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***PENN CENTRAL UNLEASHED? FINDING TAKINGS IN  
THE POST-LINGLE ERA***

**by Matthew D. Zinn**

## *Penn Central* Unleashed? Finding Takings in the Post-*Lingle* Era

Matthew D. Zinn<sup>1</sup>

### I. Has *Penn Central* Been “Unleashed”?

The premise of this panel is that the recent significant cases narrowing regulatory takings doctrine—principally *Lingle v. Chevron U.S.A. Inc.*<sup>2</sup> and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*<sup>3</sup>—have returned or will return the courts’ principal focus in takings cases to the ad-hoc, multi-factor analysis of *Penn Central Transportation Co. v. City of New York*.<sup>4</sup>

Some expansion of *Penn Central* seems inescapable. Since *Lingle* removed the “fails to substantially advance a legitimate state interest” test from the ambit of the Takings Clause, claims alleging that regulation doesn’t do what it was supposed to do can no longer be brought as takings claims. And with the clarification in *Tahoe-Sierra* that the “complete elimination of economic use” categorical takings test recognized in *Lucas v. South Carolina Coastal Council*<sup>5</sup> in fact requires *complete* elimination of economic use, *Lucas* claims are likely to account for a small, perhaps vanishingly small, proportion of takings claims. It will be rare claim indeed in which a regulation represents a total wipeout of all use and value of a property,<sup>6</sup> and it will be exceptionally rare that such a claim is not settled long before an appellate opinion can be written.

*Penn Central*, the leading candidate for a unified field theory of regulatory takings, is a likely candidate to pick up much of the slack. Indeed, Justice O’Connor’s concurrence in *Palazzolo v. Rhode Island*,<sup>7</sup> and a majority’s subsequent embrace of it in *Tahoe-Sierra*, suggest that the ad hoc inquiry of *Penn Central* is the Court’s favored approach to resolving takings claims.<sup>8</sup>

In fact, in one recent notable case (discussed further below), *Guggenheim v. City of Goleta*,<sup>9</sup> *Penn Central* picked up exactly where *Lingle* left off. The plaintiffs had prevailed in district court on a “substantially advances” claim in their challenge to the city’s mobilehome rent control ordinance, only to be undone by *Lingle*. After the district court vacated its judgment in *Lingle*’s wake, the plaintiffs litigated the case as a *Penn Central* claim. Though they lost in the

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<sup>2</sup> 544 U.S. 528 (2005).

<sup>3</sup> 535 U.S. 302 (2002).

<sup>4</sup> 438 U.S. 104 (1978).

<sup>5</sup> 505 U.S. 1003 (1992).

<sup>6</sup> *Tahoe-Sierra*’s reemphasis of the parcel-as-a-whole rule further limits the application of *Lucas* by preventing creative articulation of the “property” taken to manufacture complete wipeouts. See 535 U.S. at 327.

<sup>7</sup> 533 U.S. 606 (2001).

<sup>8</sup> See *Tahoe-Sierra*, 535 U.S. at 321, 322, 326; *Palazzolo*, 533 U.S. at 636 (O’Connor, J., concurring).

<sup>9</sup> 582 F.3d 996 (9th Cir. 2009), *en banc review granted*, 598 F.3d 1061 (2010).

district court, they won, for a time at least, in the Ninth Circuit, and the case is now under submission before an en banc panel.

But *Penn Central* is obviously not the only remaining rubric for litigating a takings claim.<sup>10</sup> In several recent cases, the physical occupation per se test<sup>11</sup> has been applied to find takings to facts distant from the classical physical occupation, e.g., the compelled siting of cable boxes on apartment buildings. Creative application of this test is nothing new. In *Hall v. City of Santa Barbara*, the Ninth Circuit held that a mobilehome rent control ordinance compelled park owners to suffer a physical occupation by mobilehome owners and their coaches.<sup>12</sup>

That conclusion was subsequently rejected by the Supreme Court,<sup>13</sup> but not so as to deter courts from applying the per se rule expansively as a way around the perhaps uncomfortable ad hoc-ery of *Penn Central*. In *Casitas Municipal Water District v. United States*,<sup>14</sup> about which other panelists at this conference have much to say, the Federal Circuit found a physical taking of water, no multi-factor balancing required. As a result of interagency consultation under the Endangered Species Act, the Bureau of Reclamation had required a dam operator to construct a fish ladder and divert water into it. The court held that that requirement, which involved releasing water from the plaintiff's diversion canal into the fish ladder, involved a physical appropriation of the water.<sup>15</sup>

*Yamagiwa v. City of Half Moon Bay*<sup>16</sup> is an interesting variant of a physical taking claim. There the district court held that the city had effected a sort of hybrid physical-regulatory taking by installing defective stormwater management facilities on the plaintiff's property and then prohibiting the plaintiff from building on the property when those defective facilities led to the creation of wetlands on the property.<sup>17</sup> The court did not apply the *Penn Central* factors either implicitly or explicitly.

As these cases suggest, that the Court's recent cases have cut off some of the branches of takings doctrine does not mean that takings cases necessarily will be channeled completely into the *Penn Central* rubric. Indeed, for every decision in which the Court has held that it "has eschewed any set formula" in reviewing takings claims,<sup>18</sup> there is a lower court decision looking

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<sup>10</sup> Moreover, after *Lingle*, "substantially advances" claims will not be brought as takings claims at all, but rather will be brought as due process claims, so it's not entirely clear that *Lingle* should result in many more *Penn Central* claims.

<sup>11</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>12</sup> 797 F.2d 1493 (9th Cir. 1986), *overruled by* *Yee v. City of Escondido*, 503 U.S. 519 (1992).

<sup>13</sup> See *Yee*, 503 U.S. at 529-30.

<sup>14</sup> 543 F.3d 1276 (Fed. Cir. 2008), *en banc review denied*, 556 F.3d 1329 (2009).

<sup>15</sup> *Id.* at 1290-91, 1295.

<sup>16</sup> 523 F. Supp. 2d 1036 (N.D. Cal. 2007).

<sup>17</sup> *Id.* at 1088-92. The case is not a physical taking case in the vein of *Loretto*, but rather applied California and federal precedent involving the impact of public water management infrastructure on private property. However, these cases are closer to the per-se *Loretto* standard than to the multi-factor balancing of *Penn Central*.

<sup>18</sup> See, e.g., *Penn Central*, 438 U.S. at 124; see also *Tahoe-Sierra*, 535 U.S. at 326-27; *Palazzolo*, 505 U.S. at 633 (O'Connor, J., concurring).

for a set formula to apply in reviewing a takings claim. As a result, I think it likely that courts and litigants will continue to be unsatisfied with the uncertainty associated with *Penn Central* and will continue to look to the remaining per se takings tests, if they don't attempt to create new per se tests that are unrelated to whether the challenged regulation advances a legitimate state interest.

## II. A (Nonrandom) Sample of Recent *Penn Central* Decisions

That said, *Lingle* and *Tahoe-Sierra* do suggest that *Penn Central* is likely to be a principal vehicle for takings claims in the future. After reviewing all of the cases invoking *Penn Central* since *Lingle* (or rather having a law clerk to do so), I've identified a small group of interesting decisions since *Lingle* in which courts have either found takings or recognized that a taking may have occurred and remanded the case for further proceedings. The sample is small, because, unsurprisingly, the vast majority of the recent *Penn Central* cases do not find a taking. However, the cases do suggest an interesting focus on *Penn Central*'s "character of the governmental action" factor rather than the traditional focus on the economic impact factor.

### A. *Guggenheim v. City of Goleta*

First up is the Ninth Circuit's panel decision in *Guggenheim v. City of Goleta*, which has since been reheard by an en banc panel of the court.<sup>19</sup> The County of Santa Barbara enacted a mobilehome rent control ordinance in 1979 and amended it in 1987. The property owner at the time of enactment and amendment operated a regulated mobilehome park, but did not challenge the ordinance. The plaintiffs purchased the property in 1997 and likewise did not challenge the ordinance. In 2002, the City of Goleta incorporated in an area of the county that included the plaintiffs' mobilehome park. As required by state law, the city reenacted all of the county's ordinances on incorporation, and then further reenacted them a few months later. Plaintiffs filed suit, claiming a taking based on the "substantially advances" test. The district court found a taking, but subsequently vacated its judgment after *Lingle*.<sup>20</sup> The case then proceeded on a *Penn Central* theory, and the district court granted summary judgment for the city.

On appeal, a divided Ninth Circuit panel reversed, finding that the ordinance, on its face, caused a taking under *Penn Central*. The court found that the ordinance effected a "naked wealth transfer" from the park owners to the mobilehome owners, creating a substantial premium on the value of the mobilehomes that the mobilehome owners could realize upon sale.<sup>21</sup> The court also found that, although the park owners were receiving approximately a 10 percent return on their investment in the property, they could have obtained a much higher return without the regulation.<sup>22</sup>

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<sup>19</sup> Oral argument was heard on June 22, 2010. Full disclosure: my firm was hired after issuance of the panel decision to represent the City in the en banc proceedings, and I have been working on the case.

<sup>20</sup> 582 F.3d at 1003.

<sup>21</sup> *Id.* at 1021.

<sup>22</sup> *Id.* at 1022-23.

The court noted that expectations favored the city, but discounted the weight of that factor in light of *Palazzolo*. Interestingly, it concluded that the park owners did have some investment-backed expectations when they purchased the property, because, it concluded, with the property, they purchased the right to file a takings claim challenging the ordinance.<sup>23</sup>

The court found that the character of the action “weigh[ed] strongly in the Park Owners’ favor,” for two reasons.<sup>24</sup> First, it concluded that the ordinance’s having caused a “naked wealth transfer” from one private party (the park owners) to another (the mobilehome owners) was relevant to character.<sup>25</sup> Second, the court applied the maxim of distributive justice underlying the Takings Clause articulated by the Supreme Court in *Armstrong v. United States*, namely, that government should not “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>26</sup> The court found that the ordinance effectively singled out mobile home park owners to bear the burden of providing the public good of affordable housing “instead of distributing the expense among all taxpayers.”<sup>27</sup>

In dissent, Judge Kleinfeld, himself no great friend of mobile home rent control, concluded that the park owners’ purchase of the property nearly 20 years after the county’s enactment of the ordinance disposed of the plaintiffs’ claim.<sup>28</sup> Judge Kleinfeld concluded that any taking was completed when the county adopted the ordinance and the property was owned by the plaintiffs’ predecessor. He noted that the plaintiffs’ paid a reduced purchase price that reflected the ordinance’s restrictions and that any cause of action that the plaintiffs’ acquired with the property was time-barred: “The Guggenheims’ purchase of the trailer park in 1997 did not breathe life into the dry bones of the takings claim that had died years before.”<sup>29</sup>

The court’s application of *Armstrong* as an attribute of character is not unusual.<sup>30</sup> However, its focus on the beneficiaries of the regulation is troubling. That the ordinance effected a “naked wealth transfer” from the park owners to the mobilehome owners, as opposed to from the park owners to the general public, does not militate in favor of a taking. The impact to the park owner is what it is, whether or not the beneficiaries are the public generally or a small group of individuals. As a result, the identity of the beneficiary of the regulation is arguably an inappropriate consideration in a takings case, particularly after *Lingle*’s emphasis that the Takings Clause looks to the distribution of the *burden* of governmental action. That a regulation

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<sup>23</sup> *Id.* at 1026-27, 1030.

<sup>24</sup> *Id.* at 1030.

<sup>25</sup> *Id.* at 1028.

<sup>26</sup> 364 U.S. 40, 49 (1960), *quoted in Guggenheim*, 582 F.3d at 1028.

<sup>27</sup> 582 F.3d at 1029.

<sup>28</sup> *Id.* at 1037-38 (Kleinfeld, J., dissenting). Judge Kleinfeld stated clearly that but for the plaintiffs’ acquisition long after the ordinance was adopted, he would have found the ordinance to be a taking. *Id.* at 1035.

<sup>29</sup> *Id.* at 1038.

<sup>30</sup> In his survey of courts’ application of the *Penn Central* factors in the post-*Lingle* era, John Echeverria includes the *Armstrong* principle as one of the numerous considerations that courts have applied under the character-of-the-action factor. See John D. Echeverria, *Making Sense of Penn Central*, 23 U.C.L.A. J. ENVTL. L. & POL’Y 171, 192-93 (2005).

transfers wealth from A to B might be a basis for a due process claim and *invalidation* of the regulation, but it offers no support for a regulatory takings claim.<sup>31</sup>

## **B. *Mann v. Georgia Dep't of Corrections***

*Mann v. Georgia Dep't of Corrections*<sup>32</sup> is an unusual takings case from the Georgia Supreme Court. In *Mann*, the court considered a takings claim challenging a Georgia statute imposing restrictions on the ability of registered sex offenders to live within 1,000 feet of certain sensitive land uses such as schools, day care centers, and churches. After *Mann* bought his residence, a day care center was proposed to be sited within the 1,000-foot buffer zone. The challenged statute thus compelled *Mann* to vacate his residence.

The court applied *Penn Central* to find a taking, concluding, at least implicitly, that all three factors supported the finding. Although the court did not explicitly refer to the character factor, it found significant that the statute “mandate[d] appellant’s immediate physical removal from his . . . residence,” presumably a consideration that goes to the character of the action.<sup>33</sup> The case might be read as recognizing a new kind of per se taking where a regulation prohibits a property owner from residing in his home, on the theory that the right to reside in one’s home is a fundament of the ownership of property in the way that excluding others from one’s property or being able to pass it along to one’s heirs is thought to be a stick near the core of the owner’s bundle.<sup>34</sup> The court also applied the “singling out” principle, concluding that the public received the benefit of limits on where registered sex offenders may live, but the costs are concentrated on the small group of sex offenders.<sup>35</sup>

Interestingly, the court’s discussion of economic impact is cursory at best. In fact, the statute presumably had a fairly minor impact on the value of the property itself, as the vast majority of the population would remain free to use it for residential purposes, and the statute would likely have little impact on rental value for the same reason. Nevertheless, the court rejected the state’s argument that *Mann* remained able to rent or sell his property. It concluded that “appellant’s testimony established that he and his wife did not purchase the . . . property for rental purposes and that neither he nor his wife are real-estate speculators” and that the statute would “force appellant and his wife to become lessors, an unwelcomed and unanticipated role for which they are ill-equipped.”<sup>36</sup> Further, sale of the home “will involve numerous expenses, such as closing costs, attorney fees and realtor commissions” which would be repeated with the

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<sup>31</sup> See *Lingle*, 544 U.S. at 543. An interesting side issue presented by the case is whether a facial *Penn Central* claim is a contradiction in terms. A facial challenge to legislation is supposed to be limited to review within the four corners of the legislative enactment. Given that *Penn Central* is an ad-hoc, intensely factual analysis based on the burden imposed by the challenged regulation on the plaintiff’s property, it is hard to imagine how such a claim could be decided based solely on the face of the challenged legislation.

<sup>32</sup> 653 S.E.2d 740 (Ga. 2007).

<sup>33</sup> *Id.* at 758.

<sup>34</sup> See *Loretto*, 503 U.S. at 419 (right to exclude); *Hodel v. Irving*, 481 U.S. 704 (1987) (right to devise); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (same).

<sup>35</sup> 653 S.E.2d at 760.

<sup>36</sup> 653 S.E.2d at 758-59.

purchase of a new home.<sup>37</sup> In other words, the court concluded the statute effected a taking even though Mann might realize a profit in renting or selling his home.

In addition to its focus on character, the court expressed serious concern about the statute's impact on expectations. The court held that the statute,

looms over every location appellant chooses to call home, with its on-going potential to force appellant from each new residence whenever, within that statutory 1,000-foot buffer zone, some third party chooses to establish any of the long list of places and facilities encompassed within the residency restriction. . . . [The statute] does not merely interfere with, it positively precludes appellant from having any reasonable investment-backed expectation in any property purchased as his private residence.<sup>38</sup>

The court's focus on Mann's ability to form settled expectations in any *future* residence makes its analysis a unique application of the expectations factor as an aggravating rather than mitigating factor. Of course, expectations is typically raised by the government as a mitigating factor—supporting rejection of a takings claim, because, as in *Guggenheim*, the plaintiff was fully aware of the regulation when it purchased the property or, as in *Penn Central* itself, the plaintiff remains fully able to use the property for the purpose for which it was purchased.

The court's application of the “singling out” principle is also unusual. Criminal sanctions would seem to be a paradigmatic example of a situation in which the costs of the governmental action are concentrated but benefits are diffuse. It is surprising to see it suggested that this could support a finding of a taking where the legislature imposes civil restrictions on those previously convicted of crimes.

### C. *DeCook v. Rochester International Airport Joint Zoning Board*

In an unpublished opinion in *DeCook v. Rochester International Airport Joint Zoning Board*,<sup>39</sup> a Minnesota intermediate appellate court found that the designation of a property adjacent to an airport as within a “safety zone,” and thus subject to building height and use restrictions, effected a taking of the property. The court applied the Minnesota Supreme Court's decision in *McShane v. City of Fairbault*,<sup>40</sup> in which the court adopted Professor Sax's government-entrepreneurial takings theory.<sup>41</sup> *McShane* had held that a similar airport zoning ordinance had resulted in a taking because it found that the zoning served the government's interest in operating the airport rather than “arbitrating” conflicting land use claims in the community.

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<sup>37</sup> *Id.* at 759.

<sup>38</sup> *Id.* (footnote omitted).

<sup>39</sup> No. A09-969, 2010 WL 1850268 (Minn. App. May 11, 2010) (review granted June 29, 2010).

<sup>40</sup> 292 N.W.2d 253 (Minn. 1980).

<sup>41</sup> See Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 35 (1964).

The *DeCook* court found the case to be basically indistinguishable from *McShane*. It concluded, as had the Minnesota Supreme Court in a previous case, that *McShane* did not represent an takings test independent of *Penn Central*.<sup>42</sup> The court went on to find a taking based on the fact that the ordinance reduced the value of plaintiffs' property by \$170,000.<sup>43</sup>

The court did not explicitly parse the *Penn Central* factors, and it did not think much of the state's argument that the *McShane* state enterprise test "merely" represented an application of the character prong.<sup>44</sup> But it is hard to avoid reading the case as giving dispositive significance to the character factor. First, it gave substantial weight to its conclusion that the ordinance involved the defendant's acting in an entrepreneurial, rather than arbitral, zoning capacity.<sup>45</sup> As the state argued, this consideration must be relevant to, if anything, the character factor. Second, the court concluded that the regulation did not provide average reciprocity of advantage, but rather imposed on plaintiffs a burden disproportionate to the benefits they received from being adjacent to the airport and disproportionate to the burdens imposed on other properties adjacent to the airport but outside the safety zone.<sup>46</sup> Other courts and commentators have also treated this consideration as one potential application of the character factor.<sup>47</sup>

In dissent, Judge Johnson argued that the majority did not apply any recognized methodology for assessing economic impact, but rather "merely look[ed] at the number of dollars of diminished value."<sup>48</sup> Indeed, the court did not provide any information about the pre-regulation property value for purposes of comparison. Because, the dissent pointed out, the property had been worth between \$2.8 million and \$4.8 million, the majority found a taking based on a *maximum* diminution in property value of six percent, which, he noted, was an order of magnitude less severe than value diminutions previously found not to cause a taking.<sup>49</sup> In focusing exclusively on economic impact, he did not mention the government enterprise theory, which apparently remains the law in Minnesota. The Minnesota Supreme Court apparently found the debate between the majority and dissent intriguing, as granted review on June 29, 2010.

Like *Mann*, the case represents another example of a court—at least implicitly—applying the character-of-the-action factor as an aggravating factor and giving great, perhaps dispositive, weight to it. The court does not engage in an explicit weighing of the *Penn Central* factors, but given the relatively minor economic impact, the court effectively gave the character factor dispositive significance.

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<sup>42</sup> *DeCook*, 2010 WL 1850268, at \*4. The previous case was *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007), which is discussed below.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at \*4-5.

<sup>45</sup> *Id.* at \*4.

<sup>46</sup> *Id.* at \*5.

<sup>47</sup> See *Echeverria*, *supra* note 30, at 192-93.

<sup>48</sup> 2010 WL 1850268, at \*6 (Johnson, J., dissenting).

<sup>49</sup> *Id.*

**D. *Wensmann Realty, Inc. v. City of Eagan***

In another Minnesota case, *Wensmann Realty, Inc. v. City of Eagan*,<sup>50</sup> the Minnesota Supreme Court did not find a taking, but remanded the claim for further consideration. Plaintiff, the owner of a private golf course designated in the city's comprehensive plan as park land, had received an offer to purchase the property, contingent on rezoning to allow residential development. The city denied a rezoning application, and plaintiff alleged a taking. The trial court entered summary judgment for plaintiff, but the court of appeals reversed. The plaintiff sought review in the state supreme court.

The court analyzed the takings claim under *Penn Central*. It held that the city's denial of a change in the status quo may cause a taking if it renders property "economically unviable." The court considered three potential measures of economic impact: (1) before and after comparison of property value; (2) impact on the plaintiff's return on its investment in the property; and (3) "whether the city's decision leaves any reasonable, economically viable use of the property."<sup>51</sup> The court found that there were disputed facts regarding whether the golf course continued to be an economically viable use.

The court found the expectations and character factors to be a wash, leaving the economic impact factor to break the tie. It found that the denial did not interfere with any investment-backed expectations of the property owner because he purchased the property with no expectation of using it for anything other than a golf course and the purchase price reflected the existing zoning restrictions. It observed that the plaintiff's economic losses in recent years "were not the result of the city's actions, but the result of general market conditions."<sup>52</sup> The court further found that the plaintiff had not made any investment in anticipation of development of the property for residential use.

On the other hand, with respect to the character factor, the court stated that "[a]lthough the relevant considerations may vary depending on the circumstances of the case, an important consideration involves whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners."<sup>53</sup> The court held that the character here favored the property owner because only a few property owners bear the burden of the restrictive "Park" designation, and it "seems aimed at things that have been considered government functions."<sup>54</sup> Moreover, the court found, the city approved residential development on all of the surrounding properties and therefore created the need to preserve the limited remaining open space.

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<sup>50</sup> 734 N.W.2d 623 (Minn. 2007).

<sup>51</sup> *Id.* at 635.

<sup>52</sup> *Id.* at 638.

<sup>53</sup> *Id.* at 639.

<sup>54</sup> *Id.* at 640. This point seems to allude to the "government enterprise" theory discussed above, but the court did not cite its decision in *McShane* for this point.

Because it found the expectations and character factors to be in equipoise, the court determined that economic impact would determine the result of the *Penn Central* inquiry and remanded for further proceedings to determine the extent of that impact.<sup>55</sup>

The court's treatment of expectations is surprising. If the lack of investment-backed expectations in this case was not sufficient to justify rejecting the claim, it is hard to imagine any claim in which it would suffice. The plaintiff purchased the property, which was designated in the city's comprehensive plan for "public facilities" uses, after it had been used as a golf course for more than 30 years, and he did so with the intention of continuing to operate it as such.<sup>56</sup> Moreover, he "bought the property shortly after the city denied a request to amend the comprehensive plan to permit residential development of the property . . . [and he] was aware of the city's action."<sup>57</sup> The city then redesignated the property several years later for "parks, open space and recreation" uses, but the plaintiff did not apparently challenge the designation.<sup>58</sup> Three years later, he sought redesignation for residential use. Even the plaintiff apparently did not argue that he had investment-backed expectations in something other than a golf course use, but rather suggested that he "had a general expectation of making a reasonable rate of return on [his] investment."<sup>59</sup>

The court did acknowledge the plaintiff's total lack of investment-backed expectations and concluded that the factor therefore favored the city. But it nonetheless found the factor to be offset by the character factor, because, it concluded, "only a few" other properties were similarly designated and it could not see any reciprocity of advantage accruing to the golf course from its designation.<sup>60</sup> As a result, it concluded that "the burden of the comprehensive plan designation falls disproportionately on the property owner."<sup>61</sup> In fact, given that the plaintiff not only lacked investment backed expectations in any other use, but had strong investment-backed expectations of continuing the existing use, it's hard to see much of a burden at all. Indeed, the price he paid for the property almost certainly reflected the assumption that the plan designation would be unchanged, as a proposed change had been rejected shortly before the property changed hands.

### **III. Some Brief Observations About These Recent Applications of *Penn Central***

What is perhaps most remarkable about these cases is the degree to which they depart from the conventional wisdom that economic impact of the challenged regulation is the most important of the factors and that an exceptionally severe economic impact is necessary to find that a taking has occurred. *Mann* and *DeCook* found takings based on economic impacts that are

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<sup>55</sup> *Id.* at 642.

<sup>56</sup> He subsequently invested more than \$300,000 in capital improvements to the golf course. *Id.* at 627.

<sup>57</sup> *Id.* at 627.

<sup>58</sup> The opinion doesn't suggest what effect, if any, that change in designation had on the allowable uses of the property, but it is clear that it permitted the existing golf course use. *Id.* at 628.

<sup>59</sup> *Id.* at 638.

<sup>60</sup> *Id.* at 640. One might imagine, however, that being surrounded by land designated for residential uses rather than "park, open space and recreational" uses may have increased the value of the plaintiff's property as a golf course by creating demand for the golf course and preventing competing facilities from being sited nearby.

<sup>61</sup> *Id.*

a small fraction of the much greater than 50 percent diminutions typically found to be takings. Indeed, *Mann* made no quantitative finding of impact at all. In *Guggenheim*, the court's discussion of economic impact focused on the "naked wealth transfer," which, as the dissent pointed out, harmed only the plaintiffs' predecessors in interest. In *Wensmann*, the court did suggest that the regulation would not be a taking if it left an economically viable use, but gave no direction to the courts below in applying the concept.

The cases are also striking for the degree to which weak or nonexistent investment backed expectations failed to substantially affect the outcomes. They suggest that at least some courts are courts reading *Palazzolo* broadly and are discounting the significance of the plaintiff's taking title with notice of an existing regulatory regime, even where the regime has been in place for decades. Both *Guggenheim* and *Wensmann* gave little weight to the factor despite a complete lack of interference with investment-backed expectations, and on the contrary, in *Wensmann*, strong expectations of continuing the existing use allowed by the city's regulation. *Wensmann* must be close to the strongest case a defendant could hope for on expectations, and yet the court did not find that the lack of impaired expectations disposed of the claim.

Finally, in each of these cases, the character factor played a starring role, though in a wide variety of different ways. In *Guggenheim*, it was that the regulation represented a wealth transfer of value between private parties and that the park owner was being singled out to bear the burden of the public interest in affordable housing. In *Mann*, it was interference with the plaintiff's right to live in his own home, a quasi-fundamental property interest like those involved in *Loretto*, *Hodel*, and *Babbitt*. In *DeCook*, the fact that the defendant board acted in an entrepreneurial rather than purely regulatory capacity appeared to outweigh a relatively minor economic impact. And in *Wensmann*, the singling out of the golf course owner to bear the burden of the public need for open space and recreation offset an otherwise exceptionally strong instance of unimpaired expectations.

This is plainly too small a sample from which to derive any grand theories about the future of *Penn Central*. But it does show the willingness of courts to look beyond economic impact to other considerations. Indeed, despite the fact that the Supreme Court's decisions in *Lingle* and *Tahoe-Sierra* narrowed application of the Takings Clause in important ways, their emphasis of the *Armstrong* distributive justice policy underlying the Takings Clause<sup>62</sup> may have the opposite result. It may encourage courts to apply, as all of the cases discussed here did, the *Armstrong* principle as an independent element of their *Penn Central* analyses. Courts may see that as a license to find takings beyond the cases of near total elimination of use or value, where takings have traditionally been found.

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<sup>62</sup> See *Lingle*, 544 U.S. at 537, 543; *Tahoe-Sierra*, 535 U.S. at 333-42.