Moreover, the availability both of a variance under [the] Land Use Ordinance and of additional special uses...strongly suggests that there are other beneficial uses not expressly included. This fact alone logically prevents the ordinance from being overrestrictive on its face.

Claimants challenging a restriction "as applied" to them must be prepared to provide a detailed factual showing of injuries clearly attributable to the governmental restrictions being challenged, and to relate it to the claimant's particular situation. Such proof generally involves expert testimony on real estate appraisal, land development and financial matters, and engineering and construction aspects.

Claims may also have to include expert testimony on whether regulatory action has left the owner any reasonable beneficial use in the property remaining to him, or on the extent to which the regulatory impact interferes with the owner's reasonable investment-backed expectations.[88] Analysis of the regulatory impact on remaining economically viable use may take the form of estimates of the number of development units that can be put on the land as restricted, compared with the number originally proposed, with an assertion that the developer cannot afford to meet his expenses from sale of the number of units permitted by the restriction in question. It does not always follow, however, that such a showing will be accepted as thwarting an owner's investment-backed expectations

If existing zoning and other land-use regulations still permit some amount of development, courts have

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[79] 505 U.S. 1003 (1992).

[80] 505 U.S. at 1015, suggesting that the essential nature of the uses that remain unrestricted must be capable of earning monetary return to the owner or else be capable of producing goods that have marketability or are useful in economic activity. A dissenting view in Lucas, urging that under some circumstances open space may not be valueless to an owner, was not considered an economically viable use.

[81] 505 at 1017, 1018.

[82] Keystone Bituminous Coal Ass'n v. DiBenedictis, 480 U.S. 470, 496 (1987); Crow-New Jersey 32 Ltd. v. Township of Clinton, 718 F. Supp. 378, 383 (D. N.J. 1989).

[83] NICHOLS, EMINENT DOMAIN, (3d ed.), § 24.02[6].

[84] 505 U.S. at 1016, 1017, n.7.

[85] *See, e.g.,* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985); General Offshore Corp. v. Farrelly, 743 F. Supp. 1177, 1200-02 (D. V.I., 1990); Crow-New Jersey 32 Ltd. v. Township of Clinton, 718 F. Supp. 378, 383 (D. NJ. 1989); Help Hoboken Housing v. Housing City of Hoboken, 650 F. Supp. 793,798 (D. NJ. 1986).

[86] Lake Nacimiento Ranch Co. v. San Luis Opisbo County, 841 F. 2d 872 (9th Cir. 1987).

[87] *Id.* at 877.

[88] Andrus v. Allard, 444 U.S. 51, 64 (1979); Pace Resources Inc. v. Shrewsbury Township, 808 F.2d 1023, 1030 (3d Cir. 1987).

tended to avoid finding that a taking occurs.[89] The property uses allowed by applicable planning and zoning must, however, be sufficiently desirable to permit property owners to find buyers in a "competitive market" for such land use.[90] Under such criteria, governmental restrictions that relegate uses of property to leaving it in an undeveloped or natural state suggest that a taking for public use occurs.[91]

C. Standards for Determining When Regulatory Takings are Compensable

1. Categorical Takings

Where it is determined that private property has been taken for public use by the police power, a second step may be required to determine whether the property owner must be compensated for his loss under the Takings Clause of the Fifth Amendment. In the approach inaugurated in *Pennsylvania Coal* in 1922, this second step involved another "ad hoc" inquiry into the claimant's circumstances before and after the regulatory burdens were imposed.[92] This practice was followed until the Supreme Court's decision in *Lucas* in 1992.[93]

In its majority opinion, the Court in *Lucas* announced that in at least two discrete categories of fact situations it could say that the regulatory actions involved were compensable "without case-specific inquiry into the public interest advanced in support of the restraint."[94] The first category encompassed regulations that compel a property owner to accept a physical invasion of his property, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it."[95] The second category included situations where regulations deny all economically beneficial or productive use of land, something which the Court characterized as the equivalent of a physical appropriation. Building on Justice Brennan's dissent in *San Diego Gas*,[96] the Court in *Lucas* justified its decision by stating that the "*functional* basis for permitting the government, by regulation, to affect property values without compensation...does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses."[97]

Establishment of categorical findings of compensability was challenged in dissenting opinions by Justices Blackmun and Stevens. Arguing that the Court had previously always determined the question of compensability by reference to "the particular circumstances of each case," for which it had identified certain factors to be considered, Blackmun stated:

> [W]hen government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it. Instead, the Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, establishes a 'taking' [under the Fifth Amendment]."[98]

In this respect he challenged the very foundations of Holmes' rationale for the holding in *Pennsylvania Coal*, as had Brandeis when dissenting from the original opinion.[99]

Justice Stevens, in his dissent, also noted the lack of precedent for "set formula" determinations of compensability, but focused his criticism on the hardship inherent in application of categorical rules. For example, a landowner whose property is diminished 100 percent would recover the land's full value, while an adjacent owner whose property lost 95 percent of its value might possibly receive nothing. Also, an owner barred from building on his property would be compensated, while an owner barred from rebuilding houses destroyed by fire or hurricane would not be able to obtain either a permit or compensation. Added to these inequities, he continued, were the facts that given the elastic nature of property rights, property losses might easily be defined in a way to guarantee that any loss would be treated as a total taking for compensation purposes.[100]

Following *Lucas*, commentators speculated as to whether it ended the validity or usefulness of the "ad hoc" analyses of *Penn Central*, *Keystone Bituminous*, *Agins*, and *San Diego Gas*.[101] Some felt the impact of

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[89] Baytree of Inverrary Realty v. City of Landerhill, 873 F.2d 1407 (11th Cir. 1989). *See also:* NICHOLS, EMINENT DOMAIN (3d ed.) § 24.04[3].

[90] Del Monte Dunes at Monterey v. City of Monterey, 95 F. 3d 1422 (9th Cir. 1996). The fact that there is a willing buyer for the property in question (especially if that buyer is a governmental agency) does not necessarily constitute a competitive market. Park Ave. Tower Ass'n v. City of New York, 746 F.2d 135, 139 (2d Cir. 1984), *cert. den.*, 470 U.S. 1087 (1985).

[91] Formanek v. United States, 26 Ct. Cl. 332, 340 (1992). *See also* Jed Rudenfeld, *Usings*, YALE L.J. 1077, 1157 (1993)

[92] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922): "So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power."

[93] 505 U.S. 1003 (1992).

[94] 505 U.S. at 1015.

[95] *Id*, citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[96] 450 U.S. 621, 652 (1981).

[97] 505 U.S. at 1018.

[98] 505 U.S. at 1047, citing United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

[99] 260 U.S. at 418, where Justice Brandeis argued that "Restriction upon [harmful] use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put."

[100] *See* 505 U.S. at 1064–65.

[101] *See, e.g.*, Lorraine Hollingsworth, *Lucas v. South Carolina Coastal Council: A New Approach to the Takings Issue*, 34

this innovation would be slight, relying on the assurances of Justice Scalia's majority opinion that use of the categorical determinations would be only in "the extraordinary circumstances" and "the relatively rare situations" when no productive or economically beneficial use of land is permitted.[102] Others believed, with dissenting Justice Blackmun, that deprivation of all economically viable use cannot be objectively determined apart from a full view of the factual circumstances affecting it.[103] Some support for this latter view may be seen in cases before the Federal Claims Court where proof of a property owner's loss of all use or value may involve extensive fact-finding efforts in an attempt to qualify for categorical treatment under *Lucas*.[104] And in this process, as noted earlier, courts have had to cope with several unresolved questions, including the absence of good working definitions of such concepts as "economically viable use," "competitive market," and "legitimate state interest."

2. Diminution of Value and the "Whole Parcel" Rule

Justice Holmes' opinion in *Pennsylvania Coal*[105] made the extent to which the value of private property is diminished by the impact of governmental action a major factor in identifying compensable regulatory takings. Two aspects of this observation, however, remained unexplained, namely: how much diminution in the subject property is required in order to amount to the deprivation of all economically beneficial use? And, in any particular case, how should this diminution be calculated?

Holmes' own observations in *Pennsylvania Coal* were not helpful with these questions, for he merely said the question depends on the particular facts.[106] In the case of the Pennsylvania Coal Company, Holmes defined the "property" in question as the subsurface mineral rights of the land which the company had reserved to itself in a previous purchase, and he declared that the value of this estate was in the owner's right to extract and sell the coal. On these premises he argued that the value of the subsurface mineral rights was completely destroyed.

But Justice Brandeis, in dissent, was not so sure. In his view, the value of the coal kept in the ground should have been compared with the value of all other parts of the land, that is, with the value of "the whole property."[107]

Currently there is a consensus that the value of "the whole parcel" should be used as the denominator in expressing the amount by which the value of the property was diminished by the impact of the government's regulatory action.[108]

Many instances involving the whole parcel issue have arisen in the principal environmental and natural resources conservation programs originating in the 1960s and 1970s, and from this body of case material several are noteworthy:

In *Florida Rock Industries, Inc. v. United States,*[109] plaintiff mined limestone on 98 acres of a 1,560-acre tract, but was denied a permit under the Clean Water Act to continue its operations, which necessarily destroyed wetlands. Claiming that this denial was a constitutional taking as applied to its situation, the mining company argued that all economically viable uses of its mining site were ended. In determining the fair market value of the property remaining after regulation, the Claims Court sought market data from investors willing to speculate on the 98-acre site, knowing of its use restrictions. From this source the court concluded that the property's value was reduced 95 percent. This, plus the fact that the property had been acquired specifically for limestone mining, led to holding that a compensable taking occurred for which full fair market value at the time of the taking was awarded.

On appeal, however, the Federal Circuit Court of Appeals rejected two critical elements of the trial court's decision. One was its treatment of the 95 percent diminution in value as a categorical taking of all economically viable use of the mining site (a result of defining the "property" narrowly instead of in terms of the whole parcel). The second problem was with the trial court's assessment of the after value of the regulated area at a nominal $500 per acre, notwithstanding

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NATURAL RESOURCES J. 479 (1994); Jan G. Laitos, *The Takings Clause in America's Industrial States After Lucas*, 24 U. TOL. L. REV. 281 (1993); Peter C. Meier, *Taking "Takings" Into the Post Lucas Era*, 22 ECOLOGY L. Q. 413 (1995).

[102] 505 U.S. at 1017, 1018.

[103] 505 U.S. at 1047.

[104] *See* Tabb Lakes, Inc. v. United States , 26 Cl. Ct. 1334 (1992), noting the lack of precision in the rule on deprivation of economically viable use and the necessity of engaging in extensive fact-finding before concluding that the plaintiff-developer had not lost all economic use of his land. *See also* 641 Co. v. Minneapolis Community Dev. Agency, 547 N.W.2d 400 (Minn. App. 1996).

[105] 260 U.S. 393 (1922).

[106] 260 U.S. at 413.

[107] 260 U.S. at 419.

[108] Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Concrete Pipe & Products of California Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 at 644 (1993).

[109] Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1565 (Fed. Cir. 1994) (Florida Rock IV), stating: The trial court on remand was instructed:

> if there is found to exist a solid and adequate market value (for the 98 acres) which Florida Rock could have obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred or that any just compensation had to be paid by the government.

And also: "The Court of Federal Claims should give consideration to 'a relevant market made up of investors who are real but who are *speculating* in whole or major part.'"

evidence that it retained a value of at least $4,000 per acre based on comparable sales.

Despite having raised these doubts as to whether *all* economically viable use of Florida Rock Industries' property was taken, the Circuit Court of Appeals noted the problem of determining diminution of value only in the most general terms, as follows:

> Ultimately, the question that must be answered is whether, as a result of the denial of certain economic uses, there was a taking of Florida Rock's property by the Government....To answer this question requires the court to resolve two preliminary issues. The first is whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking of property to occur. The second is how to determine, in any given case, what that proportion is.[110]

As matters developed, confusion over the trial evidence caused the Claims Court to reinstate its judgment in favor of Florida Rock Industries. On appeal a second time, the Federal Circuit Court of Appeals focused on the apparent confusion over compliance with the Supreme Court's holding in *Lucas* that state and federal courts at the trial level must henceforth give independent and more thorough scrutiny to the destructive effects of regulatory action on the economic value of private property. Addressing the critical point of what market, if any, existed for Florida Rock Industries' restricted wetland areas, the Circuit Court of Appeals stated:

> A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulation at any given time may not be particularly important to those active in the market....It was error to read *Florida Rock II* as requiring a detailed inquiry into the motivation and sophistication of the buyers of comparable parcels. Dollars are fungible; a speculative market provides a landowner with monetary compensation which is just as satisfactory as that provided by any other market.[111]

Similar issues were raised in *Loveladies Harbor, Inc. v. United States*,[112] when the Corps of Engineers denied a permit for construction of residential housing on 11.5 acres of wetlands in a 250-acre tract. The trial court measured the economic impact of this action by a before-and-after comparison of the value of the 11.5-acre wetlands only and found that it lost 99 percent of its value with no counterbalancing public interest in the restriction of development. As in *Florida Rock Industries*, the court ordered payment of the full fair market value of the property taken as compensation, despite a showing of $12,500 remaining value after the taking. In view of the protracted appellate history of *Florida Rock Industries*, however, it would be understandable if *Loveladies* turns out to have limited precedential acceptance.

The litigation in *Florida Rock Industries* and *Loveladies* illustrates the initial difficulties that trial courts faced in their early efforts to carry out the Supreme Court's directive in *Lucas* for increased judicial scrutiny of regulatory impacts. Conventional before-and-after appraisal methodology, reliable in ordinary real estate transactions, did not cope as well with the factual situations in which environmental regulation must be evaluated. In identifying the "whole parcel" for purposes of calculating diminution of property value, courts have appeared to favor objective evidence from the history of the property rather than abstract, statistically-based market analysis. They have sought out information about when and how the property in question was assembled and managed, what development was planned, how the parts subject to regulation are related to the other physical features, how the owner's management plan works, and the characteristics of the property itself as they suggest potential land uses.[113]

Where proposed or intended economic uses must be considered, assumptions about the necessity of obtaining permits for development, access, drainage, and similar matters or about the prospects for obtaining them are as pertinent as assumptions regarding physical or market factors. All are within the scope of a trial court's responsibility for compiling a satisfactory trial record on a regulatory taking.[114] And, finally, in an effort to achieve a "realistic" denominator for determining loss of value, intangible and often personal factors are likely to be pertinent.[115]

A circumspect approach to measuring the diminution of value due to regulatory impact was offered in *Ciampitti v. United States*,[116] where the owner of 45 acres, of which 14 acres were designated as wetlands, sought to prepare the land for housing. When denied the necessary permits to dredge and fill the wetlands, he claimed to be deprived of all economically viable use of his property. The Claims Court ruled that the owner's entire 45-acre parcel was the correct denominator for calculating the loss, and explained as follows:

> In the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus

[110] 18 F.3d at 1567–68.

[111] 18 F.3d at 1567–68.

[112] 21 Cl. Ct. 153 (1990).

[113] *See, e.g,* Forest Properties, Inc. v. United States, 39 Fed. Cl. 56, 74–75 (1997), noting that the developer regarded his lake bottom property and upland property as two complementary units of one income-generating parcel, with the lake bottom providing owners of lots in the upland areas with access to the lake for recreational purposes. Owners of waterfront lots on filled portions of the lake have, in addition, an aesthetically unique setting.

[114] Formanck v. United States, 26 Cl. Ct. 332 (1992), citing Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 158 (1990): "[T]he court sitting as finders of fact must discount proposed uses that do not meet a showing of reasonable probability for such use and that there is a demand for such use in the reasonably near future."

[115] *See, e.g.,* 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 579–80 (1992).

[116] 22 Cl. Ct. 310 (1991).

> exclusively on the wetlands, and ignore whatever rights might remain in the uplands. If a governmental entity required a buffer, for example, around a housing development, a court would not entertain a separate claim for the land dedicated to buffer. It would no doubt take into consideration the extent to which the whole parcel could be developed. Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus.
>
> The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.[117]

Since *Lucas,* courts seeking to determine the deprivation of economically viable uses by reference to the diminution of property value have had to cope with two basic problems in applying this test. It never has been agreed how much loss of usefulness (and thereby a loss of value) is required to reach Holmes' level of "going too far." Nor has there been agreement on what comprises the denominator of the fraction that expresses the extent of economic value taken from the owner by the regulatory impact in the variety of situations likely to be encountered.[118] At the levels where trial records are compiled, courts have taken seriously the Supreme Court's view that there is no set formula for determining when economic viability is lost, and that "ad hoc factual inquiries" into the circumstances of each particular case are required. Recognizing the importance of this function, the trial courts have tended to step as far as possible into the mind of the property owner and to be guided by what they can learn of the property owner's own intention as to what constitutes the "whole parcel" of his land for the use he has in mind.

At the same time, courts remain mindful that eminent domain law has developed effective general criteria for identifying the proper larger parcel in connection with determination of compensation in condemnation proceedings—criteria involving the three unities of title, use, and congruity—and that these principles generally comprise a sound foundation from which to evaluate loss of value in taking.

3. Nuisance and Other Exceptions

The ruling in *Lucas* that established categorical per se takings may be restated as providing that whenever an owner of real property is required to sacrifice all economically beneficial uses of his property for advancement of the public interest, he is entitled to compensation under the Takings Clause of the Fifth Amendment, provided the regulated activity is not a nuisance or a nuisance-like activity prohibited by the state's common law or property law.[119] In the doctrine of the takings issue, this has been called the "nuisance exception." First articulated in Chief Justice Rehnquist's dissent in *Penn Central* in 1978,[120] it was utilized by Justice Stevens in the opinion of the Court in *Keystone Bituminous* in 1987;[121] and since that time it has been used regularly by courts to enable the categorical takings rule to accommodate changing times and circumstances.

The nuisance exception is based on two ideas: first that property rights are always subject to any encumbrances (restrictions) that are inherent in the owner's title at the time it is acquired. And second, ownership of private property always includes an implied limitation against using one's property to harm others—the basis of common law nuisance doctrine.

Courts that have applied this principle to the takings issue agreed that the nuisance exception was by no means coterminous with the scope of the police power, and also that it was not limited to private activities that historically were treated as common law nuisances and subject to abatement or prevention under the police power. Uncertainty arose, however, where legislatures refined and expanded the common law definitions of nuisance and noxious activities in efforts to adapt common law doctrine to evident changing needs and circumstances.[122] This uncertainty deepened when the Supreme Court in *Lucas* appeared to significantly limit the prospect of continuing to expand the nuisance exception when it mandated stricter standards for the judicial review of remedial statutes which resulted in total takings. Some predicted that restrictions on the use of private property would be allowed to stand only if the reviewing court agreed with the legislature's balancing of the interests involved and determined that a common law nuisance or equivalent existed.[123]

The prospect that this narrow interpretation would prevail led Justice Stevens to warn that in so doing the Court's ruling would "freeze" the common law in its

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[117] 22 Cl. Ct. at 318–19.

[118] Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle,* 57 SO. CAL. L. REV. 561, 566–69 (1984).

[119] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029–30 (1992).

[120] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 145 (1978).

[121] 480 U.S. 470 (1987).

[122] John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause,* 18 COLUM. J. ENVIR. L. 1, 2-3 (1993), citing *Munn v. Illinois,* 94 U.S. 113, 134 (1876): "Historically, it was the great office of statutes...to remedy defects in the common law," adapting it to changes of time and circumstances.

[123] HUMBACH, p. 3, suggesting that "future legislative efforts to remedy deficiencies in the common law of nuisance can now be overturned precisely *because* the common law fails to protect people from the particular harm in question." *But compare* 505 U.S. at 1024, where Justice Scalia argued that in such instances appeals cannot be "newly legislated," but must inhere in the title itself, in the restrictions that background principles of the state's law of property or nuisance already place upon land ownership."

present scope and reduce the ability of state and federal legislatures to perform their roles of adapting to change.[124] Uncertainty as to which way the scope of the nuisance exception was being pushed also worried Justice Kennedy and led him, although concurring in the holding that Lucas deserved compensation, to argue that common law nuisances should not be the sole basis of a state's authority to restrict land use for public purposes. The more appropriate test, (which he felt that Lucas met in this instance), should be whether a property owner is deprived of his reasonable, investment-backed expectations as understood in the context of "the whole of our legal tradition."[125]

To commentators who also looked for an indication of which way the Takings Clause was moving, the language of the opinions in *Lucas* was inconclusive. The rationale of the nuisance exception was clear enough, namely that uses of property that are prohibited as nuisances by the common law or statute at the time property is acquired cannot be considered as part of the "bundle of rights" that a purchaser receives with his title. Accordingly, subsequent restriction of those uses could not "take" any rights from the owner.[126] But the common law concept of nuisance was admittedly an evolving one, and the rule in *Lucas* appeared ready to recognize that noncompensable restrictions of the use of private property could be based on "background principles of nuisance and property law that prohibited the uses" intended by an owner.[127] It was not clear what applications should be expected from this source.

That this proposition would be explored in varying circumstances by the courts was predictable, and was illustrated in *Tahoe-Sierra Preservation v. Tahoe Planning Agency,*[128] where the claimant challenged denial of permission for a land development that was expected to result in increased eutrophication of a nearby alpine lake. This called for an evaluation of the view that "most courts since [*Lucas*] appear to have accepted...that 'newly legislated or decreed' restrictions on land use can also constitute 'background principles' of state law for this purpose—so long as those restrictions became law *before* the property owner actually purchased the property subject to the restrictions."[129] After close scrutiny of applicable state law, the Court distinguished the type of harm associated with the proposed development from both the cases and code treatment of nuisances,[130] as well as from other "background principles" of state law that might prohibit the land use in question.[131] In the end, the Court in *Tahoe-Sierra* concluded that, while the action of the state agency might constitute a "background principle of state law" applicable to subsequent purchasers, it could not be brought within the nuisance exception to the categorical takings rule of *Lucas*. And, observing that the exception "is not the same post-*Lucas* as it was prior thereto," the Court felt that this was a part of the doctrine that still was not completely clear.[132]

In the view of some commentators, the nuisance exception should not become more than what currently could be achieved by a proper party (say, one or more adjacent owners) suing in a state court under state law or local ordinance or by a local government in a nuisance abatement action. Others felt it was too soon to judge what might develop from the common law doctrines of prescription, custom, and long-accepted practice.[133] The possibility that regulatory takings might be avoided by finding that private property interests were limited by these rules was suggested by Justice Scalia's dissent to denial of certiorari for *Stevens v. City of Cannon Beach,*[134] in which he warned that state courts should not expect to avoid takings "by invoking nonexistent rules of state substantive law."

In *Stevens,* owners of beachfront lots sought permission to build a seawall as part of the eventual development of the lots for a motel site. When the requested permits were denied, the owners sued in inverse condemnation, alleging a facial taking by the terms of the zoning ordinance and a compensable taking as applied to them. On appeal, the expected argument was made that *Lucas* might not apply because the beachfront overlay zoning did not prevent "all economically viable" use of the property in question. But the Oregon State Supreme Court focused instead on the fact that the owner's proposed use conflicted with the state's his-

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[124] 505 U.S. at 1068–69.

[125] *Id.* at 1035.

[126] City of Virginia Beach v. Bell, 255 Va. 395, 498 S.E.2d 414 (1998) *cert. den.*, 119 S. Ct. 73; Anello v. Zoning Bd. App., Village of Dobbs Ferry, 656 N.Y.2d 184, 678 N.E.2d 870 (1997), *cert. den.*, 118 S. Ct. 2 (1997); Grant v. So. Car. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995); Hunziker v. State, 519 N.W.2d 367 (Iowa 1994); Scott v. City of Del Mar, 58 Cal. App. 4th 1296, 68 Cal. Rptr. 2d 317 (1997); Aztec Mineral Corp. v. Romer, 940 P.2d 1025 (Colo. App. 1996).

[127] 505 U.S. at 1031.

[128] 34 F. Supp. 2d 1226 (D. Nev. 1999)

[129] 34 F. Supp. 2d at 1251.

[130] 34 F. Supp. 2d at 1253, declaring:

> It is certainly true that Lake Tahoe is faced with serious harm, which ought to be prevented if at all possible...[but] no testimony supported the idea that the lake will become a health hazard, or otherwise 'indecent' or 'offensive.' The fact that the lake may turn green and opaque, and be reduced to a pale copy of its current self, is abhorrent to think on—yet not, unfortunately, a 'nuisance' as defined by the pre-existing law of California.

[131] *E.g.*, Laws and ordinances against the release, disposal or treatment of waste water or runoff "associated with human habitation and harmful to the aquatic environment" were present in Tahoe-Sierra, but were regarded as not sufficiently direct, and the damage that they were designed to prevent was not sufficiently immediate to sustain application of the nuisance exception to the categorical takings rule of Lucas. 34 F. Supp. 2d at 1254–55.

[132] 34 F. Supp. 2d at 1251, n.4, and 1255.

[133] NICHOLS, EMINENT DOMAIN, (3d ed.), § 6.03[5].

[134] 317 Ore. 131, 854 P.2d 449 (1993), *cert. den.* 510 U.S. 1207 (1994).

toric, customary rule that the "dry sand areas" of beachfront were reserved for public use.[135]

The Oregon court traced this customary public right to the unique nature of the "dry sand area" and the custom that had grown up around it, and it offered the following observation on the common law doctrine of custom: To be recognized as a basis for property rights, it must be shown that (1) the land has been used in this manner so long 'that the memory of man runneth not to the contrary;' (2) the land has been used without interruption; (3) the land has been used peaceably; (4) the public use has been appropriate to the land and the usages of the community; (5) the boundary is certain; (6) the custom is obligatory, i.e., it is not left up to individual landowners as to whether they will recognize the public's right to access; and (7) the custom is not repugnant or inconsistent with other customs or laws.[136]

Applying the *Lucas* analysis to the case before it, the Oregon Supreme Court concluded:

> the common-law doctrine of custom as applied to Oregon's ocean shores...is not "newly legislated or decreed"; to the contrary, to use the words of the *Lucas* court, it "inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership."[137]

The State Supreme Court rejected plaintiff's claim that, as a result of *Lucas*, the doctrine of custom and the State's statutes implementing that doctrine are unconstitutional, finding that the charge of a facial taking was not supported by the evidence.[138]

The decision in *Stevens* suggests that state nuisance and property law may offer some leeway in applying the rules on categorical takings. Since property rights based on custom and prescriptive easements are inherently oriented to local or regional conditions and practices, however, and since such rights must be specifically asserted and a proper foundation laid for them in the trial record, the effect of this doctrine upon categorical takings based on *Lucas* may be limited in its application.[139]

More widespread in state common law and the scope of its applications, however, may be the public trust doctrine.[140] Already used in several states to answer claims for compensation due to constitutional taking,[141] this doctrine was noted in passing by the Oregon Supreme Court in *Stevens*. Prospects for refining the application of the nuisance exception in these directions, however, remain speculative. Experience with the nuisance exception as defined in *Lucas* has been slow to reveal how accurately the dissenting opinions may have foreseen its applications, or how courts may extend the public trust concept to longstanding neighborhood practices in arriving at definitions of state and local nuisance and property law. Nor is it certain how changed circumstances or newly discovered knowledge may alter public values and outlooks concerning property rights.

4. Harm/Benefit Analysis

In its adoption of categorical treatment for certain types of regulatory takings, the U.S. Supreme Court in *Lucas*[142] rejected the idea of always having to test the character of the regulatory action in question by reference to whether its purpose was to prevent or abate an injury being done to the public by the property owner or to confer upon or preserve to the public some benefit that otherwise might be lost. This process, customarily called the "harm/benefit analysis," is associated with the axiom that a regulation that prevents a property-owner from inflicting harm upon others is a valid exercise of the police power, and therefore does not result in a compensable taking of property even though its value may be diminished due to the regulation. Conversely, an action intended entirely to confer a benefit upon the public can much more easily be equated to an exercise of eminent domain and so be a compensable taking.[143]

During the formative years of American police power doctrine—roughly, 1870 to 1920—the harm/benefit analysis was accepted intuitively as reinforcing the separation of actions under the police power and actions through eminent domain.[144] The major milestones defining the scope of the police power—*Mugler, Lawton, Euclid, Nectow, Hadacheck,* and *Goldblatt*—furnish examples of using this approach and of the doc-

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[135] 510 U.S. at 1211.

[136] 854 P.2d at 454.

[137] 854 P.2d at 456, citing State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969) and BLACKSTONE'S COMMENTARIES.

[138] OR. REV. STAT., §§ 390.650 and 390.655 (1997 supp.); ORE. ADMIN. REG., §§ 736-20-005 to 730-20-030.

[139] On the necessity of specific assertion and foundation, compare: State Highway Comm'n v. Fultz, 261 Ore. 289, 491 P.2d 1171 (1971) and McDonald v. Halvorson, 308 Ore. 340, 780 P.2d 714 (1989).

[140] Recognition of public rights in certain natural resources and environmental amenities, as traced through Roman and English common law, rests on the premise that certain common properties are held by government in trusteeship for the free and unimpeded use of the general public. As adopted in American law, the public trust doctrine has been applied chiefly to shorelines and parklands. Wider application to environmental concerns is discussed in JOSEPH L. SAX, DEFENDING THE ENVIRONMENT, 163–64, *et seq.* (1977).

[141] *See* Erin Pitts, *The Public Trust Doctrine: A Tool For Ensuring Continued Public Use of Oregon Beaches,* 22 ENVIR. L. 731, 737, n.40 (1992), noting other jurisdictions that have adopted the common law doctrine of custom.

[142] 505 U.S. 1003, 1023–25 (1992).

[143] Lynda J. Oswald, *The Role of 'Harm/Benefit' and 'Average Reciprocity of Advantage' Rules in a Comprehensive Takings Analysis,* 50 VAND. L. REV. 1449 (1997).

[144] Preventive regulation of nuisances and noxious uses of land occurred throughout the Colonial and Revolutionary Period as documented in John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine,* 109 HARV. L. REV. 1252, 1259–81 (1996).

rnish examples of using this approach and of the doctrine that evolved around it.[145]

Repression of harm and the bestowal of benefits, however, became increasingly difficult to keep separate where regulatory programs were combined with federal financial and technical assistance programs. *Lucas* presented this aspect of the regulatory takings issue precisely and forcefully when it invited the Court's attention to restrictions on residential homebuilding in a beachfront location.[146] None could say that the landowner's actions as proposed were nuisance-like or harm-producing in traditional police power terms. This borderline situation allowed Justice Scalia to speak for the Court as follows:

> When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation which 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish "regulatory takings"—which require compensation—from regulatory deprivations that do not require compensation.[147]

Such criticism may well be thought to go further than necessary to dispose of the takings issue in *Lucas* since it came to the Court on a trial record which found that the State's regulatory action in that instance deprived the owner (Lucas) of all beneficial use of his beachfront property and left him no prospect of development. On such a record the question of compensability should have been relatively easy to dispose of, unless at the moment the Court happened to be waiting for an opportunity to establish a categorical rule for compensation of certain types of takings. In either event, it allowed the Court to present a finding of "no economically viable uses" on an "objective and value-free basis."[148]

The same could not be said where this basis for categorical treatment was absent, and analysis was required to determine that a challenged regulation substantially and directly advanced a public interest.[149] So, where restriction of certain specific rights in land—e.g., access, light and air, waterfront—affected some but not all economically viable uses of a parcel of land, liability for compensation under the Takings Clause is determined by balancing combinations of factors reflecting the harms and benefits associated with the private interests in property and the competing interests of the public. As a practical matter, harm/benefit analysis remains helpful in state and local government programs for managing both natural and man-made resources, and the processes of comprehensive planning.

Implied recognition of the advantages of utilizing harm/benefit analysis in land management was seen in both *Nollan*[150] and *Dolan*[151] where the practice of "proffering" was considered. In each case an unexpressed premise of the governmental action was that the landowner's proposed development would contribute to the creation of conditions that would be harmful (either long term or short term) without producing sufficient public benefits in return. A justification for applying harm/benefit analysis in designing development exactions was given by Justice Scalia in *Pennell v. City of San Jose*,[152] where a local rent control ordinance was challenged as a regulatory taking, but was dismissed as premature. Justice Scalia dissented, arguing that the takings claim should be considered on its merits, and citing the proposition in *Armstrong v. United States*[153] that the purpose of the Fifth Amendment is "to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." And he went on to comment as follows:

> Traditional land use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.[154]

In their own ways, the decisions in *Nollan* and *Dolan* may be viewed as strengthening the continued usefulness of harm/benefit analysis by insisting on more precise documentation of the connections between regulatory actions imposed upon property and the police power purpose intended to be served thereby. In *Nollan*, the "essential nexus" between the dedication of the beachfront easement required by the Coastal Commission[155] and the police power objective of the beachfront protective legislation was scrutinized to assure that it "substantially advanced" the accomplishment of its legitimate state interest. And in *Do-*

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[145] Mugler v. Kansas, 123 U.S. 623 (1887); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. Cambridge, 277 U.S. 183 (1928); Lawton v. Steele, 152 U.S. 133 (1894); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Goldblatt v. Hempstead, 369 U.S. 590 (1962).

[146] 505 U.S. 1003 (1992).

[147] 505 U.S. at 1026.

[148] 505 U.S. at 1024–26.

[149] Oswald, *supra* note 52, at 1156.

[150] 483 U.S. 825 (1987).

[151] 114 S. Ct. 2309, 512 U.S. 374 (1994).

[152] 485 U.S. 1, 19-20 (1988).

[153] 364 U.S. 40, 49 (1960).

[154] 485 U.S. at 20.

[155] 483 U.S. 825, 837 (1987).

lan,[166] this scrutiny was extended to assure that there was also a "rough proportionality" between the harm associated with the regulated form of development or resource use and the benefits obtained by applying the regulatory action selected to protect the public in the case in question. Indeed, instead of marking the end of harm/benefit analysis in judicial review of land-use regulation, these efforts to refine current doctrine for implementing the Takings Clause may sharpen the distinctions that can be obtained in this analysis to the advantage of all parties in meeting the land-use and transportation planning requirements of current federal-aid transportation programs.[167]

IV. LEGISLATIVE DEFINITION AND RESOLUTION OF THE TAKINGS ISSUE

A. Recourse to Legislative Remedies

Landmark environmental legislation in the 1960s and 1970s involved governmental agencies at all levels with problems of achieving cleaner air and water, stricter discipline for toxic waste disposal, conservation of natural resources, and preservation of community natural and cultural heritage. By the 1980s the administrative and regulatory apparatus for implementing these programs reached a size and pervasiveness that stirred up a backlash of opposition to government regulation among landowners and developers. A contributing cause of dissatisfaction was the perceived failure of judicial process and doctrine to clearly define the takings issue in these cases and dispose of them with equity and certainty.

Following its ruling in *Penn Central*,[168] the Supreme Court used procedural grounds to dispose of a series of cases alleging regulatory takings. Failing to obtain guidance on the merits of their takings claims or encouragement for a change in the judiciary's traditional reluctance to overrule legislative and administrative discretion in land-development disputes, the real estate and industrial communities sought redress of their complaints through executive and legislative action. In 1988 these efforts were rewarded by issuance of a Presidential Executive Order requiring federal agencies to perform a "takings analysis" prior to promulgation of new regulations pertaining to private property.[169] In the 1990s, the same interest groups campaigned successfully at the state level for enactment of legislation applying to regulatory actions involved in state programs and state-aided local actions. Most of the resulting body of legislation was designed to assure that new land-use regulations would be reviewed and assessed for their restrictive impact on private property; some, however, went further to create causes of action for losses of property value that were substantial, although not qualifying as a "taking" under current judicial doctrine.

B. State Private Property Protection Legislation

1. State Regulatory Impact Assessment Laws

State laws that provide for assessment of regulatory impacts on private property offer a preliminary or indirect form of protection to property owners. By requiring that a formal evaluation be made prior to promulgation of a land-use regulation or prior to a specific administrative regulatory action, these laws set up a procedural requirement within the administrative process, but leave it to the affected owner to obtain redress by other means if it is determined that in fact his property has been taken or is threatened with taking. At most the requirement of an impact assessment interposes a procedural step that may delay promulgation of a regulatory standard or the application of a regulatory action until its consequences have been analyzed and evaluated as well as they can be. Intervention in this manner for the purpose of enabling disputants to reconsider their positions and objectives is a technique that has been used in other regulatory programs, generally with the result of avoiding disputes or facilitating their resolution.[160]

Regulatory impact assessments can be significant in the early formative stages of specific regulatory measures. In the larger context, regulatory impact assessments increase public awareness of the takings issue that may be involved in achieving general public purposes by regulation; and, by focusing public debate on that issue, they may influence the way particular regulations are applied. Such so-called "checks on the abuse of power" tend to be more political than legal in their nature. Some state legislation has assured this by specifying that property owners may not bring suits over failure to comply with an assessment requirement,[161] or by limiting the issue on judicial review to whether the required assessment was in fact made

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[166] *Supra* note 151.

[167] *See* ROBERT FREILICH and DAVID W. BUSHEK, *Thou Shalt Not Take Title Without Adequate Planning: The Takings Equation After Dolan v. City of Tigard*, 27 URB. LAW. 187, 192–196 (1995); ROBERT FREILICH and ELIZABETH GARVIN, *Takings After Lucas: Growth Management, Planning and Regulatory Implementation Will Work Better Than Before*, 22 STETSON L. REV. 409, 411 (1993); Dwight Merriam and Jeffrey Lyman, *Dealing With Dolan, Practically and Jurisprudentially*, 17 ZONING & PLANNING LAW REPT., No. 8., 57-60 (1994).

[168] 438 U.S. 104 (1978).

[169] Executive Order 12630, March 15, 1888, *"Governmental Actions and Interference With Constitutionally Protected Property Rights,"* 53 Fed. Reg. 8859 (1988).

[160] *E.g.*, Environmental Impact Statements required by the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and the Federal Aid highway program's requirement for socioeconomic assessments in connection with planning highway construction in urban areas. 23 U.S.C. 138.

[161] IDAHO CODE § 67-8003(2) (Supp. 1997).

and transmitted to the agency involved.[162] Most state assessment statutes are silent on the consequences of noncompliance.

While the political process is never entirely irrelevant in shaping legal doctrine and works in subtle ways to avoid unnecessary hardship from regulatory impacts, the state assessment statutes must contend with another handicap built into their basic structure. This is because the legislative language often defines a "taking" by reference to the judicial interpretation currently given to the Fifth and Fourteenth Amendments to the U.S. Constitution and comparable provisions of state constitutions. In this respect the assessment states have incorporated into their statutes the same much-criticized body of doctrine that has evolved from the U.S. Supreme Court's decisions on the takings issue.

Although assessment statutes do not directly provide for judicial review of a taking claim on its merits, some states have provided assistance to property owners who manage by other means to secure a hearing on the merits of their claim. Thus, Kansas and Tennessee provide for payment of attorneys fees to an owner of private property who successfully establishes that governmental regulatory action resulted in an unconstitutional taking of his property.[163] Among the assessment statutes, North Dakota's law is distinctive in that it offers a definition of "regulatory taking" that is not based solely on U.S. Supreme Court doctrine. It requires that when administrative agencies take regulatory actions that impact private property, they must "explain why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners." Also, it must certify that "the benefits of the proposed rule exceed the estimated compensation costs." With respect to the statutory definition of "regulatory taking," the North Dakota legislation states that it is:

> A taking of real property through the exercise of the police and regulatory powers of the state which reduces the value of the real property more than fifty percent. However, the exercise of a police or regulatory power does not effect a taking if it substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law.[164]

To what extent the distinctions in the North Dakota statute amount to real differences in the law is not immediately clear, and some commentators have expressed concern that the exceptions included in this statute and those of other states may significantly reduce their application in practice.[165]

A comparative summary of the key provisions of current state regulatory impact assessment legislation is compiled in Appendix A of this report.

2. Assessment Process Guidelines

Statutes providing for assessment of the impact of governmental regulatory rules and actions on private property customarily assign this function either to the state's Attorney General or to the governmental entities that take such action. Thereafter, when regulatory agencies prepare impact assessments they are expected to do so pursuant to guidelines furnished by the Attorney General or the state legislature.

Uniformly the guidelines promulgated by the Attorneys General state that they are not to be construed as formal "opinions" of the Attorney General, or determinations of whether a specific action constitutes a taking of private property. Nor is it their purpose to expand or diminish the private property protection provided in the federal and state constitutions. A private party is not deemed to have a cause of action against a governmental agency for its failure to follow any suggested procedure contained in the guidelines.[166]

No standard format has been used in these guidelines, but most states indicate that their purpose is to assist state agencies and local governments in the internal management of their statutory responsibility for assessment of the impact of regulatory actions, and to establish an orderly and consistent way for agencies to consider the implications of their actions regarding unconstitutional takings of private property. Some go further to offer comments on the intent and construction of the guidelines for the benefit of their users. Thus, for example, Michigan's Attorney General advises:

> The guidelines should be construed and applied as a whole, as a means of assisting in the identification of potential takings. Applying a single principle or concept contained in these guidelines, without due regard for the other principles or concepts, could lead to a misapplication of the legal standards. Although some "bright line" rules have been developed by the courts, takings inquiries are uniquely fact specific, exceptions to general rules may apply in any particular circumstance. And takings jurisprudence has been the subject of many recent decisions.[167]

Preoccupation with the "process" of assessment is reflected in state statutes that specify that the Attorney General shall prepare not only a set of guidelines, but also a checklist for performing the takings' analysis in an "orderly and consistent manner." Washington State goes beyond a concern for state agencies and local governments to direct the Attorney General "in consultation with the Washington State Bar Association, [to]...develop a continuing course to implement" the

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[162] DEL. CODE ANN., tit. 29, § 6005(a) (Supp. 1996).

[163] KAN., STAT. ANN., § 77-709 (Supp. 1996); TENN. CODE ANN., § 12-1-205 (Supp. 1998).

[164] N. D. CENT. CODE, § 28-32-02.5 (Supp. 1995).

[165] Jerome M. Ogran, *Understanding State and Federal Property Rights Legislation*, 48 OKLA. L. REV. 191, 200 (1995).

[166] *See, e.g.*, Tennessee Attorney General's Guidelines in TENN. ADMIN. REG., v. 21, no. 8, pp. 1-8, (1995).

[167] Memorandum from the Attorney General to the Michigan Office of Regulatory Reform (Dec. 12, 1996) (copy provided by author).

assessment process.[168] And the Texas statute invites public comment and suggestions concerning the Attorney General's guidelines and directs that any such information must be considered in an annual review of the process.[169]

State assessment legislation typically requires that state agencies "shall" prepare impact analyses when issuing rules and regulations or taking regulatory administrative action, but some leave it unclear as to how strong a mandate this is to adhere to the Attorney General's guidelines. Room to exercise administrative discretion is noted in Tennessee's statement that "[t]he guidelines establish a framework for agencies to use in their internal evaluation....[and] do not prevent an agency from making an independent decision about proceeding with a specific policy or action which the decision makers determine is authorized by law."[170] Michigan's law requires merely that the departments involved review the guidelines internally prior to taking governmental action. Where it appears from such review that specific intended governmental action may constitute a taking, the regulatory agencies are referred to the Attorney General.[171]

Among the guidelines, it is widely recognized that impact assessments are hampered by an unsettled state of judicial doctrine on the takings issue, and assessments should be thorough case-by-case evaluations. At the same time, many state agency functions often may be extremely routine. In the practical application of his guidelines, therefore, Michigan's Attorney General has suggested:

> [W]here a Department routinely or repeatedly takes governmental action of a substantially similar nature or character, it may apply these guidelines to make categorical assessments as to whether such action might constitute a taking. For example, ...whether enforcement of particular requirements in regard to applications for a permit or license might constitute a taking.[172]

Statutes establishing an impact assessment requirement have sometimes indicated features of the assessment that are intended to supplement or be incorporated into other guidelines. Compliance with these statutory requirements is necessary for the sufficiency of the assessment to be acceptable upon administrative or judicial review. A summary of state statutory guidelines for preparation of regulatory impact assessment is contained in Appendix B, and excerpts from guidelines promulgated by selected states are in Appendix C of this report.

3. State Compensation Laws

In six states legislation creates causes of action for and authorizes payment of claims where property is taken by governmental regulatory action. In most cases these laws respond to a perceived need to protect certain of the state's valuable and vulnerable resources.

In North Carolina, the property interests being protected are exclusive shellfishing rights held under lease from the owner of offshore land under navigable waters of the State.[173] Places containing shellfish are subject to regulation by the State's Department of Environment, Health and Natural Resources for the purpose of conserving the State's marine and estuarine resources, and under this authority the Departmental Secretary may limit the location and extent of leasehold rights to fish for oysters, clams, and other shellfish. In exercising this authority the Secretary may deny, cancel, or modify permits and adjudicate disputed claims arising in the management of the State's shellfish beds. A person claiming that regulatory action by the Department has deprived him of private property rights in navigable waters without just compensation may file his claim for adjudication by the County Superior Court. If the claimant prevails, the Department may either condemn the property interest involved or else restore the disputed right.

In Mississippi concern for the interests of owners of forest and agricultural land was expressed in legislation to protect and encourage "production of agricultural products, timber, wood and forest products" by compensating landowners for their losses if the State "prohibits or severely limits such forestry or agricultural activities."[174] The statute creates a right of action in inverse condemnation against the State where it prohibits or severely limits the right of an owner to conduct forestry or agricultural activities so as to reduce the fair market value of the land, timber, or forest products, or the personal property rights associated with conducting those activities, by more than 40 percent of their value before the State's regulatory action.[175] Payments of compensation for such losses can be avoided in part if the State agency that is found liable for the inverse condemnation repeals the action complained of before the court's decision becomes final.

Deference to the interests of agricultural and forest land resulted in enactment of Louisiana's "Right to Farm and Forest Act" in 1995.[176] The statute's policy sought to minimize the impact of governmental regulatory action on agricultural land and "private agricultural property rights" by (1) avoiding actions that re-

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[168] WASH. REV. CODE ANN., § 36.70A.370(3) (Supp. 1999).

[169] TEX. GOV'T CODE ANN., § 2007.041 (Supp. 1999).

[170] Tenn. Admin. Reg., *supra* note 166 at 2.

[171] *Supra* note 167.

[172] *Id.*

[173] N.C. GEN. STAT., § 113-206 (Supp. 1999). For background on application of the public trust doctrine to North Carolina estuarine resources, see Monica K. Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation; Private Claims to Estuarine Marshes; Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. REV. 565 (1986).

[174] MISS. CODE ANN., § 49-33-3; 49-33-5 (Supp. 1998), *Mississippi Agricultural and Forestry Activity Act.*

[175] *Id.*, § 49-33-7; 49-33-9.

[176] LA. REV. STAT. ANN. § 3:3601 to 3:3624 (Supp. 1999).

quire compensation under the U.S. and state constitutions; (2) avoiding diminution in the value of private agricultural property used in agricultural production by 20 percent or more; (3) expediting decisions on regulatory matters where the delay will substantially interfere with the use or value of agricultural property rights; and (4) avoiding unnecessary delay in compensating private agricultural property owners when losses in value result from governmental regulatory action.[177] Implementation of these purposes is accomplished by requiring written impact statements prior to regulatory actions that are likely to diminish property value, and by creating a right of action against governmental entities to determine whether their action reduced the value of the claimant's property.[178] If the court determines that the value of the property in question was diminished by governmental action the aggrieved owner may (1) recover damages equal to his land's loss of value and retain title to the land or (2) recover the entire fair market value of the land prior to loss and transfer title to the governmental entity involved.

Recourse to litigation is not favored by the Louisiana statute. Property owners and governmental entities are encouraged to seek resolution of claims under the statute by use of mediation or other alternative dispute resolution methods; and in the absence of such efforts courts may require the parties to make them. Also, when a property owner prevails in litigation the governmental agency may reduce its financial liability by rescinding or repealing the action or regulation found to have caused the property loss. Finally, a broad exception to the statutory right of action is given when the purpose of the governmental action in question is "the regulation of agriculture...or agricultural activity by a governmental entity charged with responsibility for promotion, protection and advancement of agriculture."[179]

In South Carolina the state was prompted to revise its system for regulation of coastal shoreline areas to become consistent with the U.S. Supreme Court's decision in *Lucas*.[180] This was accomplished by giving to owners of recorded interests in land seaward of the setback line a right of action for construction in beachfront locations. In such actions the courts determine whether the petitioner has an interest in the beachfront area and whether the Coastal Council's regulation of construction so restricts the use of his property as to deprive the owner of the practical use of it and therefore constitutes a regulatory taking. If the petitioner is successful, the state must either issue the necessary permits for construction, make an exception of the property in question, or pay reasonable compensation as determined by the court.[181]

Statutes that are not limited to protecting particular economic or natural resource interests and are available for the general relief of owners of private property that is subjected to a regulatory taking have been enacted in Florida and Texas.

Florida's statute creates a cause of action, separate and distinct from the constitutional law of takings, for payment of compensation when a new statute, rule, regulation, or ordinance, as applied, "unfairly affects" real property—that is, when the action of a governmental entity "inordinately burdens" an existing use of real property or a vested right to a specific use of real property.[182] Statutory definitions of such key terms as "existing use" and "inordinate burdens" suggest that the law focuses on issues customarily raised in local land development situations. Definition of the latter term includes detailed legislative construction, including "["inordinately burdened" means] property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large."[183]

Statutory procedure for determining claims filed under this law emphasizes resolution by negotiated settlement during a 180-day notice period prior to formal filing. A range of possible bases for settlement is listed in the statute.[184] Acceptance of a negotiated settlement by a property owner is followed by execution of a settlement agreement and implementation of its terms which, when approved by the circuit court where the property is located, are accepted as both protecting the public interest and preventing the governmental regulatory action from inordinately burdening the private real property rights involved. In the event of failure to reach an agreement, the governmental entities concerned certify the ripeness of their decisions for judicial review, and the owner's claim is ready for a determination by the circuit court of whether his property or vested rights to a specific use of his property are inordinately burdened by the governmental action in question.

The Florida law notes that the cause of action created therein is for governmental actions that may not rise to the level of a taking under the state or U.S. constitutions, and that it does not supplant arrangements by the parties to utilize lawfully available arbitration, mediation, or other forms of alternative dispute resolution to avoid regulatory hardships or takings.

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[177] *Id.* § 3:3608.

[178] *Id.* § 3:3610.

[179] *Id.*, § 3.3612.

[180] 505 U.S. 1003 (1992).

[181] S.C. CODE ANN., § 48-39-305 (1976, Supp. 1998).

[182] FLA. STAT. ANN. § 70.001(1) (Supp. 1999) and (2), *Bert J. Harris Jr. Private Property Rights Protection Act.*

[183] *Id.* § 70.001(3)(e).

[184] Specifically: adjustment of land development or permit standards; modification of density and use limits; transfer of development rights; development conditions; variances and exceptions; government purchase; no change in governmental action. FLA. STAT. ANN., § 70.001(4)(c) (Supp. 1999).

As in the case of some other private property rights statutes,[186] the Florida law attempts to avoid conflicts with other longstanding doctrines, such as those applying to temporary impacts, impacts of state actions to comply with federal-aid programs, efforts to address public nuisances at common law, and noxious uses of private property, nor does the law apply to actions taken by governmental entities that relate to the operation, maintenance, or expansion of transportation facilities or eminent domain proceedings relating to transportation facilities.[188]

The Texas Private Real Property Rights Preservation Act of 1995[187] applies broadly to all real property interests recognized by the common law, including ground and surface water rights, and it addresses governmental actions that temporarily or permanently restrict the owner's right to the property in a way that causes a reduction of at least 25 percent in the market value of the affected property.

Private real property owners claiming to have suffered a taking within this statutory definition are given the right to bring suit in the county court where the property is located to determine whether the governmental action complained of does in fact cause a taking. Where the court finds that an action amounts to a taking, the property owner is only entitled to, and the governmental agency is only liable for, invalidating the contested action. Accordingly the court's judgment in favor of the property owner will order rescission of the agency's action. If, in response to this order, the agency elects to pay compensation, the court will withdraw that part of the judgment rescinding the agency's taking action. If the agency chooses not to pay the compensation so prescribed, the court will reinstate the order rescinding the agency's action.[188] The same results can be achieved by an aggrieved property owner by recourse to alternative dispute resolution under the Texas Civil Practice and Remedies Code.[189]

The Texas statute also requires that governmental entities preparing to take actions that may result in taking private real property within its purview shall provide at least 30 days public notice of their proposed action, containing a "reasonably specific" description of the proposed action and a summary of the takings impact assessment statement pertaining to the action. A governmental action requiring a takings impact assessment is void if that assessment is not prepared, and a property owner affected by the governmental action in such a situation may bring suit to have the action declared invalid for this reason. Compensation is not awarded to the successful petitioner in such cases, but costs and attorneys fees are provided for the prevailing party.[190]

Commentators have noted that the Texas Private Real Property Rights Preservation Act of 1995 does not establish any absolute right to compensation for private property taken by State governmental entities. Instead, it creates a right of action against the entity that, if successful, can result only in having the governmental action declared invalid. The aggrieved property owner is entitled to recover the reduced value of his property only if the governmental entity decides not to withdraw its earlier action. This facet of the statute, plus an extensive list of categories of actions to which the Act does not apply, substantially limit its potential for relieving financial hardship from regulatory takings; but when it was enacted in 1995 the Texas statute was credited by its proponents with taking an important step in providing protection for private property rights where none had been available in state law prior to that time.[191]

C. Proposed Federal Private Property Rights Legislation

President Reagan's Executive Order 21630 for analysis of the takings issue in proposed federal regulatory activity turned out to have little apparent influence in clarifying the line between the exercise of police power and eminent domain. This may have been inevitable since the analysis it called for was based on the Supreme Court's existing interpretation of the Takings Clause. In this instance, innovation was not a prerogative of either the executive or administrative establishment.

Legislative initiatives by Congress in 1995–1996, however, directly addressed the question of substantive standards for governmental takings with the objective of articulating a "bright line" rule for bringing claimants and regulators together, first to negotiate, then, if necessary, to arbitrate or adjudicate the issue of compensation.[192]

The initiatives of the 104th and 105th Congresses were based on criticism that the Supreme Court had not provided firm guidance, that the Court had encouraged taking issue cases to deteriorate into "fact specific inquiries," that these were unnecessarily

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[186] *E.g.*, LA. REV. STAT. ANN., § 3:3602, 3:3622 (Supp. 1996); MISS. CODE ANN. § 49-33-7 (Supp. 1996).

[187] *See* FLA. STAT. ANN. § 70.001(10) and (11).

[188] TEX. GOV'T CODE ANN. tit. 10, §§ 2007.001 to 2007.045 (Supp. 1997).

[189] *Id.* §§ 2007.021; 2007.023; 2007.045. Also, Texas law directs that in appraising private real property the effect of a governmental action on the property's market value, as determined in a proceeding carried out under § 2007.021 to 2007.025, GOV'T CODE ANN., shall be taken into consideration in appraising the property for tax purposes. TEX. CODE ANN. (Supp. 1997, TAX CODE, § 23.11.

[189] TEX. CIV. PRAC. & REM. CODE ANN., (Supp. 1999), § 154 (Alternate Methods of Dispute Resolution).

[190] TEX. GOV'T CODE ANN. (Supp. 1999), §§ 2007.041 to 2007.045.

[191] Daniel Anderson, *The Texas 'Takings' Statute: Ten Basic Facts to Know*, 60 TEX. BAR J. 12 (1997).

[192] Source material on property rights legislation in the 104th and 105th Congresses includes: H.R. REP. No. 46, 104th Cong., February 23, 1995, *Private Property Rights Protection Act of 1995* (H.R. 925); S. REP. No. 239, 104th Cong., 2d Sess. *Omnibus Property Rights Act of 1995.*

lengthy and costly for property owners, that they produced inconsistent applications of the law, and that what was needed was a "movement towards a property rights regime protected by bright line rules."[193] But, insofar as the proposed Congressional legislation offered any bright line criteria for regulatory takings, it offered little that was new. A close reading suggests that at most it merely codified selected principles recently laid down by the Supreme Court in *Nollan, Lucas,* and *Dolan,*[194] plus a new category encompassing "any other circumstances where a taking has occurred within the meaning of the Fifth Amendment of the U.S. Constitution."[195] The bill's designation of a loss of 33 per cent of the affected property's value as a test of taking was new, but it was at variance with other percentages offered as bright line criteria in the House of Representatives bill and various state legislative proposals, and a consensus was absent.

V. RESOLUTION OF TAKINGS ISSUE CASES IN TRANSPORTATION PROGRAMS

A. Regulation of Highway Traffic Operations

Regulation of the use of public streets and highways rarely raises the takings issue because it does not invade or occupy private property. Nor does it generally adversely affect how landowners may use their land. Within public rights-of-way, owners of property abutting streets, highways, and other transportation facilities may have certain interests that are recognized as property and that may be affected by traffic control measures. Courts have recognized these common law interests as rights in the nature of easements relating to access to and from public ways; rights to light, air, and view; and in some circumstances, rights relating to the space within the right-of-way that is not used for the main traveled way.[196]

Enforcement of traffic regulations occasionally may interfere with use of private property. Claims that such actions amount to compensable takings of private property have rarely been successful. Even where there has been actual physical invasion of plaintiffs' property by the police for parking limit enforcement, their temporary intrusions have been held not to be takings per se.[197] And, charges that the enforcement interfered with the owners' use of their property and reduced the market value were also dismissed because the police actions were not shown to have prevented the owners from the reasonable use of their property or to have thwarted any reasonable investment-backed expectations of development.[198]

Abutting landowners' rights with respect to public streets and highways are subject to regulation of the use of those facilities for the benefit of the traveling public, and landowners have no vested interests in the character or volume of traffic passing their property, the manner of traffic law enforcement, or the geometric and structural design selected for a facility by governmental authorities. Nor do they have any property right against subsequent changes in these features for the convenience and safety of the traveling public, of which the governmental entities controlling the facilities are the judges.

Accordingly, it has been held that changing traffic flow from two-way to one-way does not provide an owner abutting the street with grounds to claim that his access has been impaired or denied.[199] The court explained:

> The inconvenience resulting from traveling a more circuitous route is the same kind of inconvenience the general public suffers when there is a modification of certain traffic regulations on existing streets and highways. Thus the public is forced to travel a more circuitous route upon the adoption of no-left-turn regulations, or one-way street restrictions. Defendants are not entitled to recover compensation for a loss unless they can show that the type of loss is peculiar to those owning land as distinct from the loss suffered by the general public.[200]

Physical changes within the public right-of-way to improve the safety and efficiency of traffic operations generally are regarded as proper police power measures. Accordingly, use of traffic control islands, markings, and barriers to channelize traffic, and curbing or fences along the margins of the right-of-way have been regarded as not depriving abutters of their rights unless such measures close all means of access to and from the property.[201] Although such measures may be challenged as to their relationship to public safety, it has been noted by at least one state court that cities generally are not required to show a "rough propor-

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[193] S. REP. No. 239, 104th Cong., *supra* note 191, at 16–17. *See also,* David A. Thomas, *Illusory Restraints and Empty Promises of New Property Protection Laws*, 28 URB. LAW. 223 (1996).

[194] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994).

[195] S. REP. No. 239, 104th Cong., *supra* note 191, accompanying S. 605, 105th Cong., 1st Sess.

[196] 39 AM. JUR. 2d. § 182-188, "Highways, Streets and Bridges." (VI., Title & Rights of Public and Abutting Owners.)

[197] Szymkowiecz v. District of Columbia, 814 F. Supp. 124 (D.D.C. 1993).

[198] 814 F. Supp. at 127–28, distinguishing Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982) and Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[199] Ambrose v. City of Knoxville, 728 S.W.2d 338 (Tenn. App. 1987).

[200] 728 S.W.2d at 340. *See also* State Highway Comm'n v. Cent. Paving Co., 240 Or. 71, 399 P.2d 1019 (1965), frontage road; Argo Inv. Corp. v. State Dep't of Transp., 66 Or. App. 430, 674 P.2d 620 (1984), street closure; Randall v. State, 427 N.Y.S.2d 325, 75 A.D.2d (1980), one-way street; Katz v. Village of Southampton, 664 N.Y.S.2d 457 244 A.D. 2d. 461 (1997), regulation of beach traffic; Brumer v. Los Angeles Metropolitan Transp. Auth., 43 Cal. Rptr. 2d 314 (1995), one-way street.

[201] Mississippi State Highway Comm'n v. Hale, 531 So. 2d 623 (Miss. 1988).

tionality" between the private inconvenience and the public safety when regulating street and highway traffic.[202]

In most respects, abutters' rights stop at the highway's edge, as illustrated by rulings that refusal of state authorities to erect guardrails along a landowner's frontage line in order to channelize traffic was a proper exercise of the police power and was not a taking.[203] Similarly, it was held to be not a taking of property to require landowners to cut vegetation on the roadsides within the right-of-way in front of their property.[204]

Prohibition of on-street parking in front of commercial property is not a compensable taking where physical access to that property is not unreasonably denied.[205] Even where longstanding practice allowed roadside business to use part of the right-of-way for customer parking, courts have said that it "implies nothing more than a permissive way, which could in no way ripen into a right of access."[206]

B. Construction Within Public Rights-of-Way

Where construction or reconstruction work within public rights-of-way for transportation facilities causes adverse impacts on adjacent or nearby private property, compensable injury or even a taking of such property may occur. In distinguishing between compensable takings and cases that may be treated as noncompensable consequential damages, impacts involving physical invasion or occupation of private property are easiest to identify as takings. Thus, where a sidewalk on the right-of-way was excavated to construct a rapid transit rail facility, the lateral support of a building on adjacent property was withdrawn with the result that the foundations cracked and subsided. It was held that the landowner's right to lateral support of his land was an "interest" that was protected by the Constitution from appropriation or destruction for public use.[207]

Equally easy to understand are cases where private property is invaded by flood waters attributable to construction operations on nearby land. In such situations, however, the distinction between a noncompensable, nonrecurring trespass and a permanent appropriation is important, as seen in *Hillsborough County v. Gutierrez*.[208] Here an inverse condemnation claimant's property flooded regularly because a nearby subdivision developer's drainage system, with County approval, altered the natural runoff pattern of surface water following rainfall. Holding that the flooding was not merely temporary and incidental, the court declared it was permanent in the sense that the rainy season is reasonably expected to recur continually in the future,[209] and that the landowner was deprived of the beneficial use of the part of his property so afflicted. At the same time, the owner's residence located in another part of the property was not considered to have been taken since methods were available to permit the owner's continued use through the rainy season.[210]

To prove a compensable taking by flooding, a claimant must show that governmental action, by design or negligence, resulted in an invasion of flood water that was greater than mere tortious interference; that is, damage properly characterized as permanent or recurring, or chronic and unreasonable.[211] The takings analysis in such cases focuses on the regularity of the flooding, its duration, the utilization of remedial measures, and the extent to which the owner is deprived of beneficial uses of the property in question.[212]

When physical occupation of property and ouster of the owner from possession do not occur, inverse condemnation claimants sometimes have been able to show the loss or impairment of other interests, such as their implied easement of light, air, and view. This was an issue in *Castor v. City of Minneapolis*,[213] where it was claimed that an elevated pedestrian walkway (or "skyway") running the length of the claimant's building about 14 feet above ground and 4 to 5 feet from the building wall constituted a taking of the owner's implied easement. The skyway was built on supporting pillars in the street that allowed space for vehicular and pedestrian traffic through the alley to reach a municipal parking ramp and bus terminal. The court considered the nature of the landowner's easement and observed that while it was a constitutionally protected form of property, it was qualified by and subservient to the public easement in the roadway, saying:

> But the public, too, has limits. The public "cannot go beyond, but must be confined within, the general purpose

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[202] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).

[203] Pringle v. City of Wichita, 22 Kan. App. 2d 297, 917 P.2d 1351 (1996).

[204] Inglis v. State, 290 N.Y.S.2d 145 (1993).

[205] Goodnow v. City Council of Maquoketa, 574 N.W.2d 18 (Iowa 1998).

[206] Yegan v. City of Bismarck, 291 N.W.2d 422 (N.D. 1980).

[207] Holtz v. San Francisco Bay Area Transit Dist., 131 Cal. Rptr. 2d 646, 557 P.2d 430 (1976).

[208] 433 So. 2d 1337 (Fla. App. 2d Dist. 1983).

[209] 433 So. 2d at 1339.

[210] 433 So. 2d at 1340, noting that, unlike the federal law and some other state laws, Florida does not recognize temporary deprivation of use as a taking; *See also* Sun Oil Co. v. United States 572 F.2d 786 (Ct. Cl. 1978); State Dep't of Transp. & Dev. v. Van Willett, 383 So. 2d 1344 (La. App. 1980). *And compare* Kratzenstein v. Bd. of County Comm'rs, 674 P.2d 1009 (Colo. App. 1983), estoppel.

[211] Bodin v. City of Stanwood, 901 P.2d 1065, 1069 (Wash. App. Div. 1 1995).

[212] NICHOLS, EMINENT DOMAIN, (3rd ed), § 6.06; *See also* Kratzenstein v. Bd. of County Comm'rs, 674 P.2d 1009 (Colo. App. 1983); Marty v. State, 122 Ida. 766, 838 P.2d 1384 (1992); Luperini v. County of DuPage, 265 Ill. App. 3d 84; 637 N.E.2d 1264 (1994).

[213] 429 N.W.2d 244 (Minn. 1988).

> for which the easement was granted." [citation omitted] When the light, air and view over a public street are obstructed by improper street uses, an additional servitude is deemed to be placed on the property owner's implied easements and a taking can be found. [citation omitted]. This court long ago recognized the impracticality of a universal test to determine what constitutes a proper street or highway use....The highway purpose is expansive, accommodating growth and change in transportation and the "transmission of intelligence." Even innovative uses impose no additional servitude "*provided* they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, *and provided* they do not unreasonably impair the special easements of abutting owners' in the street for purposes of access, light and air."[214]

Applying these precepts, the court found that the skyway was not a proper use of the alley and that it imposed an additional servitude on the abutting landowner's property.

This same issue was raised with different results in *Haeussler v. Braun*,[216] where earthen berm sound barriers constructed within a highway right-of-way were alleged to interfere with an abutting owner's light, air, and view and to have diminished the value of his property. It was held, however, that measures to reduce traffic noise were proper highway uses and their consequences must be accepted by the abutting landowners without compensation. Their easement over the public way entitled them only to light, air, and view that was not obstructed by proper use of the street.[216]

Actions alleged to alter or "burden" the easements enjoyed by owners of land abutting transportation facilities have been the basis for inverse condemnation claims in a variety of circumstances. For example, installation of sanitary sewer pipelines within a highway right-of-way was held not to be an added burden on an abutter's servient easement.[217] And where a county constructed a road on land over which the owner of adjoining land had a right of passage, it was held that this action was not a taking despite the adjoining landowner's added expense of making a new way for his passage.[218] Complaints about vibrations from highway truck traffic and failure of public authorities to repair highway pavement also have been rejected as bases for compensable burdens upon abutters' property interests,[219] as have claims that erosion of private property adjacent to a government-constructed waterway was due to the effects of tides and boat traffic.[220]

Claims of inverse condemnation because of increased surface water runoff due to grading operations within the right-of-way have been dismissed as temporary inconveniences rather than permanent takings for public use.[221] But, where land outside the area of the government's construction easement was used for temporary storage of pipes and construction equipment, an inverse condemnation claim was successful because the unauthorized storage area was shown to have interfered with the landowner's access to his property and was not essential to the construction project.[222]

Improvements entirely within the street or highway right-of-way generally can be carried on without taking property of adjoining landowners, even though while being accomplished and after completion they may diminish the attractiveness of the adjoining land, interfere with the owner's convenience and use of it, and reduce its value.[223] Under this principle, such features as curbing and curb cuts, barriers for channelization, one-way traffic, street closures, and the like have become widely accepted. So, where curbing and curb cuts in the street were shown to be designed and installed with the access needs of claimant's commercial traffic in mind, it was predictably held that the landowner's right of access was not impaired so as to constitute a

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[214] 429 N.W.2d at 245–46.

[216] 314 N.W.2d 4 (Minn. 1981)

[216] *See also* 8,960 Sq. Ft More or Less v. State, Dep't of Transp. & Pub. Facilities, 806 P.2d 843 (Alaska 1991). State Dep't of Transp. v. Weggie's Banana Boat, 576 So. 2d 722 (Fla. 1990), circuity of travel and reduced visibility due to highway construction.

[217] Romohr v. Frank, 20 Oh. Misc. 2d 4, 485 N.E.2d 841 (1984).

[218] Griffith v. Montgomery County, 57 Md. App. 472, 470 A. 2d 840, *cert. den.* 469 U.S. 1191 (1984).

[219] Iles v. Commonwealth Dep't of Transp., 124 Pa. Comm. 158, 555 A. 2d 312 (1989).

[220] Boling v. U.S., 38 Fed. Cl. 705, 709 (1997), holding that an adjacent owner has no right to compensation for accommodating to public improvements that do not take private property for public use. The question of whether private property damage should be treated as a taking or a tort, the court said,

> does not turn on the care (or lack thereof) with which an authorized governmental action is pursued, but upon the extent of injury occasioned by the Government's action. 'The essential inquiry is whether the injury to the claimant's property...rises to the magnitude of an appropriation of some interest in his property permanently to the use of the Government,"

citing National By-Products Inc. v. United States, 186 Ct. Cl. 546, 577, 405 F.2d 1256 (1969); Bettini v. United States, 4 Ct. Cl. 755, 757 (1984), mudslide and road collapse.

[221] Hayes v. City of Maryville, 747 S.W.2d 346 (Tenn. App. 1987).

[222] City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

[223] State v. Schmidt, 805 S.W.2d 25, 30 (Tex. App. Austin 1991), stating:

> The theory of this general rule of non-liability rests upon the premise that such changes were reasonably foreseeable when the right-of-way was originally acquired, at which time the right to compensation was necessarily determined for all time. But the general rule of non-liability does *not* apply when the public authority cannot accomplish the improvement or alteration within the original right-of-way and must acquire additional strips of the owner's adjoining land....In those instances, the "proper test" for determining the issue of legal injury and right to compensation "is whether the newly-acquired right-of-way imposes burdens on the butting property which did not exist under the old right-of-way,"

citing Milam County v. Akers, 181 S.W.2d 719 (Tex. Civ. App. 1944).

compensable taking.[224] In contrast, where curbing and traffic islands were shown to prevent entry by tractor trailer trucks that serviced the claimant's business, it was held to be a de facto taking of access rights.[225]

The location and design of curb cuts along streets and highways have sometimes forced landowners to rearrange off-street parking areas on their property. Where this has meant that the landowner can have fewer parking spaces than before, claims of a compensable taking of property have been dismissed as being without merit.[226] Aesthetic interests have fared no better as a basis for claims of compensable taking, as illustrated by *State Highway & Transportation Commission v. Lanier Farm, Inc.*[227] Here, land abutting an arterial highway was being held for future subdivision development according to an unrecorded plat showing the subdivision entrance from the highway at a grove of trees that had "an aesthetically pleasing view." Prior to commencement of any subdivision development, the State determined that the sight distance at the proposed entrance was too short and realigned the highway for better sight distance and efficiency. The landowners claimed to have suffered a compensable taking by the substitution of less attractive access to the subdivision and realignment of the highway, which encouraged higher traffic speeds. But it was held that both of these actions were proper police measures and not compensable takings of property.

C. Management of Highway Access

A landowner's right of access to and from an adjacent highway is recognized as a natural and implied incident of his ownership or occupancy of the land,[228] and denial or destruction of the right of access comes within the scope of the Takings Clause.[229] Access rights of roadside landowners are, however, qualified by a superior right of the public to travel on adjacent streets and highways, and by the superior power of public authority to design, construct, and manage transportation facilities so as to promote the safety, efficiency, economy, and convenience of transportation. Accordingly, an owner of land abutting a public street or highway is said to be entitled to "reasonable but not unlimited" access to and from the adjacent public way and thence into the general system of streets and roads.[230] The standard for determining when access rights have been "taken" in the context of the Fifth Amendment is similarly qualified. Generally a compensable taking of access occurs only when governmental action either denies all access to land or where such action results in a "material and substantial impairment" of access. This has meant that in practice determination of taking is heavily dependent on the factual circumstances of the case.[231]

Whether a restriction of access amounts to a "material and substantial impairment" customarily is determined by reference to the use to which the affected property is being put or may reasonably be expected to be put. The ease or convenience of the access permitted in its restricted form may be considered as well as the number of access points; and an owner's right does not necessarily mean that he have his "preferred" access.[232] Nor does the protected right extend to all parts of an adjacent street or highway or to a street or highway of a particular type or size.[233] The adequacy of access available to a landowner after governmental action is assessed in the functional context of uses remaining to that owner.

Landowners frequently claim compensation where street and highway design changes are challenged as unfavorable to anticipated or possible future use of their property. Such claims typically involve the following types of design changes: (1) consolidation or relocation of existing driveways onto public roads; (2) conversion of existing roads to frontage roads for new controlled-access highways; (3) relocation of direct access on arterial highways; and (4) installation of median barriers and other physical features to channelize mainline traffic.[234]

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[224] Johnson v. City of Plymouth, 263 N.W.2d 603 (Minn. 1978).

[225] Tracy v. Commonwealth Dep't. of Transp., 402 A. 2d 286 (Pa. Comm. 1979). *See also:* City of Philadelphia v. Sterling Metalware Co., 410 A. 2d 90 (Pa. Comm. 1980), where the city vacated a street needed to deliver material to claimant's plant and alternative streets were too narrow for trucks to enter the plant, citing Tracy. *Compare* City of Grapevine v. Grapevine Pool Road Joint Venture, 804 S.W.2d 675 (Tex. App. Fort Worth 1991) and DuPuy v. City of Waco, 396 S.W.2d 103 (Tex. 1965).

[226] Appeal of Condemnation Award to 89.2 Realty, 566 A. 2d 979 (Vt. 1989); State Dep't of Transp. v. Michelin, 702 So. 2d 1326 (Fla. App. 1997).

[227] 357 S.E.2d 531 (Va. 1987).

[228] But see suggestions that protection against inconvenience of impaired access may not qualify as an interest in land, Commonwealth Dep't of Transp. v. Denny, 385 S.W.2d 776 (Ky. 1964); State Highway Comm'n v. Cent. Paving Co., 24 Ore. 71, 399 P.2d 1019 (1965).

[229] *Highways, Street and Bridges*, 39 AM. JUR. 2d, § 203.

[230] NICHOLS, EMINENT DOMAIN, (3rd ed.), § 16.03[2].

[231] Edward D. McKirdy, *Compensation for Impairment of Access Rights*, 1988 INST. ON PLAN. ZONING & EMINENT DOMAIN, § 13.03; Annot. *Abutting Owner's Rights to Damages for Limitation of Access Caused by Conversion of Conventional Road Into Limited Access Highway*, 42 A.L.R. (3d) 13.

[232] *See, e.g.*, Richmond County v. 0.153 Acres of Land, 430 S.E.2d. 47 (Ga. App. 1993), relocation of access points to business structures on property; State *ex rel* Dep't of Transp. v. Hood, 853 P.2d. 776 (Okla. App. 1993), difficulty of access to property and gas station; State v. Peterson, 381 N.E.2d; 83 (Ind. 1978), loss of access that was "special and peculiar" to claimant's land use; Small v. Kemp. 240 Kan. 113, 727 P.2d. 904 (1986), conversion of direct access to frontage road access.

[233] Houston v. Fox, 444 S.W.2d 591, 592–93 (Tex. 1969).

[234] Rees, Orrick & Marx, Police Power Regulation of Highway Access and Traffic Flow in the State Of Kansas, 2-3 (Kansas Dept. of Transp., Jan. 2000).

Rights of access to highways of conventional function and design come into being when the highway to which they relate is constructed. It is not necessary that they be granted by the road building authority or reserved when the highway right-of-way is acquired. An abutting landowner's right of access, however, is bound to conform to the type of highway that is established. Construction of limited-access highways for express movement of traffic or of parkways intended for recreational travel in scenic or natural areas[235] where no public way previously existed give rise to only those access points permitted by the highway authorities and provided for in their geometric design. In *State Highway Commission v. McDonalds Corp.*,[236] the court explained this matter as follows:

> The rule here and elsewhere is that where the landowner has no pre-existing right of access the mere fact that a limited-access highway is constructed adjacent to or across his property either by totally new construction or by re-routing or relocating an existing highway will not be sufficient to create in the property owner a right of access which the State must then condemn. Applicant cannot claim damages for the claimed taking of a right that never existed.[237]

Once access rights exist, alteration of highway design or regulation of roadway or roadside use must be scrutinized for possible impairment of abutters' access rights, as, for example, when highways of conventional design are converted into limited-access facilities. In such cases, the general practice is to rely on highway geometric and structural design features to mitigate the restrictive effects of access control on the use and value of roadside land.[238]

Accordingly, use of "frontage" or "service" roads[239] in conjunction with the through-traffic lanes is a basic feature of limited-access highways and serves to mitigate the loss of direct access to the express roadway. Substitution of frontage road access for previously direct access has been held not to be a taking of access rights where the resulting circuity of travel is not unreasonable.[240] But frontage road design that was reasonable when it was initially installed may become unreasonably restrictive where subsequent modifications, such as cross-street closures and one-way traffic regulations, reduce the access sufficiency of that design.[241] The cases vary according to their circumstances and trends are difficult to discern. A typical explanation of the standard of reasonableness applied in the law is reflected by the Kansas Supreme Court's comment in *Teachers Insurance and Annuity Association of America v. City of Wichita,*[242] as follows:

> The cases...[dealing with the reasonableness of access] as affected by the distance to the nearest opening of a frontage road to the express lanes of the controlled-access highway...are split on whether compensation should be awarded when frontage roads of varying lengths permitting access to the controlled highway are involved. However, virtually every case involves a situation where 'frontage roads' provided access of varying distances to the controlled access highways. Here long distances must be traveled on roads...which are no part of a frontage road, in order to gain access to the controlled highway at interchanges on the highway. The circuity of travel in the instant case is such that reasonable men could not differ in finding it unreasonable.[243]

Analysis of the reasonableness issue in access control cases often is complicated by failure to distinguish between loss of business and land value due to regulation of traffic flow resulting from construction of a limited access highway rather than from the adequacy of substitute access arrangements provided by frontage road design features. The distinction is essential to observe, however, for it is a precept of eminent domain law that landowners do not have any property right in the flow of traffic on an adjacent street.[244]

An illustration of this difficulty is found in *Garrett v. City of Topeka,*[245] where an urban neighborhood that was expected to experience intense commercial development was designated as a special "corridor" area for planning and zoning purposes and, as such, was subject to limitation of access to and from the general street system. Within this designated area, internal commercial traffic circulation was to be accommodated

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[235] Stock v. Cox, 125 Conn. 405, 6 A. 2d 346 (1939).

[236] 509 So. 2d 856 (Miss. 1987).

[237] 509 So. 2d at 861, quoting from Marris v. Mississippi State Highway Comm'n 129 So. 2d 367, 370 (Miss. 1961) and citing Morehead v. State Dep't of Roads, 195 Neb. 31, 236 N.W.2d 623, 626 (1975).

[238] *See, e.g.*, Int'l Moving & Storage Inc. v. City of Lincoln, 226 Neb. 213, 410 N.W.2d 483 (1987); State *ex rel.* State Highway Comm'n v. Lavasek, 73 N.M. 33, 385 P.2d 361 (1963); Stefan Auto Body v. State Highway Comm'n, 21 Wis. 2d 363, 124 N.W.2d 319 (1963); Filler v. City of Minot, 281 N.W.2d 237 (N.D. 1979).

[239] Short for "land-service road."

[240] Surety Savings & Loan v. State Dep't of Transp., 54 Wis. 2d. 438, 195 N.W.2d. 464 (1972); Small v. Kemp, 240 Kan. 113, 727 P.2d. 904 (1986). *But see* Johnson Bros. Grocery v. State Dep't of Highways, 229 N.W.2d. 504 (Minn. 1975), circuitous route to and from highway system was deemed substantial impairment of access.

[241] Filler v. City of Minot, 281 N.W.2d 237 (N.D. 1979); Teachers Ins. & Annuity Assn. of America v. City of Wichita, 221 Kan. 325, 559 P.2d 347 (1977); Alsop v. State, 586 P.2d 1236 (Alaska 1978). *But see* Commonwealth Dep't of Transp. v. Kastner, 13 Pa. Comm. 525, 320 A. 2d 146 (1974); rearrangement of roadways not compensable loss of access.

[242] 221 Kan. 325, 559 P.2d 347 (1977).

[243] 559 P.2d. at 355–56.

[244] State Comm'r of Transp. v. Charles Inv. Corp., 143 N.J. Super. 541, 363 A. 2d 944 (1976) at 946, noting:

> The real gist of the landowner's complaint in this case is not with access but rather with an economic harm which the owner feels he has suffered by virtue of the fact that he is now on a service road, whereas before he was on a main highway. His real complaint is that traffic, which is, after all, the source of the revenue to the gas station has been diverted away from the station. *See, also:* Int'l Moving & Storage v. City of Lincoln, 226 Neb. 213, 410 N.W.2d 483 (1987).

[245] 259 Kan. 846, 916 P.2d. 21 (1996).

by a circular "ring road" along which there were five permanent access points into the street system outside the "corridor." The ring road was never constructed, however, and led a corridor landowner to bring inverse condemnation action against the city for failure to complete the project as planned. Evidence was offered to show that this restriction of access "substantially reduced the commercial value" of the claimant's property and denied her the highest and best use of her land. The court held that the loss must be compensated.[246]

In reaching this decision, the Kansas court characterized the State's action as an "economic regulatory taking" (as contrasted with a taking accomplished by a physical invasion or impairment of title), where the economic impact on the landowner outweighed the public purpose of the regulation. It explained the basis for this result as follows:

> Where the government's exercise of its police power has an economic impact on private property, a balancing test is applied to determine if the regulation of private land is too unfair or goes too far. Factors that are used in determining if government action is too unfair or goes too far include, but are not limited to, the economic loss...; restrictions on access, and the distance and circuity of travel that is now required for ingress and egress.[247]

A strong dissent disputed the characterization of this situation as an "economic regulatory taking" and the majority's reliance on *Lucas*[248] to sustain its conclusion that the landowner was denied all economically viable use of her land. It noted that continuation of existing access was preserved and the governmental action involved only a slight circuity of travel for commercial traffic serving any permitted commercial use that the landowner might decide to carry on—something regarding which standards were well settled.[249]

In 1999 the Kansas Supreme Court reconsidered the "balancing test" prescribed in *Garrett* and expressly limited it to its unusual fact situation. Then, in *Eberth v. Kansas Department of Transportation*[250] and *City of Wichita v. McDonald's Corp.*,[251] the court adopted a distinction between restriction of an abutter's right of access and the regulation by state or local government of traffic on the public streets and highways. Utilizing this distinction, the court limited a landowner's right of access to a point of ingress and egress between his property and the public highway. Within the public right-of-way, regulatory acts and design measures are not per se compensable takings of access rights. According to an article in which the authors conclude that although the court could have been more definite in eliminating "regulation of traffic flow" claims, a fair reading of these cases leads to the conclusion that if existing points of ingress and egress to roadside property remain unchanged, the property owner cannot claim compensation for the economic impacts of the regulation of traffic flow within the public right-of-way.[252]

Interference of a temporary duration may obstruct access to roadside land while construction or maintenance work is carried out or for other reasons, and where this occurs it raises the takings issue. Although conceded to be annoying, inconvenient, and sometimes costly to abutting landowners, these conditions rarely have been regarded as taking private property because they are temporary in duration, generally are shared by the general public, and are not likely to adversely affect property values permanently. Only where an abutter can show that one or more of these construction impacts deprive him specifically and individually of access and the use of his land is he likely to succeed in claiming that a compensable taking occurs.

Proof that access was denied altogether or at least "materially and substantially impaired" during construction activity in an adjacent street or highway may not be easy. Construction sites regularly provide for continuation of at least a minimum adequate flow of traffic while work goes on. But, as this is balanced against the land-use needs of an abutting landowner, the results tend to become unpredictable and to turn on specific circumstances. In *Maloley v. City of Lexington*,[253] an appeal from summary judgment that access had not been unreasonably impaired during construction, the court said:

> We cannot say that depriving a retail establishment of access to a street is per se reasonable when said establishment's front entrance, parking stalls, and parking lot driveways border that street. If the only remaining access

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[246] 916 P.2d. at 34-35, noting that the city not only limited claimant's direct access to the adjacent street, but it "also failed to complete the ring road and in failing to do so diminished the commercial value of her property. Since this was an economic taking, the applicable test is weighing the public benefit against the economic burden of the landowner."

[247] 916 P.2d at 32.

[248] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[249] 916 P.2d at 39, citing Small v. Kemp, 240 Kan. 113, 727 P.2d 904 (1986), that where

> a landowner's direct access or an access route is changed, the reasonableness of the circuity of travel caused by the rerouting of the access is considered to determine whether the impairment of access to the property is reasonable or unreasonable. The landowner is entitled to compensation for the impairment of... access where the rerouting (circuity of travel) is unreasonable.

The court then stated: "Courts will not interfere with a valid exercise of the police power as long as the restriction is reasonable."

[250] 266 Kan. 726, 971 P.2d. 1182 (1999).

[251] 266 Kan. 708, 971 P.2d 1189 (1999).

[252] Rees, et al, note 233 *supra*, at 3-5, which observed that although the balancing test in *Garrett* now was drastically limited, "perfect clarity still was elusive. *Eberth* seems to suggest that all 'regulation of traffic flow' is not [a compensable taking], while *McDonald's* seems to suggest that some types of regulation of traffic flow may be compensable if the regulation cannot pass the 'reasonableness' test."

[253] 3 Neb. App. 976, 536 N.W.2d 916 (1995).

> to...[the claimant's] building or the parking lot which services it, is from an alley behind the building or from a street located on a side of the building which has no entrance, with the sidewalk between...[the street] and the main entrance piled high with debris and construction materials, it might be inferred by some fact finder that the property suffered more than an 'inconvenience' and an injury different in kind from that suffered by the general public.[254]

Although the U.S. Supreme Court's decision in *First English*[255] found that temporary taking, either physical or regulatory, may be actionable in inverse condemnation, arguments may still be heard that "impairment of access" should not be regarded as taking of property since this form of property was not specifically considered in *Penn Central, First English,* or *Lucas,*[256] and because it involves neither physical nor regulatory acts.[257] In at least one instance, however, doubts about this distinction were resolved by the court's ruling that *First English* applied broadly to "governmental action" and was not limited to "statutes and regulations ... when there are myriad ways in which government action can seriously impact individual owners' use of their property."[258]

D. Regulation of Roadside Development: Highway Beautification Act of 1965

1. Outdoor Advertising

Regulation of outdoor advertising signs located adjacent to highway rights-of-way is based on recognition that activities in roadside areas directly affect the roadway's transportation function. Freestanding roadside billboards and many types of on-premise signs are regarded as safety hazards contributing to distraction of drivers or interference with driving conditions.[259] Also, as extraneous features they intrude into and detract from most urban built environments and rural or natural settings. Their incompatibility in neighborhoods that are residential, historic, upscale commercial, architecturally distinctive, or scenic has been regarded as detrimental to the economy of such areas. While roadside signage may be useful to advertisers in building name and brand recognition and can provide a certain amount of commercial information to the motoring public, the uncoordinated siting of roadside signage inevitably detracts from the systematic organization and display of official travel-related information when and where it is most needed by highway users.

In the early 20th century, local ordinances in many American cities treated incompatible billboards as nuisances or nuisance-like features that could be subjected to regulation of their location, size, construction, and illumination. Under various forms of zoning, commercial advertising signs were lawfully regulated or even prohibited altogether from specified areas of comprehensively zoned communities without the need to pay compensation to the sign owner involved.

These forms of regulation were widely used at local levels and were accepted as valid police power actions when Congress in 1958 enacted legislation to restrict display of outdoor advertising along the National System of Interstate and Defense Highways.[260] Under this program, a state's allocation of federal-aid highway construction funds was increased if "effective control" of billboards conforming to minimum standards was established and maintained along that highway system. With this incentive—the so-called "Bonus Act"—25 states entered into agreements with the federal government and enacted the necessary laws and regulations to qualify for bonus payments.[261] In all but two of these instances the states adopted regulations that were in the nature of roadside zoning based on the state's police power.[262]

In 1965, as legislative authorization for the bonus incentive expired, Congressional efforts to achieve regulation of billboards throughout the entire federal-aid trunk highway system shifted from offering an incentive for state action to imposing a penalty for failure to establish "effective control" of roadside advertising along the interstate and federal-aid primary highway systems.[263] This revision, given the title of "Highway Beautification Act of 1965" (HBA), established National Standards for effective control and specified that states that failed to adopt their own programs to comply with these standards would be pe-

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[254] 536 N.W.2d at 922-23. *Compare* LaSangria, Inc. v. WMATA, 535 F.2d 1324 (D.D.C. 1976); Anchorage Office Bldg. v. WMATA 527 F.2d 852 (Table) (D.D.C. 1975), both decided prior to First English and Lucas. A summary of these cases, which were affirmed without opinion, may be found in footnote 8, Mekuria, v. WMATA, 975 F. Supp. 1, (D.D.C. 1997).

[255] 482 U.S. 304 (1987).

[256] Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[257] Mekuria v. Washington Metropolitan Area Transit Auth., 975 F. Supp. 1 (D.D.C. 1997)

[258] 975 F. Supp. at 6.

[259] Reviews of major research literature on safety and informational implications of roadside advertising are contained in FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSP., REPT. NO. FHWA/RD-80/051, SAFETY AND ENVIRONMENTAL DESIGN CONSIDERATIONS IN THE USE OF COMMERCIAL ELECTRONIC VARIABLE MESSAGE SIGNAGE (1980), and FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSP., REPORT OF THE TASK FORCE ON RESTUDY OF DIRECTIONAL AND INFORMATIONAL SIGNING, OPTIONS FOR ASSURING ADEQUATE TRAVEL INFORMATION SYSTEMS.

[260] P.L. 85-767, Aug. 27, 1958, 72 Stat. 904, codified as 23 U.S.C. "Highways."

[261] 23 U.S.C. 131(a)-(c).

[262] 23 U.S.C. 131(e). *See also* NEB. REV. STATS. (Supp. 1997) 39-212, 39-2601 to 39-2612 and N.D. CENT. CODE (Supp. 1997), 24-17-01 to 14-17-16.

[263] P.L. 89-285, Oct. 22, 1965, 79 Stat. 1028, revising 23 U.S.C. 131.

nalized by a 10 percent reduction in their apportionment of federal-aid highway funds.[264] With respect to removal of signs that became nonconforming under state compliance laws, the HBA required that states must pay just compensation for "(A)...taking from the owner of such sign, display or device of all right, title leasehold and interest in such sign, display or device," and (B)...taking from the owner of the real property on which the sign, display or device is located, of the right to erect and maintain such sign, display or device."[265]

The intent of this provision was first examined in an Opinion of the Attorney General of the United States in 1966, where it was concluded that Congress "meant to insure payment [of compensation] in each case of a billboard abatement covered by that section, whether or not compelled by the Constitution."[266] In the Attorney General's opinion, so-called "amortization statutes" that postponed removal of nonconforming outdoor advertising signs were not acceptable as satisfying the Congressional mandate.

This view was also adopted by the federal court in *State of Vermont v. Brinegar*,[267] holding that the State's provision for removal of nonconforming signs did not satisfy the federal requirement for just compensation, and the State could not avoid the statutory penalty of loss of 10 percent of its federal-aid funds for highway construction.[268]

Stimulated by these interpretations of the federal statute, by 1973 all states had enacted laws complying with the HBA[269] and the National Standards, creating a distinctive special exception to the general rule for exercise of the police power and eminent domain.

Experience with the takings issue under the HBA, therefore, may be summarized as follows: the federal statute authorizes state removal of nonconforming outdoor advertising signs at any time, subject to the statutory duty to pay cash compensation to owners for signs that are removed and to landowners for any leaseholds, licenses, or other property rights lost in the removal. By amendment of the HBA in 1968, removal of nonconforming signs was prohibited if the federal share of the necessary compensation was not available.[270] Implementation of the compensation mandate was extended in 1978 when Congress made it apply to sign removals along interstate and federal-aid primary highways "whether or not removed pursuant to or because of this section" of the act.[271]

Local regulation of outdoor advertising under comprehensive or special zoning actions has not been frustrated so consistently. There are court decisions holding that the HBA does not preempt the entire field of outdoor advertising control, but only the removal of signage along the interstate and federal-aid primary highway systems. On other road and street systems, amortized removal of nonconforming signs by state and local government police power have been upheld. Thus the New York Court of Appeals, in *Suffolk Outdoor Advertising Co., Inc. v. Town of Southampton*,[272] ruled that the town's ordinance in question had a reasonable amortization period that "fully recouped [the sign owner's] investments, substantially depreciated their billboards for income tax purposes, had relatively insubstantial lease and license obligations, and, thus, would not incur any substantial financial loss."[273] This view has been followed in other states with the result that local ordinances providing for removal of nonconforming signs after a reasonable amortization period are generally upheld against facial challenges. When challenged "as applied" to signs protected by state compliance statutes, the takings issue must undergo appropriate impact analysis under those statutes.[274]

A minor but unusual exception to the mandate of compensation may be noted in *Tahoe Regional Plan-*

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[264] 23 U.S.C. 131(b).

[265] 23 U.S.C. 131(g).

[266] 42 Op. Atty. Gen. 331, Nov. 16, 1966, No. 26, p. 334. The Attorney General's opinion also considered whether imposition of the compensation mandate upon the states violated the Tenth Amendment. It concluded that whatever may be the 'outermost line' in relation to a federally-subsidized highway program, the inducement in 23 U.S.C. 131 to a State to provide for and join in the compensation of persons who are adversely affected by compliance with beautification standards seems to be well within it." 42 Op. Atty. Gen. at 339.

[267] 379 F. Supp. 606 (D. Vt. 1974). Essentially the state argued that since 1921 its law had made billboards subject to licensing that had to be periodically renewed, and sign owner's rights were derived from this license. State law also specified that license termination was not compensable. The federal court took the position that the state's subsequent compliance legislation acquiesced in the federal position that compensation was necessary. 379 F. Supp. at 613-15.

[268] 379 F. Supp. at 616-17, stating:

> Thus, it appears that the...[U.S. Supreme Court] has postulated a two-tier test for measuring the constitutionality of federal legislation under the Tenth Amendment: (1) Is the measure under attack reasonably related to a legitimately national end, and, if so, (2) Does the challenged enactment coerce the state into participating in the federal scheme or does it merely induce the state to act?....We do not believe that the rights of a state reserved to it by the Tenth Amendment have been impermissibly invaded by this inducement.

[269] 23 U.S.C. § 131.

[270] 23 U.S.C. 131(n) , stating: "No sign, display or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal...is not available to make such payment." P.L. 90-495, Aug. 23, 1968, 82 STAT. 817.

[271] P.L. 95-599, tit. I, § 122, Nov. 6, 1978. 92 STAT. 2700, codified as 23 U.S.C. 131(g).

[272] 60 N.Y.2d 70, 455 N.E.2d 1245 (1983).

[273] *Id.* at 1247–48.

[274] National Advertising Co. v. City of Ashland, 678 F.2d 106 (9th Cir. 1982), stating at 109:

> It has been assumed by all the parties here...that Congress granted a private right of action...to bring suit for payment under the Act. Under recent authority...no such right of action can be implied. Since the Highway Beautification Act creates no federal rights in favor of billboard owners, it creates no private cause of action for their benefit.

ning Agency v. King,[275] where a regional planning agency's prohibition of all off-premise advertising signs was challenged on the basis of the HBA and state compliance law. While conceding that the state law ordinarily would prevent municipalities from uncompensated removal of the signs in question, the court held that the regional planning agency's authority was derived from an interstate compact approved by Congress and declared to be the law of the United States, which in this instance had been adopted subsequent to the HBA. The court concluded that in this case Congress had recognized a "narrow exception to the statutory compensation clause," but that it did not appear to thwart the full accomplishment of the primary purpose of the HBA.[276]

When regulating outdoor advertising beyond the reach of the statutory compensation mandate of the federal law, state and local police power actions must comply with the general standards of the takings doctrine, as expressed in *Agins* and *Keystone Bituminous*,[277] which require that a police power restriction must substantially advance a legitimate public purpose and must not deprive an owner of all economically viable use of his property.

Where outdoor advertising regulations are designed to improve a community's visual environment, aesthetic standards must provide the nexus necessary to sustain the police power. Although at one time it was common for courts to express reservations about basing police power actions on aesthetic objectives, entirely or in combination with other factors, such reservations are now seldom heard. More often, aesthetic purposes are accepted in accordance with the view of the New York court in *Cromwell v. Ferrier*:[278]

> [I]t does not mean that any aesthetic consideration suffices to justify prohibition [of billboards]. The exercise of the police power should not extend to every artistic conformity or nonconformity. Rather, what is involved are those esthetic considerations which bear substantially on the economic, social and cultural patterns of a community or district. Advertising signs and billboards, if misplaced, often are egregious examples of ugliness, distraction and deterioration. They are just as much subject to reasonable controls, including prohibition, as enterprises which emit offensive noises, odors or debris. The eye is entitled to as much recognition as the other senses, but, of course, the offense to the eye must be substantial and be deemed to have material effect on the community or district pattern.[279]

The warning that vague, undefined aesthetic considerations alone cannot sustain police power actions is timely in view of the higher level of scrutiny that now is expected in order to assure that a sufficient nexus exists between regulatory action and the intended benefits to the public.[280]

The trend to accept aesthetic values and high-quality development design as bases for outdoor advertising regulation would appear to make facial challenge of those controls more difficult. First, the "property" involved in such cases purports to be a right to be seen by traffic as it passes on the public highway. Yet, this is not something found in the "bundle" of rights that a landowner has by reason of abutting a highway.[281] It was observed in *Wolf v. Commonwealth, Department of Highways* that when the view of one's property from the road is restricted, "what the property owner is losing, in fact, is a benefit—entirely unearned by him—to his land of the economically exploitable proximity of heavy traffic. Since he has no right to this benefit and has done nothing to create it, he should have little cause to complain at losing it."[282]

This presents a difficulty for both the owner whose property abuts the highway and the sign owner who has contractual interests (and sometimes a leasehold interest) in the regulated roadside. If an abutting landowner has no property right to be seen by traffic on the highway, he cannot endow anyone else with a property interest that is protected by the takings clause. Accordingly, abutting landowners and sign owners have regularly been subject to state and local removal of nonconforming roadside signage, after appropriate amortization periods and limited only by the requirements of due process.[283] Relevant factors in determining whether an amortization period is reasonable as applied to a particular property include the amount of original investment or cost, present actual or depreciated value, date of construction, amortization for tax purposes, salvage value, remaining useful life, length and remaining term of lease under which it

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[275] 285 Cal. Rptr. 335 (1991), 233 Cal. App 3d 1365.

[276] 285 Cal. Rptr. at 348.

[277] Keystone Bituminous Coal Assn v. DeBenedictis, 480 U.S. 470 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980).

[278] 19 N.Y. 2d 263, 225 N.E.2d 749 (1967).

[279] 225 N.E.2d at 755.

[280] *See, e.g.*, Mayor & City Council of Baltimore v. Mano Swartz Inc., 268 Md 79, 299 A. 2d 828 (1973); Scots Ventures v. Hayes Township, 212 Mich. App. 530, 537 N.W.2d 610 (1995); DeMaria v. Enfield Planning & Zoning Comm'n, 159 Conn. 534, 271 A. 2d 105 (1970); Outdoor Graphics Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996); Sunrise v. DCA Homes, Inc. 421 So. 2d 1084 (Fla. App. 1982); Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982); Loundsbury v. Keene, 142 N.H. 1006, 453 A. 2d 1278 (1982). *See also:* Tahoe Regional Planning Agency v. King, 233 Cal. App. 3d 1365, 285 Cal. Rptr. 335 (1991), stating that the U.S. Supreme Court's decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) did not alter the relation of aesthetic values to the police power.

[281] *In re* Condemnation by Delaware River Port Authority, 667 A. 2d 766 (Pa. Comm. 1995).

[282] 422 Pa. 34, 220 A. 2d 868 (1966).

[283] *See, e.g.*, National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 83 Cal. Rptr 577, 464 P.2d 33 (1970); Art Neon Co. v. City and County of Denver, 488 F. 2d 118 (10th Cir. 1973).

is maintained, and harm to the public if the structure remains in place beyond the amortization period.[284]

Application of the rule that a compensable taking occurs when an owner is deprived of all economically viable use of his property may involve varying and complex situations, as illustrated in *Naegle Outdoor Advertising v. City of Durham.*[285] There, enforcement of an ordinance prohibiting certain commercial off-premise advertising signs, and providing for their removal after a 5 1/2 year amortization period, was challenged as denying the sign owner the economically viable use of its property. Determination of the impact of regulatory removal upon the owner's business had to consider that commercial advertising was not sold by reference to rental of space on certain specific signboards, but by contracts for "showings". This involved purchase of billboard space sufficient to convey commercial messages to a designated percentage of an audience driving on a particular highway during a given time period.[286] Sign companies charged standard rates for "showings" covering 25, 50, 75, and 100 percent of the highway audience, in each instance using as many billboards as required to achieve the desired coverage. Arguing that the forced removal of billboards in the "Durham metro area" denied the economically viable use of their property, the sign owners offered evidence that over a 3-year period 98 percent of their customers purchased showings in that area instead of renting individual signboards. Relying on the principle in *Penn Central*[287] that regulatory impacts must be assessed on the owner's property "as a whole"—in this case, multiple signs owned and used as a distinct element in their owner's business—the court noted evidence that the sign owner's revenues earned in the Durham metro area were only one element of a substantially larger Raleigh-Durham market area covering most of eastern North Carolina, and not a separate operating unit of the owner's business.[288]

Using this "unit" of property as the denominator factor in expressing the economic impact of the ordinance, the court found that after removal of the prohibited signs the owner retained use of 54 percent of its signage in the Durham metro area and, further, that during a 5 1/2 year amortization period the prohibited signs would earn twice their fair market value in revenue. Also, the court noted there was no evidence that the sign owner would not be able to realize a reasonable return on the remaining signs in the Durham metro area market. And finally, applying the *Penn Central* takings analysis, the court found that in formulating its investment-related expectations "a reasonable property owner must expect that the uses of his property may be restricted from time to time by the state in the legitimate exercise of its police power [citation omitted]." This is especially true in the case of personal property such as signs and leases for sign locations.[289]

The takings issue has also been raised when permission to expand an existing nonconforming sign or to extend its useful life has been denied. While allowing for reasonable repair and maintenance, both the National Standards and customary zoning doctrine require that a nonconforming sign must remain "substantially the same as it was" when it became nonconforming.[290] Failure to adhere to this principle converts a nonconforming sign into an illegal one, ineligible for compensation upon removal. Thus, where steel was substituted for wooden structural parts and signboards were expanded beyond their original size, highway regulatory agencies have treated the altered sign as illegal. When challenged by sign owners claiming that this action effectively deprives them of the economically viable use of the signs, courts generally have favored a solution that restored the sign to its original condition rather than an uncompensated removal of the entire sign.[291]

Nebraska and North Dakota, the states that elected to acquire and administer roadside advertising rights under the authority of the 1958 Bonus Act, have had a significantly easier time with the takings issue than states that relied on their police power. As owners of the property interests involved in roadside advertising, these two states were in a stronger position to say what forms of commercial signs would be permitted in their roadside areas than if they were acting to regulate activities of private landowners. Where new trunk highways were built almost entirely on new location, these preventive practices substantially reduced the

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[284] Metromedia Inc. v. San Diego, 164 Cal. Rptr 510, 610 P.2d 407 (1980).

[285] 803 F. Supp. 1068 (M.D.N.C. 1992).

[286] 803 F. Supp. at 1071, 1073, where the court notes the importance of determining the "appropriate unit" of property affected by the regulatory action, and observes that in this instance "the unit [of property] is not composed of the affected billboards, which, like the coal pillars in *Keystone* do not constitute a separate segment of property for taking purposes."

[287] 438 U.S. at 130–31.

[288] 803 F. Supp. at 1074, stating: "Since the reality of Naegle's business is that Naegle combines the leasehold interests in its signs into a unit in selling outdoor advertising in the Durham area, it follows that the unit of property to be considered for taking purposes is the combined group of Durham metro area signs."

[289] 803 F. Supp. at 1079.

[290] 23 C.F.R. § 750.707(d)(5). *And see* 23 C.F.R. 750.707(d)(6) directing states to develop criteria for destruction, abandonment, and discontinuance of non-conforming signs.

[291] Boyce Industries v. Missouri Highway & Transp. Comm'n, 670 S.W.2d 147 (Mo. App. 1984); 3M National Advertising Co. v. City of Tampa Code Enforcement Bd., 587 So. 2d 640 (Fla. App. 1991), *And see* White Advertising v. Florida Dept. of Transp., 364 So. 2d 104 (Fla. App. 1978), citing FSA 479.17, providing that signs violating the sign control statute were public and private nuisances and subject to abatement and uncompensated removal. *Also* Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 754 (N.D. 1978): "To allow more than basic repair and maintenance of a non-conforming sign would defeat the purpose of the statute."

need for removal of existing nonconforming signs from regulated areas. Signs erected in violation of state standards automatically became illegal and subject to removal without compensation.

Notwithstanding this, sign owners in North Dakota challenged the State's regulatory system as being "so onerous as to constitute a taking which constitutionally requires compensation" and, specifically, as depriving them of the right to engage in a lawful business.[292] Rejecting these charges, the State Supreme Court held that:

> The chapter does nothing more than regulate one particular future use of property while leaving available to the property owner all other uses. Newman continues to have available the option of erecting and maintaining signs within the confines of the statute. We cannot say...that the negative restriction placed on the landowner and thus on his lessee has the effect of depriving Newman of all or substantially all of the beneficial use of his property.[293]

The same result occurred where sign owners agreed, as a condition for receiving permits, to remove their signs upon expiration of their permits, and to advertisers who leased space on signboards prior to the order to remove them.[294]

Regarding hardships resulting from imposition of the state's billboard restrictions, the North Dakota court pointed out existing statutory authority for delaying enforcement of removals to permit amortization of expenses, and it observed that this has been found to be a "constitutionally acceptable way of compromising the competing interests of private property owners and the public."[295]

2. *Junkyards*

Title II of the HBA called on states to establish and maintain effective control of roadside junkyards along interstate and federal-aid primary highways or else incur a penalty of 10 percent of their federal-aid highway program allotment.[296] When effective control was not feasible, relocation or removal and disposal was to be carried out with compensation for the owner of the relocated or removed property.[297]

Prior to passage of the HBA, regulation of junkyards had been carried out in many places as part of comprehensive urban zoning codes or as special health and safety measures. Screening and fencing of junkyards were treated as legitimate police measures to abate these land uses.[298] Compensation was awarded to landowners or business owners only infrequently where the impact of the restrictive action threatened to force a lawful business to close.[299] This proviso paralleled the HBA's policy to compensate billboard owners where compliance with national and state standards for effective control of roadside advertising necessitated removal of nonconforming signs.[300]

In the case of junkyards, the takings issue also has been raised by challenging the standards as applied in specific circumstances. Thus, in *Bachman v. State*,[301] enforcement of an ordinance requiring relocation of a junkyard at least a half-mile from a specified major highway was held unconstitutional because the purpose of the ordinance could be achieved without damage to the property simply by screening it from the highway.

The facial constitutionality of state and local junkyard screening legislation has been challenged in several instances by charges that it lacked a proper police power purpose. In *State v. Smith*,[302] property owners claimed that junkyard regulations were intended for aesthetic results and "totally and completely unrelated to highway safety, maintenance, and other purposes referred to by the legislature" (i.e., traffic safety and protection of highway investment). The Tennessee Supreme Court rejected this challenge for lack of showing that other, nonaesthetic factors were absent from the legislature's determination of need, explaining:

> "[I]n recent years most courts which have considered junkyard regulations similar to those involved here have had no difficulty in sustaining them as a proper exercise of the police power of a state or local government, even if scenic or aesthetic considerations have been found to be the only basis for their enactment....Although some authorities to the contrary may be found, we find these

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[292] Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978).

[293] *Id.* at 758.

[294] Old Broadway Corp. v. Backes, 450 N.W.2d 734 (N.D. 1990).

[295] 268 N.W.2d at 758.

[296] 23 U.S.C., § 136(d), (e), and (f). "Junkyards" were defined as business establishments operated for storage, processing, and reselling old or scrap metal, paper, rubber goods, wrecked or dismantled motor vehicles and used motor vehicle parts. "Effective control" required that regulated junkyards be screened by natural objects, plantings, fences, or other appropriate means so as not to be visible from the main traveled way of the protected highway. See 23 U.S.C. 136(c).

[297] 23 U.S.C. 136(j).

[298] Iowa Dept. of Transp. v. Nebraska-Iowa Supply Co., 272 N.W.2d 6 (Iowa., 1978), approving the constitutionality of the Iowa Junkyard Beautification and Billboard Control Act; Hagaman v. Slaughter, 49 Tenn. App. 338, 354 S.W.2d 818 (1961).

[299] 23 U.S.C. 136(i) and (j), as follows: "(i) The Federal share of landscaping and screening costs under this section shall be 75 per centum. (j) Just compensation shall be paid to owners for relocation, removal, or disposal of junkyards lawfully established under State law. The Federal share of such compensation shall be 75 per centum."

[300] Foster v. Arkansas State Highway Comm'n, 527 S.W.2d 601 (Ark. 1975), citing Arkansas State Highway Comm'n v. Turk's Auto Corp, Inc., 491 S.W.2d 387 (Ark. 1973), both holding that where an owner had previously used his land for a junkyard, the imposition of a screening or removal requirement was an exaction from the owner that was not shared by the general public and so was a constitutional taking.

[301] 235 Ark. 339, 359 S.W.2d 815 (1962).

[302] 618 S.W.2d 474 (Tenn. App. 1981).

> cases [favoring regulation] to be better reasoned and more in accord with modern concerns for environmental protection, control of pollution and prevention of unsightliness."[303]

3. Scenic Enhancement

Title III of the HBA of 1965 authorized appropriation of funds in addition to the states' annual apportionment of federal-aid highway funds for the purpose of "acquisition of interests in and improvement of strips of land necessary for the restoration of scenic beauty adjacent to...[federal-aid] highways and...acquisition and development of controlled rest and recreational areas and sanitary and other facilities necessary to accommodate the traveling public."[304]

Elsewhere in the statute it was emphasized that "acquisition" meant purchase, condemnation, or receiving by gift the land or interests in land needed for scenic enhancement, and that nothing in the Act should be construed to authorize private property to be taken, or its reasonable and existing use restricted by such taking, without just compensation.[305] In this way, Congress indicated its expectation that the same programmatic mandate on compensation that it had provided in connection with the effective control of roadside advertising and junkyards would be applied to scenic enhancement measures, and so reduce the frequency with which the takings issue would be raised.

Experience showed that this was the case. As landscaping and roadside amenities became accepted as desirable elements of the federal-aid highway investment, provision regularly was made for inclusion of these items as a regular part of construction costs.[306] Occasional early hesitancy about acceptance of scenic enhancement and protection of natural and cultural resources as proper public purposes for purchase or eminent domain has been replaced by general approval, at least as against facial challenges.[307]

Other situations beyond the scope of the Highway Beautification Program may be visualized in which scenic enhancement as a public purpose is utilized in the exaction of concessions from property owners in the land-development process. They are suggested elsewhere in connection with corridor preservation and access to special natural and cultural resources.

E. Regulation of Land-Use and Transportation Development

1. The Intermodal Surface Transportation Efficiency Act of 1991 and the Takings Issue

Reauthorization of federal aid for the National Surface Transportation System in 1991 was the occasion for reorienting both the policy and purposes of that program. With passage of the Intermodal Surface Transportation Efficiency Act (ISTEA)[308] in December 1991, the engineering mission that had preoccupied Congress and the states from 1956 to 1990 was replaced with a strong emphasis on efficiency, flexibility, and intermodalism in transport operations and economy, and comprehensiveness and market responsiveness in transportation and economic development planning.[309] Construction of a nationwide surface transportation network had been the great objective of the "interstate period" of the program; in the "post interstate period" of the 1990s, application of the techniques of system management became the overriding concern.

Transportation system management was difficult to define as a public purpose, but ISTEA provided descriptions of several key elements of a management system and established the framework for a planning process designed to serve that system. Program goals were developed through metropolitan planning organizations (MPOs) and were reflected in the states' transportation improvement plans (STIP). These plans were multimodal (including pedestrian and bicycle facilities) and coordinated with comprehensive planning in metropolitan areas and the states' Clean Air Act implementation programs.[310] Transportation planners, who had in the past been accused of treating public facilities as if they were "free"—that they imposed no significant cost on the community—were told to adopt new premises that ensured a full accounting of the costs and benefits of projects.[311] As the results of re-

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[303] 618 S.W.2d at 477, citing Rotenburg v. City of Ft. Pearce, 202 So.2d 782 (Fla. App. 1967); Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964); Deimeke v. State Highway Comm'n, 444 S.W.2d 480 (Mo. 1969); National Used Cars, Inc. v. City of Kalamazoo, 61 Mich. App. 520, 233 N.W.2d 64 (1975); State v. Buckley, 243 N.E.2d 66 (1968); Farley v. Graney, 119 S.E.2d 833 (1960); Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971); People v. Stover, 191 N.E.2d 272 (1963).

[304] H. REP. No. 1084, 89th Cong., 1st Sess., (1965), *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3722.

[305] P.L. 89-285, Oct. 22, 1965, § 301; 79 Stat. 1032.

[306] *See, e.g.*, 23 U.S.C. 319(a) and 23 C.F.R. 752.1 through 752.9. Regarding scenic enhancement along the Great River Road, see 23 U.S.C. 148(a) and (b).

[307] Compare Historic Green Springs, Inc. v. Berglund, 497 F. Supp. 839 (E.D. Va. 1980) with Kamrowski v. State, 31 Wis.2d 256, 142 N.W.2d 793 (1966), upholding use of eminent domain for scenic easements along the Great River Road; Finks v. Maine State Highway Comm'n, 328 A. 2d 791 (Me. 1974), approving excess condemnation for scenic preservation as a public purpose.

[308] P.L. 102-240, Dec. 18, 1991, 105 Stat. 1914, codified as 23 U.S.C. 101 *et seq.*

[309] H. R. REP. 102-171(I), 102nd Cong., 1st Sess., (1991), *Intermodal Surface Transportation Efficiency Act of 1991*, 2-19; U.S. CODE CONG. & AD. NEWS, 1991, pp. 1527–45.

[310] 23 U.S.C. 134(e) and (f). *See also* Penny Mintz, *Transportation Alternatives Within the Clean Air Act*, 3 N.Y.U. ENVIR. L.J. 156 (1994).

[311] ROSS NETHERTON, *Federalism and the Intermodal Surface Transportation Efficiency Act of 1991*, LEGAL RESEARCH DIGEST No. 32, at 5, 8–9, Transportation Research Board (1995); Robert Freilich and Mark White, *Transportation Con-*

designed planning processes and realigned points of view began to be felt, surface transportation programs increasingly developed aspects in which the takings issue was actually or potentially present. For example, state transportation improvement programs were directed to consider such things as incorporating bicycle and pedestrian walking facilities in transportation plans; access to parks, monuments, and historic sites; transportation system management and investment strategies; coordination with the Federal Water Pollution Control Act;[312] reduction and prevention of traffic congestion by reducing motor vehicle travel; transportation effects on land use and development; and innovative methods of financing transportation projects. Also, challenges were foreseeable concerning the various guidelines that the Environmental Protection Agency Administrator was directed to promulgate for development of Transportation Control Measures for implementation of the Clean Air Act Amendments of 1990.[313]

ISTEA pushed the federal-aid surface transportation program into increased involvement in all of these activities that affected land-use planning and development processes, but three activities in particular put the program on course to raise the takings issue: programs for corridor preservation, land acquisition resulting in condemnation blight, and regulation of land use through zoning and other development controls.

2. *Corridor Preservation*

The program of corridor preservation already had a history of association with land-taking situations when ISTEA called for "Preservation of rights-of-way for construction of future transportation projects, including identification of unused rights-of-way which may be needed for future transportation corridors, and...[identification of] those corridors for which action is needed to prevent destruction or loss."[314]

This mandate was grounded in recognition that in some areas of the nation right-of-way costs exceeded construction costs, and that a major factor in this trend was the necessity of compensating landowners for development within corridors where land acquisition for transportation facilities was later carried out. Transportation corridor preservation planning under ISTEA was designed not only to conserve construction program funds, but, when coordinated with land-development processes, to increase the location options available for accommodating both public and private interests on the available land.[315] Although these benefits were well recognized—in some cases growing out of the right-of-way acquisition for the Interstate program of the 1950s and 1960s—relatively few states had adopted comprehensive corridor preservation policies and planning programs when ISTEA was enacted.[316] Most state transportation agencies limited their corridor preservation efforts to early acquisition of rights-of-way through "hardship" or "protective" purchases as permitted by federal-aid regulations.[317] In some circumstances, agencies also were successful in making agreements with owners of corridor land to preserve areas needed for future right-of-way in an unimproved condition through special contractual, property, or tax law arrangements to temporarily forego development.[318] Transportation agencies also relied upon several forms of police power regulation to accommodate public and private interests in corridor areas. At state levels, reservation of future right-of-way by official mapping statutes was utilized with mixed success; at local levels, zoning, subdivision control, and setback regulations enjoyed widespread acceptance; and a wide range of legal approaches to the protection of wetlands and other natural resources and environmental quality have been developed. Application of takings issue doctrine to these regulatory measures has, however, varied substantially.

"Reservation Maps" and Interim Restrictions. So-called "reservation maps" or "official maps" show the location of proposed major public facilities in relation to existing streets and highways. Upon their approval and effective dates, these maps give public notice that subsequent private development within the transportation corridors have to accommodate the public facilities designated on the map when they are constructed. Where private development occurs that is inconsistent with the official map and interferes with the public improvements, it can be removed without compensation.

Relatively few reservation or official map statutes prohibit absolutely any and all forms of development. Most have more qualified restrictions that impose moratoria on development while precondemnation planning is accomplished. But development moratoria, even though temporary, risk being treated as compensable takings.[319] Instances in which reservation map

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gestion and Growth Management: Comprehensive Approaches to Resolving America's Quality of Life Crisis, 24 LOY. L.A. L. REV. 915 (1991).

[312] 23 U.S.C. 135(c)(17), (1994 ed.). Subsection (c) was amended by TEA-21 to substitute more generalized requirements.

[313] P.L. 101-549, Nov. 15, 1990, 104 Stat. 2465, codified as 42 U.S.C. 7408(f)(1).

[314] P.L. 102-240, tit. I (Dec. 8, 1991) 105 Stat. 1964; this section was amended by P.L. 105-178, tit. I § 1204 (a) to (h), June 9, 1998, 112 Stat. 180-184. See 23 U.S.C. 135(c) (Supp. 1999).

[315] Ken Towcimek, *Corridor Preservation*, Paper at Transportation Research Board Transportation Law Workshop, July 22, 1990.

[316] AM. ASS'N OF STATE HIGHWAY & TRANSP. OFFICIALS, REPORT OF THE AASHTO TASK FORCE ON CORRIDOR PRESERVATION, 1-2, 4-1,-4-3 (1990).

[317] 23 C.F.R. 712.204(d).

[318] *See, e.g.*, Jerome G. Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL ESTATE L.J. 635–63 (1974).

[319] Jenson v. City of New York, 399 N.Y.S.2d 645, 369 N.E.2d 1179 (1977), where the bulk of owner's property was marked

statutes have been held not to result in unconstitutional takings have eased their restrictions on development by limiting their duration to relatively short periods with definite starting and ending dates, or by providing for issuance of variances in deserving circumstances.

Where such measures avoid a finding that all economically viable use of property is taken by enforcement of the mapping statute, facial challenges to such laws have usually been difficult to win.[320] This problem was presented in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, an inverse condemnation action initiated when the expressway authority filed a "reservation map" showing a corridor of land that might be used for road widening in the future. The court held that the act of filing the reservation map did not constitute a per se temporary taking of property without compensation. While the claimant argued that the map statute's moratorium invaded one of its property rights, the court ruled that compensation could be required only where the invasion effectively left the claimant's property without any beneficial use.[321]

A facial taking of property through imposition of development restrictions for a period of 5 years following recording of a reservation map, plus an additional 5 years if sought by the government, was, however, found by the Florida Supreme Court in *Joint Ventures, Inc. v. Department of Transportation.*[322] Here the nexus between the statute's moratorium on development and the public benefit expected from it was described by the state department of transportation simply as "various economic reasons." In its analysis of this feature of the statute, the court commented:

> We do not question the reasonableness of the state's goal to facilitate the general welfare. Rather we are concerned here with the means by which the legislature attempts to achieve that goal....The legislative staff analysis candidly indicates that the statute's purpose is not to prevent an injurious use of private property, but rather to reduce the cost of acquisition should the state later decide to condemn the property...We perceive no valid distinction between "freezing" property in this fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings. Such action has been consistently prohibited.[323]

In this respect the Florida court echoed the Texas Court of Appeals in *San Antonio River Authority v. Garrett Brothers,*[324] which made a distinction between the state's role as an arbiter among competing public and private interests (*e.g.*, zoning, public health regulations, building codes, nuisance abatement) and the contrasting situation where its purpose is to prevent the development of land that would increase the cost of a planned future acquisition of such property by the government. It concluded:

> Where government acts in this context, it can no longer pretend to be acting as a neutral arbiter....Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one or more of its citizens, the scales will tip in its own favor....To permit government, as a prospective purchaser of land, to give itself such an advantage is clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among members of the community.[325]

Development restrictions in reservation map statutes may be qualified in ways that permit property owners to make limited use of their property and so avoid being a constitutional taking. Thus, statutes may require transportation agencies to commence acquisition within a specified time,[326] or may authorize variances to be granted in apparent hardship circumstances.[327]

Provision for variances to be granted under a control procedure or permit system makes it more difficult to succeed in a facial challenge to a reservation map statute, but gives no immunity to actions challenged as they are applied to particular property or owners.[328]

Setback Regulations. "Building lines" or "building setbacks" restrict property owners from locating buildings or other permanent structures within specified distances from the right-of-way lines of existing streets and highways. In transportation corridors, such measures may have a secondary effect of pre-

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for street use on city's official map, owner was unable to sell property or use it as security for financing needed repairs.

[320] 640 So. 2d 54 (Fla. 1994).

[321] 640 So. 2d at 57, where the court stated:

> Regulations found by the courts to be invalid because they deprive landowners of substantially all use of their property without compensation are not ordinarily struck down as unconstitutional. The government is forced to choose between paying just compensation to keep the regulation in effect or removing the regulation. In situations where the action is declared an improper exercise of the police power under due process, the regulation is simply declared unconstitutional. Therefore, a land use regulation can be held facially unconstitutional without a finding that there is an uncompensated taking.

[322] 563 So. 2d 622 (Fla. 1990).

[323] 563 So. 2d at 626.

[324] 528 S.W.2d 266 (Tex. Civ. App. 1975).

[325] 528 S.W.2d at 274.

[326] *See, e.g.*, N.C. GEN. STAT. §136-44.50(d) (Matt. Bender 1999), failure to begin work within 1 year constitutes abandonment of the corridor reservation; MONT. CODE ANN. 60-4-108, (1999) no compensation paid for buildings, subdivisions, or improvements on land covered by a highway plan, but plan becomes "ineffective" if action to acquire the land is not started within 1 year after filing.

[327] CAL. STS. & HY. CODE, 7414 (Supp. 1997), "substantially damaged" by permit denial;" MINN. STAT. ANN. (1991), 462-359, inability to earn "reasonable return;" N.H. REV. STAT. ANN. 674.13 (1996), inability to earn "reasonable return."

[328] Esposito v. South Carolina Coastal Comm'n, 939 F. 2d 165 (4th Cir. 1991), *cert. den.* 112 S. Ct. 3027; City of Rochester v. Hennen, 392 N.Y.S.2d 943 (1977); Dep't of Transp. v. Zyderveld, 647 So. 2d 308 (Fla. App. 1994.) *See also*, NICHOLS, EMINENT DOMAIN (3d ed.), 17.03[1].

serving space for widening the right-of-way when increased traffic capacity is needed.

Establishment of setback lines as elements of comprehensive land-use planning and zoning is a common practice, and has been challenged on the taking issue less frequently than has reservation mapping. Its rationale and nexus with traditionally recognized bases of the police power have been their connection with preserving light and air, protecting roadside land and landowners from the noise and environmental pollution of busy streets and highways, and maintaining aesthetic amenities and patterns of design that contribute to property values.[329] Additionally, the principle of average reciprocity of advantage, which has served comprehensive zoning so well, has been available for the defense of setbacks.

Taking issue doctrine does not allow setbacks or similar restrictions to be used for the sole purpose of forestalling roadside development so that land along a street or highway can be acquired at artificially reduced cost at some future time.[330] Like other land-use restrictions, their nexus to some recognized threat to public safety, health, morals, or general welfare must be a real one, and they must be roughly proportional to such threat. As applied to particular situations, setbacks must not deprive an owner of all economically viable use of his property, as was held to be the case in *Lucas*.[331]

Planning and Zoning Regulations. Community Comprehensive Plans and Zoning Ordinances, supplemented by selected special overlay district ordinances (open space, parks and recreation areas, wetlands and floodplain, historical and cultural landmarks, agricultural and estuarine areas, transportation and utility corridors, etc.) are frequently utilized in managing land development and community growth over extended periods of time and for long-term objectives. The benefits they confer upon communities include the grouping of land uses so that incompatible mixing of uses is avoided, stabilization of land values, orderly transition when land uses change, specific attention to land uses that require special treatment, and efficiency in providing community services. Charges that regulations for these purposes take private property for public use without compensation have been rejected on the principle evolved from *Euclid*[332]—that comprehensive zoning results in an "average reciprocity of advantage" to all owners to which the zoning restrictions apply.

Specialized zoning, however, is essentially conservative in its function, acting to preserve elements of existing land-use patterns and development that contribute to property values and community character. It may not be used aggressively to create new public uses at the expense of private development. This was emphasized in *Fred F. French Investing Co., Inc. v. City of New York*,[333] where the city rezoned two residential lots for public use as parks. The court held that the rezoning violated due process and deprived the owners of any private use of their property. It stated:

> [A] zoning ordinance is unreasonable if it frustrates the owner in the use of his property, that is, if it renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value....
>
> The ultimate evil of a deprivation of property, or better, a frustration of property rights, under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefitted, that is, society at large.[334]

As noted in connection with setbacks, the presence of opportunities (variances) to mitigate the economic impact of land-use restrictions may allow an owner to continue some productive use of his property, but it is not an infallible defense to a challenge of taking as applied.

The same is true of mitigating measures used in connection with zoning. In *Fred F. French Investing*, the city noted that the development rights of the two rezoned lots could be transferred to other property to enable its development. The court doubted that such a transfer of development rights (TDR) offered any meaningful source of relief, however, and explained:

> In an attempt to preserve the [development rights] they were severed from the real property and made transferable to another section of mid-Manhattan in the city, but not to any particular parcel or place. There was thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property....The problem with this arrangement...is that it fails to assure preservation of

[329] J&B Dev. Co. v. King County, 29 Wash. App. 942, 631 P.2d 1002 (1981), reservation for future highway expansion; O'Connor Dev. Corp. v. Dep't of Transp., 533 So. 2d 800 (Fla. App. 1988), claim that setback made property unsaleable.

[330] Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 385 (1950), finding no real or substantial relation of setback to genuine police power purpose and insufficient public benefit. *See also* Note, *Problems of Advance Land Acquisition*, 52 MINN. L. REV. 1175 (1968).

[331] 505 U.S. 1003 (1992).

[332] 272 U.S. 365 (1926).

[333] 39 N.Y.2d 587, 350 N.E.2d 381, *app. den.*, 429 U.S. 990 (1976).

[334] 350 N.E.2d at 387; also citing Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305 (1974), that "[w]here government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning or provides the machinery to enjoin noxious use, there is simply noncompensable regulation." See 350 N.E.2d at 384.

> the very real economic value of the development rights as they existed when still attached to the underlying property.[336]

Although pertinent to the particular type of development rights involved in this instance, the court's comment was not a categorical condemnation of TDR, and shortly thereafter another type of TDR had an important part in the U.S. Supreme Court's rejection of a challenge of zoning for historic landmark preservation in *Penn Central*.[338]

Development restrictions of temporary duration sometimes have been regarded as compensable takings.[337] The lesson of this and other cases in which the creation of public space is promoted through zoning and similar regulation of land use appears to be that these techniques will not be acceptable substitutes for eminent domain where their sole or principal purpose is to reserve or acquire private property for public use or benefit.[338] Where there are other evident purposes advancing public health, safety and welfare, the promotion of planning objectives through zoning and similar means generally are sustained as legitimate exercises of the police power.[339] Purposes that have been accepted as sustaining use of the police power include management of various trends in community land use that bear on the efficiency, economy, and safety of the transportation system, as illustrated in *Dawson Enterprises Inc. v. Blaine County*.[340] Here county zoning restricted the last stretch of undeveloped land along a highway approaching Sun Valley ski resort to agricultural and residential use only. Its purpose was to forestall commercial roadside strip development and maintain the open rural character of the valley. Finding that the ordinance had a rational relationship to police power purpose, notwithstanding that it denied the landowner the highest and best economic use of his land, the court stated: "In promoting the concentration of commercial development within existing urban areas, the County is seeking to control population density, foster the free flow of traffic and prevent congestion along a major artery, and avoid the costly consequences of spreading county services too thin."[341]

3. De Facto Takings Through Condemnation Blight

Information that a public agency intends to acquire property for construction of public facilities—whether it is in the form of a formal announcement, filing of a corridor reservation map, preparation of the public facilities component of a community comprehensive plan, or publication in the news media—is capable of directly affecting the market value of real property that is likely or possibly to be used in such a project. Until condemnation proceedings are commenced, uncertainty about the status of such property may well impair the owner's ability to sell or rent it, prevent its use it as security for funding to undertake development of it, or restrict some of the uses he may make of the property. The longer that formal condemnation is delayed, the greater is the risk that hardship will result from a decline in market value or from the physical deterioration of both the property to be taken for public use and other property in the vicinity. Eventually, when formal acquisition occurs, the condition of the property and the public perception of its prospects for beneficial use and enjoyment may be so unattractive that the condemnor receives a windfall and the condemnee suffers an undeserved loss because of an artificially depressed market value.[342]

Other studies have discussed these conditions, collectively called "condemnation blight," and noted the diversity of court decisions regarding the point at which such blight must be treated as a de facto taking of property entitling the owner to compensation for his loss.[343] Historically, evidence of condemnation blight was treated by the courts as an aspect of the valuation process, and was dealt with by adjusting the date of taking to avoid giving effect to unrealistic and unfair influences on value.[344] Absent any physical invasion of the property in question or control of its use to the extent that the owner could make no beneficial use of it,

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[336] 350 N.E.2d at 387, 388. The court distinguished this from measures that put TDRs in a "development bank" or other device preserving them for future use, referencing John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75 (1973).

[338] 438 U.S. 104 (1978).

[337] Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); Sheerr v. Township of Evesham, 445 A. 2d 46 (N.J. 1982); Burrows v. City of Keene, 432 A. 2d 15 (N.H. 1981).

[339] Mira Dev. Corp. v. City of San Diego, 205 Cal. App. 3d 1201, 252 Cal. Rptr. 825 (1988).

[339] Leroy Land Dev. Co. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991); Stabler Dev. Co. v. Bd. of Supervisors, Lower Mt. Bethel Township, 695 A. 2d 882 (Pa. Comm. 1997), water wells: Schubert Organization, Inc. v. Landmark Preservation Comm'n of New York, 570 N.Y.S.2d 504 (1991), historic landmark; Sellon City of Manitou Springs, 745 P.2d 229 (Colo. 1987), hillside ordinance; Petersen v. City of Decorah, 259 N.W.2d 553 (Ia. App. 1977), agricultural zoning.

[340] 98 Ida. 506, 567 P.2d 1257 (1977).

[341] 567 P.2d at 1264.

[342] NICHOLS, EMINENT DOMAIN, (3d ed.), § 12B.17[6].

[343] *See, e.g.*, John C. Vance, *Recovery for Condemnation Blight Under Inverse Law*, 2 SELECTED STUDIES IN HIGHWAY LAW, (hereafter SSHL), 884-N33 (1980); John C. Vance, *Valuation Changes Resulting From Influence of Public Improvements*, 2 SSHL 733 (1976), 766-S1 (1979); Julias L. Sackman, *Condemnation Blight*, INST. ON PLAN., ZONING & EMINENT DOMAIN 173 (1975), *Police Power, Civil Rights, and Eminent Domain, Part II*, 283 (1976).

[344] *See, e.g.*, Foster v. City of Detroit, 254 F. Supp. 655 (1966), *aff'd on other grounds*, 405 F.2d 138 (1968), condemnor guilty of bad faith. *See also* Bird v. Boston Redev. Auth. 396 N.E.2d 718 (Mass. 1979); Land Clearance for Redev. Auth. of Kansas City v. Massood, 526 S.W.2d 354 (Mo. 1975).

the adverse effects of precondemnation activities upon a property's market value were considered as consequential damages and noncompensable.

Under the pressure of increased use of eminent domain in federal and federally-aided programs of urban renewal, surface transportation facilities, public works, recreation, and conservation in the 1960s and 1970s, private hardships resulting from strict application of the consequential damages rule led to modification of that doctrine. Authority to treat certain types of expenses as part of land acquisition costs and adoption of more liberal criteria of eligibility for compensation of expenses were included in legislation underlying many major programs.[346] Reconsideration of the consequential damages doctrine occurred, with the result that several states relaxed the historic requirement that claims of a de facto taking must show some physical occupation of the property in question or else the regulation of its use in derogation of the owner's rights. And in the federal courts also it became accepted that physical invasion or appropriation of property was not essential for de facto taking if the effects of precondemnation actions resulted in deprivation of the owner's use and enjoyment of it.[346]

In the decade of 1987 to 1997, when protection of private property rights received renewed attention by the U.S. Supreme Court and various state legislatures, it appeared that if a broader application of the Takings Clause was to be achieved, it would have to be through expansion of the concept of "property" by extending constitutional protection to economic interests in land that previously had not been recognized for that purpose, and through modification of the type and degree of deprivation incurred by a property owner before his property is regarded as "taken." Extension of protection to interests that did not involve physical occupation and use of property occurred in *Luber v. Milwaukee County,*[347] in which the Wisconsin court recognized a de facto taking where condemnation blight was shown to have lost the owner a long-term tenant for his rental property. The court was not specific as to just what interests in property were significant enough to be protected from de facto taking.[348]

Subsequently, the willingness of courts in other states to reach beyond interests that directly involved use and enjoyment of property was tested by claims based on diminution of market value, increased and unrecoverable costs of maintenance and security, loss of opportunities to sell, frustration of expected but presently uncommitted development opportunities (highest and best use), and anticipated exposure to annoyances from construction or operation of proposed transportation facilities.[349] Only where hardships were based on exceptional circumstances, however, did these interests rise to a level enjoying constitutional protection through the Takings Clause.

Claims litigation also presented the question of whether an entire tract of land is considered as taken when only a fraction of it is identified for condemnation. In *Commonwealth Department of Transportation v. Steppler,*[350] a landowner claimed that his entire property of 1.3 acres was de facto taken when it was announced that .03 acres would be needed for right-of-way and, as a result, he was unsuccessful in finding a buyer for the 1.3-acre parcel. The court held that the compensable taking in these circumstance must be limited to the land actually identified for condemnation and could not include the diminished value of the remainder of the property, which would not be condemned and which the owner could continue to use as at present.[351] Despite the stricter judicial scrutiny of land-use planning and regulatory actions that developed in the 1990s, courts have not appeared to treat the decision in *Luber*[352] as an invitation to give new forms of development expectations the protection of the Takings Clause when they are adversely affected by condemnation blight. Financial interests or benefits that directly involve the use and enjoyment of property form the core of these protected rights.[353]

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[345] Chief among Congressional efforts to respond to land acquisition hardships was the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, P.L. 91-646, Jan. 2, 1971, 84 Stat. 1894, codified as 42 U.S.C. 4601-4655, applicable to federal and federally-aided land acquisition. Also, the Model Eminent Domain Code, promulgated by the National Conference of Commissioners on Uniform State Laws, has been the basis for revision of eminent domain laws at the state level.

[346] Thomas W. Garland, Inc. v. City of St Louis, 596 F.2d 784 (8th Cir. 1979), *cert. den.* 444 U.S. 899 (1979); Foster v. City of Detroit, 254 F. Supp. 655 (1966)

[347] 47 Wis. 2d 271, 177 N.W.2d 380 (1970).

[348] NICHOLS, EMINENT DOMAIN (3d ed.), § 12B.07[6].

[349] Thompson v. Dep't of Transp., 209 Ga. App. 353, 433 S.E.2d 623 (1993), offer to buy lost after announcement of proposed improvement of adjacent street; City of Kenai v. Burnett, 860 P.2d 1233 (Alaska 1993), loss of access to proposed neighborhood golf course; Aronstein v. Missouri State Highway Comm'n 586 S.W.2d 328 (Mo. 1979), depressed real estate market due to demolition in vicinity; Township of West Winsor, County of Mercer v. Nierenberg, 667 A. 2d 362 (N.J. Super. 1995), depressed land value; Gaughen v. Commonwealth, Dept. of Transp. 554 A. 2d 1008 (Pa. Comm. 1989), project financing.

[350] 542 A. 2d 175 (Pa. Comm. 1988).

[351] 542 A. 2d at 178.

> [W]here the owner of a residential property has not lost the use of his property as a residence, no de facto taking of the entire property...occurred, notwithstanding the fact that the residences had a reduced market value, unless the unmarketability was the result of the property's inevitable total condemnation, such that a cloud would be placed on the property's title rendering it completely valueless.

See also Dep't of Transp v. Kemp, 100 Pa. Comm. 436, 515 A. 2d 68 (1986), where prospect of losing a strip of owner's frontage did not justify claim for de facto taking of entire residential lot.

[352] 47 Wis. 2d 271, 177 N.W.2d 380 (1970).

[353] 177 N.W.2d at 384, declaring:

> It is the opinion of some writers that the fair market value standard of compensation"...erroneously analyzes the condem-

The criteria for taking also have reflected increased concern over hardship, but have remained close to the historic principle that there can be no taking or compensation unless there is interference with an owner's possession, use, or enjoyment of his property.[364] Accordingly, delay in starting formal condemnation proceedings is not in itself a de facto taking. A variety of planning and zoning actions may be involved in launching a development project, and may make it impractical or impossible to stick to a time schedule for determining when condemnation delay becomes unreasonable. Such precondemnation preparations may include, for example, filing plans or maps for right-of-way acquisition, preparation of engineering studies, public hearings on alternative routes or environmental impacts, and the like. None of these activities, singly or in combination, necessarily raise the condemnation blight to the level of a de facto taking, yet in certain circumstances the market value of property may be affected by any of them.[365] Reasonable delay in order to accomplish necessary planning and other preparatory tasks generally is accepted and rationalized as consequential damage incurred prior to the time of taking. Accordingly, the form, intensity, and deliberateness of the condemning agency's actions should be considered, together with the evidence that those actions were a substantial cause of the loss in property value to the owner.[366]

Where condemnation of property is decided on and delay in commencement of formal eminent domain proceedings occurs deliberately, courts have found that a compensable de facto taking occurs through a combination of market-driven economic factors and "unreasonable or oppressive conduct." No formula or criteria have been offered to determine what is "unreasonable" or "oppressive," but reference to the cases in which such conduct was held to have occurred suggests that their analysis concentrates on the strength of the linkage between the condemnation delay as the specific cause of the subject's loss of value or the owner's loss of its beneficial use. A case in which unreasonable delaying conduct was held to be present is *People ex rel Department of Transportation v. Diversified Properties.*[367] Here, it was alleged that despite knowledge that the owner was being prevented from developing his property and that restriction made it virtually unmarketable, the city and the State Department of Transportation (Caltrans) cooperated in preventing the owner from removing the uncertainty of his property's status for use and development. The court pointed out that Caltrans had made no effort to relieve the owner's situation through its "protective acquisition program," and instead "allowed the City, by way of its development restrictions to 'bank' the land for the state—presumably so that, at a later date, the state could condemn the subject property in an undeveloped (and, consequently, less costly) condition."[368]

Essentially the same situation was present in *Gaughen v. Commonwealth, Department of Transportation.*[369] There funding to construct a connector road between two arterial highways ran out and forced suspension of the project. The state kept the project on its Twelve-Year Plan, however, and repeatedly asked the township authorities to delay development within the corridor, notwithstanding the township's concern that such action could make it liable for a de facto taking. Over a period of 2 years the owner of land in the connector corridor tried to obtain financing to develop his land but was unsuccessful because of mandatory environmental impact and noise studies and publicity of plans to take part of his land for highway construction. Ultimately, when condemnation of part of the land was started, the owner contended that the state's precondemnation actions amounted to a de facto taking of his entire tract of land. The court agreed with his claim, and observed:

> The theory of *de facto* taking has been developed in response to the reality that activities carried on incident to massive, complex, and time-consuming programs

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nor-condemnee relationship in terms of existing real and personal property concepts without regard to economic implications of the situation...thus it generally excludes recompense for incidental losses....In denying these losses, courts have recognized that such actions constitute a derogation of the indemnity principle and makes harsh law. Nonetheless, the practice continues, justified by reasoning that, upon critical examination, reflects dubious wisdom and logic." (citation omitted).

[364] *See, e.g.*, Gaughen v. Commonwealth Dep't of Transp., 554 A. 2d 1008 (Pa. Comm. 1989); E&J, Inc. v. Redev. Agency of Woonsocket, 122 R.I. 288, 405 A. 2d 1187 (1979); Horak v. State, 171 Conn. 257, 368 A. 2d 155 (1976); Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784 (8th Cir. 1979), *cert. den.*, 444 U.S. 899 (1979).

[365] Dade County v. Still, 377 So. 2d 689 (Fla. 1979), street width ordinance; City of Kenai v. Burnett, 860 P.2d 1233 (Alaska 1993), "general knowledge" of public improvement; Township of West Winsor, Mercer County v. Nierenberg, 667 A. 2d 362 (N.J. Super. 1995), notice of possible condemnation.

[366] Matter of Virginia Park, 328 N.W.2d 602 (Mich. App 1982) Commonwealth, Dep't of Transp. v. Pastuszek, 422 A. 2d 1223 (Pa. Comm. 1980). The adverse impact of precondemnation activity may arise from demolition of structures surrounding the claimant's property, leaving it isolated and impractical to maintain while waiting for delayed condemnation proceedings to commence. Schnack v. State, *ex rel.* Dep't of Transp., 160 N.J. Super. 343, 389 A. 2d 1006 (1978).

[367] 17 Cal. Rptr. 2d 676 (Cal. App. 4th Dist. 1993).

[368] 17 Cal. Rptr. 2d at 682. In *Diversified Products*, the municipality required the developer to set aside 4.5 acres of a much larger parcel for Caltrans's future use in expanding a freeway ramp. The record did not show, however, that the developer ever was given a choice of either dedicating his land or paying a fee proportional to the added burden imposed on the community by the traffic congestion anticipated from the proposed shopping mall. The record therefore left the impression that the landowner's proposed development had no bearing on the need for improvement of the interchange. Query whether the result of this case would have been different if a harm/benefit analysis of the proposed development and the municipal action had been carried out.

[369] 554 A. 2d 1008 (Pa. Comm. 1989).

> launched by government may so substantially interfere with one's use and enjoyment of his property as to inflict a compensable injury in a constitutional sense...even though the power of eminent domain has not been formally exercised against the property in question and there has been no physical intrusion of it.[360]

Viewing the Pennsylvania cases as a whole, the court quoted further from *Filbert*:

> Where a property is designated for formal condemnation pursuant to a planned, prospective public improvement, adverse interim consequences caused to the property by the prospect of condemnation will not constitute a de facto taking unless those interim consequences are that the owner is deprived of the use and enjoyment of the property, or is subjected to the loss of the property before formal condemnation can provide compensation.[361]

As this principle has been applied, the Pennsylvania courts have added the corollaries that where owners continue to reside in their homes on the property in question, there is no deprivation of the property's highest and best use,[362] and that when determining whether an owner is deprived of all beneficial use of his property, consideration shall be given to not only the present use but all potential uses including the highest and best use.[363]

Where property is devoted to commercial use or is being held for such use, the analysis of de facto taking focuses on whether and how precondemnation activities affect the property's ability to generate sufficient income to pay its taxes and operating expenses. As illustrated in *Petition of Cornell Industrial Electric*,[364] in 1969 the petitioner was told informally by the Urban Redevelopment Authority that its land would be acquired and that it should be prepared to relocate by 1971. Petitioner relocated but over the next 3 years did not receive any offer from the Authority, although some other buildings in its vicinity were acquired and demolished. Its efforts to rent the property after 1971 were unsuccessful and the nearby vacant property deteriorated due to theft, vandalism, and neglect. After a 5-year delay without condemnation, the court held that the beneficial use of the property had been destroyed and a de facto taking had occurred.

A contrasting situation was present in *City of Brookings v. Mills*.[365] There land was sought for expansion of a municipal airport, and owners of property in the expansion corridor were contacted with notice of this fact, but after 4 years of negotiations no agreement was reached. When condemnation was subsequently started, the owner counterclaimed, alleging a precondemnation de facto taking due to the delay in which various business opportunities were lost. The court did not agree that a case of de facto taking had been made. The evidence showed that during the delay the market value of the land had actually increased, and that it could have continued to generate income from rental for agricultural use. Commenting, the court said:

> [T]he owner may offer a plan showing a possible scheme of development for the purpose for which ...[the land] is most available, provided it appears that the likelihood of demand for the property for that purpose *is such as to affect market value*. He cannot, however, go further and describe in detail to the jury a speculative enterprise for which in his opinion (or that of some expert) the land might be used, and base his estimate of value upon the profits which he would expect to derive from the enterprise. In other words, he *cannot capitalize the projected earnings of a nonexistent enterprise or projected use*.[366]

Similar results have been reached wherever claimants did not show that inevitable condemnation was deliberately delayed and directly caused the property in question to become unmarketable or unable to generate sufficient income to prevent its loss.[367]

4. Subdivision Controls and Related Zoning Actions

Under comprehensive plans and zoning ordinances, subdivision controls regulate such aspects of development as lot size, building heights, access, setbacks, and similar features. While they do not address directly the problem of reserving space in transportation corridors for future construction of transportation facilities, they contribute indirectly to this purpose by promoting the orderly management of development and reducing the risk of uncoordinated and haphazard private development in those corridors.[368]

During the Depression of the 1930s, local governments, facing severe difficulty in obtaining funds for public improvements, sought ways by which to have subdivision developers pay all or at least some of the cost of such improvements as streets, sidewalks, curbs and gutters, and sewer and water lines needed to make their subdivisions livable. This practice contin-

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[360] 554 A. 2d at 1012–13, quoting Filbert Ltd. Partnership Appeal, 441 A. 2d at 1357, (Pa. Comm. 1982).

[361] Gaughen v. Commonwealth Dep't of Transp. 554 A. 2d at 1015. *Compare* Conroy-Prugh Glass Co. v. Commonwealth, 456 Pa. 384, 321 A. 2d 598 (1974) and Peter Roberts Enterprises Inc. v. Dep't of Transp., 376 A. 2d 1028 (1977) with Commonwealth Appeal, 221 A. 2d 289 (1966).

[362] Dep't of Transp. v. Steppler, 542 A. 2d 175 (Pa. Comm. 1988); Dep't of Transp. v. Kemp, 515 A. 2d 68 (Pa. Comm. 1986).

[363] Visco v. Dep't of Transp., 498 A. 2d 984 (Pa. Comm. 1985).

[364] 338 A. 2d 752 (Pa. Comm. 1975).

[365] 412 N.W.2d 497 (S.D. 1987).

[366] 412 N.W.2d at 502, quoting NICHOLS, EMINENT DOMAIN (3d ed.), § 18.11[2].

[367] *See, e.g.*, Aronstein v. Missouri State Highway Comm'n, 586 S.W.2d 328 (Mo. 1979); Dep't of Transp. v. Securda and Co., Inc., 329 A. 2d 296 (Pa. Comm. 1974); Matter of Allentown, 557 A. 2d 1147 (Pa. Comm. 1989); Howell Plaza Inc. v. State Highway Comm'n., 92 Wis. 2d 74, 284 N.W.2d 887 (1979); Thompson v. Dep't of Transp. 209 Ga. App. 353, 433 S.E.2d 623 (1993); City and County of San Francisco v. Golden Gate Heights Inv., 18 Cal. Rptr. 2d.

[368] R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefits Assessments and Linkage Payments: Brief History of Land Development Exactions*, 50 L. & CONTEMP. PROB. 5, 28–30 (1987).

ued through the mid-century period of prosperity when land development in many metropolitan areas set such a fast pace that local government finances could not keep up with demands for public services. Similar demands were felt where redevelopment of older urban areas was undertaken in order to achieve more efficient use of land.[369]

The method for obtaining broader participation in funding improvements involved using the planning process to induce property owners to contribute financially or dedicate part of the land being developed to the use of the public to offset the cost of the improvements needed in and for their project. These requirements were made on occasions when approval of plans was required or development permits had to be obtained. Initially the conditions imposed for approval related to improvements within the subdivision that were directly needed to complete a project. As the trend continued, however, experience with their external costs led local governments to enlarge the scope of the conditions imposed in order to fund improvements outside the project, as, for example, the cost of increasing the capacity of adjacent or nearby streets that were impacted by the traffic generated by their project.

As community planning became concerned with problems of growth on a comprehensive basis, the exaction of contributions from developers continued to stretch the connection between their contribution and the impact of their proposed development. Where developers were expected to furnish land for parks, recreation areas, and schools, the benefits of their contributions were shared generally by the community, and the need for them was attributed only indirectly to the developer and his project. Not surprisingly, the legal authority for such contributions, in-kind or otherwise, was challenged as a constitutional taking. An initial problem in such challenges generally was to verify the legal authority on which the exaction was based. State enabling legislation varied substantially, and state courts differed in their interpretation of both the basis and scope of local authority to exact contributions as part of subdivision control.[370]

Where authority to require dedication of land to assist in providing public improvements was clear, challenges frequently focused on the nexus between the exaction and the need resulting from a proposed subdivision. Analysis customarily commenced with the premise that private subdivision development should not be permitted to impose its external costs upon nearby land or the general public.[371] It proceeded then to determine what costs the project could be expected to impose on the public, and whether the exaction requested by the government was "roughly proportional" to those costs. As applied by state courts, this analysis was explained as follows:

> [For] the *nexus* test to apply, thus making a compulsory dedication constitutionally valid, the *nexus* must be *rational*. This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements—not for the purpose of 'banking' the land for use in a projected but unscheduled possible future use.[372]

> In this instance the city's comprehensive plan indicated an intention to construct the road extension which would have been used to justify its exaction, but the city had as yet made no move to commence or schedule the project. Thus, the exaction's nexus did not meet the court's standard.[373]

Another instance in which the necessary nexus was deemed insufficient involved the dedication of land in order to bring the alignment of two existing roads up to the state's design standards. Here the court found there was no relationship between the amount of land exacted and the amount of increased traffic the subdivision was expected to generate.[374] And, where road construction was not immediately planned but still was included in the county's general plan of 20-year highway needs, exaction of an unlimited dedication was held to be a compensable taking.[375]

Exactions that are sufficiently connected to proper police power purposes may still be found to be unconstitutional takings if the exaction imposes more than a

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[369] *See* Ira Michael Hayman and Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L. J. 1119 (1964); Thomas M. Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. J. URB. & CONT. L. 269 (1983); DANIEL R. MANDELKER, LAND USE LAW (4th ed.) § 9.11-9.19; NICHOLS, EMINENT DOMAIN (3d ed.) § 17.02[3][a]; Donald L. Connors and Carolyn Meacham, *Paying the Piper: What Can Local Governments Require as a Condition of Development Approval?*, INST. ON PLAN. ZONING & EMINENT DOMAIN, ch. 2 (1986).

[370] Approving statutory authority: Kottschade v. City of Rochester, 537 N.W.2d 301 (Minn. App. 1995); Sparks v. Douglas County, 904 P.2d 738 (Wash. 1995), street widening; Nelson v. City of Lake Oswego, 869 P.2d 350 (Ore. App. 1994), drainage easement; Trent Meredith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685 (Cal. App. 1981). Disapproving statutory authority: City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978); Eyde Constr. Co. v. Charter Township of Meridian, 386 N.W.2d 687 (Mich. App. 1986), recreation land; Assoc. Home Builders of Greater East Bay v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971).

[371] MANDELKER, LAND USE LAW (4th ed.), §. 9.12.

[372] Simpson v. City of North Platte, 292 N.W.2d 297 at 301 (N.D. 1980), quoting 181, Inc. v. Salem Planning Bd., 133 N.J. Super. 350, 336 A. 2d 501 (1975).

[373] 292 N.W.2d at 301.

[374] Lee County v. New Testament Baptist Church of Fort Myers, Florida, Inc., 507 So. 2d 626 (Fla. App. 1987). *Rev. denied*, 515 So. 2d 230.

[375] Howard County v. JJM, Inc., 301 Md. 256, 482 A. 2d 908 (1984).

developer's proportionate share of the costs of his subdivision to the public.[376]

An example of a properly supported exaction is *Grogan v. Zoning Board of Appeals, Town of East Hampton*,[377] where issuance of a permit for adding to a residential building was made conditional upon granting a scenic and conservation easement to the town. The easement prohibited development of part of the property in question, but did not grant public access to the property in question. The court determined that the easement did not constitute a compensable taking since it substantially advanced the town's legitimate interest in protecting its wetlands and environmentally significant areas, and the burden of the easement was roughly proportional to the impacts of the proposed construction. It noted:

> The respondent's determination, as well as, *inter alia*, the environmental assessment form prepared by the Town of East Hampton Planning Department, discusses the specific environmental impacts of the proposed construction and the best manner by which to ameliorate them....[W]e are satisfied that the respondent has rendered a valid, individualized determination that the easement is an appropriate measure to address the specific environmental impacts of the petitioner's proposal. Moreover, the easement permissibly supplements and augments the respondent's ability, under applicable legislation, to ensure preservation of the area in question.[378]

In times and places of especially rapid population growth and land development, local governments sometimes have sought and obtained legislative authority to request or allow developers to make payments of money in lieu of dedicating or constructing in-kind improvements.[379] In the mid-1960s, in an effort to assure that land development paid the municipal costs it created, so-called "impact fees" were imposed at points in the development process where governmental approval was required.[380] "In-lieu" fees had certain limitations, however, in that they were conceived to provide improvements directly beneficial to the subdivision in which they applied, and they risked rupturing the nexus to their police power base if they were applied more widely over the community's infrastructure.

The rationale of the impact fee as an exercise of the police power also relied on the premise that it was possible to allocate to a development project its proportionate share of the external costs that it generates, and to express this share in a monetary payment. This was first challenged in *Broward County v. Janis Development*,[381] where an impact fee imposed to finance road and bridge improvements in the vicinity of a proposed development was held to be not a regulatory taking measure but rather an unsuccessful attempt at taxation because it was not specific as to where and when the fees would be spent. Subsequently this defect was remedied by legislation requiring that impact fee funds be segregated so they could be spent only for specific benefits in the areas generating them.[382] With this revision the use of impact fees in Florida was upheld in *Hollywood Inc. v. Broward County*.[383]

As experience in Florida was studied elsewhere, some states passed legislation enabling impact fees that undertook to codify general standards for the nexus required by the Takings Clause doctrine. Typically, such statutes required local government to describe the uses to which revenue from these fees would be put, and that "a reasonable relationship [exist] between the fees' use and the type of development project on which the fee is imposed."[384]

Prior to 1987, when the U.S. Supreme Court's decisions on the takings issue reopened that subject for review, the states, by a combination of statutes and court decisions, appeared to have settled upon three approaches to the task of determining the sufficiency of the "essential nexus" between a permit condition and a "legitimate state interest." In some states, generalized statements as to the necessary connection usually were accepted as sufficient. In *Dolan*,[385] the majority of the Court felt this was too deferential to legislative and administrative judgment. At the other extreme, courts required local governments to show that the imposed exaction was precisely proportional

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[376] Gulest Assoc., Inc. v. Newburgh, 209 N.Y.S.2d 729 (1960). *But see modification in* Jenad, Inc v. Scarsdale, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966). *And see* Rohn v. City of Visalia, 263 Cal. Rptr. 319; 214 Cal. App. 3d 1463 (1989).

[377] 633 N.Y.S.2d 809, 221 A.D. 2d 441 (1995).

[378] 633 N.Y.S.2d at 810. *See also* Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980), dedication for flood control, park and recreation area approved; Long Beach Equities, Inc. v. County of Ventura, 282 Cal. Rptr. 877; 231 Cal. App. 3d 1016 (1991), zoning against intense residential development; City of Mobile v. Waldon, 429 So. 2d 945 (Ala. 1983), dedication for service roadway.

[379] *See* Julian Conrad Juergensmeyer and Robert Mason Blake, *Impact Fees: An Answer to Local Government's Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415 (1981); Fred Jacobson and Jeff Redding, *Making Development Pay Its Way*, 55 N.C. L. REV. 407 (1977).

[380] Connors and Meacham, *supra* note 367 at 2.02[1][d], as follows:

> The expanded use of the zoning approval process marked the beginning of use of the so-called impact fee. Whereas dedications and in-lieu fees have historically been extracted from developers under the municipalities' power to regulate subdivisions, the impact fee is more often, though not exclusively, implemented under the zoning power as a condition of discretionary zoning approval or under other municipal authorities. Although considerably more susceptible to legal challenges, the impact fee is a very useful financing mechanism for municipalities to meet the extradevelopmental costs of growth.

[381] 311 So. 2d 371 (Fla. Dist. Ct. App. 1975).

[382] FLA. STAT. ANN. § 380.00 (15)(d-f) (Supp. 1997).

[383] 432 So. 2d 606 (Fla. Dist. Ct. App. 1983). *See also* Homebuilders & Contractors Ass'n v. Bd. of County Comm'rs of Palm Beach County, 446 So. 2d 140 (1983), impact fee for road expansion.

[384] CAL. GOVT. CODE, § 66005 (1997).

[385] 512 U.S. at 389. *And see* Jenad, Inc. v. Scarsdale, 271 N.Y.S.2d 955 (1966).

to the public burden that was directly and specifically created by the proposed development. Known as the "specifically and uniquely attributable test," this standard became identified with the Illinois Supreme Court's decision in *Pioneer Trust & Savings Bank v. Village of Mt. Prospect.*[386] It, too, was later rejected by the U.S. Supreme Court as requiring a more exacting level of scrutiny than the Takings Clause demanded in such situations.[387] Between these two positions, still other states required local government to show a "reasonable relationship" between an imposed exaction and the development impact being addressed.[388] The core of the intermediate position was explained in this way:

> [T]he distinction between a proper exercise of the police power and an improper exercise of eminent domain turned on whether there was "some reasonable relationship or nexus to the use to which the property is being made or is merely being *used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.*" A city may not...impose an exaction for some future public use as a condition of permit approval when such future use is not *occasioned* by the construction sought to be permitted.[389]

Courts have been left with the question of how to relate the "rough proportionality" test mandated by *Dolan*[390] to the "reasonable relationship" standard which emerged following *Nollan.*[391] A year following *Dolan*, the Tenth Circuit Court of Appeals addressed this question in *Clajon Productions Corp. v. Petera,*[392] a regulatory taking challenge involving limitations on a license. The court characterized the nexus standards in *Nollan* and *Dolan* as

> extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure....Given the important distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical taking cases, we believe that the 'essential nexus' and 'rough proportionality' tests are properly limited to the context of development enactions.[393]

A year later, in *Ehrlich v. City of Culver City,*[394] the California Supreme Court was asked to apply this distinction to a case where a "development fee" was imposed by a municipality for its approval of a landowner's development proposal. Stating that in its view the "standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just such land-use 'bargains' between property owners and regulatory bodies," the California court commented:

> [A]lthough we conclude that the combined tests of *Nollan* and *Dolan* applies to the *monetary* exaction imposed by Culver City in this case, we also conclude that the heightened standard of scrutiny is triggered by a relatively narrow class of land use cases....[396]
>
> Where the local permit authority seeks to justify a given exaction as an alternative to denying a proposed use, *Nollan* requires a reviewing court to scrutinize the instrumental efficacy of the permit condition in order to determine whether it logically furthers the *same* regulatory goal as would outright denial of a development permit. A court must also, under the standard formulated in *Dolan*, determine whether the factual findings made by the permitting body support the condition as one that is more or less proportional, in both nature and scope, to the public impact of the proposed development.[398]

In this way the California court appeared effectively to reserve the "heightened standard of scrutiny" for cases having a high risk that the permitting agency may be seeking to avoid the obligation of compensation.[397]

Both *Nollan* and *Dolan* involved actions that required possessory dedication of real property by its owner, and the California court noted that some courts and commentators had argued that the difference between these exactions and the imposition of purely monetary development fees made the Supreme Court's heightened level of scrutiny inapplicable to the latter cases.[398] In this instance, however, the court was per-

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[386] 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

[387] *See* Dolan v. City of Tigard, 512 U.S. at 390.

[388] *See* Simpson v. City of North Platte, 206 Neb. 240, 292 N.W.2d 297 (1980), dedication of street; F&W Assoc. v. County of Somerset, 276 N.J. Super. 5719, 698 A. 2d 482 (1994), traffic impact fee.

[389] Ehrlich v. City of Culver City, 911 P.2d 429, 441–42 (Cal. 1996), (Italics added) quoting Simpson v. City of North Platte, 292 N.W.2d at 301–02.

[390] 512 U.S. at 391, stating that it wished to avoid potential confusion between the two terms, and noting that while the latter test did not require "precise mathematical calculation," it must show an effort to make "some sort of individualized determination."

[391] 483 U.S. 825 (1987).

[392] 70 F.3d 1566 (10th Cir. 1995), where landowner complained that the state had unconstitutionally taken its property by limiting the number of hunting permits that could be lawfully issued to landowners for use by nonresident visitors, thus restricting the landowner's use of his common law right to hunt the "harvestable surplus" of wildlife in reasonable quantities.

[393] 70 F.3d at 1578–79.

[394] 911 P.2d 429 (1996), *cert. denied,* 117 S. Ct. 299.

[395] 911 P.2d at 439.

[396] 911 P.2d at 438.

[397] *See* 911 P.2d at 439, citing *Nollan:* "One would expect that a [permit] regime in which this kind of *leveraging* [i.e. the imposition of *unrelated* exactions as a condition for granting approval] of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes." 483 U.S. at 837, n.5.

[398] *See, e.g.,* Blue Jeans Equities West, Inc. v. City and County of San Francisco, 4 Cal. Rptr 2d 114 (1992), heightened scrutiny test limited to possessory rather than regulatory takings; Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir. 1991); Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991); and James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condi-*

suaded that the basic purpose of the Takings Clause—that the government's monopoly power over development permits should not be illegitimately exploited by imposing conditions that lack any logical affinity to the public impact of a particular land use—would be best served by not making a categorical exception to this nexus standard for monetary fees.[399]

The court in *Ehrlich* recognized but did not discuss the nexus requirements for monetary exactions (development impact fees) that were broadly distributed throughout a subdivision or community and were dedicated to meeting the future costs of foreseeable (although not immediate) public improvements facing a municipality. By the terms of their enabling statutes, such development fees have sometimes been based on legislative formulas and municipal planning processes, and in such cases have been viewed with more evident respect than cases in which permit fees have been arrived at entirely by a process of bargaining.[400] Illustrative of this treatment is *Home Builders Association v. City of Scottsdale.*[401] Here landowners challenged a development or impact fee imposed to assure adequate water supplies in the city's future, alleging that plans for use of the fees were neither sufficiently specific nor immediate.[402] The court, however, emphasized the distinction between fees agreed upon through negotiation and fees established through the legislative process to finance future public improvements, noting that the latter are protected against many of the risks associated with so-called "regulatory leveraging."[403] Pointing out that the city had complied with the statutory standard of a "reasonable relationship" between its fee structure and the future need for water resources,[404] the court saw no need under the decisions in *Nollan* and *Dolan* to further heighten their level of scrutiny of the nexus for Scottsdale's development impact fee.[405]

tion for Public Development Approval in the Time of the Rehnquist Court, 8 J. LAND USE & ENVIR. L. 53 (1992).

[399] *See* 911 P.2d at 444, adding "The essential nexus test is, in short, a 'means-ends' equation, intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners–whether they consist of possessory dedications or the exaction of cash payments..."

[400] *Compare:* Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) and 614 P.2d 1257 (Utah 1980).

[401] 930 P.2d 993 (Ariz. 1997).

[402] Both the state zoning law and the Groundwater Code, ARIZ. REV. STAT. §§ 9-463.05(1) and 45-576(B), require subdivision plats to be supported by certification of an assured 100-year water supply.

[403] 930 P.2d at 1000.

[404] ARIZ. REV. STAT., § 9-463.05(B)(4) (Supp. 1997).

[405] 930 P.2d at 1000, commenting that the equation has not yet been settled by the Supreme Court, and citing Parking Ass'n v. City of Atlanta, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. den.* 115 S. Ct. 2268 (1995) and Ehrlich v. City of Culver City, 911 P.2d 429 (1996), *cert. den.* 117 S. Ct. 299 (1996). *See* Jonathan M. Block, *Limiting the Use of Heightened Scrutiny to Land-Use Exactions.* 71 N.Y.U. L. REV. 1021, 1024 n.154 (1996).

F. Compensation for Removal or Relocation of Utilities

The large-scale public works programs carried on since the 1950s have regularly presented questions of responsibility for payment of the costs of relocating utility facilities within rights-of-way that they shared with surface transportation facilities, or of removing them altogether from the right-of-way. In the absence of legislation or contractual modifications, the common law rule provided that if utilities were lawfully installed on their own private right-of-way, owned in fee or in one of the less-than-fee interests, and thereafter were required to relocate in favor of occupation of the space for some public use, the public authority must compensate the utility for such costs. But, if utilities were installed on a publicly owned right-of-way and remained there by sufferance or by virtue of some formal permission, the public authority might require the utility to be relocated or removed from the right-of-way at the utility's own expense as necessary to accommodate transportation or other public uses. In the first instance, the action was treated as an exercise of eminent domain, and in the second instance, it was a legitimate use of the police power to regulate the use of land for public safety and convenience.[406]

This common law rule frequently has been modified by special arrangements provided in legislation and in permission formalized as licenses, franchises, and other arrangements for sharing use of rights-of-way. Thus, application of the common law rule in surface transportation programs has required that courts deal with relocation cost claims on a case-by-case basis according to the law and practice of the locality involved.[407]

Recognizing the practical necessity of reducing both the uncertainty and the financial hardship associated with utility relocation in the federal-aid highway program, Congress in 1956 authorized use of federal-aid funds to reimburse states for payment of utility relocation costs when state law required it.[408] While not re-

[406] *See, e.g.,* Commonwealth, Dep't. of Transp. v. Louisville Gas & Elec. Co., 526 S.W.2d 820 (Ky. 1975), relocation to widen highway; Commonwealth, Dep't of Transp. v. Pennsylvania Power & Light Co., 383 A. 2d 1314 (Pa. Comm. 1978), relocation underground.

[407] The evolution, economics, and equities of state and federal law governing compensation for utility relocation expenses are extensively discussed and documented in the following publications of the Transportation Research Board: RELOCATION OF PUBLIC UTILITIES DUE TO HIGHWAY IMPROVEMENT, SPECIAL REPORT 21 (1955); RELOCATION OF PUBLIC UTILITIES, 1956-1966, SPECIAL REPORT 91 (1969); POLICIES FOR ACCOMMODATION OF UTILITIES ON HIGHWAY RIGHTS-OF-WAY, NCHRP SYNTHESIS OF HIGHWAY PRACTICE 34 (1976); and R. Williams, TRANSPORTATION RESEARCH BOARD RECORD 631 (1977) at 56.

[408] Section 111 of the Federal-Aid Highway Act of 1956, P.L. 627, June 29, 1956, 70 St. 383, stating in part,

> whenever a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate

quiring that states enact compensation statutes or imposing penalties if they failed to pay relocation expenses, this incentive of federal participation encouraged states to enact laws allocating the expenses of utility relocation as it appeared best in accordance with the needs of their programs, industry practices, the state of their law, and any applicable federal standards. The resulting body of state legislation and administrative regulations has enabled states to relieve most of the hardships and reduce the incidence of claims alleging that takings resulted from forced uncompensated relocations.

Notwithstanding this, certain constitutional questions continue to be raised in applying the takings doctrine to relocation of utilities on transportation rights-of-way. The common law position that where utilities occupy public rights-of-way, by sufferance they have merely a permission to use the land subject to the public need, has been construed favorably to the government. Thus, the "public need" has included use of expressway design, off-street parking facilities, and urban renewal. It has not, however, extended to activities that are predominantly proprietary (rather than governmental) in character. So, where utilities were required to relocate in order to increase natural drainage, expand airports, and enhance residential neighborhood amenities, the utilities' relocation costs were held to be compensable expenses.[409] Successful claims of compensable takings in derogation of the common law rule are, however, not numerous and generally depend on specific statutory authority, contractual arrangements, or existence of a property interest.[410]

Interests created in the form of "licenses" or "franchises" have presented more difficulty for purposes of takings analysis. Licenses—especially so-called "mere licenses"—are thought of primarily as grants or expressions of permission, created easily and without the formalities associated with real property law, and vulnerable to being revoked or terminated with no more formality or legal consequences.[411]

The distinguishing features of licenses, franchises, and similar permissible arrangements were discussed in *Wisconsin Public Service Corp. v. Marathon County*,[412] where the issue was whether a public utility had a sufficient property interest to require compensation for the forced removal and replacement of its power lines. In a suit to determine who should pay for such relocation, the court spoke of the utility's "rights"—derived from an agreement titled "Permit," in which the granting clause spoke of a "franchise" or "permission"—as being more than a license. Commenting that the utility's agreement indicated that the parties "did not intend these rights to be personal in nature," the court stated "The agreement for extending rights for construction of utility lines was, in form, a permit, but in substance, contained rights characteristic of a property interest. Because substance controls form, the permits must be held to have conveyed property interests."[413]

This same matter was considered by the Colorado Supreme Court in *U.S. West Communications Inc. v. City of Longmont*,[414] where a utility was ordered to relocate its surface facilities underground. The utility challenged the order as a constitutional taking, arguing that when it constructed its surface facilities in good faith reliance on the city's consent and the legislature's authority, it acquired property rights in the surface fixtures. Conceding that such property interests were subject to general municipal regulation, the utility claimed that the city went "too far" when it required "conversion to entirely new underground facilities." The court found this argument "unpersuasive" and held that the city's underground relocation order did not constitute a compensable taking, but in so doing it did not explain the nature of the utility's franchise beyond referring to it as personal property.[415]

In other instances, descriptions of the rights under a utility franchise have emphasized their permissive character and their limitation to activities specifically enumerated in a statute or municipal ordinance or in a grant from a governmental agency possessing delegated authority over the public lands involved. The terms of franchises tend to be strictly construed by the courts.[416]

Whatever form of "property" a utility's rights or interests may take, where it is determined that such rights rise to the level that is protected by the Fifth Amendment, judicial review of takings claims must

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System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the proportion as Federal funds are expended on the project.

[409] NICHOLS, EMINENT DOMAIN, (3d ed., 1997 rev. vol.), § 15.04[2].

[410] City of Livermore v. Pacific Gas & Elec. Co., 59 Cal. Rptr. 3d 852 (1997); Grand Forks-Triall Water Users Inc. v. Hjelle, 413 N.W.2d 344, *app. dism.* 484 U.S. 1053 (1987); Hampton Roads Sanitary Dist. Comm'n v. City of Chesapeake, 240 S.E.2d 819 (Va. 1978); Pub. Serv. Corp. v. Marathon County, 75 Wash. 2d 442, 249 N.W.2d 543 (1977).

[411] CHARLES EDWARD CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH THE LAND (1947), 13–15, noting that licenses have been referred to as expressions of consent that create a legal privilege, but do not create or alter any interests in real property.

[412] 75 Wis. 2d 442, 249 N.W.2d 543 (1977).

[413] 249 N.W.2d at 544–45. *See also* Southern California Gas Co. v. City of Vernon, 48 Cal. Rptr. 2d 661, 41 Cal. App., 4th 209 Cal. App. 4th 209 (1995), where a franchise to lay pipes under the street was held to be in the nature of an easement.

[414] 948 P.2d 509 (Colo. 1997).

[415] 948 P.2d at 523.

[416] City of Albuquerque v. New Mexico Public Serv. Comm'n 115 N.M. 521, 854 P.2d 348 (1993), franchise entitled utility to use streets and rights-of-way only to construct and operate its facilities and distribution system. Northwest Natural Gas Co. v. City of Portland, 70 Ore. App. 647, 690 P.2d 1099, *aff'd* 300 Ore. 291, 711 P.2d 119 (1987), nothing in franchise gives utility a right to a particular location on the right-of-way.

address the question of whether regulatory action shifting relocation costs to the utility "goes too far" and constitutes a compensable taking. Forced removals or relocations are not compensable takings merely because they substantially diminish the value of the regulated property or disallow its highest and best use. Governmental regulations or actions must prohibit all or substantially all reasonable use of regulated property for public benefits before its owner is entitled to just compensation.[417]

This precept was applied in *Grand Forks-Triall Water Users v. Hjelle*,[418] where state law prohibited installation of electrical supply or communications lines and gas, oil, water, or other pipelines on private property within 100 feet of the center line of a state highway without a permit, and made such installation subject to removal at the utility's own expense if removal was required for highway expansion. It was held that this restriction was not a compensable taking, and did nothing more than regulate a particular use of the right-of-way and left all other uses of the regulated property available to its owners.[419]

Efforts have been made to claim that relocation requirements go too far when they are not for legitimate public use or do not involve any harm to the public. This was argued where Public Service Commission regulations required installation of electric power transmission lines across railroad tracks at specified heights. It was held, however, that safety considerations, rather than the convenience of the utilities, justified the requirement.[420] In contrast, where relocation was ordered in conjunction with a general upgrading of utility facilities and service, the public purpose of the requirement was justifiably questioned, albeit with deference to legislative determinations.[421]

Where removal of utilities was ordered in conjunction with vacation of city streets in order to assemble land for redevelopment projects, it was challenged as serving solely to promote the city's proprietary interests and exceeding the legitimate governmental purposes of its police power. The court disagreed, stating that it saw "nothing fundamentally unfair in requiring the utility to bear the relocation expenses as a part of its cost of doing business."[422]

But, in another instance, where a pipeline utility was required to relocate its lines to accommodate construction of a planned new drainage system, it was held to be a compensable taking because the public purpose "did not justify imposition of the costs on the pipeline company."[423] Pointing out that the utility's lines posed no hazard to the public and were not subject to any prior agreement or condition for accommodating future highway improvements, the court reflected the influence of the recent U.S. Supreme Court decisions in *Lucas* and *Dolan*[424] on de facto takings by physical invasion when it stated:

> [T]he requirement that a public utility pay the cost of relocating its equipment to accommodate a drain is not merely a regulation of land use. It is backed by the implicit but clear threat of actual physical intrusion and removal of the equipment....Backed by this kind of power...[the relocation ordinance] cannot be treated as a mere regulation of use.[425]

VI. CONCLUSIONS

The desire to have bright line rules for implementing the Takings Clause of the Fifth Amendment is not likely to be realized on the basis of recent court decisions. Notwithstanding that for the past score of years the U.S. Supreme Court has redirected the attention of the judiciary to the constitutional limitations on taking of private property for public use and the regulation of land use, the results have failed to entirely satisfy either the proponents of stronger protection for private property rights or the proponents of stricter construction of the Takings Clause with more deference to realization of public purposes.

It is not too much to say that general consensus about the Takings Clause does not extend past the basic rationale that was announced in *Armstrong* that the Fifth Amendment is designed to "bar the Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[426] Beyond that point the courts, the regulators, and the regulated public must put up

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[417] Karl v. Malone, 313 N.W.2d 758 (N.D. 1981).

[418] 418 N.W.2d 344 (N.D. 1987).

[419] 413 N.W.2d at 347, noting that although the utility occupied its site under easements, the restriction did not materially reduce the value of usefulness of the utility's interest, citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) and distinguishing Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) and First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).

[420] Wisconsin Cent. Ltd. v. Public Serv. Comm'n of Wisconsin, 95 F.3d 1359, (7th Cir, 1996), compensation claim denied on ripeness grounds.

[421] Hawaii Hous. Auth. v. Midkoff, 467 U.S. 229 (1984).

[422] Pacific Gas & Elec. Co. v. Redevelopment Agency of City of Redlands, 142 Cal. Rptr. 584, 75 Cal. App. (3d) 957 (1977), observing that

> the distinction between "governmental" function and "proprietary function" is a sort of abstraction difficult to make meaningful in a day when municipalities continually find new ways to exercise police power in their efforts to cope with the pressing needs of their citizens....A utility's right to compensation should depend not on whether a municipal activity is "governmental" or damaging of a valuable property right. 142 Cal. Rptr. at 591.

[423] Panhandle Eastern Pipeline Co. v. Madison County, 898 F. Supp. 1302 (S.D. Ind. 1995).

[424] Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[425] 898 F. Supp. at 1311.

[426] 364 U.S. at 49.

with rules that are evolving uneasily, even with regard to the so-called categorical taking situations.

Much of the effort of judicial review has focused on defining remedies for hardships associated with regulatory (and sometimes predatory) practices of public programs. As a result, the coverage of doctrine on the takings issue has remained unclear. Preoccupation with remedies at the expense of substance is particularly evident where legislation has been sought to introduce more certainty into takings rules than the courts seem prepared to provide.

Application of the law on compensable taking of private property for public use, therefore, continues to depend essentially on what have been called (and criticized as) "ad hoc inquiries," case by case, emphasizing factual circumstances viewed in the context of certain principles or axioms, such as landowners must not be denied "all economically viable use" of their land; landowners must not be required to suffer entry into or use of their land by the government or by third parties under governmental requirement; governmental regulation of land use shall be only for public purposes; and the denial of reasonable, investment-backed expectations by government regulation may become a form of taking where circumstances justify it. Efforts to delineate situations in which categorical findings of taking apply have sought to reduce the need for ad hoc inquiries into the effects of regulatory impacts. These efforts have had their easiest applications where physical invasions and occupation are shown.

Where, however, regulatory action must be evaluated by reference to economic impacts, categorical treatment still draws heavily on the analysis derived from *Penn Central*.

Legislatures have fared little better than the courts in formulating bright line rules for distinguishing permissible takings through the police power and eminent domain. Their most useful practical contribution to resolution of the takings issue may turn out to be their recent stimulation of the states' Attorneys General to develop analytical approaches and guidelines for the use of state and local government agencies in making regulatory impact assessment for proposed regulations and administrative actions. Through these analytical aids, governmental regulators may expect to improve the results of their rulemaking and their rulings, and achieve better records in avoiding constitutional controversy over the takings issue and in defending claims of compensable taking of private property. Selected samples of guidelines currently being used in state government are collected in Appendix C of this report.

APPENDIX A

TABLE 1: State Regulatory Impact Assessment Legislation

STATE CITATION TITLE	LEGISLATIVE PURPOSE	ASSESSING AGENCY	ACTION REQUIRING ASSESSMENT	LEGISLATIVE DEFINITIONS	SPECIAL PROVISIONS
ARIZONA REV. STAT. ANN. (1995) §9-500.13	Assure compliance by cities and towns and their agencies with court decisions on unconstitutional takings of private property.	Cities, towns, and their agencies.		None.	Local government agencies must comply with decisions in *Nollan, Dolan, Lucas*, and *First English*.
DELAWARE CODE ANN. (1992) §29-605	Assessment of potential of regulations for taking private property.	Attorney General.	Promulgation of agency rule of regulation.	"Taking of private property"	Assessment guidelines published by Attorney General.
IDAHO CODE (1994) §67-8001 to §67-8004	Establish orderly consistent process to evaluate whether regulatory actions result in taking private property without due process of law.	State agencies and local governments.	Proposed regulatory or administrative actions.	"Private property," "Taking"	Title: "Idaho Regulatory Takings Act." Assessment guidelines and checklist published by Attorney General.
INDIANA BURNS STAT. ANN. (1993) §4-22-2-32	Establish procedure to determine if agency rules constitute taking of private property without compensation to owner, or violate other laws.	Attorney General.	Proposed rules for adoption by state agencies.	None.	
KANSAS STAT. ANN. (1995) §77-701 to §77-711	Reduce risk of undue or inadvertent burdens on private property from lawful governmental actions.	Attorney General and state agencies of executive branch.	Promulgation of rule or regulation by state agency.	"Governmental action," "Private property," "Taking"	Title: "Private Property Protection Act." Assessment guidelines published by Attorney General. In case of emergency, assessment may follow action.
MICHIGAN COMPILED LAWS ANN. (1996) §24.421	Provide process for evaluating governmental actions that may result in constitutional taking of private property.	Departments of Natural Resources, Transportation, and Environmental Quality.	Prior to the assessing agency taking any "government action."	"Governmental action," "Private property," "Taking"	Title: "Property Rights Preservation Act." Guidelines published by Attorney General. In case of emergency, review may follow action.
MISSOURI VERNON'S ANN. STAT. (1994) §536.017		State agency proposing rule or regulation.	Takings analysis must be made for any rule or regulation that affects use of real property and is so certified in letter to Secretary of State.		Title: "Taking of Private Property Act." Assessment is not necessary in cases of emergency, or where rule is federally mandated, or where it merely codifies existing state or federal law.

APPENDIX A

TABLE 1: State Regulatory Impact Assessment Legislation *(continued)*

STATE CITATION TITLE	LEGISLATIVE PURPOSE	ASSESSING AGENCY	ACTION REQUIRING ASSESSMENT	LEGISLATIVE DEFINITIONS	SPECIAL PROVISIONS
MONTANA CODE ANN. (1995) §2-10-101 to §2-10-105	Develop an internal management process for state agencies to evaluate effects of state actions on private property.	State agencies.	Prior to state actions with implications for taking or damaging private property, state agency must perform regulatory impact assessment.	"Action with taking or damaging implications," "Private property," "Taking or damaging"	Title: "Private Property Assessment Act." Assessments showing takings or damaging implications must be reported to Governor prior to taking action except in health or safety emergencies.
NORTH DAKOTA CENTURY CODE (1995) §28-32-02.5	Ascertain constitutional takings implications of proposed rules that may limit use of private real property.	Administrative agency.	On request of governor, member of legislature, or if proposed rule is expected to have more than $50,000 impact.	"Taking," "Regulatory taking"	Title: "Administrative Agencies Practice Act." Private landowner who is affected by a rule limiting land use may have agency reconsider a rule or its application.
TENNESSEE CODE ANN. (1994) §12-1-201 to §12-1-206	Provide mechanism for education of state agencies and the public, and consideration of what governmental actions may be unconstitutional takings of private property in order to avoid unwarranted financial burden and interference with private property rights.	Attorney General and Reporter; state administrative agencies.	Prior to promulgation, agency regulations must be reviewed if unconstitutional taking might result.	"Governmental action," "Private property," "Unconstitutional taking"	
TEXAS GOV'T CODE (1995) §2007.041 to §2007.045	Assist governmental entities to identify and evaluate governmental actions that are regulatory or physically invade private property, or reduce its market value.	State executive branch organizations or political subdivisions.	Prior to taking action that may result in a "taking," agency must give notice and file impact assessment. If action is not taken within 180 days, assessment must be updated.	"Private property," "Taking"	Title: "Private Real Property Rights Protection Act." Statute not applicable to (1) list of 14 types of governmental action; (2) county actions prior to 9/1/97; or (3) actions implementing Federal Safe Drinking Water Act or c.61, Natural Resources Code.
UTAH CODE ANN. (1994) §63-90a-1 to §63-90a-4	Adoption or establishment of guidelines to identify actions having takings implications.	State agencies and local government units.	Actions or ordinances that may involve physical taking or exacting private property.	"Constitutional taking issues"	Title: "Constitutional Takings Issues." Statute not applicable to formal eminent domain actions by political subdivisions. In emergencies, impact assessment may be made after action is taken.

APPENDIX A

TABLE 1: State Regulatory Impact Assessment Legislation *(continued)*

STATE CITATION TITLE	LEGISLATIVE PURPOSE	ASSESSING AGENCY	ACTION REQUIRING ASSESSMENT	LEGISLATIVE DEFINITIONS	SPECIAL PROVISIONS
UTAH CODE ANN. (1993) §63-90-1 to §63-90-4	Assist state agencies in identification of actions having constitutional taking implications.	State agencies.	When agency finds its action may have constitutional takings implications, it must prepare an impact assessment, analyze specific issues, and submit it to governor and legislative management committee prior to taking action.		
WASH. REV. CODE ANN. (1991) §36.70A.370	Establish a process enabling state agencies and local governments to assure that unconstitutional takings do not occur.	Attorney General.	Proposed regulatory or administrative actions.		Title: "Growth Management Act." Attorney General in consultation with state bar will develop a continuing education course to implement assessment law.
WEST VIRGINIA CODE (1995) §22-1A-1 to §22-1A-6	Establish process to evaluate how proposed actions of Division of Environmental Protection may affect privately owned real property.	State Division of Environmental Protection.	When Division believes its action is reasonably likely to deprive owner of real property of title or productive use of private property. Also when creation of buffer zone uses private property.		Title: "Private Real Property Protection Act." No assessment required unless U.S. and state supreme courts have held that under similar circumstances compensation is required. No assessment for enforcement actions, emergency regulations, or permit conditions pursuant to state or federal law.
WYOMING STAT. ANN. (1995) §9-5-301 to §9-5-305	Establish a process that better enables governmental bodies to evaluate whether regulatory or administrative action results in taking private property or violates due process.	State agencies.	When state agencies propose rules that may limit use of private property, or exactions or dedications are required from owner of private property.	"Constitutional implications," "Private property," "Taking"	Title: "Regulatory Takings Act."

APPENDIX B

TABLE 2: Guidelines for Regulatory Impact Assessment

STATE CITATION	PURPOSE / SCOPE OF GUIDELINES	DUTY TO PREPARE	GUIDELINE STANDARDS	DUTY TO PUBLISH	UTILIZATION OF GUIDELINES	DUTY TO UPDATE
DELAWARE CODE ANN. §29-605	Assessment of potential of regulations for taking private property.	Attorney General.	Not specified.	Available on request.	Since assessments are made by Attorney General's Office, guidelines are for internal use.	
IDAHO CODE ANN. §67-8003	Establish orderly, consistent process to evaluate whether proposed action will result in taking private property.	Attorney General.	"Current law."	Not specified.	State agencies and local governments "shall follow" guidelines.	Review and update process at least annually to maintain consistency with changes in the law.
INDIANA BURNS STAT. ANN. §4-22-2-32	Provide procedural rights for rulemaking by state agencies.	Attorney General.	Statutory authority; administrative procedure, and current law.	Not specified.	If Attorney General's review of regulation determines that it may constitute a taking of private property, Attorney General will so advise Governor and agency head.	
KANSAS STAT. ANN. §77-704	Assist state agencies to evaluate whether governmental actions may be taking of private property.	Attorney General.	Current law as articulated by U.S. and state supreme courts.	Publication in *Kansas Register*.	Guidelines "shall be adhered to in promulgating rules and regulations."	Attorney General shall update guidelines annually.
MICHIGAN COMP. LAWS §24.423	Assist state agencies to identify and evaluate governmental actions that may result in constitutional takings.	Attorney General in conjunction with Departments of Natural Resources, Transportation, and Environmental Quality.	State Administrative Procedures Act and current law as articulated by U.S. and state supreme courts.	Not specified.	Prior to taking action, Departments of Natural Resources, Transportation, and Environmental Quality review guidelines and consider likelihood of causes a constitutional taking.	Attorney General shall update guidelines annually.
MONTANA CODE ANN. §2-10-104	Assist agencies to identify and evaluate taking and damaging implications of agency actions.	Attorney General.	Current law as construed by U.S. and state supreme courts; avoidance of undue burden on public treasury.	Not specified.	Attorney General guidelines shall be used in preparing taking and damaging impact assessments.	Attorney General shall review guidelines annually and modify as needed to comply with changes in the law.
NORTH DAKOTA CENTURY CODE §28-32-2	Assist preparation of assessment of constitutional implications of proposed rules that may limit use of private property.	State agencies (implicit).	Not specified.	Copy or regulator analysis available on request.	Duty to prepare and issue a regulatory analyses is mandatory for agency proposing a rule or regulation.	Not specified.

APPENDIX B

TABLE 2: Guidelines for Regulatory Impact Assessment *(continued)*

STATE CITATION	PURPOSE / SCOPE OF GUIDELINES	DUTY TO PREPARE	GUIDELINE STANDARDS	DUTY TO PUBLISH	UTILIZATION OF GUIDELINES	DUTY TO UPDATE
TENNESSEE CODE ANN. §12-1-203	Assist evaluation of governmental actions that may result in unconstitutional takings.	Attorney General and Reporter.	Current law as articulated by U.S. and state Supreme courts.	Publication in *Tennessee Administrative Register.*	Purpose is to provide a mechanism for education of and consideration by state agencies and the public of what actions may result in unconstitutional taking of private property and unwarranted interference with private property rights.	Attorney General shall update guidelines at least annually to take account of changes in the law.
TEXAS GOV'T CODE §2007.041	Assist governmental entities identify and evaluate actions which may result in taking private real property.	Attorney General.	Current law as construed by U.S. and state supreme courts.	Publication in *Texas Register.*	Governmental entity shall prepare written takings impact assessment complying with guidelines prepared by Attorney General.	Attorney General shall review guidelines annually and revise to be consistent with current law.
UTAH CODE ANN. §63-90-3	Assist state agencies to identify actions with takings implications.	State agencies.	Current law.	Not specified.	Not specified.	Not specified.
UTAH CODE ANN. §63-90a-3	Assist local governments to identify actions involving physical takings or exactions that may be constitutional takings.	Local political subdivisions.	Current law.	Not specified.	Political subdivision shall consider guidelines when taking action involving physical taking or exaction of private real property. Guidelines adopted under this act are advisory.	Not specified.
WASH. REV. CODE ANN. §36.70a.370	Establish orderly, consistent process for state agencies and local governments to assure they do not result in constitutional takings of private property.	Attorney General.	Private property protection provided in state and federal constitutions.	Not specified.	Attorney General guidelines must be used by state agencies and any local government using certain state planning programs.	Attorney General shall update guidelines annually to be consistent with case law changes.
WASH. REV. CODE ANN. §19.85.030 to §19.85.040	Small business economic impact statement is to help determine whether a proposed regulation will have a disproportionate impact on small businesses.	Agency proposing rule.	Guidelines developed by "Business Assistance Center" and criteria listed in statute.	Certain impact statements must be filed with the state Code Revisor. Annual report by agency on economic impact	Purpose of annual review of economic impact of regulations is to determine need for continuation or alteration of regulations on small business.	Not specified.
WEST VIRGINIA CODE ANN. §22-1A-2	Establish orderly and consistent process to evaluate how potential action affects privately owned real property.	Attorney General.	Current law (implied) plus statutory criteria	Not specified.	State agencies shall use guidelines and checklist in evaluation of proposed actions and regulations, and in any conditions imposed on issuance of permits for specific land use.	Attorney General's Office shall review and update guidelines to reflect changes in the law.

APPENDIX C—SELECTED CHECKLISTS AND GUIDELINES FOR REGULATORY IMPACT ASSESSMENT

Idaho Regulatory Takings Act Guidelines, October 1997
Idaho Code (1997 Supp.), Sec. 67-8003
Attorney General's Checklist Criteria

Agency or local government staff must use the following questions in reviewing the potential impact of a regulatory or administrative action on specific property. While the questions also provide a framework for evaluating the impact proposed regulations may have generally, takings questions normally arise in the context of specific affected property. The public review process used for evaluating proposed regulations is another tool that the agency or local government should use aggressively to safeguard rights of private property owners. If property is subject to regulatory jurisdiction of multiple governmental agencies, each agency or local government should be sensitive to the cumulative impacts of the various regulatory restrictions.

Although a question may be answered affirmatively, it does not mean that there has been a "taking." Rather it means there could be a constitutional issue and that the proposed action should be carefully reviewed with legal counsel.

1. Does the regulation or action result in a permanent or temporary physical occupation of private property?

2. Does the regulation or action require a property owner to dedicate a portion of property or to grant an easement?

3. Does the regulation deprive the owner of all economically viable uses of the property?

4. Does the regulation have a significant impact on the landowner's economic interest?

5. Does the regulation deny a fundamental attribute of ownership?

6. Does the regulation serve the same purpose that would be served by directly prohibiting the use or action; and does the condition imposed substantially advance that purpose?

Michigan Takings Assessment Guidelines, December 1996
Michigan Compiled Laws, (1997 Supp.), sec. 24.421

Checklist

(A) Does the governmental action result in a permanent physical occupation or destruction of private property?

(B) Does the governmental action require a property owner to dedicate a portion of the property to the government or for public use?

(1) Does the dedication lack an "essential nexus" to the public purpose to be advanced?

(2) Does the scope or degree of the dedication lack a "rough proportionality" to the potential impact to be mitigated?

(C) Does the governmental action deprive the owner of all economically viable use of the property?

(1) Does the property owner have distinct investment-backed expectations that the property could be utilized in the manner which is prohibited?

(2) Would the utilization of the property be otherwise lawful under state property and nuisance laws?

(3) Does the government action impact the use of the whole property or all of the interests owned by a claimant in the property? (e.g., mineral rights; easements; etc.)

(D) Does the government action have too severe an economic impact on the property in light of the public interest advanced by the government action?

Tennessee Government Taking of Private Property Act
Tennessee Code, sec. 12-1-203 (Supp. 1996)
Attorney General's Guidelines For Evaluation of
Proposed Regulatory or Administrative Action
Tennessee Administrative Register
August 15, 1997, Vol. 23, No. 8, pp. 1–12

REGULATORY TAKINGS

Land use regulations that affect the value, use, or transfer of private property may constitute a taking if they are adjudged to go too far. The greater the deprivation of use, the greater the likelihood that a taking will be found.

While there is no set formula for determining when government action constitutes a taking, an agency should consider the following criteria:

A. Whether the policy or action will substantially advance a legitimate public purpose of the enabling statute, where the policy or action is in furtherance of obligations imposed or authorized by statute. If the regulation fails to substantially advance a legitimate state interest, or no nexus exists between the asserted government purpose and the regulation, a taking may be found.

B. Whether the regulation denies the landowner all economically viable use of his property or substantiallyinterferes with his reasonable investment-backed expectations, and the regulation goes beyond the government's powers under common law nuisance doctrine.

C. If the regulation advances a legitimate public purpose, but is not reasonably related or roughly proportional to the projected impact of the landowner's proposed use of the property. Regulation of an individual's property use must not be disproportionate to the degree which the individual's property use contributes to the overall problem. The less direct, immediate and demonstrable the contribution of the property-related activity to the harm to be addressed, the greater the risk that a taking will be found.

D. The degree to which a regulatory action closely resembles, or has the effect of, physical invasion or occupation of property....

PERMITTING AND CERTIFICATION PROGRAMS

The programs of many agencies require private parties to obtain permits or certification before making specific uses of, or acting with respect to, private property. An agency may place conditions on the granting of such permits or certification, or deny the same, without necessarily effecting a taking for which compensation is due, however, the agency should first consider the following factors in determining whether a taking may result.

A. Whether the government action will deprive the owner of essentially all economically viable or productive use of his property; and
B. Whether the landowner's proposed use of the property was not prohibited or considered a public nuisance at the time the owner acquired title to the property and, therefore, the condition or permit denial interferes with the owner's reasonable investment-backed expectations; and
C. Whether the condition imposed by the government will result in a permanent physical occupation or invasion of property; and

D. Whether the condition or permit denial is reasonably related or roughly proportional to the projected impact of the landowner's proposed use of the property....

ECONOMIC IMPACT OF THE REGULATION AS APPLIED

In assessing whether a proposed policy or action may effect a taking of private property, an agency may want to consider the economic impact of a regulation by examining the following factors:

A. The character and present use of the property, as well as the character and anticipated duration or the proposed or intended government action; and

B. The likely degree of economic impact on all identified property and economic interests. A mere diminution in the value of the property to be regulated by the government's denial of the highest and best use of the property will not generally, by itself, amount to a taking...; and

C. Whether the proposed policy or action carry benefits to the private property owner that offset or otherwise mitigate the adverse economic impact of the proposed policy or action; and,

D. Whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

THE "PARCEL AS A WHOLE" ANALYSIS

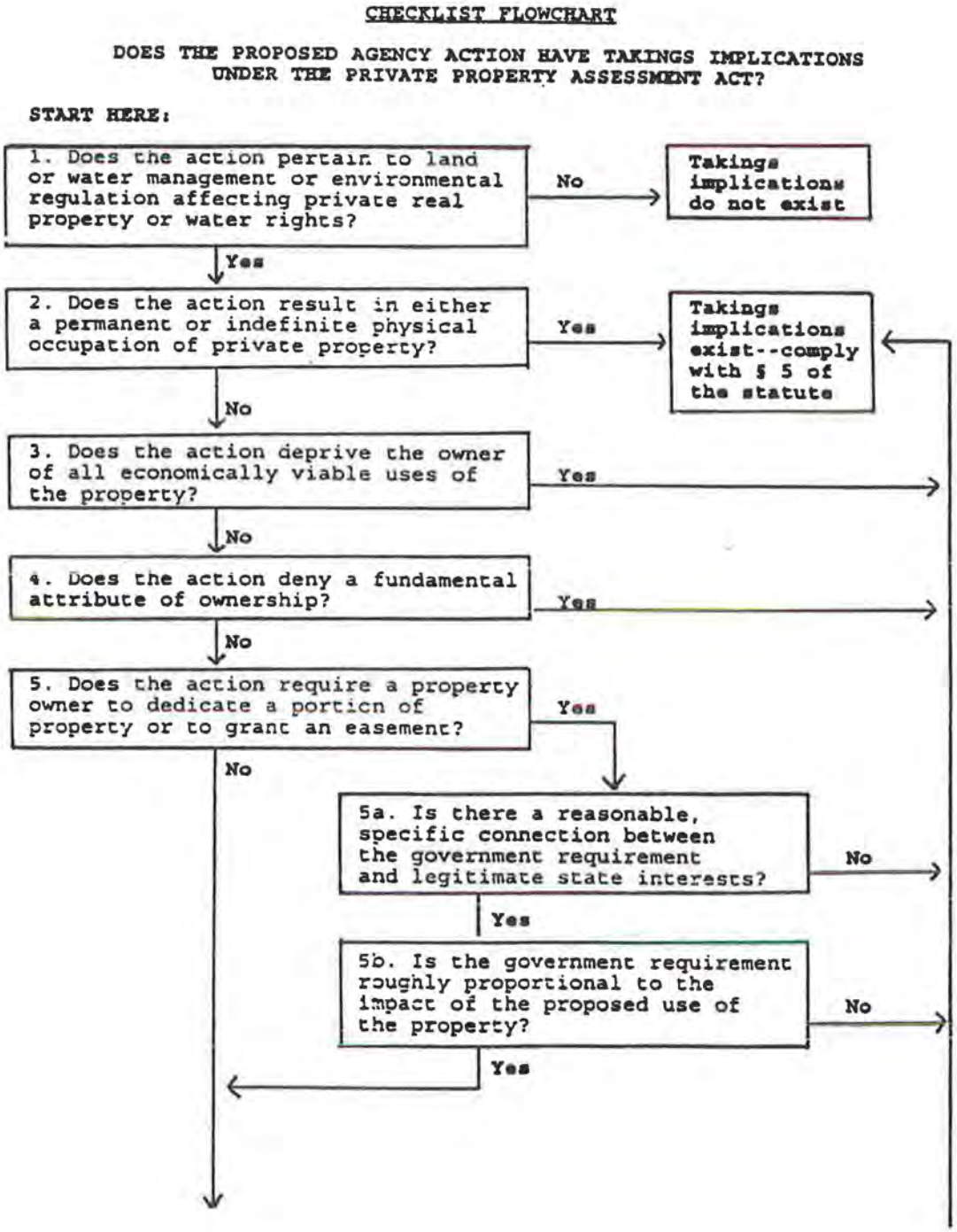
In determining the economic impact of a proposed or intended government action, an agency should consider the impact on "the parcel as a whole," and not merely the part of the parcel that is subject to regulation. Generally, if an owner has been denied economic use of a segment of a parcel, but retains viable economic use of other segments of the same parcel, a taking may not result.

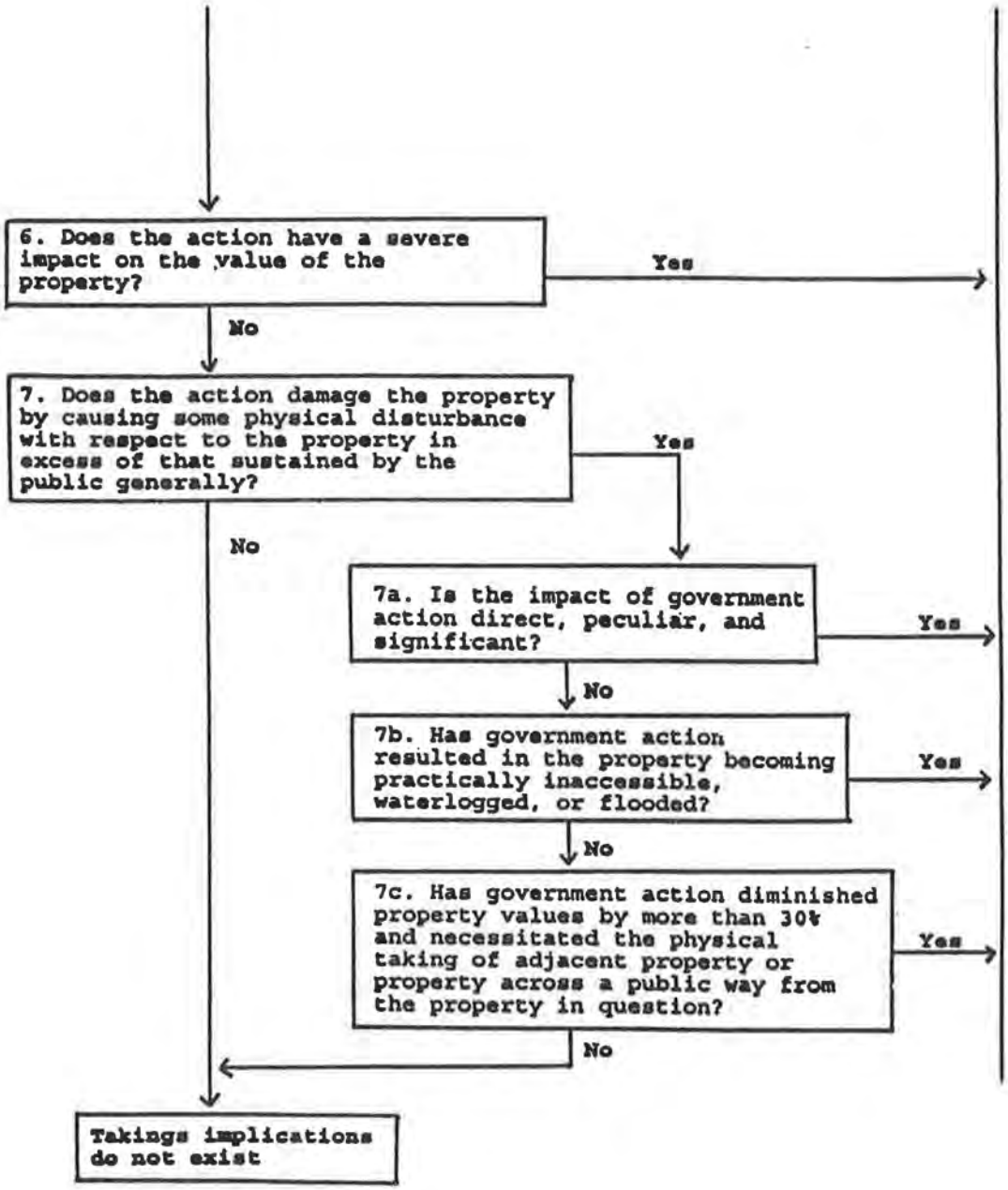
Wyoming Regulatory Takings Act
Wyoming Statutes (1997 Supp), sec. 9-5-303

Takings Checklist

1. Does the action affect private property? (If no, no further inquiry is necessary.)
2. Is the action mandated by state or federal law? (If yes, go to question 3; if no, go to 4.)
3. Does the proposed action advance a statutory purpose?
4. Does action result in permanent occupation of private property?
5. Does the action require the property owner to dedicate property or grant an easement?
6. Does the action deprive the owner of all economically viable uses of the property?
7. Does the action have a significant impact on the landowner's economic interest?
8. Does the action deny the owner a fundamental attribute of ownership?
9. Does the action serve the same purpose that would be served by directly prohibiting use of the land?
10. Could the problem that has necessitated the action be addressed in a less restrictive manner?

Montana
Attorney General's Guidelines and Checklist
Montana Code Annotated (1997 Supp.), §2-10-104




6. Does the action have a severe impact on the value of the property?
Yes
No
7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally?
Yes
No
7a. Is the impact of government action direct, peculiar, and significant?
Yes
No
7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?
Yes
No
7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?
Yes
No
Takings implications do not exist

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