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**SUBSTANTIVE TAKINGS LAW:  
A PRIMER**

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# SUBSTANTIVE TAKINGS LAW: A PRIMER

by Robert Meltz\*

“[N]or shall private property be **taken** for public use, without just compensation.” U.S. CONST. AMEND. V (emphasis added).

Some government interferences with a person’s use, possession or control of his property are deemed a “taking” of that property under the Fifth Amendment Takings Clause, requiring “just compensation.” Most such interferences are not. These materials summarize the case law on how this distinction is made.

A taking lawsuit asserts that a government action, such as regulation of private land use, has effectively “taken” that property, or a property interest therein, even though the government has not formally invoked eminent domain in a “condemnation action.” Because the property owner sues the government, rather than the reverse as in a regular condemnation action, a taking claim is also known as an “inverse condemnation” claim. *United States v. Clarke*, 445 U.S. 253, 257 (1980). Generally, the taking claimant seeks compensation, rather than invalidation of the government action, because the Takings Clause of the Fifth Amendment “does not prohibit the taking of private property, but instead places a condition on the exercise of that power” – namely, payment of just compensation. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

Though these materials cover only the *federal* Takings Clause, this is scant limitation. The federal Takings Clause applies to both the United States and (through the Fourteenth Amendment) state and local governments. Moreover, takings clauses in state constitutions are usually construed similarly to the federal Takings Clause. Indeed, some state courts, including California’s, assert complete congruence between state and federal substantive takings law. *See, e.g., Scofield v. State*, 753 N.W.2d 345, 358 (Neb. 2008); *Byrd v. City of Hartsville*, 620 S.E.2d 76, 79 n.6 (S.C. 2005); *San Remo Hotel v. San Francisco*, 41 P.3d 87, 100-01 (Cal. 2002). *Contra, McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110, 1126-27 (Nev. 2006) (Nevada constitution defines per se takings more broadly than federal constitution). Roughly half the state takings clauses apply to property that is either taken or “damaged,” the latter term adding further property protections. But “damaged” is not necessarily relevant to the takings analysis. *See, e.g., Customer Co. v. City of Sacramento*, 895 P.2d 900, 906-07, 909-12 (Cal. 1995) (“damaged” limited to eminent domain and public improvements).

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Only selected case authorities are cited herein. Also, there is a tilt in the citations toward the U.S. Court of Federal Claims (CFC) and U.S. Court of Appeals for the Federal Circuit, which adjudicate takings claims against the United States, given the more fully evolved takings jurisprudence in these courts and their nationwide influence on other courts. *See, e.g., Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1098 (N.D. Cal. 2007).

## **PART ONE: THRESHOLD SUBSTANTIVE HURDLES**

### **I. TAKINGS VERSUS OTHER LEGAL THEORIES**

At the outset, an aggrieved property owner should ask whether her state has *statutory* compensation remedies for land use restrictions. Such state “property rights laws” – principally in Florida, Texas, Oregon, and Arizona – typically set the threshold for compensating the property owner much lower than does the Takings Clause, and alternatively may allow government to waive the land-use restriction. Other legal theories overlapping with the Takings Clause are as follows.

#### **A. CONSTITUTIONAL THEORIES**

***Substantive due process.*** Takings and substantive due process (SDP) historically have been intertwined. Indeed, in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), government actions were said to constitute takings when they fail to “substantially advance legitimate state interests” – a means-end, due-process-like test. In 2005, however, the overlap between takings law and SDP was greatly reduced by *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). There, the “substantially advance” test was expunged from takings law as means-end oriented – inconsistent with the focus of takings law on the government action’s *impact* on the property. (Part Two, Section VI)

Before *Lingle*, some federal circuits held that a takings analysis, if appropriate, preempts SDP as an alternate theory. *See esp. Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc). Preemption of due process was premised on *Graham v. Connor*, 490 U.S. 386 (1989), holding that when another constitutional provision provides specific protection from the conduct complained of, the more general protection of due process may not be used. After *Lingle*, *Armendariz* preemption appears unjustified. By removing the “substantially advance” test from takings law, *Lingle* makes it harder to argue that SDP duplicates Takings Clause protections and should be preempted. *See, e.g., Crown Point Devpmt., Inc. v. City of Sun Valley*, 506 F.3d 851, 852-53 (9th Cir. 2007) (*Lingle* undermines *Armendariz* “to the limited extent that a claim for wholly illegitimate land-use regulation is not foreclosed”). Still, courts caution that SDP is not appropriate for most landowner complaints

but rather is reserved for the most egregious governmental abuses, such as those that “shock the conscience.” *See, e.g., Rivkin v. Dover Twp.*, 671 A.2d 567 (N.J. 1996).

Most recently, the Supreme Court has made clear there are still areas where takings and SDP are competing theories. *Stop the Beach Renourishment, Inc. v. Florida DEP*, 130 S. Ct. 2592 (2010) (plurality and concurring justices differ over whether judicially authored changes in the law should be assessed as takings or SDP violations).

**Equal protection.** When the landowner’s complaint is unequal treatment, as opposed to severe economic impact, equal protection may be a viable theory. *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 835 n.4 (1987). This is especially so given *Olech*’s revival of “class of one” equal protection claims, though courts often require that plaintiff prove government “ill will” to succeed. The distribution of a regulatory burden remains a proper concern of takings analysis too, *Lingle*, 544 U.S. at 542, so the two theories are not entirely distinct. For a typical “class of one” land-use equal protection claim, see *Flying J, Inc. v. City of New Haven*, 549 F.3d 538, 547-48 (7th Cir. 2008).

**Fourth amendment.** The Fourth Amendment’s proscription against “unreasonable seizures” plainly overlaps with some physical takings claims, particularly given the Supreme Court’s broad definition of “seizure.” *See, e.g., Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992). Two federal circuits have approved the use of simultaneous seizure and taking claims based on the same facts. *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009); *Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006).

## **B. TORT**

The takings-tort blur typically arises with physical invasions, such as flooding. When a taking claim alleges in essence the unlawfulness or unreasonableness of a government act, a court may discern a tort. *See, e.g., Thune v. United States*, 41 Fed. Cl. 49 (1998) (at best a tort, not a taking); *Arreola v. Monterey County*, 99 Cal. App. 4th 722 (2002) (both a tort and a taking). And when a governmental invasion of property is short-lived, not sufficiently intrusive, and/or unlikely to recur, it may fall short of a taking and amount to merely a tort such as trespass. *See, e.g., Barnes v. United States*, 538 F.2d 865, 870 (Ct. Cl. 1976); *Smith v. Town of Long Lake*, 837 N.Y.S.2d 391, 393 (App. Div. 2007); *Morris v. Douglas County Bd. of Health*, 561 S.E.2d 393 (Ga. 2002). The fact that the property injury was not deliberate may also relegate it to, at most, tort status. *Knutson v. City of Fargo*, 714 N.W.2d 44 (N.D. 2006).

The Federal Circuit uses a two-part inquiry to distinguish physical takings from torts. First, a taking results only when the government intends to invade a property interest or the invasion is the direct, natural, or probable result of an authorized activity, as opposed to an incidental or consequential injury. Second, the invasion must secure a benefit to the government at the expense of the property owner, or at least preempt the owner's right to enjoy his property for an extended period. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003). The first prong of the *Ridge Line* test is also stated as an element of the required causation between government act and property injury. (See this Part, Section III.B.)

The decisions split on whether the same facts can give rise to both takings and torts. *Compare Hansen v. United States*, 65 Fed. Cl. 76, 101 (2005) (collecting cases on both sides of issue, but finding that "While not all torts are takings, every taking that involves invasion or destruction of property is by definition tortious") and *Mildenberger v. United States*, 91 Fed. Cl. 217, 258 (2010) (torts and takings may arise from same facts) with *Smith*, 837 N.Y.S.2d at 393 ("entry onto the property of another cannot be both a trespass and a taking").

### C. BREACH OF CONTRACT

Contract rights often are held to be property. Thus, a claim of governmental breach of contract sometimes is joined by a claim that the government has taken a property right. The CFC and Federal Circuit, where many such combined actions have been filed, prefer to resolve them under the more specific breach-of-contract theory. *See, e.g., Hughes Communications Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001) ("[t]akings claims rarely arise under government contracts, because the government acts in its commercial or proprietary capacity ...."); *Sun Oil Co. v. United States*, 572 F.2d 786 (Ct. Cl. 1978); *Barlow & Haun, Inc. v. United States*, 87 Fed. Cl. 428 (2009).

Nor is anything taken where the plaintiff, as is typical, retains the full range of breach of contract remedies. *Castle v. United States*, 301 F.3d 1328, 1342 (Fed. Cir. 2002). For contracts-theory preferences outside the Federal Circuit, see *County of Ventura v. Channel Islands Marina, Inc.*, 71 Cal. Rptr. 3d 762, 768-69 (Cal. App. 2008) and *Mid-American Waste Systems, Inc. v. City of Gary*, 49 F.3d 286, 289 (7th Cir. 1995).

The preference for breach of contract in the CFC/Federal Circuit takes two inconsistent forms: the majority view, under which the taking claim may be dismissed at the outset, *see, e.g., Hughes*, 271 F.3d at 1070, and the minority (but growing) view, under which both theories may be argued, but the taking claim falls by the wayside only if the contract claim succeeds, *see, e.g., Consolidated Edison Co. of New York v. United States*, 67 Fed. Cl. 285, 291 (2005). The minority view has been expressly rejected in some decisions. *See, e.g., PG & E v. United States*, 70 Fed. Cl. 766, 780 n.14 (2006). But see most recently *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1368-69 (Fed. Cir. 2009) (appearing to endorse minority view). Of course, "a party can obtain only one recovery for a single harm." *Id.* at 1369.

Parenthetically, when government action affects performance under contracts *to which it is not a party*, there is no disputing that a takings theory is available. However, takings are almost never found. The government action, if public and general, is seen as merely "frustrating" incidentally, not taking, the thwarted contract right. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed. Cir. 2008). Even when the enactment "targets" the class of contracts to which plaintiff's contract belongs, making the *Omnia* rule unavailable as a defense, use of the *Penn Central* test almost always leaves the government without liability. *See, e.g., Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 642 (1993). In contrast, a taking does occur when the government seeks to "stand in the shoes" of a contract party, assuming that party's rights and duties under the contract. *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924).

## II. THE CONCEPT OF "PROPERTY"

### A. BASICS

The Takings Clause is not implicated unless the government conduct affects “property” cognizable under the Clause. *See, e.g., Bair v. United States*, 515 F.3d 1323, 1327 (Fed. Cir. 2008). Unilateral expectations and abstract needs are not property. *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980). Nor is an economic advantage, unless it has “the law back of [it].” *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (quoting *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945)).

Property interests are not created by the Constitution itself. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998). “Rather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law.” *Webb’s*, 449 U.S. at 161. Or, less commonly, federal law. *See, e.g., Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002). Concepts that define the bounds of a property interest – the sticks in the “bundle of rights” – include the law creating it, existing rules and understandings, and “background principles” of nuisance and property law existing when the property was acquired. *See, e.g., Schooner Harbor Ventures v. United States*, 569 F.3d 1359, 1362 (Fed. Cir. 2009). An interest having value does not, of itself, confer property status. *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932).

In modern usage, the term “property” refers to the rights inhering in the person’s relationship to some thing, not the thing itself. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003 (1984). A second point of word usage: some courts, in demarcating what the Takings Clause protects, speak of whether a property right is “vested,” or more than merely “inchoate,” rather than whether a property right exists.

### B. EVOLUTION OVER TIME / JUDICIAL TAKINGS

The latitude that governments have to shape and redefine property concepts over time is a recurring issue. The “government’s power to redefine ... property [is] necessarily constrained by constitutional limits,” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992), and “a State, by *ipse dixit*, may not transform private property into public property without compensation,” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). On the other hand, and key to the issue’s complexity, notions of property obviously evolve over time. Further complexity arises when it is unclear whether the government is merely clarifying what a property rule has always been, or announcing a new rule.

The clarifying-the-law versus announcing-new-law issue often arises in “judicial taking” cases. A judicial taking claim asserts that when a court makes certain changes in the law so as to divest existing property rights, that may constitute a taking as surely as when statutes or regulations do the same thing. The concept was first broached in a 1967 Supreme Court concurring opinion, *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J.), but was then largely ignored by the Court until 2010. In *Stop the Beach Renourishment, Inc. v. Florida DEP*, 130 S. Ct. 2592 (2010), a four-Justice plurality opinion saw no reason to suppose that takings by the judicial branch are entitled to special treatment, proposing that “If a legislature *or a court* declares that what was once an

established right of private property no longer exists, it has taken that property.” *Id.* at 2602 (emphasis in original). In concurring opinions, however, four Justices declined to reach the question of whether judicial takings exist, the Court unanimously having held that the state supreme court decision at issue was a reasonable interpretation of state precedent.

### C. “BACKGROUND PRINCIPLES”

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court announced that complete elimination of a land parcel’s use or value effects a per se “total taking.” Pertinent here, the Court added an exception. A land-use restriction, it said, is not a taking if it merely makes explicit what could have been prohibited under “background principles of the State’s law of property and nuisance” existing when the property was acquired. *Id.* at 1029. Though debuted in a total taking case, it is now clear that this “background principles” concept, limiting the rights obtained when property is acquired, applies in *all* regulatory takings cases, total and partial, *see, e.g., Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995); *Mutschler v. City of Phoenix*, 129 P.3d 71, 75 (Ariz. App. 2006) – indeed, it would seem, in physical takings cases as well (see Part Three, Section III).

Given the centrality of the background principles concept, *Lucas* said little about its content – beyond including the common law of nuisance, federal navigation servitude, and “doctrine of actual necessity” (Part One, Section VIII) as background principles. Early debate following *Lucas* asked whether background principles include (1) statutory law, as opposed to just common law; (2) statutes enacted not long before the property was acquired, as opposed to just vintage laws rooted in age-old legal tradition; and (3) federal law, as opposed to just state law. From the text of *Lucas* alone, however, it seems plain that the common-law-of-nuisance-only view errs in ignoring the “property” component of “background principles ... of property and nuisance,” and that the state-law-only view is incorrect in ignoring *Lucas*’ explicit mention of the federal navigation servitude. Lower courts generally have rejected these constraints on what constitutes “background principles” (see below).

However, courts are not free to conjure up background principles: they must be based on “objectively reasonable application of relevant precedents.” *Lucas*, 505 U.S. at 1032 n.18 (emphasis in original). See also, in this regard, Section II.B. Still, a pre-acquisition restriction *denied* background principle status nonetheless remains relevant to assessing what investment-backed expectations are reasonable under *Penn Central*. (See Part Two, Section III.B. – *Regulation predates acquisition*).

***Interpretation by Supreme Court.*** The Supreme Court has not spoken at length on background principles since *Lucas*. Its most extended remarks came in *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30 (2001), saying that “a regulation ... is not transformed into a background principle ... by mere virtue of the passage of title.” Rather, background principles reflect “common, shared understandings of permissible limitations derived from a State’s legal tradition.” *Id.* These comments appear to contemplate the possibility that some pre-acquisition statutes and regulations will qualify as background principles, though it is unclear how far such laws can go beyond simply mirroring the common law of nuisance.

***Interpretation by courts other than CFC and Federal Circuit.*** These courts often interpret “background principles” broadly. State courts have held background principles to subsume statutes,

whether or not they codify common law, *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 418 (Va. 1998), *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997), and recently enacted laws, not just ancient ones. *Annello v. Zoning Bd. of Appeals*, 678 N.E.2d 870 (N.Y. 1997) (ordinance enacted two years before property acquisition); *Hunziker v. State*, 519 N.W. 2d 367, 371 (Iowa 1994) (state statute enacted ten years before acquisition). Query whether all these decisions survive the *Palazzolo* remarks above. A contrary decision, asserting that background principles derive only from common law, not statutory law, is *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75 (Cal. App.), *rev. denied* (2008).

The background-principle status of some common-law property principles has been made explicit. One example is the public trust doctrine. *See, e.g., McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, 119 n.5 (S.C. 2003); *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002). Another is the Oregon doctrine of custom, giving the public recreational access to the “dry sand” beach, *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993), and the Texas “rolling” (migrating) easement allowing public access to the dry beach between mean high tide line and natural vegetation line, notwithstanding that these lines move, *Severance v. Patterson*, 485 F. Supp. 2d 793, 804 (S.D. Tex. 2007), *aff’d on other grounds*, 566 F.3d 490 (5th Cir. 2009). Yet another is certain water law limitations. *See, e.g., West Maricopa Combine, Inc. v. Arizona*, 26 P.3d 1171, 1180 (Ariz. App. 2001). Limited case law suggests that the historical responsibility of states for wildlife protection, including the state ownership doctrine, may qualify as a background principle as well, *see, e.g., New York v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78, 84 (2000).

***Interpretation by CFC and Federal Circuit.*** These courts initially took the narrow view that background principles generally include only state common law of nuisance, and statutes that reflect that common law. *See, e.g., Preseault v. United States*, 100 F.3d 1525, 1538 (Fed. Cir. 1996) (en banc plurality) and its progeny. More recent decisions, however, have endorsed as background principles a wide array of common law and statutes. *Bair v. United States*, 515 F.3d 1323 (Fed. Cir. 2008) (federal law asserting super-priority of federal loans to sugar processors); *American Pelagic Fishing Co, L.P. v. United States*, 379 F.3d 1363, 1379 (Fed. Cir. 2004) (federal fisheries statute, because “consistent with the historical role played by the sovereign ... with respect to its waters”); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1384, *aff’d on rehearing*, 231 F.3d 1354 (Fed. Cir. 2000) (federal navigation servitude); *Air Pegasus, Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005) (public ownership of navigable airspace); *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997) (practices of international law).

#### **D. TAKINGS PROPERTY VERSUS DUE PROCESS PROPERTY**

The Takings and Due Process Clauses use “property” in adjacent text. Notwithstanding, courts generally hold that “property” is narrower for takings purposes. *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996); *Pittman v. Chicago Bd. of Ed.*, 64 F.3d 1098, 1104 (7th Cir. 1995); *Zealy v. City of Waukesha*, 153 F. Supp. 2d 970, 977 (E.D. Wis. 2001); *Bronco Wine Co. v. Jolly*, 29 Cal. Rptr. 3d 462, 494 (Cal. App. 2005). *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 557 (1998) (four-justice dissent asserting that Takings Clause and Due Process Clause have different objectives, permitting difference in how “property” is construed in each). The reason for the usual, narrower definition of “property” in takings law is never stated – possibly it is the different remedies under the two clauses: coerced government purchase of the property versus better procedures. In any event, a wide range of statutory entitlements – welfare payments, unemployment compensation, public

employment – are not covered by the Takings Clause even though they are covered by due process procedural safeguards.

## E. LAND

Almost all interests in land are recognized as “property” under the Takings Clause – from fee simples to leaseholds, easements, liens, life estates, and restrictive covenants. *See, e.g., United States v. Welch*, 217 U.S. 333 (1910) (easements). Equitable as well as legal interests are recognized. The decisions generally recognize as property even some of the more insubstantial interests in land, such as certain contingent future interests, options to purchase or renew a lease, and rights of first refusal. *See, e.g., United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946) (option to renew lease); *MHC of Washington v. State*, 13 P.3d 183 (Wash. 2000) (right of first refusal). Of course, state law treatment of the interest controls. Compare *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 70 (1997) (option to purchase, even unexercised, is property under California law) with *New England Estates v. Town of Branford*, 988 A.2d 229 (Conn. 2010) (unexercised option to purchase property is not a property interest under state law). Indian lands recognized by treaty are property. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

Water rights, though often of a qualified nature, are generally held property. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (riparian rights); *Walker v. United States*, 69 Fed. Cl. 222 (2005) (appropriation rights); *Hensley v. City of Columbus*, 433 F.3d 494 (6th Cir. 2006) (groundwater rights). *See generally Hansen v. United States*, 65 Fed. Cl. 76, 123-24 (2005). *But see Walton County v. Stop Beach Renourishment, Inc.*, 998 So.2d 1102, 1111 (Fla. 2008) (noting that certain littoral rights are property in Florida, but mere licenses in Mississippi), *affirmed*, 130 S. Ct. 2592 (2010), and *Mildenberger v. United States*, 91 Fed. Cl. 217, 243-44 (2010) (under Florida law, riparian rights held concurrently with the public are not compensable). Also property are mineral rights, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and even unpatented mining claims, *Kunkes v. United States*, 78 F.3d 1549 (Fed. Cir. 1999). And usable airspace up to the floor of public airspace. *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006) (collecting cases).

## F. PERSONAL PROPERTY

The Takings Clause covers personal property, both tangible and intangible. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003 (1984); *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). With regard to intangible property, in the absence of statutory language precluding a property interest, one looks to “whether ... the alleged property had the hallmark rights of transferability and excludability.” *Peanut Quota Holders*, 421 F.3d at 1330. Again, value alone does not automatically confer property status, and lack of value does not preclude it. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 169 (1998).

Held to be property under the Clause are (1) franchises, *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1883); (2) money, *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); (3) interest on principal, *id.*; (4) debts of a lender, *Bowen v. POSSE*, 477 U.S. 41, 55 (1986); (5) liens, *Armstrong v. United States*, 364 U.S. 40 (1960) (materialmen’s lien); (6) certain contract rights, *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 642 (1993); (7) patents and copyrights, *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000) (copyrights); (8) trade secrets, *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003-04 (1984); and (9) causes of action

once reduced to final, unreviewable judgment, *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9<sup>th</sup> Cir. 2009). As for causes of action, all federal circuits to address the question have agreed with *Ileto*, except the Federal Circuit. Federal Circuit decisions suggest the position, with no analysis, that accrued causes of action are property regardless of whether reduced to judgment.

Held *not* to be property under the Clause are (1) permits and licenses, when nontransferable and revocable, *Mobile Relay Assocs. v. FCC*, 457 F.3d 1 (D.C. Cir. 2006), *Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002), *Bronco Wine Co. v. Jolly*, 29 Cal. Rptr. 3d 462, 494 (Cal. App. 2005), *contra*, *State Bd. of Ed. v. Drury*, 437 S.E.2d 290 (Ga. 1993) (license to engage in profession); *Pre-Need Family Services v. Bureau*, 904 A.2d 996, 1003 (Pa. Cmwlth. 2006) (same); (2) government benefits, unless contractual, *Bowen v. Gilliard*, 483 U.S. 587, 604 (1987) (welfare payments); *Peanut Quota Holders*, 421 F.3d 1323 (quotas are property in the nature of revocable statutory benefits, hence noncompensable); (3) uses/access dependent on government authorization, especially in a context of pervasive government control, *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1217-18 (Fed. Cir. 2005) (access to public airspace), *Rick's Amusement, Inc. v. State*, 570 S.E.2d 155, 158-59 (S.C. 2001) (right to operate video gaming machines); (4) the mere ability to conduct a business, as something separate from the business' assets, *College Savings Bank v. Florida Prepaid*, 527 U.S. 666, 675 (1999) (a due process decision), particularly when voluntarily entering a pervasively regulated field, *Akins v. United States*, 82 Fed. Cl. 619 (2008) (firearms); and (5) wildlife prior to its being reduced to possession, *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1426 (10<sup>th</sup> Cir. 1986).

Also, “[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.” *New York Central R.R. v. White*, 243 U.S. 188, 198 (1917); *Branch v. United States*, 69 F.3d 1577-78 (Fed. Cir. 1995).

## **G. “FUNDAMENTAL” PROPERTY INTERESTS**

Some property rights are judicially acknowledged as fundamental. The right to physically exclude others is the prime example, resulting in a rule that permanent physical occupations by the government are per se takings, even when the space occupied and the economic impact are minimal. See Part III, Sec. I. The right to pass on property to one’s heirs appears to be another, resulting in a rule that at least where the interference is total or substantial, the remedy may be invalidation – rather than the usual compensation. *Babbitt v. Youpee*, 519 U.S. 234 (1997); see *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998).

## **III. CAUSATION, ATTRIBUTION, ETC.**

### **A. NECESSITY OF DIRECT CAUSATION**

A taking claim can succeed only when the harm to the property interest was caused *directly* by the challenged government action. Indirect, aka "consequential," injuries are without Takings Clause remedy. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923); *Air Pegasus, Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005). Thus, government allowing increased use on one parcel or itself constructing a project thereon, causing harm to a neighbor, usually gives the neighbor no taking claim. See, e.g., *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005) (increasing allowed uses); *E-L Enter., Inc. v. Milwaukee Metropolitan Sewerage Dist.*, 785 N.W.2d 409 (Wis. 2010)

(constructing project). *Cf. Armstrong v. United States*, 364 U.S. 40 (1960) (government's destruction of lien value not merely consequential).

When the causation requirement is addressed, the standard is variously stated. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (passing reference to losses "proximately caused" by government); *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988) (more than "incidental result" of regulation); *Akins v. State*, 61 Cal. App. 4th 1 (1998) (owner must show a "substantial cause-and-effect relationship, excluding the probability that other forces *alone* produced the injury") (emphasis in original). *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 n.14 (1992) (law that destroys value of land without being aimed at land "perhaps" cannot be taking).

Inadequate efforts of the government to prevent property injury from natural disasters, as Hurricane Katrina, usually lead to holdings that it was the natural event, not the government, that caused the injury. *See, e.g., Nicholson v. United States*, 77 Fed. Cl. 605 (2007). Actions of the plaintiff also may be seen as the cause of the property harm. *See, e.g., United States v. Locke*, 471 U.S. 84, 107 (1985) (failure of unpatented mining claim holder to meet filing deadline in statute, not the filing statute, caused claim to be extinguished); *Walcek v. United States*, 44 Fed. Cl. 462, 468 (1999) (most of delay in issuing permit was caused by inadequacy of plaintiff's applications and plaintiff's opting early to litigate takings claim), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002).

When property injury is linked to government alteration of a natural process, the causation question may turn on whether a private actor precipitated the injury. *Compare Cotton Land Co. v. United States*, 109 Ct. Cl. 816 (1948) (where government dam slowed upstream flow and increased sand deposition in riverbed, causing flooding, taking occurred) *with Cary v. United States*, 552 F.3d 1373 (Fed. Cir.) (where government forest fire suppression resulted in denser trees and forest fire here being more severe, no taking of fire-destroyed homes occurred because fire was started by hunter's signal fire and was thus not the direct, natural or probable result of government's acts), *cert. denied*, 129 S. Ct. 2878 (2009).

Causation is sometimes subsumed within the court's standing inquiry. *See, e.g., Autozone Devpmt. Co. v. District of Columbia*, 484 F. Supp. 2d 24, 30 (D.D.C. 2007).

## **B. FORESEEABILITY/ INTENT**

Causation in fact is often held a necessary, but not sufficient, condition for establishing takings liability. In addition to causation in fact, "an inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury." *Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005). *Accord, City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005) (must show city intentionally took property, or was substantially certain that would be result). Thus, an unforeseeable intervening cause may exonerate the government from liability for subsequent harm. *See, e.g., Thune v. United States*, 41 Fed. Cl. 49 (1998) (destruction of hunting camp when forest fire set by U.S. shifted direction is not a taking, due in part to unforeseeable wind change); *Cary*, 552 F.3d at 1378-79 (hunter setting signal fire was unforeseeable intervening cause). A showing of governmental intent to take is not required.

### C. ATTRIBUTION: LIABILITY FOR THIRD PARTY CONDUCT

**Private third parties.** Takings liability for the acts of a private third party may be attributed to a government when it has a “direct and substantial” involvement with the party. *Casa de Cambio v. United States*, 291 F.3d 1356, 1361 (Fed. Cir. 2002). Such involvement may be discerned when the government directed or authorized third-party conduct with specific reference to the plaintiff’s property. A well-settled example is government authorization of physical invasion by private parties. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state liable for physical taking, even though state-authorized activity carried out by private company). Liability also may be imputed to the government when the third party acted as its agent.

Merely because the government *authorizes* a third party to act in a way harmful to plaintiff’s land, as by issuing a permit or rezoning, does not make the government liable for any taking. “Without governmental encouragement or coercion, actions taken by private corporations pursuant to federal law do not transmute into government action under the Fifth Amendment.” *Broad v. Sealaska Corp.*, 85 F.3d 422, 431 (9th Cir. 1996). *Accord, Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005) (rezoning); *Benson v. State*, 710 N.W.2d 131, 156 (S.D.) (decriminalizing conduct); *Stanfield v. Glynn County*, 631 S.E.2d 374 (Ga. 2006) (permitting of waste transfer facility); *Berkley v. R.R. Comm’n*, 282 S.W.3d 240 (Tex. App. 2009) (permitting of underground injection). *But see Swartz v. Beach*, 229 F. Supp. 2d 1239 (D. Wyo. 2002) (issuance of permit together with alleged government malfeasance states taking claim based on permitted activity).

**Government third parties.** The third party whose actions impinge on private property is often another government, posing the question of which government, if any, is the taker. The cases arise chiefly when the third-party government participates in a program of the defendant government. When, in so doing, the third-party government is deemed an agent or instrumentality of the defendant, takings liability will be imputed. *See, e.g., Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (superfund program); *Toews v. United States*, 376 F.3d 1371, 1381-82 (Fed. Cir. 2004) (rails-to-trails program). Agent/instrumentality status has been rejected, though, when the state acted solely to qualify for federal money, and considerable discretion was left to the state. *B&G Enterprises v. United States*, 220 F.3d 1318 (Fed. Cir. 2000) (federal substance-abuse block grant); *Adolph v. FEMA*, 854 F.2d 732, 736 (5th Cir. 1988) (federal flood insurance program). *See also Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962) (county, not U.S., liable for taking of air easement near county airport, even though airport was funded by U.S. based on compliance with federal regulations). Whether state environmental programs operated under delegated federal authority can give rise to federal takings liability appears not to have been addressed.

The mere fact that the U.S. cajoled the other government into taking action is insufficient to shift any takings liability to the U.S. *Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir. 1985); *Davis v. United States*, 35 Fed. Cl. 392 (1996); *Blue v. United States*, 21 Cl. Ct. 359 (1990). Neither is there imputation of takings liability to the U.S. when the state’s action is merely a logical consequence of federal activity – that is, there is no formal federal-state interaction pursuant to a federal program. *Applegate v. United States*, 35 Fed. Cl. 406, 422 (1996).

## D. OWNERSHIP AS OF THE DATE OF THE ALLEGED TAKING

Until *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a property owner generally could maintain a taking claim only if he owned the property as of the date of the alleged taking. The right to compensation, said the courts, is not passed to a subsequent purchaser. *United States v. Dow*, 357 U.S. 17, 20 (1958) (a direct condemnation case); *Norman v. United States*, 38 Fed. Cl. 417, 423-24 (1999) (a regulatory taking case). This is the prime standing-to-sue rule of takings law.

*Palazzolo* reaffirmed this rule for direct condemnations and physical invasions. It seemed to abandon or at least limit it, however, for regulatory taking actions. 533 U.S. at 628. See *Machipongo Land & Coal Co., Inc. v. Commonwealth*, 799 A.2d 751, 761-63 (Pa. 2002); *City of Sherman v. Wayne*, 266 S.W.3d 34, 47 (Tex. App. 2008). The Federal Circuit appears not to be swayed, however, stating post-*Palazzolo* in a regulatory case: “It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.” *American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). Moreover, even if the old rule has lost some force, the post-taking acquirer faces an uphill climb in demonstrating reasonable investment-backed expectations under a *Penn Central* analysis (See Part Two, Section III.B. – Regulation predates acquisition).

## IV. INVALID GOVERNMENT ACTIONS

### A. COURTS OTHER THAN CFC AND FEDERAL CIRCUIT

For some courts, the erroneous/unauthorized aspect of the government action is *irrelevant* to the takings analysis. See, e.g., *Eberle v. Dane County*, 595 N.W.2d 730 (Wis. 1999); *Harris County Flood Control Dist. v. Adam*, 56 S.W.3d 665, 668-69 (Tex. App. 2001). Other cases hold that an invalid government action *cannot* be a taking. See, e.g., *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001) (invalid zoning ordinance is not, in the words of *First English*, the “otherwise proper [governmental] interference” that the Takings Clause presupposes). See also *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (in separate opinions, majority of justices say that Takings Clause assumes that challenged government conduct is “legitimate,” *id.* at 554, or “valid,” *id.* at 545). This view arguably received a boost in *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005), which (1) said that the Takings Clause “presupposes that the government has acted in pursuit of a valid purpose,” *id.* at 543, and (2) twice quoted the “otherwise proper” language in *First English* cited above.

What has been pivotal in several cases is that the erroneous government action (including judicial challenges thereto) was judicially regarded as a normal administrative delay in passing upon a development application. Routine delays during the process of government decisionmaking are not takings. *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980). See, e.g., *Sea Cabins on the Ocean IV Homeowners Ass’n v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001); *Landgate*, 953 P.2d at 1197 (California agency’s mistaken but reasonable assertion of jurisdiction was “part of the development approval process,” hence not a taking); *Ali v. City of Los Angeles*, 91 Cal. Rptr. 458 (Cal. App. 1999) (denial of demolition permit was arbitrary and capricious, not “normal delay” as in *Landgate*; regulatory taking found).

## B. CFC AND FEDERAL CIRCUIT

In these courts, “unauthorized” acts of federal agencies cannot be the basis of takings claims against the United States. A taking plaintiff implicitly concedes that the government action was authorized. Thus, she cannot seek return of the property – only compensation. *Del Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998). *Del Rio* clarified that this “unauthorized acts rule” applies only to a subset of invalid government actions: those that are “*ultra vires*, *i.e.*, ... either explicitly prohibited or ... outside the normal scope of the government officials’ duties.” *Id.* at 1363. By contrast, agency conduct that is the natural consequence of congressional measures or an exercise of discretion granted to an official is not “unauthorized,” even if invalid. Such conduct does *not* preclude a taking claim. Query, however, whether the *Lingle* references noted above may prompt these courts to expand the universe of takings-preclusive government actions to all invalid actions. They have not so far.

Justifications stated for the unauthorized-acts rule are: (1) a federal officer acting without authority “will not ... represent the United States,” *Hooe v. United States*, 218 U.S. 322, 335 (1910), and (2) allowing the obligation of federal funds based on unauthorized federal conduct “would strike a blow at [Congress’] power of the purse.” *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978).

Illustrative is the takings litigation attacking an FDA regulation limiting where cigarette vending machines could be installed. While the cases were pending, the Supreme Court repudiated FDA’s authority to regulate cigarettes as having been expressly disallowed by Congress. Thus, said the CFC, the unauthorized-acts rule required dismissal of the takings claims. *See, e.g., A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345 (2001), *aff’d*, 304 F.3d 1349 (Fed. Cir. 2002).

## V. ABSENCE OF POWER TO CONDEMN

Takings are unacknowledged exercises of eminent domain power. Does this logically require that to be subject to a taking claim, an agency must have eminent domain (condemnation) authority in the circumstance giving rise to the alleged taking?

Courts split on this question. Those answering yes assume the symmetry of demanding condemnation authority in both instances. *See, e.g., Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1575 (10th Cir. 1995); *State v. The Mill*, 809 P.2d 434, 439 (Colo. 1991) (en banc); and *Butchart v. Baker County*, 166 P.3d 537, 545 (Or. App. 2007). Courts answering no point to the irrelevance of the authority issue to the compensatory concerns of the Takings Clause, and note that requiring condemnation authority invites government manipulation to circumvent the Clause. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1341-42 (9th Cir. 1990); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982); *Manning v. Energy, Minerals, and Natural Res. Dep’t*, 144 P.3d 87, 91-92 (N.M. 2006); and *Mowrer v. Charles County*, 605 S.E.2d 563 (S.C. App. 2004).

## VI. "PUBLIC USE"

A taking must be for a “public use.” If it is not, the government act is void regardless of whether compensation is paid. Where the issue whether a government action furthers a public use arises, it is almost always in a direct condemnation case. Instances of courts invalidating inverse condemnations as lacking a public use include *Daniels*, 306 F.3d 445 (vacation of restrictive covenant was taking for private purpose; commission’s findings as to public purpose were not entitled to deference), and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (aggressive enforcement of building code to prompt sale of parcel to another private entity violates “public use” prerequisite). *Cf. Action Apartment Ass’n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020 (9th Cir. 2007) (rent control ordinance satisfies public use requirement).

The “public use” hurdle in the federal constitution is a low one -- it is enough that the taking be “rationally related to a conceivable public purpose.” *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). And it is enough that the legislature could have believed this; the statute need not have proved successful. A “public purpose” is any purpose within the government’s police power, and great deference is shown to the legislative judgment. Supreme Court decisions of the past half century, arising from direct condemnations, have solidified this expansive interpretation. The most recent is *Kelo v. City of New London*, 545 U.S. 469 (2005), holding that even condemnation of unblighted private property for conveyance to private developers can be a public use, given a proper economic development purpose.

*Kelo* sparked a nationwide backlash leading to state legislative enactments and initiatives on numerous state ballots to rein in use of eminent domain for economic development. Important here, property rights partisans sought to broaden the public’s *Kelo* concerns to include as well government *regulation* of private property. As a result, *Kelo*-spawned initiatives on the 2006 ballots in Arizona, California, and Idaho also included measures requiring compensation for land use regulations that reduce property values, and, in Arizona and Idaho, allowing the government to instead waive the regulation. A fourth regulatory compensation measure, unpaired with an anti-*Kelo* proposal, appeared on the 2006 ballot in Washington. Of the four measures, only Arizona’s was adopted. Where such measures apply, one can assume that landowners will have little interest in constitutional takings actions with their generally higher threshold for obtaining compensation. Oregon has since backed off the low-threshold compensation/waiver requirements for land-use controls in its pre-*Kelo* Measure 37 through its 2007 adoption of Measure 49. In June 2008, California voters opted for the less severe of two eminent domain-restricting initiatives on the ballot (Proposition 99) – the more restrictive option (Proposition 98) would have also barred regulation in some cases.

## VII. GOVERNMENT PROPRIETARY RIGHTS

Generally, no taking issue is raised when the government asserts its own property rights without invoking sovereign powers. The former is found to have occurred when the government transacts in a commercial capacity, *see Pi Electronics Corp. v. United States*, 55 Fed. Cl. 279, 287 (2003), or asserts its property rights in a judicial proceeding, *DSI Corp. v. United States*, 228 Ct. Cl. 299 (1981) (government’s prosecution of its lien claim before a court in an equal contest of ownership was not a taking); *Janicki Logging Co. v. United States*, 36 Fed. Cl. 338 (1996) (no taking where government complied with contract terms and never asserted more than proprietary rights), *aff’d*, 124

F.3d 226 (Fed. Cir. 1997) (table entry). *See also State v. Holland*, 221 S.W.3d 639 (Tex. 2007) (when government acts pursuant to colorable contract rights, i.e., as private citizen, it retains its sovereign immunity under state constitution).

But if the government unilaterally (without going to court) uses threats backed by sovereign power to enforce its asserted property rights, takings liability may indeed attach, depending on the facts. *Yuba Goldfields v. United States*, 723 F.3d 884, 889 (Fed. Cir. 1983) (notifying plaintiff that its mining of precious metals claimed by government was “prohibited” is sovereign, not proprietary, act; but noting that “resolution of the ‘proprietary-sovereign’ dichotomy is not in itself controlling in just compensation jurisprudence”); *Petro v. United States*, 47 Fed. Cl. 136, 150 (2000) (government order that plaintiff cease and desist mining of sand and gravel claimed by government was sovereign, not proprietary, act).

## VIII. MISCELLANEOUS EXCLUSIONS

In a few situations, government actions that look at first blush like appropriations of property are deemed outside the reach of takings law. One example is forfeiture, both civil and criminal, *Acadia Technology, Inc. v. United States*, 458 F.3d 1327, 1331-33 (Fed. Cir. 2006) (collecting cases), *Howell v. State*, 656 S.E.2d 511 (Ga. 2008), even when the property owner is not the accused party, *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008). Another example is incidental destruction of an innocent third person’s property as part of police efforts to apprehend suspects. *See, e.g., Customer Co. v. Sacramento*, 895 P.2d 900, 909-12 (Cal. 1995). *Compare Brutschke v. City of Kent*, 193 P.3d 110, 119-20 (Wash. 2008) (collecting cases on court split as to whether police destruction of innocent person’s property while executing search warrant is taking).

Another exclusion, not yet firmly established, is that government imposition of generalized monetary liability cannot be a taking. (See Part Two, Section III.C. – Need for specific property). Perhaps related, though of much older vintage, is the rule that taxes are not takings. *See, e.g., County of Mobile v. Kimball*, 102 U.S. 691, 703 (1880); *Branch v. United States*, 69 F.3d 1571, 1576-77 (Fed. Cir. 1995) (collecting cases); *Empress Casino Joliet Corp. v. Giannoulis*, 896 N.E.2d 277, 293 (Ill. 2008), *cert. denied*, 129 S. Ct. 2764 (2009).

Yet another exclusion from takings liability occurs during public calamities as when, under the “doctrine of necessity,” firemen (or private parties) freely trespass on land and houses may even be destroyed to prevent the fire from spreading. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992). Closely related are the wartime exclusions, such as the destruction of private property to prevent its capture by an advancing enemy. *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952).

Generally, a taking cannot result from government *inaction* – e.g., failure to alleviate property injury. *See, e.g., Hall v. United States*, 84 Fed. Cl. 463, 472 (2008); *State v. Nixon*, 250 S.W.3d 365, 372 (Mo. 2008); *Travelers Excess and Surplus Lines Co. v. City of Atlanta*, 677 S.E.2d 388 (Ga. App. 2009). But see Part Two, Section VIII.C. (Administrative delays).

*Preface to remainder of this primer:* A takings claim can be “as-applied” or “facial.” An as-applied claim, far more common, argues that as applied to *the plaintiff’s* property, the government action works a taking, though it might not be a taking as applied to other properties. A facial claim is more ambitious, asserting that as applied to *any* property, the government action effects a taking. In most cases, a facial claim is thus a challenge to the mere enactment of legislation, rather than awaiting an administrative act applying it to plaintiff’s property. “Facial takings challenges face an uphill battle since it is difficult to demonstrate that the mere enactment of a piece of legislation deprived the owner of all economically viable use of his property.” *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997).

## **PART TWO: REGULATORY TAKINGS TESTS**

### **I. OVERVIEW**

In 1922, the Supreme Court announced that a Fifth Amendment taking could occur simply through government regulation that “goes too far” – that is, even in the absence of any physical invasion or appropriation of the property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The remainder of this Part Two distills the tests developed by courts to determine when a regulation “goes too far.” Almost all of this jurisprudential development has occurred in the period beginning with *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), and was summarized by the Court in 2005: *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005).

Declared at the outset of many takings decisions is that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). While short on specifics, this ubiquitous statement stands as an admonition that takings decisions are to be infused with a sense of what is fair – to the property owner and to the government – under the totality of circumstances. At the same time, the Court’s more recent pronouncement that regulatory takings law seeks to identify regulatory situations that are the “functional equivalent” of appropriation or physical ouster necessarily constrains the latitude within which the “fairness and justice” principle can operate. *Lingle*, 544 U.S. at 539.

The various types of takings claims in general have widely varying chances of success. Physical takings claims (Part Three) are the most likely to succeed; next, total regulatory takings claims under *Lucas* (below); and last, partial regulatory takings claims under *Penn Central* (below). If the facts permit, therefore, plaintiffs tend to argue their claims in that order. Plaintiff victories under *Penn Central* are uncommon.

Finally, these materials cover only the predominant tests for regulatory takings – *Lucas* and *Penn Central*. There are a few, special-situation tests that predate *Lucas* and *Penn Central* and have yet to be displaced by them. *See, e.g., State v. Cincinnati*, 886 N.E.2d 839 (Ohio 2008) (taking occurs when government “substantially or unreasonably interferes” with right of owner of land abutting public highway to access highway).

## A. *LUCAS* "TOTAL TAKING" RULE

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1029 (1992), the Supreme Court said –

**Government regulation *completely* eliminating the economic use (and seemingly value, too) of land is a per se "total taking."**

Though described by the Court as one of its two major per se takings rules (along with the *Loretto* permanent physical occupation rule), the *Lucas* rule contains a big exception. Despite complete elimination of use and/or value, a restriction is not a taking if it merely duplicates what could have been achieved under “background principles of the State’s law of property and nuisance” existing when plaintiff acquired the land. (See Part One, Section II.B.) Such background principles limit the rights plaintiff acquired in the property. Plainly, there can be no taking when a government restriction eliminates a right the landowner never acquired.

*Lucas* has been largely confined to land-use restrictions of prospectively indefinite duration, as opposed to those known to be temporary at the outset. *Tahoe-Sierra*, 535 U.S. at 332.

## B. *PENN CENTRAL* "PARTIAL REGULATORY TAKING" TEST

This “test” applies when the *Lucas* rule is inapplicable – that is, the government regulation falls short of completely eliminating use and/or value. Unlike the per se *Lucas* rule, *Penn Central* requires multifactor balancing –

**To determine whether a partial regulatory taking has occurred, examine the government action for its (1) economic impact on the property owner, (2) degree of interference with the owner’s “distinct” (in many later cases, “reasonable”) investment-backed expectations, and (3) “character.”**

*Penn Central*, 438 U.S. at 124. These factors are mere guideposts, with only modest content supplied by the Supreme Court (but more supplied by lower courts). The Court stresses that a partial regulatory taking analysis is not governed by “set formula,” but is an “essentially ad hoc, factual inquir[y].” *Id.* Thus, *Penn Central* is as much an analytical framework as a true “test.”

A court’s invocation of *Penn Central* generally prompts it to assess all three factors. However, each factor, if sufficiently compelling, can be conclusive that a taking exists – dispensing with the need to examine the other two. For the “economic impact” factor, this point is made by *Lucas*, the special case where the economic impact is a total wipeout (see below). Conversely, the *absence* of proof of economic impact may be dispositive as well, requiring a holding of no taking. *Kafka v. Montana Dep’t of Fish, Wildlife, and Parks*, 201 P.3d 8 (Mont. 2008). For the “interference with investment-backed expectations” factor, see *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984) (“force of this factor is so overwhelming ... that it disposes of the taking question ....”). As with economic impact, the absence of this factor may preclude a taking. *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1581 (Fed. Cir. 1995). For the “character” factor, the point is made by the *Loretto* “permanent physical occupation” rule (Part Three).

## C. REMOVAL OF RESTRICTION FOLLOWING TAKING HOLDING

A judicial finding of a regulatory taking in no way limits the government's ability to rescind or amend the offending restriction. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987). Thus, plaintiff cannot force the government to pay for a permanent taking if the government is willing to undo the restriction. On the other hand, once a taking has been found as of when the restriction was imposed, nothing the government does can undo that fact – it must at least pay for the temporary taking while the restriction was in effect. *Id.*

## II. LUCAS TEST ISSUES

Plaintiffs are far more likely to win if the court accepts a *Lucas* total-taking argument than if it relegates plaintiff to *Penn Central* balancing.

### A. USE OR VALUE, OR BOTH?

The *Lucas* test is stated above as requiring total loss of both economic use *and value*. Use and value are quite distinct, of course – a piece of land stripped of economic use may still retain value as open space or for speculation. *Lucas* itself, however, left the inclusion of value unclear, since most of its references were to residual use. Total loss of value was noted as part of the *Lucas* test, however, in *Palazzolo* in 2001, 533 U.S. at 631, and in *Tahoe-Sierra* in 2002, 535 U.S. at 330. A three-justice dissent in *Tahoe-Sierra* took exception on this point, asserting a use-only view of *Lucas*. *Id.* at 350-51. But the Court's last word on the issue endorses value. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Today, most courts in defining the *Lucas* test still refer simply to the elimination of "economic" or "beneficial" or "productive" use, and fail to mention value. Some courts use the two concepts interchangeably. *See, e.g., Maritrans, Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003).

### B. HOW TOTAL IS "TOTAL"?

How "total" must the "total taking" of use and/or value be for a *Lucas* claim? A property owner left with a mere "token interest" qualifies as a total taking, says *Palazzolo*. 533 U.S. at 631. More than a token interest, however, and the owner must look to *Penn Central*. In *Lucas* itself, the Court acknowledged that an owner "whose deprivation is one step short of complete" – giving 95% value loss as an illustration – would not come under the total taking rule (though there might be a *Penn Central* taking). 505 U.S. at 1019 n.8. *Lucas* spoke of the total taking situation as "extraordinary" and "relatively rare." *Id.* at 1017-18. And *Palazzolo* held that a landowner restricted to building a single residence on a 20-acre parcel retained enough use and value to fall outside *Lucas*. *Tahoe-Sierra* described *Lucas* as requiring the "permanent obliteration" of the parcel's value. 535 U.S. at 330.

Because the *Lucas* test requires *total* elimination of use/value on the parcel as a whole, its successful use by fee owners has been rare. As just noted, even a parcel on which one cannot build at all likely retains value.

### **C. ROLE OF EXPECTATIONS**

Does the expectations factor of *Penn Central* play a role in *total* takings? The *Lucas* majority opinion offers conflicting signals, 505 U.S. at 1015-16, though to be sure the Court's opinion did not include any discussion of plaintiff's expectations. Justice Kennedy, in concurrence, found that a role for expectations in total takings analysis was essential. *Id.* at 1034.

The question provoked a spat between two Federal Circuit panels. *Compare Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (absence of investment-backed expectations defeats total taking claim), with *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354 (Fed. Cir. 2000) (*Lucas* bars any role for investment-backed expectations in a total taking analysis; *Good* was dictum and violated law of the circuit). Subsequent CFC decisions have followed *Palm Beach Isles* – only *Cane Tennessee, Inc. v. United States*, 62 Fed. Cl. 703, 711-16 (2004), adding discussion. State court decisions, in broad prefatory descriptions of the takings tests, appear to assume the absence of an expectations role in the total takings context. *See, e.g., Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 36 (1st Cir. 2002) (en banc); *Glenn v. City of Grant City*, 69 S.W.3d 126 (Mo. Ct. App. 2002). *But see McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, 119 n.5 (S.C. 2003) (dictum asserting continued confusion on the issue).

### **D. APPLICATION TO PERSONAL PROPERTY**

*Lucas* involved an alleged taking of *land*; dicta suggest that the economic value of personal property gets less protection from regulatory takings. 505 U.S. at 1027-28. There is sound argument, therefore, that the *Lucas* rule does not apply to personal property. *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999). *But see Maritrans v. United States*, 342 F.3d 1344 (Fed. Cir. 2003) (applying *Lucas* rule to oil tankers without discussion, and finding no taking).

### **E. POSSIBILITY OF TEMPORARY TOTAL TAKINGS**

The United States has argued that there is no such thing as a temporary *Lucas* taking “because by its very nature a temporary taking allows a property owner some measure of its property value.” *Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004). This seems incorrect. *Tahoe-Sierra*, properly read, rejected *Lucas*' application only as to development moratoria – that is, land-use regulation known at the outset to be temporary – in contrast with prospectively permanent regulation that only later becomes temporary when rescinded. *Seiber* noted, but failed to resolve, the issue.

## **III. PENN CENTRAL TEST ISSUES**

The *Penn Central* test has never been invoked successfully in the Supreme Court in a land-use case – outside of situations where a special feature of the challenged regulation (physical invasion, total taking, fundamental property interest) triggered per se analysis. Yet three decisions of the Court since 2000 (*Palazzolo*, *Tahoe-Sierra*, and *Lingle*) have made clear that outside the “relatively narrow” per se rules for such special features, *Penn Central* is the reigning formula – indeed is the preferred mode of analysis. Thus, when falling short of a *Lucas* total wipeout, plaintiff still may have suffered a partial regulatory taking under *Penn Central*.

Problem is, the Court has shed little direct light on the content of its beloved *Penn Central* factors, or on how to balance them. Each factor raises "vexing subsidiary questions." *Lingle*, 544 U.S. at 539. Many commentators have harshly criticized the ad hocery of the test, particularly now that more than a quarter century has elapsed since its debut. Meanwhile, some state courts have elaborated the *Penn Central* factors into lists of additional, or restated, factors. *See, e.g., Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997).

One thing *is* clear however: *Penn Central* takings are rare because, as noted below, the degree of impact on the parcel as a whole must still be very substantial, even if not total, and development expectations must be reasonable. Two examples of courts finding *Penn Central* takings: *Florida Rock Indus. v. United States*, 45 Fed. Cl. 21 (1999), and *Hageland Aviation Services, Inc. v. Harms*, 210 P.3d 444, 451 n.27 (Alaska 2009).

## A. ECONOMIC IMPACT

The *Penn Central* inquiry "turns in large part, albeit not exclusively" on this factor. *Lingle*, 544 U.S. at 540.

**Use or value?** *Penn Central* stated no preference for whether economic impact is to be measured in terms of remaining economic use, or remaining market value. As with the *Lucas* total takings analysis, many courts focus on remaining economic use. The most consistent proponents of a market-value focus are the CFC and Federal Circuit.

**Degree of impact required.** The Supreme Court has never specified that a value loss less than a set percentage of pre-regulation value precludes a regulatory taking, nor that a value loss greater than a set percentage (but short of 100%) must be a taking. *See, e.g., Cienega Gardens v. United States*, 331 F.3d 1319, 1340, 1345 (Fed. Cir. 2003). The Court *has* said several things, however, indicating that for this factor to cut in favor of a taking, economic impact generally must be very substantial, arguably severe, when the other *Penn Central* factors are not determinative.

Most cogent as to the need for severe loss, the Court says that the regulatory taking inquiry asks at bottom whether the restriction is the functional equivalent of a physical occupation or appropriation of the land. *Lingle*, 544 U.S. at 539. It is hard to argue that anything less than severe loss is the functional equivalent of physical occupation or appropriation. *See Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1195 (Fed. Cir. 2004) (judicial insistence on "severe economic deprivation" stems from nature of regulatory taking claim as arguing that regulatory interference is so severe as to be tantamount to condemnation or appropriation). The Court has also remarked that land use regulation may "under extreme circumstances" be a taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1983).

Less useful for divining the required economic impact, the Court says that mere diminution in property value (short of a total wipeout) cannot by itself establish a taking, citing cases in which value diminutions upwards of 75% were upheld. *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993). Most broadly, the Court tells us that "[g]overnment 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." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). And that being deprived of a parcel's most profitable ("highest and best") use is not, without more, a taking. *Penn Central*, 438 U.S. at 125.

The CFC generally has relied on value losses “well in excess of 85 percent” in finding takings. *Brace v. United States*, 72 Fed. Cl. 337, 357 n.32 (2006) (collecting cases), *aff’d*, 250 Fed. Appx. 359 (2007), *cert. denied*, 552 U.S. 1258 (2008). But a handful of CFC/Federal Circuit decisions have accepted lower percentages as takings. *See, e.g., Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (if value loss is 62.5%, taking might be found), *on remand*, 45 Fed. Cl. 21 (1999) (finding 73.1% value loss to support a taking), and stunningly, *CCA Assocs. v. United States*, 91 Fed. Cl. 580 (2010) (18% reduction in market value over 5-year period effects temporary regulatory taking). At the same time, these courts have found value losses of up to 60% to tip *against* a taking. *Brace*, 72 Fed. Cl. at 357 n.33 (collecting cases). However, the Federal Circuit has repeatedly cautioned that there is no fixed floor for finding an economic impact to support a taking. *See, e.g., Cienega Gardens*, 331 F.3d at 1340.

Many state courts also require severe value loss. *See, e.g., Animas Valley Sand & Gravel, Inc. v. Board of County Comm’rs*, 38 P.3d 59, 67 (Col. 2001) (*Penn Central* requires claimant to show that “it falls into the rare category of landowners whose land has a value slightly greater than de minimis”); *Wyer v. Board of Env’tl. Protection*, 747 A.2d 192, 193 (Me. 2000) (requiring value loss “so substantial as to strip the property of all practical value”); *Noghrey v. Town of Brookhaven*, 852 N.Y.S.2d 220 (App. Div. 2008) (jury instruction that “substantial” value loss is taking is insufficient to convey “one step short of complete” value loss required by *Penn Central*). Some have not. *See, e.g., San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 247 (Tex. App. 2006) (40% loss in rental income from rezoning supports taking), *rev. denied* (2007).

To avoid a taking, a required fee to retain a property interest must be reasonable compared to the value of the property. *Kunkes v. United States*, 78 F.3d 1549 (Fed. Cir. 1996).

**Meaning of “economic use.”** “Economic use” embraces more than just use that returns a profit. Rather, it refers to any use that imparts significant market value to the property – e.g., being able to continue living in an already built residence. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226, 1243 (D. Nev. 1999), *aff’d in part, rev’d in part on other grounds*, 216 F.3d 764 (9th Cir. 2000), *aff’d*, 535 U.S. 302 (2002). Plainly, this sense of “economic use” blurs use and value, and court decisions often use the two terms interchangeably.

As in land valuation generally, an economic use must meet a showing of reasonable probability that the land is both physically adaptable for such use and that there will be a demand for such use in the reasonably near future. It follows that uses not considered economic uses in one circumstance may be considered so in another. *See, e.g., Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986) (in superheated real estate market near Miami, holding development-restricted wetland for possible sale to speculators willing to gamble that restrictions might someday be lifted is an economic use); *Wyer*, 747 A.2d 192 (parcel’s proximity to recreational beach meant that its use for parking and picnics imparted sufficient value to defeat taking claim).

**Calculating value loss.** When courts assess the economic impact factor by percentage value loss, the calculation is often said to be based on a comparison of the market value of the property immediately before and after the restriction was imposed. What courts *actually* do is another matter. The “before value” used often appears to be the parcel’s value in a world in which not only the restriction, but the entire regulatory program under which the restriction was imposed, did not exist – at least as to that property. This seems to be something different from the above-noted “value immediately before,” which in the real world reflects value reduction due to the possibility that

permission to develop under the regulatory scheme will, when applied for, be denied. Worse, from the government's point of view, before-value may implicitly include the added property value stemming from the diminished supply of developable real estate and amenity values caused by application of the regulatory scheme to others.

Market value is based on the property's "highest and best use": the reasonably probable and legal use of a tract that is physically possible and results in the greatest value. The dominant approach for determining market value is the comparable sales approach, where sales of parcels similar to the one alleged to have been taken exist. Otherwise, as often happens with income-producing properties, courts may use an income-capitalization approach, which computes the present value of the property from reasonably anticipated future earnings, discounted for risks and other variables stemming from future occurrence. Valuation approaches may be combined.

May before-value reflect use restrictions previously imposed by a government other than the defendant, reducing the calculated economic impact? *See City National Bank of Miami v. United States*, 33 Fed. Cl. 759 (1995) (local restriction *unrelated* to federal wetlands permit program was properly reflected in "before value" used in taking analysis of later federal permit denial).

**Reasonable return.** Some decisions note the importance of leaving plaintiff with a "reasonable return." This element tends to be salient, or at least a factor, in takings decisions involving already existing property uses. *See, e.g., Penn Central*, 438 U.S. at 136 (historic preservation ordinance); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 855 (Cal. 1997) (rent control law). A close cousin of reasonable return is diminution in return (profit). *See, e.g., Cienega Gardens v. United States*, 331 F.3d 1319, 1342-43 (Fed. Cir. 2003) (96% reduction in rate of return points to taking). *But see Rose Acre Farms v. United States*, 559 F.3d 1260 (Fed. Cir. 2009) (looking only at percentage decrease in profits gives incomplete view: vast majority of takings decisions examine *lost value*), *cert. denied*, 130 S. Ct. 1501 (2010).

In the utility/common-carrier rate-setting cases, "reasonable" ("nonconfiscatory") return generally is the *only* standard applied; *Penn Central* is not invoked. Government-prescribed rates need only be reasonable in their *overall* effect, not as to individual components of the rate scheme. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 526 n.36 (2002).

**Recoupment of cost basis.** Another metric for economic impact, cited regularly by the CFC and Federal Circuit but rarely by other courts, is plaintiff's ability to recoup his/her cost basis in the property under the challenged regulation. *See, e.g., Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) ("[i]n determining ... economic impact, the owner's opportunity to recoup its investment ... cannot be ignored"); *Walcek v. United States*, 49 Fed. Cl. 248, 266-67 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002); *Putnam County National Bank v. City of New York*, 829 N.Y.S.2d 661 (App. Div. 2007). This element is likely to weigh in the government's favor for any parcel long held by plaintiff, owing to appreciation. In the Federal Circuit, the plaintiff's cost basis is not adjusted for inflation. *Walcek*, 303 F.3d 1349.

**Offsetting direct benefits.** When regulatory programs provide benefits directly to the property owner, courts may offset them against the economic impact. In *Penn Central*, the Court made clear that transferrable development rights (TDRs) conferred on the landowner "mitigate whatever financial burdens the law has imposed ... and ... are to be taken into account in considering the impact of

regulation.” 438 U.S. at 137. *See also Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *Cienega Gardens*, 503 F.3d at 1282-84.

The alternative to considering a direct benefit in the takings analysis would be to confine it to, at most, the calculation of compensation once a taking was found. The argument is that where benefits do not ameliorate the challenged restrictions, they are outside the takings analysis. *See, e.g., Cienega Gardens*, 503 F.3d at 1283-84 (government offer of land exchange cannot be considered in takings analysis, but rather as compensation for taking). Moreover, the argument continues, including benefits in the takings analysis allows the government to deflect takings claims on the cheap, since even a small direct benefit may confer enough economic value to preclude a taking. This issue surfaced in a *Suitum v. Tahoe Regional Planning Agency* concurrence, which called for limiting consideration of TDRs to the remedy phase. 520 U.S. 725, 745-50 (1997).

***Government refusal to lift restriction or rezone.*** Generally, an owner has no property right to rezoning to allow new uses of a tract, and the fact that a municipality’s refusal to rezone leaves value unaffected means no taking has occurred. In an aberrant case, however, the taking standard adopted was whether the refusal to rezone “leaves any reasonable, economically viable use of the property.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 635 (Minn. 2007).

***Land devoted to charitable or religious uses.*** Several courts have applied a specialized *Penn Central* test here, since economic impact is less relevant. Said one: “the constitutional question is whether the land-use regulation impairs the continued operation of the property in its originally expected use.” *St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, 356 (2d Cir. 1990). *Contra, Franklin Memorial Hosp. v. Harvey*, 575 F.3d 121, 127 n.7 (1st Cir. 2009) (notwithstanding charitable purpose of hospital, “the usual” *Penn Central* analysis applies).

## **B. INVESTMENT-BACKED EXPECTATIONS**

This factor originated in *Penn Central* as “distinct” investment-backed expectations, but in most later Supreme Court opinions morphed, without explanation, into “reasonable” investment-backed expectations. The analysis is often seen as having two steps: (1) Did the claimant have *actual* investment-backed expectations?, and (2) Were those expectations *objectively reasonable*? *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). *See also Hageland Aviation Services, Inc. v. Harms*, 210 P.3d 444, 451 n.27 (Alaska 2009) (expectations factor establishes objective standard; subjective expectations of plaintiff are irrelevant). The most pivotal use of this factor by the Supreme Court is *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), where a taking was found when the government frustrated statutorily created expectations that submitted trade secrets would be kept confidential. *See also Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992) (listing eight factual questions that must be answered to evaluate *Penn Central* economic impact and expectations factors).

The expectations in question were probably intended by *Penn Central* as those existing when the investment was made or the property acquired. *See Bair v. United States*, 515 F.3d 1323, 1328 n.2 (Fed. Cir. 2008). *Good v. United States*, 189 F.3d 1355, 1361-63 (Fed. Cir. 1999), is not inconsistent in asserting that if the “regulatory climate” at acquisition makes future enactments *foreseeable*, post-acquisition adoption of new statutes and regulations may enter the reasonable expectations analysis.

**Regulation predates acquisition ("notice rule").** During the 1990s, several courts appeared to adopt an absolute notice rule. Under this rule, no regulatory taking could occur when government restricts a parcel's use under laws or regulations existing when plaintiff acquired it – or whose adoption after acquisition was foreseeable. Courts based the rule on either the investment-backed expectations factor of *Penn Central* or the background principles concept of *Lucas*. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court struck down the absolute version of the rule, but left open whether the pre-existing regulatory regime still plays some less-than-dispositive role in the takings analysis. Justice O'Connor's concurrence argued that it does, and the following year *Tahoe-Sierra* embraced the O'Connor concurrence.

The O'Connor view has prevailed. Indeed, many post-*Palazzolo* decisions, particularly involving environmental regulation, continue to give substantial, almost dispositive weight to pre-acquisition regulatory schemes. See, e.g., *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004) (federal surface mining statute); *Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001) (same); and *United States v. Donovan*, 466 F. Supp. 2d 590 (D. Del. 2006) (federal wetlands permitting program). The CFC/Federal Circuit often cite three factors: (1) Is it a highly regulated industry?; (2) Was plaintiff aware of the problem that spawned the regulation when the property was acquired?; and (3) Could the regulation have been reasonably anticipated? See, e.g., *Appollo Fuels*, 381 F.3d at 1349. See also *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009) (developer's knowledge of pre-existing regulation is not per se dispositive; on remand, trial court must consider all relevant factors).

A pre-acquisition regulatory scheme is a particular obstacle for takings plaintiffs having pre-acquisition experience with it, such as experienced land developers, on the theory that they are especially "on notice." See, e.g., *Appollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717 (2002), *aff'd per above*; *K&K Construction, Inc. v. DEQ*, 705 N.W.2d 365 (Mich. App. 2005).

**"Heavily regulated field."** Those who voluntarily enter a "heavily regulated field" find regulatory takings claims particularly difficult to maintain. Such entities are said to lack a reasonable expectation that the legislature will not enact new requirements from time to time that buttress the regulatory scheme. The list of human activities labelled as heavily regulated fields continues to grow. See, e.g., *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 645-46 (1993) (employee pension plans); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 442 (8th Cir. 2007) (gaming); *Thykkuttathil v. United States*, 88 Fed. Cl. 293 (2009) (banking); *Akins v. United States*, 82 Fed. Cl. 619 (2008) (sale of firearms) *People's Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 215 (D. Mass. 2006) (liquor stores); *Franklin Memorial Hosp. v. Harvey*, 575 F.3d 121, 128 (1st Cir. 2009) (hospitals). The Federal Circuit also has incorporated the heavily-regulated-field factor into its determination of the weight to be given pre-acquisition regulatory schemes (see preceding section). But caution: not *all* expectations are unreasonable in a heavily regulated field; if government goes far enough, a taking may still be found. See, e.g., *Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003); *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1276 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1501 (2010).

No court has yet said that land use generally is a heavily regulated field, with all that would entail for landowners seeking to establish takings.

**Initially limited intentions of property buyer.** Those who buy land with limited economic intentions and keep it in low-intensity use for years may be barred from asserting a taking when regulations thwart the owner's belated desire for more intensive development. *See, e.g., Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) (zoning laws adopted after parcel was acquired did not frustrate any investment-backed expectations, since parcel was purchased for ranch use and so used for four decades); *Rural Water Co. v. Zoning Bd.*, 947 A.2d 944, 956-57 (Conn. 2008). A taking claim was allowed to proceed, however, in a case where post-acquisition development desires arose from the initial use becoming unprofitable. *Wensmann Realty v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007) (purchase of restricted tract, intending only existing use, does not preclude taking claim when that use becomes unprofitable and city declines to permit other uses). *Wensmann* raises the troubling prospect of the government being forced to act as insurer of market risk.

**Buyer's awareness that obtaining permit might be difficult / low price paid for parcel.** This factor undermines the reasonable investment-backed expectations of the land buyer, cutting against a later regulatory taking claim. *See, e.g., Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) (buyer's development expectations undercut by his acknowledgment at time of purchase that state and federal regulatory approvals would be hard to obtain). *Gazza v. New York DEC*, 679 N.E.2d 1035 (N.Y. 1997) (owner who paid \$100,000 for designated wetland worth \$396,000 if unregulated cannot complain of taking when development permit is denied).

**"Primary" expectations or uses.** Regulation interfering with the "primary use" of a parcel are said to particularly interfere with owner expectations. Conversely, regulations leaving the primary use intact are less likely to be a taking. By "primary use," courts often have meant the use at the time a restriction was imposed, where a longstanding economic one. *Penn Central*, 438 U.S. at 136; *San Remo Hotel, L.P. v. San Francisco*, 41 P.3d 87, 109 (Cal. 2002). In *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 38-39 (2000), the primary use was the sole commercial purpose for which the land was purchased.

**Acquisition without investment.** Should those who acquire property by gift or inheritance – i.e., without *investment-backed* expectations – have less Takings Clause protection? In her *Palazzolo* concurrence, Justice O'Connor said: "We have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property, such as a donee, heir, or devisee." 533 U.S. at 635. This statement does not preclude absence of investment being a less-than-determinative factor in the government's favor. *See Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865, 874-75 (Mass. 2005).

### C. "CHARACTER" OF GOVERNMENT ACTION

This is the *Penn Central* test's most elastic factor. When debuted, the Court explained it only as meaning that takings "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." 438 U.S. at 124. Since then, the Court has added other elements to the character factor.

*Lingle* suggests that aspects of the character factor may be less important than the previous two *Penn Central* factors. 544 U.S. at 538-39. In light of *Lingle*'s teaching that takings law looks at the government action's *impacts on the property owner* (and distribution), it would seem that the government's *purpose*, and the regulation's value, public benefit, or effectiveness, once part of the

character factor, have been downgraded. *See, e.g., City of Coeur d'Alene v. Simpson*, 136 P.3d 310, 318 n.5 (Idaho 2006) (inquiry into “relative goodness” of government action not part of character factor after *Lingle*); *Mansoldo v. State*, 898 A.2d 1018, 1024 (N.J. 2006) (fact that prohibited land uses posed danger has no bearing on takings analysis under *Lingle*). Not all courts agree, however. *See, e.g., Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009) (*Lingle* caused no diminution in importance of character prong, at least with respect to public health and safety regulations), *cert. denied*, 130 S. Ct. 1501 (2010).

**Balancing of public interest and private burden.** From time to time, courts say regulatory takings analysis (outside of total takings) includes a balancing of the public interest advanced by the government measure against the burden on the property owner. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 492 (1987); *Phillip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002) (en banc) (fact that publication of cigarette manufacturers’ trade secrets “could” protect public health is not government interest sufficiently compelling to offset private loss caused). After misconstruing *Lucas* to excise such balancing from the character factor of *Penn Central* and substitute a nuisance inquiry, *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the Federal Circuit has now corrected itself. *Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004). The pendulum may swing yet again, however, if as noted *Lingle* is construed to minimize the importance of the government purpose.

Public/private balancing has prompted courts to consistently refuse to find regulatory (but not physical) takings based on government measures to address war, emergencies, and national security. *See, e.g., United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (temporary wartime shutdown of gold mines not a taking, since “[w]ar ... demands the strict regulation of nearly all resources”); *Block v. Hirsh*, 256 U.S. 135, 157 (1920) (wartime rent controls not a taking, in part because “[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change”).

**Benefit creation versus harm avoidance.** A government restriction viewed as creating a public benefit (e.g., a park) is likely to be held compensable, while a restriction seen as averting a public harm (e.g., pollution) is likely not. This benefit-creation/harm-avoidance dichotomy was criticized in *Lucas* in 1992, which saw it as value-laden and easily manipulated. 505 U.S. at 1024-25 (citing wetlands preservation). But it is still occasionally used. *See, e.g., Florida Rock*, 45 Fed. Cl. at 40 (wetlands preservation); *Husband v. United States*, 90 Fed. Cl. 29, 36 (2009). Exercises of the police power that directly protect public health and safety remain unlikely, even after *Lingle*, to be a taking under *Penn Central*. *See, e.g., Rose Acre Farms, Inc.*, 559 F.3d at 1281.

**Need for specific property.** The character factor demands that the government conduct target *specific* property, according to the concurring justice and four dissenters in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Thus, a taking claim may arise when government appropriates money from a specifically identified fund of money. *See, e.g., Brown v. Washington Legal Found.*, 538 U.S. 216 (2003) (interest on lawyers’ trust accounts); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest on interpleader fund). But a statute imposing a generalized monetary liability – e.g., that A pay B out of unspecified funds – is not a taking, though it may offend substantive due process. Lower courts have endorsed this principle. *See, e.g., Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (en banc); *Swisher International, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008), *cert. denied*, 130 S. Ct. 71 (2009); *Empress Casino Joliet Corp. v. Giannoulis*, 896 N.E.2d 277 (Ill. 2008), *cert. denied*, 129 S. Ct. 2764 (2009). Requiring that a taking

claim be based on specific property calls into question whether special assessments (as for road improvement) can be takings. *See Creason v. City of Washington*, 435 F.3d 820, 825 (8th Cir. 2006) (matter is “somewhat unclear”).

**“Average reciprocity of advantage.”** This inquiry looks at whether a restriction not only burdens the landowner, but also benefits him indirectly by subjecting other similarly situated landowners to the same sort of restriction. The paradigmatic example is zoning: a homeowner is required to forego, say, commercial use of his property, but benefits from others in the area being restricted in the same way. The Supreme Court most famously stated the average reciprocity factor in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and has cited it (or something similar) a few times since. *See, e.g., Tahoe-Sierra*, 535 U.S. at 341 (development moratorium); *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (density zoning). *Penn Central* makes clear that the burdens and benefits accruing to the plaintiff from the regulatory program need not be equal, and that the other similarly restricted properties do not have to be in the immediate area. 438 U.S. at 133-35.

The word “average” suggests that any “reciprocity” between burdens and benefits be assessed with reference to the entire affected group of property owners, not individuals. *See Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987); *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 108 (Cal. 2002). Moreover, these decisions read average reciprocity of advantage quite broadly as not limited to the regulatory program at issue, but rather applying to the universe of *all* land use restrictions. *Keystone*, 480 U.S. at 491; *San Remo Hotel*, 41 P.3d at 108-109.

**Direct benefits for government.** Whether there is a taking turns on what the property owner has lost, not with what the government gained. *Aris Gloves v. United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970). Thus, it is not a takings prerequisite that the government action resulted in benefits to the government. But governmental benefits, when present, may tip the balance toward the plaintiff. An example is when local jurisdictions restrict the use of private land to allow future acquisition, as for a roadway, at a lower price than would otherwise obtain. *See, e.g., Joint Venture, Inc. v. Dep’t of Transportation*, 563 So. 2d 622 (Fla. 1990).

**Primary purpose of government action was to help property owner.** Where the plaintiff was the intended beneficiary of the government action, the taking claim usually will be rejected, even though there are incidental government benefits as well. *YMCA v. United States*, 395 U.S. 85 (1969) (no taking due to occupation of buildings by U.S. troops seeking to protect them from rioters); *Belk v. United States*, 858 F.2d 706 (Fed. Cir. 1988) (no taking when United States terminated claims of Iranian hostages against Iran to secure their release).

**Governmental bad faith.** Takings law is based, courts repeatedly say, on “fairness and justice.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Hence, it is unsurprising that when government acts in bad faith, courts tilt toward the plaintiff. Examples are cited throughout these materials (*see, e.g.,* this Part, Section VIII.C. – Administrative delays). Another example is *Tahoe-Sierra*, 535 U.S. at 333 (were it not for findings below that agency acted in good faith, “we might have concluded that the agency was stalling” and found a taking), *citing City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (involving city’s repeated rejections of development plans after each of five progressively scaled-back proposals accommodating city’s demands). Of course, substantive due process is an alternate theory.

**Voluntariness.** The fact that plaintiff subjected himself *voluntarily* to the government act cuts against a taking. For example, tenant eviction restrictions on mobile home park owners are not takings when the owner operates his land as a mobile home park voluntarily. *Yee v. City of Escondido*, 503 U.S. 519 (1992). Rent control cannot work a taking if “[t]here is no requirement that the apartments in question be used for purposes which bring them under the [rent control] Act.” *Bowles v. Willingham*, 321 U.S. 503, 517 (1944). In contrast, a business that is legally compelled to operate, such as a common carrier or electric utility, has a taking claim if government-prescribed rates do not allow a reasonable rate of return. *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (recognizing “erosion taking” if statute compels rail operations at a loss), and the common-carrier rate cases generally.

Also illustrative are cases attacking limits on health-care service charges, or limiting reimbursement to the care provider. *Compare Garelick v. Sullivan*, 987 F.2d 913 (2d Cir. 1993) (though regulations limited anesthesiologists’ charges to Medicare patients in hospitals, anesthesiologists did not have to work in hospitals) and *Franklin Memorial Hospital v. Harvey*, 575 F.3d 121 (1st Cir. 2009) with *Methodist Hospitals v. Indiana*, 860 F. Supp. 1309 (N.D. Ind. 1994) (Medicaid reimbursement rates might effect taking, since hospital’s emergency room was obliged to treat all patients, including Medicaid patients).

How far can the voluntariness defense be pushed, given that many nominally voluntary human activities have economic compulsion behind them? *See, e.g., Phillip Morris v. Harshberger*, 159 F.3d 670, 679 (1st Cir. 1998) (cigarette maker was effectively compelled to participate in regulatory scheme where state statute imposed Hobson’s choice of either disclosing trade secrets or ending business operation in major market); *Franklin Memorial Hosp.*, 575 F.3d at 130 (suggesting that a “coercive financial incentive” can undercut voluntariness).

**“Singling out” property owner.** Regulation that “singles out” the plaintiff, or a narrow group of plaintiffs, is often said to suggest a taking. The rationale appears to be that singling out offends “fairness and justice” or suggests bad faith (above) or points to an absence of average reciprocity of advantage (above). *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-44 (2005); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 341 (2002); *Penn Central*, 438 U.S. at 133-34 n.30; *Maritrans v. United States*, 342 F.3d 1344 (Fed. Cir. 2003) (fact that double-hull requirement for oil tankers applies across entire industry cuts against taking); *K&K Construction, Inc. v. DEQ*, 705 N.W.2d 365 (Mich. App. 2005) (similar holding for wetland owners). Holding that the regulations in question applied narrowly enough that the character factor pointed to a taking is *Cienega Gardens v. United States*, 331 F.3d 1319, 1338-39 (Fed. Cir. 2003) (regulations promoting housing affordability by burdening owners of low-income apartments). No clear criteria have emerged for when narrow becomes too narrow, though the availability of publicly funded alternatives to burdening a category of property owners appears to be one.

## IV. PARCEL AS A WHOLE RULE

Under *Penn Central*, a court must assess the economic loss to the property owner and the degree of interference with its expectations, and under *Lucas*, at least the former. This inquiry is not done in isolation -- rather, it compares what was taken from the property owner *with what the owner still has*. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987). To assess what the owner still has, the court must define the extent of the plaintiff’s property to include in the analysis. This is the “parcel as a whole” or “relevant parcel” – also called the “denominator” issue. Not

surprisingly, the property owner wants the relevant parcel defined narrowly (enhancing the relative impact of the government action); the government, broadly (diminishing the relative impact). A court's determination of the parcel as a whole may easily decide the case.

The parcel as a whole concept has three dimensions – spatial (most commonly at issue), functional, and temporal – as follows.

### A. SPATIAL DIMENSION

Takings law “does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. ... [T]his Court focuses rather both on the character of the action and extent of the interference with rights in the parcel as a whole ....” *Tahoe-Sierra*, 535 U.S. at 327, quoting *Penn Central*, 438 U.S. at 130. But what *is* the “parcel as a whole”? – the quote leaves much room for interpretation.

The Supreme Court has said that acreage may not be excluded from the relevant parcel solely to isolate the regulated portion of plaintiff's property. See, e.g., *Tahoe-Sierra*, 535 U.S. at 331 (“defining the property interest taken in terms of the very regulation being challenged is circular”). But it has said little more. This limited clarification has left plaintiffs before lower courts with ample room to argue for whittling down the relevant parcel in other ways. Owners have argued, with limited success, that acreage should be excluded from the relevant parcel because it is separated by a road, subdivided as different lots, owned by a different entity, in a different zoning or tax assessment status, acquired at a different time or through a different transaction, financed separately, beyond the scope of the permit being sought, economically viable in its own right, beyond the reach of the regulating authority, etc.

**Current approach.** Most courts use an ad hoc approach to defining the parcel as a whole. The effort, said the CFC, “must be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.” *Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991). Similarly, the Federal Circuit urged “a flexible approach, designed to account for factual nuances.” *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994). The pattern has been to include in the relevant parcel all contiguous, same-ownership land unless there is good reason to exclude. See, e.g., *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999) (contiguous parcel purchased and long treated as a single unit by owner is relevant parcel, not individual lots into which it was eventually subdivided). For some exclusions of contiguous, same-ownership land, see *East Cape May Assocs. v. New Jersey*, 777 A.2d 1015 (N.J. Super. Ct. App. Div. 2001) (excluding acreage based on five factors), and *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882 (5th Cir. 2004) (excluding adjacent acreage because outside city limits).

A *Tahoe-Sierra* dictum states that “[a]n interest in real property is defined [in the parcel as a whole context] by the metes and bounds that describe its geographic dimensions ...” 535 U.S. at 331. See *Walcek v. United States*, 303 F.3d 1349, 1356 (Fed. Cir. 2002) (“*Tahoe* affirmed that regulatory takings analysis properly analyzes ... the land owner's entire parcel.”). *Tahoe-Sierra* thus disfavors the thesis of John Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994), noted in *Palazzolo*, that the relevant-parcel inquiry should be whether the acreage whose inclusion is in question could be independently developed in an economically viable way. A few lower courts have adopted a Fee-like test. See generally *City of Coeur d'Alene v. Simpson*, 136 P.3d 310, 323 (Idaho 2006).

Inclusion in the relevant parcel is particularly favored when the plaintiff-developer has treated the tracts as a single income-producing unit for purposes of financing, planning, or development. *See, e.g., Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed. Cir. 2004) (leases purchased as parts of one unified mining plan); *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *K&K Construction, Inc. v. DNR*, 575 N.W.2d 531 (Mich. 1998). Indeed, unified treatment by the owner has trumped even noncontiguity with the regulated portion, a factor cutting against inclusion. *See, e.g., Cane Tennessee, Inc. v. United States*, 62 Fed. Cl. 481 (2003); *Town of Jupiter v. Alexander*, 747 So. 2d 395 (Fla. App. 1998).

The relevant parcel rule applies as well to non-real-estate property. *See, e.g., Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993). Where no unique attribute inheres in the restricted portion of the non-land property, the relevant parcel rule has been said to apply "with even greater force" than to real property. *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1190 (Fed. Cir. 2004).

**Sold-off property.** A recurring relevant-parcel issue has been whether to include land sold off prior to a certain date. One government argument has been that inclusion is required to forestall "strategic behavior": land conveyances motivated by the owner's desire to place himself in an advantageous position in the event he files a taking action. The classic example is selling off acreage on which development is likely to be approved, enhancing the economic impact when development is denied on the remaining portion. Perhaps with the goal of averting strategic behavior, the Federal Circuit asserts that a key inclusion factor is whether the land was "developed or sold before the regulatory environment existed." *Loveladies Harbor*, 28 F.3d at 1181. *Accord, K & K Construction*, 575 N.W.2d at 584 n.9. *But see Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (though statute was in place when uplands portion was sold, other factors tip against including it in relevant parcel).

Courts occasionally note a relevant parcel issue when the plaintiff is the holder of the *sold-off* parcel or interest – rather than, as above, the owner of the tract from which the interest or acreage was carved. *City of Coeur d'Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006) (circumstances as to plaintiff's purchase of parcels from larger tract are relevant to whether larger tract might be relevant parcel); *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 139 P.3d 119 (Cal. 2006) (landowner facing imminent regulation cannot manufacture taking by leasing to plaintiff a narrow interest as to which regulation removes all economic use). As in the previous paragraph, these decisions show judicial aversion to strategic behavior – that is, to a landowner's creating a smaller parcel or fractional interest designed so as to be rendered without economic use, thus "taken," by likely regulation.

**Vertical parcel as a whole.** *Penn Central*, the decision that debuted the relevant parcel rule, was itself a vertical case – holding that air rights could not be considered separately from the land rights beneath. The Court reaffirmed vertical parcel as a whole in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), with regard to a plaintiff who owned both a surface and mineral estate – despite state-law recognition of mineral estates as a separate property interest. Lower courts have not always followed suit, however, when state law recognizes a separate interest. *See State ex rel R.T.G., Inc. v. State*, 780 N.E.2d 998, 1008-09 (Ohio 2002) (under state constitution, coal rights may be the relevant parcel notwithstanding owner holding surface estate as well, if owner purchased property solely to mine the coal).

## B. FUNCTIONAL DIMENSION

“[W]here an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002). Courts do not always follow this holistic edict, however. Rather, they have accepted on occasion that abrogation of a single right can be a taking despite plaintiff’s retention of many other rights. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987) (fundamental right to pass on property to one’s heirs); *Daniels v. Area Plan Comm’n of Allen County*, 306 F.3d 445 (7th Cir. 2002) (right to enforce restrictive covenant on nearby parcels); *MHC of Washington v. State*, 13 P.3d 183 (Wash. 2000) (mobile-home park owner’s unencumbered right to sell). Why functional parcel as a whole did not apply in these cases is clear with respect to those property rights deemed so fundamental as to tolerate little or no infringement (*Hodel* and physical occupations). For other property rights, the reasons are debatable.

The functional parcel as a whole rule has as one consequence that a regulatory taking claim is more likely to succeed when plaintiff owns only a narrow, fractional property interest (such as a mineral estate), rather than a fee simple. The wide range of economic uses available to the typical fee owner will almost always allow the government to point to sufficient residual use or value to deflect the regulatory taking claim.

## C. TEMPORAL DIMENSION

The temporal parcel as a whole rule bars divvying up the period during which plaintiff’s property interest runs (indefinitely in the case of a fee simple absolute). A court may not look at only the period during which the challenged restriction was in effect.

Though formally embraced by the Supreme Court only recently in *Tahoe-Sierra*, the rule has hoary case law antecedents. One precursor is the newly imposed zoning scheme that allows nonconforming uses to continue. Such an amortization period, allowing owners continued use for a period to recoup their investments and earn a reasonable (if temporary) economic return, deflects a taking claim. A related example is billboard prohibitions, where the key issue in the decisions is whether the owner has been provided a reasonable period of years before the nonconforming billboards must be taken down. *See, e.g., Tahoe Regional Planning Agency v. King*, 285 Cal. Rptr. 335, 351-52 (Ct. App. 1991). From a takings-law perspective, such an amortization period allows government defenders to argue that the owner has not suffered a *Lucas* total taking. Instead, the program can be seen as one that only partially limits economic return and so falls under *Penn Central*.

Similarly, *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed. Cir. 2001), rejected plaintiff’s argument that in assessing its taking claim, the court should ignore the period before its mining permit was revoked, when it mined profitably. Thus, there was no total taking and *Penn Central* applied. *Maritrans, Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003), reaffirmed the *Rith* rule and related it to *Tahoe-Sierra*’s use of a temporal parcel as a whole rationale for land-use moratoria. (See this Part, Section VIII). In sum, the temporal parcel as a whole rule applies both to the can-use-now/can’t-use-later situation (*Rith*, *Maritrans*) and its can’t-use-now/can-use-later opposite (*Tahoe-Sierra*).

## D. CONCERNS OF CONSERVATIVE JUSTICES

As often as the Supreme Court has reaffirmed the relevant parcel rule, the conservative justices have signaled concern. In 1992, Justice Scalia discussed relevant parcel doctrine in the *Lucas* majority opinion even though it wasn't an issue in the case. 505 U.S. at 1016 n.7. In *Palazzolo*, Justice Kennedy's majority opinion referred in dicta to this "difficult, persisting question" and noted that "we have at times expressed discomfort with the logic of this rule." 533 U.S. at 631. *Tahoe-Sierra* revealed shadings among the Court's conservatives – Kennedy and O'Connor signing on to the majority opinion, with its ringing endorsement of parcel as a whole, while Thomas and Scalia noted in dissent "this questionable rule." 535 U.S. at 355. Query whether there are now five votes on the Court supporting some qualification of the parcel as a whole rule.

## V. PENN CENTRAL AND RETROACTIVITY

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a four-justice plurality said that "while Congress has considerable leeway to fashion economic legislation," there are limits. Applying *Penn Central*, the plurality announced a specialized rule: legislation might effect a taking "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-529. The plurality then found a taking based on a federal statute making companies retroactively liable for coal miner health benefits based on their decades-previous involvement in the industry. In separate opinions, however, five justices held takings analysis inappropriate in this circumstance, opting instead for a substantive due process approach.

The fractured opinions in *Eastern* led some courts to confine it to substantially similar facts. See, e.g., *United States v. Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003). Others have applied it more generally, but still have found that the retroactivity in question effected no taking. See, e.g., *United States v. Vertac Chem. Corp.*, 453 F.3d 1031, 1047-48 (8th Cir. 2006). The cited decisions are among several post-*Eastern* takings challenges to the retroactive application of the coal miner health benefits statute and the Superfund Act, all unsuccessful.

## VI. DEMISE OF "SUBSTANTIALLY ADVANCE" TEST

The Supreme Court announced in *Agin v. City of Tiburon*, 447 U.S. 255, 260 (1980), that a regulatory taking results when a government action does not substantially advance legitimate state interests – seemingly a free-standing takings test. It was immediately apparent, however, that this test was an awkward fit with the rest of takings law. The "substantially advance" test was concerned with the means-end fit of the challenged measure, while the rest of takings law was concerned with the nature, degree, and distribution of the measure's impact on the property owner. For this reason, the Court in *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005), unanimously abandoned the substantially advance test after a quarter-century run.

Properly read, *Lingle* did not simply transfer the substantially advance inquiry into some other takings framework, such as the "character" factor in *Penn Central*. The means-end, due-process thrust of "substantially advance," *Lingle* indicates, makes it inappropriate *anywhere* in takings law. While most courts seem to get the idea, means-end rhetoric lingers on post-*Lingle*. See, e.g., *Casey v. Mayor of Rockville*, 929 A.2d 74, 102-03 (Md. 2007) (quoting with approval *Penn Central* statement that "a

use restriction on real property may be a taking if not reasonably necessary to the effectuation of a substantial public purpose”).

*Lingle* also appears not to have shifted the substantially advance test to substantive due process, as some sort of heightened review for land-use regulation. *See, e.g.*, Justice Kennedy's concurrence (describing substantive due process test for regulation in traditional "arbitrary or irrational" terms); *Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865, 870 (Mass. 2005) (*Lingle* renders a zoning ordinance valid under the U.S. Constitution unless its application bears no "reasonable relation to the State's legitimate purpose.").

## VII. PROSPECTIVELY TEMPORARY REGULATION

Here we deal chiefly with planning moratoria, but also nuisance-abatement moratoria, environmental moratoria, permitting delays, and restrictions on product sales after contamination is found or suspected. The central issue: does the fact that a use restriction is known *at the outset* to be temporary cut against a taking – when the same restriction, understood at the outset to be of permanent or indefinite duration, would be a taking (or a temporary taking should it be rescinded or invalidated)? The issue arises because other things being equal, the restriction known *at the outset* to be temporary is easier on the property owner – most obviously, the parcel retains value during the restriction period since economic use will be available at a reasonably certain time in the future. As noted below, however, the Supreme Court based its differentiation between the two types of property use restriction on the temporal parcel as a whole rule.

### A. PLANNING MORATORIA

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Supreme Court held that a planning moratorium, notwithstanding its elimination of all economic use of a parcel during the moratorium, is not subject to the *Lucas* per se rule for total takings. Rather,

**Moratoria, even when they eliminate all economic use while in effect, generally are to be tested under the multifactor *Penn Central* test.**

When applying *Penn Central*, the duration of the moratorium and the complete elimination of economic use are but two of the factors to be examined (though duration is “one of the most important,” 535 U.S. at 342). Of course, the *Tahoe-Sierra* ruling against categorical analysis of expressly temporary regulations does not lessen the possibility of temporary categorical takings from expressly permanent regulations that are later rescinded or invalidated. The Federal Circuit has consistently refused to hold that categorical treatment is necessarily inappropriate for temporary takings. *See Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447 (2009) (collecting cases).

Where economic use continues throughout the moratorium period, the appropriateness of the *Penn Central* test was never in doubt. *See, e.g., W.R. Grace & Co.-Conn. v. Cambridge City Council*, 779 N.E.2d 141 (Mass. App. 2002).

**Tahoe-Sierra's caveats.** While a powerful endorsement of planning moratoria, *Tahoe-Sierra* suggests some cautions. “[I]t may well be true,” it states, “that any moratorium that lasts for more than one year should be viewed with special skepticism,” 535 U.S. at 341, noting, however, that the six-year moratorium in *First English* was ultimately upheld. And see *Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850 (N.D. 2005) (21-month building moratorium to develop floodplain management plan is not taking). *But see Boise Cascade Corp. v. Bd. of Forestry*, 935 P.2d 411, 421 (Or. 1997) (denial of economic use “so long lived as to make any present economic plans for the property impractical” may be taking). *Tahoe-Sierra* also suggests that moratoria imposed in bad faith may still raise a takings issue, as may a succession of moratoria tacked end-to-end (“rolling moratoria”). Finally, given the temporal parcel-as-a-whole rationale adopted in *Tahoe-Sierra*, persons having time-limited property interests (e.g., leaseholds expiring before the moratorium expires) may still be able to assert *Lucas* takings.

## B. NUISANCE ABATEMENT MORATORIA

Overly aggressive moratoria on use of a property following persistent nuisance activity there (drug use, prostitution) routinely have been held takings, though the known decisions are all pre-*Tahoe-Sierra*. See, e.g., *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001) (temporary closing of apartment complex under nuisance abatement statute was a taking, in light of separability of nuisance activity from lawful activity, and denial of all economic use during closure period).

## C. ADMINISTRATIVE DELAYS

“Normal delays” in obtaining building permits, variances, etc., are not takings, *Tahoe-Sierra*, 535 U.S. at 335, but “extraordinary delays” may be, *Agins*, 447 U.S. at 263 n.9. “Extraordinary delay” has become a commonly stated, seemingly independent takings standard, particularly in the Federal Circuit. See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004). Despite many challenges, however, research reveals no administrative delay held to satisfy this criterion. See, e.g., *Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004) (45-month delay); *Appolo Fuels*, 381 F.3d 1338 (18-month delay); *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001) (seven-year delay); *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 330 (4th Cir. 2005) (three-plus-year delay); *Byrd v. City of Hartsville*, 620 S.E.2d 76 (S.C. 2005) (11-month delay).

Extraordinariness depends on all relevant circumstances, of which the length of the delay is but one. As elsewhere in takings law, government bad faith cuts in favor of a delay taking. See, e.g., *Landgate* (taking might result where agency delay was so prolonged as to support inference that government was only putting off project); *Bio Energy, LLC v. Town of Hopkinton*, 891 A.2d 509 (N.H. 2005) (no taking where town’s cease and desist order based on reasonable misreading of variance terms). The Federal Circuit has called it “the rare circumstance that we will find a temporary taking based on extraordinary delay without a showing of bad faith.” *Wyatt*, 271 F.3d at 1098. *Accord, Wild Rice River Estates v. City of Fargo*, 705 N.W.2d 850, 859 (N.D. 2005). Also important: “[g]overnment agencies that implement complex permitting schemes should be afforded significant deference ...” – often cited by the government to defend delays in environmental permitting. *Wyatt*, 271 F.3d at 1098.

In the Federal Circuit, *Appolo Fuels* said that if the delay is extraordinary, the existence of a temporary regulatory taking is *then* determined by the *Penn Central* test, 381 F.3d at 1351. This suggestion of a *two-stage* inquiry, where extraordinariness is akin to a ripeness threshold, has been picked up by a few CFC decisions. See, e.g., *Aloisi v. United States*, 85 Fed. Cl. 84, 93 (2008). Several

state courts, sometimes using an “unreasonableness” standard, seem to simply make the delay part of a one-step *Penn Central* analysis. See, e.g., *Byrd v. City of Hartsville*, 620 S.E.2d 76, 81 (S.C. 2005); *Duncan v. Middlefield*, 898 N.E.2d 952, 956 (Ohio 2008). Another link between the two tests is that where a *permanent* restriction would not be a permanent taking, “it would be strange to hold that a temporary restriction imposed pending the outcome of the regulatory decision-making process requires compensation.” *Appolo Fuels*, 381 F.3d. at 1352.

Procedures ancillary to agency processing of development applications have been viewed as a normal part of the administrative process, hence, if reasonable, not grounds for a delay taking. For example, where an agency avails itself of a statutory opportunity to relax application of regulations to a parcel to avoid a taking, the added delay causes no taking. *Griffith v. State DEP*, 775 A.2d 54 (N.J. App. 2001). Similarly, delay resulting from a landowner’s successful challenge (judicial or otherwise) to an administrative error is not compensable, if the agency’s position was reasonable. A regulatory mistake causing delay, by itself, does not result in a taking, but rather is a normal part of the administrative process. See, e.g., *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001); *Landgate, Inc. v. California Coastal Comm’n*, 953 P.2d 1188, 1195 (Cal. 1998).

*Tahoe-Sierra* suggests that moratoria and ordinary permit delays should be treated the same for takings purposes. 535 U.S. at 337 n.31.

Not addressed here are the prospectively temporary disabilities imposed de facto on property owners by condemnation blight. Here, a city’s delay in carrying out an announced intention to condemn an area (as for urban renewal) leads to neighborhood deterioration and the argument by property owners that a present taking has occurred, in advance of the future condemnation.

## **PART THREE: PHYSICAL TAKINGS TESTS**

When government physically occupies or otherwise invades private property, or causes or authorizes other persons/things to do so, judicial suspicion that a taking has occurred is greatly enhanced. The reason is that the right to exclude others is deemed “one of the most treasured strands in an owner’s bundle of property rights.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). *Accord, John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1356-57 (Fed. Cir. 2006) (collecting cases), *aff’d*, 552 U.S. 130 (2008). Thus, physical invasions, along with outright appropriations, are the “paradigmatic taking[s].” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

### **I. PERMANENT PHYSICAL OCCUPATIONS**

If the government-caused physical invasion amounts to a “permanent physical occupation,” the rule is categorical:

**Permanent physical occupations of property are per se takings.**

This is the “*Loretto* rule,” after the decision that first made the principle explicit. Classic examples are flooding from a government dam that is continuous or at least inevitably recurring, regular and low overflights by government airplanes, government installation of relatively permanent structures on private property (e.g., groundwater monitoring wells), and shoreline erosion caused by government jetties.

Takings claims based on permanent physical occupations are conceptually neat and clean. In contrast with regulatory takings, the magnitude of the intrusion is irrelevant, as is the economic impact on the property owner or the importance of the government interest advanced. Also in contrast with regulatory claims, there is no parcel-as-a-whole rule for permanent physical occupations; a permanent occupation of only a small portion of a tract will be held a taking – as it was in *Loretto*. The sharp distinction between per se physical takings and regulatory takings makes it “inappropriate” to treat decisions involving either as controlling precedent for claims involving the other. *Tahoe-Sierra*, 535 U.S. at 323.

A permanent physical occupation does not require that the particular occupying persons or things be constant over time. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 832 (1987) (permanent physical occupation occurs “where individuals are given a permanent and continuous right to pass to and fro”). Nor is *Loretto* confined to real property. See, e.g., *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2004) (interest on lawyers' trust accounts for client funds); *Nixon v. United States*, 978 F.2d 1269, 1284-85 (D.C. Cir. 1992) (presidential papers). But the occupation, if not by the government itself, must be by a third party; government requirements for installation of smoke detectors, fire extinguishers, surveillance cameras, fences, etc., owned by the landowner herself do not fall under *Loretto*. *Loretto*, 458 U.S. at 440; *Herzberg v. City of Plumas*, 34 Cal. Rptr. 3d 588 (Cal. App. 2005).

When the extent or permanence or extent of the physical occupation becomes clear only after a while, the taking claim accrues, and the statute of limitations begin to run, only when the situation has “stabilized.” The case announcing this rule, *United States v. Dickinson*, 331 U.S. 745 (1947), has been limited to gradual physical processes set in motion by the government, chiefly flooding and shoreline erosion, as opposed to an evolving series of government intrusions or the evolving economic impact of a regulation. See, e.g., *United States v. Dow*, 357 U.S. 17, 27 (1958); *John R. Sand*, 457 F.3d at 459-60 (collecting cases). As construed in the CFC and Federal Circuit, the physical taking claim accrues under *Dickinson* when (1) the permanent nature of invasion is evident and (2) the extent of damage is foreseeable (rather than fully realized). *Mildenberger v. United States*, 91 Fed. Cl. 217, 234-35 (2010).

The Court often characterizes physical takings as a subset of regulatory takings -- i.e., as a special case of *Penn Central* where the character of the government action is determinative. See, e.g., *Loretto*, 458 U.S. at 426, 432; *Lingle*, 544 U.S. at 538 (one category of “regulatory action” deemed a per se taking is “where government requires an owner to suffer a permanent physical invasion”). This view of physical takings is appropriate where a regulatory act authorized the occupation, as in *Loretto*, but whether or not so viewed appears to make little analytical difference.

Given the same per se treatment as permanent physical occupations are “appropriations”: government assertions of ownership or absolute dominion over a property interest, whether or not a physical occupation occurs. See *Lingle*, 544 U.S. at 537 (“[t]he paradigmatic taking ... is a direct government appropriation or physical invasion of private property”). Illustrative of appropriation decisions are those discerning per se takings when government retains the interest on private funds

involuntarily in the government's possession, beyond an amount needed to cover government costs. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Moldon v. County of Clark*, 188 P.3d 76 (Nev. 2008).

## II. LESSER PHYSICAL INVASIONS

Physical encroachments that fall short of permanent physical occupations are known as "temporary physical invasions."

### **Temporary physical invasions are tested under the *Penn Central* three-factor test.**

*Loretto*, 458 U.S. 419; *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002). Thus, they are much less likely than their permanent-occupation brethren to be held takings. *See, e.g., Benson v. State*, 710 N.W.2d 131, 151-153 (S.D. 2006) (rules limiting when shooting over private land can occur must be analyzed under *Penn Central*; no taking under that test).

The permanent-occupation/temporary-invasion boundary – often, as noted, the line between taking and non-taking – may be elusive. According to the Federal Circuit in 1991, "permanent does not mean forever, or anything like it." Rather, a government occupation is "permanent" when it is a "substantial physical occupancy" of private property, while "temporary" refers to occupation that is "transient and relatively inconsequential." *Hendler v. United States*, 952 F.3d 1364, 1376-77 (Fed. Cir. 1991). The Circuit later clarified that "permanent" depends *not only* on duration, but also on the nature of the government intrusion. *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1356 (Fed. Cir. 2002); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006), (determination of whether government occupancy is "permanent" is highly fact-specific), *aff'd*, 552 U.S. 130 (2008). Apparently, the more significant the intrusion (as when the government asserts dominion or control), the shorter the duration needed for permanent status. *Compare Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573 (Fed. Cir. 1993) (taking possession of warehouse, after breaking and entering, for nine months is permanent occupation) *with Boise* (five months of brief incursions by government owl surveyors is not permanent occupation).

At the short-duration end of the spectrum, temporary physical invasions blur into torts, particularly trespass.

## III. DEFENSES AND EXCEPTIONS

First, a physical invasion or occupation to which the plaintiff consented cannot be a taking. *Yee v. City of Escondido*, 503 U.S. 519 (1992); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *but see Loretto*, 458 U.S. at 439 n.17 (possibility that landlord could avoid physical occupation by ceasing to rent building does not defeat taking claim). The line between consent and government compulsion may be highly nuanced, however. Second (and related to the first), there is no physical taking when the plaintiff voluntarily entered a highly regulated field in which there was no reasonable expectation of being free of invasion when certain events occur. *California Housing Securities v. United States*, 959 F.3d 955 (Fed. Cir. 1992) (RTC's occupation and seizure of failed S&L is not taking, given absence of "historically rooted expectations" of compensation in such circumstances).

Third, the concept of background principles, though announced in a regulatory taking case, has been held to apply to physical taking claims. This is unsurprising, given that background principles go to the threshold determination whether the plaintiff had the property right alleged to be taken. *John R. Sand*, 60 Fed. Cl. 230, 235 (2004), *vacated on other grounds*, 457 F.3d 1345 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008); *Lucas*, 505 U.S. at 1028-29 (preexisting federal navigation servitude bars physical taking); *Kim v. City of New York*, 681 N.E.2d 312, 318 (N.Y. 1997) (preexisting duty of lateral support bars physical taking claim). Finally, the vaunted right to exclude may, on occasion, have to accommodate other sacrosanct rights, such as free speech. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980) (no taking caused by state prohibition on shopping center's exclusion of demonstrators, despite indefinite duration of occupation).

## **IV. BLUR BETWEEN REGULATORY AND PHYSICAL TAKINGS**

The Court's decisions using per se physical takings analysis typically involve physical invasions in the literal sense – recall the “classic examples” above in Section I. But in some factual contexts, noted below, physical and regulatory takings have proved difficult to keep separate. The tendency to blur the two is enhanced by the powerful incentives plaintiffs have to urge a physical, versus regulatory, takings theory. First, there are fewer ripeness hurdles (no need to seek variances) and, for permanent physical occupation claims there is a lesser showing on the merits (no analysis of economic impact, no parcel as a whole rule, etc.). Second, there is the extremely narrow scope of the *Lucas* total taking rule, relegating the plaintiff in almost all regulatory cases to the vagaries of *Penn Central* balancing. As a result, many cases have seen courts reject plaintiffs' efforts to characterize a rather straightforward regulatory case as a physical taking. See, e.g., *Stearns v. United States*, 396 F.3d 1354 (Fed. Cir. 2005); *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 763 (Pa. 2002).

### **A. HYBRID GOVERNMENT ACTIONS**

Some regulatory programs indisputably are associated with physical invasions. For example, wildlife protection statutes have prompted landowners to claim physical takings based on the presence on private property of animals that the owner is regulatorily barred from harming, or the depredations of protected animals (e.g., eating crops). Such claims generally fail, often on the ground that the government is not liable for the actions of wild animals. See, e.g., *Colvin Cattle, Inc. v. United States*, 468 F.3d 803, 809 (Fed. Cir. 2006); *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004). *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988); *Coast Range Conifers, LLC v. State of Oregon*, 117 P.3d 990 (Or. 2005) (rules that prevent property owner from altering natural condition of land differ from rules that authorize a third person to occupy it).

Regulatory controls on a landlord's ability to evict tenants also give rise to arguments that the landlord is being forced to suffer a physical occupation by unwanted tenants. The Supreme Court, however, generally has been unreceptive to physical taking claims here. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court rejected a physical taking challenge to a mobile-home statute that limited evictions, citing the fact that the owner's decision to put his property to mobile-home rental use had been voluntary. But the taking claim was “perhaps within the scope of our regulatory taking cases.” *Id.* at 527.

## B. NON-PHYSICAL-INVASION GOVERNMENT ACTIONS

In other cases, the government program causes no classical physical invasion, but affects the property owner in a way more or less akin to an appropriation. Here, the takings analysis may go either way – regulatory or physical. Compare *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001) (IOLTA program’s use of interest on lawyers’ trust accounts to support legal services for indigents should be analyzed as per se physical-like taking), with *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835 (9th Cir. 2001) (en banc) (same to be analyzed as regulatory taking). On appeal of the latter, the Supreme Court found that the interest transfer was more akin to the physical occupation in *Loretto. Brown*, 538 U.S. at 235.

Another regulatory/physical confusion arises from reductions in the amount of federal reclamation project water available for contract users and water rights holders, when demanded by the Endangered Species Act (ESA) to protect listed fish. In *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 319 (2001), the court found that reduced water delivery was best analyzed as a *physical* taking, and found such a taking. Years later, the same judge concluded that the intervening *Tahoe-Sierra* decision required him to analyze as a *regulatory* taking another ESA requirement resulting in reduced water availability – that a water district divert water to a fish ladder for a listed species. *Casitas Municipal Water Dist. v. United States*, 76 Fed. Cl. 100, 106 (2007). The Federal Circuit reversed 2-1, however, because it saw the ESA-compelled physical diversion of water (as opposed to a mere restriction on amount used) as falling under old Supreme Court decisions holding that federally compelled water diversions, for the use of the United States or a third party, are *physical* takings of water rights. 543 F.3d 1276 (Fed. Cir. 2008). How a merely usufructuary right can be physically taken is not clear.

## V. DIRECT BENEFITS

In contrast with regulatory takings, the apparent pattern with physical takings (or at least permanent physical occupation takings) is to exclude from the liability phase consideration of any benefits afforded the property owner by the challenged government conduct. Rather, such benefits are limited to offsetting the compensation due, if a taking is found. See, e.g., *Hendler v. United States*, 175 F.3d 1374 (Fed. Cir. 1999) (benefit to owner from government-conducted groundwater monitoring on his land outweighed value of easements held to be taken; hence, while physical taking occurred, no compensation is owed).

## PART FOUR: EXACTION TAKINGS TESTS

One regulatory/physical hybrid is the government exaction condition. Here, the government *allows* the land owner to develop *if* the land owner agrees to dedicate a portion of his tract for a public purpose (road, school, daycare center, wildlife preservation, etc.), or make on- or off-site improvements addressing public needs. In a popular variation, the government may allow the property owner to instead pay an “in lieu fee” (in lieu of a dedication) or “impact fee” (based on the costs imposed on the community by the development), known as monetary exactions. The Supreme Court’s exaction cases seek to fix when such exactions constitute takings.

It is immaterial to the exactions tests that the landowner's development proposal could be denied outright without effecting a taking. That is, the government cannot defend an exactions-takings claim by arguing that since *outright denial* would not be a taking, a more permissive government response – offering a *conditional approval* – logically cannot be one either.

## I. OVERVIEW

The takings test for exaction conditions has two prongs: “essential nexus” and “rough proportionality” – together often referred to as “heightened scrutiny.” An exaction condition failing either prong is a taking. Because this test is viewed as more plaintiff-friendly than *Penn Central*, plaintiffs and property rights groups often push for its broad application.

The “essential nexus” prong speaks to the *nature* of the exaction condition, and debuted in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987). To avoid being a taking --

**An exaction condition on development permission must substantially advance a government purpose that would justify denial of the permit.**

Otherwise, the condition may be just “out-and-out ... extortion” by the government. *Id.* at 837.

The “rough proportionality” test speaks to the *extent* of the exaction condition, and was announced in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). To avoid being a taking --

**The burden imposed on the landowner by the exaction condition must be no greater than “roughly proportional” to the burden that the landowner’s proposed development would impose on the community.**

In a departure from the usual rule for land-use regulation, *Dolan* placed the burden of proof for showing rough proportionality on the government, rather than requiring plaintiff to show *lack* of rough proportionality. As a second new burden for the government, *Dolan* instructed that the demonstration of rough proportionality (and essential nexus, too) must involve “some sort of individualized determination,” though “[n]o precise mathematical calculation is required.” *Id.* at 391. For one court’s interpretation of rough proportionality, see *B.A.M. Dvpm. v. Salt Lake County*, 196 P.3d 601 (Utah 2008) (under *Dolan*, court must determine whether cost to community of assuaging impact of development is “about the same” in dollars as the value of land required to be dedicated plus any other costs to developer).

*Dolan* offered two rationales for the foregoing departures from ordinary land-use regulation. First, ordinary land-use regulation involves “legislative determinations classifying entire areas of the city,” as opposed to (as in *Dolan*) an adjudicative decision on a single parcel. *Id.* at 385. Second, such regulation merely restricts use, as opposed to (as in *Dolan*) a requirement that the landowner deed portions of his property to the city. Following *Dolan*, debate broke out as to whether these two rationales were formal prerequisites for applying *Dolan*. The question has been extensively litigated in the lower courts with no clear consensus, as discussed in Sections II and III. For a case law review, see *Rogers Machinery v. Washington County*, 45 P.3d 966 (Or. App. 2002).

When a landowner refuses an exaction condition, resulting in denial of development, does *Nollan/Dolan* apply even though no exaction was ever imposed and the usual takings test for a permit denial is *Lucas/Penn Central*? Apparently the only authority on this not infrequent situation is *St. John's River Mgmt. Dist. v. Koontz*, 5 So. 3d 8 (Fl. App. 2009), *review pending*, holding 2-1 that *Nollan/Dolan* does apply. *See also Lambert v. San Francisco*, 529 U.S. 1045, 1048 (2000) (three-justice dissent from denial of certiorari).

## II. LEGISLATIVELY IMPOSED EXACTION CONDITIONS

Authority on whether legislatively imposed exactions are subject to *Dolan* is split. Compare, for example, *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), holding that *Dolan* does not apply to a development condition imposed through the legislative process, rather than through individualized determinations (but see dissent from denial of certiorari), with *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App.1995), holding that *Dolan* does apply to legislatively imposed development conditions. Of course, there are countless intermediate circumstances, such as where the condition or fee is legislatively fixed within a range, leaving some discretion for the individualized proceeding.

The 2005 *Lingle* decision conceivably may be read to restrict *Nollan/Dolan* to adjudicatively imposed conditions – e.g., by twice noting that *Nollan* and *Dolan* were based on adjudicative conditions. Thus, it will be interesting to see whether post-*Lingle* case law continues to be divided. *See, e.g., Wisconsin Builders Ass'n v. Wisconsin DOT*, 702 N.W.2d 433, 448 (Wis. 2005) (noting that both *City of Monterey* and *Lingle* emphasize that *Nollan/Dolan* is not to be extended beyond the specific context of those cases – e.g., adjudicative imposition).

## III. NON-DEDICATION CONDITIONS, AND DEDICATION CONDITIONS NOT REQUIRING PUBLIC ACCESS

Does *Nollan/Dolan*'s elevated scrutiny apply solely to physical dedication conditions on land development (as were involved in *Nollan* and *Dolan*), or to most any development condition? The Supreme Court suggests the former: “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).

**Monetary exactions.** Commentators noted that if the foregoing *City of Monterey* quote means to define “exactions” to include *only* “dedication[s] of property to public use,” it is incorrect. There are monetary exactions, too. Thus, they argue, *City of Monterey* leaves open whether monetary exactions, such as impact fees, are covered by *Nollan/Dolan*.

Again, the courts split. “Some courts have declared, seemingly categorically, that *Dolan* is limited to dedications of property and does not extend to nonpossessory exactions, such as the payment of fees. Other courts have rejected that view, holding that *Dolan* potentially can extend to monetary exactions, at least in some circumstances.” *Rogers Machinery*, 45 P.2d at 976. California is in the “some circumstances” camp, holding that monetary exactions are subject to *Nollan/Dolan* when imposed on a discretionary, individual (non-legislative) basis. *Ehrlich v. City of Culver City*, 911 P.2d

429 (Cal. 1996) (adding that legislatively imposed conditions may still effect takings, but on a more deferential standard – see *San Remo Hotel*, 41 P.3d at 105). The Ninth Circuit, however, which includes California, holds to the contrary – monetary exactions are never subject to exactions analysis. *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2765 (2009). As has the most recent judicial word, in *West Linn Corporate Park v. City of West Linn*, 2010 WL 3730348 (Or. App. Sept. 23, 2010) (concluding, in response to certified questions from Ninth Circuit, that condition that developer expend funds to improve public roads is fundamentally different than a dedication of land, thus not subject to *Nollan/Dolan*).

Where *Nollan/Dolan* coverage is found, the question arises whether the money need be paid *to the government*. See, e.g., *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620 (Tex. 2004) (condition that developer expend funds to improve public property, such as roads, is a dedication of the funds, thus subject to *Nollan/Dolan*).

At least two arguments now exist against *Nollan/Dolan* coverage of monetary exactions. First, a majority of the justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), said that the Takings Clause does not reach government-imposed generalized monetary liability. Second, *Lingle* in 2005 described *Nollan* and *Dolan* as each “[beginning] with the premise that had the government simply appropriated the easement in question, this would have been a *per se* physical taking.” 544 U.S. at 546 (emphasis in original). If limited to physically invasive conditions, *Nollan* and *Dolan* arguably would not apply to monetary exactions. See *United States v. Sperry*, 493 U.S. 52, 62 n.9 (1989) (fee requirements are not physical occupations); *Eastern Enterprises*, 524 U.S. at 529-30 (plurality) (monetary liability to private party is not physical occupation). *Lingle* also clarified that the rationale for *Nollan/Dolan* is not the substantially advance test, but rather the doctrine of unconstitutional conditions – used by the Oregon Supreme Court, *supra*, to conclude that *Nollan/Dolan* does not reach monetary exactions.

***Dedications without physical access.*** Some lower courts read *Nollan* and *Dolan* as limited to dedicated land *open to the public*. See, e.g., *Smith v. Town of Mendon*, 789 N.Y.S.2d 696 (N.Y. 2004) (holding 4-3 that *Nollan/Dolan* does not apply where even though development condition was dedication of conservation easement, easement involved no physical public access and merely restricts use); *Wisconsin Builders Ass’n*, 702 N.W.2d at 502-03 (setback restrictions cannot be analogized to easements in *Nollan* and *Dolan*; former do not eliminate right to exclude). *But see Isla Verde v. City of Camas*, 990 P.2d 429, 436 n.3 (Wash. App. 1999) (dictum rejecting restriction of *Nolan* to dedications of property to public use), *aff’d*, 49 P.3d 867 (Wash. 2002). Subsequent to these decisions, *Lingle* noted that *Nollan* and *Dolan* involved “government demands that a landowner dedicate an easement *allowing public access* ....” 544 U.S. at 546 (emphasis added).