

---

## IV. The Constitution and Its Protection of Property Rights

---

This is an excerpt from the ASFPM No Adverse Impact Legal Guide for Flood Risk Management.

The entire document is available at [no.floods.org/NAI-Legal](https://no.floods.org/NAI-Legal)

---



FIND THE FULL DOCUMENT FRONT MATTER, SUGGESTED CITATIONS, ACKNOWLEDGEMENTS, TABLE OF CONTENTS, INTRODUCTION TO THIS GUIDE, AND COMMON TERMINOLOGY APPENDED TO THE END OF THIS EXCERPT DOCUMENT.

---

## IV. The Constitution and Its Protection of Property Rights

---

---

### IV.A. Fourteenth Amendment

---

The Fifth Amendment to the U.S. Constitution is not the only protection of private property offered in the U.S. Constitution's Bill of Rights. The Fourth Amendment and Fourteenth Amendment also offer property protections.<sup>755</sup> While the Fourth Amendment's language<sup>756</sup> can be interpreted to include property, jurisprudence has developed in such a way as to focus the Fourth Amendment's language on the right to privacy more than on protection of property.<sup>757</sup>

The Fourteenth Amendment provides, in pertinent part, that "nor shall any State deprive any person of life, liberty, or property, without due process of law."<sup>758</sup> Note that this does not prohibit deprivation of life, liberty, or property; only that such deprivation may only occur with "due process."<sup>759</sup> Beginning in 1897, with the case *Chicago, Burlington & Quincy Railroad v. City of Chicago*, 166 U.S. 226 (1897), the U.S. Supreme Court tacitly "incorporated" certain protections of the Bill of Rights, including the Fifth Amendment's property protections, into the due process of the Fourteenth Amendment.<sup>760</sup> A few years later, the U.S. Supreme Court made this incorporation of the Bill of Rights explicit,<sup>761</sup> resulting in extending many of the protections

---

<sup>755</sup> Robert Meltz, Dwight H. Merriman & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 13 (Island Press 1999).

<sup>756</sup> Providing people "the right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."

<sup>757</sup> Robert Meltz, Dwight H. Merriman & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 18-19 (Island Press 1999).

<sup>758</sup> U.S. Const., Amend. IV, sec. 1.

<sup>759</sup> *See, e.g.*, U.S. Const., Amend. V ("No person shall be . . . deprived of life, liberty, or property, *without due process of law*." (italics added)) and U.S. Const., Amend. XIV, sec. 1 ("nor shall any state deprive any person of life, liberty, or property, *without due process of law*." (italics added)).

<sup>760</sup> Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 6.3.3 (1997).

<sup>761</sup> *Twining v. New Jersey*, 211 U.S. 78 (1908).

of the Bill of Rights against *federal* action to also include action by the *states*.<sup>762</sup> Here it is appropriate to keep in mind that neither the Bill of Rights *nor* the Fourteenth Amendment's protections protect against *private* actions.<sup>763</sup> However, "local ordinances adopted under state authority are within the Fourteenth Amendment's reach."<sup>764</sup>

The concept of due process has been separated into "procedural" versus "substantive" due process,<sup>765</sup> and a due process claim must be either a procedural or a substantive due process claim.<sup>766</sup>

Procedural due process, as the name implies, is about the fairness of the *process* used to deprive a person of life, liberty, or property. Typically, due process involves questions about the amount of notice and right to be heard afforded to a person subject to the deprivation of life, liberty, or property.<sup>767</sup> While citizens do not necessarily have a right to notice or opportunity to be heard prior to general legislative enactments through statute,<sup>768</sup> when a local law targets specific property owners, as opposed to property owners more generally, this is often considered an "adjudicatory" action rather than a legislative action, and an action which requires notice to those affected and the opportunity to present evidence and be heard.<sup>769</sup> Based on this, general state statutory enactments of property regulation to prevent flooding or protect wetlands do not require notice to property owners and a right to be heard. However, local enactments often require such notice and opportunity to be heard, especially if the local enactments only affect an identifiable subset of property owners, such as those in a specific area and with property within 50 feet of a wetland, for example. The distinction is whether or not the action of the government is a general policy affecting many or a more directed policy that affects a few people and may involve factual inquiry into which people or properties may be affected.<sup>770</sup>

---

<sup>762</sup> Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 6.3.3 (1997). Note that not *every* right in the Bill of Rights has been incorporated into the Fourteenth Amendment and thus made applicable to states. However, most have. *Id.*

<sup>763</sup> *DeShaney v. Winnebago Cty. Dept. of Soc. Serv.*, 489 U.S. 189, 195-96 (1989).

<sup>764</sup> *Pietsch v. Ward Cty.*, 446 F. Supp. 3d 513, 525-26 (N.D. D. 2020).

<sup>765</sup> Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 7.1 (1997).

<sup>766</sup> *Villa of Lake Jackson, Ltd. v. Leon Cty.*, 906 F. Supp. 1509, 1515 (N.D. Fla. 1995).

<sup>767</sup> Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 7.4.1 (1997).

<sup>768</sup> *Minn. State Bd. For Cmty. Colleges v. Knight*, 465 U.S. 271, 283-84 (1984); *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

<sup>769</sup> *See, e.g., Property Owners Ass'n v. Ketchikan*, 781 P.2d 567, 571-72 (1989) (citing *Londoner v. City of Denver*, 210 U.S. 373, 386 (1908)).

<sup>770</sup> *De Peñuelas v. Ecosystems, Inc.* 2015 PR App. LEXIS 675, \*22-\*23 (Tribunal De Apelaciones De Puerto Rico, Region Judicial De Ponce Y Humacao 2015) (citing Pierce Richard J., *Administrative Law Treatise*, Fourth Edition, Vol. II).

Procedural due process is not addressed at great length here as it is assumed that most local governments have adequate processes in place to ensure compliance with the requirements of procedural due process in their local processes for adopting laws, ordinances, or regulations that require notice and an opportunity to be heard.<sup>771</sup>

Substantive due process, on the other hand, “asks whether the government has an adequate reason for taking away a person’s life, liberty, or property.”<sup>772</sup>

A number of earlier cases that are often considered as takings cases actually invoked the Fourteenth Amendment’s protections against deprivation of property without due process of law.<sup>773</sup> This contributed to the doctrinal confusion between substantive due process and takings.<sup>774</sup> For example, note that *Goldblatt v. Town of Hempstead*<sup>775</sup> is not a Fifth Amendment case but a Fourteenth Amendment case. In *Goldblatt*, plaintiffs “claim that it in effect prevents them from continuing their business and therefore takes their property without due process of law in violation of the Fourteenth Amendment.”<sup>776</sup> And yet the *Goldblatt* Court goes on to consider whether the challenged regulation indeed worked an unconstitutional taking since, as the Court acknowledged when citing to *Pennsylvania Coal Co. v. Mahon*, this could be the case. Since there was no evidence for the Court on how much, if at all, the prohibition affected the value of the property, the Court again assumed that it was constitutional unless proven unreasonable by the plaintiff.<sup>777</sup> So, it appears *Goldblatt* was limited to a Fourteenth Amendment case on the police power since there was not evidence in the record to evaluate the impact of the regulation on the property’s value for a Fifth Amendment claim (only that the regulation would make the existing operations of the mining company worthless). *Goldblatt* reinforced the same Fourteenth Amendment standard as previous cases: “If this ordinance is otherwise a valid exercise of the town’s police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.”<sup>778</sup> However, this simple equation of substantive due process protection and a finding of no taking is no longer the law as the U.S.

---

<sup>771</sup> *Pietsch v. Ward Cty.*, 446 F. Supp. 3d 513, 536 (D.N.D. 2020) (“In the zoning context . . . procedural due process is afforded when the landowner has notice of the proposed government action and an opportunity to be heard.”).

<sup>772</sup> Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 7.1 (1997).

<sup>773</sup> *See, e.g.*, *Mugler v. Kansas*, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

<sup>774</sup> *See, e.g.*, *Klineburger v. Dep’t of Ecology*, No. 76458-6-I, 2018 Wash. App. LEXIS 1935, at \*6 (Ct. App. Aug. 13, 2018) (“It is critical that these two grounds be separately considered and independently analyzed because the remedies for each of these types of constitutional violation are different.”).

<sup>775</sup> 369 U.S. 590 (1962).

<sup>776</sup> *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 591 (1962).

<sup>777</sup> *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

<sup>778</sup> *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962).

Supreme Court has indicated that the substantive due process inquiry and the takings inquiry are separate.<sup>779</sup>

As another example of the difficulty of parsing out property protections between the Fourteenth and Fifth Amendments, see *Dobbins v. Los Angeles*.<sup>780</sup> Note that *Dobbins v. Los Angeles* is a Fourteenth Amendment case and not a Fifth Amendment case. In *Dobbins*, a woman purchased land zoned for gas works, began constructing, and then the City changed the zoning to make use illegal after the owner had spent significant sums of money on the then-legal use. The Supreme Court said that if there had been a change in neighborhood character requiring the zoning change to protect public health and welfare, then the ordinance would have been a valid exercise of the police power. However, absent such a showing of need or reason for the ordinance to protect the public safety and welfare, the ordinance destroying the property owner's vested right was an unconstitutional taking of her property under the Fourteenth Amendment. "The practical significance of the distinction between Fourteenth Amendment due process analysis and Fifth Amendment takings analysis is in the remedy associated with the cause of action. 'The remedy . . . under the due process theory, is not 'just compensation,' but invalidation of the regulation, and if authorized and appropriate, actual damages.'"<sup>781</sup> Accordingly, in *Dobbins*, the U.S. Supreme Court invalidated as an unconstitutional "impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution" the arbitrary and discriminatory zoning law.

But an aggrieved property owner cannot just simply claim a Fourteenth Amendment due process "taking" of property instead of a regulatory takings claim.<sup>782</sup> Any substantive due process analysis of a challenged regulation is logically antecedent to consideration of a claim of the regulation effecting a taking.<sup>783</sup> The U.S. Supreme Court clearly declared that language questioning whether a regulation "substantially advances" a legitimate state interest is only appropriate to a substantive due process analysis and does not constitute an independent takings analysis test.<sup>784</sup>

---

<sup>779</sup> *Lingle v. Chevron*, 544 U.S. 528 (2005). See also, *Nollan v. Cal. Cstl. Com'n.*, 483 U.S. 825, 834 n.3 (1987) (noting that the implication in *Goldblatt* that due process and takings standards are the same is "inconsistent with the formulations of our later cases.").

<sup>780</sup> 195 U.S. 223 (1904).

<sup>781</sup> *Dibble Edge Partners, LLC v. Town of Wallingford*, 2008 Conn. Super. LEXIS 2054, \*45 (2008).

<sup>782</sup> *Villas of Lake Jackson, Ltd. v. Leon Cty.*, 906 F. Supp. 1509 (N.D. Fla. 1995).

<sup>783</sup> *Lingle v. Chevron*, 544 U.S. 528, 543 (2005).

<sup>784</sup> *Lingle v. Chevron*, 544 U.S. 528 (2005). In *Lingle*, the U.S. Supreme Court indicated that its language giving rise to the apparent independent "substantially advances" test for a takings was a result of "regrettably imprecise" language, *Lingle v. Chevron*, 544 U.S. 528, 542; it was "understandable" that this happened due to apparent commingling of due process and takings analysis in prior precedent such as *Penn Central*, *Goldblatt*, and *Nectow v. Cambridge*. *Lingle v. Chevron*, 544 U.S. 528, 540-41 (2005).



## IV.A.1. Conclusion

---

Procedural and substantive due process attacks on local floodplain management-related ordinances or regulations should be exceedingly rare as long as a local government has a reasonable procedure for notice and opportunity to be heard, and as long as the local government articulates a reasonable policy reason for the ordinance or regulation. After all, courts have made it clear that “[a] plaintiff who wishes to pursue a claim for an alleged violation of the right to substantive due process embarks on a difficult undertaking, especially if the claim involves zoning or other real property regulatory actions by a governmental body.”<sup>785</sup> In fact, virtually any adequately drafted land use or flooding-related ordinance should be able to pass the substantive due process test since “the ‘decisions of state zoning boards do not violate substantive due process unless the court finds no “conceivable rational basis” on which the board might have based its decision.’”<sup>786</sup>

---

<sup>785</sup> *Bettendorf v. St. Croix County*, 631 F.3d 421, 426 (7th Cir. 2011) (citing *Eternalist*, 225 Wis.2d at 775). *See also*, *Bunnell v. Vill. of Shiocton*, 2020 WL 2100097 (E.D. Wisc. 2020) (“As relevant here, the Court has limited the reach of the substantive component of the due-process guarantee to cases involving abuse of governmental power so arbitrary and oppressive that it shocks the conscience.” *Catinella*, 881 F.3d at 518-19. “[O]nly the most egregious official conduct” can be said to violate this standard. *Lewis*, 523 U.S. at 846.”)

<sup>786</sup> *Residents v. Zone*, 260 F. Supp. 3d 738, 765 (S.D. Tex. 2017) (citing *Shelton v. City of College Station*, 780 F.2d 475, 477 (5th Cir. 1986)).

---

## IV.B. Fifth Amendment

---

### IV.B.1. History, Context, and Development

---

Early U.S. law provided limited legal avenues for those whose property was invaded by government to receive the just compensation mandated by the Fifth Amendment to the U.S. Constitution.<sup>787</sup> Rather, plaintiffs would typically bring a trespass action, the government would defend based on the statute or law allowing the trespass, and, if the plaintiff prevailed, he could only receive damages for past government action and ejection of the government from the property.

"The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom."<sup>788</sup> The Fifth Amendment's final clause reads "nor shall private property be taken for public use, without just compensation." Based on the word "taken," lawyers and many laypeople have come to use the word "takings" as shorthand for a government violation of the protections offered by this last clause of the Fifth Amendment. As is clear from this text, government is not forbidden from taking property. Rather, "All private property is held subject to the necessities of government. . . . The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. . . . [B]ut the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation -- this asserted paramount right -- is exercised it shall be attended by compensation."<sup>789</sup>

Change and development have been the greatest constants in constitutional takings law. "[A]s Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience."<sup>790</sup> And experience has shown that takings law has proven incredibly difficult to understand on any sort of rational, logical basis. As the reader will see, in many instances, the "rule" followed by courts interpreting the Fifth Amendment is a list of factors to be considered. And even these factors often contain multiple subparts and analyses that have developed with the experience of courts. More recently the U.S. Supreme Court has noted that takings law has had to remain "flexible" because it has to balance two competing objectives: "the individual's right to retain the interests and exercise the freedoms at the core of private

---

<sup>787</sup> *Knick v. Twp. Of Scott*, 139 S. Ct. 2162, 2175-76 (2019).

<sup>788</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071.

<sup>789</sup> *U.S. v. Lynah*, 188 U.S. 445, 465 (1903).

<sup>790</sup> *Kaiser Aetna*, 444 U.S. 164, 177 (1979).

property ownership” and “the government’s well-established power to ‘adju[s]t rights for the public good.’”<sup>791</sup>

As a result, scholars have said that Fifth Amendment takings law does not lend itself to clear-cut, tidy rules or any “unified theory” that can impose intellectual and logical consistency in all cases.<sup>792</sup> The multiple factors and sub-factors give great flexibility to courts to account for the uniqueness of each takings claim. At the same time, they make it frustrating for government officials—and property owners—to reliably predict the outcome. This becomes even more important since one of the long-standing challenges of takings law is that it usually represents an all-or-nothing game: either a taking has occurred and just compensation is due, or no taking has occurred, and a burdened property owner gets nothing.<sup>793</sup>

For well over a century of U.S. legal history, the 12 words of the last phrase of the U.S. Constitution’s Fifth Amendment<sup>794</sup> were almost exclusively limited to instances in which government directly appropriated or invaded property. With the U.S. Supreme Court case of *Pennsylvania Coal Company vs. Mahon*,<sup>795</sup> all this changed, and regulatory takings was born. The importance of this change cannot be overstated: *Pennsylvania Coal* opened a whole new world of takings law.<sup>796</sup> And this new world dramatically increased the uncertainty and unpredictability of takings law and its limitations on government regulation generally.

The Fifth Amendment’s protections of private property originally focused on *federal* government action, not the action of actors in the states. This changed in 1897 when the property protections of the Fifth Amendment were incorporated into the Fourteenth Amendment and made applicable to the states.<sup>797</sup> State constitutions also contain property protections, as do

---

<sup>791</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).

<sup>792</sup> See, e.g., Lynda J. Oswald, The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis, 50 Vand. L. Rev. 1449, 1523-24 (1997) (quoting and citing sources for this proposition).

<sup>793</sup> Cf. e.g., Brian Angelo Lee, “Equitable Compensation” as “Just Compensation” for Takings, 10 PROP. RTS. J. 315, 317-20 (2021) (noting that “property,” “taken,” and “public use” are all binary determinations in takings law though the reality is often murkier).

<sup>794</sup> “. . . nor shall private property be taken for public use without just compensation.” U.S. Const., amend. V.

<sup>795</sup> 260 US 393 (1922).

<sup>796</sup> For an analysis of how this dramatic change has been based on the erroneous notion that the Founding Fathers and the Fifth Amendment conceived of early/colonial private property as only limited by nuisances, nuisance-like activities and the doctrine of *sic utere tuo ut alienum non laedas*, see John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 Harv. L. Rev. 1252 (1996).

<sup>797</sup> The Fifth Amendment’s stipulation that “private property [shall not] be taken for public use without just compensation” applies to the states through the Fourteenth Amendment. See *Chicago Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).



some state statutes. The analysis presented here focuses on the U.S. Constitution's Fifth Amendment takings jurisprudence. However, a number of states have held that their constitutional property protections are interpreted in the same manner as the U.S. Constitution's property protections.<sup>798</sup> The analysis presented here does not include consideration of state constitutional property protections that are not interpreted coextensively with protections of the U.S. Constitution's Fifth Amendment nor state statutory property protections.<sup>799</sup>

Some laypeople mistakenly believe that the Fifth Amendment prohibits government from taking private property. This is not true. "As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'"<sup>800</sup> Government *may* take private property for public use as long as government pays "just compensation" for any such taking.

Another note on terminology before going further: "Inverse condemnation" and "regulatory taking" are not the same thing. "Inverse condemnation" refers to instances in which government action has resulted in a "taking" of private property, but the government has not filed an action in eminent domain to take the property lawfully. Such "inverse condemnation" may occur if government damages private property (such as by flooding, significantly limiting access, or through the actions of police) or via a regulatory taking. "Regulatory takings" occur when a regulation limiting the use of property goes "too far." Thus, all regulatory takings are inverse condemnation cases, but not all inverse condemnation cases are regulatory takings cases. When inverse condemnation occurs, the property owner has the right to institute a lawsuit seeking compensation from the government entity that is claimed to be responsible for the taking.

Many of the early "inverse condemnation" cases were related to government-caused flooding.<sup>801</sup> In such cases, courts found an "implied obligation" of the government to pay compensation, and this "implied obligation" to pay compensation or "implied contract" as part of non-eminent

---

<sup>798</sup> See, e.g., *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 2018 U.S. Dist. LEXIS 214350, 2018 WL 6705529, at \*4 (D. Haw. Dec. 20, 2018); *Abdelhak v. City of San Antonio*, 2011 U.S. Dist. LEXIS 161339 at \*27; *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4<sup>th</sup> 218, 289 (4<sup>th</sup> Cir. 2021); *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011); *Litz v. Md. Dep't of the Env't*, 446 Md. 254, 265-66 (Ct. App. Md. 2016); *Bettendorf v. St. Croix County*, 631 F.3d 421 (7<sup>th</sup> Cir. Ct. App. 2011); *Bernardsville Quarry v. Borough of Bernardsville N.J. Supr. Ct.*, 129 N.J. 221, 231 (N.J. 1992); and *Blair v. Dep't of Conservation & Rec.*, 457 Mass. 634, 642-43 (Mass. 2010).

<sup>799</sup> For example, Florida has private property rights protections in Chapter 70, Florida Statutes. For discussion of the potential impact of Florida's Bert J. Harris, Jr., Private Property Rights Protection Act, see, Thomas Ruppert & Chelsea Miller, *Sea-Level Rise Adaptation and the Bert J. Harris, Jr., Private Property Rights Protection Act*, 50 STETSON L.R. 585 (2021)

<sup>800</sup> *Lingle v. Chevron*, 544 U.S. 528, 536 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987)).

<sup>801</sup> For more on this topic, see the section "[Proximate Cause](#)" (discussing evolution of government-caused flooding as the basis for a takings claim).

domain cases, formed the basis of early takings claims since the 1800s.<sup>802</sup> However, today, courts no longer engage in discussion of “implied obligations” or “implied contracts” when addressing inverse condemnation cases.<sup>803</sup>

Early decisions challenging regulations as a violation of the Fifth Amendment’s protections of private property—and the Fourteenth Amendment’s protections as well—regularly indicated that as long as there was a valid exercise of the police power to prevent harm, there was not a violation of property rights protections, even when the impact to the regulated property was severe or resulted in complete destruction of property.<sup>804</sup> Of course this only applied to *regulatory* actions, not any action that actually physically took land, such as was common in many early property cases in which government flooded land for development of navigation or flood control. The idea that valid regulatory exercises of the police power *never* resulted in a taking finally ended in the U.S. Supreme Court with the decision in *Pennsylvania Coal Co. v. Mahon*.<sup>805</sup> However, even after the *Mahon* case, the U.S. Supreme Court did not easily let go of

---

<sup>802</sup> See, e.g., *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-57 (1884). *Bothwell v. United States*, 254 U.S. 231, 232-33 (U.S. 1920) (noting that “nothing could have been recovered for destruction of business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation.”). *John Horstman Co. v. United States*, 257 U.S. 138, 145-46 (U.S. 1921) (“It is declared that the rule deducible from prior cases, which are reviewed, is that the appropriation of property by the Government implies a contract to pay its value, and it is further declared that there need not be a physical taking, an absolute conversion of the property to the use of the public. It is clear from the authorities, it is said, that, if by public works the value of the property of an individual is substantially destroyed, its value is taken, within the scope of the Fifth Amendment. And it was decided that the law will imply a promise to make the required compensation, where property to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses.”). See also *United States v. Lynah*, 188 U.S. 445, 465 (1903) (“when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates”) and *Sanguinetti v. United States*, 264 U.S. 146, 148, 150 (1924) (“The Court of Claims concluded that none of the land here involved had been taken, within the meaning of the Fifth Amendment to the Constitution, and that, therefore, no recovery could be had upon the theory of an implied contract.” And “The most that can be said is that there was probably some increased flooding due to the canal and that a greater injury may have resulted than otherwise would have been the case. But this and all other matters aside, the injury was in its nature indirect and consequential, for which no implied obligation on the part of the Government can arise.”).

<sup>803</sup> See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315-16 (1987) (citing since *Jacobs v. United States*, 290 U.S. 13 (1933)). *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 168 (4th Cir. Ct. App. 1991) (discussing temporary takings and how gov’t owes for them).

<sup>804</sup> *Mugler v. Kansas*, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). See also Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 Vand. L. Rev. 1449, 1453-57 (1997) (tracing history of distinction between police power and eminent domain).

<sup>805</sup> *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). For how controversial—and mistaken—this seemed to some, see *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 418 (U.S. 1922) (Brandeis, J.,

the idea that a valid exercise of the police power did not result in an unconstitutional violation of property rights.<sup>806</sup> The distinction may have been founded partly on the basis of the cause of action: later cases on property rights and the police power addressed Fourteenth Amendment substantive due process claims rather than Fifth Amendment property protections.<sup>807</sup> For example, despite some negative treatment, the case of *Mugler*<sup>808</sup> is still cited by federal courts for various propositions such as its language that “prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking.”<sup>809</sup> And yet this quote appears to contradict U.S. Supreme Court precedent in the 1992 *Lucas* case, which found a taking for regulation that was a valid exercise of the police power.<sup>810</sup> This contradiction really highlights what an outlier the *Lucas* case has become.<sup>811</sup>

## IV.B.2. Per Se Takings

“While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>812</sup> Although the Court has yet to establish a set formula on what amounts to “too far”<sup>813</sup>, two categories of per se takings have been identified.<sup>814</sup> A regulation

---

dissenting) (“Restriction upon 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.” The liquor and the oleomargarine cases settled that. *Mugler v. Kansas*, 123 U. S. 623, 668, 669, 8 Sup. Ct. 273, 31 L. Ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 682, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253. See also *Hadacheck v. Los Angeles*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381.”).

<sup>806</sup> *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Flint v. Cty. of Kauai*, 521 F. Supp. 978, 992 (D. Haw. 2021); *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009)

<sup>807</sup> *E.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

<sup>808</sup> *Mugler v. Kansas*, 123 U.S. 623 (1887).

<sup>809</sup> *See, e.g.*, *Flint v. Cty. of Kauai*, 521 F. Supp. 978, 992 (D. Haw. 2021); *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009).

<sup>810</sup> *Lucas v. South Carolina Coastal Com’n*, 505 US 1003 (1992) (finding a taking despite not questioning the state’s police power to enact the challenged regulation focused on preventing harms from coastal development).

<sup>811</sup> For more on the case of *Lucas v. South Carolina Coastal Commission*, 505 US 1003 (1992), see the [Lucas v. South Carolina Coastal Council](#) section.

<sup>812</sup> *Lucas v. South Carolina Coastal Com’n*, 505 US 1003, 1014 (1992) (citing *Pennsylvania Coal Company vs. Mahon*, 260 US 393, 415 (1922)).

<sup>813</sup> *Lucas v. South Carolina Coastal Com’n*, 505 US 1003, 1015 (1992) (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).

<sup>814</sup> *Lucas v. South Carolina Coastal Com’n*, 505 US 1003, 1015 (1992).

that imposes a “permanent physical occupation or invasion” of property, “no matter how minute the intrusion,” constitutes a per se taking.<sup>815</sup> Further, when a regulation “denies all economically beneficial or productive use of land,” a per se taking will be found unless the regulation is an “explicit statement of common law limitations already present in the title.”<sup>816</sup> In either case of per se takings, the owner must be compensated.<sup>817</sup> It is important to note that this rule is to be applied specifically to real property owners<sup>818</sup> and does not extend to personal property.<sup>819</sup> In addition, courts will evaluate whether a *per se* taking has occurred before moving on to the [\*Penn Central\* analysis](#).<sup>820</sup>

### IV.B.2.a. A Physical Per Se Taking: The Loretto Case

A permanent physical occupation constitutes a per se taking and requires compensation for the owner because the occupancy is destroying vital property rights including: 1) the right to personally possess or exclude from the area; 2) the right to use or exclude others from using the space; and 3) the ability to dispose or transfer the property for full value.<sup>821</sup> The Supreme Court case *Loretto v. Teleprompter Manhattan CATV Corp.* was the first case to establish a per se taking for a physical invasion. In *Loretto*, a building owner challenged a New York state law granting cable companies the right to physically attach television cables to an owner’s building without permission or authorization, even if the property owner objected.<sup>822</sup> The wires occupied less than two cubic feet of the landlord’s property<sup>823</sup>, but the Court held that under the Fifth and Fourteenth Amendments of the Constitution, when a government-authorized physical intrusion

---

<sup>815</sup> *Lingle v. Chevron*, 125 S. Ct. 2074, 2081 (2005) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (state law requiring landlords to permit cable TV companies to install cable facilities in apartment buildings held to be a taking)).; see also *Lemon Bay Cove* (2020) citing *Bass Enters. Prod. Co. v. U.S.*, 381 F.3d 1360, 1365 (Fed. Cir. 2004)

<sup>816</sup> *Lingle v. Chevron*, 125 S. Ct. 2074, 2081 (2005) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992)). Also see, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (referencing *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987) and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987)). See also *Lemon Bay Cove, LLC v. United States*, 147 Fed. Cl. 528 (2020) (citing *Bass Enters. Prod. Co. v. U.S.*, 381 F.3d 1360, 1365 (Fed. Cir. 2004)).

<sup>817</sup> *Lingle v. Chevron*, 125 S. Ct. 2074, 2081 (2005) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992)).

<sup>818</sup> *Lucas v. South Carolina Coastal Com’n*, 505 US 1003, 1019 (1992).

<sup>819</sup> *Lucas v. South Carolina Coastal Com’n*, 505 US 1003, 1027-28 (1992).

<sup>820</sup> *Lemon Bay Cove, LLC v. United States*, 147 Fed. Cl. 528 534 (2020).

<sup>821</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982).

<sup>822</sup> *Lucas v. South Carolina Coastal Com’n*, 505 US 1003 (1992) (referencing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-40 (1982)).

<sup>823</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982).

of an owner's land becomes a permanent occupation, a taking will be found and compensation shall be paid<sup>824</sup> – no matter how minute the invasion.<sup>825</sup> This is true regardless of “the public interests that it may serve.”<sup>826</sup> In making this decision, the Court relied on earlier cases in which physical invasions were held to amount to property appropriations.<sup>827</sup>

A *Loretto* taking involves the granting of a “right to invade another’s physical property.”<sup>828</sup> This can take place through both direct government action or a physical invasion arising from government regulation.<sup>829</sup> A physical invasion can be by plane, boat, cable, etc.<sup>830</sup> A physical invasion occurs “where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness.”<sup>831</sup> “[P]ermanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner’s use of the rest of his land.”<sup>832</sup> A physical taking may also occur where the government: 1) uses its eminent domain power “to formally condemn property;”<sup>833</sup> 2) “physically takes possession of property without acquiring title to it;”<sup>834</sup> or 3) “occupies property—say, by

<sup>824</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

<sup>825</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) See also *Lucas v. South Carolina Coastal Com’n*, 505 US 1003, 1019 (1992) (citing *United States v. Causby*, 328 U.S. 256, 265, and n. 10 (1946) (physical invasions of airspace)); cf. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (imposition of navigational servitude upon private marina).

<sup>826</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

<sup>827</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-28 (1982) (citing *Pumpelly v. Green Bay & Mississippi Canal Co.* 80 U.S. 166 (1871) (holding defendant’s construction of a dam which permanently flooded plaintiff’s property constituted a taking.) See also *Bedford v. United States*, 192 U.S. 217, 225 (1904); *United States v. Cress*, 243 U.S. 316, 327–328 (1917); *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924) (to be a taking, flooding must “constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property”); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809–810 (1950).

<sup>828</sup> *Cedar Point Nursery*, 141 U.S. 2063 (2021).

<sup>829</sup> *Cedar Point Nursery*, 141 U.S. 2063, 2072 (2021).

<sup>830</sup> *Cedar Point Nursery*, 141 U.S. 2063 (2021).

<sup>831</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (citing *Pumpelly* at 181).

<sup>832</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982) (citing *Lovett v. West Va. Central Gas Co.*, 65 W.Va. 739 (1909); *Southwestern Bell Telephone Co. v. Webb*, 393 S.W.2d 117, 121 (Mo.App.1965). Cf. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922).

<sup>833</sup> *Cedar Point Nursery*, 141 U.S. 2063 (2021) (citing *United States v. General Motors Corp.*, 323 U.S. 373, 374–375 (1945); *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 270–271 (1943)).

<sup>834</sup> *Cedar Point Nursery*, 141 U.S. 2063 (2021) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–117 (1951)).



recurring flooding as a result of building a dam.”<sup>835</sup> “Whenever a regulation results in a physical appropriation of property, a per se taking has occurred, and [the] Penn Central [analysis] has no place.”<sup>836</sup> “These sorts of physical appropriations constitute the “clearest sort of taking,”<sup>837</sup> “and we assess them using a simple, per se rule: The government must pay for what it takes.”<sup>838</sup>

The character of a physical invasion is generally more intrusive than other types of property regulation<sup>839</sup> because it imposes unique burdens – however minimal the economic cost it entails, a permanent physical invasion “eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.”<sup>840</sup> A permanent physical invasion is “more severe than a regulation of the use of property” because it eliminates fundamental rights, allowing strangers to invade and occupy an owner’s land.<sup>841</sup> Thus, the property owner is deprived of controlling the timing, extent, and nature of physical intrusions to their land.<sup>842</sup> In *Loretto*, the landowner had no say over the cable installation – he did not get to choose to forego the installation, and he did not get to choose when it would take place or where it would be located on his property. He was robbed of all control.

Although *Loretto* involved a permanent physical invasion, recent cases have expanded the rule to encompass intermittent invasions as well.<sup>843</sup> When individuals are granted a permanent right to make recurrent visits or pass-throughs over private property, allowing for continuous traveling over the land, a permanent physical invasion will be found.<sup>844</sup> In *Cedar Point*, the U.S. Supreme Court held a regulation granting labor organizations a “right to take access” to an agricultural employer’s property to solicit union support to be an unconstitutional per se

---

<sup>835</sup> *Cedar Point Nursery*, 141 U.S. 2063 (2021) (citing *United States v. Cress*, 243 U.S. 316, 327–328 (1917)).

<sup>836</sup> *Cedar Point Nursery*, 141 U.S. 2063, 2072 (2021).

<sup>837</sup> *Cedar Point Nursery*, 141 U.S. 2063 (2021) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).

<sup>838</sup> *Cedar Point Nursery*, 141 U.S. 2063 (2021) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)).

<sup>839</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982).

<sup>840</sup> *Lingle v. Chevron*, 125 S.Ct. 2074 (2005) (citing *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831–832 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 17 (1979); *Cedar Point Nursery*, 141 US 2063, 2072 (2021) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

<sup>841</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

<sup>842</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

<sup>843</sup> *Cedar Point Nursery*, 141 U.S. 2063 (2021) (citing *Causby* at 259 (holding that “overflights of private property effected a taking, even though they occurred on only 4% of takeoffs and 7% of landings at the nearby airport”)).

<sup>844</sup> *Nollan v. CCC*, 483 U.S. 825 (1987).



physical taking because the easement constituted an appropriation of the property.<sup>845</sup> The regulation allowed union organizers “to physically enter and occupy the growers’ land for three hours per day, 120 days per year.”<sup>846</sup> Although this regulation did not restrict the growers’ use of their own property and granted an easement allowing access short of 365 days per year, the regulation impacted their right to exclude.<sup>847</sup> “The fact that a right to take access is exercised only from time to time does not make it any less a physical taking.”<sup>848</sup> Overall, the case law suggests that physical invasions of any sort will be subjected to extremely strict review due to the important nature of the right to exclude.<sup>849</sup>

*Loretto* established that a permanent physical occupation constitutes a *per se* taking – regardless of the extent of economic loss<sup>850</sup> or importance of the public benefit achieved.<sup>851</sup> The size of the occupied property is also irrelevant to the takings determination – precedent has established that even minimal physical occupations require compensation.<sup>852</sup> *Cedar Point* went even further by holding that “the duration of an appropriation—just like the size of an appropriation<sup>853</sup>—bears only on the amount of compensation.”<sup>854</sup> The evidence speaks for itself in trying to prove the occurrence of this type of taking.<sup>855</sup> “The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute.”<sup>856</sup> Thus, *Loretto*

---

<sup>845</sup> *Cedar Point Nursery*, 141 U.S. 2063 (2021).

<sup>846</sup> *Cedar Point Nursery*, 141 U.S. 2063, 2072 (2021).

<sup>847</sup> *Cedar Point Nursery*, 141 U.S. 2063, 2072 (2021).

<sup>848</sup> *Cedar Point Nursery*, 141 U.S. 2063 (holding that a regulation granting union organizers the right to take access for limited time is a physical taking).

<sup>849</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-37 (1982) (discussing importance of physical invasion); *Nollan v. Cal. Coastal Com’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

<sup>850</sup> *Cedar Point Nursery*, 141 US 2063, 2073 (2021).

<sup>851</sup> *Nollan v. CCC*, 483 US 825, 831-32 (1987) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-35 (1982)).

<sup>852</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982)).

<sup>853</sup> *Cedar Point Nursery*, 141 US 2063, 2074 (2021) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982)).

<sup>854</sup> *Cedar Point Nursery*, 141 US 2063, 2074 (2021) (citing *United States v. Dow*, 357 U.S. 17, 26 (1958)).

<sup>855</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982).

<sup>856</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982).

indicates that the *Penn Central* analysis of the “nature of the governmental action” in the case of a permanent physical invasion is dispositive.<sup>857</sup>

In order to avoid a *per se* taking for a physical invasion, floodplain and wetland regulations should avoid allowing placement of facilities or allowing ongoing access to properties by non-owners whenever possible.<sup>858</sup> Further, floodplain management activities of local government should avoid causing permanent or inevitably recurring flooding of private property, as the floodwaters themselves could result in a finding of a taking. For more on this, see the section “[Proximate Cause](#)” (discussing evolution of government-caused flooding as the basis for a takings claim).

### IV.B.2.b. Per Se Taking by Elimination of Economically Beneficial Use: The Lucas Case

In the case *Lucas v. South Carolina Coastal Council*, property owner David Lucas had purchased two ocean-front parcels on which he intended to build homes that he would sell.<sup>859</sup> However, before Lucas built any homes, South Carolina adopted a new beach management law that prevented the building of single-family homes on the lots Lucas had purchased.<sup>860</sup> Lucas sued, and a state trial court found that Lucas’ lots had been rendered “valueless.”<sup>861</sup> The U.S. Supreme Court then held that when a regulation eliminates “all economically beneficial uses” of a

---

<sup>857</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (noting that in the case of a permanent physical invasion, the “character of the government action” “is determinative”).

<sup>858</sup> The expansion of takings law to include even non-permanent, limited access to property as *per se* takings because they are “appropriations of access easements” presents some questions for the status of regulatory regimes that allow for government access to verify compliance with permit conditions. This and other difficulties that emerge from focusing on a “physical” aspect of a regulation in takings law presents serious analytical challenges. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 450 (1982) (Blackmun, J., dissenting) (noting that “It was precisely to avoid ‘[permitting] technicalities of form to dictate consequences of substance,’ *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 181 (1958) (Harlan, J., dissenting), that the Court abandoned a ‘physical contacts’ test in the first place.”).

<sup>859</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006-07 (U.S. 1992).

<sup>860</sup> *Id.* at 1007.

<sup>861</sup> *Id.* at 1019 (emphasizing loss of all value by noting that “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking” (italics in original)).

property, a taking has occurred.<sup>862</sup> The Court said that this categorical rule applied “no matter how weighty the asserted ‘public interests’ involved.”<sup>863</sup>

The majority opinion in the *Lucas* case also spent considerable time distinguishing its holding from previous case law that tended to indicate that a valid exercise of the police power to prevent a “noxious use” did not result in a taking.<sup>864</sup> The majority opinion said that “the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.”<sup>865</sup> For more on the distinction between “harm-preventing” vs. “benefit-conferring” and “noxious use” in takings law, see the [Noxious Use and Nuisance](#) section.

While *Lucas*’ majority opinion strongly criticized the harm-versus-benefit distinction, the opinion also outlined one instance of when a complete elimination of economically beneficial use of property does not require compensation: when the regulation doing so merely represents an inherent limitation that already existed in the title of the property.<sup>866</sup>

This “exception” to the *Lucas* rule that elimination of all economically beneficial use automatically results in a taking, creates its own problems. The exception created by the opinion is rooted in nuisance or other common law limitations inherent in the title of ownership.<sup>867</sup> However, as noted by the concurrence, the “common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society.”<sup>868</sup> This evinces a concern that was even shared by the majority opinion of hampering further development of

---

<sup>862</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (U.S. 1992).

<sup>863</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (U.S. 1992).

<sup>864</sup> *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1021-26 (U.S. 1992).

<sup>865</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024 (U.S. 1992).

<sup>866</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (U.S. 1992) and *id.* at 1029 (“regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise”).

Less recognized among many lawyers is that a decade later the U.S. Supreme Court cited approvingly language from *First English* noting another way to avoid at least a temporary taking despite elimination of all use: “denial of all use was insulated as a part of the State’s authority to enact safety regulations.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 329 (2002) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 313 (1987)).

<sup>867</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (U.S. 1992).

<sup>868</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (U.S. 1992) (Kennedy, J., concurring).

property law at the state level.<sup>869</sup> *Lucas*' limitations on the "nuisance exception" created, as observed by Professor Peter Byrne, a tension with state laws since the limitation in *Lucas* "reverses the majoritarian premise of every state's constitution, namely, that legislation supersedes common law rules." Freezing the common law at a specific point in time undermines the very adaptability and evolution for which the common law is known.

The dissenting opinion of Justice Blackmun focused extensively on this problem of the narrow "nuisance exception" constraining evolution of the concept of property. The dissent notes the extensive evidence in the record for the health and safety justifications for the South Carolina regulation at issue.<sup>870</sup> This nuisance exception has prevented compensation in some cases. For example, even though the U.S. Supreme Court's decision in *Lucas* could be read to significantly limit application the doctrine of "nuisance" as a defense to a takings claim, courts have not always been so limited in their ongoing acceptance of "nuisance" as a government defense to a takings claim. For example, in the case *Palazzolo v. State*, the trial court observed that the *Lucas* case "establish[ed] public nuisance as a preclusive defense to takings claims."<sup>871</sup> The trial court then went on to cite evidence presented by the State of Rhode Island that the "significant and predictable negative effects" of the proposed development qualified it as a nuisance due to environmental impacts and the fact that the salt marsh and submerged lands were not a suitable place for a high-density subdivision.<sup>872</sup>

Finally, another inherent limitation on the categorical or per se takings rule in *Lucas* is that it only applies when a property is rendered "valueless."<sup>873</sup> The majority opinion, concurring opinion, dissent, and statement of Justice Stevens all noted that this was a strange conclusion of the trial court that the U.S. Supreme Court had to accept as fact, even as the Court noted that it was likely to be a very rare occurrence.<sup>874</sup> Further cases have borne out that this is not a frequent occurrence.<sup>875</sup> And, contrary to what many have asserted, the *Lucas* case *does not* mean that a

---

<sup>869</sup> Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (U.S. 1992) ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so).").

<sup>870</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1037-41 (U.S. 1992) (Blackmun, J., dissenting).

<sup>871</sup> *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108\*, 20 (2005).

<sup>872</sup> *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108\*, 20-21 (2005).

<sup>873</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020 (U.S. 1992).

<sup>874</sup> See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (U.S. 1992); *id.* At 1034 (Kennedy, J., concurring); *id.* At 1043-45 (Blackmun, J., dissenting); *id.* At 1076-77 (Stevens, J., statement).

<sup>875</sup> See, e.g., *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F. Supp. 2d 972, 994 (Nev. Dist. 2004) (citing *Lucas v. South Carolina Cstl. Com'n.*, 505 US 1003 (1992)); *Contra Lucas: Department of Env'tl. Protection v. Burgess*, 772 So. 2d 540 (Fla. App. Ct. 1st Dist. 2000) (finding no right of a property owner to speculative growth in property values and no loss of

*per se* taking has occurred just because a property owner is not allowed to build at least a single-family home.<sup>876</sup> But property may not have to actually have zero monetary value to qualify for a *Lucas* claim of a categorical taking.<sup>877</sup> The distinction between *de minimus* residual value and “real” value is that real value, for determining whether a *Lucas*-style total deprivation has occurred, is whether the value remaining in the property is based on use of the land rather than potential sale of the land.<sup>878</sup>

The “nuisance” and “background principles” exceptions contained in the *Lucas* case have combined to decrease the importance of the *Lucas* decision for almost three decades following the decision. Evidence of the limited importance of the *Lucas* *per se* takings rule emerges from research demonstrating that only 1.6% of *Lucas* claims have been successful.<sup>879</sup> Furthermore, subsequent cases have not completely abandoned “noxious use” or “harmful activities” language.<sup>880</sup> And the U.S. Supreme Court has noted that part of the analysis of whether a regulation denies all economic use of property can turn on “the nature of the land use proscribed.”<sup>881</sup>

#### IV.B.2.b.i. Recommendations for Floodplain Managers

When developing floodplain regulations, make every reasonable effort to *not* prevent all use of the land. This *does not* mean that a property owner must be allowed to at least build a single-family home on their property; while allowing building of at least a single-family home will guarantee that no categorical taking has occurred, *not* allowing a house due to public health and safety concerns related to the land and its characteristics is not necessarily a taking. When a regulatory or zoning regime does not allow a single-family house, the enacting government agency should clearly set out the attributes of the land (e.g., steep land; prone to flooding or

---

“all economically viable use” just because property owner was not allowed to build camping facilities in a wetland); *Doherty v. Planning Bd. of Scituate*, 467 Mass. 560 (Mass. 2014);

<sup>876</sup> See, e.g., *Wyer v. Board of Environmental Protection*, 747 A.2d 192 (Me. 2000); *Doherty v. Planning Bd. of Scituate*, 467 Mass. 560 (Mass. 2014).

<sup>877</sup> *Lost Tree Village Corp. v. United States*, 115 Fed. Cl. 219, 231 (2014), *aff'd*, 787 F.3d 1111 (Fed. Cir. 2015) (determining that when the Corps denied a central Florida property owner a Section 404 permit, the value of the property with a permit would have been \$4,245,387.93, but without the permit, only \$27,500, and that this 99.4% diminution of value “constitute[d] a categorical taking under *Lucas*”).

<sup>878</sup> *Lost Tree Vill. Corp. v. United States*, 787 F.3d 111, 1117 (Fed. Cir. 2015).

<sup>879</sup> Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1850 (2017).

<sup>880</sup> See, e.g., *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154-55 (Fed. Cir. 1995).

<sup>881</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (“The ‘total taking’ inquiry we require today will ordinarily entail ... analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities.”)).

erosion, etc.) and the public health and safety reasons for the limitations since, even with a categorical claim of a taking of all economically beneficial use, if the risk of harm is great and the land regulated is not susceptible of the proposed development without risk of harm to human health and safety, this may undermine a successful *Lucas* claim *even if* there were a finding of loss of all economically beneficial use.

In addition, when a house is not allowed, the regulation should emphasize what, if any, other land uses are acceptable, such as passive recreation (e.g., camping, birding, hiking, etc.) or other uses.

### IV.B.3. Elements of Inverse Condemnation/Regulatory Taking

---

While often used interchangeably, inverse condemnation and regulatory takings are not exactly the same thing. Inverse condemnation means that government has taken private property but without the government beginning condemnation proceedings to do so.<sup>882</sup> In such a case, the property owner must begin an action for condemnation and compensation against the government. Hence the name “inverse” condemnation as the property owner is claiming a case of government condemnation of property. Inverse condemnation may occur by physical government invasion of property, such as government-caused flooding of property, or through regulation that limits the use of property. The latter is known as a “regulatory taking.” Thus, all regulatory takings are a type of inverse condemnation, but not all inverse condemnation occurs through a regulatory taking.

#### IV.B.3.a. A “Taking” and the Requirement of Government Action

To file a takings claim, a plaintiff must identify the government action that allegedly caused a taking of a property right. Inevitably, overlap occurs between the alleged government action and causation. Another way of stating the law: If the government’s action is not the “cause” of the alleged property loss, the government could not have taken property within the meaning of the Fifth Amendment.<sup>883</sup>

While the claimed property right often must be addressed in the context of these discussions, for specific treatment of the need to identify a property right, see the [Of a Property Right section](#).

---

<sup>882</sup> See, e.g., *United States v. Clarke*, 445 U.S. 253, 257 (U.S. 1980).

<sup>883</sup> *Burrage v. United States*, 571 U.S. 204, 210 (U.S. 2014).



The “requirement for government action” is not a simple bifurcation. Rather, it operates along a spectrum where the extremes of the spectrum are easily classifiable as “government action” or “not government action.” For example, when the government builds a dam whose impoundment, when filled, permanently submerges private property, the building of the dam is clearly a government action. Just as clearly, when a massive storm surge washes away land not directly impacted by any government infrastructure, this is an act of nature and not the government. Difficult cases fall in between these extremes, when natural events interact with government-built and government-authorized infrastructure in such a way as to cause harm to private property, whose owners then claim a “taking” of their private property.<sup>884</sup> Indeed, some of the most challenging recent takings cases on flooding specifically address the issue of when natural events collide with government-built flood infrastructure that either “causes” or fails to prevent flooding.<sup>885</sup>

It comprises government action when any level of government makes a decision on a permit. Government construction of infrastructure is government action. Government provision of information that is merely “persuasive” and not “coercive” does not rise to the level of “government action” on which a taking claim can be founded.<sup>886</sup> Arguably, this last point supports policies designed to provide notice of past, current, and future flood risks.

In many cases, the questions of “government action” and “causation” overlap: Even as a plaintiff will have to establish *what* action the government authorized that allegedly took the plaintiff’s property, the plaintiff will also have to allege and be able to prove that the government’s action was the “cause” of the taking of property. Causation in law has two parts: actual cause and

---

<sup>884</sup> See, e.g., Thomas Ruppert, *Castles—and Roads—in the Sand: Do All Roads Lead to a “Taking”?*, 48 Env’tl L. Reporter 10914, 10916-17 (2018) (comparing the trial court decision in *Jordan v. St. Johns County*, No. 05-694, slip op. at 2 (Fla. Cir. Ct. May 21, 2009) (finding that “it is uncontroverted that the initial and primary action that caused damage to ‘Old A1A’ was the natural forces of storms and ocean waves,”) with *Jordan v. St. Johns County*, 63 So. 3d 835 (Fla. Dist. Ct. App. 2011) (finding that “natural forces have played a role in the degradation of the road and that the County has performed some level of maintenance,” but remanding the case to the trial court to decide “whether the level of maintenance provided has been reasonable or whether it has been so deficient as to constitute de facto abandonment” in light of a duty to maintain the road). See also, *Drake v. Walton County*, 6 So. 3d 717, 719 (Fla. Dist. Ct. App. 2009) (noting that the claim of taking case would have been “in a completely different posture had [a]ppellant’s property been flooded by the hurricane itself, without the County’s intervention.”).

<sup>885</sup> See, e.g., *Arkansas Game and Fish Commission v. United States*, 568 U. S. 23 (2012) and *St. Bernard Par. Gov’t v. United States*, 887 F.3d 1354 (Fed. Cir. 2018). See also, William Shapiro, *The Flooding of Eagle Lake: But-For Causation and the Doctrine of Relative Benefits in Flood-Based Fifth Amendment Cases*, 34 Tul. Env’tl. L.J. 1 (2021) (discussing the case of *Alford v. U.S.*, 141 Fed. Cl. 421 (Fed. Cl. 2019)).

<sup>886</sup> *Taylor v. U.S.*, 959 F.3d 1081, 1089-90 (Fed. Cir. 2020).

proximate (or legal) cause.<sup>887</sup> The difficulty of sorting out causation is discussed after addressing whether there was government action sufficient to support a takings claim.

### IV.B.3.a.i. Action vs. Inaction

The Fifth Amendment's limitations on a taking of private property without just compensation *only* protect private property owners from the actions of government, not private actors.<sup>888</sup> As such, a claimant must identify what *governmental* action led to the alleged taking of property.

A very long list of federal cases have held that to claim a taking of a property right, a claimant must assert a specific government action that caused the taking.<sup>889</sup> Most state courts have also

---

<sup>887</sup> See, e.g., *Burrage v. United States*, 571 U.S. 204, 210 (U.S. 2014) (“The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause. H. Hart & A. Honor©, *Causation in the Law* 104 (1959).”).

<sup>888</sup> *DeShaney v. Winnebago Dep’t of Soc. Servs.*, 489 U.S. 189, 195-96 (1989) (“Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression,’ . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes. (Internal citations omitted.).”).

<sup>889</sup> See, e.g., *Bench Creek Ranch, LLC v. United States*, 855 Fed. Appx. 726, 727-28 (Fed. Cir. 2021) (citing to *St. Bernard Parish* for the holding that inaction on the part of the government only sounds in tort, not under the Fifth Amendment’s property protections); *St. Bernard Parish Gov’t v. U.S.*, 887 F.3d 1354, 1357, 1360-61 (Fed. Cir. 2018); *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331 (Fed. Cir. 2018) (“not kind of government inaction that could be basis for takings liability”); *Berry v. United States*, 2022 U.S. Claims LEXIS 939, \*10-\*11 (Fed. Cl. 2022); *Ideker Farms, Inc. v. United States*, 142 Fed. Cl. 222, 226-27 (Fed. Cl. (2019) (stating that a failure of government to take discretionary action is *inaction*, which sounds in tort, not in takings law); *id.* at 225 (“The court explained that challenges to the Corps’ failure to act or properly manage the 2011 flood sound in tort, regardless of how plaintiffs characterized their claims, and this court does not have jurisdiction over tort claims. *Id.* at 693.”); *Nicholson v. United States*, 77 Fed. Cl. 605, 620 (Fed. Cl. 2007) (“In no case that we know of has a governmental agency’s failure to act or to perform its duties correctly been ruled a taking. Indeed, the proposition has profound implications. The Federal Circuit, in a non-flooding context, has very recently held that such conduct may not be redressed under the 5th Amendment takings clause. See *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, (Fed. Cir. 2006) (property that depreciated in value resulting from Customs Service’ unreasonable delay in subjecting property to forfeiture proceedings is not grounds for takings claim). The Court has consistently required that an affirmative action on the part of the Government form the basis of the alleged taking.”); *Georgia Power Co. v. United States*, 224 Ct. Cl. 521, 527-28 (Ct. Cl. 1980) (finding no taking for the discretionary action of not regulating mast heights of boats on reservoir over which power line easement runs); *968 Franklin Manor LLC v. Anne Arundel Cty. Office of Planning & Zoning*, 2020 U.S. Dist. LEXIS 209607, \*4-\*5 (D. Md. 2020). *But see*, *Forsgren Revocable Living Family Pres. Trust v. United States*, 2008 U.S. Claims LEXIS 128, \*31-\*40 (Fed. Cl. 2008) (finding that a takings claim based on inaction qualified as a “non-frivolous” claim that could survive a challenge to subject-matter jurisdiction under the Tucker Act); *Swartz v. Beach*, 229 F. Supp. 2d

concluded that a viable takings claim must allege affirmative government action and that governmental inaction, including a governmental unit's refusal or failure to enforce its own regulations or ordinances, is not a viable takings claim.<sup>890</sup> And courts that do not accept inaction as a basis for a valid takings claim seem to have little trouble dispensing with overly creative framing of government inaction as action.<sup>891</sup>

However, some jurisdictions do recognize, in some instances, that government inaction may support a takings claim.<sup>892</sup> The highly specific factual nature of the cases recognizing a taking—or at least the availability of a cognizable *claim* for a taking—based on a lack of governmental

---

1239, 1262-63 (D. Wyo. 2002) (holding that a state's failure to carry out its affirmative statutory and regulatory obligations such that it results in the destruction of private property could constitute a taking).

<sup>890</sup> See, e.g., *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793 (TX 2016) (inaction does not support takings claim under TX Const.); *Schmitz v. Denton Cty. Cowboy Church*, 550 S.W.3d 342, 356 (Tex. Ct. App. 2d Dist. 2018) and *City of Mason v. Lee*, 2018 Tex. App. LEXIS 9086, \*7-\*8 (Tex. App. 4<sup>th</sup> Dist., San Antonio 2018); *Schick v. Fla. Dep't. of Agriculture*, 504 So.2d 1318, 1320 (1st DCA 1987); *Welgosh v. City of Novi*, No. 318516, 2015 Mich. App. LEXIS 601 at \*15-16 (2015) (finding that “Plaintiffs[sic] attempt to recast the City's failure to enforce the building code as an affirmative act of ‘maladministration.’ However, at its core, plaintiffs' claim is based on an omission, i.e., inadequate inspection. Plaintiffs fail to cite any caselaw or other authority supporting that a government's failure to enforce regulations or a building code might constitute an inverse taking.”); *Sunflower Spa LLC v. City of Appleton*, No. 14-C-861, 2015 U.S. Dist. LEXIS 91242 (E.D. Wis. July 14, 2015); *Davis v. Lawrence*, LEXIS 687, \*13, 797 P.2d 892 (Kan. App. 1990) (finding no taking for repeated flooding since there was no affirmative government action that contributed to the flooding); *Hinojosa v. Dep't of Nat. Res.*, 263 Mich. App. 537, 688 N.W.2d 550 (2004) (finding no taking because plaintiffs alleged no affirmative state action); *Grunwald v. City of Castle Hills*, 100 S.W.3d 350 (Tex. App. 2002). See also, Timothy Mulvaney, *Non-Enforcement Takings*, 59 B.C. L. Rev. 145, 147 (2018) (noting that “no federal or state court has found a taking based on the non-enforcement of an existing regulation against a third party, and most courts to have addressed such claims have rejected them summarily” but still calling this rule into question in the article).

<sup>891</sup> *Bench Creek Ranch, LLC v. U.S.*, 855 Fed. Appx. 726, 728 (Fed. Cir. 2021); *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 138 Fed. Cl. 658, 666-67 (Fed. Cl. 2018).

<sup>892</sup> It appears that one of the earliest reported takings cases using the phrase “action or inaction” on the part of the government as a potential cause for a taking was *Czech v. City of Blaine*, 253 N.W.2d 272, 275 (Minn. 1977). However, *Czech* cited for this to cases that provide no support. Thomas Ruppert, *Castles—and Roads—in the Sand: Do All Roads Lead to a “Taking”?*, 48 ENV'T L. REPORTER 10914, 10922 (2018). In fact, the whole rise of government “inaction” as a potential takings claim in Minnesota law seems to have arisen through careless lawyering and drafting of opinions by courts. *Id.* at 10922-23. This might not have occurred had the courts using the word “inaction” been more careful and followed the U.S. Supreme Court's advice on when to put a lot of weight on a word or not: “We resist reading a single sentence unnecessary to the decision as having done so much work. In this regard, we recall Chief Justice Marshall's sage observation that “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.” *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821).” *Arkansas Game & Fish Com'n v. U.S.*, 568 U.S. 23, 35 (2012).

action or a failure of government to act almost defies categorization. Nonetheless, in an attempt to do so, the cases somewhat fit into one of a few general scenarios: 1) a mandatory statutory, regulatory, contractual, or court requirement which government did not fulfill;<sup>893</sup> 2) a failure to conduct extraordinary maintenance;<sup>894</sup> or 3) promises or misrepresentations, without statutory backing, which induced a property owner's reliance to the property owner's detriment.<sup>895</sup> What most seems to unite these cases is probably just how outrageous the government behaved and/or the incredible severity of the impacts that the government refused to act to address. For example, the judge in one case characterized the situation as "farcical."<sup>896</sup> More than one case involved years of repeated overflows of raw sewage that the local government was aware of and failed to address;<sup>897</sup> in fact, in one of those cases, the local government had, through its "inaction," failed to honor an administrative consent decree that it had signed to address the

---

<sup>893</sup> *Dibble Edge Partners, LLC v. Town of Wallingford*, 2008 Conn. Super. LEXIS 2054, \*70-\*72 (N.J. Sup. Ct. (allowing a takings claim based on alleged governmental failure to act in accordance with a land use regulation); *Litz v. Md. Dep't of the Env't*, 131 A.3d 923 (Md. 2016) (holding the possibility of a taking based on inaction if there existed "a general or specific statutory duty to act" or on the basis of a "Consent Order [that may have] created an affirmative duty to act."); *Litz v. Md. Dep't of the Env't*, 131 A.3d 923, 933-34 (Md. 2016); *Parker Ave., L.P. v. City of Philadelphia*, 2014 Phila. Ct. Com. Pl. LEXIS 648, 43-\*45 (Philadelphia County Court of Common Pleas, Civil Division 2014) (finding a taking of private property when the local government sought to avoid a development by refusing to pass a "pro forma" approval for paying of access; while the case did not focus very much on the issue of "inaction," the case also noted that the local government was free to not "act" by "pro forma" approval of road paving for property access, but that if it insisted on doing so, it would have to take the property by eminent domain). *But see*, *Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998) (implying the possibility of a taking by inaction by breaching a duty owed but noting in that case that the government's "failure to [stop harmful private action] successfully does not breach any duty owing to [the plaintiffs].").

<sup>894</sup> *State ex rel. Gilbert v. City of Cincinnati*, 2009-Ohio-1078, \*P3-\*P4 (noting that the Ohio Supreme Court had repeatedly ruled that the "release of large quantities of raw sewage from a sewer system onto private property constitutes a taking."); *State ex rel. Livingston Court Apts. v. City of Columbus*, 130 Ohio App. 3d 730, 721 N.E.2d 135 (1998) (finding that failure to repair a sewer system caused repeated flooding of apartments with raw sewage); *Arreola v. Cty. of Monterey*, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (Cal. App. 2002) (finding that failure to keep a drainage channel clear created a dangerous condition which the government had a duty to correct).

<sup>895</sup> *Citino v. Redevelopment Agency of City of Hartford*, 51 Conn. App. 262, 282, 721 A.2d 1197 (1998) (observing that "[F]ailing to implement its redevelopment plan for the area in a reasonable amount of time amounts to a taking of the plaintiff's property without just compensation" when the property owner had relied on government representations prior to rehabilitating his own property).

<sup>896</sup> *Parker Ave., L.P. v. City of Philadelphia*, 2014 Phila. Ct. Com. Pl. LEXIS 648, \*46 (Philadelphia County Court of Common Pleas, Civil Division 2014)

<sup>897</sup> *State ex rel. Gilbert v. City of Cincinnati*, 2009-Ohio-1078, \*P3-\*P4 () (noting that the Ohio Supreme Court had repeatedly ruled that the "release of large quantities of raw sewage from a sewer system onto private property constitutes a taking."); *State ex rel. Livingston Court Apts. v. City of Columbus*, 130 Ohio App. 3d 730, 721 N.E.2d 135 (1998) (finding that failure to repair a sewer system caused repeated flooding of apartments with raw sewage).

issue.<sup>898</sup> In that same case, the court distinguished the situation from cases finding that a “failure to regulate” could not result in a taking by noting that several of the “failure-to-regulate-is-not-a-taking” cases focused on actions by third parties and that the property interests asserted were not “traditional in-fee property interests.”<sup>899</sup> Still, in at least one outlier case, a court found that a takings claim based on discretionary governmental inaction to address erosion of a road could survive the defendant’s motion for summary judgment, though no court ever decided in that case if a taking had indeed occurred.<sup>900</sup>

In summary, most cases finding that government “inaction” can support a takings claim have done so under very constrained circumstances that supported finding a “duty” on the part of government to act. Some of the limited circumstances include: indicating exclusive government control over the cause of the alleged taking, a legal obligation to act (i.e., action was not purely discretionary on the part of the government), and the involvement of a physical invasion of a fee-simple property interest. These very limited circumstances do not, overall, negate the general rule that government has no duty to act in most cases.<sup>901</sup>

Even in jurisdictions that allow some form of governmental “inaction” as a potential basis for a takings claim, government is not under a duty to provide flood protection.<sup>902</sup> Mere planning does not cause a taking.<sup>903</sup> A mere risk of future flooding is not enough to bring a takings claim for compensation; a property owner must suffer at least one flood.<sup>904</sup> Authorization of a flood control project that might, in the future, include work that could effect a taking of private property, is not a taking.<sup>905</sup> But knowingly and deliberating allowing infrastructure to fall into a state of disrepair that risks harm and harm does result, may be a taking.<sup>906</sup> Ultimately, the

---

<sup>898</sup> *Litz v. Md. Dep’t of the Env’t*, 131 A.3d 923, 926-27, 932, 934 (Md. 2016).

<sup>899</sup> *Litz v. Md. Dep’t of the Env’t*, 131 A.3d 923, 933 (Md. 2016).

<sup>900</sup> *Jordan v. St. Johns Cty.*, 63 So.3d 835, 839 (Fla. 5th DCA 2011). Upon remand, the litigants settled the case before the trial court determined whether or not a taking by governmental inaction had occurred. For full analysis of the case of *Jordan v. St. Johns Cty.*, 63 So.3d 835 (Fla. 5th DCA 2011), governmental inaction, and the policy implications for sea-level rise and local government infrastructure, see, Thomas Ruppert, *Castles—and Roads—in the Sand: Do All Roads Lead to a “Taking”?*, 48 ENV’T L. REPORTER 10914 (2018).

<sup>901</sup> For more on this topic, look for “public duty doctrine” in the [Sovereignty section](#).

<sup>902</sup> *Cf. United States v. Sponenbarger*, 308 U.S. 256, 266 (1939) (“the Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all.”). See also, *e.g.*, *Coleman v. Portage Cnty. Eng’r*, 133 Ohio St. 3d 28 (Ohio Aug. 29, 2012) (failure to upgrade is different from failure to maintain and is subject to local immunity)).

<sup>903</sup> *Cf. Fritz v. Washoe County*, 2017 Nev. Dist. LEXIS 2012, \*18-\*21 (D. Nev. 2018).

<sup>904</sup> William Shapiro, *The Flooding of Eagle Lake: But-For Causation and the Doctrine of Relative Benefits in Flood-Based Fifth Amendment Cases*, 34 Tul. Envtl. L.J. 1, 29 n.78 (2021) (listing cases).

<sup>905</sup> See, *e.g.*, *Danforth v. United States*, 308 U.S. 271, 286 (1939).

<sup>906</sup> See, *e.g.*, *Arreola v. Cty. of Monterey*, 99 Cal. App. 4th 722, 743-44 (2002).



government has not “caused” flooding if infrastructure fails to prevent flooding that would have occurred even if the government had not acted.<sup>907</sup> However, “when public authorities have provided protective infrastructure, their knowledge that the infrastructure is inadequate to protect against known risks has in some cases led to liability for negligence”<sup>908</sup> and takings.<sup>909</sup>

#### IV.B.3.a.ii. Proximate Cause

Proximate cause in law is essentially a judgement of the law that the cause asserted has sufficient connection in fact to be considered the “legal” or proximate cause of claimed harm. In other words, actual cause is just that: Did the government action help to physically cause the taking to occur? “Legal cause” is whether a physically contributing cause is sufficiently connected to the impacts potentially causing a taking to be called the “legal” cause of the harm or alleged taking.

In deciding what “caused” the harm alleged to be a taking, courts look at a number of potentially relevant factors. Generally, these can include careful review of the government’s action, the legal basis for the government’s action, the foreseeability and likelihood of the harm caused,<sup>910</sup> and whether or not there were additional causes of the harm that were unknown by or uncontrollable by the government. When causes other than just government action play a prominent role, very often the harm to which government action might have contributed will be deemed mere “consequential” damages, which are not compensable under takings law.<sup>911</sup>

---

<sup>907</sup> *United States v. Sponenbarger*, 308 U.S. 256 (S.Ct. 1939) (holding that when the government attempts to protect an area from a flood hazard, landowners whom the attempt fails to or cannot protect are not entitled to compensation under the Fifth Amendment); *St. Bernard Parish Gov’t v. United States* 887 F.3d 1354 (Fed. Cir. 2018).

<sup>908</sup> *See, e.g., Arreola v. Cty. of Monterey*, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (Cal. App. 2002) (finding government liable for flooding that resulted from a decision not to conduct maintenance on a drainage channel). *See, also, J.B. Ruhl, Climate Adaptation Law*, in *GLOBAL CLIMATE CHANGE AND LAW* 677 (ABA Press, Michael B. Gerrard & Jody Freeman eds., 2nd ed. 2014) (citing *City of El Paso v. Ramirez*, 349 S.W.3d 181 (Tex. App. 2011) (city aware of potential for overflow from retention pond was negligent in not taking measures to prevent such overflows)).

<sup>909</sup> *Arreola v. Cty. of Monterey*, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (Cal. App. 2002).

<sup>910</sup> *See, e.g., Arkansas Game and Fish Comm’n*, 568 U. S. 23, 39 (2012) (“Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action.”).

<sup>911</sup> *United States v. Chicago, B. & Q. R. Co.*, 82 F.2d. 131, 136-37 (8<sup>th</sup> Cir. Ct. 1936) (“confusion comes, we think, from a failure to distinguish as to the origin of the independent cause. If the latter arises from the act of another person and so could have been obviated or prevented, or from natural causes acting abnormally, e. g. acts of God, damages arising from the original act are not recoverable, for they are consequential merely, and not proximate”).



In some earlier federal court opinions on flooding due to government construction of navigation projects, the courts seemed more likely to find that any damages were not so closely related or severe as to comprise anything more than “consequential” damages that did not rise to the level of a taking. For example, in *Gibson v. United States*,<sup>912</sup> construction of a dike by the United States made access to/from a farm more sporadic and more difficult. The court in *Gibson* said that what Gibson suffered was “not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.”<sup>913</sup>

Similarly, in 1904, the U.S. Supreme Court in *Bedford v. United States*<sup>914</sup> held that the building of revetments along the banks of a river, which were blamed for washing away hundreds of acres of farmland downstream, was not a taking.<sup>915</sup> The works were not constructed on the claimant’s property and were an effort by the federal government to engage in its management of commerce and navigation.<sup>916</sup> The damages to claimant’s property occurred years later, with the implication by the court that the natural dynamics of the river were an intervening factor that decreased any potential liability of the government for such damage.<sup>917</sup> The court also noted that it was not established how much damage the government’s revetments caused since what would have happened to the claimant’s property without the revetment was conjectural.<sup>918</sup>

In another case, the U.S. Supreme Court noted that when property remained well-protected by government levees but there arose the possibility that the latest levee constructed could also retain “water from unusual floods for a somewhat longer period or . . . increase [the water’s] depth or destructiveness,” any such potential damages were merely an “incidental consequence” of the additional levee constructed by the government.<sup>919</sup> While, “remote or consequential damages” do not rise to the level of a taking, distinguishing between “remote or consequential damages” and damages sufficient to constitute a taking remains a challenge, but some negative impacts on a property do not rise to the level of a taking when overall the program of government action has great benefits to the property at issue.<sup>920</sup>

---

<sup>912</sup> 166 U.S. 269 (1897).

<sup>913</sup> *Gibson v. U.S.*, 166 U.S. 269, 275 (1897).

<sup>914</sup> 192 U.S. 217 (1904).

<sup>915</sup> *Bedford v. United States*, 192 U.S. 217, 224-25 (1904).

<sup>916</sup> *Id.*

<sup>917</sup> *Bedford v. United States*, 192 U.S. 217, 225 (1904).

<sup>918</sup> *Id.*

<sup>919</sup> *Danforth v. United States*, 308 U.S. 271, 286-87 (1939).

<sup>920</sup> *See, e.g.*, *United States v. Sponenbarger*, 308 U.S. 256, 266 (U.S. 1939) (finding no taking of private property due to fact that plaintiff’s land greatly benefited from lowered flood risk and loss from overall plan of flood control of which challenged action was a part; any potential damages from project were still speculative; and plaintiff could not demonstrate that government action had in any way caused

However, in many of the major cases discussing the distinction between takings and consequential damages that do not rise to the level of a taking,<sup>921</sup> one common feature is that in each of these cases, there was no actual invasion of the claimants' property.<sup>922</sup> Rather, earlier Supreme Court precedent on government-caused flooding indicated that, to rise to the level of a taking, damages must include "that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."<sup>923</sup> In the case of *Sanguinetti v. U.S.*,<sup>924</sup> the Supreme Court indicated that the government project may have increased the flooding and injury to the land owner's property, but that the land had already been subject to flooding prior to the government action, any additional flooding did not oust the owner from his property, the owner could continue his customary use of the land, the owner did not suffer any permanent impairment of value, and that the owner failed to demonstrate that the flooding was the "direct or necessary result of the structure."<sup>925</sup> Thus, the case law indicates that the amount of damages suffered constitutes part of the evaluation of whether a taking occurred at all.

In more recent times, increased understanding of river, rain, flood, and coastal dynamics along with massive data collection has made the argument of "consequential" damages and lack of causation less effective as government defenses to takings claims.

Part of this change comes in the form of increasing stringency of the "foreseeability" of the results of government action. "Foreseeable" does not necessarily mean that the government's action *intended* to invade or flood a property; rather, the standard is whether the impact to property was "the foreseeable or predictable result" of the government's action.<sup>926</sup> This does not

---

more flooding on her land than had the government not acted); *Alford v. United States*, 961 F.3d 1380, 1383-86 (Fed. Cir. 2020).

<sup>921</sup> See, e.g. *Bedford v. United States*, 192 U.S. 217 (1904); *Manigault v. Springs*, 199 U.S. 473 (1905); *Sanguinetti v. United States*, 264 U.S. 146 (1924); *Jackson v. United States*, 230 U.S. 1 (1913); and *Christman v. United States*, 74 F.(2d) 112 (7<sup>th</sup> Cir. 1934).

<sup>922</sup> *United States v. Chicago, B. & Q. R. Co.*, 82 F.2d 131, 139 (8<sup>th</sup> Cir. 1936).

<sup>923</sup> *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924).

<sup>924</sup> 264 U.S. 146 (1924).

<sup>925</sup> 264 U.S. 146, 149-50 (1924).

<sup>926</sup> *Ark. Game & Fish Comm'n.*, 568 U.S. 23, 39 (2012) ("Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. See *supra*, at \_\_\_, 184 L. Ed. 2d, at 428; *John Horstmann Co. v. United States*, 257 U.S. 138, 146, 42 S. Ct. 58, 66 L. Ed. 171, 57 Ct. Cl. 592 (1921) (no takings liability when damage caused by government action could not have been foreseen). See also *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355-1356 (CA Fed. 2003); *In re: Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 799 F.2d 317, 325-326 (CA7 1986).").

*Ark. Game & Fish Comm'n. v. U.S.*, 736 F.3d 1364, 1372-73 (Fed. Circ. 2013) ("In order for a taking to occur, it is not necessary that the government intend to invade the property owner's rights, as long as the invasion that occurred was "the foreseeable or predictable result" of the government's actions. *Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005); accord *Ridge Line, Inc. v. United States*, 346 F.3d

mean that the mere fact that flooding occurred despite flood control infrastructure results in government liability;<sup>927</sup> rather, it must be shown that an affirmative act of the government caused the flooding and made it worse than it would have been had the government done nothing to address flooding.<sup>928</sup> And the harm caused must reach a certain level of severity before the harm can give rise to a taking.<sup>929</sup>

Causation does not require that there be no intervening events. Instead, the focus remains on foreseeability and predictability of the consequences of the initial government action; if the initial government action started a foreseeable and predictable chain of events that resulted in the loss without interference from other actors or factors, the government action was still the proximate cause of the loss.<sup>930</sup> The level of predictability/certainty of the result of government action must be substantial to potentially hold the government liable.<sup>931</sup>

As our understanding of stormwater, flooding, and weather events increases through modern techniques, we can see that even events that have never occurred during our record keeping of a mere 200-300 years for much of the United States are, nonetheless, foreseeable. This has become even more true due to climate change affecting long-term precipitation and other climate trends.

---

1346, 1357 (Fed. Cir. 2003). The trial court found that the Corps of Engineers could have foreseen that the series of deviations approved during the 1990s would lead to substantially increased flooding of the Management Area and, ultimately, to the loss of large numbers of trees there. We uphold the court's conclusion as to that issue.”).

<sup>927</sup> See, e.g., *In re Downstream Addicks & Barker Flood-Control Reservoirs*, 147 Fed. Cl. 566, 578-79 (2019) (overturned on other grounds by *Milton v. U.S.*, 36 F.4th 1154 (Fed. Cir. 2022)) (finding that Hurricane Harvey’s rainfall was an “act of God,” and that that was “so unusual that it could not have been reasonably expected or provided against.”). *Id.* at 575 (finding that Hurricane Harvey was the sole and proximate cause of flooding, not action by the government).

<sup>928</sup> *Ideker v. U.S.*, 142 Fed. Cl. 222, 227 (Fed. Cl. 2019). See also, *St. Bernard Parish Gov’t v. U.S.*, 887 F.3d 1354, 1362 (Fed. Cir. 2018) (noting that “Causation requires a showing of ‘what would have occurred’ if the government had not acted.”). *Nicholson v. United States*, 77 Fed. Cl. 605, 622 (Fed. Cl. 2007) (noting that even if there is a claim that flood control infrastructure could have been operated better by the government, a plaintiff still needs to demonstrate that the flooding would have been worse without the government action).

<sup>929</sup> *Ark. Game & Fish Comm’n v. U.S.*, 736 F.3d 1364, 1369-70 (Fed. Cir. 2013) (finding that temporary and ad hoc increased releases from a reservoir that caused increased temporary flooding each year for several years resulted in a severe enough impact to constitute a temporary taking).

<sup>930</sup> *Ideker v. U.S.*, 136 Fed. Cl. 654, 677 (Fed. Cl. 2018) (quoting [Cotton Land](#), 75 F. Supp. At 233).

<sup>931</sup> See, e.g., *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 138 Fed. Cl. 658, 667 (Fed. Cl. 2018) (comparing and contrasting the instant case with *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 807 (Tex. 2016)).

Analysis of causation in a takings claim leaves some difficult questions.<sup>932</sup> One of the most difficult: If the question is whether there is more flooding with government action than absent government action, what is the baseline by which this measurement occurs?<sup>933</sup> In *St. Bernard Parish*, the Federal Circuit Court emphasized that the legal standard was a “compar[ison of] the flood damage that actually occurred to the flood damage that would have occurred if there had been no government action at all.”<sup>934</sup> Even this seemingly clear standard presents complexity: Which government actions should be included in the comparison? Any government action related to flood risk? Or only those actions most immediately related to the claimed harm?

For example, if government reduces a property’s flood risk from once every five years to once every 10 years with a dam, but then years later alters the system such that flooding on the property is estimated at every eight years, did the government action “cause” increased flooding?<sup>935</sup> Thus, the question is whether the “baseline” from which to measure “resets” to a new normal based on previous government action. One commentator asserts that the answer is likely no, the baseline does not reset based on previous government action to reduce flood risk.<sup>936</sup> However, case law seems to indicate that the answer is not so simple.

In the *Ideker Farms* series of cases,<sup>937</sup> the court seems to have used as a “baseline” the flooding regime in place *after* the U.S. had built extensive flood control infrastructure and then, 40 years later, began modifying the system to mitigate environmental harms that the flood control system had wrought.<sup>938</sup> This seems to potentially conflict with the *St. Bernard Parish* court’s

---

<sup>932</sup> William Shapiro, The Flooding of Eagle Lake: But-For Causation and the Doctrine of Relative Benefits in Flood-Based Fifth Amendment Cases, 34 TUL. ENVTL. L.J. 1, 35-et seq. (2021).

<sup>933</sup> William Shapiro, The Flooding of Eagle Lake: But-For Causation and the Doctrine of Relative Benefits in Flood-Based Fifth Amendment Cases, 34 TUL. ENVTL. L.J. 1, 39 (2021).

<sup>934</sup> 887 F.3d 1354, 1362 (Fed. Cir. 2018).

<sup>935</sup> William Shapiro, The Flooding of Eagle Lake: But-For Causation and the Doctrine of Relative Benefits in Flood-Based Fifth Amendment Cases, 34 TUL. ENVTL. L.J. 1, 39 (2021).

<sup>936</sup> See, e.g., William Shapiro, The Flooding of Eagle Lake: But-For Causation and the Doctrine of Relative Benefits in Flood-Based Fifth Amendment Cases, 34 TUL. ENVTL. L.J. 1, 40-49 (2021).

<sup>937</sup> 136 Fed. Cl. 654 (2018).

<sup>938</sup> *Ideker Farms*, 136 Fed. Cl. 654, 674 (2018) (noting that the legal standard is whether the changes to the existing flood control system completed in 1967 “led to flooding, or more severe flooding on the property owned or farmed by that individual plaintiff than the flooding the plaintiff would have experienced without the Corps’ System and River Changes.” Note that “System and River Changes” is defined at 667-68 (“changes the Corps has made to its operation of the Mainstem Reservoir and Dam System, hereafter “System Changes,” and the changes made to the BSNP and under the MRRP, hereafter “River Changes,” to meet its ESA obligations under the 2003 BiOp. Together, these changes are referred to as “System and River Changes.””). See also, *Ideker Farms, Inc. v. United States*, 142 Fed. Cl. 222, 224 (Fed. Cl. (2019) (“All of the experts assumed for purposes of their analyses that the “but for” world for comparison purposes included the System flood control protections built and operated by the Corps under

holding that “Causation requires a showing of ‘what would have occurred’ if the government had not acted.”<sup>939</sup> The “no government action” scenario in *St. Bernard Parish* was if the government had not built *any flood control infrastructure at all*, whereas in *Ideker*, the only “actions” considered in the takings claim were changes in the structures and management of a previously constructed system, not comparison to the original natural system of the river prior to any government flood control infrastructure. Since *Ideker* was originally decided prior to *St. Bernard Parish*, the Court of Federal Claims entertained a motion for reconsideration based on the intervening decision of *St. Bernard Parish*.<sup>940</sup> The Court of Federal Claims then denied the motion of the government for reconsideration, holding that, based on footnote 14 in *St. Bernard Parish*, there exists a “Hardwicke exception” that “if the risk-reducing government action preceded the risk-increasing action, the risk-reducing action would only be considered in assessing causation if the risk-increasing action was “contemplated” at the time of the risk-reducing action.”<sup>941</sup> Since this was not the case in *Ideker*, the Court of Federal Claims denied the government’s motion for reconsideration.<sup>942</sup>

Thus, *Ideker III* of 2019 arguably established the rule: “When government engages in environmental restoration activities to mitigate impacts from past flood-control projects, the government is liable for a taking if the level of flooding after the environmental mitigation is higher than before the environmental mitigation; this is true *even if* the flooding is still less than before the original flood-control project.” However, this rule only applies when the “flood-increasing” government action that came after the original flood control was *not* contemplated as part of the original flood control plan. *If* the original flood control plan included in its design or planning to engage in a plan of activity that temporarily lowers flood risk greatly, but subsequent parts of the plan lower the level of flood protection, that is *not* a taking.<sup>943</sup>

While this rule is potentially extremely harsh for government entities that would like to do more “green” and “nature-based infrastructure” work to redress the environmental harms from historic dependence on gray infrastructure in water management, *Ideker II*<sup>944</sup> did not rule on “whether the off-setting benefits from the Corps’ flood control actions must be considered in

---

its pre-2004 Master Manuals together with all of the River flood control protections in place prior to 2004.”).

<sup>939</sup> *St. Bernard Parish Gov’t*, 887 F.3d 1354, 1362 (Fed. Cir. 2018).

<sup>940</sup> *Ideker Farms, Inc. v. United States*, 142 Fed. Cl. 222, 229 (Fed. Cl. 2019) (“There is no question that the Circuit’s decision in *St. Bernard Parish* is an intervening change in controlling law that requires the court to re-examine its opinion regarding causation.”).

<sup>941</sup> *Ideker v. U.S.*, 142 Fed. Cl. 222, 232 (Fed. Cl. 2019) (citing *St. Bernard Parish Gov’t v. United States*, 887 F.3d 1354, 1367 (Fed. Cir. 2018) (citing *John B. Hardwicke Co. v. United States*, 467 F.2d 488, 490-91 (Ct. Cl. 1972)).

<sup>942</sup> *Ideker v. U.S.*, 142 Fed. Cl. 222, 232 (Fed. Cl. 2019).

<sup>943</sup> *Ideker v. U.S.*, 142 Fed. Cl. 222, 227-28 (Fed. Cl. 2019).

<sup>944</sup> 146 Fed. Cl. 413 (Fed. Cl. 2020).

determining whether there has been a taking.”<sup>945</sup> However, *Ideker III*<sup>946</sup> conclusively states that flood control projects from 1940-1960 could *not* be used as an offset when determining whether government action had caused a taking since the “baseline”—also known as the “but for world” of the case—to be used for comparison in causation was the level of flood protection enjoyed by the properties *after* the 1940-1960 work and *before* the government began environmental and species-driven restoration of the river system.<sup>947</sup>

Causation also becomes an issue for determining what caused flood damage from storms or rain events. For flooding to be a taking, the government’s action must have a causal connection to the flooding.<sup>948</sup> One of many complications in determining proximate cause in cases of flooding arises in areas where significant development has occurred over the span of decades, creating or worsening flooding problems.<sup>949</sup> For more on this topic, see [Liability for Problems Due to Permitting](#) section.

On the one hand, rain is a phenomenon to be fully expected and will not usually be unexpected enough to break a causal chain when the taking is alleged to be caused by a government-owned drainage system.<sup>950</sup> However, on the other hand, courts still do recognize that some rain events may not be very foreseeable<sup>951</sup> or may rise to the level of “Act of God.”<sup>952</sup>

---

<sup>945</sup> *Ideker v. U.S.*, 142 Fed. Cl. 222, 232 (Fed. Cl. 2019).

<sup>946</sup> *Ideker III*, 146 Fed. Cl. 413 (Fed. Cl. 2020).

<sup>947</sup> *Ideker III*, 146 Fed. Cl. 413, 416 (Fed. Cl. 2020).

<sup>948</sup> *Columbia Venture, LLC v. Richland Cnty.*, 776 S.E.2d 900, 910 (S.C. 2015) (stating that “for flooding to amount to a taking, there must be a causal connection between the challenged government act and the increased flooding” and citing to *Sanguinetti v. United States*, 264 U.S. 146, 149-50 (1924) for this proposition).

<sup>949</sup> *See, e.g., Fritz v. Washoe County*, 2017 Nev. Dist. LEXIS 2012, \*24-\*30 (D. Nev. 2018) (discussing proximate cause of flooding in that instance and concluding that evidence supported that “substantial involvement” in the development of private lands was not the proximate cause of flooding in that case).

<sup>950</sup> *Bartolf v. Jackson Twp. Bd. of Educ.*, 2018 N.J. Super. Unpub. LEXIS 2361, \*21 (N.J. Super. 2018) (“Defendant is unable to skirt liability under this analysis by blaming plaintiffs’ injury on rain. It is doctrinal that foreseeable and normal intervening causes do not break the causal chain and relieve liability. *Cruz-Mendez v. ISU/Insurance Services of San Francisco*, 156 N.J. 556, 575, 722 A.2d 515 (1999) (citing *Rappaport v. Nichols*, 31 N.J. 188, 203, 156 A.2d 1, (1959)). That rain will flow into and out of a stormwater drainage system is foreseeable and normal. Rain is, thus, not an intervening cause sufficient to relieve an actor of liability.”).

<sup>951</sup> *Cf. Ideker v. U.S.*, 146 Fed. Cl. 413, 421 n.6 (Fed. Cl. 2020) (citing *Bartz*, 633 F.2d at 577 for its holding that “[e]xcessive precipitation was the root cause of the flooding experienced by plaintiffs”).

<sup>952</sup> *In re Downstream Addicks & Barker Flood-Control Reservoirs*, 147 Fed. Cl. 566, 578-79 (2019) *rev’d on other grounds* (finding that Hurricane Harvey’s rainfall was an “act of God,” and that it was “so unusual that it could not have been reasonably expected or provided against.”)



### IV.B.3.a.iii. Tort or Takings? Why the Label Matters

The interactions between tort law and inverse condemnation are long and complex.<sup>953</sup> “Inverse condemnation is tied to, and parallels, tort law.”<sup>954</sup> While not all torts are takings, all takings involving physical invasion originate from tort law.<sup>955</sup>

However, it seems that “[T]he line between claims that sound in tort and those that arise under the Takings Clause is becoming more difficult to discern.”<sup>956</sup> The distinction between tort and takings carries great importance. While a successful tort claim may be impossible due to sovereign immunity of the government, a takings claim is not subject to [sovereign immunity](#).<sup>957</sup> This leads many plaintiffs to seek to frame as a taking cases that might be more appropriately presented as tort claims.<sup>958</sup> But tort claims are not compensable under the Fifth Amendment.<sup>959</sup> Whether a case is presented as a tort, a taking, or both, determines which courts have [jurisdiction](#) over the case if the case is against the federal government.<sup>960</sup>

Even more important than potential venue and jurisdiction issues is that tort claims against government often fail due to sovereign immunity, whereas takings claims are not limited by sovereign immunity. In fact, this distinction is so important that it has been asserted that perhaps the reason that constitutional property protections arose in western law is that

---

<sup>953</sup> See, e.g., “Inverse condemnation law is tied to, and parallels, tort law.” 9 PATRICK J. ROHAN & MELVIN A. RESKIN, NICHOLS ON EMINENT DOMAIN § 34.03[1] (3d ed. 1980 & Supp. 2002). See also, *Nicholson v. United States*, 77 Fed. Cl. 605, 615 (Fed. Cl. 2007) (“Despite the familiar ring of tort in Plaintiffs’ pleadings, we are also well aware that takings claims often contain elements of tort law. See *Moden v. United States*, 404 F.3d 1335, 1339, n.1 (Fed. Cir. 2005) (citations omitted)”).

<sup>954</sup> *Ridge Line, Inc. v. United States*, 346 F.3d, 1346, 1355 (Fec. Cir. 2021).

<sup>955</sup> *Henderson v. United States*, 2007 U.S. Claims LEXIS 490, \*7-\*8 (Fed. Cl. 2007) (noting that the Tucker Act excludes the jurisdiction of the Court of Federal Claims in cases sounding in tort); *In re TVA Ash Spill Litig.*, 805 F. Supp. 2d 468, 491-92 (E.D. Tenn. 2011) (quoting *Hanson v. United States*, 65 Fed. Cl. 76, 80-81 (Fed. Cl. 2005)).

<sup>956</sup> J. Scott Pippin & Mandi Moroz, But Flooding IS Different: Takings Liability for Flooding the Era of Climate Change, 50 *Envtl. L. Rep.* 10920, 10937 (2020).

<sup>957</sup> See, e.g., *City of Fort Lauderdale v. Hinton*, 276 So. 3d 319, 327 (4<sup>th</sup> Dist. Ct. App. Fla. 2019).

<sup>958</sup> See, e.g., Sandra B. Zellmer, *Takings, Torts, and Background Principles*, 52 WAKE FOREST L. REV. 193, 194-95 (2017).

<sup>959</sup> *Nicholson v. United States*, 77 Fed. Cl. 605, 614 (Fed. Cl. 2007).

<sup>960</sup> If a takings claim could also be framed as a tort claim, this does not necessarily rule out filing the claim in federal court under the Tucker Act (28 U.S.C. § 1491). *Taylor v. United States*, 959 F.3d 1081 (Fed. Cir. 2020). If the federal government takes property, the property owner may bring a claim in the Federal Court of Claims, whereas if the damage is “consequential,” then it is a tort and the Court of Claims has no jurisdiction. *United States v. Lynah*, 188 U.S. 445, 472 (1903).

sovereign immunity prevented tort suits against the sovereign, and prohibitions on government taking of property constituted a way to prevent arbitrary government action.<sup>961</sup>

Several early U.S. Supreme Court decisions on takings discuss whether a claim was actually a tort or a taking. From the context of such cases, it appears that frequently a desire to present the suit before the U.S. Court of Claims was a key driver for framing a claim as a taking rather than a tort. It appears that you could claim a taking—and thus have access to the Court of Claims—if the government took/used/destroyed your property without you ever trying to stop the government and without the government ever denying/disputing your property right.<sup>962</sup> However, all of this took place during a time when the art of pleading was still more complex and arcane than today.

In today's world of simplified pleading of cases, plaintiffs may simultaneously plead that government action resulted in both a tort and a taking of property.<sup>963</sup> Courts may consider a number of factors when trying to distinguish between torts and takings. These include: 1) Whether the harm was the "direct, natural, or probable result" of the government action;<sup>964</sup> 2)

---

<sup>961</sup> Kris. W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211, 1228 (1996).

<sup>962</sup> *See, e.g.*, *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-57 (1884); *Hollister v. Benedict Manufacturing Company*, 113 U.S. 59, 67 (U.S. 1884); *United States v. Lynah*, 188 U.S. 445, 463-65 (1903) (citing *The United States v. The Great Falls Manufacturing Company*, 112 U.S. 645); *United States v. Lynah*, 188 U.S. 445, 465 (1903) (noting that "if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own."); *United States v. Lynah*, 188 U.S. 445, 463-64 (1903) (citing to *United States v. Palmer*, 128 U.S. 262, 269 for idea that the Court of Claims had property jurisdiction because "No tort was committed or claimed to have been committed. The government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use -- two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under a lease.").

<sup>963</sup> The U.S. Court of Federal Claims does not have jurisdiction over tort cases, but it may exercise concurrent jurisdiction over a tort claim that is part of a claim for a taking. *Taylor v. U.S.*, 959 F.3d 1081, 1086 (Fed. Cir. 2020) ("As a substantive-law matter, we have recognized that "the same operative facts may give rise to both a taking and a tort." *Moden v. United States*, 404 F.3d 1335, 1339 n.1 (Fed. Cir. 2005) (relying on *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), and other cases). And in *El-Shifa Pharmaceutical Industries Co. v. United States*, we specifically held that Tucker Act jurisdiction existed over a complaint that asserted a taking claim notwithstanding that the complaint also characterized the same government conduct as tortious. 378 F.3d 1346, 1353-54 (Fed. Cir. 2004).").

<sup>964</sup> *Ideker v. U.S.*, 136 Fed. Cl. 654, 677 (Fed. Cl. 2018) ("The Federal Circuit has explained that to prove a direct, natural, or probable result, a "property owner must prove that the asserted government invasion of property interests allegedly effecting a taking 'was the predictable result of the government action,' . . . because it was 'the direct or necessary result' of the act." *Nicholson v. U.S.*, 77 Fed. Cl. 605, 616 (Fed. Cl. 2007). *Vaizburd v. United States*, 384 F.3d 1278, 1282-3 (Fed. Cir. 2004) (quoting *Ridge*

Whether the governmental action was part of "deliberate design, construction, or maintenance of the public improvement." If not, then the action was potentially a tort but not a taking;<sup>965</sup> 3) Whether flooding is either permanent or inevitably recurring;<sup>966</sup> if it is neither, then the remedy is in tort, not in takings;<sup>967</sup> 4) Whether any invasion represents an on-going tort that has matured into a Fifth Amendment claim,<sup>968</sup> and 5) Whether the impact to property rights is sufficient to sustain a takings claim or only a tort claim.<sup>969</sup>

---

Line, 346 F.3d at 1356) (other citations omitted). This court in *Baird v. United States* explained that "it is the 'likelihood of the outcome' of the government's action that distinguishes its takings from its torts." *Baird v. United States*, 5 Cl. Ct. 324, 330 (1984) (quoting *Bettini v. United States*, 4 Cl. Ct. 755, 760 (1984)); *Berenholz v. United States*, 1 Cl. Ct. 620, 628 (1982) ("The likelihood of the outcome serves to distinguish conduct which is taking from that which is tortious.") *aff'd*, 723 F.2d 68 (Fed. Cir. 1983)). In other words, "the probability and foreseeability of the damage is a primary determinative element in whether a taking or tort occurred." *Baird v. United States*, 5 Cl. Ct. 324, 330 (1984)."); *Ridge Line v. U.S.*, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003); *South Fla. Water Mgmt. Dist. v. Basore of Fla., Inc.*, 723 So. 2d 287, 288 (Fla. 4<sup>th</sup> Dist. Ct. Appeal 1998) (finding insufficient "proof of willfulness [on the part of the government] to support a finding of a 'taking' as distinguished from a tort claim").

<sup>965</sup> *Arreola v. Cty. of Monterey*, 99 Cal. App. 4th 722, 742 (2002). *See also*, *Bunnell v. Vill. of Shiocton*, 2020 WL 2100097 (Eastern District, Wisc. 2020) ("The defendants' actions, as noted above, appear to amount to negligence, but they do not amount to a taking of private property for public use.").

<sup>966</sup> *Nicholson v. United States*, 77 Fed. Cl. 605, 618-19 (Fed. Cl. 2007) (mere possibility of repeat flooding in the future is not sufficient to support a takings claim); *id.* at 620-21 ("in order to establish a compensable taking, Plaintiffs must demonstrate that the [government action] will inevitably cause damage to their property"); *Ridge Line v. U.S.*, 346 F.3d 1346, 1357 (Fed. Cir. 2003) (noting that "isolated invasions, such as one or two floodings . . . do not make a taking . . . but repeated invasions of the same type have often been held to result in an involuntary servitude"); (*Bartolf v. Jackson Twp. Bd. of Educ.*, 2015 N.J. Super. Unpub. LEXIS 670, \*21 (N.J. Super. 2015) ("The United States Supreme Court has consistently ruled that to be actionable as a taking, the flooding caused by action of a governmental agency must 'constitute an actual permanent invasion of the land amounting to an appropriation of and not merely an injury to the property.' *Sanguinetti v. United States*, 264 U.S. 146, 44 S. Ct. 264, 68 L. Ed. 608, 59 Ct. Cl. 955 (1924). In other words, reviewing courts must distinguish between a taking and a tort."))

<sup>967</sup> *Bartolf v. Jackson Twp. Bd. of Educ.*, 2015 N.J. Super. Unpub. LEXIS 670, \*26 (N.J. Super. 2015). However, note that the clarity of this rule has been undermined by the U.S. Supreme Court's ruling in *Arkansas Game and Fish Commission v. United States*, 568 U. S. 23 (2012), which now allows for the potential that a flooding loss that is not necessarily either permanent or inevitably recurring may nonetheless rise to the level of a taking.

<sup>968</sup> *See, e.g.*, *City of Fort Lauderdale v. Hinton*, 276 So. 3d 319, 327 (4<sup>th</sup> Dist. Ct. App. Fla. 2019).

<sup>969</sup> *See, e.g.*, *In re TVA Ash Spill Litig.*, 806 F. Supp. 2d 468, 492-93 (Tenn. E.D. 2011) (finding that coal ash pollution on land and in water on and around plaintiff's property did not sufficiently deprive plaintiff of use of the property to advance beyond being a claim for nuisance or trespass) and *Nicholson v. United States*, 77 Fed. Cl. 605, 615-16 (Fed. Cl. 2007) ("the flooding must be sufficiently frequent in order to constitute a taking. *Fromme v. United States*, 412 F.2d 1192, 188 Ct. Cl. 1112, 1118-19 (1969); *see also*, *Nat'l By-Products*, 186 Ct. Cl. at 579 (plaintiff failed to demonstrate damage due to overflow "rises above a temporary, incidental injury"). *See also* *Ridge Line v. U.S.*, 346 F.3d 1346, 1355 (Fed.

A significant area of difficulty in distinguishing between takings and torts is the area of maintenance of infrastructure and the harm that may result from inadequate maintenance. Such cases highlight the importance of the takings requirement that a plaintiff identify the “government action” that led to the harm. If the claim is that the government provided *insufficient* maintenance, is this *inaction* on the part of the government or the *action* of not providing sufficient maintenance? The Court Federal of Claims and the Federal Circuit have been the courts that have been clearest on the difficult distinction between torts and takings. They have long stated that a failure of maintenance or failure of protection of property sounds in tort rather than in takings.<sup>970</sup>

### IV.B.3.b. Of a Property Right

To advance a takings claim, the plaintiff must possess a constitutionally protected property right.<sup>971</sup> The plaintiff also must have owned the property at the time of the taking,<sup>972</sup> but not necessarily at the time of litigation.<sup>973</sup> And the plaintiff’s rights in their property must be substantially diminished in order to sustain a takings claim; mere impact to the value of property from government action adjacent or nearby does not diminish the rights of a plaintiff in their

---

Cir. 2003) (noting the need in a takings claim based on intermittent flooding to establish whether the harm was a predictable result of the government’s action and whether the harm was sufficiently substantial to justify a takings remedy).

<sup>970</sup> *Bench Creek Ranch, LLC v. U.S.*, 855 Fed. Appx. 726, 727-28 (Fed. Cir. 2021); *St. Bernard Parish v.* 887 F.3d 1354, 1357, 1360-1362 (Fed. Cir. 2018); *Nicholson v. United States*, 77 Fed. Cl. 605, 622-23 (Fed. Cl. 2007); and *Moden v. United States*, 60 Fed. Cl. 275, 281-83 (2004) (noting that despite government-caused flooding, “[o]nly under limited circumstances may the property-owner be compensated for a taking” and summarizing case law differentiating between tort and takings in the context of government-induced flooding).” For more on the topics of government action versus inaction and tort versus takings claims, see Thomas Ruppert, *Castles—and Roads—In the Sand: Do All Roads Lead to a Taking?*, 48 EVNTL. L. REV. 10914, 10930-32 (2018).

<sup>971</sup> *Flint v. Cty. of Kauai*, 521 F. Supp. 3d 978, 988 (D. Haw. 2021) (citing to *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984)) (“As a threshold matter, to advance a takings claim a plaintiff must establish that they possess a constitutionally protected property interest.”).

<sup>972</sup> *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1263 (Fed. Cir. 2017) (citing *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) and also *Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003)).

<sup>973</sup> *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1263 (Fed. Cir. 2017) (“‘It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.’ *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) (emphasis added); see also *Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003). While precedent requires that the property owner prove its ownership at the time of the alleged taking, we are aware of no case that requires the property owner to possess those same rights during litigation. We thus decline to adopt the Claims Court’s rule that a property owner must not relinquish its property rights before filing suit.”).

own property.<sup>974</sup> The existence of a compensable property right is a question of law decided by the court.<sup>975</sup>

Ascertaining the bounds of what rights “property” includes presents one of the thorniest issues in takings law since a determination that the claimed “property right” does not exist eliminates any further need to evaluate the case.<sup>976</sup> And “property” in legal cases may be different from what the average person thinks of as property.<sup>977</sup>

Property law was long considered to be exclusively state law. This meant that federal courts, including the U.S. Supreme Court, deferred to state statutes and state court decisions that define “property.”<sup>978</sup> One case that somewhat confounds this analysis is *Murr v. Wisconsin*.<sup>979</sup> In *Murr*, the majority had to determine the relevant parcel comprising the “denominator” at issue in the takings analysis. In doing so, the majority opinion lists a set of factors to determine the relevant property at issue.<sup>980</sup> These include “the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land.”<sup>981</sup> And while these factors to determine the bounds of the property occurred in the context of the

---

<sup>974</sup> In re TVA Ash Spill Litig., 806 F. Supp. 2d 468, 492-94 (Tenn. E.D. 2011).

<sup>975</sup> *Milton v. U.S.*, 36 F.4<sup>th</sup> 1154, 1160 (Fed. Cir. 2022).

<sup>976</sup> Cf. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) (Roberts, C.J., dissenting) (noting that takings “inquiries presuppose that the relevant ‘private property’ has already been identified.”).

<sup>977</sup> *Penn Central v. NYC*, 438 U.S. 104, 142-43 (1978) (Rehnquist, J., dissenting) (noting that the term property is not used in the “vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote [s] the group of rights inhering in the citizen's relation to the physical THING, AS THE RIGHT TO POSSESS, USE AND DISPOSE OF IT. . . . the constitutional provision is addressed to every sort of interest the citizen may possess.”).

<sup>978</sup> See, e.g., *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163 (1998); *Nollan v. Cal. Cstl. Com’n*, 483 U.S. 825, 857 (1987) (Brennan, J., dissenting); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 743- (1950) (“But since the federal law adopts [the property law] of the State as the test of federal liability, we must venture a conclusion as to peculiarly local law.”); *United States v. Cress*, 243 U.S. 316, 319 (U.S. 1917); *Sauer v. City of New York*, 206 U.S. 536, 548 (1907) (“The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. . . . As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various States to a uniform rule which it shall announce and impose.”).

<sup>979</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

<sup>980</sup> The dissent argues that these factors do not comport with the Court’s precedent since such analysis means that “the government’s regulatory interests will come into play not once [via just the *Penn Central* analysis], but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a burden on that property.” *Murr v. Wisconsin*, 137 S. Ct. 1933, 1955 (2017) (Roberts, C.J., dissenting).

<sup>981</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).



“denominator question” or “[parcel as a whole](#)” issue, this is intimately related to a determination of a property right.<sup>982</sup>

Rather than pore through cases that discuss different aspects of a property right, we condense some aspects of property rights into those which owners have, those they don’t, and those which are unclear. We then provide footnote citations for examples supporting each of these, though the footnote references are by no means exhaustive.

Some property rights that property owners have include:

- The right to exclude others.<sup>983</sup>
- Freedom from extended and repeated flooding that causes substantial damage due to water management activities of government.<sup>984</sup>
- Easements.<sup>985</sup>

Some instances in which property owners do not have a compensable property interest include:

- Fluctuations in value due to governmental action, permitting, and decision-making, absent extraordinary delay.<sup>986</sup>

---

<sup>982</sup> *Cf. e.g., Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017) (discussing that in the *Palazzolo* case, the Court had struck down a state-court decision rejecting a takings claims since the regulation predated the owner’s acquisition of the property).

<sup>983</sup> *Cedar Point Nursery*, 141 US 2063, 2072-74, 2077-78 (2021); *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393-94 (1994); *Nollan v. CCC*, 483 US 825, 831-33 (1987); *Kaiser v. Aetna*, 444 U.S. 164, 179-80 (1979).

<sup>984</sup> *Cf. Arkansas Game and Fish Com’n*, 568 U.S. 23, 38-39 (2012).

<sup>985</sup> An easement is a property right. *See, e.g., Kaiser Aetna*, 444 U.S. 164, 180 (1979) (citing *United States v. Causby*, 328 U.S. 256, 265 (1946); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922)). However, compare this with *Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*, 402 N.E.2d 501 (Mass. 1980). In that case, a court upheld the constitutionality of a retroactive statute that modified a contractual ingress/egress easement that did not allow any other activities to be modified by a statute to give the easement holder the right to install utilities in the ingress/egress easement. In reaching this conclusion, the court noted two key things. First, the easement holder had already had the right to “invade” the servient estate for ingress/egress. Second, the court noted that the common law rule of an easement for ingress/egress would not allow any other activities that “may have been adequate at a time when utilities were unknown;” today’s world is different and the full use of property requires access for utilities. *Id.* at 504.

<sup>986</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Forest Preserve Dist. v. West Suburban Bank*, 641 N.E.2d 493 (1994) (discussing that an injunction during pendency of eminent domain is not itself a “taking” of property; relevant to this section b/c discusses that a taking has not occurred without substantial limitations on property); *Bridge Aina Le...* at 631 (“Nevertheless, “[m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the



- “Perfect flood control,” or the expectation of no flooding simply because the government has undertaken some action to address flooding.<sup>987</sup>
- Any flood control or mitigation by government.<sup>988</sup>
- Rights to government benefits related to property.<sup>989</sup>
- Government enforcement of its own laws, regulations, and ordinances.<sup>990</sup>
- The “highest and best use” or most profitable use of property.<sup>991</sup>

constitutional sense.” *Tahoe-Sierra*, 535 U.S. at 332 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)); *First English*, 482 U.S. at 320 (same).”).

<sup>987</sup> *In re Downstream Addicks & Barker Flood-Control Reservoirs*, 147 Fed. Cl. 566 (2019) (finding no cognizable property right that would support a takings claim because the plaintiffs had no property right to “perfect flood control.”). *United States v. Sponenbarger*, 308 U.S. 256 (S.Ct. 1939). *Cf. also*, *Nat'l By-Products, Inc. v. United States*, 405 F.2d 1256, 186 Ct. Cl. 546, 575-76 (1969) (“The Supreme Court and this court have recognized that the United States can appropriate land to its own use as effectively by flooding it as by occupying it in other ways.... It is equally settled, however, that not all floodings caused by or partially attributable to governmental activities amount to a taking.”) (citations omitted).

<sup>988</sup> *PDTC Owners Ass'n v. Coachella Valley Cty Water Dist.*, 443 F. Supp. 338 (D. Cal. 1978) (noting that other cases have generally held the level of protection afforded by particular mitigation actions to be discretionary. In this example, the court held that owners of land damaged by floods could not recover compensation from a county water district under the Fifth and Fourteenth Amendments for failure to construct a levee large enough to protect landowners from a 50-year flood. The levee which had been constructed was made of sand, did not include riprap, and provided protection only from a 30-year flood.); *Tri-Chem Inc. v. Los Angeles County Flood Control District*, 132 Cal. Rptr. 142 (Calif. 1976) (indicating that courts have held that the basic decision to protect or not protect is not subject to liability under theories of either no duty or discretionary function. In *Tri-Chem Inc.*, the court held that a county has no duty to construct a flood control system adequate to handle infrequent floods for an area that acts as natural sump.).

<sup>989</sup> *Texas Landowners Rights Associations v. Harris County*, 453 F. Supp. 1025 (D.D.C., 1978), *aff'd* 598 F.2d 311 (1979), *cert. denied*, 444 U.S. 927 (1979) (upholding the overall constitutionality of the National Flood Insurance Program and noting that denial of federally subsidized flood insurance to certain landowners and the community was a denial of “benefits” rather than denial of any “property right.” Because of this, the court further held that landowners and the community could not claim a “taking” if insurance (benefits) or disaster relief (benefits) were denied for failure to comply with National Flood Insurance Program standards.)

<sup>990</sup> *Schmitz v. Denton Cty. Cowboy Church*, 550 S.W.3d 342, 356 (Tex. App.—Fort Worth 2018) (“a claim based upon a governmental unit's refusal or failure to enforce its own regulations or ordinances is not a viable takings claim.”). *See also, cf. City of Mason v. Lee*, 2018 Tex. App. LEXIS 9086, \*7-\*8 (Tex. App. 4<sup>th</sup> Dist., San Antonio 2018).

<sup>991</sup> *Fitchburg Gas & Elec. Light Co. v. Dep't of Pub. Utils.*, 467 Mass. 768, 784 (Mass. 2014); *Moskow v. Commissioner of Dep't of Environmental Management*, 427 N.E.2d 750 (Mass. 1981) (Government regulations like the wetlands restrictions at issue in this case “may deprive an owner of a beneficial property use -- even the most beneficial such use -- without rendering the regulation an unconstitutional taking.” and citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-128 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962); *Turnpike Realty Co. v. Dedham*, 362 Mass. at 234). *See also, Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 337 S.C. 380 (S.C. Ct. App. 1999) (finding that an ordinance that prevented a community from rebuilding a pier after a

- Compensation for impacts to property resulting from “Acts of God.”<sup>992</sup>
- Anything which the property owner would not have had a property right to even absent a challenged government action.<sup>993</sup>
- Uses contrary to reasonable floodplain regulations.<sup>994</sup>

Some instances in which it is not always clear whether a claimant has a property right include:

---

hurricane was not a taking) and *Bernardsville Quarry v. Borough of Bernardsville N.J. Supr. Ct.*, 129 N.J. 221, 239-43 (N.J. 1992) (no taking for not allowing the most profitable use of property); and *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072 (2014) (finding that requiring property owners wishing to withdraw their rent-controlled property from the rental market to pay a lump sum to displaced tenants is a taking since “the relinquishment of funds [is] linked to a specific, identifiable property interest such as a bank account or parcel of real property, a ‘per se [takings] approach’ is the proper mode of analysis under the Court’s precedent.”). However, *see*, *Lost Tree Vill. Corp. v. United States*, 787 F.3d 111, 1118-19 (Fed. Cir. 2015), which found that the appropriate measure of value for a pre-regulation property value calculation was not the purchase price of the parcel but the “highest and best use” value, which was also used to calculate damages.

<sup>992</sup> *In re Downstream Addicks & Barker Flood-Control Reservoirs*, 147 Fed. Cl. 566, 578-79 (2019) (overturned on other grounds by *Milton v. U.S.*, 36 F.4th 1154 (Fed. Cir. 2022)) (concluding that Hurricane Harvey’s rainfall was an “act of God,” and that that was “so unusual that it could not have been reasonably expected or provided against.”) *In re Downstream and Addicks & Barker Flood-Control Reservoirs*, 147 Fed. Cl. 566, 575 (2019) (overturned on other grounds by *Milton v. U.S.*, 36 F.4th 1154 (Fed. Cir. 2022)) (finding that Hurricane Harvey was the sole and proximate cause of flooding, not action by the government.).

*Berenholz v. United States*, 1 Cl. Ct. 620, 626 (Cl. Ct. 1982) (“However, where there is no such showing of inevitable recurrence, but, rather, ‘a random event induced more by an extraordinary natural phenomenon than by Government interference’ there can be no taking, even if there is permanent damage to property partially attributable to Government activity.” *Id.*; *see* *Columbia Basin Orchard v. United States*, 132 Ct.Cl. 445, 450, 132 F. Supp. 707, 709 (1955).

<sup>993</sup> *Caquelin v. United States*, 959 F.3d 1360, 1371 (Fed. Cir. 2020) (“It is a fundamental principle of takings law that a government action is not a taking of property if, even in the absence of the challenged government action, the plaintiff would not have possessed the allegedly taken property interest. *St. Bernard Parish Gov’t v. United States*, 887 F.3d 1354, 1359-60, 1362 (Fed. Cir. 2018); *see* *United States v. Archer*, 241 U.S. 119, 132, 36 S. Ct. 521, 60 L. Ed. 918, 51 Ct. Cl. 491 (1916). That causation principle focuses on comparing the plaintiff’s property interest in the presence of the challenged government action and the property interest the plaintiff would have had in its absence.”).

<sup>994</sup> *R&Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 298 (Ala. 2001) (finding no taking due to floodplain regulations, in part because such regulations are socially desirable at the larger scale, and the requirement for payment imposes harm on all, including the claimants, as the claimants also benefit from the restriction); *Usdin v. State of New Jersey*, 173 N.J. Super. 311 (1980) (finding no taking based on floodplain regulations that allowed no building in the floodway as a way to protect human health and safety); *Maple Leaf Investors, Inc. v. State of Washington*, 565 P.2d 1162 (1977) (rejecting a takings claim on the basis of floodplain regulations).

- Unchanging property law.<sup>995</sup>
- Requirements to pay money that are related to specific parcels.<sup>996</sup>
- Rebuilding after a disaster.<sup>997</sup>
- Non-conforming use rights.<sup>998</sup>

One of the many outstanding questions that plagues determination of what constitutes a property right is whether that determination should include consideration of reasonable investment-backed expectations – i.e., should RIBE only play a role in the three-factor *Penn Central* test, or should it also play a role as part of the antecedent inquiry into the “property rights” at issue?<sup>999</sup> Recent U.S. Supreme Court jurisprudence tends to indicate that reasonable

<sup>995</sup> Compare, e.g., *Chicago & Alton R. Co. v. Tranberger*, 238 U.S. 67 (1915) (upholding state laws against claims of taking or violation of due process when the laws changed the “common enemy” doctrine to a doctrine of reasonable use) and *Nantucket Conserv. Found., Inc. v. Russell Mgmt, Inc.*, 402 N.E.2d 501 (Mass. 1980) (finding no taking where a state statute granted a right to alter an existing easement only for ingress and egress to one that also allows installation of utilities) with e.g., *Lucas v. South Carolina Cstl. Com’n.*, 505 US 1003 (1992).

<sup>996</sup> Historically, “Courts and commentators alike have read *Eastern Enterprises* to mean that general obligations to pay money do not fall within the ambit of “private property” protected by the Takings Clause.” Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, THE SUPREME COURT REVIEW 287, 299 (2013). This usually means that a government requirement to pay money does not infringe on a “property right.” This helps to explain why economic impact on property is not considered, by itself, to be a definitive taking unless *all* economically beneficial use has been eliminated per the test established in the *Lucas* case. *Kaiser v. Aetna*, 444 U.S. 164, 178 (1979) (“But not all economic interests are ‘property rights’; only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.”) (citing *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945)). However, a recent U.S. Supreme Court case cast doubt on all of this and dramatically confused whether there can be a property right in the payment of money. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). *Koontz* held that a supposed attempted exaction of money was subject to the same scrutiny as exactions that limited the right to exclude others. This has been followed by other courts with the apparent distinction from previous case law that the exaction of money is “property” because of its close nexus with ownership of a specific parcel of property. See also, *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072, 1084 (2014) (finding that requiring property owners wishing to withdraw their rent-controlled property from the rental market to pay a lump sum to displaced tenants is a taking since “the relinquishment of funds [is] linked to a specific, identifiable property interest such as a bank account or parcel of real property, a ‘per se [takings] approach’ is the proper mode of analysis under the Court’s precedent.”).

<sup>997</sup> See, e.g., *Staubes v. City of Folly Beach*, 500 S.E.2d 160 (S.C. Ct. App. 1998) (finding no temporary taking when property owner’s permit to repair a duplex after a hurricane was denied but then issued after a court appeal).

<sup>998</sup> Cf., e.g., *Flint v. Cty. of Kauai*, 521 F. Supp. 3d 978, 988 (D. Haw. 2021) (“But whether nonconforming TVR use constitutes a property right appears to be an unsettled area of state law.” And citing Hawai’i cases).

<sup>999</sup> Robert Meltz, Dwight H. Merriman & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 557 (Island Press 1999).

investment-backed expectations *can* play a role in defining the property right or interest in a takings case.<sup>1000</sup>

### IV.B.3.c. Parcel as a Whole

"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>1001</sup> Evaluating when a regulatory taking occurs involves courts comparing the value of property prior to and after the imposition of the regulation. Comparing "the property" before and after regulation leads to the question of what "the property" at issue consists of. "Defining the property interest taken in terms of the very regulation being challenged is circular."<sup>1002</sup> With property so divided, every delay or potential taking would constitute a total ban/taking.<sup>1003</sup> To address this issue, the "Parcel as a Whole" rule was created.

The relevant parcel determination is also referred to as the "denominator problem" because in comparing the diminution in value of the claimant's private property with the value that remains in the property, it is crucial to first determine the portion of property "whose value is to furnish the denominator of the fraction."<sup>1004</sup> This can be done by identifying the unit of property before and after the "taking"<sup>1005</sup> and involves a fact-intensive inquiry which includes consideration of at least the following factors: degree of contiguity<sup>1006</sup>, dates of acquisition, treatment of the parcel

---

<sup>1000</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944-45 (2017). *But see*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Roberts, C.J., dissenting).

<sup>1001</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

<sup>1002</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002).

<sup>1003</sup> *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 643-644 (1993); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002); *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944 (2017).

<sup>1004</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944 (2017) (citing *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165, 1192 (1967)). See also *2910 Georgia Avenue LLC v. District of Columbia*, 234 F.Supp.3d 281, 294 (2017) (citing *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 879 (1999)).

<sup>1005</sup> *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 497 (1987).

<sup>1006</sup> Contiguous is defined as "[t]ouching at a point or along a boundary." *Black's Law Dictionary* (9<sup>th</sup> ed. 2009).

by owner and government, and prospective value.<sup>1007</sup> The owner's economic expectations in relation to the property should be taken into account as well.<sup>1008</sup>

The United States Court of Appeals has concluded that considering the impact on the value of the parcel as a whole is important in the analysis of both permanent and temporary regulatory takings.<sup>1009</sup> The Supreme Court has explained that "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question."<sup>1010</sup> The property must be assessed as a whole to make the evaluation fair.

The most recent U.S. Supreme Court case to directly focus on the question of the unit of property at issue in a takings case is *Murr v. Wisconsin*.<sup>1011</sup> Under the state and local law of St. Croix County, Wisconsin, a merger provision results in the automatic unification of contiguous lots, subsequently barring separate sale or development of the parcels at issue if they do not meet minimum size requirements.<sup>1012</sup> The Murrs, who became owners of two contiguous parcels after this regulation went into effect, brought suit against the State of Wisconsin, claiming that the ordinance – which prevented them from separately using or selling their parcels – constituted a taking.<sup>1013</sup> The Court held that the parcels must be evaluated as one whole and that the regulations did not effect a compensable regulatory taking.<sup>1014</sup>

The U.S. Supreme Court has noted that it does not limit its inquiry necessarily just to the portion of property at which a challenged regulation is directed<sup>1015</sup> nor does it limit its inquiry to what

---

<sup>1007</sup> 2910 Georgia Avenue LLC v. District of Columbia, 983 F.Supp.2d at 137; District Intown Properties Ltd. Partnership v. District of Columbia, 198 F.3d 874, 880 (1999); Ciampitti v. United States, 22 Cl. Ct., 310, 318 (1991); Cane Tennessee, Inc. v. U.S., 60 Fed.Cl. 694, 699-700 (2004); Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1380 (Fed. Cir. 2000); Forest Properties, Inc. v. U.S., 177 F.3d 1360, 1365 (Fed. Cir. 1999); *K & K Const., Inc. v. Department of Natural Resources*, 456 Mich. 570, 575 (stressing contiguity, unity of ownership, and a common development plan).

<sup>1008</sup> Cane Tennessee, Inc. v. U.S., 60 Fed. Cl. 694, 704 (2004) (citing *Forest Properties*, 177 F.3d at 1365).

<sup>1009</sup> Cienega Gardens v. U.S., 503 F.3d 1266, 1279 (2007).

<sup>1010</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944-45 (2017) (citing *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993)).

<sup>1011</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017).

<sup>1012</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1940 (2017).

<sup>1013</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1941 (2017).

<sup>1014</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1949 (2017).

<sup>1015</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944-1946 (2017).

state law says.<sup>1016</sup> Additionally, a relevant parcel of land is not always defined by lot lines.<sup>1017</sup> When determining which piece(s) of land make up the parcel as a whole, no single consideration will suffice – courts must consider a number of factors, including: “1) the treatment of the land under state and local law; 2) the physical characteristics of the land; and 3) the prospective value of the regulated land”<sup>1018</sup> including “any effect on the owner’s other holdings.”<sup>1019</sup> The examination of the treatment of the land under state law and the physical characteristics of the land at issue must include a review of the area’s topography and human/ecological environment.<sup>1020</sup> For example, is the property in a location subject to—or likely to become subject to—environmental regulation?<sup>1021</sup> A focus on the nature of the land would strongly support the validity of the types of merger statutes and ordinances that were at issue in *Murr*. The No Adverse Impact (NAI) approach to floodplain management should also encourage local ordinances that merge contiguous properties under common ownership for application of floodplain regulations when the physical characteristics of the land and the socio-ecological context make it reasonable or sensible to treat the commonly owned parcels as one whole.<sup>1022</sup>

### **Land Must Not be Separated into Different Segments for a Takings Claim**

In multiple Supreme Court cases, including *Murr*, it has been made clear that the portion of property cut in value must not be considered in isolation.<sup>1023</sup> A regulation that affects only one “stick of the bundle of property rights” is not a taking<sup>1024</sup> because the aggregate is

---

<sup>1016</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944-47 (2017).

<sup>1017</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1947-48 (2017).

<sup>1018</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017).

<sup>1019</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017).

<sup>1020</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017).

<sup>1021</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944-46 (2017).

<sup>1022</sup> See, e.g., *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945-50 (2017) (expressing little appetite by the Court to broadly characterize common merger provisions as unconstitutional).

<sup>1023</sup> *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978); *Concrete Pipe & Prods. V. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993); *Cienega Gardens v. U.S.*, 503 F.3d 1266, 1280 (2007); *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944 (2017).

<sup>1024</sup> See *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 480 (1987) (citing *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding that a regulation prohibiting commercial transactions in eagle feathers was not a taking because it “did not bar other uses or impose any physical invasion or restraint upon them”)); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002) (citing *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978)). See also *Gorieb v. Fox*, 274 U.S. 603, 605-610 (1927) (affirming that restrictions on portions of a parcel such as setback ordinances do not constitute regulatory takings).



to be viewed in its entirety.<sup>1025</sup> This concept premiered in the case *Penn Central Transportation Company v. City of New York* when the Court rejected the owner of Grand Central Terminal's challenge to a permit denial preventing the construction of an office tower above the terminal. In making this decision, the Court held that the air rights alone did not constitute the parcel as a whole and a parcel may not be divided into separate pieces for a takings determination.<sup>1026</sup> However, some state laws allow for the transfer of development rights to other commonly owned parcels in the vicinity that allow for their use. For example, a 1969 amendment to a 1968 New York ordinance permitted transfer of unexploited development rights to a single parcel in highly commercialized areas such as Midtown Manhattan.<sup>1027</sup>

The Parcel as a Whole rule was further confirmed in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* and *Cienega Gardens v. United States*, which both held that arguments for conceptual severance of the regulated portion of a parcel will likely be unavailing as they ignore *Penn Central's* rule of focusing on "the parcel as a whole"<sup>1028</sup> by simply "defining the property interest taken in terms of the very regulation being challenged."<sup>1029</sup> In this regard, the Court has explained that a portion is always taken in its entirety, but "the relevant question is whether the property taken *is all, or only a portion of*, the parcel in question."<sup>1030</sup>

Avoiding disaggregation of related parcels can be a very powerful defense for government regulations. For example, in one case in which new floodplain restrictions prevented the existing use of 39 basement-level apartments in an apartment complex,

<sup>1025</sup> *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Cienega Gardens v. U.S.*, 503 F.3d 1266 (2007) (holding that the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period). See also *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 498 (1987).

<sup>1026</sup> See *Concrete Pipe & Prods. V. Constr. Laborers Pension Trust*, 508 U.S. 602, 643–44 (1993) ("a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable"); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 478–79 (1987); *Rith Energy v. United States*, 270 F.3d 1347, 1349–50 (Fed. Cir. 2001).

<sup>1027</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 114–15 (1978).

<sup>1028</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002) (quoting *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993)); *Cienega Gardens v. U.S.*, 503 F.3d 1266, 1281 (2007).

<sup>1029</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002).

<sup>1030</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944 (2017) (quoting *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993)).

the court held that no taking had occurred because the relevant parcel was the whole apartment complex, including the 156 upper-level apartments still available for use.<sup>1031</sup>

### **Treatment of the Land under State and Local Law**

Courts should give great regard to the treatment of the land under state and local law.<sup>1032</sup> In *Murr*, the Court adopted the respect for state law from *Lucas v. South Carolina Coastal Council* but also considered whether the state's regulations were in accord with other aspects of reasonable property expectations.<sup>1033</sup> In evaluating the treatment of property factor, the Court held that the merger provision at issue had a particular and fair purpose, aligning with the commonly accepted concept that lot lines do not define the property in every case.<sup>1034</sup>

Federal property rights under the Takings Clause coexist with those under state law.<sup>1035</sup> While state law may provide guidance for the relevant parcel determination,<sup>1036</sup> states do not have unrestricted power to form and characterize property rights and reasonable investment-backed expectations without ensuring that landowners have potential remedies against unreasonable regulation.<sup>1037</sup> When an owner possesses bordering pieces of land subject to regulation under state or local law (such as a merger provision), the tracts will be considered one parcel in a takings claim if the owner could have reasonably expected that their holdings would be treated as such.<sup>1038</sup>

---

<sup>1031</sup> *Elsmere Park Club Ltd. Partnership v. Elsmere*, 771 F. Supp. 646, 653 (Fed. Dist. Del. 1991).

<sup>1032</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017).

<sup>1033</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1946-47 (2017) (referencing *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992)).

<sup>1034</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1947-48 (2017).

<sup>1035</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944 (2017).

<sup>1036</sup> *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 879 (1999) (comparing *Lucas*, 505 U.S. at 1017 (suggesting that one may look to the influence of the State's property law—whether and to what extent the State has recognized and extended legal recognition to the particular interest alleged to have been deprived of all economic value—on the claimant's reasonable expectations), with *Keystone Bituminous Coal Ass'n*, 480 U.S. at 500, (refusing to treat the support estate as a separate parcel of property simply because Pennsylvania law recognizes it as such and noting that “our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights”)).

<sup>1037</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1944-45 (2017) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001)).

<sup>1038</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017).

Although property is generally defined by state law,<sup>1039</sup> *Murr* explained that in determining the denominator in a takings claim, state law is to be given deference but is not the exclusive legal source.<sup>1040</sup> For example, lot lines do not always define the bounds of a parcel<sup>1041</sup> – they can vary between states, making them an unreliable standard measure for the reasonable expectations of property owners.<sup>1042</sup> They can also be altered by landowners seeking to manipulate the outcome of a takings claim.<sup>1043</sup> Therefore, the inquiry is objective and shall examine reasonable expectations obtained from traditional customs and law.<sup>1044</sup>

The relevant parcel determination should examine a landowner's reasonable economic expectations<sup>1045</sup> to see if they would anticipate their holdings to be deemed one parcel or separate tracts.<sup>1046</sup> For an owner's expectations to be reasonable, they must acknowledge legitimate restrictions that could affect the property and its use.<sup>1047</sup> A restriction put in place before the owner's acquisition of land would be a factor that a landowner should use in forming expectations about their property.<sup>1048</sup> In *Murr*, the petitioners could not have reasonably expected to sell or develop either of their lots separately as the merger regulation was in place before they acquired both lots.<sup>1049</sup> Since

---

<sup>1039</sup> *United States v. Cress*, 243 U.S. 316, 319 (U.S. 1917); *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 743 (1950) (“But since the federal law adopts [the property law] of the State as the test of federal liability, we must venture a conclusion as to peculiarly local law.”); *Armstrong et al. v. United States*, 364 U.S. 40, 44-46 (1960) (noting that materialmen’s liens attached are based on operation of state law); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); Robert Meltz, Dwight H. Merriman & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 26 (Island Press 1999). *But, see*, *United States v. Twin City Power Co.*, 350 U.S. 222, 227-28 (1956) (noting that even though claimants had a recognized property right under state law, this did not entitle them to compensation due to the federal navigational servitude).

<sup>1040</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1947 (2017); *2910 Georgia Avenue LLC v. District of Columbia*, 234 F.Supp.3d 281, 295 (2017).

<sup>1041</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1947-48 (2017).

<sup>1042</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1948 (2017).

<sup>1043</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1948 (2017).

<sup>1044</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017).

<sup>1045</sup> See *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 500–01 (1987).

<sup>1046</sup> See, e.g., *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017).

<sup>1047</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017) (quoting *Ballard v. Hunter*, 204 U.S. 241, 262 (1907) (“Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings”).

<sup>1048</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 627) (“[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned”).

<sup>1049</sup> *Murr v. Wisconsin*, 137 S.Ct. 1933, 1942 (2017).

they voluntarily brought the pieces of land under common ownership with knowledge of the regulation, they should have expected the parcels to be treated as one.<sup>1050</sup> The provision at issue was held to be a “legitimate exercise of government power” and failed to constitute a taking under the *Penn Central* analysis.<sup>1051</sup>

The case of *Loveladies Harbor, Inc. v. United States* made a narrow modification to this concept by holding that land developed or sold prior to a new regulation may be considered as separate from the parcel as a whole.<sup>1052</sup> In *Loveladies*, the trial court excluded portions of land from the parcel as a whole, only evaluating what still belonged to Loveladies because: 1) many of the excluded acres were developed and sold before the regulatory restrictions were imposed, and 2) the remaining excluded acres had been dedicated to the state.<sup>1053</sup> Similarly, in *Palm Beach Isles Associates v. United States*, the court allowed for the separation of tracts from the parcel as a whole due to: 1) acres being sold years before the regulatory restriction was enacted, and because 2) the properties were unconnected – both physically and legally,<sup>1054</sup> though a strenuous dissent on denial of rehearing articulated numerous problems with the panel’s analysis of the takings issues, particularly the “conceptual severance” of the uplands from the wetlands; this dissent noted that the rule of the majority opinion enables developers to develop and separate property so as to create a successful takings claim for part of their property.<sup>1055</sup> The situations in *Lucas*<sup>1056</sup> and *Lost Tree*<sup>1057</sup> both present cases for an argument that developers could purchase regulated land, apply for permits, and then bring a takings claim when they fail.<sup>1058</sup> The Federal Circuit asserts that this is not an issue because real estate investors typically do not engage in such strategic behavior, and if they were to do so, the flexibility of the takings inquiry would allow for that to be

---

<sup>1050</sup> *Murr v. Wisconsin*, 137 S.Ct. 1967, 1968 (2017).

<sup>1051</sup> *Murr v. Wisconsin*, 137 S.Ct. 1967, 1968 (2017).

<sup>1052</sup> *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (“The timing of property acquisition and development, compared with the enactment and implementation of the governmental regimen that led to the regulatory imposition, is a factor, but only one factor, to be considered in determining the proper denominator for analysis”). *See also Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed.Cir.) (stressing the owner’s treatment of property as a unit from the time of purchase).

<sup>1053</sup> *2910 Georgia Avenue LLC v. District of Columbia*, 234 F.Supp.3d 281, 297 (2017) (citing *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994)).

<sup>1054</sup> *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000).

<sup>1055</sup> *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1365, 1370-72 (Fed. Cir. 2000).

<sup>1056</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (U.S. 1992).

<sup>1057</sup> *Lost Tree Vill. Corp. v. United States*, 787 F.3d 111 (Fed. Cir. 2015).

<sup>1058</sup> *Lost Tree Vill. Corp. v. United States*, 787 F.3d 111, 1118 (Fed. Cir. 2015).

addressed in the individual case.<sup>1059</sup> However, this argument seems less convincing since, to some degree, it occurred in the very case in which the Federal Circuit opined that it was not a problem.<sup>1060</sup> And at least one jurisdiction in the State of New York has openly allowed and essentially encouraged and condoned such a speculative approach to land value through its rulings.<sup>1061</sup>

Another aspect to be considered when determining the relevant parcel is the owner's treatment of the land.<sup>1062</sup> Although it was not a factor covered in *Murr*, other cases have given it substantial weight.<sup>1063</sup> Where an owner treats pieces of property as a "single integrated project," the relevant parcel will include all pieces even if they were acquired at different times.<sup>1064</sup> In 2015, *Lost Tree Village Corporation v. United States* narrowed this rule by holding that a lone plat is to be evaluated as the relevant parcel when the owner developed the parcels "at different times" and treated them as "distinct economic units."<sup>1065</sup> Courts may apply a flexible approach to account for such factual distinctions, but many jurisdictions have generally held the denominator to consist of contiguous acres under common ownership.<sup>1066</sup>

#### IV.B.3.c.i. Physical Characteristics of the Land

Courts must examine the physical characteristics of the landowner's property – including the physical relationship of distinguishable parcels, the land's topography, and the surrounding human and ecological environment.<sup>1067</sup> Where an owner possesses spatially/functionally contiguous properties or develops multiple units as part of a single project, the parcels are

<sup>1059</sup> *Lost Tree Vill. Corp. v. United States*, 787 F.3d 111, 1114 (Fed. Cir. 2015).

<sup>1060</sup> *See, e.g., Lost Tree Vill. Corp. v. United States*, 787 F.3d 111, 1113 (Fed. Cir. 2015) (developer purchased around 2,000 acres of land and developed much of it over decades, including about 1,300 acres developed as a gated residential community but apparently left submerged and wetlands area as the least developable land until later in the process and then brought a takings case for denial of a fill permit). *See also, Palm Beach Isles Assocs. V. United States*, 231 F.3d 1365 (Fed. Cir. 2000) (Gajarsa, J., dissenting from denial of rehearing *en banc*).

<sup>1061</sup> *Matter of City of New York (New Cr. Bluebelt, Phase 4)*, 2018 NY Slip Op 50024(U) [58 Misc 3d 1210(A)] (N.Y., Supreme Court of Richmond Cty. January 12, 2018) (on file with author Thomas Ruppert); *Matter of New Cr. Bluebelt, Phase (Galarza--City of New York)*, 2022 NY Slip Op 03118 (N.Y. Appellate Division, Second Department May 11, 2022) (on file with author Thomas Ruppert).

<sup>1062</sup> *Forest Properties, Inc. v. U.S.*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

<sup>1063</sup> *Forest Properties, Inc. v. U.S.*, 177 F.3d 1360, 1366-67 (Fed. Cir. 1999).

<sup>1064</sup> *Forest Properties, Inc. v. U.S.*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

<sup>1065</sup> *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1115 (Fed. Cir. 2015).

<sup>1066</sup> *Karam v. State, Dept. of Environmental Protection*, 308 N.J.Super. 225, 238 (1998).

<sup>1067</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945-48 (2017).

generally treated as one whole.<sup>1068</sup> In *Karam v. State of New Jersey, Department of Environmental Protection*, the lands were held to be a single property unit because they were: 1) commonly owned, 2) bought and sold as a single unit, 3) presented as a single unit in a single contract of sale, and 4) legally and factually intertwined.<sup>1069</sup> Contiguity is an important factor to be considered in the parcel-as-a-whole analysis<sup>1070</sup>; however, relevant parcels may include noncontiguous property.<sup>1071</sup> Additionally, it may be relevant if the property is located in an area subject to, or likely to become subject to, environmental or other regulations.<sup>1072</sup>

In *Murr*, the physical characteristics of the property supported its treatment as a single parcel.<sup>1073</sup> The lots were contiguous.<sup>1074</sup> Their size, location, and terrain made it reasonable for the owners to expect that their “potential uses may be limited.”<sup>1075</sup> They were also located along the Lower St. Croix River – a body of water long regulated by local, state, and federal law – which means that petitioners should have anticipated the possibility of public regulation affecting the use and enjoyment of the property.<sup>1076</sup>

#### IV.B.3.C.ii. Prospective Value of the Regulated Land

Courts shall evaluate the prospective value of the property under the challenged regulation, with consideration of the regulated portion’s effect on the remainder of the land.<sup>1077</sup> Use restrictions may reduce a property’s market value, but the loss in value may be mitigated if the regulation

---

<sup>1068</sup> 2910 Georgia Avenue LLC v. District of Columbia, 234 F.Supp.3d 281, 297-98 (2017) (holding that an entire condominium building and all of its units were the relevant parcel because it was “presented as a single investment for financing, planning, and building purposes”).

<sup>1069</sup> *Karam v. State, Dept. of Environmental Protection*, 308 N.J. Super. 225 (1998).

<sup>1070</sup> *Cane Tennessee, Inc. v. U.S.*, 60 Fed.Cl. 694, 700-03 (2004); *2910 Georgia Avenue LLC v. District of Columbia*, 234 F.Supp.3d 281, 296 (2017).

<sup>1071</sup> *Cane Tennessee, Inc. v. U.S.*, 60 Fed.Cl. 694, 703 (2004).

<sup>1072</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945-48 (2017).

<sup>1073</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1948 (2017).

<sup>1074</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1948 (2017).

<sup>1075</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1948 (2017).

<sup>1076</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017) (citing *Lucas*, at 1035 (Kennedy, J., concurring) (“Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit”)).

<sup>1077</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).



adds value to the parcel through improvements such as increased privacy, preserved nature areas, or expanded recreational space.<sup>1078</sup>

Since a regulatory takings analysis requires comparison of the value of property before and after regulation, analysis of what constitutes the boundaries of the property at stake is an important,<sup>1079</sup> in some cases perhaps definitive,<sup>1080</sup> part of the analysis. For example, in *Penn Central*, the U.S. Supreme Court held that the affected property consisted of the whole parcel, which included both the Grand Central Terminal building and the air rights above it.<sup>1081</sup>

The absence of a special relationship between holdings may counsel against consideration of multiple parcels being considered as a single parcel for a takings analysis; considering multiple parcels individually increases the likelihood that a restrictive regulation could be found to result in a taking.<sup>1082</sup> However, in *Murr*, the lots had a special relationship evidenced by their combined valuation, which was greater than the value of the separated lots.<sup>1083</sup> Additionally, the combination of the lots allowed for greater privacy and increased recreational space.<sup>1084</sup> The increased value and other benefits supported the merger and treatment of the parcel as one whole.<sup>1085</sup>

#### IV.B.3.C.iii. Conclusion

Whether a taking has occurred depends on the specific facts at hand.<sup>1086</sup> A takings determination will be skewed if the property is viewed too broadly or narrowly.<sup>1087</sup> Therefore,

---

<sup>1078</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017). See also, *id.* at 1948-49 (applying this part of the test).

<sup>1079</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1941-44 (2017).

<sup>1080</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017) (citing *Eagle, The Four-Factor Penn Central Regulatory Takings Test*, 118 Pa. St. L. Rev. 601, 631 (2014)). But, see, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017) (noting that “Defining the property at the outset, however, should not necessarily preordain the outcome in every case.”).

<sup>1081</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017) (citing *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130 (1978)).

<sup>1082</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017).

<sup>1083</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017).

<sup>1084</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1948-49 (2017).

<sup>1085</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949-50 (2017).

<sup>1086</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 529 (1992).

<sup>1087</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337-39 (2002).

courts should try to define the parcel as “realistically and fairly as possible.”<sup>1088</sup> In *Murr*, the Supreme Court affirmed the Court of Appeals’ decision to analyze the petitioners’ entire property, consisting of two similar and contiguous parcels, as a single whole for a takings analysis.<sup>1089</sup> The decision relied on strong cases and analyzed a multitude of factors, including the degree of contiguity, dates of acquisition, treatment of the parcel, prospective value of the regulated land, and more<sup>1090</sup>, before ultimately deciding to treat the parcel as a single unit.<sup>1091</sup>

There is no bright-line rule or single test for properly determining the parcel in a regulatory takings case,<sup>1092</sup> but the Supreme Court has consistently used the parcel as a whole rule<sup>1093</sup> as a way to “define the parcel in a manner that reflects reasonable expectations about the property.”<sup>1094</sup> The parcel as a whole approach follows established precedent and is in accord with Supreme Court case law.<sup>1095</sup>

#### IV.B.3.c.iv. Recommendations

Courts usually tend to frown upon efforts by property owners to divide parcels up to increase the likelihood of a successful takings claim. However, in a few cases, courts have found a taking when parcels that previously were part of a larger whole have been separated even though doing so has made them less appropriate for development; when courts have allowed such separation as part of a takings claim, it is usually because some timeline or activity in the development process demonstrated that the developer was treating the parts of the parcels as separate entities. To prevent appellants from asserting that a piece of land in a takings claim should be evaluated separately from the entire parcel, development permits should account for separate units as a whole if they are part of “a single, common development plan or project.”<sup>1096</sup>

---

<sup>1088</sup> Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978).

<sup>1089</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017).

<sup>1090</sup> *Cane Tennessee, Inc. v. U.S.*, 60 Fed.Cl.694, 700 (2004) (citing *Ciampitti v. United States*, 22 Cl.Ct. 310, 318 (2001)).

<sup>1091</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017).

<sup>1092</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949-50 (2017) (citing *Arkansas Game and Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012)).

<sup>1093</sup> *Cane Tennessee, Inc. v. U.S.*, 60 Fed.Cl. 694, 699 (2004) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. at 327).

<sup>1094</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017).

<sup>1095</sup> *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 882 (1999).

<sup>1096</sup> *2910 Georgia Avenue LLC v. District of Columbia*, 234 F.Supp.3d 281, 296 (2017) (citing *Forest Properties Inc., v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (a combination of legally distinct parcels was properly treated as the relevant parcel where “the development was treated as a single integrated project” and it was understood that the individual “portions would be developed as a single project”)).

When evaluating a development proposal from a developer that owns contiguous land that might be less appropriate for development, the permitting government should ensure that they discuss future development plans for the additional land with the developer, indicate any reasons that the land might present permitting difficulties, and ensure that this conversation is clearly recorded in a public record for future reference. This may assist in preventing successful takings claims in instances where, as in *Lost Tree Village Corporation v. United States*,<sup>1097</sup> a developer leaves wetlands to develop separately and then brings a takings claim when they cannot be filled and developed. Additionally, when defending against a takings claim, government defendants should carefully review the history of the property to evaluate if it was previously part of a larger parcel and potentially separated intentionally due to part of the land being less appropriate for development due to wetlands, a flood zone designation, or other potential limiting factors.

When implementing floodplain regulations that might limit property use, governments can use merger provisions – commonly used in land use planning<sup>1098</sup> to combine neighboring parcels with a common owner<sup>1099</sup> – to serve important interests in floodplain management. An example of this could be to increase minimum lot sizes in order to decrease potential density in hazardous areas while minimizing the risk of a successful takings claim.<sup>1100</sup>

Under current precedent, the multitude of potential factors that determine what is considered the “parcel as a whole” can lead to confusing and potentially contradictory results. However, overall, courts have usually avoided allowing claimants to strategically separate parcels to increase the chance of a success in a takings claim. Similarly, courts have been quite deferential to state merger requirements that can serve to lessen development in hazardous areas and the risk of successful takings claims.

### IV.B.3.d. Facial vs. As-Applied Challenges

In takings law, a “facial” versus an “as-applied” challenge to a regulation means that the plaintiff attacking the law is asserting not only that the law is unconstitutional as applied to her property but that application of the law to *any* property under *any* imaginable circumstances will *always* be unconstitutional. In other words, mere enactment of the law is an unconstitutional taking.<sup>1101</sup>

---

<sup>1097</sup> 787 F.3d 111, 1113 (Fed. Cir. 2015).

<sup>1098</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

<sup>1099</sup> Based on *Murr v. Wisconsin*, 137 S. Ct. 1933, 1947-48 (2017).

<sup>1100</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

<sup>1101</sup> See, e.g., *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F. Supp. 2d 972, 993 (Nev. Dist. 2004).

This means that the real distinction between an as-applied versus a facial challenge to a regulation in the land-use context is the *remedy*, not the substantive standard applied to determine a constitutional violation.<sup>1102</sup>

Courts have repeatedly noted that a claimant who asserts that a taking of property has occurred by mere enactment of a regulation is fighting an “uphill battle.”<sup>1103</sup> As a facial challenge does not involve evaluating the facts of a specific application of the challenged law, ripeness is not an issue in such challenges to the constitutionality of and claim of a taking of property by a regulation.<sup>1104</sup>

Showing that regulations make land less profitable or less valuable is not, alone, sufficient to support a finding of facial unconstitutionality for a taking.<sup>1105</sup> On the contrary: since a facial claim asserts that no application of the challenged law is constitutional, almost any demonstrated “economically viable and legally permissible use of the property alone is generally sufficient to defeat a facial takings claim.”<sup>1106</sup>

### IV.B.3.e. Ripeness

In takings law, the concept of “ripeness” represents the idea that courts should not rule on a case until the courts have before them a sufficiently complete record of facts to accurately ascertain the extent of any impact on property rights of a challenged regulation.<sup>1107</sup> The prudential necessity for ripeness is in part due to the need for courts to understand the impact of the regulation on RIBE and the economic impact of the regulation.<sup>1108</sup> Even as ripeness has

---

<sup>1102</sup> Cf. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127-28 (2019).

<sup>1103</sup> *Tahoe-Sierra Pres. Council*, 535 U.S. 302, 320 (2002) (quoting *Keystone*, 480 U.S. at 495).

<sup>1104</sup> See *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (noting that facial challenges are immediately ripe); *Pennell*, 485 U.S. 1, 11-14 (1988) (rejecting facial claim on the merits despite dismissing as-applied claims on grounds of ripeness); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.), cert. denied, 513 U.S. 870 (1994) (“ripeness requirements are relevant only to as-applied challenges, and not to facial challenges”).

<sup>1105</sup> *Kittay v. Guillian*, 112 F. Supp. 2d 342, 351 (2000).

<sup>1106</sup> *Kittay v. Guillian*, 112 F. Supp. 2d 342, 351 (2000) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 296 n. 37 (1981)).

<sup>1107</sup> See, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967) abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). For an example in which the U.S. Supreme Court said that a claim was not ripe based on argument that mere assertion of U.S. Army Corps of Engineers jurisdiction could give rise to a taking, see *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

<sup>1108</sup> *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 737-38 (1997); *id.* at 746 (O’Connor, J., concurring). See also, *Laurjo Const. Co. v. State*, 550 A.2d 518, 1988 N.J. Super. LEXIS 417 (“A court cannot decide whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.”)

sometimes been portrayed as a prudential requirement, courts have also characterized ripeness as a jurisdictional hurdle.<sup>1109</sup>

In the case of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*,<sup>1110</sup> the U.S. Supreme Court explained that a takings case is not ripe until “the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”<sup>1111</sup> The point of this, as the U.S. Supreme Court noted in a case a year after *Williamson County*, is to ensure that the court is certain of “the extent of permitted development.”<sup>1112</sup> Specifically, the U.S. Supreme Court has articulated that “[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.”<sup>1113</sup> Thus, if there are variance or exception procedures available to a property owner, these must, if not clearly futile,<sup>1114</sup> be utilized by a property owner before a claim will be ripe.<sup>1115</sup> Again, this holding emphasizes that courts seek to ensure that property owners have established to what uses their property can be put prior to pursuing a Fifth Amendment takings claim.<sup>1116</sup>

At the same time, the *Williamson County* holding that a final decision is needed by the governmental authority implementing the challenged regulation will not allow government to

---

McDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285, 294 (1986), reh'g den. 487 U.S. 1035, 107 S.Ct. 22, 92 L.Ed.2d 773 (1986).). Klineburger v. Dep't of Ecology, 2018 Wash. App. LEXIS 1935 \*7-\*8 (finding a takings claim unripe due to an insufficiently developed record to demonstrate what could be done with the property and what value remains).

<sup>1109</sup> See, e.g., *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469 at 478 (2d Cir. 1999) (“ripeness is a constitutional prerequisite to exercise of jurisdiction by federal courts”) (internal quotations omitted); Robert Meltz, Dwight H. Merriman & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 46 (Island Press 1999).

<sup>1110</sup> 473 U.S. 172 (1985).

<sup>1111</sup> *Id.*, at 186. For a different perspective on ripeness, in which a claimant who “drew a line in the sand” at the rejection of a single application convinced the court that the takings claim was ripe, see *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560, 562 (Fla. Dist. Ct. App. 1998) (reversing dismissal of suit for lack of a ripe claim).

<sup>1112</sup> *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986).

<sup>1113</sup> *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986).

<sup>1114</sup> For discussion of “futility,” see the following paragraph.

<sup>1115</sup> See, e.g., *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 187-91 (1985); *Kittay v. Giuliani*, 112 F. Supp. 2d 342 (2000) (dismissing a takings claim as it was not ripe since the claimant had not exhausted administrative remedies).

<sup>1116</sup> *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (noting that a plat rejection by a planning commission but without any action by the property owner to available variance procedures meant that “the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.”).

prevent ripeness by avoiding meeting the *Williamson County* standard of a “final decision.” An example of such abuse that led to a successful takings claim is the case of *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*<sup>1117</sup> That case noted that “After five years, five formal decisions, and 19 different site plans,”<sup>1118</sup> during which the applicant kept meeting city demands only to see a rejection and stricter demands issued, the U.S. Supreme Court approved a court decision finding the case ripe due to concerns about “repetitive and unfair procedures.”<sup>1119</sup> Other cases have further developed the idea of the “futility exception” to the need to exhaust administrative remedies.<sup>1120</sup>

Nor does the requirement for final decision always require a decision squarely addressing the proposed use. In the 2001 case of *Palazzolo v. Rhode Island*, the U.S. Supreme Court backed away from language requiring a specific decision on the application of regulations limiting property. Confronted with a factual scenario where the Rhode Island Supreme Court found a case unripe because the claimant had received permit rejections for large projects that would have involved filling all or most of its wetland properties, but the applicant had never submitted any permit applications for more modest development requiring far less filling of wetlands,<sup>1121</sup> the court noted that the ripeness doctrine does not require a landowner to submit applications for their own sake.<sup>1122</sup> Rather, a claimant is required to explore development opportunities on their upland parcel only if there is uncertainty as to the land’s permitted use.<sup>1123</sup>

Rather than apply the hard and fast rules previously requiring a “final decision regarding the application of regulations to the property at issue” by the regulatory authority, in *Palazzolo*, the court applied the *principles* from its precedent in analysis of ripeness.<sup>1124</sup> These principles, said the Court, allowed it to distinguish cases in which the significant discretion often available to land use boards to soften the impact of their regulations has been given an opportunity to function versus cases in which it has not been offered such an opportunity or no such

---

<sup>1117</sup> 526 U.S. 687 (1999).

<sup>1118</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999).

<sup>1119</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999).

<sup>1120</sup> See, e.g. *Kittay v. Giuliani*, 112 F. Supp. 2d 342, 349-50 (2000) (describing the futility exception and citing cases); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987) (requiring at least one application as a prerequisite to invoking the futility exemption).

<sup>1121</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001).

<sup>1122</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001).

<sup>1123</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 624-25 (2001). See, also, *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997). In *Suitum*, the U.S. Supreme Court found the claim to be ripe since there was “no question here about how the ‘regulations at issue [apply] to the particular land in question.’” *Id.* at 739 (1997) (quoting *Williamson County* at 191).

<sup>1124</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001).



opportunity exists.<sup>1125</sup> As the regulations at issue in *Palazzolo* were so strict and earlier permit applications had already established some findings, the Court found evidence in the record of sufficient indicia of what would and would not be allowed to fulfill the ripeness requirements in the Court's jurisprudence.<sup>1126</sup>

Also part of the issue of ripeness, since the 1985 decision of the U.S. Supreme Court in *Williamson County Regional Planning Comm'n v. Hamilton Bank*,<sup>1127</sup> property owners with claims against local government entities were required to exhaust state procedures for compensation—including litigating a takings claim in state courts—before being allowed entry to federal courts with their Fifth Amendment claim.<sup>1128</sup> This put claimants against a taking at the local government level in a quandary: they had to bring a constitutional takings claim in state court to ripen their federal court claim, but, according to other U.S. Supreme Court precedent,<sup>1129</sup> the state court results of such litigation were given preclusive effect in federal court. This essentially meant that no claimants of a taking at the local government level could have access to federal courts for their takings claim. At the same time, the limitations of *Williamson County* could alternatively be characterized as ensuring that an effective state process to address takings claims is adequately utilized, thus avoiding a flood of takings litigation against local governments overwhelming federal courts with "a mass of quintessentially local cases involving complex state-law issues into federal courts."<sup>1130</sup>

This changed in 2019 when the U.S. Supreme Court, in the case of *Knick v. Township of Scott*, overruled prior precedent to announce direct access to federal courts for takings claims regardless of available state procedures for compensation.<sup>1131</sup> The Court overruled *Williamson County Regional Planning Comm'n v. Hamilton Bank* because, said the Court, the *Williamson County* decision's requirement to pursue state litigation for compensation had failed to adequately account for the fact that a takings claim eligible for a 42 U.S.C.S. § 1983 action arose at the time of the taking.<sup>1132</sup>

Also in the case of *Knick v. Township of Scott*, the U.S. Supreme Court had expressed doubt that a takings claim could ever be ripe for injunctive relief since a taking does not exist in the regulatory context until the effect of the regulation on property is sufficiently established or, in

---

<sup>1125</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

<sup>1126</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001).

<sup>1127</sup> 473 U.S. 172 (1985).

<sup>1128</sup> *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-200 (1985).

<sup>1129</sup> *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U. S. 323 (2005).

<sup>1130</sup> See, e.g., *Knick v. Twp. Of Scott*, 139 S. Ct. 2162, 2180-81 (2019) (Kagan, J., dissenting).

<sup>1131</sup> *Knick v. Twp. Of Scott*, 139 S. Ct. 2162 (2019).

<sup>1132</sup> *Knick v. Twp. Of Scott*, 139 S. Ct. 2162, 2167-68 (2019).

the case of a physical taking, the property has actually been taken.<sup>1133</sup> However, just one year later, in *Cedar Point Nursery*, the U.S. Supreme Court concluded that an imminent physical taking established a basis for injunctive relief.<sup>1134</sup>

As a corollary to ripeness, which presents the first moment when a case may be brought, cases may also have an expiration date, known as a “statute of limitations.” For example, 28 U.S.C. §2501 establishes a 6-year statute of limitations for any cases over which the Court of Federal Claims has jurisdiction,<sup>1135</sup> which includes takings claims brought under the Tucker Act/42 U.S.C. §1983. Court decisions on disagreements over when to begin the clock running for a statute of limitations have concluded that time begins when a claim has ripened.<sup>1136</sup> Expiration of the statute of limitations removes a court’s jurisdiction over the case.<sup>1137</sup>

#### IV.B.3.e.i. **Recommendations**

Ripeness represents a decision by a court that the record presented to the court presents sufficient information for the court to be able to understand the real impact of a challenged regulation and to evaluate whether the regulation effected a taking of private property. Government defendants that do not, in good faith, believe that a claimant has sufficiently established the ultimate impact of the challenged regulation on the claimant’s property may assert ripeness as a defense to the takings claim. However, government entities should ensure that they are acting competently and in good faith if they begin requiring numerous, repetitive requests for applications as this could be construed as trying to prevent a claimant from ripening a case. The concept of “good faith” plays a crucial role in how to balance requests for multiple applications against assertions that such role-playing by the government is intended to prevent a claimant from having a ripe case. As the decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* demonstrates, when government has abused its discretion to prevent

---

<sup>1133</sup> *Knick v. Township of Scott*, 139 S. Ct. 1262, 2179 (2019).

<sup>1134</sup> *Cedar Point Nursery*, 141 US 2063, 2072 (2021).

<sup>1135</sup> 28 U.S.C. §2501.

<sup>1136</sup> See, e.g. *Goodrich v. United States*, 434 F.3d 1329 (Fed. Cir. 2006); *Ladd v. United States*, 630 F.3d 1015, 2010 U.S. App. LEXIS 25443 (Fed. Cir. 2010); *McDonald v. United States*, 37 Fed. Cl. 110 (Fed. Cir. 1998) (takings claim accrued when claimant was aware or should have been aware of all events indicating government’s liability). Cf. also, *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1262 (Fed. Cir. 2017) (noting that the claim was not barred by the statute of limitations in 28 U.S.C. §2501 because the claim had ripened less than six years before the filing of the suit); *Royal Manor, Ltd. v. United States*, 69 Fed. Cl. 58, 61 (2005) (“[A] regulatory takings claim will not accrue until the claim is ripe.”).

<sup>1137</sup> *Reoforce, Inc. v. United States*, 853 F.3d. 1249, 1264 (Fed. Cir. 2017); *Duncan v. United States*, 98 Fed. Cl. 318 (Fed. Cl. Apr. 12, 2011), aff’d, 456 Fed. Appx. 891 (Fed. Cir. 2011) (expiration of statute of limitations removed federal court’s jurisdiction to hear the case); *Luciano v. United States*, 124 Fed. Cl. 371 (Fed. Cl. 2015).

the ripening of a claim, courts have had little problem in finding liability for “repetitive and unfair procedures.”<sup>1138</sup>

### **IV.B.3.f. Regulation Prior to Acquisition<sup>1139</sup>**

### **IV.B.3.g. Foreseeability in Takings Law<sup>1140</sup>**

## **IV.B.4. Exactions**

---

An “exaction” in law is “[t]he wrongful demand of a reward or fee for an official service performed in the normal course of duty.”<sup>1141</sup> Exactions are a tool commonly used by government to have the flexibility to allow proposed development that otherwise might not be permitted due to impacts that would legally prohibit the development; the exaction can then be imposed as a way to eliminate or mitigate the impacts that would otherwise prevent issuance of a permit. In this sense, exactions constitute demands in exchange for an official service, but properly used they are not necessarily “wrongful” as the official service (e.g., the permit) would not have to be provided without voluntary acceptance of the demand that the permit applicant address impermissible impacts from the proposed development.

Exactions constitute a special type of “takings” case under the U.S. Constitution’s Fifth Amendment that falls somewhere in between a physical and regulatory taking.<sup>1142</sup> The U.S.

---

<sup>1138</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698-99 (1999) (citing to *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350, n. 7 (1986)).

<sup>1139</sup> This section currently under review and will be added to this *Guide* in the next revision. *See also* the [Reasonable Investment-Backed Expectations](#) section.

<sup>1140</sup> This section currently under review and will be added to this *Guide* in the next revision. *See also* the [Reasonable Investment-Backed Expectations](#) section.

<sup>1141</sup> Bryan A. Garner, *Black’s Law Dictionary* 238 (West Publishing 1998 Pocket Edition).

<sup>1142</sup> 13 *Powell on Real Property* § 79E.03 (“A further type of taking in the land-use context is an illegitimate or excessive “exaction,” which is a condition imposed on the government’s grant of a discretionary landuse approval that the landowner dedicate to the public or the government land, facilities, and other real property, or money. The area of exactions falls between physical takings and regulatory takings, because, on one hand, the government does not occupy private property unless the landowner gives up the property in exchange for a discretionary permit, and on the other hand, the landowner is not denied the desired use so long as he or she meets the exacting conditions of approval. Aware of the potential for government agencies to use the regulatory process to extort otherwise confiscatory transfers of private property to the public, the United States Supreme Court has created a special set of two takings tests applicable to exactions, both of which apply to any challenged exaction.”). *See, e.g.*; *Nollan v. Cal. Coastal Com’n*, 483 US 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (distinguishing

Supreme Court has justified its exactions jurisprudence as a special application of the “unconstitutional conditions” doctrine,<sup>1143</sup> and called this doctrine “well settled” despite many protestations to the contrary.<sup>1144</sup>

Exactions jurisprudence creates confusion as to whether exactions are actually Fifth Amendment takings cases or should more properly be characterized as substantive due process cases,<sup>1145</sup> notwithstanding the U.S. Supreme Court’s assertions in the majority opinions of the cases below. For example, the first U.S. Supreme Court case that announced the unique and more searching standard for exactions, *Nollan v. Cal. Cstl. Com’n*,<sup>1146</sup> is almost *completely* dependent on the substantive due process language of “substantially advance a legitimate state interest” from *Agins*.<sup>1147</sup> Arguably, all exactions law is an aberration as it applies substantive due process-like analysis and burdens in the takings context. From the perspective of those dealing with land use and attempting to address serious current and future crises related to uses of land, adding ever stricter constraints on exactions makes their jobs much harder.<sup>1148</sup>

---

other takings cases from the instant case and *Nollan v. Cal. Cstl. Com’n*, 483 U.S. 825 (1987); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).).

<sup>1143</sup> See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-07, 611-12 (2013). See also, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005).

<sup>1144</sup> See, e.g., John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. Envtl. L.J. 1, 23 n.132 (2014) (citing Daniel Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 914 (2006); see also Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 755 (2007)

<sup>1145</sup> See, e.g., John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. Envtl. L.J. 1, 6 n.32, 31 (2014); Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403 (2014) (suggesting that a *Nollan/Dolan* unconstitutional conditions violation should be viewed as involving a substantive due process issue). See, also *Dolan v. City of Tigard*, 512 U.S. 374, 407 (1994) (Stevens, J., dissenting) (criticizing majority’s facile use of the “unconstitutional conditions doctrine” in the case).

<sup>1146</sup> *Nollan v. Cal. Cstl. Com’n*, 483 U.S. 825 (1987).

<sup>1147</sup> See, e.g., 483 U.S. 825, 836 (“The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree.”); 837 (“The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.”); 841 (“our cases describe the condition for abridgement of property rights through the police power as a “substantial advanc[ing]” of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.”). See also *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618-19 (2013)

<sup>1148</sup> As just one example, consider that where and how we build are *still* considered greater drivers of increased future flood risk than climate change. Oliver E. J. Wing, William Lehman, Paul D. Bates,

This section will briefly describe the three seminal exactions cases from the U.S. Supreme Court before delving more into the difficulties that exactions jurisprudence poses for those seeking to protect human health and safety, as well as the environment, from flooding.

The U.S. Supreme Court's exactions jurisprudence began with the case of *Nollan v. California Coastal Commission*.<sup>1149</sup> In *Nollan*, the Nollans had applied to the California Coastal Commission for a permit to demolish a small, dilapidated bungalow on a beach-front parcel and replace it with a three-bedroom house.<sup>1150</sup> The Commission granted the permit on the condition that the Nollans record an easement allowing the public to pass across their property between the mean high tide line and the eight-foot seawall behind which they would build the house.<sup>1151</sup> The Nollans protested the imposition of the easement, but they complied and received their permit, after which they filed suit to challenge the imposition of the easement.<sup>1152</sup> After several legal battles, the case reached the U.S. Supreme Court with the question of whether the U.S. Constitution's Fifth Amendment prohibited the exaction.<sup>1153</sup>

The Court began its analysis by noting that an easement interferes with a right to exclude others and constitutes a physical invasion similar to that found to be a per se taking in another case.<sup>1154</sup> Since the access easement would clearly have been a taking outside of the permitting regime, the question becomes, said the Court, whether it also is in the permitting regime.<sup>1155</sup> This, said the Court, put the focus on "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."<sup>1156</sup> This really sets exactions apart from regulatory takings jurisprudence, which focuses heavily on the burden imposed on property owners.<sup>1157</sup> But

---

Christopher C. Sampson, Niall Quinn, Andrew M. Smith, Jeffrey C. Neal, Jeremy R. Porter & Carolyn Kousky, *Inequitable patterns of US flood risk in the Anthropocene*, 12 NAT. CLIM. CHANGE 156 (2022) (noting that population change in at-risk areas could cause as much as four times more increase in flood risk by 2050 as climate change).

<sup>1149</sup> *Nollan v. Cal. Cstl. Com'n.*, 483 U.S. 825 (1987).

<sup>1150</sup> *Nollan v. Cal. Cstl. Com'n.*, 483 U.S. 825, 827-28 (1987).

<sup>1151</sup> *Nollan v. Cal. Cstl. Com'n.*, 483 U.S. 825, 828 (1987).

<sup>1152</sup> *Nollan v. Cal. Cstl. Com'n.*, 483 U.S. 825, 828 (1987).

<sup>1153</sup> *Nollan v. Cal. Cstl. Com'n.*, 483 U.S. 825, 828-31 (1987).

<sup>1154</sup> *Nollan v. Cal. Cstl. Com'n.*, 483 U.S. 825, 831-32 (1987) (citing to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

<sup>1155</sup> *Nollan v. Cal. Cstl. Com'n.*, 483 U.S. 825, 833-34 (1987).

<sup>1156</sup> *Nollan v. Cal. Cstl. Com'n.*, 483 U.S. 825, 828-31 (1987).

<sup>1157</sup> *Lingle v. Chevron*, 544 US 528, 539–40, 542–43 (2005).

exactions are an anomaly as they address the “means-ends” issue that is usually considered the province of substantive due process claims.<sup>1158</sup>

In *Nollan*, the U.S. Supreme Court seemed to have agreed that the government could have outright denied the Nollans’ development application based on legitimate government concerns.<sup>1159</sup> The Court also stated that “If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.”<sup>1160</sup> However, the Court found that the condition violated the Fifth and Fourteenth Amendments because the condition imposed lacked an “essential nexus” to the harm that could have justified denial of the permit.<sup>1161</sup>

After establishing the “essential nexus” test in *Nollan*, the Court’s next exactions case was *Dolan v. City of Tigard*.<sup>1162</sup> In *Dolan*, the City of Tigard, Oregon, had conditioned the issuance of a development permit on the dedication of a strip of land in the floodplain as a greenway to address flooding problems that would be exacerbated by the proposed increased impermeable area of the sought development.<sup>1163</sup> In addition, the permit was also conditioned on dedicating a 15-foot strip of land adjacent to the greenway for a public bike path. The City’s comprehensive plan and ordinances established that the greenway and bike land dedications were integral parts of addressing flooding and traffic problems in the area where the development permit was sought.<sup>1164</sup>

In *Dolan*, the U.S. Supreme Court furthered the development of the special category of exactions. The majority in *Dolan* argued that the case was unlike a “regular” takings case for two main reasons. First, *Dolan* involved an adjudicative decision<sup>1165</sup> to a condition on a permit;

---

<sup>1158</sup> See, e.g., Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, THE SUPREME COURT REVIEW 287, 291-94 (2013).

<sup>1159</sup> *Nollan v. Cal. Cstl. Com’n.*, 483 U.S. 825, 835-36 (1987) (assuming “protecting the public’s ability to see the beach, assisting the public in overcoming the ‘psychological barrier’ to using the beach created by a developed shorefront, and preventing congestion on the public beaches” are “permissible” government purposes, “the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans’ use of their property as to constitute a taking.”).

<sup>1160</sup> *Nollan v. Cal. Cstl. Com’n.*, 483 U.S. 825, 837 (1987).

<sup>1161</sup> *Nollan v. Cal. Cstl. Com’n.*, 483 U.S. 825, 837 (1987).

<sup>1162</sup> 512 U.S. 374 (1994).

<sup>1163</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 379-80 (1994).

<sup>1164</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 381-82 (1994).

<sup>1165</sup> However, as pointed out by Justice Souter in his dissent, the permit conditions imposed on Dolan were done pursuant to the City of Tigard Land Development Code; the only “adjudication” was of a



second, conditions imposed on the property limited not only the owner's use but also required that she deed a portion of the property to the local government.<sup>1166</sup> These factors, said the Court, implicated the "well-settled doctrine of 'unconstitutional conditions,'"<sup>1167</sup> which states that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."<sup>1168</sup> The Court then noted that the *Dolan* case required it to reach a question not reached in *Nollan*: What is the "required degree of connection between the exactions and the projected impact of the proposed development"?<sup>1169</sup> The *Dolan* court then proceeded to consider various standards of review used in exactions cases by state courts,<sup>1170</sup> and determined that the standard closest to the Court's view of the constitutional norm was the "reasonable relationship" test.<sup>1171</sup> However, due to potential confusion of "reasonable relationship" with the "rational basis" review standard under the Equal Protection Clause, the court instead minted an entirely new review standard for the fit required between an exaction and the projected impact used to justify imposition of the exaction: the "rough proportionality" test.<sup>1172</sup> While the *Dolan* court indicated that "[n]o precise mathematical calculation is required,"<sup>1173</sup> the standard does require "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."<sup>1174</sup>

Part of what seemed to sway the Court against finding "rough proportionality" in the *Dolan* case was the City's insistence that the greenway requirements—which the Court agreed would help address increased runoff due to the proposed development—needed to be a *public* rather than *private* greenway.<sup>1175</sup> The Court then went on to discuss the "right to exclude" as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."<sup>1176</sup> Even though it was a public business that *wanted* to attract people, the Court emphasized that it

---

requested variance to the required permit conditions. *Dolan v. City of Tigard*, 512 U.S. 374, 413 n.\* (1994) (Souter, J., dissenting).

<sup>1166</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385, 391 n.8 (1994).

<sup>1167</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

<sup>1168</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

<sup>1169</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

<sup>1170</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994).

<sup>1171</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

<sup>1172</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

<sup>1173</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

<sup>1174</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

<sup>1175</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

<sup>1176</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (citing *Kaiser Aetna*, 444 U.S., at 176).

still wanted to be able to control the time and manner of their entry to the property.<sup>1177</sup> Thus, said the Court, the findings supporting the need for floodplain management due to the redevelopment did not necessitate the *public* easement sought by the city.<sup>1178</sup>

When considering the pedestrian/bicycle path part of the exaction, the Court agreed that the proposed development would create more traffic. And while the Court noted that dedications of streets, sidewalks, and rights-of-way are acceptable as ways to offset such impacts, “on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement.”<sup>1179</sup> The Court reiterated that “No precise mathematical calculation is required,”<sup>1180</sup> but then went on to say that “the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.”<sup>1181</sup> The Court’s guidance seems confusing, at best, since it requires individualized, quantified findings but not a “precise mathematical calculation.”

From 1994 until the *Koontz* decision in 2013, exactions law was generally interpreted as requiring that any exaction on a permit be designed to address the reason(s) that a permit could be denied (the “rational nexus” test from *Nollan*) and that the burden or impact of the exaction be based on “individualized determination” of the impact of the proposed development (the “rough proportionality” test of *Dolan*). Both *Nollan* and *Dolan* justified this heightened scrutiny of exactions with reference to the importance of compensating for permanent physical invasions and protecting the right to exclude.<sup>1182</sup> Based on the language in *Nollan* and *Dolan*, many had assumed that the characteristics shared by both cases—i.e., an adjudicative land use decision, government demand, and a physical easement allowing public access—were each required aspects of an “exactions” case. This narrow framing of *Nollan* and *Dolan* seemed to be reinforced by the U.S. Supreme Court in *Lingle v. Chevron*, where the Court said that “[b]oth *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions--specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.”<sup>1183</sup> However, in 2013, this was all thrown into dramatic disarray by the *Koontz* case, which expanded the realm

---

<sup>1177</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994).

<sup>1178</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 394-95 (1994).

<sup>1179</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994).

<sup>1180</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994).

<sup>1181</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 395-96 (1994).

<sup>1182</sup> See, *Nollan v. Cal. Cstl. Com’n.*, 483 U.S. 825, 831-32 (1987); and *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393-94 (1994).

<sup>1183</sup> *Lingle v. Chevron*, 544 U.S. 528, 546 (2005).

of higher-scrutiny exactions to include exactions of money, even when the exaction was never paid and no permit was ever issued.

The saga that led to the U.S. Supreme Court's *Koontz* decision in 2013 first landed in an appellate court almost a decade and a half prior<sup>1184</sup> and would finally end in 2016,<sup>1185</sup> 18 years after it began. As is to be expected of such a long, drawn-out battle, the case became at least as complex procedurally as it was factually. And the case has, maybe rightfully so, been questioned as the worst takings decision ever.<sup>1186</sup> The case undermined some level of increasing coherence that had been developing in takings law after the decision in *Lingle*<sup>1187</sup> finally made a clearer demarcation between substantive due process and takings precedents.<sup>1188</sup>

Factually, the case can be simplified as follows. Petitioner Koontz had purchased 14.9 acres of property that included wetlands, part of which he wanted to impact to develop part of his property.<sup>1189</sup> Koontz proposed dedicating a conservation easement on 11 acres of the property to offset the wetlands impacts, but the government agency found this to be inadequate.<sup>1190</sup> Instead, suggested the government, Koontz could reduce his proposed development from 3.7 acres to one acre, while granting a conservation easement on the remaining 13.9 acres or he could develop 3.7 acres with a conservation on the remainder and mitigate impacts through paying for off-site mitigation of impacts.<sup>1191</sup> Koontz believed these demands to be excessive, so he filed a takings claim.<sup>1192</sup>

Koontz received a ruling from a Florida District Court of Appeals that the government's action was a taking, but this was reversed by the Florida Supreme Court, which sided with courts that had limited the applicability of *Nollan* and *Dolan* to situations in which a property interest was being exacted.<sup>1193</sup> The U.S. Supreme Court reversed, and found that an exaction of money was

---

<sup>1184</sup> See, *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560 (Fla. Ct. App. 5<sup>th</sup> Dist. 1998).

<sup>1185</sup> *St. Johns River Water Mgmt. Dist. v. Koontz*, 2016 Fla. LEXIS 2810 (Fla. 2016) (decision without published opinion rejecting to accept jurisdiction over an appeal).

<sup>1186</sup> John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. Envtl. L.J. 1 (2014).

<sup>1187</sup> *Lingle v. Chevron*, 544 U.S. 528, 537 (2005).

<sup>1188</sup> John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. Envtl. L.J. 1 n.3, 12-13 (2014).

<sup>1189</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599-602 (2013).

<sup>1190</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 601 (2013).

<sup>1191</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 601-02 (2013).

<sup>1192</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 602 (2013).

<sup>1193</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 602-03 (2013).

subject to the rules of *Nollan* and *Dolan*,<sup>1194</sup> even if no money actually changed hands and the permit was never issued.

Ultimately, the U.S. Supreme Court's argument can be summarized as: If we assume that the "exaction," if consummated, would have violated the Takings Clause, then, even if it were not consummated, based on a rejection of the exaction and permit denial, then that would be a constitutional violation *not* of the Fifth Amendment's takings clause itself, but of the "unconstitutional conditions" doctrine. Note, however, the analytical challenge here: It is necessary to *assume* that the exaction amounts to a taking to find a violation of the "unconstitutional conditions" doctrine. However, in *Koontz*, while a lower court did indeed find a taking,<sup>1195</sup> it did so on the basis of *Nollan* and *Dolan* exactions jurisprudence. Why? Because the lower court found a lack of "essential nexus" and "rough proportionality." However, *Nollan* and *Dolan* applied these standards based on the idea that what was exacted—an interest in property—would clearly have been a taking had it occurred *outside* of the realm of permitting.<sup>1196</sup> Thus, the lower court addressed the threshold question of "Was there a taking?" by *assuming* that the *Nollan* and *Dolan* tests applied in that circumstance. But both *Nollan* and *Dolan* were founded on the uniqueness inherent in that what was exacted might be a taking of property prohibited by the Fifth Amendment, thus requiring the "heightened scrutiny" of *Nollan* and *Dolan*.<sup>1197</sup> Absent the exaction of an interest in property protected by the Fifth Amendment—which historically, payment of money was not<sup>1198</sup>—there is no condition that is unconstitutional.<sup>1199</sup>

However, in *Koontz*, the Court disagreed and said that "the direct link between the government's demand and a specific parcel of real property" implicated the "central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue."<sup>1200</sup> Thus, *Koontz* abandoned the Court's earlier focus on public easements and harming a property

---

<sup>1194</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 603 (2013).

<sup>1195</sup> *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fla. 5<sup>th</sup> Dist. Ct. App. 2009).

<sup>1196</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 620, 621-22 (2013) (Kagan, J., dissenting).

<sup>1197</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 625-26 (2013). *See also* John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 37 (2014).

<sup>1198</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 620, 621-22 (2013) (Kagan, J., dissenting). John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 35-41 (2014).

<sup>1199</sup> John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 34 (2014).

<sup>1200</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013).

owner's "right to exclude" in favor of focusing on anything "exacted" in permitting.<sup>1201</sup> But this makes it difficult to discern what even constitutes an "exaction" since permitting rules were the basis for the exaction in *Koontz*.<sup>1202</sup>

Based on the statutory and regulatory scheme that supported the government's position in the *Koontz* case, the government could have summarily denied the property owner's proposed development permit without ever offering the property owner any options for mitigation that would allow permit issuance.<sup>1203</sup> Such an action would have allowed the property owner to challenge the permit denial as a regulatory taking under the *Penn Central* test, which would have presented a far less favorable standard for the property owner's claim.<sup>1204</sup> Thus, one lesson taken by many from the *Koontz* case is that government *should not* work with property owners to maximize potential use of their property through use of exactions to mitigate the impacts that would have justified denial of the permit.<sup>1205</sup> The rule of *Koontz* thus either increases the

---

<sup>1201</sup> In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), the U.S. Supreme Court specifically stated that "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on *the dedication of property to public use*." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (emphasis added). Thus, mere denial of permit, even when unreasonable, does not itself rise to the level of an exaction. Thus, the only distinction between *Del Monte Dunes* and *Koontz* is that *Koontz* was allowed the opportunity to address impacts that would otherwise would prevent issuance of a permit; and that something was money, not an interest in *Koontz*'s real property. Had this not been done, then the simple permit denial would not have allowed the increased scrutiny of the *Nollan/Dolan* test. Yet in *Lingle*, the U.S. Supreme Court resoundingly refused heightened scrutiny under the due process clause or the takings clause based on separation of powers concerns. *Lingle v. Chevron*, 544 U.S. 528, 529, 544 (2005).

<sup>1202</sup> See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 600-01 (2013) (noting the grant of statutory authority to regulate and protect waters under Florida's "Water Resources Act" and "Warren S. Henderson Wetlands Protection Act"). Cf. also, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 628 (2013) (Kagan, J., dissenting) (noting that it was unclear in the majority's decision whether the new rule on monetary exactions applies only to ad hoc fees or also those legislatively imposed by rule or regulation).

<sup>1203</sup> See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 596 (2013); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 632 (2013) (Kagan, J., dissenting) (discussing permit requirements that the proposal failed to meet). But, see, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 602-03 (2013) (citing to the *Koontz* trial court finding that the wetlands at issue were "seriously degraded" and that "any further mitigation in the form of payment for offsite improvements . . . lacked both a nexus and rough proportionality"). However, had the permit been denied without the government's suggestion of paying for offsite impacts, the legal standard to evaluate whether the denial of permit was a taking would have been the *Penn Central* test.

<sup>1204</sup> *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 703-04 (1999) (establishing that the *Dolan* rough proportionality test does not apply to a mere permit denial); cf. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 621-22 (2013) (Kagan, J., dissenting) (comparing the standards of review in *Nollan* and *Dolan* with *Penn Central*).

<sup>1205</sup> See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 631 (2013) (Kagan, J., dissenting); *id.* At 632-34 ("If every suggestion could become the subject of a lawsuit under *Nollan* and

risks to government seeking to mitigate negative environmental impacts of proposed development or results in outright permit denials, which fails to allow uses of property that might have been able to offset their impacts through some sort of exaction.

One key question in *Koontz* is, what was the “taking”? After all, the U.S. Supreme Court said that no “taking” had occurred.<sup>1206</sup> Nonetheless, the U.S. Supreme Court indicated that the “compensable injury is the impermissible denial of a governmental benefit. *Nollan/Dolan* limits the conditions that a governmental agency may exact in exchange for bestowing the governmental benefit. If property is taken as a result of such impermissible governmental action, the remedy is just compensation under the Fifth Amendment; if no property is taken, however, the remedy is as provided under state law.”<sup>1207</sup> Since the “burden” was “the right not to have property taken without just compensation,”<sup>1208</sup> then there was a “burden” on a constitutional right that deserved a remedy, but there was no “taking” that merited “compensation.”<sup>1209</sup>

### IV.B.4.a. Questions Answered by the Koontz Case:

#### 1) What damages are available for a violation of the *Nollan/Dolan* test?

**Answer:** “whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases.”<sup>1210</sup>

---

*Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving Koontz any advice—even if he asks for guidance. As the Florida Supreme Court observed of this case: Were *Nollan* and *Dolan* to apply, the District would ‘opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation’; and property owners like Koontz then would ‘have no opportunity to amend their applications or discuss mitigation options.’”); John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 2-3, 43-44 (2014).

<sup>1206</sup> See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013) (“Where the permit is denied and the condition is never imposed, nothing has been taken.”).

<sup>1207</sup> *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 400 (Fla. Dist. Ct. App. 2014) (Griffin, J., dissenting).

<sup>1208</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 596 (2013).

<sup>1209</sup> See, e.g., *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 400-01 (Fla. Dist. Ct. App. 2014) (Griffin, J., dissenting) (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013)).

<sup>1210</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 609 (2013).



## 2) How can courts distinguish between property taxes/taxes generally and impermissible landuse exactions?

**Answer:** Taxes and user fees are *not* exactions,<sup>1211</sup> but a taking of property may be found “where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax.”<sup>1212</sup> The unsatisfying answer of the court is that, when it comes to taxes versus eminent domain, the Court has “had little trouble distinguishing between the two.”<sup>1213</sup>

## 3) Must all monetary exactions meet the *Nollan/Dolan* tests?

**Answer:** Unclear. As noted by the dissent, the majority’s opinion did not clarify this.<sup>1214</sup> Though this seems intellectually incompatible with previous precedent.<sup>1215</sup>

The *Koontz* decision is stirring things up, and many cases cite *Koontz*. One case that mentioned *Koontz*, but did not rely upon it, held that local mitigation ordinances, such as those requiring tree mitigation *fees* for destruction of trees, are a taking of private property. The argument is that a generalized fee schedule for impacts is an exaction because it requires money for a permit; the fee fails the “rough proportionality” rule of *Dolan* because there was not a sufficiently “individualized finding” about the impact of the removal of the tree; since the fee fails *Dolan*, its imposition is an unconstitutional condition on receiving a permit to remove the trees.<sup>1216</sup> However, it is important to note that the parties never disputed *whether* the *Nollan*, *Dolan*, and *Koontz* frameworks applied to the tree ordinance.<sup>1217</sup> A finding that a generally applicable, legislatively enacted tree ordinance with a fee requirement is subject to the tests in *Nollan*, *Dolan*, and *Koontz* creates an inherent contradiction that will *always* lead to a finding of a constitutional violation: Any generally applicable, legislatively enacted rule will *always* fail the individualized analysis requirement of the “rough proportionality” rule in *Dolan*. Indeed, that is what the *F.P. Development v. Charter Township of Canton* case said.<sup>1218</sup>

But not all courts agree on this. In the case of *Knight v. Metropolitan Government of Nashville & Davidson County*, the court addressed the question of “whether a legislative, generally

<sup>1211</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013).

<sup>1212</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013).

<sup>1213</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 617 (2013).

<sup>1214</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013).

<sup>1215</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 626 (2013) (Kagan, J., dissenting); John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 34-41 (2014).

<sup>1216</sup> see, e.g. *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198 (6<sup>th</sup> Cir. 2021).

<sup>1217</sup> *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 205-06 (6<sup>th</sup> Cir. Oct. 13, 2021).

<sup>1218</sup> *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 205-06 (6<sup>th</sup> Cir. Oct. 13, 2021).

applicable development condition that applies to all new development within a certain geographic zone, as opposed to an adjudicative land-use exaction, should be addressed under the *Nollan/Dolan* framework.”<sup>1219</sup> The *Knight* court concluded that “the *Nollan/Dolan* test, as extended by *Koontz*, does not apply.”<sup>1220</sup> The court reasoned that the challenged ordinance in *Knight*, which involved a sidewalk ordinance requiring either new sidewalks or an in-lieu-of payment based on the length of the sidewalk not added,<sup>1221</sup> represented “generally applicable legislation” as opposed to an adjudicative/ad hoc imposition.<sup>1222</sup> Since the generally applicable legislation was not subject to the same exercise of discretion as ad hoc decision-making, the risk of abuse or extortion is diminished, and the protections of *Nollan*, *Dolan*, and *Koontz* are not warranted.<sup>1223</sup>

Another case that also took a different approach from the *F.P. Development* court’s broad reading—even dramatic expansion—of exactions law through the application of *Koontz*, is *Ballinger v. City of Oakland*.<sup>1224</sup> In *Ballinger*, the court expressly rejected the “adjudicative” versus “legislative” distinction relied upon in *F.P. Development* to distinguish between an exaction and a non-exaction.<sup>1225</sup> Instead, the *Ballinger* court emphasized that analysis of a claimed exaction “is . . . whether the substance of the condition, such as granting an easement as in *Nollan* and *Dolan*, would be a taking independent of the conditioned benefit. Here, the relocation fee is not a compensable taking, so the relocation fee did not constitute an exaction.”

The *Ballinger* court also expressly rejected an argument that the payment of money to tenants as part of a property owner’s ability to evict the tenants was not an exaction but rather constituted a “regulation of the landlord-tenant relationship.”<sup>1226</sup> Interestingly, the court did not

---

<sup>1219</sup> *Knight v. Metro. Gov’t of Nashville & Davidson Cty.*, 572 F. Supp. 3d 428, 438-39 (M.D. Ten. 2021).

<sup>1220</sup> *Knight v. Metro. Gov’t of Nashville & Davidson Cty.*, 572 F. Supp. 3d 428, 439 (M.D. Ten. 2021).

<sup>1221</sup> *Knight v. Metro. Gov’t of Nashville & Davidson Cty.*, 572 F. Supp. 3d 428, 431-35 (M.D. Ten. 2021).

<sup>1222</sup> *Knight v. Metro. Gov’t of Nashville & Davidson Cty.*, 572 F. Supp. 3d 428, 440 (M.D. Ten. 2021).

<sup>1223</sup> *Knight v. Metro. Gov’t of Nashville & Davidson Cty.*, 572 F. Supp. 3d 428, 440-42 (M.D. Ten. 2021). The *Knight* case also references other cases finding application of *Nollan*, *Dolan*, and *Koontz* inappropriate in cases of generally applicable, legislatively enacted rules containing fee-in-lieu provisions. *Knight v. Metro. Gov’t of Nashville & Davidson Cty.*, 572 F. Supp. 3d 428, 441 (M.D. Ten. 2021). But see, *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W. 3d 620 (Tex. 2004) (finding that the *Nollan*, *Dolan*, *Koontz* test applies to a generally applicable requirement that developers improve abutting streets that do not meet specified standards).

<sup>1224</sup> 24 F.4th 1287 (9<sup>th</sup> Cir. 2022).

<sup>1225</sup> *Id.* at 1298-1300.

<sup>1226</sup> *Id.* at 1293.

consider the “adjudicative” versus “legislative” issue of distinguishing an exaction as did the court in *F.P. Development*. At the same time, the *Ballinger* court had to address how a payment to tenants to terminate a lease before the property owners could retake control of the property did not fulfill the *Koontz* case’s assertion that an exaction arises when there is a “direct link between the government’s demand for money and their real property.”<sup>1227</sup> The court acknowledged some link between the specific rental property and the required payment to tenants. However, said the court, that link to the real property is no more direct than the link between a specific property and property taxes or estate taxes, both of which are constitutional.<sup>1228</sup> This focused attention on a key conclusion of the *Ballinger* court: without a finding of a taking, there can be no exaction.<sup>1229</sup>

Thus, much uncertainty remains. Are generally applicable, legislatively enacted provisions that may cost permit applicants money exactions or not? Some courts say yes, some say no, and others find the question irrelevant in favor of beginning the analysis with whether whatever was supposedly demanded would constitute a taking outside of the context of the permit application; it appears likely that the third option here will likely prevail over the longer term.

Other uncertainties also abound. How certain must a “demand” for something be to give rise to liability under *Nollan* and *Dolan*.<sup>1230</sup> On a related note, to what types of “bargains” or “negotiations” does exaction law’s heightened scrutiny apply? This is not easy to discern,<sup>1231</sup> but many have noted that perhaps the safest legal route for government entities after *Koontz* is to *never* initiate negotiations or make suggestions about what mitigation might allow issuance of a permit.<sup>1232</sup>

---

<sup>1227</sup> *Id.* at 1297 (quoting *Koontz*, 570 U.S. at 164).

<sup>1228</sup> *Ballinger v. City of Oakland*, 24 F.4th 1287, 1297 (9<sup>th</sup> Cir. 2022).

<sup>1229</sup> *Id.* at 1298.

<sup>1230</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 610 (2013) (“This Court therefore has no occasion to consider how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*.”).

<sup>1231</sup> Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, THE SUPREME COURT REVIEW 287, 299-307 (2013).

<sup>1232</sup> See, e.g., *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 15 (Fla. 5<sup>th</sup> Dist. Ct. App. 2009) (J. Orfinger, concurring) (“Because the burden to justify a requested exaction is on the government, liability can be avoided if the government simply refuses to engage in the bargaining process with a landowner. Or, a more likely outcome is that the government will refuse to offer any conditions in exchange for development approval, but will consider offers from the landowner. [\*\*21] It is hard to imagine that a landowner could invoke the doctrine of unconstitutional conditions and claim a taking if the landowner, and not the government, initiates the bargaining process and makes all of the offers. This role reversal accomplishes little, but seems a possible outcome given the uncertainty inherent when applying the doctrine of unconstitutional conditions to land use/development decisions rather than more

### IV.B.4.b. Recommendations and Lessons for Floodplain Managers

Exactions law generally, and the *Koontz* decision in particular, represent stark departures from the U.S. Supreme Court's usual deference to legislative decision-making and findings.<sup>1233</sup> Floodplain managers and their local governments should exercise caution to avoid liability under the more demanding standards in exactions law.

The safest approach for government, from a legal perspective, is to set permit criteria and not negotiate with applicants over any sort of payment or dedication that might offset any reasons for a refusal to issue a permit, as such back and forth risks liability under the *Koontz* decision.<sup>1234</sup> If government seeks to make any recommendations or overtures to a permit applicant on how the permit applicant might engage in any payment, mitigation, or dedication of property interests to address a failure to meet permit criteria, the government should *first* carefully analyze any potential suggestions for compliance with the *Nollan* and *Dolan* tests *prior* to communicating anything to the permit applicant.

For generally applicable rules that require fees for permits, governments would be wise to ensure that they do not involve discretion but rather follow formulas applied to each affected property. Although even this could potentially lead to a finding of an "exaction," depending on whether local courts follow the rule of *F.P. Dev., LLC v. Charter Township of Canton* or of the cases *Knight v. Metropolitan Government of Nashville & Davidson County* and *Ballinger v. City of Oakland*, discussed above.

### IV.B.5. Most Regulatory Takings: Penn Central Analysis

---

Up until 1922, the Fifth Amendment's property protections were understood as limited to government actions that either physically invade or take title to property.<sup>1235</sup> However, in the

---

traditional takings jurisprudence."); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 633-34 (2013) (Kagan, J., dissenting).

<sup>1233</sup> See, e.g., John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 49-50 (2014) (citing to *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 544-45 (2005)).

<sup>1234</sup> See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 630 (2013) (Kagan, J., dissenting); John D. Echeverria, *Koontz: The Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 41-44 (2014).

<sup>1235</sup> See, e.g., *Lingle v. Chevron*, 544 U.S. 528, 537 (2005); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021).

1922 case of *Pennsylvania Coal Co. v. Mahon*, the U.S. Supreme Court held that a regulation that goes “too far” in limiting the use of property can be treated as equivalent to a physical invasion of property.<sup>1236</sup> This new type of taking has been called a “regulatory taking” or “inverse condemnation.” This memo refers to these as regulatory takings or simply as “takings.”

Prior to as well as after the *Mahon* case, numerous other U.S. Supreme Court takings cases addressing regulations did not require compensation for situations in which regulations had severely diminished the value of property. This line of cases, stretching from 1887 to 1962,<sup>1237</sup> indicated that when the State exercises its power to protect the health, morals, and safety of the public from a use of property that works contrary to these interests, no compensation is required unless the burden on the property owner is too onerous.<sup>1238</sup>

After *Mahon*, no U.S. Supreme Court case attempted to further elaborate on *Mahon*’s “too far” language until the U.S. Supreme Court case of *Penn Central Transportation Company v. City of*

---

<sup>1236</sup> 260 U.S. 393, 415 (1922).

<sup>1237</sup> See generally, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978) (stating that “in instances in which a state tribunal reasonably concluded that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.” (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928))); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962) (indicating that a valid police-power exercise of the right to regulate land use “‘as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.’” (quoting *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887))); *Miller v. Schoene*, 276 U.S. 272, 277-78 (1928) (allowing destruction of cedar trees, without compensation for the resulting decrease in property value, in order to protect the valuable apple industry from cedar rust); *Gorieb v. Fox*, 274 U.S. 603, 605 (1927) (requirement that portions of parcels be left unbuilt as set-backs); *Vill. Of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384-85 (1926) (prohibition of industrial use); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (barring operation of brick mill in residential area and dramatically decreasing value of property); *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibiting manufacture of alcoholic beverages and dramatically decreasing value of property).

It might be argued that *Lingle* essentially overturned this aspect of several of these cases on the basis that these cases were actually due process cases, not regulatory takings cases. Cf. 544 U.S. at 541. However, *Lingle* likely did not overrule *Goldblatt* or the others since these cases were still, at least in part, properly takings cases. *Goldblatt* serves as an example. On the one hand, *Goldblatt*’s holding is that the claimant did not meet its burden to demonstrate that the regulation was not reasonable—a due process argument. *Goldblatt*, 369 U.S. at 596. However, the Court only examined the due process question of whether the regulation was reasonable after disposing of the issue of whether the regulation was a taking in light of the regulation going too far in imposing a financial burden. *Id.* At 592-94. In *Goldblatt*, the Court cited approvingly to *Mugler*’s language that “A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.” *Goldblatt*, 369 U.S. at 593.

<sup>1238</sup> *Goldblatt v. Hempstead*, 369 U.S. 529, 592-94 (1962).

*New York*.<sup>1239</sup> The *Penn Central* case remains one of the most analyzed and cited takings cases in history. The *Penn Central* decision acknowledged that the U.S. Supreme Court had been unable to develop any "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."<sup>1240</sup> Instead, *Penn Central* established an ad hoc, three-part test to determine when a regulation caused a taking of land.<sup>1241</sup> The factors the Court considered are "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."<sup>1242</sup> Under current regulatory takings law analysis, most regulatory takings cases are analyzed under these factors from the *Penn Central* case as developed by subsequent case law.<sup>1243</sup>

While *Penn Central* cited "distinct investment-backed expectations" as the second factor of the *Penn Central* test, the U.S. Supreme Court soon converted this language to "reasonable investment-backed expectations" and has continued this usage up to the present.<sup>1244</sup> In keeping with this language and for the sake of brevity, this legal guide abbreviates "reasonable investment-backed expectations" as "RIBE." As the *Penn Central* test remains the key takings case test for most regulatory takings, its factors and development in case law are analyzed here in depth, beginning with the "economic impact of the regulation on the plaintiff," then addressing RIBE, and finally "the character of the governmental action."

### IV.B.5.a. Economic Impact of the Regulation or Government Action

---

<sup>1239</sup> 438 U.S. 104 (1978).

<sup>1240</sup> 438 U.S. 104, 124 (1978).

<sup>1241</sup> 438 U.S. 104, 124 (1978).

<sup>1242</sup> 438 U.S. 104, 124 (1978) (internal citations omitted). *See, also, e.g.,* Lingle v. Chevron, 544 U.S. 528, 539 (2005).

<sup>1243</sup> *See, e.g.,* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021); Murr v. Wisconsin, 137 S. Ct. 1933 (2017); Horne v. Dep't. of Agric., 576 U.S. 351, 360 (2015); Arkansas Game and Fish Comm'n v. U.S., 568 U.S. 23 (2012); Lingle v. Chevron, 544 U.S. 528 (2005); Tahoe-Sierra, 535 U.S. 302 (2002). *But see*, Dave Owen, *The Realities of Takings Litigation*, 47 BYU L. REV. 577, 582 (2023) (noting that during the time period of 2000-2014, most of the takings claims in the Federal Court of Claims involved claims of a physical invasion or appropriation "arising out of military airplane flights, flooding, or conversions of railroad lines to recreational trails."). Arguably this analysis by Professor Owen does not affect the statement made here that most *regulatory* takings claims are analyzed under the *Penn Central* standard since it appears that many of the cases addressed by Professor Owen fall under the umbrella of *inverse condemnation* but not necessarily under the narrower definition of *regulatory* takings.

<sup>1244</sup> *But, see*, Lemon Bay Cove, LLC v. United States, 147 Fed. Cl. 528, 534 (2020) (citing to Guggenheim v. City of Goleta, 638 F.3d 1111, 1120 (9th Cir. 2010) where this case discusses the meaning of "distinct investment-backed expectations" in *Penn Central*).



The first factor in the *Penn Central* analysis is the economic impact of the regulation.<sup>1245</sup> This section examines the factor of “the economic impact of the regulation” on the claimant as part of the *Penn Central* analysis.

While the *Penn Central* case did consider the “economic impact of the regulation on the claimant,” the Court quickly cited *Pennsylvania Coal Co. v. Mahon*<sup>1246</sup> to reaffirm the principle that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>1247</sup>

Determination of the economic impact of an alleged taking requires a court to “compare the value that has been taken from the property with the value that remains in the property.”<sup>1248</sup> Assessing the value of property before and after the regulation or governmental action requires establishing the baseline of what “property” is at issue. This has come to be known as the denominator issue, which is addressed in [The Parcel as a Whole](#) section. It is critical early in the defense of any takings claim to evaluate what the “denominator” is since this can make or break a takings case in some circumstances.

As part of evaluating the “severity of the economic impact” of a law on a parcel, the U.S. Supreme Court has noted that it is important to ask whether existing uses can be maintained.<sup>1249</sup> At the same time, a finding that a property owner suffers economic loss because they cannot continue an existing land use does not, by itself, automatically result in a taking.<sup>1250</sup>

In *Penn Central*, the U.S. Supreme Court indicated that even a significant diminishment of property value alone by an otherwise-valid regulation does not necessarily amount to a

---

<sup>1245</sup> See, e.g., *Lingle v. Chevron*, 544 U.S. 528, 538-39 (2005). Some cases have presented these factors in different order, but *Penn Central* and *Lingle v. Chevron* both used the order 1) economic impact of the regulation, 2) investment-backed expectations, and 3) character of the governmental action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>1246</sup> 260 U.S. 393, 413 (1922).

<sup>1247</sup> 438 U.S. 104, 124 (1978).

<sup>1248</sup> *Flint v. Cty. of Kauai*, 521 F. Supp. 3d 978, 989 (D. Haw. 2021) (quoting *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) quote of *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497). In a non-real estate application of the “economic impact of the regulation,” see how courts differ in their interpretations by comparing *Rose Acre Farms, Inc. v. United*, 75 Fed. Cl. 527 (finding a taking due to the severity of the economic impact of the regulation and interference with reasonable investment-backed expectations even though the character of the governmental action factor was in favor of the government) with *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (finding no taking because the economic impact was not severe and the character of the government’s action strongly favored the government).

<sup>1249</sup> 438 U.S. 104, 136 (1978).

<sup>1250</sup> See, e.g., *id.* at 125-27 (citing to *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962)).

taking.<sup>1251</sup> And an economic impact of regulation that is not severe will seldom be found a taking, unless the [“character of the governmental action”](#) and [“reasonable investment-backed expectations”](#) analyses go strongly against the government.<sup>1252</sup> Indeed, in the *Lucas* case itself, the U.S. Supreme Court indicated that in some instances, even a loss of 95% of a property’s value might not get any compensation.<sup>1253</sup> In *Palazzolo v. Rhode Island*, the U.S. Supreme Court upheld a state court decision finding no *per se* taking under the *Lucas* criterion of “deprivation of all economically beneficial” use despite a claimed loss of about 94% of the property’s value due to regulation.<sup>1254</sup> Instead, said the *Palazzolo* court, the case should be evaluated under the *Penn Central* framework.<sup>1255</sup> On remand,<sup>1256</sup> among other holdings, the state court found that the high development costs for the wetlands site would actually have *cost* the claimant money, meaning that any regulation that stopped the claimant from such development could not have caused any financial harm.<sup>1257</sup>

Recent court decisions have reiterated that even regulation-induced reductions in property value from 75% to 92.5% do not necessarily constitute takings depending on the analysis of other *Penn Central* factors.<sup>1258</sup> And the Federal Circuit has stated that it was not aware of *any* case in which a court found a taking where the diminution in value was less than 50%.<sup>1259</sup> However, the Federal Circuit has found that a property value reduction of 99.4% *did* qualify as a taking under the holding of *Lucas* when the remaining 0.6% value remaining was not based on “economic use.”<sup>1260</sup>

---

<sup>1251</sup> 438 U.S. 104, 131 (1978) (citing cases that found no taking despite 75% and 87.5% reductions in property value). The exception to this is the *per se* takings rule that a regulation that eliminates all economically beneficial use is a taking. *Lucas v. South Carolina Cstl. Com’n.*, 505 US 1003 (1992).

<sup>1252</sup> See, e.g., *Taylor v. U.S.*, 959 F.3d 1081, 1087 (Fed. Cir. 2020) (stating that “the economic impact of the regulation on the Taylors weighs so strongly against finding a regulatory taking that it might be decisive on its own—something we need not decide because the full three-factor analysis leads to the same conclusion”).

<sup>1253</sup> *Lucas v. South Carolina Coastal Com’n.*, 505 US 1003, 1019 (1992)

<sup>1254</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001) (claimed property value prior to the governmental action of \$3,150,000 reduced to undisputed \$200,000 development value).

<sup>1255</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001)

<sup>1256</sup> *Palazzolo v. State*, 2005 R.I. Super. Lexis 108 \*; 2005 WL 1645974 (R.I. 2005).

<sup>1257</sup> *Palazzolo v. State*, 2005 R.I. Super. Lexis 108 \*48; 2005 WL 1645974 (R.I. 2005).

<sup>1258</sup> See, e.g., *Flint v. Cty. Of Kauai*, 521 F. Supp. 3d 978, 989-91 (D. Haw. 2021) (citing *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 451 (9<sup>th</sup> Cir. 2018)).

<sup>1259</sup> *Flint v. Cty. Of Kauai*, 521 F. Supp. 3d 978, 989-91 (D. Haw. 2021) (citing *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 451 (9<sup>th</sup> Cir. 2018)).

<sup>1260</sup> *Lost Tree Vill. Corp. v. United States*, 787 F.3d 111, 1114, 1119 (Fed. Cir. 2015)

When lost income is part of a takings claim, the amount of lost income is not referenced as a dollar amount on its own; but it can be taken into account in relation to the change in property value before and after the regulation to the extent that the income loss impacts the property's value.<sup>1261</sup> If the regulation impacts only profits or business operations but not the underlying property value, the measure of the economic impact is still not the profit lost but rather the lost value of the property taken.<sup>1262</sup>

Finally, when evaluating the economic impact of the regulation, courts may face claims of lost value based on assumptions of development that would not have been permitted for other reasons.<sup>1263</sup> In such cases, courts typically review other relevant, valid limitations on land use or development.<sup>1264</sup> After all, "mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land-use limitations."<sup>1265</sup>

#### IV.B.5.a.i. Recommendations

When defending against takings claims, the government defendant should ensure that they carefully outline how any proposed development on which a takings challenge is based should also include any other regulations that would also limit development. This helps avoid courts entertaining a plaintiff's efforts to base a takings claim on completely unrealistic development proposals that would not have been approved even absent the specific regulation being challenged.

In addition, government defendants should understand that severe economic impact alone does not necessarily result in a successful takings claim. Other factors, such as "reasonable investment-backed expectations" and "the character of the governmental action," which are addressed below, may overcome a takings claim despite serious economic impact.

---

<sup>1261</sup> *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 451 (9<sup>th</sup> Cir. 2018) (finding no taking for a \$5.7 million rental income loss over eight years that represented 24.8% of a purchase price of \$23 million); *Flint v. Cty. Of Kauai*, 521 F. Supp. 3d 978, 989-91 (D. Haw. 2021) (finding no taking where the economic impact on the value of the property at purchase was \$926,000 and sale, during the effectiveness of the challenged regulation, was \$920,000, or less than 1%).

<sup>1262</sup> *Rose Acre Farms v. U.S.*, 559 F.3d 1260, 1268-69 (Fed. Cir. 2009) (citing numerous U.S. Supreme Court cases and other cases).

<sup>1263</sup> *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 624-25 (2001).

<sup>1264</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001).

<sup>1265</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001).

## IV.B.5.b. Reasonable Investment-Backed Expectations (RIBE)

This section briefly discusses a number of the seminal U.S. Supreme Court cases as well as a few example cases from federal and state courts that help determine the scope of RIBE before drawing some conclusions about the state of RIBE today and how it plays a role in takings claims related to floodplain management.<sup>1266</sup>

### IV.B.5.b.i. Introduction to Reasonable Investment-Backed Expectations

The precursor to RIBE first made its U.S. Supreme Court appearance in the seminal case of *Penn Central Transportation Co. v. City of New York* in 1978.<sup>1267</sup> The *Penn Central* court discussed that the seminal case establishing regulatory takings—*Pennsylvania Coal v. Mahon*—was the leading case which indicated that “a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”<sup>1268</sup> In *Penn Central*, the City of New York’s Landmarks Preservation Committee had refused to allow construction of a more than fifty-story office building over Grand Central Terminal, which had been declared an historic landmark.<sup>1269</sup> In response, Penn Central sued and claimed that the historic landmark designation and related denial of permission to construct a fifty-plus story office building on top of Grand Central Terminal resulted in a taking of Penn Central’s property without payment of “just compensation.”<sup>1270</sup> The U.S. Supreme Court held that the historic preservation law and denial to Penn Central of the permit did not constitute a “taking” of property.<sup>1271</sup> In doing so, the U.S. Supreme Court reviewed the development of Fifth Amendment takings jurisprudence and noted that the Court had “been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by

---

<sup>1266</sup> Many additional Supreme Court cases mention RIBE, but this section focuses more on those cases that involve real property (as opposed to personal property) and/or include RIBE as a crucial part of the analysis in the decision.

<sup>1267</sup> 438 U.S. 104 (1978). Despite being used by the U.S. Supreme Court for the first time in 1978, the phrase “investment-backed expectations” traces its roots to a seminal article of 1967 by Professor Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation Law,”* 80 HARV. L. REV. 1165, 1213 (1967).

<sup>1268</sup> *Penn Central*, 438 U.S. at 127.

<sup>1269</sup> *Penn Central*, 438 U.S. at 116-18.

<sup>1270</sup> *Id.* at 119.

<sup>1271</sup> *Id.* at 131, 136.

public action be compensated[.]”<sup>1272</sup> Instead, the Court uses “ad hoc, factual inquiries” to determine when a taking has occurred.<sup>1273</sup> This analysis occurs through a three-pronged inquiry,<sup>1274</sup> one factor of which is “the extent to which the regulation has interfered with distinct investment-backed expectations[.]”<sup>1275</sup> The Court observed that this does not, however, always mean that a property owner is allowed to do what they thought they could.<sup>1276</sup>

The U.S. Supreme Court in *Penn Central* connected “investment-backed expectations” to the impact on the value of the parcel as a whole.<sup>1277</sup> The Court noted that the primary expectation of *Penn Central* was to be able to continue to use Grand Central Terminal as it had been used for the past sixty-five years and that *Penn Central* could obtain a “reasonable return” on its investment.<sup>1278</sup> Presented below are some significant cases outlining the parameters of RIBE.

#### IV.B.5.b.ii. **Kaiser Aetna v. United States**

Only one year after *Penn Central*, the case of *Kaiser Aetna v. United States* changed the phrase “distinct investment-backed expectations” to “reasonable investment-backed expectations.”<sup>1279</sup> It did this with little fanfare and without even noting that the phrase was any different than what had been put forth in *Penn Central* the prior year. While the word “reasonable” carries

---

<sup>1272</sup> *Id.* at 124.

<sup>1273</sup> *Id.*

<sup>1274</sup> The three prongs include: 1) the character of the government action, 2) the economic impact on the claimant, and 3) the “distinct investment-backed expectations” of the claimant. *Id.* See also, e.g., *Horne v. Dep’t of Agric.*, 576 U.S. 351, 360 (2015).

<sup>1275</sup> *Penn Central*, 438 U.S. at 124. The Court twice referred to *Pennsylvania Coal Co. v. Mahon* as the leading case indicating that sufficient frustration of “distinct investment-backed expectations” could result in a taking. *Id.* at 124, 127.

<sup>1276</sup> *Id.* at 130.

<sup>1277</sup> *Penn Central*, 438 U.S. at 130, FN 27 (noting that “These [cited] cases dispose of any contention that might be based on *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably--i. e., irrespective of the impact of the restriction on the value of the parcel as a whole--constitutes a ‘taking.’”). The resulting issue of “the parcel as a whole” has presented many issues; these are addressed in depth in the [Parcel as a Whole](#) section.

<sup>1278</sup> *Id.* at 136.

<sup>1279</sup> 444 U.S. 164, 175 (1979) (emphasis added).

significance,<sup>1280</sup> adding it only made clearer the “reasonableness” standard that was likely already intended in *Penn Central*’s version.<sup>1281</sup>

*Kaiser Aetna* also added an interesting twist: Government action may impact the “expectancies” related to property. In *Kaiser Aetna*, the owner of a private pond that was hydrologically connected to the Pacific Ocean dredged the pond and opened the natural beach that separated it from the Pacific for purposes of any boat traffic.<sup>1282</sup> Once the pond was dredged and opened up to the Pacific for recreational boat traffic, a dispute arose with the U.S. Army Corps of Engineers, which argued that the pond was now subject to the federal navigational servitude, thus allowing public boat access to the pond.<sup>1283</sup> The U.S. Supreme Court disagreed, and held that while the pond was subject to broad federal regulation, it remained private, and if the government wanted to provide public access, allowing such a “public invasion” would require exercising eminent domain.<sup>1284</sup>

During this analysis, the U.S. Supreme Court noted that the property owners had created the connection “to navigable water by a channel dredged by them *with the consent of the Government*.”<sup>1285</sup> The court found that the government’s consent made the relevant property expectation stronger for the private property owner.<sup>1286</sup> This leads one to ask whether the obverse also applies: May government action similarly reduce the relevant “expectancies” of

---

<sup>1280</sup> Using the example of tort law—i.e., the “reasonable man” standard—“reasonable” investment-backed expectations are not those of the particular owner but rather are those of the “reasonable” person. See, e.g., RESTATEMENT (SECOND) OF TORTS §283, cmt. c (1965) (noting that the “reasonable man” standard is objective and external to the individual). Cf. also, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (observing that “The inquiry [about the relevant parcel in question] is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.”). See, also, *Chancellor Manor v. United States*, 331 F.3d 891, 904 (Fed. Cir. 2003) (noting that the “subjective expectations of the [claimant] are irrelevant.”). For a bizarre analysis that turns this upside-down and claims that expectations of an individual are “objective” and those based on broader context and evidence independent of any specific individual’s “distinct” beliefs are “subjective,” see Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 VA. ENVTL. L.J. 43, 56-67 (2004) (arguing that adding “reasonable” to “investment-backed expectations” is more subjective than the “distinct” investment-backed expectations of individual claimants).

<sup>1281</sup> See Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW 215, 217 (1995). See also Zach Whitney, *Comment, Regulatory Takings: Distinguishing Between the Privilege of Use and Duty*, 86 MARQ. L. REV. 617, 637 n.145 (2002).

<sup>1282</sup> *Kaiser Aetna*, 444 U.S. 164, 166-67 (1979).

<sup>1283</sup> *Kaiser Aetna*, 444 U.S. 164, 168-69 (1979).

<sup>1284</sup> *Kaiser Aetna*, 444 U.S. 164, 180 (1979).

<sup>1285</sup> *Kaiser Aetna*, 444 U.S. 164, 179 (1979) (emphasis added).

<sup>1286</sup> *Kaiser Aetna*, 444 U.S. at 179-80.



property owners? This appears true in cases of regulation of business<sup>1287</sup> and has also been established in the realm of real property.<sup>1288</sup> For example, the case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*<sup>1289</sup> established that an existing regulatory scheme, even one that did not extend as far as the challenged regulation, could combine with long-term, well-known environmental problems to reduce RIBE based on purchase of property “amidst a heavily regulated zoning scheme.”<sup>1290</sup>

---

<sup>1287</sup> See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160 (1998); *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645-47 (1993) (noting that the business should have anticipated the potential for substantial new regulation since the industry in which it was involved was already highly regulated by a complex regulatory structure), and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226-28 (1986) (standing for the same principle as *Concrete Pipe & Products*). But, see, *Horne v. Dept. of Agric.*, 576 U.S. 351 (2015) and *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (framing business regulations as a physical taking and as a physical invasion, respectively).

<sup>1288</sup> In *Lucas v. South Carolina Coastal Council*, Justice Scalia announced that the state can entirely destroy the value of personal property, but not real property, 505 U.S. 1003, 1027-29 (1992). This distinction between real and personal property led some to assume that the “notice” rule in the case *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (noting that one could have no RIBE of something when one was on notice of a law to the contrary) had added this limitation to real property law. It has not. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). See also, [Regulation Prior to Acquisition](#) section. But even in personal property law, this rule has likely been limited by the subsequent case of *Horne v. Dept. of Agric.*, 576 U.S. 351 (2015), in which the U.S. Supreme Court framed a business regulation as a physical appropriation of personal property.

<sup>1289</sup> 535 U.S. 302 (2002).

<sup>1290</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 313 n.5. (2002).

### IV.B.5.b.iii. **Nollan v. California Coastal Commission**

In the case of *Nollan v. California Coastal Commission*, the Court held that requiring a lateral public easement across the beach in exchange for a development permit constituted a taking.<sup>1291</sup> The Court held this exaction an unconstitutional condition and a taking because the required easement—which allowed public access to property in violation of the fundamental right to exclude outsiders from private property—lacked an essential nexus with the reason why the local government could have rejected the permit application.<sup>1292</sup> The local government argued that it could have rejected the permit application based on impacts to visual access to the beach.<sup>1293</sup>

Footnote two in the opinion dismisses the argument made in the dissent that because the Commission publicly announced its intention to require lateral easements in these circumstances, the owners had no RIBE.<sup>1294</sup> Justice Scalia distinguished the precedent cited by the dissent by noting that there it was an application for a “valuable [g]overnment benefit” not including real property and that a permit to build on your own property “cannot remotely be described as a ‘governmental benefit.’”<sup>1295</sup>

While some intimated that *Nollan* may have limited the reach of the importance of notice of new laws or regulations in takings analysis,<sup>1296</sup> subsequent cases continued to reference notice to property owners as an element of RIBE in regulatory takings analysis.<sup>1297</sup>

In the floodplain management field, this means that it is important to provide as much notice as possible of new or pending regulations to property owners and to potential property purchasers/owners as this may impact RIBE analysis, but it will still not necessarily be determinative.<sup>1298</sup>

---

<sup>1291</sup> 483 U.S. 825, 841-42 (1987).

<sup>1292</sup> *Id.* at 837.

<sup>1293</sup> *Id.* at 836.

<sup>1294</sup> *Id.* at 833 n.2.

<sup>1295</sup> *Id.* (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (emphasis omitted)).

<sup>1296</sup> *See, e.g.*, Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW 215, 221-23 (1995).

<sup>1297</sup> *See, e.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l. Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). For a more complete discussion of the issue of acquiring property *after* passage of relevant regulations, *see infra* section [“The State of RIBE Today.”](#)

<sup>1298</sup> *See, e.g.*, *Anaheim Gardens, L.P v. United States*, 953 F.3d 1344, 1351 (Fed. Cir. 2020); *Columbia Venture, LLC v. Richland Cnty.*, 776 S.E.2d 900, 914 (S.C. 2015); *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348-49 (Fed. Cir. 2004); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2001).

#### IV.B.5.b.iv. **Keystone Bituminous Coal Assoc. v. DeBenedictus**

On the surface of it, the facts of *Keystone Bituminous Coal Assoc. v. DeBenedictus*<sup>1299</sup> seem almost indistinguishable from the facts of *Pennsylvania Coal v. Mahon*.<sup>1300</sup> Both cases involved regulations of coal mining that required coal companies to leave some coal in the ground in order to protect overlying properties from subsidence damage. However, the *Keystone* Court identified two main reasons the cases differed enough that *Mahon* did not control the outcome in *Keystone*. First, said the court in *Keystone*, the “public purpose” of the law at issue in *Keystone* was clear, strongly supported, and significant, whereas in *Mahon*, the interests being protected were those of the private landowner involved in the case.<sup>1301</sup> The strong public interest demonstrated in *Keystone* led the U.S. Supreme Court to note in its *Penn Central* analysis that “the character of the governmental action involved here leans heavily against finding a taking.”<sup>1302</sup>

Second, the *Keystone* Court focused on “Diminution of Value and Investment-Backed Expectations.”<sup>1303</sup> The Court noted that as *Keystone* was a facial as opposed to as-applied challenge of the mining legislation at issue, there had not been developed a robust record of the actual impacts of the legislation on the claimant.<sup>1304</sup> Without such findings, the claimants could not demonstrate a frustration of their reasonable investment-backed expectations.<sup>1305</sup>

#### IV.B.5.b.v. **Lucas v. South Carolina Coastal Council**

In *Lucas v. South Carolina Coastal Council*, property owner Lucas had purchased coastal property with the intent of building single-family homes on the lots.<sup>1306</sup> South Carolina subsequently passed the Beachfront Management Act, which directly prohibited Lucas from building any permanent structures on his lots.<sup>1307</sup> Lucas sued, and a trial court found the law had

<sup>1299</sup> 480 U.S. 470, 485 (1987).

<sup>1300</sup> *Pennsylvania Coal Company vs. Mahon*, 260 US 393 (1922).

<sup>1301</sup> *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470, 485-93 (1987).

<sup>1302</sup> 480 U.S. 470, 485 (1987).

<sup>1303</sup> *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470, 493 (1987).

<sup>1304</sup> *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470, 493-96 (1987).

<sup>1305</sup> *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470, 499 (1987).

<sup>1306</sup> 505 U.S. 1003, 1006-07 (1992).

<sup>1307</sup> *Id.* at 1007.

rendered Lucas's property valueless.<sup>1308</sup> The U.S. Supreme Court concluded that a taking of property occurs when a regulation removes all economically beneficial use from a property.<sup>1309</sup>

*Lucas's* majority opinion overtly mentions expectations only once in its analysis.<sup>1310</sup> The Court noted that examination of the owner's reasonable expectations, as shaped by the state's property law, can help to explain seemingly contradictory takings cases analyzed under the *Penn Central* factors of economic impact, RIBE, and nature of the government action.<sup>1311</sup>

In addition, the concurring opinion is dedicated largely to a discussion of how RIBE should figure into takings analysis.<sup>1312</sup> The concurrence asserts that a finding of "no value" should be determined "by reference to the owner's reasonable, investment-backed expectations"<sup>1313</sup> as this retains the ability of state property law to continue to evolve in response to our "complex and interdependent society."<sup>1314</sup> For the concurrence, had the "reasonable expectations" of the claimant in the case been more in line with the prohibition on construction as evidenced by both such a finding by the legislature and by having imposed the regulation prior to development of adjacent lots rather than imposing it on Lucas after his purchase, there might have been no taking.<sup>1315</sup>

#### IV.B.5.b.vi. **Palazzolo v. Rhode Island**

The case of *Palazzolo v. Rhode Island* is factually complex, but a key issue in the case is whether acquiring land after regulations limiting development have been passed automatically precludes a takings claim based on those regulations.<sup>1316</sup> The Rhode Island Supreme Court had, in fact, ruled specifically that the challenged regulation could not be a taking under the *Penn Central*

---

<sup>1308</sup> *Id.*

<sup>1309</sup> *Id.* at 1027. The Court then proceeded to outline an exception to this rule for instances in which "background principles" of common law would also have had the same effect as the challenged regulation. *Id.* at 1027-32.

<sup>1310</sup> *Id.* at 1016 n.7. In addition, a footnote in the majority opinion addressing an issue from the dissent uses the phrase "distinct investment-backed expectations" when quoting from *Penn Central*. *Id.* at 1019 n.8 (quoting 438 U.S. 104, 124 (1978)).

<sup>1311</sup> *Id.* at 1016 n.7.

<sup>1312</sup> *Id.* at 1032-36 (Kennedy, J., concurring).

<sup>1313</sup> *Id.* at 1034 (Kennedy, J., concurring) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

<sup>1314</sup> *Id.* at 1035 (Kennedy, J., concurring) (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962)).

<sup>1315</sup> *Id.* at 1035-36 (Kennedy, J., concurring). [BB 10.9]

<sup>1316</sup> 533 U.S. 606, 616, 626 (2001).

analysis because “[Palazzolo] could have had ‘no reasonable investment-backed expectations that were affected by this regulation’ because [the regulation] predated his ownership.”<sup>1317</sup>

*Palazzolo* presented particularly difficult facts since the claimant legally acquired the property after the regulation alleged to have caused the taking. However, the claimant acquired the property through the operation of law: the claimant was the sole remaining shareholder of the corporation that owned the property for many years prior to enactment of the challenged regulation.<sup>1318</sup> After the new regulation was enacted, the corporation’s charter was revoked for failure to pay corporate income taxes.<sup>1319</sup>

In a highly fractured set of opinions, the U.S. Supreme Court disagreed with the Rhode Island Supreme Court’s ruling that the claimant could not challenge the regulations that were enacted when the now-dissolved corporation owned the property but before the claimant took personal ownership of the property.<sup>1320</sup> The U.S. Supreme Court rejected any rule that acquiring property after a new regulation takes effect—in other words, with notice of new regulations—shields the new regulation from challenge as a taking.<sup>1321</sup> Such a rule, said the Court, would put an “expiration date” on the Takings Clause and fail to take into account owners at the time regulation takes effect as such owners would not be transferring their full property rights to the next owners.<sup>1322</sup>

*Palazzolo* addresses both *Nollan* and *Lucas*. *Palazzolo* said that *Nollan*’s rule was that notice of a pre-existing regulation did not prohibit challenging the regulation under the Takings Clause and that *Lucas* did not mean that mere enactment of a regulation makes it a “background principle” that is immune from a takings challenge.<sup>1323</sup> While a majority of the Court agreed on these points, Justices Scalia and O’Connor filed separate concurring opinions that were diametrically opposed in their respective “understanding[s]” of the majority’s opinion and how it should be interpreted.<sup>1324</sup> Justice O’Connor indicated her understanding that the Court was saying that notice of pre-existing regulations was still a factor in the *Penn Central* analysis<sup>1325</sup>, whereas

---

<sup>1317</sup> *Id.* at 616 (quoting *Palazzolo v. State*, 746 A.2d 707, 717 (R.I. 2000)).

<sup>1318</sup> *Id.* at 613-14.

<sup>1319</sup> *Id.* at 614.

<sup>1320</sup> *Id.* at 616, 630.

<sup>1321</sup> *Id.* at 627.

<sup>1322</sup> *Id.* at 627-28.

<sup>1323</sup> *Id.* at 629-30.

<sup>1324</sup> *Id.* at 632, 636 (O’Connor, J., & Scalia, J., concurring). *Compare id.* at 633-36 (O’Connor, J., concurring) *with id.* at 636-37 (Scalia, J., concurring).

<sup>1325</sup> *Id.* at 632 (O’Connor, J., concurring).

Justice Scalia indicated the opposite, saying that notice via previous enactment of regulation was irrelevant to takings analysis.<sup>1326</sup>

Upon remand, the Rhode Island Superior Court utilized the *Penn Central* framework to analyze the case but found no taking. As so tersely stated by the Rhode Island Superior Court on remand, "Constitutional takings law does not compensate bad business decisions."<sup>1327</sup>

Additionally, extensive post-*Palazzolo* case law also indicates the difficulty that plaintiffs have had demonstrating RIBE contrary to a regulatory regime in place at the time of purchase.<sup>1328</sup>

#### IV.B.5.b.vii. **Tahoe Sierra**

*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*<sup>1329</sup> resoundingly reaffirmed the importance of an existing regulatory scheme in assessing RIBE. In *Tahoe-Sierra*, the U.S. Supreme Court upheld the district court's finding that the challenged moratorium on development was not a regulatory taking under the *Penn Central* analysis.<sup>1330</sup> *Tahoe-Sierra* indicated that consideration of the RIBE of the property owners contributed heavily to this finding of no taking. *Tahoe-Sierra* observed that "the 'average holding time of a lot in the Tahoe area between lot purchase and home construction is twenty-five years,'"<sup>1331</sup> and that the claimants had had time to build before restrictions went into effect, and "almost everyone . . . knew . . . that a crackdown on development was in the works."<sup>1332</sup> The court also cited the intent of the "'average'" purchaser in support of the conclusion that the purchasers "'did not have reasonable, investment-backed expectations . . .'" contravened by the challenged moratorium.<sup>1333</sup>

In further support of the lack of RIBE, the U.S. Supreme Court noted that claimants had purchased the land "amidst a heavily regulated zoning scheme."<sup>1334</sup> Operating in an area

---

<sup>1326</sup> *Id.* at 637 (Scalia, J., concurring).

<sup>1327</sup> *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108\*, 52; 2005 WL 1645974 (July 5, 2005)

<sup>1328</sup> *Cf., e.g., Cienega Gardens v. United States*, 331 F.3d 1319, 1345–46 (Fed.Cir.2003); *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 914–15 (S.C. 2015). For additional discussion of this topic, see the [Regulation Prior to Acquisition](#) section.

<sup>1329</sup> 535 U.S. 302 (2002).

<sup>1330</sup> *Id.* at 341–42.

<sup>1331</sup> *Id.* at 315 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1240 (D. Nev. 1999)).

<sup>1332</sup> *Id.* at 315 n.11 (quoting *Tahoe-Sierra*, 34 F. Supp 2d at 1241).

<sup>1333</sup> *Id.* at 315 (quoting *Tahoe-Sierra*, 34 F. Supp 2d at 1241).

<sup>1334</sup> *Id.* at 313 n.5. [BB 3.2(b)].



historically subject to extensive regulation and enactment of regulations prior to acquisition of property remain important issues in the case law, and each is treated in its own discussion.

#### IV.B.5.b.viii. **Arkansas Game and Fish Com'n v. U.S. Army Corps of Engineers**

In *Arksanas Game and Fish Com'n v. U.S. Army Corps of Engineers*,<sup>1335</sup> the U.S. Supreme Court had to address the question of whether government-caused flooding that was both temporary and *not* inevitably recurring could rise to the level of a taking.<sup>1336</sup> In the case, the U.S. Army Corps of Engineers (Corps) operated a dam upstream from the Arkansas Game and Fish Com'n's property. For decades, the Corps had operated the dam according to an operation manual that limited the time during which the Com'n's land was flooded. However, from 1993 to 2000, the Corps authorized deviations from the operations manual. These deviations caused significantly longer flooding of the Com'n's land, severely damaging the trees there, including destruction of 18 million board feet of lumber, and led to costs for environmental restoration by the Com'n.

The U.S. Supreme Court began its background review of takings law by acknowledging, as *Penn Central* had established, that "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area."<sup>1337</sup> Thus, said the Court, most cases are guided by *Penn Central's* "situation-specific factual inquiries."<sup>1338</sup>

Ultimately, the Court in *Arkansas Game and Fish Com'n v. U.S.* strongly reaffirmed that flooding is no different than any other sort of government invasion of property<sup>1339</sup> and that most takings cases will fall into the *Penn Central* analysis, including *Penn Central's* focus on RIBE. The Court in *Arkansas Game and Fish Com'n v. U.S.* only held that "government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection"<sup>1340</sup> and remanded for further proceedings.<sup>1341</sup>

<sup>1335</sup> 568 U.S. 23 (2012).

<sup>1336</sup> 568 U.S. 23, 26-27 (2012).

<sup>1337</sup> 568 U.S. 23, 32 (2012).

<sup>1338</sup> 568 U.S. 23, 32 (2012).

<sup>1339</sup> 568 U.S. 23, 36, 37 (2012).

<sup>1340</sup> 568 U.S. 23, 36, 38 (2012).

<sup>1341</sup> 568 U.S. 23, 36, 40 (2012).

#### IV.B.5.b.ix. **Murr v. Wisconsin**

The *Murr* case reiterated that *Penn Central* serves as the touchstone for the ad hoc inquiries that govern most regulatory takings cases,<sup>1342</sup> including use of *Penn Central*'s three-part test of economic impact, interference with RIBE, and the character of the government action.<sup>1343</sup>

While the *Murr* case does not dedicate the bulk of its analysis to RIBE, *Murr* still informs RIBE because of its emphasis that the entire ad hoc process of analyzing a factual situation for a possible regulatory taking is objective and based on "reasonable expectations" of what constitutes property.<sup>1344</sup>

#### IV.B.5.b.x. **Cedar Point Nursery v. Hassid**<sup>1345</sup>

In *Cedar Point Nursery*, two companies subject to California's Agricultural Labor Relations Act of 1975 challenged as a *per se* regulatory taking the regulatory provision allowing, with prior notice and other limitations, labor organizers to enter onto the property of some agricultural operations.<sup>1346</sup> The *Cedar Point* case demonstrates the importance of how the way that a case or legal question is *framed* can be virtually determinative of the outcome of the case. In *Cedar Point*, the U.S. Supreme Court framed the question as "whether the access regulation constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments."<sup>1347</sup> The Court characterized the case as a physical taking as the Court accepted the plaintiffs' arguments that what was taken was an access easement, which was transferred to the labor unions.<sup>1348</sup> And the Court stated that "Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and [a] *Penn Central* [analysis] has no place."<sup>1349</sup>

The key issue, says the U.S. Supreme Court in *Cedar Point*, is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead

---

<sup>1342</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017).

<sup>1343</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).

<sup>1344</sup> See, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 ("The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition. Cf. *Lucas*, 505 U. S., at 1035, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (Kennedy, J., concurring) ("The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved")); *id.* at 1947 (2017); *id.* at 1950.

<sup>1345</sup> 141 S. Ct. 2063 (2021).

<sup>1346</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021).

<sup>1347</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021).

<sup>1348</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021).

<sup>1349</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021).

restricted a property owner's ability to use his own property."<sup>1350</sup> This highlights the U.S. Supreme Court's move from the "permanent physical invasion" standard in *Loretto*, in which case there was an actual, permanent physical invasion, though it was very minor, to a standard in which an "invasion" arises because the government "physical[ly] appropriate[ed]" property in the form of an easement.<sup>1351</sup> Whereas in previous cases of easements the taking had been found on the basis of the importance of the "right to exclude,"<sup>1352</sup> *Cedar Point* now extends the "right to exclude" to prevent access to even a small subset of people at very limited times to accomplish specific public policy goals.

While U.S. Supreme Court takings precedent trumps all other courts on takings issues the U.S. Supreme Court has clearly ruled upon, not all takings issues have been directly addressed by the U.S. Supreme Court. Furthermore, how a case is framed and presented can make it a judgement call as to whether the "issues" at play fall inside or outside the bounds of existing precedent. This means that in many cases, state and federal courts look extensively at both binding precedent that may be applicable as well as potentially applicable case law from jurisdictions that is not binding but may be considered persuasive in any given case.<sup>1353</sup> Presented here are a small number of key takings cases, most related to floodplain management issues or RIBE, that help us develop a better understanding of takings law and floodplain management issues.

#### IV.B.5.b.xi. **A Columbia Venture, LLC v. Richland Cnty.**<sup>1354</sup>

*Columbia Venture* represents an extremely important development in case law supporting the acceptability of higher standards for floodplain management without a finding of a taking. In *Columbia Venture*, the plaintiff purchased an extensive tract of land with knowledge that the Federal Emergency Management Agency was revising area flood maps in a way that would include most of the land at issue in the regulatory floodway.<sup>1355</sup> After failing to remove the

---

<sup>1350</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

<sup>1351</sup> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

<sup>1352</sup> See, e.g., *Nollan v. Cal. Cstl. Com'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>1353</sup> For further discussion of "binding" versus "persuasive" precedent, see ["Introduction to the Court System and Jurisdiction."](#)

<sup>1354</sup> 776 S.E.2d 900 (S.C. 2015).

<sup>1355</sup> *Columbia Venture, LLC v. Richland Cnty.*, 776 S.E.2d 900, 903 (S.C. 2015). For a definition of the "regulatory floodway," see, 44 C.F.R. §59.1 (defining the "regulatory floodway" as "the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than a designated height.").

“regulatory floodway” designation from the land, Columbia Venture sued for a taking, and the case was dismissed in favor of Richland County after a trial.<sup>1356</sup> Columbia Venture appealed.

In the South Carolina Supreme Court’s review of the case, the court noted that while federal law generally prohibits development within the regulatory floodway, there exists an exemption for development that can demonstrate that it “would not result in any increase in flood levels.”<sup>1357</sup> However, while federal law would have allowed Richland County to include this exemption for residential development that “would not result in any increase in flood levels,” Richland County did not choose to add this exemption and instead forbade all residential development in the regulatory floodway.<sup>1358</sup> In fact, the South Carolina Supreme Court cited testimony from Richland County that they used more restrictive standards very intentionally to provide more public health and safety and protection than mere adherence to FEMA’s minimums and maps would provide since FEMA’s maps “do not account for the continued urbanization and development of the corresponding watersheds and the resulting increase in stormwater runoff and potential flooding,” while also noting that FEMA’s maps only look backwards in time and do not include future urbanization or changes in rainfall and storm intensity due to climate change.<sup>1359</sup>

While the case involved a long series of complicated issues regarding timing, purchase options, levees, and FEMA regulations, suffice it to say that Columbia Venture was not able to develop the land as they had envisioned when purchasing the land.

The court easily disposed of claims by Columbia Venture that Richland County had taken a flowage easement; the court noted that a taking of a flowage easement would have required government action that caused flooding.<sup>1360</sup>

Ultimately, the *Columbia Venture* case was largely about RIBE. The South Carolina Supreme Court spent several pages of its opinion discussing that Columbia Venture was aware, before purchasing the land, of the preliminary FEMA maps—already being used for regulatory purposes—that would prevent development on much of the land, as well as several other Richland County programs and ordinances that might also prevent development.<sup>1361</sup> After several citations of case law to the effect that RIBE is determined at the time of purchase, that RIBE is determined objectively, that RIBE is important but not necessarily dispositive, and that the existence of a challenged regulation prior to acquisition does not automatically eliminate

---

<sup>1356</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 903 (S.C. 2015).

<sup>1357</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 904 (S.C. 2015).

<sup>1358</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 903-04 (S.C. 2015).

<sup>1359</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 904 n.4 (S.C. 2015).

<sup>1360</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 910-12 (S.C. 2015).

<sup>1361</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 906-09 (S.C. 2015).

RIBE entirely,<sup>1362</sup> the court observed that the unreasonableness of Columbia Venture's expectations precluded the finding of a taking.<sup>1363</sup> While this was not based exclusively on the pre-purchase awareness by Columbia Ventures of the proposed flood map revisions, this certainly was a key finding contributing to the disposition of the case.<sup>1364</sup> In fact, the "character of government action" analysis led the court to state that "in light of the potential public costs of extensive development in the regulatory floodway, we reject the argument that the County's floodway development restrictions constitute anything but responsible land-use policy."<sup>1365</sup>

#### IV.B.5.b.xii. **Anaheim Gardens, L.P v. United States**<sup>1366</sup>

While not actually a case focused on floodplain management issues, the *Anaheim Gardens* case discussed RIBE as a key element in the takings analysis. *Anaheim Gardens* involved a first wave of six plaintiffs suing over a federal law that sought to preserve the availability of low-income housing.<sup>1367</sup> The claim was brought in the Federal Claims Court, which ruled against all six plaintiffs, who then appealed to the United States Court of Appeals for the Federal Circuit.<sup>1368</sup> The appeals court noted that one plaintiff had purchased their property on which the claim was based *after* the law challenged as a taking was passed into law. While the court noted that there was no *per se* rule that purchasing a property after passage of a regulation automatically negated RIBE contrary to the law, the court noted that the plaintiff was a "sophisticated investor that purchased its property with knowledge about the effects of the [challenged law]."<sup>1369</sup> As such, the court concluded that "because a sophisticated investor voluntarily purchased its property with knowledge [of the challenged law's impact], the complete lack of investment-backed expectations overwhelmingly outweighs the other Penn Central factors."<sup>1370</sup> Thus, the appeals court affirmed dismissal with regard to this plaintiff while overturning the grant of summary judgement for other defendants based on potential issues of fact related to the economic impacts on the plaintiffs of the challenged law.<sup>1371</sup> In other words, the court found

<sup>1362</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 914 (S.C. 2015).

<sup>1363</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 914-15 (S.C. 2015).

<sup>1364</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 915, FN 2 (S.C. 2015).

<sup>1365</sup> Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 916 (S.C. 2015).

<sup>1366</sup> Anaheim Gardens, L.P v. United States, 953 F.3d 1344 (Fed. Cir. 2020).

<sup>1367</sup> Anaheim Gardens, L.P v. United States, 953 F.3d 1344, 1347 (Fed. Cir. 2020).

<sup>1368</sup> Anaheim Gardens, L.P v. United States, 953 F.3d 1344, 1347 (Fed. Cir. 2020).

<sup>1369</sup> Anaheim Gardens, L.P v. United States, 953 F.3d 1344, 1351 (Fed. Cir. 2020).

<sup>1370</sup> Anaheim Gardens, L.P v. United States, 953 F.3d 1344, 1351 (Fed. Cir. 2020).

<sup>1371</sup> Anaheim Gardens, L.P v. United States, 953 F.3d 1344, 1357 (Fed. Cir. 2020).

that a lack of RIBE was not determinative for the other plaintiffs, and that they might be able to prevail on their *Penn Central* claims at trial.

The *Anaheim Gardens* case reinforces the lesson from the case law that challenging regulations that predate acquisition makes it *very* difficult to demonstrate RIBE, especially for sophisticated investors.

#### IV.B.5.b.xiii. **Mehaffy v. United States**<sup>1372</sup>

The case of *Mehaffy v. United States* noted that a complete inability of a plaintiff to demonstrate RIBE accords with U.S. Supreme Court precedent that any one factor in the *Penn Central* analysis may be so overwhelming as to decide the fate of the takings claim.<sup>1373</sup> In *Mehaffy v. United States*, the court found a lack of reasonable investment-backed expectations to be dispositive and eliminate the need to even consider the nature of the government action or the economic impact on the claimant.<sup>1374</sup>

In *Mehaffy*, the claimant owned land for which a previous company with which he was involved had negotiated sale of a flowage easement over wetlands to the U.S. government. During negotiations, the company with which Mehaffy was affiliated negotiated for an easement to place fill in the wetlands covered by the government's new flowage easement.<sup>1375</sup> This agreement, in 1970, predated the Clean Water Act's 1972 passage and limitations on fill in wetlands. In 1980, the U.S. Army Corps of Engineers informed the company that owned the land, and of which Mehaffy was part of, that the negotiated agreement to allow fill in the government's easement area did not supersede the new need for a permit under the Clean Water Act.<sup>1376</sup> In 2006, Mehaffy, now as a personal owner of the property, applied for a permit to place fill in 48 acres of wetlands, including in the regulatory floodway.<sup>1377</sup> The U.S. Army Corps of

---

<sup>1372</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18 (Fed. Cir. 2012).

<sup>1373</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18, 22, 23 (Fed. Cir. 2012) (“While evaluation of the *Penn Central* factors ‘is essentially an “ad hoc, factual” inquiry,’ it is possible for a single factor to have such force that it disposes of the whole takings claim. *Ruckelshaus v. Monsanto Co.* 467 U.S. 986, 1005, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)); see also *Norman v. United States*, 429 F.3d 1081, 1094 (Fed. Cir. 2005) (noting that the absence of a single *Penn Central* factor can be dispositive); *Good*, 189 F.3d at 1360 (affirming a grant of summary judgment for the government solely on the lack of reasonable investment-backed expectations); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994) (concluding the absence of reasonable investment-backed expectations disposed of the takings claim).”).

<sup>1374</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18, 23 (Fed. Cir. 2012).

<sup>1375</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18, 20 (Fed. Cir. 2012).

<sup>1376</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18, 20 (Fed. Cir. 2012).

<sup>1377</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18, 20 (Fed. Cir. 2012).



Engineers denied the permit.<sup>1378</sup> Mehaffy sued, but the trial court granted summary judgment to the government as the trial court ruled, as a matter of law, that Mehaffy “could not show he had a reasonable investment-backed expectation to fill the property.”<sup>1379</sup>

This decision was upheld by the United States Court of Appeals for the Federal Circuit, which began its discussion of RIBE by noting that RIBE is determined “at the time the claimant acquires the property.”<sup>1380</sup> As in other cases,<sup>1381</sup> in the *Mehaffy* case, the court noted that Mr. Mehaffy, due to the nature of his work, had long experience and knowledge of the very laws that hampered his ability to place fill in wetlands.<sup>1382</sup>

#### IV.B.5.b.xiv. **Taylor v. U.S., 959 F.3d 1081 (Fed. Cir. 2020)**

If a claimant has made no specific investments that could reasonably be demonstrated to have included the property rights claimed to have been lost, courts will find the claimant lacked RIBE.<sup>1383</sup> In *Taylor*, the Taylors had purchased land near a U.S. Air Force base for use as agricultural land.<sup>1384</sup> Several years later, the Taylors sold a wind development company an option to construct wind towers on their land.<sup>1385</sup> The company exercised its option to cancel the contract after the company heard, informally, from Air Force employees, that the company would not be able to secure a required “No Hazard” designation from the Federal Aviation Administration for construction of the wind towers so close to the Air Force base.<sup>1386</sup>

The Taylors sued on two theories. First, they claimed a regulatory taking of their property interest in the canceled option contract, and second, a physical taking due to the U.S. Air Force’s flyovers of their property.<sup>1387</sup> The Court of Federal Claims dismissed the Taylors’ suit for lack of

---

<sup>1378</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18, 21 (Fed. Cir. 2012).

<sup>1379</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18, 21 (Fed. Cir. 2012).

<sup>1380</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18, 21 (Fed. Cir. 2012) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348-49 (Fed. Cir. 2004); *Good*, 189 F.3d at 1361-62.).

<sup>1381</sup> *See, e.g., Anaheim Gardens, L.P v. United States*, 953 F.3d 1344, 1351 (Fed. Cir. 2020) (noting that the buyer was a “sophisticated” buyer); *Columbia Venture, LLC v. Richland Cty.*, 776 S.E. 2d 900, 906-09 (S.C. 2015).

<sup>1382</sup> *Mehaffy v. United States*, 499 Fed. Appx. 18, 22 (Fed. Cir. 2012).

<sup>1383</sup> *Taylor v. U.S.*, 959 F.3d 1081, 1088 (Fed. Cir. 2020).

<sup>1384</sup> *Taylor v. U.S.*, 959 F.3d 1081, 1084 (Fed. Cir. 2020).

<sup>1385</sup> *Taylor v. U.S.*, 959 F.3d 1081, 1084 (Fed. Cir. 2020).

<sup>1386</sup> *Taylor v. U.S.*, 959 F.3d 1081, 1084-85 (Fed. Cir. 2020).

<sup>1387</sup> *Taylor v. U.S.*, 959 F.3d 1081, 1085-86 (Fed. Cir. 2020).

subject matter jurisdiction and for failure to state a claim upon which relief can be granted.<sup>1388</sup> While the appeals court disagreed that the trial court lacked subject matter jurisdiction over the regulatory takings claim, the appeals court noted that the claim still failed as a matter of law under the *Penn Central* analysis.<sup>1389</sup> In part, this was due to a lack of RIBE by the Taylors. First, noted the court, the Taylors made no investment specifically related to the option contract, nor was there any indication that the purchase of the property had anything to do with an attempt at potential wind development almost two decades later.<sup>1390</sup> Additionally, the Federal Circuit Court of Appeals observed that there are three specific questions that assist in evaluating RIBE: “whether the plaintiff operated in a ‘highly regulated industry’”; “whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property”; and “whether the plaintiff could have ‘reasonably anticipated’ the possibility of such regulation in light of the ‘regulatory environment’ at the time of purchase.”<sup>1391</sup> The court then evaluated these and found that all weighed against a finding of any RIBE on the part of the Taylors.<sup>1392</sup>

#### IV.B.5.b.xv. **Gove v. Zoning Bd. of Appeals**<sup>1393</sup>

In *Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865 (Mass. S. Ct. 2005), Gove had inherited land in a floodplain in 1975. After unsuccessful attempts to sell the land over the years due to its vulnerable nature, increasing coastal property values led to a sale contract contingent upon securing permits.<sup>1394</sup> After noting that the land at issue was “a highly marginal parcel of land, exposed to the ravages of nature, that for good reason remained undeveloped for several decades even as more habitable properties in the vicinity were put to various productive uses,”<sup>1395</sup> evidence demonstrated that even after passage of the regulation prohibiting single-family homes in the floodplain, Gove still had not had any RIBE in selling the property for development.<sup>1396</sup> Furthermore, the court emphasized, this was “not a case where a bona fide purchaser for value invested reasonably in land fit for development, only to see a novel regulation destroy the value of her investment.”<sup>1397</sup> Finally, Gove failed to demonstrate any

---

<sup>1388</sup> Taylor v. U.S., 959 F.3d 1081, 1085-86 (Fed. Cir. 2020).

<sup>1389</sup> Taylor v. U.S., 959 F.3d 1081, 1087 (Fed. Cir. 2020).

<sup>1390</sup> Taylor v. U.S., 959 F.3d 1081, 1088 (Fed. Cir. 2020).

<sup>1391</sup> Taylor v. U.S., 959 F.3d 1081, 1088 (Fed. Cir. 2020).

<sup>1392</sup> Taylor v. U.S., 959 F.3d 1081, 1088-89 (Fed. Cir. 2020).

<sup>1393</sup> Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865 (Mass. S. Ct. 2005).

<sup>1394</sup> Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 869 (Mass. S. Ct. 2005).

<sup>1395</sup> Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 874 (Mass. S. Ct. 2005).

<sup>1396</sup> Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 874 (Mass. S. Ct. 2005).

<sup>1397</sup> Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 874 (Mass. S. Ct. 2005).

significant personal investment in the property that would create a reasonable expectation of selling that lot for residential development.<sup>1398</sup> Taken together, said the court, these indicia of a lack of RIBE meant that any ruling of a taking and compensation for Gove would actually represent a windfall for Gove.<sup>1399</sup>

#### IV.B.5.b.xvi. The State of RIBE Today

Confusion sometimes surfaces around RIBE because it can include so many different factors.<sup>1400</sup> Factors include, among others, current use of the property,<sup>1401</sup> purchase price,<sup>1402</sup> use of adjacent properties,<sup>1403</sup> how the property was acquired,<sup>1404</sup> appropriateness of the property for the proposed use,<sup>1405</sup> investment in the property related to the claimed property right infringed upon,<sup>1406</sup> time of acquisition relative to the contested regulation(s),<sup>1407</sup> prior existence of similar or related regulations,<sup>1408</sup> and the sophistication of the buyer and awareness of the regulatory

<sup>1398</sup> Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 875 (Mass. S. Ct. 2005).

<sup>1399</sup> Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 875 (Mass. S. Ct. 2005).

<sup>1400</sup> Many commentators have criticized RIBE for its lack of specificity and definitiveness. *See, e.g.,* R. S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 449 n.3 (2001) (listing articles critical of the lack of clarity in RIBE); Robert Meltz, Dwight H. Merriman & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 133-34 (Island Press 1999) (noting that the phrase is “amorphous”).

<sup>1401</sup> Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

<sup>1402</sup> Gazza v. N.Y. State Dep’t of Envtl. Conservation, 605 N.Y.S.2d 642, 643-44 (N.Y. 1993).

<sup>1403</sup> *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008 (1992); Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368, 1375 (Conn. 1991); McNulty v. Town of Indialantic, 727 F. Supp. 604, 611 (M.D. Fla. 1989).

<sup>1404</sup> Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 875 (Mass. S. Ct. 2005). *Cf. also* Columbia Venture, LLC v. Richland Cnty., 776 S.E.2d 900, 906-11 (S.C. 2015) (outlining purchase of property at issue with full knowledge of the many circumstances that could thwart planned development).

<sup>1405</sup> *Cf., e.g.,* *Tahoe-Sierra* 535 U.S. at 315, 315 n.11 (2002). Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 874 (Mass. S. Ct. 2005).

<sup>1406</sup> Taylor v. United States, 959 F.3d 1081, 1088 (Fed. Cir. 2020).

<sup>1407</sup> *See, e.g.,* Anaheim Gardens, L.P v. United States, 953 F.3d 1344 (Fed. Cir. 2020); Palazzolo v. Rhode Island, 533 U.S. 606, 613-15 (2001); McNulty, 727 F. Supp. at 611-12. [BB 10.9, 10]; Mehaffy v. U.S., 499 Fed. Appx. 18, 21 (Fed. Cir. 2012).

<sup>1408</sup> *Tahoe-Sierra*, 535 U.S. at 313; McNulty, 727 F. Supp. at 612.

environment.<sup>1409</sup> The numerous potential factors and the importance of the RIBE analysis can actually help explain seemingly contradictory case law.<sup>1410</sup>

As with the *Penn Central* analysis itself, RIBE defies set rules and instead is an *ad hoc*, case-specific inquiry—which has been defended as the appropriate, albeit difficult, approach for regulatory takings.<sup>1411</sup> While the specific parameters of RIBE may be subject to debate as applied in any given case, what is clear is that RIBE remains part of our takings law in the U.S. Supreme Court<sup>1412</sup> and in other federal courts.<sup>1413</sup>

In fact, federal courts are not so confused about how to evaluate RIBE as some commentators seem to be. For example, the Court of Appeals for the Federal Circuit noted:

“[T]hree factors relevant to the determination of a party’s reasonable expectations: (1) whether the plaintiff operated in a highly regulated industry; (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have reasonably anticipated the possibility of such regulation in light of the regulatory environment at the time of purchase.”<sup>1414</sup>

<sup>1409</sup> See, e.g., *Anaheim Gardens, L.P v. United States*, 953 F.3d 1344, 1351 (Fed. Cir. 2020); *Columbia Venture, LLC v. Richland Cnty.*, 776 S.E.2d 900, 906-11 (S.C. 2015) (outlining purchase of property at issue by experienced developers with full knowledge of the many circumstances that could thwart planned development); *Mehaffy v. United States*, 499 Fed. Appx. 18, 21-22 (Fed. Cir. 2012); *Paradisioiotis v. United States*, 304 F.3d 1271, 1276 (Fed. Cir. 2002).

<sup>1410</sup> *Lucas v. South Carolina Cstl. Com’n.*, 505 U.S. 1003, 1016 n.7 (1992).

<sup>1411</sup> *Palazzolo*, 533 U.S. at 633-36 (O’Connor, J., concurring).

<sup>1412</sup> See, e.g., *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Horne v. Dep’t. of Agric.*, 576 U.S. 351, 360 (2015); *Arkansas Game and Fish Com’n v. U.S.*, 568 U.S. 23 (2012); *Lingle v. Chevron*, 544 U.S. 528 (2005); *Tahoe-Sierra*, 535 U.S. 302 (2002).

<sup>1413</sup> See, e.g., *Taylor v. U.S.*, 959 F.3d 1081, 1088 (Fed. Cir. 2020); *Anaheim Gardens, L.P v. United States*, 953 F.3d 1344 (Fed. Cir. 2020); *Columbia Venture, LLC v. Richland Cnty.*, 776 S.E.2d 900, 906-15 (S.C. 2015); *Mehaffy v. United States*, 499 Fed. Appx. 18 (Fed. Cir. 2012); *Webster v. United States*, 90 Fed. Cl. 107, 114 (Fed. Ct. Cl. 2009); *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 474 (Fed. Ct. Cl. 2009); *Cienega Gardens v. United States*, 503 F.3d 1266, 1289-91 (Fed. Cir. 2007). In addition, courts also continue to apply expectations analysis in non-real property cases. See, e.g., *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1261-1262 (Fed. Cir. 2009).

<sup>1414</sup> *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (2004) (citing *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2001)) (internal quotation marks omitted); *Webster*, 90 Fed. Cl. at 114 (citing *Appollo Fuels* for the three relevant factors in determining the reasonableness of investment-backed expectations); *Res. Invs.*, 85 Fed. Cl. at 513-14 (same); *Kemp v. United States*, 65 Fed. Cl. 818, 821 (Fed. Ct. Cl. 2005) (same); See also *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999) (discussing the appellant’s necessary awareness of regulations and increasing environmental concerns).

Note that of these three, the second is based entirely on a claimant's actual knowledge.<sup>1415</sup> An additional—and related—factor considered in determining RIBE includes the appropriateness of property for the proposed use (i.e., would the proposed use harm resources or the public due to the nature or location of the property?); environmentally sensitive land is a good example of land that is likely to be regulated in the future, even if it is not now.<sup>1416</sup> Finally, as a threshold matter, courts have required that the claimant has had an actual, subjective expectation that has been frustrated.<sup>1417</sup> And this expectation cannot be merely to make a speculative profit on what was spent on acquiring property.<sup>1418</sup>

One challenging issue in the last two decades of takings law has been the issue of the time of acquisition of property relative to challenged regulations. The Supreme Court first addressed this head on in the decision of *Palazzolo v. Rhode Island*.<sup>1419</sup> While a majority of the Court agreed in *Palazzolo* that no taking had occurred, the two concurrences with the plurality opinion were diametrically opposed in their understandings of the role that post-regulatory acquisition of property played in the *Penn Central* takings analysis.<sup>1420</sup> Justice O'Connor's understanding was that the Court's decision required integrating time of acquisition of the property relative to the time of regulation as a factor in the *Penn Central* analysis of RIBE.<sup>1421</sup> On the other hand, Justice Scalia's concurrence understood the Court's decision as requiring that time of acquisition relative to enactment of regulation was irrelevant.<sup>1422</sup>

---

<sup>1415</sup> For the impact of actual knowledge, *see also*, *Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1351 (Fed. Cir. 2020) (dismissing only one of five plaintiffs' claims as that plaintiff could not demonstrate sufficient RIBE since they acquired the property after the regulations complained of); *Columbia Venture, LLC v. Richland Cnty.*, 776 S.E.2d 900, 903 (S.C. 2015); *Mehaffy v. United States*, 499 Fed. Appx. 18, 22 (Fed. Cir. 2012).

<sup>1416</sup> *Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865, 874 (Mass. S. Ct. 2005); *Good*, 189 F.3d at 1363. *Cf. Tahoe-Sierra*, 535 U.S. at 307-12 (2002) (citing extensively to the appeals court opinion that noted the likelihood of increased future regulation of the property around Lake Tahoe since existing regulations were clearly insufficient to protect the quality of Lake Tahoe); Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 344-46 (2005) (discussing the "Natural Use Doctrine" as a defense to a takings claim).

<sup>1417</sup> *See Appollo Fuels*, 381 F.3d at 1349.

<sup>1418</sup> *See, e.g., Department of Env'tl. Protection v. Burgess*, 772 So. 2d 540, 543-44 (Fla. 1<sup>st</sup> Dist. Ct. App. 2000) (noting that land purchased 30 years before development attempted as an "undefined" investment does not give rise to a reasonable expectation of profit through an increase in property value).

<sup>1419</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

<sup>1420</sup> *Compare Palazzolo*, 533 U.S. at 632-36 (O'Connor, J., concurring) *with Palazzolo*, 533 U.S. at 636-45 (Scalia, J., concurring).

<sup>1421</sup> 533 U.S. 606 at 632-33 (O'Connor, J., concurring).

<sup>1422</sup> 533 U.S. at 636-45 (Scalia, J., concurring).

Ignoring the pre- and post-enactment status of the owner, as Scalia advocated, presents problems as it would eviscerate the *Penn Central* analysis.<sup>1423</sup> Considering the time of acquisition of property relative to enactment of regulation in takings analysis of RIBE amounts, said Scalia, to assuming the constitutionality of the regulation in question.<sup>1424</sup> In a sense this is correct; if one assumes the validity of the regulation in order to determine RIBE, then the owner had no RIBE. However, Scalia failed to appreciate that the converse also holds true. Assuming the invalidity of the regulation to calculate RIBE virtually eliminates the “reasonable” in RIBE as one could harbor RIBE completely contrary to existing regulations. In fact, the more out-of-line a proposed development is with existing regulation, the better chance the plaintiff has at winning a takings claim under this approach as the more valuable the proposed development compared to the pre-existing regulation, the greater the supposed “burden” on the property owner.<sup>1425</sup> This approach would create incentive for developers to speculate on heavily regulated land in hopes of getting compensation or getting the regulation invalidated.<sup>1426</sup> So the question becomes how to calculate RIBE when the “reasonableness” in RIBE relates to the validity or invalidity of the questioned regulation. Yet this very validity or invalidity depends in part on defining the RIBE involved. Justice Kennedy explicitly acknowledged such circularity in his concurrence in *Lucas* and said that some amount of it cannot be avoided.<sup>1427</sup> Yet, objective standards in the legal tradition limit circularity.<sup>1428</sup> Kennedy’s statement that “courts must

<sup>1423</sup> *Id.* at 635 (O’Connor, J., concurring).

<sup>1424</sup> *Id.* at 637 (Scalia, J., concurring).

<sup>1425</sup> *Cf. id.* at 634-35 (O’Connor, J., concurring) (“[T]he development sought by the claimant may also shape legitimate expectations . . .”). *Cf. also*, *Lost Tree Vill. Corp. v. United States*, 787 F.3d 111 (Fed. Cir. 2015) (finding a taking of a single platted parcel of wetlands and submerged lands when the value was over \$4 million with a permit for fill, but less than \$28,000 without the permit for fill).

<sup>1426</sup> *See id.* at 636 (Scalia, J., concurring). *See also*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1070 n.5 (1992) (Stevens, J., dissenting) (expressing fear that the categorical rule of a taking for elimination of all value will lead developers to overinvest).

<sup>1427</sup> *Lucas*, 505 U.S. at 1034-35 (Kennedy, J., concurring). *See also* Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. LAW. 215, 228-29 (1995).

<sup>1428</sup> *Lucas*, 505 U.S. at 1034-35 (“Some circularity must be tolerated in these matters, however, as it is in other spheres. *E.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy). The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.”). For an extensive treatment of the issue of circularity and the problem of those that assert a regulatory takings claim on a property that was subject to the regulation when they acquired the property, see Tal Dickstein, *Escaping Logical Circularity: The Postenactment Purchaser Problem and Reasonable Investment-Backed Expectations*, 34 ENVTL. L. REP. 10865 (2004). The article’s proposed solution is to review the investment-backed expectations of the owner prior to the “postenactment” purchaser. *Id.* at 10889. However, even this proposed solution remains significantly subjective. *Id.* While some subjectivity is allowable, few of the factors typically considered by federal courts in evaluations of RIBE are subjective. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978) (current use of property); *Gazza v. N.Y. State Dep’t of Env’tl. Conservation*, 605 N.Y.S.2d 642, 643-44 (N.Y. 1993) (purchase price); *Lucas v. S.C. Coastal*



consider all reasonable expectations whatever their source”<sup>1429</sup> echoes O’Connor’s approach in her *Palazzolo* concurrence.<sup>1430</sup> Subsequent court rulings to date favor O’Connor’s approach over Scalia’s.<sup>1431</sup>

At this point, it should be clear that regulations that existed prior to acquisition present challenges for how *reasonable* “reasonable investment-backed expectations” really are. While RIBE is far broader than just notice of prior regulation, prior regulation still plays an important role.<sup>1432</sup> If no obvious forms of notice exist for potential regulations, hazards, or other problems with a property and most people are not aware of the issue, expectations contrary to them could potentially still seem reasonable. As part of shaping expectations, notice of existing or potential regulations and the environmental and public safety issues motivating them assist in decision-making about property purchases. For example, situations arise that offend our sense of fairness and justice when, after saving for a lifetime, a couple buys their dream retirement home on the beach without understanding the risks, and they lose everything to coastal

---

Council, 505 U.S. 1003, 1008 (1992) (use of adjacent properties); *Gil v. Inland Wetlands & Watercourses Agency*, 593 A.2d 1368, 1375 (Conn. 1991) (same); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 611 (M.D. Fla. 1989) (same); *Tahoe-Sierra*, 535 U.S. at 315, 315 n.11 (appropriateness of the property for the proposed use); *Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344 (Fed. Cir. 2020) (time of acquisition relative to contested regulation(s)); *Palazzolo v. Rhode Island*, 533 U.S. 606, 613-15 (2001) (same); *McNulty*, 727 F. Supp. at 611-12. [BB 10.9, 10] (same); *Tahoe-Sierra*, 535 U.S. at 313 (prior existence of similar or related regulations); *McNulty*, 727 F. Supp. at 612 (same).

<sup>1429</sup> *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

<sup>1430</sup> *Palazzolo*, 535 U.S. at 634-36 (O’Connor, J., concurring).

<sup>1431</sup> See, e.g., *Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344 (Fed. Cir. 2020); *Columbia Venture, LLC v. Richland Cnty.*, 776 S.E.2d 900 (S.C. 2015); *Mehaffy v. United States*, 499 Fed. Appx. 18, 23 (Fed. Cir. 2012); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2001); *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348-49 (Fed. Cir. 2004).

<sup>1432</sup> Numerous writings on takings issues address the notice of prior regulation issue, see, e.g., Robert Meltz, Dwight H. Merriman & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 384-86, 430 (Island Press 1999), especially after the *Palazzolo* case. See, e.g., Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 VA. ENVTL. L.J. 43 (2004); Dana Larkin, Comment, *Dramatic Decreases in Clarity: Using the Penn Central Analysis to Solve the Tahoe-Sierra Controversy*, 40 SAN DIEGO L. REV. 1597, 1616-17 (2003). Courts have taken differing positions on how notice of existing regulations affects purchasers after the regulation takes effect, see, Tal Dickstein, *Escaping Logical Circularity: The Postenactment Purchaser Problem and Reasonable Investment-Backed Expectations*, 34 ENVTL. L. REP. 10865, at 10866-67 (2004). Some courts find that notice of existing regulations offers an insurmountable bar to a takings claim, while others do not see it as a bar but rather as part of the *Penn Central* regulatory takings inquiry. *Id.* at 10866-67. Since *Palazzolo*, courts are no longer free to find that notice due to pre-existing regulations forms an absolute bar to a takings claim. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-28 (2001). Still, courts since *Palazzolo*, while not finding prior regulation an absolute bar to a claim, have found that claimants in such situations cannot demonstrate sufficient RIBE to even overcome a summary judgment motion. See, e.g., *Taylor v. U.S.*, 959 F.3d 1081 (Fed. Cir. 2020).

dynamics,<sup>1433</sup> or when the couple buys a house along a beautiful river only to lose it to flooding or learn after purchase that they cannot afford the flood insurance. Laws that help avoid such situations serve to ensure that property owners understand the inherent risks, limitations, and responsibilities of owning property rather than being unpleasantly—and maybe even unfairly—surprised by them.<sup>1434</sup> Additionally, notice helps overcome the general lack of awareness of the public that laws controlling property have historically changed and will continue to do so.<sup>1435</sup> Such notice of the risks and limitations should, then, color property owners' expectations. Thus, while notice is not itself the same thing as RIBE, the quality of notice about the factors affecting RIBE helps determine the reasonableness of their expectations.

Notice impacting RIBE can be broken down into two general types: 1) notice of existing regulations, and 2) notice of context/appropriateness of land use.

Notice of existing regulations can be further dissected into two parts: 1A) notice that a proposed land use is prohibited, and 1B) that an existing regulatory framework indicates the likelihood of future changes. Type 1A)—notice of current regulatory prohibition—was addressed primarily in the *Palazzolo* case for real property. As noted above, *Palazzolo* resulted in the narrow holding that enactment of regulations that predate ownership of property does not preclude a takings claim based on the prior-enacted regulation; strong disagreement emerged as to whether prior enactment of regulations should be irrelevant in takings analysis or simply constitute another case-specific factor for consideration in the *Penn Central* analysis of a regulatory taking. Case law since *Palazzolo* indicates that acquisition of property after notice via regulation remains a factor to consider in RIBE, but is not dispositive.<sup>1436</sup>

As to 1B) notice—notice via current regulation that future regulation may occur—*Tahoe-Sierra* noted that claimants had purchased the land “amidst a heavily regulated zoning scheme.”<sup>1437</sup>

---

<sup>1433</sup> See, e.g., David P. Hendricks, Silence is Golden: The Case for Mandatory Disclosure of Coastal Hazards and Land-Use Restrictions by Residential Sellers in North Carolina, 25 N.C. CENT. L.J. 96, 96-97 (2002).

<sup>1434</sup> While the former rule in real property transactions used to be *caveat emptor*, all states in the United States now have statutes relating to disclosures for at least some issue in residential property transfers. In fact, the past several years have finally seen some movement on providing improved notice and disclosures of flood risk to potential property purchasers. For example, in 2021, Texas passed the strongest flood disclosure law in the country; the new law even requires that the landlord alert renters as to a property's flood history and whether the property is located in an area subject to flooding. Legal Regulations Review, Texas enacts nation's strongest flood disclosure law (Jan. 6, 2022), <https://legalregulationreview.com/texas-enacts-nations-strongest-flood-disclosure-law/>.

<sup>1435</sup> See, e.g., ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 102-04 (2007). See also the [Property](#) section.

<sup>1436</sup> See, e.g., *Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1351 (Fed. Cir. 2020) *Columbia Venture, LLC v. Richland Cnty.*, 776 S.E.2d 900 (S.C. 2015); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348-49 (2004).

<sup>1437</sup> *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 313 n.5 (2002).

This phraseology evokes the Court’s language in several regulatory takings cases that did not include real property. These cases, sometimes referred to as the “heavily regulated industries” cases, reason that when one involves oneself in an area of business that is already highly regulated, one must expect that further regulation may occur.<sup>1438</sup> This is so, say courts, for two reasons: 1) the businesses involved in highly regulated areas are already aware of the existence of complex regulation and the dynamic nature of that regulation, and 2) based on knowledge of past change in regulations, such businesses should plan on future changes to regulations that may not be favorable. After all, accounting for uncertainty is a landmark of business planning. In some more recent real property cases addressing RIBE, courts have noted that “sophisticated” individuals, purchasing property while intimately aware of regulatory hurdles they later complain about, cannot demonstrate RIBE.<sup>1439</sup>

Do we really believe, however, that most private individuals purchasing land in or near floodplains are so sophisticated as to understand the complexity of regulatory regimes potentially affecting their property, as well as the changing environmental and land use dynamics affecting flooding? While some might be this sophisticated, we may not currently ascribe such knowledge to all purchasers. But, even if this is so, at what point must we attribute constructive notice to the general public? In our increasingly complex world, just as in business, change has become the rule rather than the exception to the rule. This applies also to legal and regulatory matters. Thus, even with regard to real property, courts have stated that “[i]n light of the growing consciousness of and sensitivity toward environmental issues, [the owner] must also have been aware that

---

<sup>1438</sup> See, e.g., *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 410 (4th Cir. 2007); *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645-46 (1993) (noting that since pension plans had long been subject to federal regulation, the plaintiff “could have had no reasonable expectation that it would not be faced with liability”); *Mitchell Arms, Inc. v. United States*, 26 Cl. Ct. 1, 5 (Cl. Ct. 1992), *aff’d*, 7 F.3d 212 (Fed. Cir. 1993) (rejecting claim that suspension of import permits constituted taking, noting that “government as we know it would soon cease to exist if such exclusively governmental functions as the control over foreign commerce could not be accomplished without the payment of compensation to those business interests that have chosen to operate within this highly regulated area”). But, see *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 26 (1st Cir. 2002) (en banc) (finding that Massachusetts’s Disclosure Act, requiring cigarette companies to disclose ingredients, constituted a taking of manufacturers’ trade secrets even though “[u]nquestionably, tobacco is subject to heavy regulation by federal and state governments”).

But, see, *Rose Acre Farms v. U.S.*, 559 F.3d 1260, 1275-76 (Fed. Cir. 2009) (noting that new *salmonella* regulations did not fit well under the guise of the “heavily regulated industries” exception because the science on which new regulations were based was so new and different from past science and related regulation that the claimant could still have RIBE contrary to the new regulations despite operating in a highly regulated industry).

<sup>1439</sup> *Anaheim Gardens, L.P. v. United States*, 953 F.3d 1344, 1351 (Fed. Cir. 2020); *Columbia Venture, LLC v. Richland Cnty.*, 776 S.E.2d 900, 903 (S.C. 2015); *Mehaffy v. United States*, 499 Fed. Appx. 18, 22 (Fed. Cir. 2012).

standards could change to his detriment, and that regulatory approval could become harder to get.”<sup>1440</sup> Due to an increasing focus on the need for notice to potential property purchasers of the hazards of flooding, the last several years have seen some modest movement on increasing the legal requirements for notice/disclosure of flood risk, whether past flooding has impacted a property, and notice of locations subject to federal requirements for flood insurance prior to sale.<sup>1441</sup>

The second type of notice, i.e., notice of context/appropriateness of land use, also remains a factor under current case law, though its application has been less clear. The *Tahoe-Sierra* case implied that this type of notice undermined any argument of RIBE by the claimants since, in that case, it had been widely understood for about four decades that land development was damaging Lake Tahoe. In addition, no one disputed that the claimants’ lands were lands that, if developed, would contribute to the damage to Lake Tahoe.<sup>1442</sup> The Court seemed to be saying that the claimants could have little RIBE in development that clearly harms an important public resource.

Ultimately, actual notice of the vulnerability of property to flooding, erosion, sea-level rise or any other water hazard should impact the takings analysis for owners. For owners that purchased their land forty or fifty years ago, the import of such notice should be less since widespread understanding of flooding, changing precipitation patterns with climate change, erosion, storm surge, and sea-level rise did not exist.<sup>1443</sup> With today’s extensive scientific evidence of changing precipitation, storm, and flooding events, arguably even property owners without *actual* notice of these changes should be charged with *constructive* notice of the changing risks of flooding and the likelihood of regulatory changes in response. Experience with flooding, its dominance as a driver of disasters with high economic and loss of life costs, as well as its inexorably increasing damage over the past century, demonstrate the importance of local, state, and federal government regulations to protect people and property from flooding. This topic is treated in more depth in [The Nature of the Governmental Action](#) section.

---

<sup>1440</sup> *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999) (finding no taking where a property owner applied for and received federal permits over many years but could not secure state permits; in the meantime, the federal regulatory scheme changed and the owner could no longer secure federal permits to replace the expired permits).

<sup>1441</sup> See, e.g., CoastalReview.org staff report “Real Estate Commission grants petition for flood disclosure,” at <https://coastalreview.org/2023/02/real-estate-commission-grants-petition-for-flood-disclosure/> (February 21, 2023) (last visited March 20, 2023). For an extremely proactive approach, see Hawai’i Senate Bill 0-474 SD1 HD2 CD1, signed into law on July 2, 2021, which creates maps at the tax parcel level showing properties likely to be inundated by sea-level rise.

<sup>1442</sup> *Tahoe-Sierra Pres. Council*, 535 U.S. at 314 n.9.

<sup>1443</sup> Cf. *Nordlinger v. Hahn*, 505 U.S. 1, 13-14 (1992) (treating otherwise similarly situated landowners differently for an equal protection analysis based on time of purchase of property and justifying this based on “reasonable reliance interests”).

Careful case-by-case analysis of the many factors cited by courts as relevant to RIBE should effectively serve to promote justice and fairness<sup>1444</sup> and avoidance of arbitrariness.<sup>1445</sup> Even avoiding arbitrariness will not be enough to satisfy everyone; many property owners simply do not want to see property law ever change, even though such a desire remains entirely unreasonable in the face of historical precedent.<sup>1446</sup> In other words, some believe that the only way any change in the rules of property should be allowed is through payment to property owners for the change. Aside from being impracticable,<sup>1447</sup> no historical precedent supports freezing the meaning of property independent of the society that creates and protects property or regardless of the changing physical characteristics of the property itself. Rather, property has and remains a dynamic concept that evolves in direct relationship with the society that defines it.<sup>1448</sup>

RIBE holds the balance between the need for property concepts to evolve and the need for certainty or consistency in definitions of property. Too much flexibility in the definition of property can leave property owners subject to unfair losses, while too little flexibility in the definition of property can lead to grave harms to the society that makes property possible and protects it. Harms to society can include making society shoulder the environmental costs of

---

<sup>1444</sup> See, e.g., *Tahoe-Sierra*, 535 U.S. at 334 (noting that concepts of justice and fairness underlie the Takings Clause).

<sup>1445</sup> Cf. Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. LAW. 215, 217 (1995).

<sup>1446</sup> See the [Property](#) section.

<sup>1447</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>1448</sup> See, e.g., ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 62, 65, 73-78 (2003) (explaining the importance of continued development of property law to meet society's evolving needs).

activities on private property, loss of public access to resources, foisting the costs of risk-taking onto the public,<sup>1449</sup> and, in the most extreme case, the inability of society to advance.<sup>1450</sup>

#### IV.B.5.b.xvii. **Penn Central's RIBE and Floodplain Management: The Big Picture and Takeaways**

What makes expectations “reasonable” with regard to regulations represents a complex question. As noted in the cases above, the time/method/cost of acquisition, whether the regulations pre-dated or ante-dated acquisition, whether the property owner was aware of the reasons justifying the changed regulations, the level of general awareness of the need for or likelihood of new regulations, the nature of the land being regulated, and many other potential factors can impact the “reasonableness” of expectations that courts will consider in a takings claim. One lesson from the cases above: RIBE contrary to increasing floodplain regulation should be much harder for plaintiffs to establish as the awareness of increasing flood losses, the reality of heavier rainfall events, and sea-level rise continue to become common public knowledge. This broad awareness makes “unreasonable” any expectations other than an increased need to address both current and future flood risk through more and more stringent controls on the creation of flood risk.

Arguably, almost no area of land regulation already receives more deferential treatment from courts than regulation of floodplains. **For example, federal courts have shown great**

---

<sup>1449</sup> Taxpayer liability may accrue at the federal, state, or local level. At the federal level, taxpayers shoulder the financial burden via the federally subsidized National Flood Insurance Program. This program has long been criticized as a financial boondoggle that improperly benefits those that take risks by locating in floodplain areas; the program is sustained by tax dollars as premiums paid into the program by policy holders are insufficient to cover its costs. Ernest B. Abbott, *Floods, Flood Insurance, Litigation, Politics—and Catastrophe: The National Flood Insurance Program*, 1 SEA GRANT L. & POL’Y J. 129, 129-30 (2008), available at <http://nsglc.olemiss.edu/SGLPJ/Vol1No1/vol1no1.pdf>. For a discussion of a dynamic in river floodplains similar to what may happen in coastal areas subject to flooding, see Adam Scales, *A Nation of Policyholders: Governmental and Market Failure in Flood Insurance*, 26 MISS. C. L. REV. 3, 6 (2007) (discussing the “self-destructive pattern” of flood mitigation efforts that includes flood control works, followed by increased development, followed by eventual system failure and flooding in the context of levees). At the state level, some states provide direct subsidies through state-sponsored and guaranteed, subsidized property insurance. See, e.g., Michael Hofrichter, Comment, *Texas’s Open Beaches Act: Proposed Reforms Due to Coastal Erosion*, 4 ENVT’L & ENERGY L. & POL’Y J. 147, 151 (2009) (discussing Texas’s “Texas Windstorm Insurance Corporation”); Florida’s Hurricane Catastrophe Fund, FLA. STAT. § 215.555 (2010) (outlining Florida’s state-sponsored and required reinsurance program for companies offering hurricane insurance in the state); Florida’s Citizens Property Insurance, FLA. STAT. § 627.351(6) (2010). Florida’s Citizens Property Insurance can fund deficits by assessing charges on other insurance policies in the state, including auto insurance. RUPPERT ET AL., DYNAMIC HABITAT ACCOMMODATION: THE POLICY FRAMEWORK TO ENSURE SEA TURTLE NESTING BEACHES IN FLORIDA, FN 269 and accompanying text (2008).

<sup>1450</sup> See e.g., Eric Freyfogle, *The Land We Share: Private Property and the Common Good*, at 74-75.



**deference for local regulations enacted as part of participation in the Federal Emergency Management Agency's National Flood Insurance Program.<sup>1451</sup> RIBE has played a crucial role in this deference.** With the growing awareness of the severe impacts of flooding and the increasing incidence and severity of economic losses and loss of life due to flooding, courts will likely continue this trend of finding that property owners have fewer and fewer *reasonable* investment-backed expectations of using land contrary to well-designed, human-safety-focused floodplain management regulations of property as long as the regulations do not result in physical invasions or completely wipe out the value of property, which, as noted by the U.S. Supreme Court, is an extremely unusual event.<sup>1452</sup> Judicial deference has resulted in a finding of no taking of property rights in many cases, such as those cited above, in which government has developed floodplain management regulations that go *beyond* the minimum standards required by the National Flood Insurance Program. Thus, courts are not likely to often find that property owners have *reasonable* investment-backed expectations of developing land contrary to well-designed floodplain regulations that conform to ASFPM's No Adverse Impact strategy.

### IV.B.5.c. Penn Central's 'Character of the Governmental Action' Factor in Takings Law

Of the three *Penn Central* factors to consider in a regulatory takings case, the U.S. Supreme Court has sometimes given less attention to the third factor of "the character of the governmental action."<sup>1453</sup>

Initially this was thought to be the clearest and easiest to apply of the *Penn Central* factors.<sup>1454</sup> But as courts and commentators have observed, the "character of the governmental action" has come to include several potential factors that themselves present great analytical difficulty.

While the "character of the governmental action" is most often associated with the *Penn Central* analysis of which it has become a part, similar language made its appearance in takings law

---

<sup>1451</sup> See, e.g., *Guadalupe Cnty. v. Woodlake Partners, Inc.*, 2017 Tex. App. LEXIS 3192 (Tex. App. 2017) (citing to *Adolph v. Fed. Emergency Mgmt. Agency of the U.S.*, 854 F.2d 732, 736-38 (5th Cir. 1988)); *Wyer v. Board of Environmental Protection*, 747 A.2d 192 (Me. 2000); *Beverly Bank v. Illinois Department of Transportation*, 579 N.E.2d 815 (Ill. 1991); *Usdin v. State of New Jersey*, 173 N.J. Super. 311 (1980); *Reel Enterprises v. City of LaCrosse*, 146 Wis.2d 662, N.W.2d 743 (Wis. Ct. App. 1988); *Laurjo Const. Co. v. State*, 228 N.J. Super. 552 (1988); *Responsible Citizens in Opposition to floodplain Ordinance v. City of Asheville*, 302 S.E.2d 204 (N.C. 1983); *Krahl v. Nine Mile Creek Watershed District*, 283 N.W.2d 538 (Minn., 1979).

<sup>1452</sup> See, e.g., *Lucas v. South Carolina Cstl. Com'n*, 505 U.S. 1003, 1033-34 (1992) (Kennedy, J., concurring).

<sup>1453</sup> Cf. *Lingle v. Chevron*, 544 U.S. 528, 538-39 (2005).

<sup>1454</sup> See, e.g. Robert Meltz, Dwight H. Merriman & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 135-36 (Island Press 1999).

jurisprudence about 60 years earlier. In *United States v. Cress*, the U.S. Supreme Court said that “it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.”<sup>1455</sup>

This portion of the *Penn Central* analysis, like the others, focuses on “the magnitude or character of the burden.”<sup>1456</sup> One thing most definitely *not* included as part of the “character of the governmental action” analysis is whether the regulation is the best, most efficient way of achieving the regulatory ends sought; more recent U.S. Supreme Court precedent makes clear that such an inquiry is part of substantive due process analysis rather than takings law.<sup>1457</sup> At the same time, the Federal Circuit and Federal Claims Court have emphasized that it also includes “consider[ation of] the purpose and importance of the public interest reflected in the regulatory imposition.”<sup>1458</sup> Thus, “character of the governmental action” includes the reasoning behind and public importance of the governmental action, but *not* evaluation of whether the means chosen to achieve the government’s objective is the best way of doing so.

Character of the governmental action is sometimes interpreted extremely narrowly to really only discuss if the regulatory action is more like a physical taking case or one in which regulation has taken all value from the property. However, it is more common for cases to also include other aspects, such as the type and importance of the public purpose involved, whether the regulatory scheme is broadly applicable or only targets one or extremely few property owners, or is prohibiting a “noxious use” or nuisance.

### IV.B.5.d. Facets of “Character of the Governmental Action”

After almost a half century of case law interpreting “the nature of the governmental action,” this prong of the *Penn Central* analysis has become quite complex. Commentators have spilled a lot of ink trying to pin down exactly what things are or are not and should or should not be included as part of the examining “the nature of the governmental action.” An exhaustive

---

<sup>1455</sup> *United States v. Cress*, 243 U.S. 316, 328 (U.S. 1917). Ultimately, however, *Cress*’ use of the “character of the invasion” language came in the context of a physical invasion of water from a government project. Today it is unnecessary to evaluate the “character of the governmental action” in any case involving a permanent direct occupation of land since *Loretto v. Teleprompter Manhattan*, 458 US 419 (1982), established the principle that a permanent government invasion is a per se taking. The challenges come in [flooding cases when the invasion is tangible but not necessarily permanent](#).

<sup>1456</sup> *Lingle v. Chevron*, 544 U.S. 528, 538-39 (2005).

<sup>1457</sup> *See, e.g.* *Rose Acre Farms v. U.S.*, 559 F.3d 1260, 1276-82 (Fed. Cir. 2009) (discussing in depth the impact of the U.S. Supreme Court decision in *Lingle v. Chevron*, 544 U.S. 528 (2005) on evaluation of how to consider the economic impact of the governmental action).

<sup>1458</sup> *See, e.g.*, *Rose Acre Farms, Inc. v. United States*, 75 Fed. Cl. 527, 535 (Fed. Cl. 2007) (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1176 (Fed. Circ. 1994)).

overview of such sources and all case law utilizing the phrase would create more confusion than clarity. For the sake of brevity, this discussion focuses less on absolute logical clarity and analytic consistency and instead seeks to provide some general parameters and facets of this prong that may be most relevant to higher standards for floodplain management.

#### IV.B.5.d.i. Like an “Invasion”?

First, in the case that coined this phrase, *Penn Central*, the U.S. Supreme Court indicated that “a ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>1459</sup> This has become the absolute minimum required consideration for courts to apply when examining this prong.

At the same time, the U.S. Supreme Court gives some insight into the “character of the governmental action.” While “character of the governmental action” relates to non-arbitrary and fair treatment of different parcels, this does not mean that *every* parcel must be treated the same regardless of the characteristics of the parcel.<sup>1460</sup> Rather, the U.S. Supreme Court has subsequently noted that the character of the land at issue is a relevant topic of examination when seeking to determine whether a taking has occurred.<sup>1461</sup> Thus, the nature of the land at issue can impact analysis of the governmental action prong of the *Penn Central* analysis since a proposed land use that might be a nuisance or cause safety concerns is relevant to determination of the character of the governmental action since regulations that protect human health and safety are typically given great deference and latitude by courts. This means that the risk of flooding to a parcel and the potential harms from that flooding that are reduced by regulations can definitely run in favor of governmental action designed to prevent such harms.

---

<sup>1459</sup> *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (internal citations omitted).

<sup>1460</sup> 438 U.S. 104, 133-34 (stating that “Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases. Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account.”).

<sup>1461</sup> *Arkansas Game and Fish Comm’n*, 568 U. S. 23, 39 (2012).

#### IV.B.5.d.ii. **Disproportionate Burdens and “Average Reciprocity of Advantage”**

The U.S. Supreme Court has indicated that it is less likely to find a taking due to “land use regulations” rather than a physical appropriation of property.<sup>1462</sup> As part of this, the Court said that land use regulations, such as floodplain regulations, are less likely to be takings because they secure an “average reciprocity of advantage.”<sup>1463</sup> Furthermore, the U.S. Supreme Court has also noted its own hesitance to find a taking “when the State merely restrains uses of property that are tantamount to public nuisances” as such limitations are consistent with the “reciprocity of advantage” the Court has frequently recited.<sup>1464</sup>

In the *Penn Central* case that coined the phrase “nature of the governmental action,” the U.S. Supreme Court indicated that a significant diminishment of property value alone by an otherwise-valid regulation did not amount to a taking.<sup>1465</sup> At the same time, the Court gives some insight into the “character of the governmental action” by contrasting New York City’s historic preservation law with so-called “reverse spot zoning,” which, the Court noted, “singles out a particular parcel for different, less favorable treatment than the neighboring ones.”<sup>1466</sup> The Court contrasted reverse spot zoning with the historic preservation law at issue in *Penn Central* by noting that the historic preservation law, while it only applied to some parcels, was part of a “comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”<sup>1467</sup> Furthermore, while “character of the governmental action” relates to non-arbitrary and fair treatment of different parcels, this does not mean that *every* parcel must be treated the same regardless of the characteristics of the parcel.<sup>1468</sup>

---

<sup>1462</sup> *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 488 n.18 (1987).

<sup>1463</sup> *See, e.g., Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 488 (1987) (“[In *Plymouth Coal Co. v. Pennsylvania*, 232, U.S. 531 (1914), ‘it was held competent for the legislature to require a pillar of coal to be left along the line of ad-joining property.’ *Pennsylvania Coal*, 260 U.S., at 415, 43 S.Ct., at 160. Justice Holmes explained that unlike the Kohler Act [at issue in the *Pennsylvania Coal Company vs. Mahon*, 260 US 393 (1922), case], the statute challenged in *Plymouth Coal* dealt with ‘a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.’ 260 U.S., at 415, 43 S.Ct., at 160.”).

<sup>1464</sup> *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 491 (1987).

<sup>1465</sup> 438 U.S. 104, 131 (1978) (citing cases that found no taking despite 75% and 87.5% reductions in property value).

<sup>1466</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 132 (1978) (citing 2 A. Rathkopf, *The Law of Zoning and Planning* 26-4, and n. 6 (4th ed. 1978)).

<sup>1467</sup> 438 U.S. 104, 132 (1978).

<sup>1468</sup> 438 U.S. 104, 133-34 (stating that “Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees

This general analysis—that generally applicable regulations that offer some level of “reciprocity of advantage”—remains a vibrant and important part of the *Penn Central* analysis in takings cases. For example, a recent case examining challenges to an emergency safety law put in effect after severe flooding began by noting that government actions that “‘adjust[] the benefits and burdens of economic life to promote the common good’ . . . rarely constitute a taking.”<sup>1469</sup>

Additionally, while regulations may impose economic burdens in many cases, this is actually a “quintessential example[]” of adjusting ‘the benefits and burdens of economic life to promote the common good’ by converting ‘public health burdens into economic burdens.’”<sup>1470</sup>

The lesson from this for floodplain management is that treating parcels differently based on their risk of flood losses is acceptable, particularly when integrated as part of a comprehensive, generally applicable governmental plan to address flood losses. Under such a regime, courts should conclude that the “character of the governmental action” is not in favor of finding a regulatory taking.

#### IV.B.5.d.iii. **Noxious Use and Nuisance**

One of the most difficult—and maybe even maddeningly inconsistent—facets of “character of the governmental action” comes in the form of how to evaluate a supposed noxious use/nuisance and the “harm versus benefit” distinction. Early U.S. Supreme Court jurisprudence on regulatory takings made extremely broad statements indicating that prohibitions of noxious uses or nuisances were not takings.<sup>1471</sup> The *Keystone* case noted that just five years after *Pennsylvania Coal Company vs. Mahon*,<sup>1472</sup> the *Miller v. Schoene*<sup>1473</sup> case indicated that the Court did not find the need to “weigh with nicety the question whether the infected cedars

in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases. Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account.”).

<sup>1469</sup> See, e.g. *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108\*, 45; 2005 WL 1645974 (July 5, 2005) (noting “average reciprocity of advantage” from regulations that prevented most all development on a 20-acre site but would contribute to a price premium for the single-family home that could be built); *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 992 (Dist. of Haw. 2021) (quoting *PCG-SP Venture I LLC v. Newsom*, 2020 U.S. Dist. LEXIS 137155, 2020 WL 4344631, at \*10 (C.D. Cal. June 23, 2020) and citing also *Mugler v. Kansas*, 123 U.S. 623, 668 (1887)). See also, *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 915 (S.C. 2015).

<sup>1470</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 992 (Dist. of Haw. 2021) (citing *PCG-SP Venture I*, 2020 U.S. Dist. LEXIS 137155, 2020 WL 4344631, at \*10).

<sup>1471</sup> See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

<sup>1472</sup> 260 US 393 (1922).

<sup>1473</sup> 276 U.S. 272 (1928).

constitute a nuisance according to common law; or whether they may be so declared by statute.”<sup>1474</sup> So, while a “nuisance” may not have been very clear, it seemed that once something was classified as a nuisance, its regulation would not be a taking.

However, the automatic finding of no taking for regulating a noxious use or nuisance and the related justifications of the harm/benefit distinction were thrown into question by *Lucas v. South Carolina Coastal Council*.<sup>1475</sup> In *Lucas*, the U.S. Supreme Court’s majority opinion dismissed the “noxious uses” language in past cases as merely a precursor to “the progenitor of our more contemporary statements that ‘land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’....”<sup>1476</sup> Furthermore, said the Court, the distinction between harm-preventing and benefit-conferring regulations is in the eye of the beholder, and since almost any regulation can be characterized as “harm-preventing” or “benefit-conferring,” the distinction boils down to “whether the legislature has a stupid staff.”<sup>1477</sup> However, taking such language from *Lucas* at face value would cause some serious problems. For example, it would stop the evolution of our notions of “nuisance” to only those that had already existed in the background principles of property law and nuisance.<sup>1478</sup> The harm-preventing versus benefit-conferring nature of a regulation is challenging to assess as to its current viability after the significant criticism of this distinction in *Lucas v. South Carolina Coastal Commission*.<sup>1479</sup>

*Lucas*’ criticism of the harm versus benefit distinction, read in isolation, might have been sufficient to eliminate noxious use and harm-preventing versus benefit-conferring language from analysis of the “character of the governmental action” had it not been for two things. First, the majority opinion did acknowledge that a “total taking” inquiry is different from typical regulatory takings inquiry under *Penn Central*<sup>1480</sup> and that even this “total taking” inquiry still included, “among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities, the social value of the claimant’s activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.”<sup>1481</sup> Second, Justice Kennedy’s concurrence in the judgement

---

<sup>1474</sup> *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 490 (1987).

<sup>1475</sup> 505 U.S. 1003 (1992).

<sup>1476</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023-24 (1992).

<sup>1477</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n. 12 (1992).

<sup>1478</sup> See, e.g. Lynda J. Oswald, The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis, 50 Vand. L. Rev. 1449, 1471 (1997).

<sup>1479</sup> See, e.g. John D. Echeverria, Making Sense of Penn Central, 23 UCLA J. Envtl. L. & Pol’y 171, 207-08 (2005).

<sup>1480</sup> Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1018, 1030 (1992).

<sup>1481</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (1992) (internal citations omitted).



advocated for consideration of the property owners “reasonable investment-backed expectations” (RIBE) as part of the analysis even in cases in which all economic value has been destroyed.<sup>1482</sup> While we understand that destruction of all economic value does not, in fact, require consideration of RIBE—or any other *Penn Central* factor—subsequent decisions applying the *Penn Central* factor of “nature of the governmental action” continue to demonstrate that courts consider the ideas of “harm prevention” even if couched in other terms. (See [Regulations Focused on Safety and Flooding](#) section below).

In support of the idea that “harm prevention” has remained part of the *Penn Central* analysis despite criticisms of it in *Lucas*, we can look to the 2009 case of *Rose Acre Farms, Inc. v. United States*.<sup>1483</sup> In *Rose Acre Farms*, the U.S. Department of Agriculture had imposed specific limitations on Rose Acre Farms’ egg sales due to testing revealing the presence of *salmonella* in some of Rose Acres’ laying hens.<sup>1484</sup> This forced Rose Acres to destroy laying hens, clean and sanitize layer facilities, and forced them for 25 months to sell eggs on a less lucrative market.<sup>1485</sup> The court carefully analyzed the character of the government action, especially in light of the then-new precedent of *Lingle v. Chevron*.<sup>1486</sup> As part of this, the court noted that *Lingle* no longer allowed any sort of evaluation of the appropriateness or effectiveness of a regulation to achieve its desired end since *Lingle* clearly established that that is a substantive due process analysis.<sup>1487</sup> Rather, the character of the governmental action required the court to “consider ‘the actual burden imposed on property rights, or how that burden is allocated.’”<sup>1488</sup> In addition, the court noted that the *character* of the governmental action also still focused on “the health and safety aspects” of this prong of *Penn Central*,<sup>1489</sup> going so far as to clearly state that “[t]here is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a Penn Central analysis.”<sup>1490</sup> In doing so, the court agreed that the character of the governmental action in protecting public health “weighs strongly” against a finding of a taking.<sup>1491</sup> This potentially means that “character of the governmental action” might not actually be a difficult test at all, and it may be the case that merely stating an important

---

<sup>1482</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034-36 (1992).

<sup>1483</sup> 559 F.3d 1260, 1264 (Fed. Cir. 2009).

<sup>1484</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1264 (Fed. Cir. 2009).

<sup>1485</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1264 (Fed. Cir. 2009).

<sup>1486</sup> 544 US 528 (2005).

<sup>1487</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1278-79 (Fed. Cir. 2009).

<sup>1488</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1278 (Fed. Cir. 2009) (citing *Lingle v. Chevron*, 544 U.S. 528, 543 (2005)).

<sup>1489</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1279 (Fed. Cir. 2009).

<sup>1490</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009) (citing *Apollo Fuels*, 381 F.3d at 1351 as “considering ‘government action designed to protect health and safety’ within the character prong of *Penn Central*”).

<sup>1491</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009).

public interest will automatically weigh the “character of the governmental action” in favor of the government action.<sup>1492</sup>

The *Lucas* case also narrowed the “nuisance” exception to regulatory takings by noting that a “nuisance” is not automatically created by legislative pronouncement unless that legislative pronouncement “do[es] no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”<sup>1493</sup> So, this does not eliminate nuisance as a basis for a finding of no taking, but it does make it more likely that an existing land use legislatively declared a nuisance and limiting what has previously been a common activity is more likely to be considered a taking than a nuisance based on “existing rules or understandings that stem from an independent source such as state law.”<sup>1494</sup> To avoid a successful takings claim, government should ensure that when it declares something a “nuisance,” the government provides ample evidence that the activity does have the characteristics of a nuisance and that the label “nuisance” is not simply being attached as a talisman to avoid a takings claim.

In summary, the *Lucas* criticism of the harm versus benefit distinction and the limiting of the nuisance exception have not in fact been as dramatic as Justice Scalia’s language in *Lucas* might indicate. While *Lucas* does put some guardrails on declaring *anything* a “nuisance” to avoid a takings claim, courts—and people—can understand that a nuisance as well as the distinction between a harm-preventing versus benefit-conferring regulation can be realistically assessed to some degree by community understandings.<sup>1495</sup> And as appreciation of the importance and danger of flooding continues to grow, regulations focused on limiting the harms of flooding will increasingly be understood by communities as “harm-preventing” measures.

#### IV.B.5.d.iv. Regulations Focused on Safety and Flooding

Another key aspect of the “character of the governmental action” evaluated in some cases relates directly back to the “harm-prevention” that was so criticized in *Lucas* but emphasized in

---

<sup>1492</sup> See, e.g. Michael Lewyn, *Character Counts: The “Character of the Government Action” in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 633-34 (2010) (discussing the case of *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447 (Fed. Cl. 2009)).

<sup>1493</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

<sup>1494</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-31 (1992).

<sup>1495</sup> Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1479-81 (1997) (discussing writings of Epstein, Ellickson, and Freyfogle that present “ordinary causation, ordinary speech, normal behavior, or the community’s sense of value” as providing a “rough-and-ready analytical tool” for resolving takings issues involving the harm versus benefit distinction or benefit-conferring versus harm-preventing aspect of the character of the governmental action).

*Rose Acre Farms*: a focus on safety and public health, and, by extension of these, the nature of the land at issue and the proposed use that has been curtailed.

Prior to the holding of *Lucas*, another U.S. Supreme Court case had discussed the importance of considering the specifics of land and public health and safety when conducting a *Penn Central* analysis. In *Keystone Bituminous Coal Assoc. v. DeBenedictis*,<sup>1496</sup> the court was confronted with facts very similar to those of the seminal case through which the U.S. Supreme Court minted the regulatory taking cause of action under the Fifth Amendment: *Pennsylvania Coal v. Mahon*.<sup>1497</sup> Both cases challenged as a taking a state law that limited the amount of coal that could be mined in order to avoid settling of the overlying land. However, in *Keystone Bituminous Coal*, the Court said that “the character of the governmental action involved here leans heavily against finding a taking” due to the broader public interest being served.<sup>1498</sup> The distinction between *Keystone* and *Mahon* depended primarily on two points: 1) *Keystone* was a facial challenge that focused on the public interest and thus represented a valid exercise of the police power whereas *Mahon* focused on individual property rights being altered to favor one property owner over another and not generally on the public interest, 2) there were no clear findings in *Keystone* that it was no longer possible to profitably mine coal. The first distinction demonstrates the importance of the “nature of the governmental action.”

But did the *Lucas* case undermine this? It appears not; a number of other court decisions around the country since *Lucas* have continued to integrate evaluation of public safety, public health, and the impacts of proposed activities based on the particulars of a specific parcel of land.

For example, in *Flint v. County of Kauai*,<sup>1499</sup> the court provided extensive discussion of the “character of the government action” in *Penn Central* to find no taking (even temporary) for emergency order protections. *Flint* represents the idea that the “character of the governmental action” particularly cuts against claimants and for the government when the government is exercising its regulatory authority to protect public safety and/or during emergencies.<sup>1500</sup> In *Flint v. County of Kauai*, a county government in Hawai’i had issued emergency orders that limited access to an area that had been ravaged by rain that caused flooding, landslides, and sinkholes and left the region disconnected from land access due to more than 20 areas of damage to the only access road.<sup>1501</sup> The emergency order only allowed access by emergency workers, road crews, and residents but forbid entry to tourists.<sup>1502</sup> These limitations led to the lawsuit of the

---

<sup>1496</sup> 480 U.S. 470 (1987).

<sup>1497</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>1498</sup> *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 485 (1987).

<sup>1499</sup> 2521 F. Supp. 3d 978 (Dist. of Haw. 2021).

<sup>1500</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 992-993 (Dist. of Haw. 2021).

<sup>1501</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 984-86 (Dist. of Haw. 2021).

<sup>1502</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 985 (Dist. of Haw. 2021).

Flints, who owned a non-conforming use rental property that they were unable to rent during the almost one year during which the emergency orders were in effect.<sup>1503</sup> The court analyzed the takings claim under the three *Penn Central* factors and found that none of the factors favored the claimants.<sup>1504</sup> As part of this, the court gave an extended analysis of the governmental action. This analysis began by noting that government actions that “adjust[] the benefits and burdens of economic life to promote the common good” . . . rarely constitute a taking.”<sup>1505</sup> The analysis also emphasized the emergency orders were focused on protecting emergency workers and the public’s safety and welfare.<sup>1506</sup> The court likened this to the many COVID-19 restrictions on businesses and noted that such protections represented “quintessential examples”<sup>1507</sup> of regulations “adjusting the benefits and burdens of economic life to promote the common good.”<sup>1508</sup> Such efforts to protect public health and safety, noted the court, entitle the state to limit access to property in order to protect the public.<sup>1509</sup> Thus, while floodplain management regulations generally are not “emergency” regulations, the *Flint* case still emphasizes and teaches that courts give wide latitude to government entity regulations of property when such regulations respond directly to a need to “prioritize the health and safety of residents and emergency workers over [a] desire to rent [] property.”<sup>1510</sup> Again, while this was specifically about the assumed<sup>1511</sup> right of the property owners to rent their property, the focus on protecting health and safety of both the public and emergency workers definitely applies to floodplain management and should *always* be referenced as the main motivating factor in floodplain management regulations.

Another example of the continued importance of the public health and safety purposes informing evaluation of the nature of the governmental action came in a 2015 case, which is more focused on floodplain management. In *Columbia Venture, LLC v. Richland County*,<sup>1512</sup> the South Carolina Supreme Court reviewed a decision finding no taking when a developer’s plans

---

<sup>1503</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 986 (Dist. of Haw. 2021).

<sup>1504</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 993 (Dist. of Haw. 2021).

<sup>1505</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 992 (Dist. of Haw. 2021) (quoting *PCG-SP Venture I LLC v. Newsom*, 2020 U.S. Dist. LEXIS 137155, 2020 WL 4344631, at \*10 (C.D. Cal. June 23, 2020) and citing also *Mugler v. Kansas*, 123 U.S. 623, 668 (1887)).

<sup>1506</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 992-93 (Dist. of Haw. 2021).

<sup>1507</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 992 (Dist. of Haw. 2021).

<sup>1508</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 992 (Dist. of Haw. 2021).

<sup>1509</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 992-93 (Dist. of Haw. 2021) (citing numerous cases finding no taking due to restrictions due to regulations to minimize the spread of COVID-19).

<sup>1510</sup> *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 923 (Dist. of Haw. 2021).

<sup>1511</sup> The case noted that it was not deciding, but it would assume for the sake of argument, that a non-conforming rental use was a “property right” according to Hawai’i state law, though this was most certainly not clear in the case. *Flint v. Cty. of Kauai*, 2521 F. Supp. 3d 978, 988 (Dist. of Haw. 2021).

<sup>1512</sup> 776 S.E.2d 900 (S.C. 2015) ), reh’g denied (Oct. 9, 2015), cert. denied, 136 S. Ct. 1458 (2016).

were frustrated by floodplain regulations. The *Columbia Venture* case arose when a developer that had purchased a large tract of land along a river with the intent to develop it was frustrated in that attempt by local regulations that were stricter than FEMA's minimum requirements for participation in the National Flood Insurance Program.<sup>1513</sup> In denying that the county regulations that stopped development plans were a taking, the trial court emphasized two things: First, the developer's "reasonable investment-backed expectations" were not, in fact, reasonable at all.<sup>1514</sup> Second, "the County's pre-existing floodplain regulations and floodplain management regulations served an important purpose of flood protection."<sup>1515</sup> The South Carolina Supreme Court agreed.<sup>1516</sup>

In its review of the case, the South Carolina Supreme Court noted that the challenge was evaluated under the *Penn Central* analysis.<sup>1517</sup> As part of this, the South Carolina Supreme Court dedicated almost two pages to examination of the "character of the governmental action" in the case.<sup>1518</sup> Citing the U.S. Supreme Court's decision in *Lingle*, the *Columbia Venture* court noted that character of the governmental action included evaluation of "'the magnitude or character of the burden a particular regulation imposes upon private property rights' and 'how any regulatory burden is distributed among property owners.'"<sup>1519</sup> In finding that the character of the governmental action was in strongly in favor of the county, the court emphasized the "important public purposes of mitigating the social and economic costs of flooding that are served by the County's ordinances."<sup>1520</sup> It also highlighted the "safety-enhancing character of the government action" of regulating the floodway.<sup>1521</sup>

Many other court decisions, before and after *Columbia Venture* and *Flint v. Cty. of Kauai* have similarly emphasized the importance of public health and safety, floodplain management, and mitigation of flood risk when evaluating the "nature of the governmental action" in the *Penn Central* analysis.<sup>1522</sup> Even the U.S. Supreme Court itself has acknowledged the on-going

---

<sup>1513</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 904-05 (S.C. 2015). Specifically, Richland County's ordinances required that, to remove land from the regulatory floodway or floodplain, a certified levee had to protect the land from a 500-year flood (0.2% annual chance flood) and 3 feet of "freeboard." *Id.* at 905.

<sup>1514</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 909-10 (S.C. 2015).

<sup>1515</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 910 (S.C. 2015).

<sup>1516</sup> *Id.* at 910 and 913.

<sup>1517</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 913 (S.C. 2015).

<sup>1518</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 915-17 (S.C. 2015).

<sup>1519</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 915 (S.C. 2015).

<sup>1520</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 915 (S.C. 2015).

<sup>1521</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 904 (S.C. 2015).

<sup>1522</sup> On the importance of floodplain regulations, *see, e.g.* *First English v. Los Angeles*, 210 Cal. App. 3d 1353, 1370 (1989) ("Preventing loss of life and property due to flooding or other natural hazards

importance of the “character of the governmental action” after *Lucas v. South Carolina Cstl. Com’n*: “The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis.”<sup>1523</sup>

The nature of the land at issue can impact analysis of the governmental action prong of the *Penn Central* analysis. A proposed land use that might be a nuisance or cause safety concerns on one parcel but not on another is relevant to determination of the character of the governmental action. This rings true, for example, for regulations protecting wetlands.<sup>1524</sup>

### IV.B.5.e. State of “Nature of the Governmental Action” Today

After the U.S. Supreme Court’s decision in *Lingle v. Chevron*,<sup>1525</sup> some scholars have again seemed to prematurely assert the downfall of the “character of governmental action” prong of the *Penn Central* analysis,<sup>1526</sup> but this is belied by subsequent case law.<sup>1527</sup>

---

carries more weight than protecting aesthetic values.”); *Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865, 875 (Mass. S. Ct. 2005) (“We add that ‘the character of the governmental action’ here is the type of limited protection against harmful private land use that routinely has withstood allegations of regulatory takings” (internal citations omitted)). For general health and safety regulations, *see, e.g.*, *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, (Fed. Cir. 2009) (finding no taking in large part because the nature of the governmental action—protection of public health—was so strongly in favor of the government, even though the reasonable investment-backed expectations might have supported a finding of a taking).

<sup>1523</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (citing *Penn Central v. City of New York*, 438 U.S. 104, 127).

<sup>1524</sup> *See, e.g.*, *Brace v. United States*, 72 Fed. Cl. 337, 339, 366 (2006) (holding that wetlands regulations did not constitute a regulatory taking. The court stated that in evaluating the character of the governmental action, the court must consider “the purpose and importance of the public interest underlying [the] regulatory imposition” which includes examining the act’s social value and location. *Id.* at 355. The court reasoned that the preservation of ecologically significant areas outweighed the effects produced by the regulation. *See, id.* at 356 (focusing on the extreme importance of the regulations in upholding the regulations).); *Smith v. Town of Mendon*, 822 N.E. 2d. 1214 (2004).

<sup>1525</sup> 544 US 528 (2005).

<sup>1526</sup> *See, e.g.*, Michael Lewyn, *Character Counts: The “Character of the Government Action” in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 598-99 (2010) (citing sources).

<sup>1527</sup> *See, e.g.*, *Rose Acre Farms v. U.S.*, 559 F.3d 1260, 1276-82 (Fed. Cir. 2009). *See also* Michael Lewyn, *Character Counts: The “Character of the Government Action” in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 607-09 (2010) (listing and discussing cases applying the “character of the governmental action” prong of *Penn Central* prior to *Lingle*); *id.* at 619-23 (discussing continued viability of the “private harm/public interest” inquiry under the “character of the governmental action” prong).



For example, as noted above, in *Rose Acre Farms, Inc. v. United States*,<sup>1528</sup> the U.S. Department of Agriculture had imposed specific limitations on Rose Acre Farms' egg sales due to testing revealing the presence of *salmonella* in some of Rose Acres' laying hens.<sup>1529</sup> The court carefully analyzed the character of the government action, especially in light of the then-relatively new precedent of *Lingle v. Chevron*.<sup>1530</sup> As part of this, the court noted that *Lingle* no longer allowed any sort of evaluation of the appropriateness or effectiveness of a regulation to achieve its desired end since *Lingle* clearly established that that is a substantive due process analysis.<sup>1531</sup> Rather, the character of the governmental action required the court to "consider 'the actual burden imposed on property rights, or how that burden is allocated.'"<sup>1532</sup> In addition, the court noted that the *character* of the government action also still focused on "the health and safety aspects" of this prong of *Penn Central*.<sup>1533</sup> The *Rose Acres* court clearly stated that "[t]here is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a *Penn Central* analysis."<sup>1534</sup>

And while some might argue that the analysis in *Rose Acre Farms* by the Federal Circuit Court of Appeals is not enough to offset the criticism in *Lucas* of talking about "harm prevention," 20 years after *Lucas*, the U.S. Supreme Court specifically noted that the character of the land at issue remains a relevant topic of examination when seeking to determine whether a taking has occurred.<sup>1535</sup>

Much criticism has been leveled at facets of "character of the governmental action." For instance, is it so broad that merely stating an important public interest will automatically weigh the "character of the governmental action" in favor of the government action?<sup>1536</sup> Similarly, might the facet of "average reciprocity of advantage" really be less of a guidepost in evaluating

<sup>1528</sup> 559 F.3d 1260, (Fed. Cir. 2009).

<sup>1529</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1264 (Fed. Cir. 2009).

<sup>1530</sup> *Lingle v. Chevron*, 544 US 528 (2005).

<sup>1531</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1278-79 (Fed. Cir. 2009).

<sup>1532</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1278 (Fed. Cir. 2009) (citing *Lingle v. Chevron*, 544 U.S. 528, 543 (2005)).

<sup>1533</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1279 (Fed. Cir. 2009).

<sup>1534</sup> *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009) (citing *Apollo Fuels*, 381 F.3d at 1351 as "considering 'government action designed to protect health and safety' within the character prong of *Penn Central*").

<sup>1535</sup> *Arkansas Game and Fish Comm'n*, 568 U. S. 23, 39 (2012).

<sup>1536</sup> See, e.g. Michael Lewyn, *Character Counts: The "Character of the Government Action" in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 633-34 (2010) (discussing the case of *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447 (Fed. Cl. 2009)).

whether a taking occurred or just a *post hoc* rationalization for why a court ruled there was not taking? Or can almost anything qualify as “average reciprocity of advantage”?<sup>1537</sup>

While such cynical views may have some arguments to support them—after all, most takings challenges under the *Penn Central* standard indeed fail—it is hard to avoid the common sense notion that the government should have extensive power to regulate land uses to avoid harm to public health and safety, protect important environmental resources, and prevent property owners from externalizing the costs of their land uses onto others, especially the taxpayer. In fact, ever-increasing flood losses and the challenges of climate change and sea-level rise even support an argument that we are already not doing enough protection, and that we need a takings test that carefully examines “the harms *effected* by a particular regulation” as well as giving “great weight to the harms *avoided* by the regulation, or in other words, the purposes served by the regulation.”<sup>1538</sup>

Evaluation of the “nature of the governmental action” indicates that courts have been doing this. And our ever-increasing flood losses indicate the need for local governments to understand that courts will usually *not* find a taking for well-designed, broadly applicable floodplain management regulations that form part of a comprehensive program to address flooding. In fact, many courts around the country, when evaluating takings challenges to regulations related to flooding, have emphasized that the extreme importance of addressing flooding creates a high bar to finding a takings under the *Penn Central* analysis. And much of this concern about the importance of the governmental action comes in through consideration of the nature of the governmental action.

### IV.B.5.f. Summary of the Penn Central Test

In summary, the “character of the governmental action” has a long history, even predating its inclusion in the seminal *Penn Central* case. The importance and scope of the character of the governmental action was thrown into question, according to some, by the U.S. Supreme Court’s decision in *Lucas v. South Carolina Coastal Commission* and then again by the *Lingle v. Chevron*. However, subsequent U.S. Supreme Court cases and numerous federal cases have demonstrated the continued importance and robustness of the “character of the governmental action” as the third prong of the *Penn Central* test. The “character of the governmental action,” like the other

---

<sup>1537</sup> See, e.g. *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108\*, 45; 2005 WL 1645974 (July 5, 2005) (noting “average reciprocity of advantage” from regulations that prevented most all development on a 20-acre site but would contribute to a price premium for the single-family home that could be built).

<sup>1538</sup> Devon Applegate, *The Intersection of the Takings Clause and Rising Sea Levels: Justice O’Connor’s Concurrence in Palazzolo Could Prevent Climate Change Chaos*, 43 B.C. ENV’T L. AFF. L. REV. 511, 512 (2016).

two prongs of the *Penn Central* analysis, can itself be the deciding factor in not finding a taking in any given case depending on the facts of the case.<sup>1539</sup>

Additionally, the character of the governmental action has the potential to aid in promoting better floodplain management by minimizing the risk of *successful* takings claims when government entities design broadly applicable floodplain management regulations of property as part of a comprehensive plan of action to protect human health and safety from flooding.

## IV.B.6. Temporary Takings

---

In early takings law, when cases typically involved some sort of physical occupation or severe burden on access, time was less often a factor that was discussed. However, as takings law has evolved and grown, whether a taking is permanent or temporary has arisen more and more frequently. Now that the potential for temporary takings is an accepted part of takings law, it is important because “[u]nlike permanent physical takings, . . . temporary invasions 'are subject to a more complex balancing process to determine whether they are a taking.'”<sup>1540</sup>

In early Supreme Court precedent on takings by virtue of flooding, cases stated that the invading flooding must be a “permanent” invasion of floodwaters as when there is a “permanent condition of continual overflow” or “a permanent liability to intermittent but inevitably recurring overflows.”<sup>1541</sup>

In the context of land use regulations, it became clear in 1987 that a temporary taking could occur. In the case of *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>1542</sup> a storm dumped several inches of rain and flooded the plaintiff's property, and many buildings on certain portions of the plaintiff's camp were destroyed.<sup>1543</sup> The County Flood Control District passed a regulatory interim ordinance temporarily prohibiting any building or rebuilding in the

---

<sup>1539</sup> Compare, e.g. *Pennsylvania Coal v. Mahon*, 260 US 393 (1922) with *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987) (finding no taking on facts similar to those in *Pennsylvania Coal v. Mahon* since in *Keystone* the “character of the government action” is different because a broader public interest is being served rather than the primarily private interests in *Pennsylvania Coal v. Mahon*).

<sup>1540</sup> *Arkansas Game & Fish Com'n v. U.S.*, 736 F.3d 1364, 1369 (Fed. Cir. 2013) (quoting *Arkansas Game & Fish Com'n v. U.S.*, 568 U.S. 23, 36 (2012)).

<sup>1541</sup> *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) (noting that “where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.”). *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884). *United States v. Lynah*, 188 U.S. 445 (1903). *United States v. Cress*, 243 U.S. 316, 328 (1917).

<sup>1542</sup> 482 U.S. 304 (1987).

<sup>1543</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 307 (1987).

floodplain flooded until studies were performed on any likelihood of reoccurrence.<sup>1544</sup> The California courts, following California precedent, threw out a complaint against the regulation because California precedent said that no damages were available for a taking until a regulation had been found excessive via an action in mandamus or a declaratory judgement<sup>1545</sup> and that no damages are available for a temporary taking.<sup>1546</sup> In part, the hesitancy of courts to find a taking for temporary impacts to land was premised on the idea that imposing financial liability on government *prior* to any offending regulation being challenged and found a taking could limit the ability of government to decide whether or not to abandon or make exceptions to a regulation rather than being forced to pay compensation for the taking declared by the court.<sup>1547</sup>

Nonetheless, the U.S. Supreme Court in *First English* then went on to decide that where a taking has occurred, subsequent withdrawal of the regulation that caused the taking does not “relieve [government] of the duty to provide compensation for the period during which the taking was effective.”<sup>1548</sup> While *First English* established that a regulatory taking could be temporary and require compensation, the case focused on a regulatory taking and did not address when the claimed taking was due to physical invasion by flooding. Did the flooding really need to be permanent or inevitably recurring? In addition, while *First English* determined that a temporary taking *could* exist, it did not decide that the regulations in question were indeed a taking; instead, the U.S. Supreme Court remanded the case to consider whether a taking had occurred. After remand from the Supreme Court’s decision in *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>1549</sup> the court in *First English Evangelical Church of Glendale v. County of Los Angeles* found no taking,<sup>1550</sup> and the U.S. Supreme Court declined review of that decision.<sup>1551</sup> In fact, the court on remand resoundingly reaffirmed the authority of the government to enact regulations for the protection of human life and safety, noting that in such cases, the police power is at its strongest and least subject to a finding of a taking.<sup>1552</sup> In fact, the

---

<sup>1544</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 307 (1987).

<sup>1545</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 308-09 (1987).

<sup>1546</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311-12 (1987).

<sup>1547</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317 (1987).

<sup>1548</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

<sup>1549</sup> 482 U.S. 304 (1987).

<sup>1550</sup> 210 Cal. App. 3d 1353 (Ca. 2d Dist. Ct. App.1989).

<sup>1551</sup> 493 U.S. 1056 (1990).

<sup>1552</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1366 (Ca. 2d Dist. Ct. App.1989) (noting that “it makes perfect sense to deny compensation for the denial of “all uses” where health and safety are at stake but require compensation for the denial of ‘all uses’ where the land use regulation advances lesser public purposes. Indeed, it would be extraordinary to

U.S. Supreme Court cited approvingly language from *First English* noting that even temporary elimination of all use is not necessarily a temporary taking when “denial of all use [is] insulated as a part of the State's authority to enact safety regulations.”<sup>1553</sup>

In 2002, the U.S. Supreme Court again confronted the issue of a temporary taking. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,<sup>1554</sup> the Court had to consider whether a 32-month moratorium on development, to create a comprehensive plan to address the ecological damage occurring in Lake Tahoe due to development around the lake, constituted a per se, temporary taking.<sup>1555</sup> This is an important point: *Tahoe-Sierra Preservation Council* only addressed whether a development moratorium was a per se temporary taking under the holding in *Lucas*, **not** whether it was a temporary taking under the test in *Penn Central*.<sup>1556</sup> The Court stated that an effort by the plaintiffs in *Tahoe-Sierra* to claim a per se—or total—taking of the time during which the moratorium was in place was nothing more than a violation of the “parcel-as-a-whole rule.”<sup>1557</sup> In addition, the Court held that the correct legal standard to apply when evaluating a takings claim based on a moratorium is the *Penn Central* test.<sup>1558</sup> Subsequent court decisions have, therefore, applied the *Penn Central* test when confronted with questions of temporary takings.<sup>1559</sup> Courts have also concluded that a temporary taking does not often result from temporary emergency orders necessary to protect human life and safety.<sup>1560</sup>

---

construe the Constitution to require a government to compensate private landowners because it denied them ‘the right’ to use property which cannot be used without risking injury and death.”).

<sup>1553</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 329 (2002) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 313 (1987)).

<sup>1554</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

<sup>1555</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306 (2002).

<sup>1556</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 317-18 (2002).

<sup>1557</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 318-21, 326-27, 33--32 (2002).

<sup>1558</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-27, 329-31, 334, 342 (2002).

<sup>1559</sup> *See, e.g., Reoforce, Inc. v. United States*, 853 F.3d 1249, 1266- (Fed. Cir. 2017) (temporary takings analysis conducted under the *Penn Central* test if not a per se taking).

<sup>1560</sup> *Flint v. Cty. of Kauai*, 2021 U.S. Dist. LEXIS 31574 (discussing the “character of the government action” aspect in *Penn Central* and finding no taking—even temporary—for emergency order protections).

The issue of whether a temporary taking could occur due to *non-permanent flooding* reached the U.S. Supreme Court in the case of *Arkansas Game & Fish Commission*.<sup>1561</sup> In *Arkansas Game & Fish Commission*, the Court found that takings liability may still attach for flooding, even if that flooding is neither permanent nor inevitably recurring.<sup>1562</sup> Determination of whether temporary flooding impacts rise to the level of a taking is determined by a four-part test: 1) the amount of time involved, 2) the “degree to which the invasion is the intended or foreseeable result of authorized government action”, 3) the character of the land at issue and the reasonable investment-backed expectations of the owner, and 4) the severity of the interference.<sup>1563</sup> Of these factors, the Court treated in some depth the issue of the foreseeability of the harm that the temporary flooding caused.<sup>1564</sup>

Regardless of whether the claimed taking is by physical invasion, such as of floodwaters, or regulatory, the dividing line between a temporary and physical taking is not very clear. It has been said that temporary “refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential.”<sup>1565</sup> Permanent taking “refers to those governmental activities more substantial in nature,” though they need not be “exclusive, or continuous and uninterrupted.”<sup>1566</sup>

### **IV.B.6.a. Recommendations and Lessons for Floodplain Managers**

Temporary takings may occur, but they are not very common. Local governments have the ability to use development moratoria as a stop-gap measure during development of planning and zoning tools to address the dangers of flooding. Provided that there is no undue or terribly unreasonable delay in the planning or zoning being finalized and the moratorium lifted, courts are very likely to find the importance of good decision-making a key aspect of the “character of the government action” that militates towards a finding of no taking.

Another lesson from this section and a recommendation: Do not risk a takings claim with a permanent ordinance/regulation with the hope that, if it is found to be a taking, you will simply

---

<sup>1561</sup> 568 U. S. 23 (2012).

<sup>1562</sup> *Arkansas Game and Fish Commission v. United States*, 568 U. S. 23, 27, 34 (2012).

<sup>1563</sup> *Arkansas Game and Fish Com’n*, 568 U.S. 23, 38-39 (2012). *See also*, *Ark. Game & Fish Comm’n v. United States*, 736 F.3d 1364, 1370 (Fed. Cir. 2013). *See also* *Bartolf v. Jackson Twp. Bd. of Educ.*, 2018 N.J. Super. Unpub. LEXIS 2361, \*5-\*6 (N.J. Super. 2018).

<sup>1564</sup> *Arkansas Game and Fish Com’n*, 568 U.S. 23, 38-39 (2012) (noting that a taking would not occur if the flooding could not have been foreseen).

<sup>1565</sup> *In re Upstream Addicks & Barker (Tex.) Flood-Control Reservoirs*, 146 Fed. Cl. 219, 247 (Fed. Cl. 2019).

<sup>1566</sup> *Id.*



rescind the ordinance/regulation; once a taking has occurred, you will have to pay for the taking, even if it was only temporary. In addition, the mere cost of defending a takings lawsuit can be a major strain on a local government, especially for smaller local governments with limited budget resources.

### IV.B.7. Damages for a Taking and Addressing Excessive Claims

---

"A strong public desire to improve the public condition [does not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."<sup>1567</sup> Holding the government accountable is important in takings cases to protect property rights, preserve freedom, and "empower persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."<sup>1568</sup> These quotes from the U.S. Supreme Court make clear that compensation must be paid when a taking, whether by eminent domain or inverse condemnation, occurs.<sup>1569</sup> And that compensation must be "just,"<sup>1570</sup> but compensation need not be paid *prior* to the taking.<sup>1571</sup>

---

<sup>1567</sup> Dolan at 396 citing Penn Coal at 416.

<sup>1568</sup> Cedar Point at 2071 citing Murr at 1943. *But see*, Erwin Chemerinsky, Constitutional Law: Principles and Policies 472 (Aspen Law & Business 1997) (citing Charles Beard, An Economic Interpretation of the Constitution (1913) for this argument and also citing contrary analyses).

<sup>1569</sup> When the government extinguishes property rights through physical invasion for any purpose and a per se taking is found, the Takings Clause mandates the payment of just compensation to the landowner. Cedar Point at 2075 (citing *Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002); *see also* Cedar point at 2076 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

<sup>1570</sup> "[I]f the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

<sup>1571</sup> *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 n.14 (1985) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)).

Before addressing compensation and excessive claims in more detail, it merits mentioning that there is a relationship between damages and whether a taking is found. For more on this, see the [A “Taking” and the Requirement of Government Action](#) section.

It is important to note that damages and compensation are not the same thing in takings law. Damages denote the harm suffered by the property owner, whereas compensation is what the government owes the property owner if a taking occurred. “However, the formula for computing the correct amount of compensation in the event of a taking is not the same as the antecedent determination of whether or not a taking has been proven.”<sup>1572</sup> One critique of the “just compensation” requirement is that it provides higher compensation to the wealthy and less to the poor,<sup>1573</sup> not only because of land values but also due to a frequent lack of legal representation on the part of poorer property owners whose land has been taken.

According to the Fifth Amendment’s text and previous precedent, compensation is the only remedy for a taking by the Fifth Amendment. An injunction to stop a taking was not historically part of the Fifth Amendment’s protections.<sup>1574</sup> However, the case of *Cedar Point Nursery v. Hassid*<sup>1575</sup> noted that plaintiffs were seeking an injunction as a remedy for the alleged taking.<sup>1576</sup> The lower courts denied this motion, but after the U.S. Supreme Court granted review, it reversed the lower courts’ rulings and remanded the case, but without mentioning the issue of whether an injunction should be a permissible remedy.<sup>1577</sup> As of this writing, the Ninth Circuit Court of Appeals had, in line with the Supreme Court’s remand, reversed the district court’s dismissal of the Fifth and Fourteenth Amendment claims of *Cedar Point Nursery* but did not mention the issue of compensation or injunction as a remedy.<sup>1578</sup> While the district court has not issued an opinion in the case as of this date, the district court will need to address the issue of a

---

<sup>1572</sup> *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108\*, 39-40; 2005 WL 1645974 (July 5, 2005) (citing *Tahoe-Sierra Pres. Council*, 535 U.S. at 318-19 (contrasting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987) with *Lucas*)).

<sup>1573</sup> See, e.g., Maye C. Emlein, *Rising to the Challenge: Managed Retreat and the Taking Clause in Maine's Climate Change Era*, 73 MAINE L. REV. 169, 196 (2021).

<sup>1574</sup> *Knick v. Township of Scott*, 588 U. S. \_\_\_, \_\_\_, 139 S. Ct. 2162, 2179 (2019) (“As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed.”) The *Knick* court also stated that, “Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government’s action effecting a taking.” *Id.* at 2177-78.

<sup>1575</sup> 141 S. Ct. 2063 (2021).

<sup>1576</sup> *Cedar Point Nursery*, 141 S. Ct. 2063, 2070 (2021).

<sup>1577</sup> *Cedar Point Nursery*, 141 S. Ct. 2063, 2080 (2021).

<sup>1578</sup> *Cedar Point Nursery v. Hassid*, 5 F.4th 1098, 1098-99 (9<sup>th</sup> Cir. 2021).

remedy, which was noted by the dissent in the Supreme Court's case.<sup>1579</sup> However, at least one court has interpreted the U.S. Supreme Court's decision in *Cedar Point Nursery* to allow an injunction as a remedy for a Fifth Amendment takings claim before the taking has occurred.<sup>1580</sup>

### IV.B.7.a. What Was Taken

While the legislative branch of government has the authority to decide what property needs to be "taken" for public purposes, once it accomplishes this taking, it cannot determine compensation in its own case; rather, determination of compensation is the exclusive domain of the judiciary.<sup>1581</sup>

While simple in theory, in addition to complications about *what* exactly has been taken, many cases have had to confront *how to value* what has been taken. Since the value of the alleged taking is part of the analysis of *whether* a taking occurred, cases sometimes expend great effort on valuing the possible taking before concluding that a taking did not occur.<sup>1582</sup> This valuation is critical as it helps determine what "just compensation" is due.<sup>1583</sup> And the value of what was taken also changes depending on *when* the taking occurred, so determining a specific date often forms an important part of the compensation issue. Finally, plaintiffs claiming a taking sometimes assert what might be deemed excessive sums for a claimed taking; standards set by courts usually serve reasonably well to provide limits to such excessive claims. We begin by discussing how to determine what has been taken.

Often what has been taken is clear. In the flooding and floodplain management context, this often includes flooding of land or limitations on property development to avoid or lessen

---

<sup>1579</sup> *Cedar Point Nursery*, 141 S. Ct. 2063, 2089 (2021).

<sup>1580</sup> *Barber v. Charter Twp. of Springfield*, 31 F.4th 382, 388-89 (6<sup>th</sup> Cir. 2022) ("the Supreme Court made clear, plaintiffs may sue for injunctive relief even before a physical taking has happened. *Cedar Point Nursery*, 141 S. Ct. at 2070, 2072-73.").

<sup>1581</sup> *Monongahela*, 148 U.S. 312, 327 (1893). *U.S. v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923).

<sup>1582</sup> *See, e.g., Rose Acre Farms v. U.S.*, 559 F.3d 1260, 1267-75 (Fed. Cir. 2009) (evaluating the damages or "economic impact of the regulations" as part of a takings claim evaluation under the *Penn Central* analysis).

<sup>1583</sup> The value of what was taken may not be the same as the compensation ordered by a court as some offsets may occur.

potential flood damage. Plaintiffs must adequately plead *what* was taken to survive a motion to dismiss and then prove the taking factually at trial.<sup>1584</sup>

The requirement to pay “just compensation” for regulatory takings can, in some instances, make regulations prohibitively expensive if the regulations are deemed a taking.<sup>1585</sup> This difficult calculus can make courts reluctant to find a taking in an effort to prevent generally undermining the feasibility of regulation.<sup>1586</sup> However, were it possible to consider a “taking” as requiring something less than the full market value of what was taken—what one scholar has termed “equitable compensation”—the all-or-nothing nature of takings law might be softened.<sup>1587</sup> To a limited degree, this occurs in cases in which courts offset direct benefits to the property from the government taking.<sup>1588</sup> For example, in the case of *Borough of Harvey Cedars v. Karan*,<sup>1589</sup> the court reversed lower courts and remanded for a new trial because the trial court had not allowed the government to present evidence of benefit of the alleged “taking” on the remaining property.<sup>1590</sup> The court in *Borough of Harvey Cedars* engaged in a long, careful, historical evaluation of New Jersey law addressing the issue of whether and how benefits to property might be included in the calculation of just compensation.<sup>1591</sup> The court concluded that the justification for the historic test of a “special benefit,” which could serve as an offset for

---

<sup>1584</sup> *Barber v. Charter Twnshp. Of Springfield*, 31 F.4<sup>th</sup> 382 (2022) (majority finding a pleading sufficient to grant standing while dissent argued that the claims of harm were too vague, speculative, and contradictory).

<sup>1585</sup> Brian Angelo Lee, “*Equitable Compensation*” as “*Just Compensation*” for Takings, 10 PROP. RTS. J. 315, 346-47 (2021) (citing to *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978) (noting that a finding of a taking in the case would invalidate New York City’s historic preservation law as well as similar laws around the country)).

<sup>1586</sup> *Cf.*, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017); *Lingle*, 544 U. S. 528, 538 (2005); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U. S. 302, 335 (2002); *Dolan v. City of Tigard*, 512 U. S. 374, 384-385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1018 (1992).

<sup>1587</sup> Brian Angelo Lee, “*Equitable Compensation*” as “*Just Compensation*” for Takings, 10 PROP. RTS. J. 315, 317-20 (2021).

<sup>1588</sup> *See, e.g.*, Brittany Harrison, *The Compensation Conundrum in Partial Takings Cases and the Consequences of Borough of Harvey Cedars*, 2015 CARDOZO L. REV. DE NOVO 31 (2015). *Cf. also*, *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 728 (1997) (noting that the court specifically did *not* decide whether the alleged value of transfer of development rights (TDRs) are considered as part of the takings analysis or part of the just compensation evaluation).

<sup>1589</sup> 214 N.J. 384, 388-89 (N.J. 2013).

<sup>1590</sup> *Borough of Harvey Cedars v. Karan*, 214 N.J. 384, 388-89 (N.J. 2013).

<sup>1591</sup> *Borough of Harvey Cedars v. Karan*, 214 N.J. 384, 403-16 (N.J. 2013).

compensation, versus a “general benefit,” which could not be used as an offset, was no longer justified.<sup>1592</sup>

As the Fifth Amendment only requires compensation for a taking, what happens when a court finds a constitutional violation of the Fifth Amendment even though no property was ever taken? This is the scenario presented by *Koontz v. St. Johns River Water Management District*.<sup>1593</sup> In *Koontz*, the U.S. Supreme Court explicitly noted that nothing had ever been “taken” from Koontz.<sup>1594</sup> Nonetheless, the U.S. Supreme Court found a taking due to the “burden” on the Fifth Amendment’s Constitutional right to not have property taken without just compensation.<sup>1595</sup> Thus arose the topsy-turvy world in which courts can find a violation of the Fifth Amendment’s Takings Clause in a case where no property was taken,<sup>1596</sup> and courts award damages for a taking even though no property was ever taken.<sup>1597</sup>

### IV.B.7.b. How to Value What Has Been Taken

Once a taking is established, courts must look into the details to determine the extent of the loss and how much compensation shall be paid.<sup>1598</sup> “The State and the plaintiff are unlikely to see

---

<sup>1592</sup> *Borough of Harvey Cedars v. Karan*, 214 N.J. 384, 389 (N.J. 2013). (noting that just compensation should include “consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property. In a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a pay out that disregards the home’s enhanced value resulting from a public project. To calculate that loss, we must look to the difference between the fair market value of the property before the partial taking and after the taking.”) and *id.* at 416-18 (finding that reasonably calculable benefits from the taking should be included in the before and after fair-market-value determination).

<sup>1593</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

<sup>1594</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013).

<sup>1595</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608-09 (2013).

<sup>1596</sup> *Vill. Cmty., LLC v. Cty. of San Diego*, 2021 U.S. Dist. LEXIS 20794, \*7 (Cal. S.D. 2021) (denying a motion to dismiss by finding that a claim of a taking based on an exaction that was never completed and no permit issued). *See, e.g.*, *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 397 (Fla. 5<sup>th</sup> Dist. Ct. App. 2014) (holding that the analysis finding a taking in *Koontz v. St. Johns River Water Mgmt. Dist.*, 5 So. 3d 8 (Fla. 5<sup>th</sup> D. Ct. App. 2009) was still valid under the U.S. Supreme Court’s holding in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013)). *Cf.* *Talismanic Props., LLC v. Tipp City*, 209 F. Supp. 3d 501, 509 (Ohio, S.D. 2017).

<sup>1597</sup> *See, e.g.*, *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 397 (Fla. 5<sup>th</sup> Dist. Ct. App. 2014) (holding that the analysis finding a taking in *Koontz v. St. Johns River Water Mgmt. Dist.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 5 So. 3d 8 (Fla. 5<sup>th</sup> D. Ct. App. 2009) was still valid under the U.S. Supreme Court’s holding in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013)).

<sup>1598</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982); *cf.* *YMCA v. United States*, 395 U.S. 85, 92 (1969) (“Ordinarily, of course, government occupation of private property

eye to eye on what the property is worth, and there is often a battle of the experts about the property's value."<sup>1599</sup> A plaintiff need not prove damages precisely to receive compensation; a "reasonable" certainty or approximation is sufficient.<sup>1600</sup> Courts have some discretion in how they evaluate damages and what compensation is awarded.<sup>1601</sup>

The measure of just compensation is what was lost to the owner, not the value to the taking government.<sup>1602</sup> Damages for a taking include any potential "severance" damages.<sup>1603</sup> In addition to "fair market value," if only part of a parcel is taken by the government, the owner of the remainder may be entitled to "severance damages" if the value of the remainder is less than the percentage of the parcel remaining.<sup>1604</sup> These include any decrease in value or utility to the property that remains after the taking.<sup>1605</sup> However, not all damages necessarily receive

---

deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation").

<sup>1599</sup> Kusler, Government Liability for Flood Hazards, 16-17, (citing 4 Sackman, Nichols on Eminent Domain §13.01[1][b][i] ("Establishing the value of real estate requires a valuation expert"); ("Valuation of property is not an exact process and courts are often greeted with conflicting appraisal testimony.")).

<sup>1600</sup> Ark. Game & Fish Comm'n., 736 F.3d 1364, 1379 (Fed. Cir. 2013) ("The principle that damages must be shown to a reasonable certainty, which is borrowed from the law of contract remedies, is not incompatible with the rule that a plaintiff need not prove the precise amount of damages; both principles require that the quantum of damages be shown to a reasonable approximation." And citing cases).

<sup>1601</sup> See, e.g., Ideker Farms, Inc. v. U.S., 151 Fed. Cl. 560, 599 (2020) (noting that "there is no one approved approach for determining what injuries and losses are compensable; rather, the determination must be based on the particular facts of each case"); *id.* at 607; Ridge Line v. U.S., 346 F.3d 1346, 1358-59 (Fed. Cir. 2003) (setting out options for how the trial court might evaluate damages should it find a taking on remand). See also Waverley View Inv'rs, LLC v. United States, 135 Fed. Cl. 750, 813-15 (Fed. Cl. 2018) (court exercising discretion in evaluating competing before and after appraisals for a taking).

<sup>1602</sup> United States v. Twin City Power Co., 350 U.S. 222, 228 (1956) ("The Court in the *Chandler-Dunbar* case emphasized that it was only loss to the owner, not gain to the taker, that is compensable. 229 U.S., at 76."). See also, United States v. New River Collieries Co., 262 U.S. 341 (1923) (finding that value of taken coal should be fixed by looking at the profit that the company could demonstrate it would have gained from the coal based on its past business practices).

<sup>1603</sup> Atl. Coast Pipeline, LLC v. 0.07 Acre, 396 F. Supp. 3d 628, 634 (W.D. Va. 2019) ("Just compensation is to be awarded for the value of the taking plus any 'severance damages.'" Internal citations omitted.). In addition to "fair market value," if only part of a parcel is taken by the government, the owner of the remainder may be entitled to "severance damages" if the value of the remainder is less than the mere percentage of the parcel remaining. United States v. Miller, 317 U.S. 369, 376 (1943).

<sup>1604</sup> See, e.g., Waverley View Inv'rs, LLC v. United States, 135 Fed. Cl. 750, 808 (Fed. Cl. 2018). It may, in certain cases, even be possible that a partial physical taking of property could result in "stigma" damages. *Id.* at 811-13 (citing cases for this even though the court indicated that the potential for such "stigma" damages is extremely limited).

<sup>1605</sup> United States v. Chicago, B. & Q. R. Co., 82 F.2d 131, 136-37 (8<sup>th</sup> Cir. 1936).



compensation; for example, consequential damages, such as business losses, are not necessarily included.<sup>1606</sup> However, in some cases, costs to prevent a further taking have been awarded.<sup>1607</sup>

The general touchstone for evaluating just compensation in regulatory takings is to compare the market value of the property before the taking with the value of the property after the taking.<sup>1608</sup> Appraising property is potentially subject to abuse and “can resemble more art than science.”<sup>1609</sup>

When real property is taken, “The mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land-use limitations. When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value.”<sup>1610</sup>

Another option for calculating just compensation is by “compar[ing] the lost net income due to the restriction (discounted to the present value at the date the restriction was imposed) with the total net income without the restriction over the entire useful life of the property (again

---

<sup>1606</sup> *United States v. Miller*, 317 U.S. 369, 376 (1943); *Ideker Farms, Inc. v. U.S.*, 151 Fed. Cl. 560, 607 (2020); *id.* at 607-08 (finding that seeking “damages for crop losses and lost profits, damage to structure, damages to equipment, flood prevention expenses and flood reclamation expenses” were mere “consequential damages” of the taking of a flowage easement, which was already being compensated based on the before and after value of the land); and *Taylor v. U.S.*, 959 F.3d 1081, 1088, FN 3 (Fed. Cir. 2020) (“The [Takings Clause](#)'s focus on particular property interests is reflected in the longstanding rule that the clause does not provide for compensation for ‘consequential losses.’”).

<sup>1607</sup> *Albers v. County of Los Angeles*, 398 P.2d 129 (Cal., 1965) (County liable for inverse condemnation for landslide damage caused by public placement of fill; landowner could recover not only difference in fair market value before and after slide, but cost of stopping slide. *Property Reserve, Inc. v. Superior Court*, 375 P.3d 887 (2016) is the most recent by far of California supreme court cases that discuss inverse condemnations and fair market value.)

<sup>1608</sup> *See, e.g., Horne v. Dep’t of Agric.*, 576 U.S. 351, 368-69 (2015); *Ideker Farms, Inc. v. U.S.*, 151 Fed. Cl. 560, 599 (2020) (citing cases for this proposition).

<sup>1609</sup> Dominic P. Parker & Walter N. Thurman, *Private Land Conservation and Public Policy: Land Trusts, Land Owners, and Conservation Easements*, 11 ANNU. REV. RESOUR. ECON. 337, 344 (2019). *Cf. also, Ideker Farms, Inc. v. U.S.*, 151 Fed. Cl. 560, 599-606 (2020) (evaluating competing methods of calculating the value of land before and after the government took a flowage easement).

<sup>1610</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001) (citing *Olson v. United States*, 292 U.S. 246, 255 (1934); 4 J. Sackman, *Nichols on Eminent Domain* § 12.01 (rev.3d ed.2000)). Interestingly, in the context of valuing property for condemnation proceedings, New York state law includes the “reasonable probability-incremental increase rule,” which states that “if the owner proves a reasonable probability that the regulations on the property could be invalidated in court as an unconstitutional taking, he or she is entitled to an increment above the value of the property as regulated, ‘representing the premium a knowledgeable buyer would be willing to pay for a potential change to a more valuable use.’” *Matter of New Cr. Bluebelt, Phase (Galarza--City of New York)*, 2022 NY Slip Op 03118 (N.Y., App. Div., 2d Dept., May 11, 2022). This “reasonable probability-incremental increase rule” arguably serves to encourage speculation on wetlands.

discounted to present value).”<sup>1611</sup> While compensation for a taking need not precede or be contemporaneous with the taking, compensation should still “put[] the property owner in as good a financial position as if the compensation were given concurrently with the taking.”<sup>1612</sup> This principle requires establishing the date of the taking and awarding interest from the date of the taking.<sup>1613</sup>

Typically, one would expect that damages for a taking cannot exceed the appraised value of the property since “logically speaking, the government cannot take more than what the plaintiffs actually possess.”<sup>1614</sup> However, damages might exceed the appraisal amount if the appraisal does not necessarily accurately reflect the value of the property.<sup>1615</sup>

Once the government pays for a taking, what does the government receive for its payment? If it is a taking of real property, such as occurs with flooding, payment for the taking should vest some interest in the government.<sup>1616</sup> In a more rational system of takings law jurisprudence, the rule might be that if compensation is paid, then the government should be able to take title to an established property interest. If no such interest is granted to the government, then no compensation for a taking should be provided.<sup>1617</sup> However, under today’s takings jurisprudence, government may pay for a taking without ever acquiring any cognizable legal right to a vested interest in property.<sup>1618</sup>

---

<sup>1611</sup> *Anaheim Gardens, LP v. United States*, 953 F.3d 1344, 1353 (Fed. Cir. 2020).

<sup>1612</sup> *Ideker Farms, Inc. v. U.S.*, 151 Fed. Cl. 560, 608 (2020).

<sup>1613</sup> *Ideker Farms, Inc. v. U.S.*, 151 Fed. Cl. 560, 608-09 (2020).

<sup>1614</sup> *Anaheim Gardens, LP v. United States*, 953 F.3d 1344, 1356 (Fed. Cir. 2020).

<sup>1615</sup> *Anaheim Gardens, LP v. United States*, 953 F.3d 1344, 1356-57 (Fed. Cir. 2020).

<sup>1616</sup> *United States v. Cress*, 243 U.S. 316, 327-28 (U.S. 1917) (“As the court said, speaking by Mr. Justice Brewer, in *United States v. Lynah*, 188 U.S. 445, 470: ‘Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto -- in this case those at least which belong to a riparian proprietor -- pass to the government and it becomes henceforth the owner.’”).

<sup>1617</sup> Danaya C. Wright, *A Requiem for Regulatory Takings: Reclaiming Eminent Domain for Constitutional Property Claims*, 49 *Envtl. L.* 307, 366-72 (2019); *id.* at 371 (“One way [to make takings law more rational] would be to require that when compensation is paid, some cognizable property right must be appropriated”).

<sup>1618</sup> *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

### IV.B.7.c. When the Taking Occurred

The U.S. Supreme Court is clear that the calculation of compensation must be based on the date when the taking began, plus interest.<sup>1619</sup> This makes it important to identify when the taking occurred. As with so many things in takings law, this proves surprisingly complex. However, note that even though a property owner has a takings action available the moment that the government takes property without just compensation,<sup>1620</sup> the U.S. Supreme Court has *never* said that the Fifth Amendment's protections require prior compensation.<sup>1621</sup>

As estimating damages requires understanding when a claim accrues, courts have addressed this question, including how to assess damages when the taking is ongoing or continuous. "The Supreme Court held in *Dickinson v. United States* that where the 'source of the entire [takings] claim . . . is not a single event[, but] is continuous,' such as a series of floods, a claim does not arise 'until the situation becomes stabilized.' This is because 'when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really "taken."' Under *Dickinson*, a claim becomes 'stabilized' where the 'consequences of inundation have so manifested themselves that a final account may be struck.'"<sup>1622</sup>

A government action may cause damages amounting to a taking many years after a project's construction due to its operation and maintenance when the damages are a foreseeable result of that operation and maintenance over time.<sup>1623</sup>

Despite the general rule that a determination of damages uses the value on the date of the taking (plus interest), the U.S. Supreme Court has said that, "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity."<sup>1624</sup> However, if "the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be

---

<sup>1619</sup> *Knick v. Township of Scott*, 588 U. S. \_\_\_, 139 S. Ct. 1262, 2170, 2175 n.6 (2019).

<sup>1620</sup> *Knick v. Township of Scott*, 588 U. S. \_\_\_, 139 S. Ct. 1262, 2170-71 (2019).

<sup>1621</sup> *Knick v. Township of Scott*, 588 U. S. \_\_\_, 139 S. Ct. 1262, 2185 (2019). *But, see, id.* at 2180 (Thomas, J., dissenting) (suggesting without basis in precedent that regulatory takings must be accompanied by *prior* compensation).

<sup>1622</sup> *Ideker Farms, Inc. v. U.S.*, 151 Fed. Cl. 560, 593-94 (2020) (internal citations omitted).

<sup>1623</sup> *Brazos River Authority v. Graham*, 163 Tex. 167, 176-77 (Tex. 1961).

<sup>1624</sup> *United States v. Miller*, 317 U.S. 369, 376 (1943).

taken.”<sup>1625</sup> Thus, the fair market value of land on the date of the taking—the usual measure of value—should be modified to the date that the government made clear its intention to take the property.<sup>1626</sup>

---

<sup>1625</sup> United States v. Miller, 317 U.S. 369, 376-77 (1943).

<sup>1626</sup> United States v. Miller, 317 U.S. 369, 377 (1943).

---

## IV.C. Summary of Takings

---

The extensive case law on the Takings Clause of the Fifth Amendment to the U.S. Constitution admits of no easy summary. Hundreds – even thousands – of legal scholars and commentators have for decades struggled to make sense of the jurisprudence just from the U.S. Supreme Court, much less from other federal and state courts seeking to interpret the Fifth Amendment jurisprudence of the U.S. Supreme Court. Sometimes these commentators start to believe that the jurisprudence is beginning to lead to a fairly rationale structure of takings jurisprudence only to be flummoxed by subsequent case law that undermines any supposed foundational principles that might organize the chaos.<sup>1627</sup>

Despite some high-profile outlier U.S. Supreme Court cases to the contrary – such as *Lucas* and *Koontz* – most court rulings, both before and after these two cases, have been very clear that an extremely important and compelling public interest, such as protecting human life and property from flood losses, is so important that regulations to accomplish such will rarely be found to be a taking. When developers purchase land and then complain when they cannot then develop as they wished, courts have sometimes been merciless in their criticism and clear that the Fifth Amendment’s protection of private property rights are not there to be an insurance policy when developers lose on a risk of being able to develop contrary to existing regulations<sup>1628</sup> or just generally lose to a risk inherent in development.<sup>1629</sup>

Government entities possess great latitude to prevent public harm through floodplain management before a “taking” of private property will occur. Property owners do not have absolute and unlimited rights to modify land from its natural state to allow uses for which the land was not suitable in its natural state.<sup>1630</sup> And a risk of increased flooding from or of new development may serve to demonstrate that land is not suitable for such development. However, it would be wrong to assert that a takings claim can never be successful merely because the regulation at issue was designed to prevent a great public harm like flooding. But making clear the importance of the values at issue allows a court to consider this when

---

<sup>1627</sup> John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, N.Y.U. ENVTL. L.J. 22 1 (2014).

<sup>1628</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 916-17 (S.C. 2015) (“In sum, we find no taking occurred. Richland County is not the “ ‘involuntary guarantor of the property owner’s gamble that he could develop the land as he wished despite the existing regulatory structure.’ ” *Mehaffy v. United States*, 102 Fed.Cl. 755, 765 (2012)).

<sup>1629</sup> *Columbia Venture, LLC v. Richland Cty.*, 776 S.E.2d 900, 917 (S.C. 2015) (““Purchasing and developing real estate carries with it certain financial risks, and it is not the government’s duty to underwrite this risk as an extension of obligations under the takings clause.” *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex.1994).”).

<sup>1630</sup> *Usdin v. State, Dep’t of Environmental Protection, Div. of Water Resources*, 173 N.J. Super. 311, 327 (1980).

evaluating the nature of the government action and what were the reasonable investment-backed expectations of the property owner.

While takings law is complicated, some of the simplest and easiest general rules to remember to avoid a taking in floodplain management are:

- Ensure that regulation is clearly and unequivocally tied to public safety whenever reasonable. Environmental protection may also be added as a justification, but any justification should, if reasonable, first and most strongly focus on protecting the public safety, health, and welfare. When done this way, well-drafted, comprehensive floodplain management regulations are almost never found to be a taking.
- Try to ensure that regulation does not eliminate every possible use of the property.
- Whenever possible, avoid any activity that would cause a physical invasion of property.
- Ensure that any activities you undertake do *not* cause any additional flooding beyond what would have occurred without government action. If you are undertaking floodplain management infrastructure, conduct modeling to ensure that you understand when affected property already floods and ensure that the modeling clearly—and reliably—indicates that flooding will be lessened or, at worst, equivalent, to flooding that would have occurred without the proposed flood management infrastructure.
- Avoid accepting responsibility for private drainage infrastructure that may cause problems for you in the future.
- Consider both substantive and procedural due process in creating floodplain regulations.

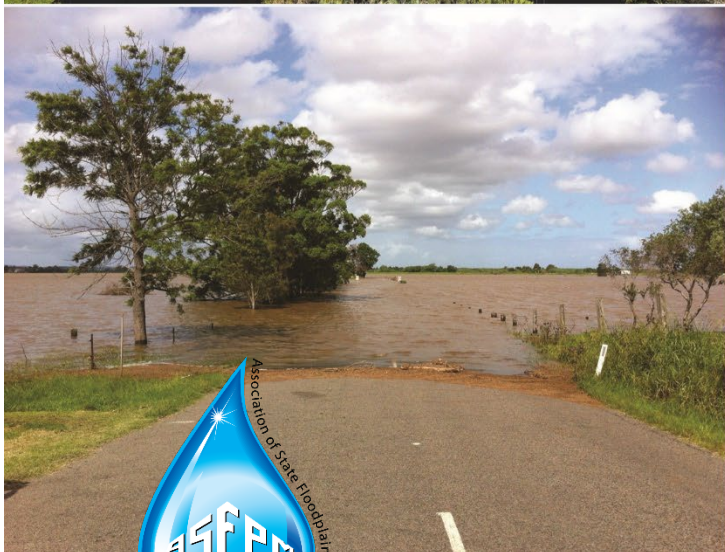
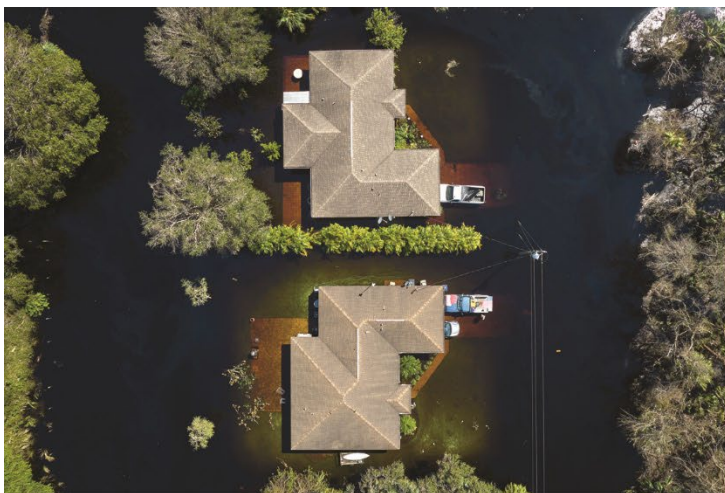
At some level, it appears we are unlikely to ever have a truly “coherent” law of takings. While this should not deter us from being as reasonably consistent as possible in deciding cases and in the use of analytical rules and tests, we must become more comfortable with the shifting notions of property and the need to consider *values*, and how these change, in our takings analyses.<sup>1631</sup> This means embracing the plasticity of property and forcefully arguing for the ability to protect human health, safety, and welfare through comprehensive floodplain management at the local level, including using policy arguments about the very nature of property and how our understanding of it has historically changed in response to changes in our society and situation.<sup>1632</sup>

---

<sup>1631</sup> See, e.g. Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1479-1481 (1997) (discussing various commentators’ efforts to utilize “ordinary causation; ordinary speech, normal behavior, or the community’s sense of *value*” as analytical tools in takings claims) (emphasis added); *id.* at 1485-86 (discussing values in takings decisions).

<sup>1632</sup> For more on the topic of the nature of property and historical changes in the nature of what law considers “property,” see *supra*, [“Property.”](#)





# No Adverse Impact Legal Guide for Flood Risk Management

June 2023

[no.floods.org/LegalGuide](https://no.floods.org/LegalGuide)

---

**Cover Photos (clockwise from top left):**

Hurricane Ian flooded houses in Florida residential area;<sup>1</sup> U.S. Supreme Court;<sup>2</sup> Untitled image of road inundated with floodwater.<sup>3</sup>

---

## No Adverse Impact Legal Guide for Flood Risk Management

June, 2023

[no.floods.org/NAI-Legal](https://no.floods.org/NAI-Legal)

---

Association of State Floodplain Managers, Inc.  
8301 Excelsior Drive  
Madison, Wisconsin 53717  
608.828.3000  
[www.floods.org](https://www.floods.org)

The Association of State Floodplain Managers Inc. (ASFPM) published this *Guide* as part of its mission to promote education, policies and activities that mitigate current and future losses, costs and human suffering caused by flooding. Founded in 1977, the organization had over 19,000 members as of 2023, including members in 38 state chapters. ASFPM supports professionals involved in floodplain management, flood hazard mitigation, flood preparedness and flood warning and recovery. Members represent local, state and federal government agencies, citizen groups, private consulting firms, academia, the insurance industry and lenders.

---

<sup>1</sup> Bilanol. Accessed May 2023. Hurricane Ian flooded houses in Florida residential area. <https://www.canva.com/photos/MAFOfc76ibY-hurricane-ian-flooded-houses-in-florida-residential-area-natural-disaster-and-its-consequences/>. Used under Canva Pro Content License.

<sup>2</sup> OZinOH. Accessed May 2023. Supreme Court IMG\_2952. <https://www.flickr.com/photos/75905404@N00/3049421552/>. Used under Creative Commons Attribution-NonCommercial 2.0 License.

<sup>3</sup> bohemianbikini from Pixabay. Accessed May 2023. Untitled. <https://www.canva.com/photos/MAEF8PqH24s/>. Used under Canva Free to Use License.

**Suggested Legal Citation:<sup>4</sup>**

GERALD MURPHY, THOMAS RUPPERT & EMMA CAMPBELL, ASSOCIATION OF STATE FLOODPLAIN MANAGERS, NO ADVERSE IMPACT LEGAL GUIDE FOR FLOOD RISK MANAGEMENT V.23.06 (2023).

**Suggested General Citation:**

Association of State Floodplain Managers. June 2023. *No Adverse Impact Legal Guide for Flood Risk Management*. (v.23.06) Madison, WI. [no.floods.org/NAI-Legal](http://no.floods.org/NAI-Legal).

**Acknowledgements:**

This guide was funded by the Association of State Floodplain Managers Board of Directors and in part by the Federal Emergency Management Agency.

Principal investigators and authors – legal memos:

- Jerry Murphy, J.D., AICP, CFM – State Specialized Program Agent, Program for Resource Efficient Communities, University of Florida
- Thomas Ruppert, Esq. – Coastal Planning & Legal Specialist, Florida Sea Grant, University of Florida
- Emma Campbell, Esq. – Florida Sea Grant Legal Fellow, Elisabeth Haub School of Law at Pace University



**PREC**  
PROGRAM FOR RESOURCE  
EFFICIENT COMMUNITIES



Authors and advisors – No Adverse Impact content and resources:

- Janet Thigpen, CFM – Flood Mitigation Specialist, Southern Tier Central Regional Planning & Development Board, New York; Co-Chair NAI Committee
- Terri L Turner, AICP, CFM – Principal / Owner, HALO Strategic Planning; Co-Chair NAI Committee

Additional investigators and authors – legal memos:

- Justin Weatherwax, Esq. – Florida Sea Grant Legal Fellow, University of Miami School of Law
- Jordan Maun, J.D. Candidate, Florida Sea Grant Extern, University of Miami School of Law
- Tyler Rudolph, J.D. – Florida Sea Grant Extern, University of Miami School of Law
- William Schwartz, J.D. – Florida Sea Grant Extern, University of Miami School of Law

Special appreciation is extended to the following individuals who assisted in the review and creation of this publication:

- Chad Berginnis, CFM – Executive Director, Association of State Floodplain Managers

<sup>4</sup> As a document with legal analyses, this publication utilizes the most common citation format in legal writing, *The Bluebook: A Uniform System of Citation* (Columbia L. Rev. Ass'n et al. eds., 21<sup>st</sup> ed. 1<sup>st</sup>.prtg. 2020).

- John Ryan-Henry, J.D. – Policy Analyst, Coastal States Organization
- Richard Norton, J.D., Ph.D. – Professor, Urban and Regional Planning, Taubman College of Architecture and Urban Planning, University of Michigan
- Samantha Medlock, CFM, J.D. – Senior Counsel, Select Committee on the Climate Crisis at U.S. House of Representatives
- Ed Thomas, Esq. – Principal, Edward A. Thomas Esq., LLC; President
- French Wetmore, CFM – President, French & Associates, Ltd.
- Niki Pace, CFM, J.D., LL.M. – Research Attorney, Sustainability Coordinator, Louisiana Sea Grant Law & Policy Program
- Michele Donato, Esq. – Principal, Michele R. Donato, P.A., New Jersey
- Jack Smith, J.D. – Partner, Nelson Mullins Riley & Scarborough LLP
- Scott Pippin, J.D., M.E.P.D., CFM – Public Service Associate, Carl Vinson Institute of Government, University of Georgia
- Richard Hamann, J.D. – Emeritus Associate in Law, Levin College of Law, University of Florida
- Mary-Carson S. Stiff, J.D., CFM – Deputy Director, Wetlands Watch
- Lawrence Dunbar, P.E. – Water Resources & Environmental Engineer / Consultant, Texas

Production, project management, copy editing, website development and final formatting and design were completed by the following ASFPM Flood Science Center staff:

- Jeff Stone, GISP, CFM – Research Director & Legal Guide Project Manager
- Beth Klusinske – Research Analyst and Technical Editor
- Jason Hochschild – Web and GIS Administrator
- Dave Fowler, CFM – NAI Subject Matter Expert
- Jacob Jett, Ph.D. – Research Librarian
- Melissa Haig, MLIS – Research Librarian



---

Association of State Floodplain Managers, Inc.

8301 Excelsior Drive

Madison, Wisconsin 53717

608.828.3000

[asfpm@floods.org](mailto:asfpm@floods.org)

[www.floods.org](http://www.floods.org)

[no.floods.org/LegalGuide](http://no.floods.org/LegalGuide)

---

# Table of Contents

<b>Introduction to This <i>Guide</i>.....</b>	<b>1</b>
<b>Common Terminology .....</b>	<b>2</b>
<b>I. Introduction to No Adverse Impact .....</b>	<b>9</b>
<b>I.A. Local Implementation of NAI.....</b>	<b>9</b>
<b>I.B. A Legal Foundation for NAI .....</b>	<b>10</b>
<b>I.C. The National Flood Insurance Program (NFIP) .....</b>	<b>11</b>
<b>I.D. Limitations of Minimum NFIP Standards.....</b>	<b>12</b>
<b>I.E. The NAI Approach .....</b>	<b>18</b>
I.E.1. Local Empowerment .....	19
I.E.2. More Effective Programs and Projects.....	20
I.E.3. Lower Long-term Costs .....	20
I.E.4. Improved Partnerships.....	21
I.E.5. Reduced Liability .....	21
I.E.6. Meet Community Needs .....	22
I.E.7. Greener Floodplain .....	22
I.E.8. The Community Rating System (CRS) and CRS Credits.....	23
I.E.9. Climate Adaptation .....	24
I.E.10. Social Justice and Equity .....	24
<b>II. No Adverse Impact and the Law.....</b>	<b>26</b>
<b>II.A. Lawsuits .....</b>	<b>26</b>
<b>II.B. Venue – state courts, federal district courts, and federal court of claims.....</b>	<b>29</b>
II.B.1. Introduction to the Court System and Jurisdiction.....	29
II.B.1.a. Choosing Venues, If You Can .....	34
<b>II.C. Property.....</b>	<b>37</b>
II.C.1. What is “Property” and Where Does It Originate? .....	37
II.C.2. The Plasticity of Property .....	41
II.C.2.a. Early Common Law of Property .....	43
II.C.2.b. Recent Changes in the Idea of Property .....	46
II.C.3. Property Law and Flooding .....	48

<b>II.D.</b>	<b>Sovereign Submerged Land .....</b>	<b>52</b>
<b>II.E.</b>	<b>Land Use Limitations.....</b>	<b>52</b>
II.E.1.	State Police Powers .....	52
II.E.2.	Local Governments.....	55
II.E.2.a.	Dillon’s Rule vs. Home Rule.....	56
II.E.2.a.i.	Dillon’s Rule.....	56
II.E.2.a.ii.	Home Rule .....	57
II.E.2.a.iii.	Dilution of Dillon’s Rule in the Land Use Context .....	57
II.E.2.a.iv.	Floodplain Management.....	57
II.E.2.b.	Local Land Use Regulations .....	58
II.E.2.b.i.	Planning .....	58
II.E.2.b.ii.	Comprehensive planning .....	59
II.E.2.b.iii.	Zoning .....	61
II.E.2.c.	Special Use / Exception Permit or Conditional Use .....	62
II.E.2.d.	Rebuilding Limitations and Amortization of Non-conforming Uses.....	65
II.E.2.d.i.	Limitations on Rebuilding Damaged Structures .....	65
II.E.2.d.ii.	Legal Authority for Nonconformities and Rebuild Limitations.....	66
II.E.2.d.iii.	The 50% Rule Generally .....	66
II.E.2.d.iv.	Evidence Necessary to Declare Damage beyond 50% of Market Value .....	68
II.E.2.d.v.	Properties with Multiple Structures.....	69
II.E.2.d.vi.	Conflicting Zoning Requirements.....	71
II.E.2.d.vii.	Conclusion and Recommendations .....	74
II.E.2.e.	Liability for Problems Due to Permitting.....	75
<b>III.</b>	<b>Torts.....</b>	<b>75</b>
<b>III.A.</b>	<b>Negligence .....</b>	<b>80</b>
III.A.1.	Elements of Negligence.....	83
III.A.1.a.	Duty of Care .....	83
III.A.1.b.	Breach of Duty.....	89
III.A.1.c.	Causation and Foreseeability.....	90
III.A.1.c.i.	Cause in Fact.....	91
III.A.1.c.ii.	Proximate Cause.....	91
III.A.1.c.iii.	Foreseeability.....	92
III.A.1.c.iv.	Intervening and Superseding Cause.....	94



III.A.1.c.v.	Risk/Cost Benefit Analysis.....	94
III.A.1.c.vi.	Causation and Strict Liability .....	95
III.A.1.d.	Damages.....	95
III.A.1.e.	Force Majeure or “Act of God” .....	96
<b>III.B.</b>	<b>Trespass to Land .....</b>	<b>100</b>
<b>III.C.</b>	<b>Nuisance .....</b>	<b>101</b>
<b>III.D.</b>	<b>Governmental and Sovereign Immunity from Liability.....</b>	<b>105</b>
III.D.1.	Federal <i>Sovereign</i> Immunity.....	106
III.D.1.a.	Introduction.....	106
III.D.1.b.	Federal Tort Claims.....	107
III.D.1.b.i.	Federal Tort Claims Act (“FTCA”).....	111
III.D.1.b.ii.	FTCA Exceptions and Post-FTCA Jurisprudence.....	113
III.D.1.b.iii.	Absolute and Qualified Immunity.....	121
III.D.2.	State <i>Sovereign</i> Immunity .....	127
III.D.2.a.	Introduction.....	127
III.D.2.b.	Early Historical Background .....	128
III.D.2.c.	Eleventh Amendment.....	129
III.D.2.d.	Post-Eleventh Amendment Jurisprudence .....	130
III.D.3.	Local <i>Government</i> Immunity .....	140
III.D.3.a.	Introduction.....	140
III.D.3.b.	Historical Background .....	141
III.D.3.c.	U.S. Supreme Court Jurisprudence.....	141
III.D.4.	Generally.....	142
III.D.4.a.	Governmental vs. Proprietary Actions.....	145
III.D.4.b.	Discretionary versus Ministerial Actions.....	147
III.D.5.	Public Duty Doctrine .....	153
III.D.6.	Federal Civil Rights Liability (42 U.S.C. § 1983).....	154
III.D.7.	Summary .....	155
<b>IV.</b>	<b>The Constitution and Its Protection of Property Rights .....</b>	<b>156</b>
<b>IV.A.</b>	<b>Fourteenth Amendment .....</b>	<b>156</b>
<b>IV.B.</b>	<b>Fifth Amendment .....</b>	<b>161</b>
IV.B.1.	History, Context, and Development.....	161
IV.B.2.	Per Se Takings .....	165

IV.B.2.a.	A Physical Per Se Taking: The Loretto Case .....	166
IV.B.2.b.	Per Se Taking by Elimination of Economically Beneficial Use: The Lucas Case .....	170
IV.B.2.b.i.	Recommendations for Floodplain Managers .....	173
IV.B.3.	Elements of Inverse Condemnation/Regulatory Taking .....	174
IV.B.3.a.	A “Taking” and the Requirement of Government Action .....	174
IV.B.3.a.i.	Action vs. Inaction .....	176
IV.B.3.a.ii.	Proximate Cause .....	180
IV.B.3.a.iii.	Tort or Takings? Why the Label Matters .....	187
IV.B.3.b.	Of a Property Right .....	190
IV.B.3.c.	Parcel as a Whole .....	196
IV.B.3.c.i.	Physical Characteristics of the Land .....	203
IV.B.3.c.ii.	Prospective Value of the Regulated Land .....	204
IV.B.3.c.iii.	Conclusion .....	205
IV.B.3.c.iv.	Recommendations .....	206
IV.B.3.d.	Facial vs. As-Applied Challenges .....	207
IV.B.3.e.	Ripeness .....	208
IV.B.3.e.i.	Recommendations .....	212
IV.B.3.f.	Regulation Prior to Acquisition .....	213
IV.B.3.g.	Foreseeability in Takings Law .....	213
IV.B.4.	Exactions .....	213
IV.B.4.a.	Questions Answered by the Koontz Case: .....	222
IV.B.4.b.	Recommendations and Lessons for Floodplain Managers .....	226
IV.B.5.	Most Regulatory Takings: <i>Penn Central Analysis</i> .....	226
IV.B.5.a.	Economic Impact of the Regulation or Government Action .....	228
IV.B.5.a.i.	Recommendations .....	231
IV.B.5.b.	Reasonable Investment-Backed Expectations (RIBE) .....	232
IV.B.5.b.i.	Introduction to Reasonable Investment-Backed Expectations .....	232
IV.B.5.b.ii.	Kaiser Aetna v. United States .....	233
IV.B.5.b.iii.	Nollan v. California Coastal Commission .....	236
IV.B.5.b.iv.	Keystone Bituminous Coal Assoc. v. DeBenedictus .....	237
IV.B.5.b.v.	Lucas v. South Carolina Coastal Council .....	237
IV.B.5.b.vi.	Palazzolo v. Rhode Island .....	238
IV.B.5.b.vii.	Tahoe Sierra .....	240

IV.B.5.b.viii.	Arkansas Game and Fish Com'n v. U.S. Army Corps of Engineers.....	241
IV.B.5.b.ix.	Murr v. Wisconsin.....	242
IV.B.5.b.x.	Cedar Point Nursery v. Hassid.....	242
IV.B.5.b.xi.	A Columbia Venture, LLC v. Richland Cnty.....	243
IV.B.5.b.xii.	Anaheim Gardens, L.P v. United States.....	245
IV.B.5.b.xiii.	Mehaffy v. United States.....	246
IV.B.5.b.xiv.	Taylor v. U.S., 959 F.3d 1081 (Fed. Cir. 2020).....	247
IV.B.5.b.xv.	Gove v. Zoning Bd. of Appeals.....	248
IV.B.5.b.xvi.	The State of RIBE Today.....	249
IV.B.5.b.xvii.	Penn Central's RIBE and Floodplain Management: The Big Picture and Takeaways.....	258
IV.B.5.c.	Penn Central's 'Character of the Governmental Action' Factor in Takings Law	259
IV.B.5.d.	Facets of "Character of the Governmental Action".....	260
IV.B.5.d.i.	Like an "Invasion"?.....	261
IV.B.5.d.ii.	Disproportionate Burdens and "Average Reciprocity of Advantage".....	262
IV.B.5.d.iii.	Noxious Use and Nuisance.....	263
IV.B.5.d.iv.	Regulations Focused on Safety and Flooding.....	266
IV.B.5.e.	State of "Nature of the Governmental Action" Today.....	270
IV.B.5.f.	Summary of the Penn Central Test.....	272
IV.B.6.	Temporary Takings.....	273
IV.B.6.a.	Recommendations and Lessons for Floodplain Managers.....	276
IV.B.7.	Damages for a Taking and Addressing Excessive Claims.....	277
IV.B.7.a.	What Was Taken.....	279
IV.B.7.b.	How to Value What Has Been Taken.....	281
IV.B.7.c.	When the Taking Occurred.....	285
<b>IV.C.</b>	<b>Summary of Takings.....</b>	<b>287</b>
<b>V.</b>	<b>Executive Orders.....</b>	<b>289</b>
<b>V.A.</b>	<b>Generally.....</b>	<b>289</b>
V.A.1.	Constitutional role.....	289
V.A.2.	Basic Elements.....	289
<b>V.B.</b>	<b>Executive Orders: Floodplain Stewardship.....</b>	<b>291</b>
V.B.1.	Background.....	291
V.B.1.a.	The Unified National Program for Managing Flood Losses.....	293

V.B.2.	Executive Orders Post-NFIA .....	294
V.B.2.a.	E.O. 11988, Floodplain Management .....	295
V.B.2.b.	Floodplain Management Guidelines for Implementing E.O. 11988 ("1978 Guidelines") .....	297
V.B.2.c.	Real Property Transaction Disclosures .....	299
V.B.2.d.	Relationship between E.O. 11988 and 11990 .....	300
V.B.3.	Climate Action, the <i>Federal Flood Risk Management Standard</i> (FFRMS), and Water Resources .....	300
V.B.3.a.	Executive Order 13653 .....	300
V.B.3.b.	Executive Order 13690 .....	301
V.B.3.c.	Executive Order 13693 .....	303
V.B.3.d.	Executive Order 13766 .....	304
V.B.3.e.	Executive Order 13783 .....	304
V.B.3.f.	Executive Order 13807 .....	304
V.B.3.g.	Executive Order 13834 .....	305
V.B.3.h.	Executive Order 13956 .....	305
V.B.3.i.	Executive Order 13990 .....	306
V.B.3.j.	Executive Order 14008 .....	307
V.B.3.k.	Executive Order 14027 .....	309
V.B.3.l.	Executive Order 14030 .....	309
V.B.4.	Judicially Enforced Limits on Executive Orders .....	310
V.B.5.	Miscellaneous Executive Orders: Further No Adverse Impact (NAI) Interests .....	311

---

# Introduction to This Guide

---

This *No Adverse Impact Legal Guide for Flood Risk Management* (a.k.a., the *NAI Legal Guide*) provides legal resources to inform the decisions of community representatives and municipal attorneys who design, implement, and defend NAI programs. It includes:

- Detailed resources for legal professionals, and
- Legal essentials for floodplain managers and community officials.

This Guide supplements other NAI documents that present tools and guidance for integrating NAI principles into local regulations, policies, and programs. It will help readers to understand, anticipate, and manage legal issues that may arise when a community implements activities that enhance flood resilience, especially when those activities exceed state and federal requirements for floodplain management.

This *Guide* is divided into five sections:

**Section I** – Introduction to No Adverse Impact

**Section II** – Introduction to Legal Concepts for No Adverse Impact

**Section III** – Torts

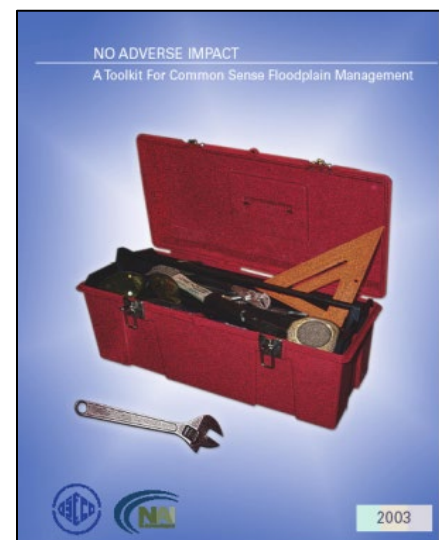
**Section IV** – The Constitution and Its Protection of Property Rights

**Section V** – Federal Laws

Section One is an introduction to the concept of No Adverse Impact for those not familiar with its application to flood risk reduction. Section Two focuses on introducing common legal concepts, which is then followed by the detailed legal memos found in Sections Three, Four and Five.

After reviewing this *Guide*, it is recommended that a community conduct an assessment of its flood risk management activities to see if those activities are legally sound, and where they can be improved by using NAI techniques to better protect its population and natural floodplain functions.

[No Adverse Impact Toolkit](#), prepared by the Association of State Floodplain Managers, identifies tools for implementing NAI.



---

## NAI How-to Guides

---

**A series of How-to Guides** provide usable information to help communities implement NAI practices:

- [Hazard Identification and Floodplain Mapping](#)
- [Regulations and Development Standards](#)
- [Education and Outreach](#)
- [Emergency Services](#)
- [Planning](#)
- [Mitigation](#)
- [Infrastructure](#)

---

## Common Terminology

---

Many of the following definitions are derived from NFIP floodplain management; others are specific legal definitions; and yet others relate to NAI tools and approaches. This section is not all-inclusive of the flood risk management and legal terms used in this *Guide*; additional definitions may be provided elsewhere for ease of reference.

**Base flood:** The flood having a one percent probability of being equaled or exceeded in any given year (previously called the 100-year flood). This is the design flood for the NFIP and is used to map Special Flood Hazard Areas and to determine Base Flood Elevations. Modeling of the base flood uses historic flood data.

**Base Flood Elevation (BFE):** The modeled elevation of floodwater during the base flood. The BFE determines the level of flood protection required by NFIP floodplain development standards.

**Building (structure):** A walled and roofed building with two or more outside rigid walls and a fully secured roof that is affixed to a permanent site, as well as a manufactured home on a permanent foundation. The terms "structure" and "building" are sometimes used interchangeably in the NFIP. However, for NFIP floodplain management purposes, the term "structure" also includes a gas or liquid storage tank that is principally above ground.

Within the NFIP, residential and non-residential structures are treated differently. A residential structure built in a Special Flood Hazard Area must be elevated above the Base Flood Elevation. A non-residential structure may be elevated or dry floodproofed so that the structure is watertight to prevent the entry of water.



**Climate change:** Climate change refers to long-term shifts in temperatures and weather patterns. These shifts may be natural, such as through variations in the solar cycle. But since the 1800s, human activities have been the main driver of climate change, primarily due to the burning of fossil fuels like coal, oil and gas.<sup>5</sup>

**Community:** The NFIP definition of a community is a political subdivision that has the authority to adopt and enforce floodplain management regulations for the areas within its jurisdiction. The term usually means cities, villages, townships, counties, and Indian tribal governments. For the purposes of this *Guide*, a “community” also includes a neighborhood, unincorporated settlement, or other non-governmental subdivision where people live or work together.

**Conservation Zone:** An area indicated on a map or plan adopted by a local jurisdiction, municipality, or other governing body within which development is governed by special regulations in order to protect and preserve the quality and function of its natural environment.

**Community Rating System (CRS):** The NFIP Community Rating System is a program that provides reduced flood insurance premiums for policyholders in communities that go above and beyond the minimum NFIP criteria. For more information see <https://www.fema.gov/floodplain-management/community-rating-system>.

**Federal Emergency Management Agency (FEMA):** The federal agency under which the NFIP is administered.

**Flood:** A community may adopt a more expansive definition of “flood” than is used by the NFIP in order to include additional sources of water damage, such as groundwater flooding of basements or local washouts associated with a drainage ditch. The NFIP definition of a flood is:

- (a) A general and temporary condition of partial or complete inundation of normally dry land areas from:
  - (1) The overflow of inland or tidal waters.
  - (2) The unusual and rapid accumulation or runoff of surface waters from any source.
  - (3) Mudslides (i.e., mudflows) which are proximately caused by flooding as defined in paragraph (a)(2) of this definition and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current.
- (b) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water

---

<sup>5</sup> Source: United Nations, “What is Climate Change?” webpage, accessed March 2023, <https://www.un.org/en/climatechange/what-is-climate-change>.

exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (a)(1) of this definition.

For NFIP flood insurance claims, a flood must inundate two or more acres of normally dry land area or two or more properties.

**Flood Insurance Rate Map (FIRM):** An official map of a community on which the Federal Emergency Management Agency has delineated the boundaries of Special Flood Hazard Areas. In some areas, FIRMS (with associated maps and studies) may also indicate Base Flood Elevations and regulatory floodways. FIRMs and other mapping products can be viewed and downloaded at FEMA's Map Service Center – <https://msc.fema.gov/portal/home>.

**Floodplain:** Nature's floodplain is the land area susceptible to being inundated by water from any source. This includes:

- Special Flood Hazard Areas (SFHAs) mapped by FEMA for the NFIP program;
- Flood-prone areas near waterbodies for which SFHAs have not been mapped;
- Areas outside of the SFHA that are subject to inundation by larger flood events or floods that are altered by debris or other blockages;
- Areas subject to smaller, more frequent, or repetitive flooding;
- Areas subject to shallow flooding, stormwater flooding, or drainage problems that do not meet the NFIP mapping criteria;
- Areas affected by flood-related hazards, such as coastal and riverine erosion, mudflows, or subsidence; and
- Areas that will be flooded when future conditions are accounted for, such as climate-related issues, sea-level rise, and upstream watershed development.

The Special Flood Hazard Area mapped for the NFIP is only part of a community's flood risk area, with 40 percent of flood insurance claims occurring outside of the SFHA.<sup>6</sup> To represent a community's true flood risk, the term "floodplain" is used in this *Guide* instead of "SFHA."

**Floodplain stewardship:** Caring for and protecting the beneficial biologic and hydrologic functions of areas where the risk of flooding is expected, while managing human uses to minimize the potential for adverse impacts and flood damage.

**Floodproof:** Floodproofing means any combination of structural and non-structural additions, changes, or adjustments to buildings or other structures that reduce or eliminate flood damage to real estate or improved real property, water and sanitary facilities, structures, and their contents. This term includes dry floodproofing, in which a structure is watertight, with walls

---

<sup>6</sup> Federal Emergency Management Agency, 2021, "Myths and Facts About Flood Insurance," <https://www.fema.gov/fact-sheet/myths-and-facts-about-flood-insurance-1>.

substantially impermeable to the passage of water. NFIP development standards allow dry floodproofing of non-residential structures in lieu of elevating the lowest floor.

**Freeboard:** A factor of safety, usually expressed in feet above the Base Flood Elevation, that determines the required level of flood protection.

**Future conditions flood:** The flood having a one percent probability of being equaled or exceeded in any given year based on future-conditions hydrology. Also known as the “1%-annual-chance future conditions” flood.

**Liability:** A party is liable when they are held legally responsible for something. Unlike in criminal cases, where a defendant could be found guilty, a defendant in a civil case risks only liability.<sup>7</sup>

**Mitigation:** Hazard mitigation is any sustained action taken to reduce or eliminate any long-term risk to life or property from a hazard event. Mitigation is most often thought of as being applied to existing at-risk development. Examples of flood mitigation activities include: floodproofing, elevating, relocating or demolishing at-risk structures; retrofitting existing infrastructure to make it more flood resilient; developing and implementing Continuity of Operations Plans; structural mitigation measures such as levees, floodwalls and flood control reservoirs; detention/retention basins; and beach, dune, and floodplain restoration.

**National Flood Insurance Program (NFIP):** Federal program that maps flood hazard areas and provides flood insurance in participating communities that agree to regulate new construction in mapped high flood hazard areas. Most community floodplain maps and floodplain management standards have been adopted to meet the NFIP’s criteria. Learn more at [www.fema.gov](http://www.fema.gov).

**Natural floodplain functions:** The functions associated with the natural or relatively undisturbed floodplain that moderate flooding, maintain water quality, recharge groundwater, reduce erosion, redistribute sand and sediment, and provide fish and wildlife habitat. One goal of NAI floodplain stewardship is to preserve and protect these functions, in addition to protecting human development.

**Police powers:** Police powers are the fundamental ability of a government to enact laws to coerce its citizenry for the public good, although the term eludes an exact definition. The term does not directly relate to the common connotation of police as officers charged with maintaining public order, but rather to broad governmental regulatory power. *Berman v. Parker*, a 1954 U.S. Supreme Court case, stated that “[p]ublic safety, public health, morality, peace and quiet, law and order. . . are some of the more conspicuous examples of the traditional

---

<sup>7</sup> Source: Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/wex/liability>. Liability is “[t]he quality or state of being legally obligated or responsible.” BLACK’S LAW DICTIONARY: NEW POCKET EDITION (1996).

application of the police power;" while recognizing that "[a]n attempt to define [police power's] reach or trace its outer limits is fruitless."<sup>8</sup>

**Regulatory floodway:** The channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood (with a 1% annual probability) without cumulatively increasing the water surface elevation more than a designated height.

**Resilience:** "The ability to prepare for and adapt to changing conditions and withstand and rapidly recover from disruptions," as defined in [FEMA's National Disaster Recovery Framework](#).

**Riparian buffer:** Zone of variable width along the banks of a stream, river, lake, or wetland that provides a protective natural area adjacent to the waterbody.

**Sovereign immunity:** Sovereign immunity refers to the fact that the government cannot be sued without its consent.<sup>9</sup>

**Special Flood Hazard Area (SFHA):** An area mapped on the NFIP FIRM that shows the area subject to inundation by the base flood (with a one percent or greater probability of flooding in any given year). SFHAs have been mapped for flooding caused by rivers, lakes, oceans, and other larger sources of flooding.

**Standard of care:** The watchfulness, attention, caution, and prudence that a reasonable person in the circumstances would exercise. If a person's actions do not meet this standard of care, then their acts fail to meet the duty of care, which all people (supposedly) have toward others.<sup>10</sup>

**Substantial damage:** Damage of any origin sustained by a structure (building) whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

**Substantial improvement:** Any reconstruction, rehabilitation, addition, or other improvement of a structure (building), the cost of which equals or exceeds 50 percent of the market value of the structure before the start of construction for the improvement. This term includes structures that have incurred substantial damage, regardless of the actual repair work performed. NFIP

---

<sup>8</sup> Source: Cornell Law School, Legal Information Institute, [https://www.law.cornell.edu/wex/police\\_powers](https://www.law.cornell.edu/wex/police_powers). Police power has also been defined as "1. [a] state's Tenth Amendment right, subject to due process and other limitations, to establish and enforce laws protecting the public's health, safety, and general welfare, or to delegate this right to local governments. 2. Loosely, the power of the government to intervene in privately owned property, as by subjecting it to eminent domain." BLACK'S LAW DICTIONARY: NEW POCKET EDITION (1996).

<sup>9</sup> Source: Cornell Law School, Legal Information Institute, [https://www.law.cornell.edu/wex/sovereign\\_immunity](https://www.law.cornell.edu/wex/sovereign_immunity).

<sup>10</sup> Source: Law.com Dictionary, <https://dictionary.law.com/Default.aspx?selected=2002>.

development standards require that a substantially improved building be regulated as new construction.

**Sustainable:** Able to “meet the needs of the present without compromising the ability of future generations to meet their own needs,” as defined by the [United Nations](#).

**Takings:** A taking is when the government seizes private property for public use. A taking can come in two forms. The taking may be physical, meaning the government physically interferes with private property; or the taking may be constructive (also called a regulatory taking), meaning that the government restricts the owner's rights to such an extent that the governmental action becomes the functional equivalent of a physical seizure.<sup>11</sup>

**Tort:** A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. In the context of torts, “injury” describes the invasion of any legal right, whereas “harm” describes a loss or detriment in fact that an individual suffers.<sup>12</sup>

**Watershed:** The land area that channels rainfall and snowmelt to creeks, streams, and rivers, and eventually to outflow points, such as reservoirs, bays, and the ocean. Also known as a basin or catchment area.

---

<sup>11</sup> Source: Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/wex/takings>. A taking may also be defined as “[t]he government’s actual or effective acquisition of private property either by ousting the owner and claiming title or by destroying the property or severely impairing its utility.” BLACK’S LAW DICTIONARY: NEW POCKET EDITION (1996).

<sup>12</sup> Source: Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/wex/tort>.