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**THE 13TH ANNUAL CONFERENCE ON LITIGATING TAKINGS
AND OTHER LEGAL CHALLENGES TO LAND USE AND
ENVIRONMENTAL REGULATION**

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**SELECTED THRESHOLD PROCEDURAL,
SUBSTANTIVE, AND REMEDY ISSUES IN FEDERAL
TAKINGS CASES**

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I. INTRODUCTION

This paper addresses a number of secondary issues that surround takings claims under the federal constitution. It begins by exploring selected procedural and substantive threshold issues to bringing a takings claim, such as whether the claim is ripe, whether it is timely, whether the defendant is subject to suit in federal court, and whether non-takings theories are available for the same challenge. It concludes with a summary of the remedies available for takings. Each of these subjects contain a great deal of nuance, and the discussion herein is intended as an overview rather than an exhaustive analysis.

II. THRESHOLD ISSUES

There are a number of procedural and substantive threshold issues that should be analyzed before bringing a takings claim under the Fifth Amendment. The discussion below summarizes some of the major issues. First, several procedural hurdles exist that can limit or prevent the presentation of taking claims. The Williamson County ripeness test can limit the availability of a federal forum before certain state procedures are followed. As with any claim, the statutes of limitation and standing requirements must be met. Because of the interplay of state and federal interests, there are also a number of federal abstention doctrines that may prevent litigation in the federal courts, at least in the first instance. Those doctrine, as well as the

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ripeness requirements, then lead to the question of whether issues may be reserved for later litigation in federal court.

In addition, several substantive issues can influence which claims are brought, and where. Questions of state sovereign immunity and the Eleventh Amendment substantially limit the claims available against states in the federal courts, although no such restrictions apply to claims against local governments. The “public use” clause of the Fifth Amendment provides a separate method of attacking takings, albeit a very limited one. Similarly, a number of alternative legal theories are often advanced in takings cases, such as substantive due process, equal protection, or a fourth amendment unlawful seizure claim. These theories all provide an avenue for challenging “takings” that do not readily submit to the traditional takings tests, although the effectiveness of that approach seems substantially hampered by the rational basis or reasonableness analysis applied to such claims.

A. Selected Procedural Threshold Issues

1. Ripeness

In Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), the United States Supreme Court created a ripeness requirement for federal takings cases. That requirement has two prongs:

The first condition ... requires a claimant to utilize available administrative mechanisms, such as seeking variances from overly-restrictive or confiscatory zoning ordinances, so that a federal court can assess the scope of the regulatory taking. ... The second condition ... is based on the principle that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.” Consequently, “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [federal] Just Compensation Clause until it has used the procedure and been denied just compensation.”

W. Linn Corporate Park LLC v. City of West Linn, 534 F.3d 1091, 1099-1100 (9th Cir. 2008)
(citations omitted).

a. Williamson County prong one

The “first ripeness requirement embodies ‘the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.’” Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824, 826-27 (9th Cir. 2004). “[U]ntil the landowner has followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion ... including the opportunity to grant any variances or waivers allowed by law ... the extent of the restriction on property is not known and a regulatory taking has not yet been established.” Id. at 827.

This first Williamson County prong does not apply to physical takings. Vacation Village Inc. v. Clark County, 497 F.3d 902, 912 (9th Cir. 2007); McKenzie v. City of White Hall, 112 F.3d 313, 317 (8th Cir. 1997) (“A physical taking is by definition a final decision for the purpose of satisfying *Williamson* ‘s first requirement.”). It also does not apply to facial challenges, Yee v. City of Escondido, 503 U.S. 519, 533-34 (1992), or where seeking a final decision would be futile (although the land owner must make at least one “meaningful application” to argue futility). St. Clair v. City of Chico, 880 F.2d 199, 203 (9th Cir. 1989); DLX, Inc. v. Kentucky, 381 F.3d 511, 525 (6th Cir. 2004).

b. Williamson County prong two

The second prong of Williamson County arises from the Fifth Amendment’s prohibition of takings *without just compensation*. “As its language indicates, and as the Court has frequently noted, [the Fifth Amendment] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes

clear that it is designed not to limit the government interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.” First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987) (citations omitted); see Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536-37 (2005).

This second requirement applies to both physical and regulatory takings claims. Severance v. Patterson, 566 F.3d 490, 497 (5th Cir. 2009). It does not apply, however, if state law does not provide an avenue to claim compensation.² Suitum v. Tahoe Reg’l Planning Agency, 520 U.S. 725, 734 n.8 (1997); Pascoag Reservoir & Dam, LLC v. Rhode Island, 337 F.3d 87, 92-93 (1st Cir. 2003). It also does not apply where pursuing state remedies would be futile. Pascoag, 337 F.3d at 92-93; Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 657, 658-61 (9th Cir. 2003).

There is a split of authority concerning whether the compensation requirement applies to a claim that a taking violates the public use clause of the Fifth Amendment. See Dahlen v. Shelter House, 598 F.3d 1007, 1010 (8th Cir. 2010) (no state procedure required); Daniels v. Area Plan Com’n of Allen County, 306 F.3d 445, 452054 (7th Cir. 2002) (discussing split of authority).

c. Debate over jurisdictional status of doctrine

There has historically been a split in the case law concerning whether the Williamson County requirements are subject to waiver. Some cases deemed the requirements jurisdictional.

² The lack of power to condemn, for example, may result in state remedies being unavailable. Thus, in Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995), the Court held that a taking claim was ripe even though no compensation was sought from the state courts because the government agency in question lacked the power of eminent domain, and thus Wyoming state inverse condemnation procedures did not apply. Id. at 1575. This is a question of state procedures, not federal constitutional law.

E.g., Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 548 F.3d 1184, 1191-92 (9th Cir. 2008); Island Park, LLC v. CSX Transp., 559 F.3d 96, 109-110 (2d Cir. 2009); Snaza v. City of Saint Paul, Minnesota, 548 F.3d 1178, 1182 (8th Cir. 2008); Braun v. Ann Arbor Charter Twp., 519 F.3d 564, 569-71 (6th Cir. 2008). Others have described the requirements as prudential (and thus potentially subject to waiver). Holliday Amusement Co. v. South Carolina, 493 F.3d 404 (4th Cir. 2007); Asociacion de Subscripcion Conjunta Del Seguro Responsabilidad Obligatorio v. Galarza, 484 F.3d 1 (1st Cir. 2007).

This debate was seemingly resolved by the Supreme Court in Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, 130 S.Ct. 2592 (2010).³ In a single sentence without any analysis or acknowledgment whatsoever of the split in authority, the Supreme Court asserted that the Williamson County ripeness requirements are prudential and thus subject to waiver:

At the outset, respondents raise two preliminary points which need not detain us long. The city and the county argue that petitioner cannot state a cause of action for a taking because, though the Members own private property, petitioner itself does not; and that the claim is unripe because petitioner has not sought just compensation. Neither objection appeared in the briefs in opposition to the petition for writ of certiorari, and since neither is jurisdictional, we deem both waived.

Id. at 2610. All eight Justices hearing the case joined this portion of the opinion.

It remains to be seen how further case law will deal with the Court's seemingly offhand resolution of this issue. Governments intending to rely on Williamson County would be well advised to raise it promptly at the trial and appellate levels in any proceeding to avoid any argument that the requirements were waived.

³ This result was presaged in Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 733-34 (1997), where the Supreme Court described Williamson County as a prudential ripeness doctrine. Stop the Beach, however, is the first instance where the Supreme Court has actually found the requirements to have been waived for failure to raise them below.

d. Special California issue with second prong - “Kavanau” adjustment

The second Williamson County prong presents a unique dispute under California law with respect to rent control. Under California law, a landowner who establishes that a rent control law constitutes a taking must first seek indirect compensation through increased rent before seeking damages from the state under the procedure established in Kavanau v. Santa Monica Rent Control Board, 16 Cal. 4th 761 (1997). A landlord must first challenge the regulated rent through an action for administrative mandamus in state court. Galland v. City of Clovis, 24 Cal. 4th 1003, 1022 (2001). If a writ of mandamus is granted, the property owner must then seek an adjustment of future rents from the governing rent board “that takes into consideration past confiscatory rents.” Kavanau, 16 Cal. 4th at 783-85. This is referred to as a “Kavanau adjustment.” See Galland, 24 Cal. 4th at 1025. If such an adjustment is found inadequate, the landlord can sue for inverse condemnation damages. Id. at 1029-30.

Landlords in California have repeatedly argued that Kavanau fails to provide just compensation as a matter of law. The Ninth Circuit has rejected that argument in five published opinions. Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 548 F.3d 1184, 1191-92 (9th Cir. 2008); Manufactured Home Communities, Inc. v. City of San Jose, 420 F.3d 1022, 1035-36 (9th Cir. 2005); Ventura Mobilehome Communities Owners Ass’n v. City of San Buenaventura, 371 F.3d 1046, 1053 (9th Cir. 2004); Carson Harbor Village Ltd. v. City of Carson, 353 F.3d 824, 827-30 (9th Cir. 2004); Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 658-59 (9th Cir. 2003). However, in none of these cases has the Ninth Circuit squarely approved the procedure – each holds that it was not shown to be inadequate. Until this issue is resolved on the merits, it seems likely that the adequacy of Kavanau will continue to be challenged in federal rent control takings cases.

2. Statute of limitations

a. *Applicable limitations period*

Takings claims against the federal government are governed by the six year statute of limitations in the Tucker Act, 28 U.S.C. § 2501.

Federal takings claims against local entities are brought under 42 U.S.C. § 1983.⁴ Because Congress has not created a specific statute of limitations for section 1983 claims, they are governed by borrowing the “general or residual statute for personal injury actions” under the law of the relevant state. Owens v. Okure, 488 U.S. 235, 250 (1989). In California, that period is currently two years. Cal. Code Civ. Proc. § 335.1; see Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651,655 n.2 (2003).

The statute of limitations for state law takings claims varies substantially from state to state. Some states have specific statutes directed at condemnation and inverse condemnation claims. (E.g., New Mexico Stat. Ann § 42A-1-31; Cal. Code Civ. Proc. § 338(j).) Other states apply a more general, relatively short statute of limitations applicable to tort or implied contract claims. (E.g., Hart v. City of Detroit, 331 N.W.2d 438, 441-503 (Mich. 1982).) Some states, however, allow inverse condemnation claims to apply the lengthy period applicable to adverse possession claims, which can stretch for decades. (E.g., Sundell v. New London, 119 N.H. 839, 409 A.2d 1315, 1321 (1979) (20 years).) A good discussion and overall survey of these various approaches to statute of limitations for inverse condemnation claims can be found at 26 A.L.R.4th 68.

⁴ States and their officials acting in an official capacity are not “persons” within the meaning of 42 U.S.C. § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989).

b. Accrual of claim

A federal takings claim under the Tucker Act accrues “when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action” but only if “the plaintiff knew or should have known of the existence of the events fixing the government’s liability.” John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1355-56 (2006) (citations omitted).

Although the various Circuits describe the test slightly differently, takings claims against states and municipalities accrue on the date the claim is ripe. New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1496-97 (11th Cir. 1993); Vistamar, Inc. v. Fagundo-Fagundo, 430 F.3d 66, 70 (1st Cir. 2005) (accrues when wrongful acquisition complete); Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 655 (9th Cir. 2003) (accrues when compensation is denied by the state courts or, if resort to the state courts would be futile, the claim accrues when the condemnation occurs or when the challenged regulation is enacted). From a doctrinal perspective, it seems to make little difference whether the claim is deemed to accrue immediately upon enactment but remain tolled during any exhaustion of state remedies, or instead deemed to accrue after exhaustion of state remedies (i.e. when it is ripe).

State law takings theories accrue at different times depending on the type of statute of limitation at issue in the particular state. See 26 A.L.R.4th 687.

c. Tolling

The Tucker Act six year statute of limitations is jurisdictional, and cannot be equitably tolled or waived. John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1354-44 (2006).

Whether and how the statute of limitations for takings claims under 42 U.S.C. § 1983 can be tolled is a question of the borrowed state law. Canatella v. Van de Kamp, 486 F.3d 1128, 1132 (9th Cir. 2007) (“courts apply the forum state’s statute of limitations for personal injury

actions, along with the forum state’s law regarding tolling, including equitable tolling....”) (citations omitted). Thus, unlike claims against the federal government, takings claims against states and local jurisdictions may be subject to either express or equitable tolling depending on the circumstances of the claim and the law of the relevant jurisdiction.

3. Standing

To establish standing under Article III of the U.S. Constitution, plaintiffs “must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 598 (2007) (citations omitted). This requirement exists in takings cases just as in any other. E.g., Minneapolis Taxi Owners Coalition, Inc. v. City of Minneapolis, 572 F.3d 502, 510 (8th Cir. 2009).

Thus in Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 548 F.3d 1184, 1193 (9th Cir. 2008), the Ninth Circuit held that a mobilehome park owner had no standing to bring a facial takings challenge to an ordinance passed prior to its acquisition of the property because any injury occurred at the time of enactment, and thus the plaintiff had not been injured in fact.

Property rights advocates frequently cite Palazzolo v. Rhode Island, 533 U.S. 606 (2001) as a standing case. Palazzolo did not directly address the question of standing, but rejected a “blanket rule that purchasers with notice have no compensation right when a claim becomes ripe...” Id. at 628. Palazzolo involved an alleged Lucas⁵ taking of land where the plaintiff purchased property through a corporate form created for that purpose prior to the challenged regulations, but then took title as an individual after the regulation was enacted when the

⁵ Under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), a regulation that completely eliminates a property’s economic value is a taking.

corporation's charter was revoked. Id. at 614. The extent to which Palazzolo will be interpreted as creating standing for independent purchasers who acquire property after the challenged regulation is yet another open question that will likely be the subject of continued litigation. This is one of the questions to potentially be decided in Guggenheim v. City of Goleta, 582 F.3d 996, 9th Cir. Case No. 06-56306, (9th Cir. 2009) which is currently under submission following a June 22, 2010 en banc rehearing.

4. Abstention

Traditional federal abstention rules apply in takings cases just as in other federal cases. There are three primary abstention doctrines that come into play in regulatory takings cases: Younger abstention, Pullman abstention, and Burford abstention.

Younger abstention is named after Younger v. Harris, 401 U.S. 37 (1971). Under Younger, the Court must usually abstain from exercising its jurisdiction where four requirements are met: “(1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so.” San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose, 546 F.3d 1087, 1092 (9th Cir. 2008). Younger abstention is frequently applied where a federal takings claim is filed during the pendency of a related state proceeding. E.g., Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156, 165-66 (4th Cir. 2008); Coles v. Granville, 448 F.3d 853, 865-66 (6th Cir. 2006). It should be noted, however, that the pendency of the state court action may also cause the federal claim to be unripe under Williamson County, as discussed above, and the abstention question need not be reached in such cases.

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), allows a district court to abstain from hearing a case within its jurisdiction where three factors exist: (1) the complaint “touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open”; (2) a “definitive ruling on the state issue” would “terminate the controversy”; and (3) “the possibly determinative issue of state law is doubtful.” McMillan v. Goleta Water Dist., 792 F.2d 1453, 1458 (9th Cir. 1986). Takings cases can be subject to Pullman abstention. See San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095, 1104-05 (9th Cir. 1998). The doctrine would seem particularly appropriate where the challenged land use ordinance’s operation or meaning are unclear. This, of course, is also conceptually tied to the first prong of the Williamson County test discussed above. Pullman abstention is not appropriate simply because there are state constitutional rights similar to those provided by the Fifth Amendment. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 237 n.4 (1984).

Burford abstention provides a narrow doctrine for abstention where the federal court’s exercise of jurisdiction would interfere with a complex, technical state regulatory scheme involving a matter of substantial public concern. Burford v. Sun Oil. Co., 319 U.S. 315 (1943). The application of Burford abstention is extremely rare, and there is no formulaic test for determining whether abstention is appropriate. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 727 (1996). The doctrine has been applied to takings cases. See Sierra Club v. City of San Antonio, 112 F.3d 789, 793-98 (5th Cir. 1997); Fourth Quarter Properties IV, Inc. v. City of Concord, 127 Fed. Appx. 648, 654-56 (4th Cir. 2005) (unpublished decision);

5. Reservation of federal claims during exhaustion?

In England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), the Court held that where a federal court dismisses or stays a case as a matter of abstention in favor of state proceedings, the plaintiff may reserve his federal claims for determination in later federal court proceedings. Id. at 421-22. In San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005), the Supreme Court appeared to substantially limit the scope of these “England reservations” and their utility to preserve a separate federal case (at least in takings cases). The Court held that an England reservation cannot be used to avoid the res judicata effect of state proceedings. Id. at 338. The Court also stated that England can only apply in Pullman abstention cases where “the antecedent state issue requiring abstention was distinct from the reserved federal issue.” Id. at 339-40.

San Remo Hotel recognized that, as a practical matter, these rules mean that most takings claims will be litigated in state court. The Court expressed no discomfort with that result.

It is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts. ... [T]here is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment’s Takings Clause. To the contrary, most of the cases in our takings jurisprudence, including nearly all of the cases on which petitioners rely, came to us on writs of certiorari from state courts of last resort. . . . State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.

San Remo Hotel, 545 U.S. at 346-47 (citations omitted).

Prior to San Remo Hotel, England reservations were frequently used not only in cases of abstention, but also where state claims were pursued as required by Williamson County. E.g., DLX, Inc. v. Kentucky, 381 F.3d 511, 521-24 (6th Cir. 2004). The Eleventh Circuit has noted

that San Remo Hotel casts such reservations in doubt, but did not decide the issue. Agripost, LLC v. Miami-Dade County, 525 F.3d 1049, 1055 (11th Cir. 2008). Some commentators have suggested that San Remo Hotel effectively ends the use of England reservations in takings cases. E.g., Lindberg, *Multijurisdictionality and Federalism: Assessing San Remo Hotel's Effect on Regulatory Takings*, Comment, 57 U.C.L.A. Law Review 1819 (Aug. 2010).

The Ninth Circuit, however, has recently held that an England reservation can be made during state proceedings even if there was no original federal proceeding, and renewed again if a subsequent federal case is dismissed under Younger abstention. Los Altos El Granada Investors v. City of Capitola, 583 F.3d 674, 685-689 (9th Cir. 2009). The decision does not discuss San Remo Hotel. The continuing availability and utility of England reservations in takings cases thus appears to be an issue that will generate additional litigation for the foreseeable future, at least in the Ninth Circuit.

B. Selected Substantive Threshold Issues

1. Sovereign Immunity/Eleventh Amendment

a. Claims against the United States

The Tucker Act, 28 U.S.C. §§ 1491 et seq, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (claims for \$10,000 or less), waive the sovereign immunity of the United States, thus subjecting it to suit for violations of the Fifth Amendment. Lion Raisins, Inc. v. United States, 57 Fed. Cl. 435, 437-38 (2003), *aff'd* 416 F.3d 1356 (Fed. Cir. 2005).

b. Claims against States and state agencies

The term “Eleventh Amendment immunity” encompasses more than the precise restrictions of the Eleventh Amendment⁶ – it is a shorthand for the sovereign immunity of the states. “This Court’s cases have recognized that the immunity of States from suit ‘is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ... except as altered by the plan of the Convention or certain constitutional Amendments.’ Consistent with this recognition, ... we have observed that the phrase ‘Eleventh Amendment immunity’ ... is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.’” Northern Ins. Co. of New York v. Chatham County, 547 U.S. 189, 193 (2006).

This immunity has several important aspects for takings cases. First, it acts essentially as a bar to suit in federal court. The Eleventh Amendment protects states and their agencies from being sued in federal court without their consent. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). This bar is absolute with respect to state law claims - such claims cannot be brought in federal court without the consent of the state or state agency being sued. Id. at 104-06. As to federal claims, it bars all claims against the state itself as well as all claims for money damages against state officials. Id. 100-103. The Eleventh Amendment does not, however, bar federal law claims for prospective injunctive relief against state officials in their official capacity. Ex parte Young, 209 U.S. 123, 155-68 (1908).

While the issue has not been specifically addressed by the Supreme Court, the lower courts have uniformly held that states and state agencies may not be sued for takings claims in

⁶ “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. Am. XI.

federal court without their consent due to this Eleventh Amendment immunity. Seven Up Pete Venture v. Schweitzer, 523 F.3d 948, 954-56 (9th Cir. 2008).

The Ex Parte Young exception does not have much application to takings claims, as the remedy sought in the ordinary takings claim is *not* prospective injunctive relief, but instead compensation. Id. at 956; DLX, Inc. v. Kentucky, 381 F.3d 511, 527 & n.14 (6th Cir. 2004). In appropriate cases, however, courts have allowed suits for prospective equitable relief against state officials to proceed in federal court. Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009).

The Eleventh Amendment does not generally create a bar to states being sued in their own courts. While the Supreme Court has held that Congress cannot subject a state to suit in its own courts without its consent, Alden v. Maine, 527 U.S. 706 (1999), the few courts to consider the issue have held that the Eleventh Amendment does not prevent claims under the Fifth Amendment (as incorporated in the Fourteenth Amendment) in state court. SDDS, Inc. v. State, 650 N.W.2d 1 (S.D. 2002); Boise Cascade Corp. v. State, 991 P.2d 563, 569 (Or. App. 1999).

Eleventh Amendment immunity can be waived in particular cases by consenting to the jurisdiction of the federal courts. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999). For example, removal of a case from state to federal court waives the Eleventh Amendment's bar on suit in federal court. Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 620 (2002). In addition, to the extent a state has waived its substantive sovereign immunity in state court, consenting to the federal forum makes the same substantive waiver apply in federal court. Independent Living Center of Southern California, Inc. v. Maxwell-Jolly, 572, F.3d 644, 661 (9th Cir. 2009).

In addition, Congress has the power to waive the Eleventh Amendment in exercise of its power to enforce the Fourteenth Amendment. College Sav. Bank v. Florida Prepaid

Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999). Congress has not, however, done so with regard to takings claims.

c. Claims against local governments

Local governments, such as counties or cities, and their agents are not considered arms of the state and have no Eleventh Amendment immunity. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977).

2. Public Use

The Takings Clause of the Fifth Amendment provides that no “private property [shall] be taken for public use, without just compensation.” U.S. Const. amend. V. The “public use” requirement is satisfied when the government’s action is “rationally related to a conceivable public purpose.” Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 240-41 (1984) (“The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (public use requirement is satisfied so long as the law “has a conceivable public character.”). In Kelo v. City of New London, the Supreme Court affirmed this deferential rule. Kelo v. City of New London, 545 U.S. 469, 488 (2005).

Although there has been a great deal of political discussion of the “public use” clause since the Kelo decision (which found *no* violation of the public use clause), the public use takings theory has not gained any traction in the case law. Post-Kelo Court of Appeal cases have continued to apply the broad Midkiff standard re-affirmed in Kelo, which is “coterminous” with the government’s due process police powers. See Fideicomiso De La Tierra Del Caño Martin Peña v. Fortuño, 604 F.3d 7, 18 (1st Cir. 2010); United States v. 14.02 Acres, 547 F.3d 943, 952 (9th Cir. 2008); Carole Media LLC v. New Jersey Transit Corp., 550 F.3d 302, 309 (3d Cir. 2008); Goldstein v. Pataki, 516 F.3d 50, 61-63 (2d Cir. 2008).

One question that has not been directly addressed by the Courts is whether the “public use” clause can be meaningfully applied to a regulatory takings claim. No Supreme Court decision has discussed this test in the context of regulatory takings, and in Lingle the Supreme Court stated that except in cases of physical invasion or deprivation of all economic value, “regulatory takings challenges are governed by the standards set forth in [Penn Central].” Lingle v. Chevron USA, 544 U.S. 528, 538, 548 (2005). Indeed, Lingle suggests that a valid “public use” is a precondition for a regulatory taking claim. Id. at 543. It appears more doctrinally logical to limit the public use clause to physical takings where the actual power of eminent domain is exercised, and to address laws that are enacted outside of the scope of the police power through the due process clause.

3. Alternative Legal Theories To Takings Claim

a. *Substantive due process*

The substantive due process clause is sometimes used to challenge a government regulation instead of, or in addition to, the takings clause. This theory presents two challenges. First, whether the law allows a taking to be challenged as a violation of substantive due process. Second, whether using that challenge provides a productive attack on the challenged regulation.

The first question is presently uncertain. Prior to 2005, the Ninth Circuit and other courts had held that the substantive due process clause could not be used to challenge government action that was also being challenged as a taking. Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc). This rule was based on the Supreme Court’s reluctance to expand substantive due process into an alternative doctrine where other constitutional principles applied. “[W]e have ‘always been reluctant to expand the concept of substantive due process,’ ... ‘[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of

substantive due process, must be the guide for analyzing these claims.” County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)) (other citations omitted).

Although Lingle v. Chevron USA, 544 U.S. 528 (2005), did not specifically address a substantive due process claim, its rejection of the substantially advances test as more properly stating a due process test, as well as Justice Kennedy’s continuing advocacy for a separate substantive due process standard, has led the Ninth Circuit to reconsider Armendariz. See 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”). Current Ninth Circuit law now appears to allow substantive due process challenges as an alternative to a takings claim. North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 484 (9th Cir. 2008).

Additional uncertainty, however, was recently created by Stop the Beach Renourishment, Inc. v. Florida Dep’t of Environmental Protection, 130 S.Ct. 2592 (2010). Justice Scalia’s plurality opinion, while not precedential, asserts three substantial problems with a substantive due process challenge, including essentially the same rule as Armendariz:

The first problem with using Substantive Due Process to do the work of the Takings Clause is that we have held it cannot be done. “Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.’” Albright v. Oliver, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (four-Justice plurality opinion) (quoting Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)); see also 510 U.S., at 281, 114 S.Ct. 807 (KENNEDY, J., concurring in judgment) (“I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process”).

The second problem is that we have held for many years (logically or not) that the “liberties” protected by Substantive Due Process do not include economic liberties. See, e.g., *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536, 69 S.Ct. 251, 93 L.Ed. 212 (1949). Justice KENNEDY’s language (“If a judicial decision ... eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law,” *post*, at 2614) propels us back to what is referred to (usually deprecatingly) as “the *Lochner* era.” See *Lochner v. New York*, 198 U.S. 45, 56-58, 25 S.Ct. 539, 49 L.Ed. 937 (1905). That is a step of much greater novelty, and much more unpredictable effect, than merely applying the Takings Clause to judicial action.

And the third and last problem with using Substantive Due Process is that either (1) it will not do all that the Takings Clause does, or (2) if it does all that the Takings Clause does, it will encounter the same supposed difficulties that Justice KENNEDY finds troublesome

Stop the Beach Renourishment, Inc., 130 S.Ct. at 2606. The Ninth Circuit has not had an opportunity to readdress Armendariz in light of Stop the Beach Renourishment, Inc.

Assuming this is a valid theory, how valuable is it? The standard for substantive due process is very hard to meet. In order to find that a government action violates substantive due process, the court must conclude that the action is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” Dodd v. Hood River County, 59 F.3d 852, 864 (9th Cir. 1995) (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)). “[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.” Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487-88 (1955). Moreover, the Court cannot consider whether the law actually works. “In a substantive due process challenge, we do not require that the City’s legislative acts actually advance its stated purposes, but instead look to whether ‘the governmental body *could* have had no legitimate reason for its decision.’” Richardson v. City and County of Honolulu, 124 F.3d 1150, 1162 (9th Cir. 1997). “[H]ow well the ordinance

serves [its] purpose[s] is a legislative question, one the court will not consider' in the context of a substantive due process challenge.” Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 690 (9th Cir. 1993).

b. Equal protection

A few cases have suggested that a landowner who is subject to unequal regulation as compared to similarly situated landowners may have an equal protection claim under a “class of one” 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). There are two potential problems with any such challenge.

First, such a claim may be subject to the same ripeness requirements as a takings claim. See Muscarello v. Ogle County Bd. of Com’rs, 610 F.3d 416, 423 (7th Cir. 2010) (“Any equal protection claim based on a taking would be unripe and subject to all of the objections that we have just reviewed in connection with the takings claim.”).

Second, and more importantly, in the absence of a constitutionally suspect classification, an equal protection claim is analyzed under the highly deferential rational basis test. “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). Thus, like the substantive due process clause, equal protection provides very little opportunity to challenge economic regulation.

c. Fourth Amendment unreasonable seizure claim

Some property owners have sought to evade the ripeness and other requirements of the Fifth Amendment takings claims by bringing a claim for “unreasonable seizure” under the

Fourth Amendment. Severance v. Patterson, 566 F.3d 490, 501-02 (5th Cir. 2009). “To prevail on a seizure claim, a plaintiff must prove that the government *unreasonably* seized property.” Presley v. City of Charlottesville, 464 F.3d 480, 485 (4th Cir. 2006). Given the broad “reasonableness” latitude given to the government under this standard, it is unclear why this claim would be of substantial benefit to landowners except perhaps as an attempt to avoid the taking rather than seek compensation for it.

Moreover, while no published case has expressly held either way, it would logically seem that this theory is inapplicable to regulatory takings claims where no physical property is seized by the government.

III. REMEDIES FOR TAKING

What remedies are available when the Fifth Amendment’s takings clause has been violated? There are basically two forms of remedy generally sought: monetary damages and invalidation/injunctive relief. There are far fewer cases discussing remedy than the standards for a taking, for the rather obvious reason that successful takings cases are far rarer than unsuccessful ones. The discussion below highlights some common standards concerning such remedies.

A. Before and After Market Value

As a general matter, compensation is the only appropriate remedy for a taking. “Damages, in the form of just compensation, are the normal remedy for a takings claim. In almost all takings cases, the governmental body has the constitutional power to regulate or seize the private property in question; the only issue is whether (or how much) it needs to pay for that property. Indeed, it is the very essence of an ordinary takings claim that the property owner

cannot prevent the governmental body from regulating or seizing the property, provided that just compensation is paid.” Daniel v. County of Santa Barbara, 288 F.3d 375, 384 (9th Cir. 2002).

Where an entire piece of property is taken, the basic measure of damages is the fair market value of the property at the time of the taking. In other words, “the price at which the property would change hands between a willing buyer and seller, neither being under any compulsion to consummate the sale.” Louis and Karen Metro Family, LLC v. Lawenceburg Conservancy Dist., ___ F.3d ___, 2010 WL 2944219 at *4 (7th Cir. July 29, 2010). The purpose of this approach is” to return the affected property owner to “as good position pecuniarily as he would have occupied if his property had not been taken.”“ A.A. Profiles, Inc. v. City of Fort Lauderdale, 253 F.3d 576, 583 (11th Cir. 2001).

A slightly more nuanced analysis is applied in the case of a partial or regulatory taking, although the goal is the same. The most accepted analysis in this circumstance is the “before and after” test. In the case of a partial physical taking (i.e. condemnation of part of a tract of land), the court should measure the value of the *entire* property before the taking and compare it to the value of the *remaining* (not taken) property after the taking. The difference between those two is the damage suffered by the taking. See, e.g., United States v. 33.92356 Acres of Land, 585 F.3d 1, 9-10 (1st Cir. 2009); United States v. 38.60 Acres of Land, 625 F.2d 196, 199 (8th Cir. 1990); United States v. 8.41 Acres of Land, 680 F.2d 388, 392 (5th Cir. 1982). Similarly, where a regulatory taking is alleged, the damages are calculated as the value of the land immediately prior to the regulation, compared with the value immediately thereafter. See Independence Park Apartments v. United States, 449 F.3d 1235, 1242 (Fed. Cir. 2006); A.A. Profiles, Inc. v. City of Fort Lauderdale, 253 F.3d 576, 583-84 (11th Cir. 2001).

Damages are available for temporary takings, just as for permanent ones. First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 318-20 (1987). Where a taking is temporary, the compensation owed is the loss caused by the taking. For instance, where land is taken, a fair market rent is often calculated for the period. Where a regulation unreasonably limited the income producing use of the land, lost income can be considered. Wheeler v. City of Pleasant Grove, 833 F.2d 267, 270-71 (11th Cir. 1987).

B. Prejudgment Interest

Where compensation for a taking has been delayed (which will exist in pretty much every litigated takings case), “just compensation” includes prejudgment interest. Schneider v. County of San Diego, 285 F.3d 784, 789-90 (9th Cir. 2002). The amount of interest is calculated using a “reasonably prudent investor” analysis. Id. at 792-94.

C. Proof of Value by Owner

Proof of the damage standards discussed above typically involves expert testimony from economists, real estate appraisers, and other comparable experts. One interesting wrinkle on this issue is the traditional common law rule that an owner may testify about the value of his or her property. “[A]n owner, because of his ownership, is presumed to have special knowledge of the property and may testify as to its value.” United States v. Sowards, 370 F.2d 87, 92 (10th Cir.1966). Such testimony is considered “expert” testimony, and may be based on inadmissible evidence. United States v. 10,031.98 Acres of Land, 850 F.2d 634, 636-37 (10th Cir. 1988); King v. Ames, 179 F.3d 370, 376 (5th Cir. 1999). As with any expert testimony, it cannot be based on naked speculation. King, 179 F.3d at 376; United Staets v. Rivers, 917 F.2d 369, 372-73 (8th Cir. 1990). In practice, however, the basis for the opinion seems to go more to weight than admissibility given the general presumption that an owner has knowledge of the value of his

or her property. See LaCombe v. A-T-O, Inc., 679 F.2d 431, 432-36 (5th Cir. 1982); District of Columbia Redevelopment Land Agency v. Thirteen Parcels of Land, 534 F.2d 337, 340 (D.C. Cir. 1976).

D. Invalidation/Injunctive Relief

The other possible remedy for a taking is invalidation of the challenged government action or injunctive relief against continued enforcement of the challenged regulation. As a general matter, an injunction is not a proper remedy for a taking, because the Constitution does not prohibit the taking per se; it only requires that just compensation be paid. Daniel, 288 F.3d at 384; Washington Legal Foundation, 271 F.3d 835, 849-50 (9th Cir. 2001), aff'd on other grounds, 538 U.S. 216 (2003).

There is one notable exception. A taking that violates the public use clause is subject to injunction/invalidation. Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno, 604 F.3d 7, 17 (1st Cir. 2010). Similarly, under the now-defunct “substantially advances test,” a regulatory taking could be enjoined. See Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 473 n.4 (9th Cir. 1994). The common thread is that an injunction is only available in the limited circumstance where the government acts in excess of its authority. That would suggest injunctive relief is also available on due process or equal protection challenges. See Williamson County Regional Planning Com’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 196 (1985) (“The remedy for a regulation that goes too far, under the due process theory, is not ‘just compensation,’ but invalidation of the regulation, and if authorized and appropriate, actual damages.”).

I note that damages in successful takings cases can be quite large, and may exceed the annual budgets of smaller municipalities. An interesting question for further litigation is whether

the defendant's inability or refusal to pay is a factor that might authorize injunctive relief. Along those lines, it is also worth noting that an injunctive claim against the United States would need to be presented in the district courts, not in the Court of Federal Claims. See Eastern Enterprises v. Apfel, 524 U.S. 498, 519-22 (1998).