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LAND USE AND ENVIRONMENT

Regulatory Takings and Land Use Regulation: A Primer for Public Agency Staff

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By

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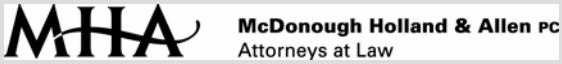

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About the Institute and the Development of this Document:

The mission of the Institute for Local Government is to develop resources for local officials in California. For the past six years, the Institute has been tracking developments in takings law as one of its primary focus areas.

This document is an updated version of an earlier publication entitled the *Basics of Takings Law* published by the Institute in 2000, written by ***Andrew Schwartz*** (Shute, Mihaly & Weinberger) with the assistance of ***Anthony Saul Alperin*** (former Assistant City Attorney, City of Los Angeles), ***Fran Layton*** (Shute, Mihaly & Weinberger), ***Katherine Stone*** (Myers, Widders, Gibson, Jones & Schneider), ***Rochelle Browne*** (Richards, Watson & Gershon) and ***Bill Higgins*** (Land Use Program Director, Institute for Local Government)

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IN MEMORY OF ANTHONY SAUL ALPERIN 1946-2003

This primer is dedicated to the memory of Anthony Saul Alperin, an outstanding legal scholar and advocate for local government. Tony served notably for more than 29 years in the Office of the City Attorney for the city of Los Angeles, where he spent 21 years in the land use division and became a recognized expert in takings law. In 1999, he was named assistant in charge of the ethics and elections divisions. He also served as lead counsel to the City Ethics Commission.

His numerous achievements in the practice of public law include material contributions to both the League of California Cities and the Institute for Local Government. He was quick to provide a scholarly analysis of the most difficult municipal law issues. Tony's generosity in sharing his knowledge and his contributions to his profession were formally recognized in 1995, when he was named the California State Bar Association's Public Lawyer of the Year.

Tony was a founding member of the Institute's land use project. He was a tireless contributor to the substance of the project's work, serving as a peer reviewer for virtually every publication in the early years of the project. He also authored several articles, including *The "Takings" Clause: When Does Regulation "Go Too Far"?* in the Southwestern University Law Review (2002). When the Institute launched its ethics and public confidence project, Tony stepped forward to help with that effort as well. In appreciation for Tony's many contributions to the Institute for Local Government, the Institute's board of directors voted to dedicate this publication in Tony's honor.

Benjamin Disraeli, who was also a lawyer committed to the advancement of public policy, observed that the "secret of success is constancy to purpose." Tony left a legacy that was very successful indeed and the world is a better place because of it.

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I. FIRST PRINCIPLES

A. OVERVIEW AND ABOUT THIS PUBLICATION

The scene is familiar: local residents become concerned about the accelerated pace of development in an area. At first, not much comes of it. Then, a proposed new subdivision galvanizes the community to action. The planning department updates its planning documents to more effectively manage growth. But then several property owners claim that the policies unlawfully interfere with their constitutionally protected property rights. They threaten to sue for compensation if restrictions are placed on their property.

Now what? This scenario has perplexed more than one group of local officials. But to what extent does land use regulation really amount to an unconstitutional taking of property? That is the subject of this primer.

The short answer is that in most circumstances, a land use regulation *does not* amount to a regulatory taking. Indeed, most regulations share two general characteristics that make it difficult to mount a successful challenge:

- ***Regulated Land Nearly Always Retains Economic Uses.*** As long as land can be put to productive economic use, it retains value and the regulation will not "deny all economic use" of the land. Landowners do not have a right to the most profitable use of land.

- ***Regulations are Generally Enacted Legislatively.*** Courts give greater deference to actions that apply broadly to a class of landowners than to unique regulations imposed on individual landowners.

But these factors are not guarantees. The possibility remains that a land use regulation may be implemented in a way that causes a taking. A solid understanding of takings law and property rights, therefore, is essential for those involved in drafting and implementing any land use regulation.

B. THE POLICE POWER: THE AUTHORITY TO REGULATE

The authority for local agencies to regulate land arises from the "police power" to protect the public's health, safety and welfare.[1] In California, the constitution gives this power to cities and counties. These agencies have authority to make and enforce laws to protect

[1] The police power is inherent in a sovereign government. This power is reserved for states in the Tenth Amendment to the United States Constitution. *See also Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) (holding that local governments may protect the general welfare through enactment of residential zoning ordinances).

public health and safety to the extent that they do not conflict with the state laws.[2] Courts have traditionally construed the police power to authorize local land use regulation.[3]

The police power is also elastic, meaning that it is flexible enough to meet the changing conditions of society.[4] Efforts that might not have been thought of as promoting the general welfare a century ago (like regulations to improve air quality, perhaps) are well within notions of the general welfare today. Courts have found that a wide variety of local concerns legitimately fall within the general welfare, including growth management.[5]

As explained below, this authority is subject to certain limits. Constitutional protections, such as those concerning takings, due process, and equal protection, restrict the police power.

C. WHAT IS A REGULATORY TAKING?

The term "taking" derives from the Just Compensation Clause of the Fifth Amendment of the U.S. Constitution, which states "…nor shall private property be taken for public use, without just compensation."[6] Thus, the Just Compensation Clause provides a check against the police power not by prohibiting public agency action, but by requiring payment of just compensation.[7]

The clearest sort of taking occurs when a public agency takes, occupies, or encroaches upon private land for its own proposed use, such as to build roads, create parks, or develop other public uses.[8] These actions—called eminent domain or condemnation actions—are premised upon the payment of just compensation or fair market value, for the property. Challenges to these types of takings usually involve the straightforward application of *per se* rules.[9]

A regulatory taking is different. A regulatory taking occurs when a regulation becomes so onerous that it has the practical effect of a direct appropriation.[10] An extreme example would be zoning private land as a public park. Such a regulation does two things: 1) it prevents the owner from putting the land to any economic use, and 2) it prevents the owner from exercising one of the most fundamental characteristics of property

[2] Cal. Const. art. XI, § 7. *Miller v. Board of Public Works*, 195 Cal. 477 (1925).
[3] *Candid Enterprises, Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 886 (1985).
[4] *Euclid v. Ambler Realty Company*, 272 U.S. 365, 387 (1926), *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).
[5] *DeVita v. County of Napa*, 9 Cal. 4th 763 (1995).
[6] To the same effect is Article 1, Section 19 of the California Constitution: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."
[7] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987).
[8] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).
[9] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).
[10] *See Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).

ownership: the right to exclude others. Thus, the regulation would have a similar effect as if the public agency had condemned the land and built a park.

The Just Compensation Clause is often misconstrued as a prohibition against *any* regulation that either decreases property value or prevents owners from doing what they want with their land. But the clause merely requires that land may be put to some economic use, not the most profitable or speculative use. As one court said, the Just Compensation Clause "is not a panacea for less-than-perfect investment or business opportunities."[11] What makes takings law very difficult is that the courts have not articulated an easy-to-understand set of rules that help planners, the public and landowners recognize when a regulation crosses the line. The following two oft-cited passages from U.S. Supreme Court jurisprudence help illustrate the challenge:

- *"The Fifth Amendment . . . 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."*[12]

- *"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."*[13]

How can these two statements be reconciled? Land use planning, by its very nature, adjusts rights for the public good by imposing benefits and burdens unequally among landowners.[14]

FIVE THINGS TO REMEMBER ABOUT REGULATORY TAKINGS

- ***A Takings Challenge Generally Fails When Economic Uses of Property Remain.*** Claims that a regulation denies economic uses of property will fail when the property retains economically viable uses. Zoning land for agriculture, for example, allows for an economic use and will generally preclude a successful takings claim even when the owner argues the regulation is costing millions in lost development value. The Takings Clause does not guarantee that owners will be compensated for the most speculative use of land.[15]
- ***Reasonable and Proportional Conditions on Development are Permitted.*** Conditions on development requiring that the developer give land as an easement

[11] *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal. App. 3d 1016, 1040 (1991).
[12] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[13] *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).
[14] *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

[15] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

to the public will not cause a taking when they are reasonably related and proportional to the harm or impact caused by the development.[16] Conditions that are imposed by ordinance—instead of on a case-by-case basis—and do not involve the dedication of land to the public—are even less likely to be found to be a taking.[17]

- ***Landowners Must Seek a Less Intensive Development Before Suing.*** Courts are reluctant to require compensation unless they are absolutely sure that a regulation or condition will be applied in a way that amounts to a taking. Thus, landowners must usually file two applications and seek a scaled down development before courts will even entertain a claim. This two-application procedure allows the local agency to take corrective action when a regulation unfairly affects a particular parcel.[18]
- ***"Automatic" or Per Se Takings are Rare.*** Regulations that cause 100 percent devaluation or a permanent physical presence on property will almost always be found to be a taking, but such regulations are rare. It might seem like a condition on development—like a requirement to create a park or bike path—amounts to a permanent physical occupation. The reason why this is not the case is that the condition is imposed in response to the development application, which is *voluntarily* sought by the developer.[19]
- ***Fairness Matters.*** Courts are often concerned that the landowner was treated fairly by the agency. Thus, it is always good to design efficient, straightforward processes that are consistent with the general plan in order to set appropriate development expectations.[20]

As a result, courts have not articulated a set formula to determine when a specific burden is a mere incident of property ownership or unfairly burdens select owners.[21] Instead, courts have carved out a few narrow *per se* rules that apply in extreme cases and have opted for a case-by-case analysis in cases when the economic impact of the regulation is less severe.

This approach is not one that necessarily lends itself to effective land use planning – and the absence of certainty affects landowner and public agency alike.

[16] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).
[17] *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002).
[18] *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).
[19] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982); *Yee v. City of Escondido*, 503 U.S. 519 (1992).
[20] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).
[21] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002).

D. THE PUBLIC USE REQUIREMENT AND REGULATORY TAKINGS

Before going further, one more distinction should be drawn between regulatory takings and eminent domain. How and when eminent domain should be used has received a great deal of attention after the U.S. Supreme Court's decision in *Kelo v. City of New London*.[22] The use of eminent domain is premised on two conditions: (1) the action furthers a public purpose or use; and (2) the payment of just compensation.

In *Kelo*, a public agency acquired land through eminent domain to further a comprehensive economic revitalization plan that included hotels, office buildings, a service area for a historic park, a marina, parks, and a riverwalk. A group of property owners challenged the property acquisition, because the ultimate result was to take land from one private owner (a home owner) and turn it over to another (a developer). Thus, the owners argued, the transaction was essentially private, not public.

The United States Supreme Court rejected this argument in a 5 to 4 decision. The Court said that an eminent domain action could be challenged for failing to further a public use, but in this instance the subsequent private ownership—on its own—did not mean that the property acquisition did not achieve public purposes. The Court deferred to the city's determination that the overall objective of rejuvenating the downtown was a sufficient public purpose to justify acquiring the property.

The public use issue, however, plays out quite differently within the context of regulatory takings. Because the Just Compensation Clause expressly requires compensation when a public agency takes private property for public use, it presumes that regulations are valid (and therefore further a public interest) at the time they are adopted.

Thus, the Just Compensation Clause does not prevent public agencies from regulating property uses. Instead, it requires compensation in the event that an otherwise proper regulation amounts to a taking.[23] In other words, the Just Compensation Clause merely provides a remedy (fair compensation) for otherwise legitimate public action.

Challenges to the *validity* of a regulation may not occur under the Just Compensation Clause. Instead challengers must show that a regulation is impermissible under some other constitutional or statutory requirement. If a regulation is determined to be invalid on such grounds, that is the end of the inquiry.[24] No amount of compensation can authorize such action.

[22] *Kelo v. City of New London*, ___ U.S.___, 125 S. Ct. 2655 (2005).
[23] *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005) (emphasis in original) (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)).
[24] *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).

E. RISK ASSESSMENT TOOL AND FLOW CHART

A goal of this primer is to provide policymakers, planners and other officials with a practical way to analyze and evaluate takings issues. This will help determine whether a particular course of action may pose too many legal and financial risks.

One such method is the *Risk Assessment Flowchart* on the next page. The *Flowchart* proposes an eight-step analysis. First it asks two threshold questions and then divides takings claims into four basic categories. For each category, it identifies the key issues that must be considered in determining whether the action amounts to a compensable taking of property. Although the situation-specific nature of the inquiry makes absolute conclusions inadvisable, asking the questions posed in the *Flowchart* will help agency officials assess the risk that a given action could constitute a compensable taking.

Analyzing Regulatory Takings Claims: An Eight-Step Risk Assessment Tool

STEP 1: Is there a compensable property interest?

STEP 2: Is the claim ripe for review and timely filed?

STEP 3: Which type of taking is claimed?

STEP 4: State the Test

STEP 5: Apply other test-specific considerations

STEP 6: Assess other test specific risk factors

STEP 7 Remember the "fairness factor"

STEP 8: Apply rules to assess risk

Is There A Taking?

PROPERTY THRESHOLD
(1) Recognized property interest defined by background principles of state law (2) must be harmed by agency action. **(PAGE 13)**

TIMING THRESHOLD
(1) Agency decision must be final and (2) claim must be timely filed. **(PAGE 19)**

THRESHOLD ISSUES:
No risk when claim does not satisfy all threshold issues

PHYSICAL (PAGE 24)

An involuntary physical occupation of property is *per se* taking

Term "physical occupation" is narrowly construed

Occupation must be involuntary

PHYSICAL TAKINGS CLAIMS:
High risk when physical occupation occurs

DIMINUTION IN ECONOMIC VALUE CLAIMS (PAGE 27)

Total Loss
100% reduction in property value is *per se* taking

Partial Loss (Most Common)
Partial. Regulation partially reduces value, review following three factors:
(1) Economic impact
(2) Reasonable investment-backed

The claim must be based on the use and value of the entire or whole parcel.

Per se test applies only when the parcel has no value

Severe economic impact (for example, greater than 70%) generally required

TOTAL TAKING:
High risk when property loses all value

PARTIAL TAKINGS CLAIMS:
Low risk when property retains value or economically viable use

DEDICATIONS (PAGE 40)

Dedications and ad hoc conditions must be logically related (essential nexus) and roughly proportional to project impact

Agency bears burden of proof if heightened scrutiny applies

Does not apply to legislative conditions applied to a broad class of owners

DEDICATION & FEE CLAIMS:
Low risk for valid legislative fees; high risk for dedications or ad hoc conditions with no proportional relationship

II. STEP ONE: IS THERE A COMPENSABLE PROPERTY INTEREST?

In order to claim that property has been taken, the person making the claim must show ownership of a valid property interest at the time of the claimed taking.[25] Thus, it is important to identify the underlying ownership interest that serves as the basis for the claim. The "bundle of sticks" metaphor is typically used to describe property rights, when each stick represents a discrete property right. The owner's right to *use* the property is the most obvious stick in the bundle. Another important property right is the *right to exclude others*.[26] Property owners also have the right to *sell or lease or otherwise transfer* their property, and to decide the rent and the selling price.

These property rights can be bundled into a single ownership interest or divided among different property owners. For example, when a property owner leases a property to another, the bundle of sticks is divided between the owner and the lessee. To assert a claim a compensable taking has occurred, the owner must demonstrate ownership of all or part of the sticks in the bundle. This ownership interest is often most easily established when a property is wholly owned by a single person. However, partial interests in property may also be sufficient to make a claim for compensation under the Just Compensation Clause. Easements (including conservation easements), mineral rights, covenants, leases, and air rights are all recognized as valid (and thus compensable) interests in property.

A. PRINCIPLES OF STATE PROPERTY LAW

The background principles of a state's property law further define the nature of the property interest. Background principles are restrictions on property (and the use of property) recognized by state law. While not precisely defined, these restrictions derive from nuisance law, public safety needs, preservation of navigable waterways, and other important public interests.

The logic of the "background principles" doctrine is that property owners cannot lose a property right that they never had. Property ownership is confined by limitations on the use of land that "inhere in the title itself."[27] Such uses (like a use that constitutes a public nuisance) are not considered to be part of the owner's "bundle of sticks." Thus, even a regulation that seemingly destroys all market value is not a compensable taking if a

[25] *Wyatt v. United States*, 271 F. 3d 1090, 1096 (Fed. Cir. 2001).
[26] *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).
[27] *Lucas. v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992); *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001).

"background principle" of state property law supports it.[28] The most common types of background principles are:

- ***Nuisances***. A nuisance is any harmful or offensive use of property that interferes with the "comfortable enjoyment" of the property of others.[29] Public agencies' right to prohibit nuisances, regardless of the cost to the owners, has been recognized since at least 1887, when the U.S. Supreme Court upheld a local ordinance stopping a local distillery from producing alcoholic beverages.[30] Similarly, in 1915 the Court upheld a city ordinance prohibiting the operation of brickyards in residential areas, because a brickyard was considered a traditional nuisance.[31]

  A more modern example might include limiting building on steep, unstable hillsides or in an area prone to flooding.[32] In determining whether a use is a nuisance, courts consider how much harm is being caused to public land and adjacent private property, the value of the use, and the ease with which harm can be avoided. The loss of value by itself is not a factor. An agency might even be able to force the removal of a nuclear power plant as a nuisance if it were found to be sited on an active earthquake fault.[33]

- ***Public Safety and Emergency.*** Physical invasion and even destruction of property may not be a compensable taking if needed to "avert impending peril." Police actions damaging private property in an emergency do not constitute a compensable taking.[34] Other actions needed to avert economic disaster might also not be a compensable taking.

  For example, after floods and mudslides killed several people and wiped out buildings, a temporary prohibition on construction within the flood zone to study how to prevent future damage did not amount to a compensable taking because the public benefits of avoiding further death or injury far exceeded the cost to the individual property owner.[35]

  In addition, destroying infected red cedar trees to protect apple orchards from a ruinous pest is not a compensable taking; the state was faced with the imminent

[28] *Lucas. v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992).
[29] *See* Cal. Civ. Code §§ 3479, 3480.

[30] *Mugler v. Kansas*, 123 U.S. 623, 675 (1887).

[31] *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915).

[32] *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353 (1989).
[33] *Lucas. v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-31 (1992).
[34] *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 384 (1995) (holding that property damage caused by police firing tear gas into a 7-Eleven store to apprehend a felon is not a taking).
[35] *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1371 (1989).

destruction of its apple industry, and could decide that the public interest was served in protecting the more valuable apple trees.[36]

- ***Custom.*** Most states have developed certain customs about land uses. These customs may shape the scope of property rights. In one Oregon case, for example, a property owner unsuccessfully sought compensation for a coastal public access requirement. The claim was rejected because of Oregon's customs relating to public ownership of beaches.

  Herzberg vs. County of Plumas provides an example of a custom of California law.[37] Early on in California, cattle could lawfully roam from one property to another. The duty was on the property owners to fence cattle *out* rather than on cattle owners to fence cattle *in*. Though this law has changed in much of the state, it remains in effect in certain range areas in Northern California. As a result, property owners in these defined areas may not bring a claim for compensation under the Just Compensation Clause for trespass and property damage caused by cattle wandering onto their property.

- ***Public Trust.*** The public trust doctrine provides that tidelands, the beds of navigable waterways and other natural resources are held in trust for the public by the state.[38] Land in California located beneath navigable and tidal waterways are subject to certain public access and navigation rights. The state holds these rights in trust for the public. Thus, private property restrictions relating to these public trust rights cannot constitute a compensable taking; the owner never had the right to use the property for non-public trust uses.[39]

The burden of establishing that a background principle exists falls on the public agency.[40] The U.S. Supreme Court has described background principles as "common, shared understandings of permissible limitations . . . derived from a state's legal tradition."[41] Not all state laws are "background traditions," but the limits are not certain. However, there are no California cases illuminating the concepts. Courts in other states have ruled that certain long-standing statutes do constitute background principles.[42]

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[36] *Miller v. Schoene*, 276 U.S. 272 (1928). A Washington state court recently reached a similar conclusion in *Property Located at 14255 53rd Ave., S. Tukwila, King County, Washington v. Washington State Dept. of Agriculture*, 120 Wash. App. 737, 739 (2004) (finding compensation was not required for the destruction of trees within a one-eighth mile radius of five escaped citrus long horned beetles).

[37] *Herzberg v. County of Plumas*, 133 Cal. App. 4th 1 (2005). The court ultimately analyzed this tradition under the Penn Central test. However, the discussion centers on the customary use of range properties under California law.

[38] *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-4 (1892).

[39] *See National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 440 (1983).

[40] *Lucas. v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-31 (1992).

[41] *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001).

[42] *See Kim v. City of New York*, 90 N.Y. 2d 1, 5-9 (1997) (finding that a common law and City Charter provision requiring properties to provide lateral support for a public roadway constituted a background principle).

B. RELATED CONTRACT RIGHTS THAT DO NOT CONSTITUTE PROPERTY

Not all interests in property rise to the level of a recognized property right. For example, options to purchase[43] or rights of first refusal[44] are not usually considered interests in the property. Instead, they are contract rights. Likewise, a lender with a mortgage or deed of trust may own a contract obligation secured by the property, but this does not usually equate to an interest in the property itself (or "stick in the bundle").[45] Nor can a person who owns shares in a corporation that owns property assert a property interest in land owned by the corporation.[46]

The status of contract deliveries of water to farmers and irrigation districts through state and federal water projects is an example. Some deliveries have had to be curtailed to assure that adequate flows remain for endangered fish species, such as salmon. Do farmers have a property right in those water deliveries? One decision said yes.[47] As a result, a reduction in deliveries constituted a compensable taking. Later decisions have disagreed, instead characterizing the issue as a contract dispute and examining the extent to which the original contracts allowed for limited deliveries when circumstances changed.[48]

[43] *See San Jose Parking, Inc. v. Superior Court*, 110 Cal. App. 4th 1321, 1327 (2003) (holding that a purchase option is not an interest in land and may not be condemned by eminent domain). *But see County of San Diego v. Miller*, 13 Cal. 3d 684 (1975) (finding that a purchase option must be compensated in eminent domain).

[44] *Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926, 937 (D. Hawaii 1986) (under Hawaiian law, a right of first refusal is a contract, not a property interest).

[45] *VLX Properties, Inc. v. Southern States Utilities, Inc.*, 701 So. 2d 391, 395 (1997).

[46] *Eastern Minerals Intern., Inc. v. United States*, 36 Fed. Cl. 541, 547 (Fed. Cl. 1996).

[47] *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (Fed. Cl. 2001).

[48] *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (Fed. Cl. 2005).

C. PERMITS AND VESTED RIGHTS

Generally, the grant of a permit—in and of itself—is not considered property. In the land use context, however, a permit may create a vested right to develop a property.[49] The right to develop land generally vests when a building permit has been issued or the property owner has performed substantial work and incurred substantial liability in good faith reliance on the permit. In addition, the Subdivision Map Act (vesting maps) and development agreement law allow for rights to vest earlier in the development process.

Can a property owner claim a compensable taking when a public agency interferes with a vested right? The answer is not entirely clear.[50] California courts have not addressed this issue directly. In other states, some courts have found that such interference is a taking.[51] Others have found that the owner may be entitled to equitable relief on some theory, but the interference with a vested right does not necessarily amount to a compensable taking.[52]

Outside of the land use context, the grant of a permit does not necessarily create a compensable property right—particularly if the permit is associated with a heavily regulated industry when there is an expectation that the conditions imposed on the permit will change over time.

A California case involved a challenge to a state law that barred the use of the name "Napa" on a brand or wine label unless at least 75 percent of the grapes used to make the wine came from Napa County. A wine producer who possessed federally-approved certificates for the "*Napa Ridge*" and "*Napa Creek Winery"* labels challenged the law. The producer, among other things, sought compensation for the lost value of the label. It argued that law created a compensable taking of the federal certificates because it eliminated the value of the Napa-related brand names.

The court of appeal rejected the claim, concluding that the federal permits, standing alone, were not property subject to Fifth Amendment protection. The court also concluded that the statute did not destroy the economic value of the brand names, because the producer could still use them on wines made with grapes grown in Napa.[53]

[49] *AVCO Community Developers, Inc. v South Coast Regional Commission*, 17 Cal. 3d 785, 791 (1976).
[50] *See* Douglas T. Kendal, Timothy J. Dowling & Andrew W. Schwartz, *Takings Litigation Handbook* 158 (American Legal Publishing, 2000).
[51] *See Nemmers v. City of Dubuque*, 716 F.2d 1194, 1197-1201 (8th Cir. 1983).
[52] *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073-75 (11th Cir. 1996).
[53] *Bronco Wine Co. v. Jolly*, 129 Cal. App. 4th 988 (2005).

For more on vested rights in the land use context, see Chapter 5, *Curtin's California Land Use and Planning Law* and the Institute for Local Government's *Development Agreement Manual* (www.ca-ilg.org/devtagmt).

D. AGENCY ACTION MUST "PROXIMATELY CAUSE" OWNER'S HARM

To create the risk of a compensable taking, the public agency action must be the direct or "proximate" cause of the claimed harm to the property.[54] When some other factor causes the harm, the property owner is not entitled to recover from the public agency. This issue typically arises either when the landowner's voluntary actions caused the harm or when some other intervening natural factor was involved in damaging the property.

In one case, developers claimed an eight-year delay in receiving project permits created a compensable taking. The court concluded that the developers were responsible for the lion's share of the delay, because they had not completed their application to the Army Corps of Engineers for a fill permit and had not obtained other required state permits.[55]

In another case, the buyer and seller cancelled a land sales contract after the Corps designated part of the property as wetlands. The court found that the parties themselves caused any losses due to the cancellation, not the Corps' wetlands designation.[56]

The courts have also determined that state and federal laws protecting wildlife do not "cause" a compensable taking when protected species enter private property.[57] Many of these claims were based on the argument that the endangered species laws were creating a physical invasion of their properties by limiting the extent to which landowners can prevent endangered species from entering their land. Physical invasions of property are considered *per se* takings (see page 24).

The courts concluded that the endangered species laws are not directly responsible for the presence of the endangered species on private property. The courts noted that public agencies do not own or control the animals, nor do the laws somehow convert the animals into "government agents."

[54] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (making reference to losses "proximately caused" by government).
[55] *Walcek v. United States*, 44 Fed. Cl. 462, 467-68 (Fed. Cl. 1999).
[56] *Robbins v. United States*, 40 Fed. Cl. 381, 385 (Fed. Cl. 1998).
[57] *Christy v. Hodel*, 857 F.2d 1324, 1334-5 (9th Cir. 1988).

III. STEP TWO PROCEDURAL ISSUES: IS THE CLAIM RIPE FOR REVIEW AND TIMELY FILED?

In many cases, takings claims are threatened prematurely. A valid claim must meet two timing conditions before a court will allow the claim to proceed. First, the agency's decision must be a *final* determination, meaning that there is no other way that the regulation at issue will be applied that will not result in a compensable taking. Second, the claim must have been *timely filed* within the limits imposed by the statute of limitations.

A. AGENCY MUST HAVE REACHED A FINAL DECISION

The threat of a takings claim is often first raised after a public agency denies a permit. But such claims are often premature. Takings claims are not "ripe" for a court action until the local agency has reached a *final* decision about what level of development will be permitted on the property.[58] A denial of one development application, on its own, does not necessarily mean that all applications will be denied.

This rule assures that a taking may not occur before a public agency can use its own procedures to decide the full extent of the challenged regulation. The landowner must allow the agency to exercise its full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed, the extent of the restriction on property is not known and a compensable regulatory taking has not yet been established.[59]

For example, in *MacDonald, Sommer & Frates v. Yolo County*,[60] developers applied for permission to subdivide their farm into 159 lots for single-family homes. The board of supervisors denied the project as inconsistent with the county's general plan. Although the property was zoned for residences, it had no public sewer, water, or street access. Nor had the developer applied to the proper agencies for utility service. The developers claimed that they had exhausted all administrative remedies and that any application for development would be futile.

[58] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 173 (1985).
[59] *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736, and n.10 (1997) (noting difficulty of demonstrating that "'mere enactment'" of regulations restricting land use effects a taking).
[60] *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 342 (1986).

The Court disagreed. Since the possibility remained that some development would be permitted on the property, the Board's denial did not represented the Board's "final, definitive position." As such, the Court could not reach a decision on whether the property had been taken and compensation was due.

This reflects a practical reality: just because an agency does not approve one proposal does not mean that it will disapprove all proposals. Indeed, some owners initially propose grandiose plans that are unlikely to be approved. It would be premature for a court to jump in and determine whether a compensable taking has occurred under such circumstances when an agency is likely to approve a more modest development proposal.

On the other hand, courts do assess the fairness of the agency's actions. Courts will not allow a public agency to avoid the ripening of a takings claim by denying one application after another on various pretexts. The courts will act once they believe that the extent of permitted development is clear.

While decisions about finality are made on a case-by-case basis, here are some guidelines:

- ***Administrative Remedies Must Be Exhausted.*** The landowner must file at least one complete application for use of the property and exhaust all administrative remedies. The owner must have followed all reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. Until these ordinary processes have been followed, the extent of the restriction on property is not known and a compensable regulatory taking has not yet been established.[61] Thus, applications that are abandoned or withdrawn before any decision is made are not considered meaningful for purposes of deciding if there has been a final decision.[62] The owner must also exhaust all available administrative appeals, such appealing a planning commission's decision to the governing body.

- ***Additional Applications (and a Variance) May Be Necessary.*** Additional applications must be submitted as long as there is uncertainty about the permitted use of the property. In most cases, at least one application and a variance application may be needed before the agency's decision can be considered final. The issue, however, is not the number of applications; it is whether the application history makes it clear how much development will be permitted on the site.

[61] *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736, and n.10 (1997).
[62] *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987).

- ***Reasonable Effort to Comply With Existing Regulations Must Be Made.*** The owner must make some reasonable effort to comply with existing regulations. Successively more grandiose applications cannot be used to demonstrate finality.[63] For example, in *Toigo v. Town of Ross*, a second application to subdivide a hillside lot into five parcels was before the council. The staff report found that the second application was in many ways more environmentally damaging than the first. This placed the town in a difficult position. A second denial could result in a viable takings claim. In response, the town drafted a set of findings that was 38 pages long—hardly typical for a denial of a five-unit subdivision—that detailed how the second proposal was still inconsistent with six subdivision standards, two zoning provisions, eleven roadway and driveway design standards, eight hillside lot criteria, and ten design review standards. Ultimately, the takings claim was dismissed. The court said that the owners had failed to submit a "meaningful application" and had "made no attempt to alter their vision" from the first to the second application.[64]

- ***Futile Applications Need Not Be Filed.*** An application is not necessary when filing would be futile because the extent of permitted development has been clearly established.[65] "Futility" is an extremely narrow exception. It applies only if it is nearly certain that future applications will be denied,[66] or if the agency's position is so clear that it would be a waste of time to submit more applications. For example, *Hoehne v. San Benito County* involved a 60-acre parcel characterized by steep hillsides and zoned for single-family homes with a five-acre minimum lot size. The application to subdivide the property into four lots was denied by both the planning commission and board of supervisors. Subsequently the board changed the general plan to require 40-acre minimum lot sizes. The landowner claimed that filing any additional applications would be futile. The court agreed because no general plan variance was possible and the board's actions in downzoning the property showed clearly that it was opposed to any subdivision. The court found that the applicant and county had reached "the end of the road," and the county's decision was final.[67]

Finally, most regulatory actions provide for a certain degree of flexibility to fit the needs of individual property owners and avoid legal problems. An ordinance will not create a compensable taking if there is any way the ordinance can be applied to make it constitutional, such as by allowing variances.[68]

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[63] The final decision requirement is not satisfied when a developer submits, and a land use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353, n.9 (1986).
[64] *Toigo v. Town of Ross*, 70 Cal. App. 4th 309, 326 (1998).
[65] *Palazzolo v. Rhode Island*, 533 U.S. 606, 625-6 (2001).
[66] *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991).
[67] *Hoehne v. County of San Benito*, 870 F.2d 529, 535 (9th Cir. 1989). *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 613-6, 618-26 (2001) (finding case ripe when government provides clear indication that development will not be permitted in coastal wetland areas).
[68] *See, for example, Home Builders Ass'n v. City of Napa*, 90 Cal. App. 4th 188, 199 (2001).

However, if there is no way that an ordinance can be applied to property in a constitutional way, then the takings claim is "ripe" as soon as the ordinance is adopted.

As a result, one way to limit a local agency's exposure to claims that an ordinance "on its face" creates a compensable taking of property is to include a variance procedure that gives the agency the opportunity to avoid an unconstitutional result. A sample of a variance procedure designed for takings claims is posted on the Institute's online Takings Resource Center (www.ca-ilg.org/takings).

B. STATUTE OF LIMITATIONS: THE LAWSUIT MUST BE FILED IN TIME

A takings claim cannot succeed unless it is filed in time—within the time limits established by state or federal law (known as the statute of limitations).

In California, the time limit for takings claims filed under the *federal* civil rights laws is two years.[69] Claims filed under *state law* protections of property rights must be filed more quickly. In most cases, the lawsuit must be filed *and* served on the local legislative body within 90 days after a decision on a project is made or within 90 days after an ordinance becomes effective.[70] In some cases, the statute of limitations is even shorter. For example, all challenges to decisions made by the California Coastal Commission must be brought within 60 days.[71] Some cases involving state agencies, or local agencies acting on behalf of state agencies, must be filed within 30 days.[72]

There are some interesting wrinkles relating to the timing of claims. If a property owner challenges the disapproval or approval with conditions of a project within 90 days after the decision, the owner may also challenge the facial constitutionality of any ordinance applied to the property. For example, a Santa Cruz County homeowner challenged the conditions on his second unit permit, arguing that they constituted a compensable taking "as applied." The conditions were required by the County's second unit ordinance, which had been adopted *twelve* years before. However, by coupling the facial challenge with a timely as-applied challenge, the court found the homeowner could still mount a facial challenge to the underlying ordinance, even though the statute of limitations had long since expired for challenging the ordinance on its face.[73]

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[69] In federal court, takings claims must be brought under 42 U.S.C. section 1983. *Azul-Pacifico, Inc. v. City of Los Angeles,* 973 F.2d 704, 705 (9th Cir. 1992). The statute of limitations for a section 1983 claim in California is two years. *See* Cal. Civ. Proc Code § 335.1.

[70] Cal. Gov't Code § 65009; *Hensler v. City of Glendale*, 8 Cal. 4th 1, 22 (1994).

[71] Cal. Pub. Res. Code § 30801.

[72] Cal. Gov't Code § 11523 (claim must be filed within 30 days of the last date on which reconsideration could have been sought). *See* detailed discussion of California statutes of limitation in Daniel J. Curtin, Jr. & Cecily T. Talbert, *Curtin's California Land Use & Planning Law* 442 (Solano Press, 2004 ed.).

[73] *Travis v. County of Santa Cruz*, 33 Cal. 4th 757 (2004).

IV. STEPS THREE THROUGH SIX: THE THREE TYPES OF REGULATORY TAKINGS CLAIMS, THEIR TESTS AND RISK FACTORS

Regulatory takings claims fall into three basic categories. Each category has its own test and analysis. Understanding these three basic classifications will help local officials understand how takings law affects their land use planning:

- ***Physical Takings***. Regulations that require a permanent physical occupation of property, no matter how small.

- ***Diminution in Value Takings.*** The most common type of compensable taking is based on the claim that a regulation diminishes the value of property. Here there are two applicable tests, depending on the degree to which claim asserts that the property value has diminished. A *per se* taking occurs in the rare case when a regulation wipes out all (100 percent of) economic value. Less than total loss claims, on the other hand, are reviewed on a case-by-case basis.

- ***Unconstitutional Exactions***. Individual conditions on property that are functionally equivalent to the eminent domain actions in which a public agency directly appropriates private property or ousts the owner from the property.[74]

For the most part, the inquiries relating to each classification share a common theme: each aims to identify regulatory actions that are functionally equivalent to the classic compensable taking in which a public agency directly appropriates or ousts the owner from private property. The tests focus on the severity of the burden that a public agency imposes upon private property rights.[75]

Until recently, there was an additional theory that a compensable taking could occur if a regulation failed to substantially advance a legitimate state interest.[76] In essence, this theory required that a regulation be designed in a manner to accomplish its goals (known in legal circles as a means-ends requirement and the "substantially advance" test).

In 2005, the U.S. Supreme Court rejected this theory in *Lingle v. Chevron U.S.A.* The Court noted that the Just Compensation Clause merely provides a remedy (compensation) for when public agency action rises to the level of a taking.[77] The Just Compensation Clause is not vehicle through which to evaluate public agency's goals and the means chosen to achieve those goals.

[74] *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).
[75] *Id.*
[76] *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).
[77] *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).

California courts have not yet signaled whether the "substantial advance" test has any traction under state constitutional property rights protections. However, California courts have generally interpreted the property rights protections of the California Constitution as being equivalent to those in federal law.[78]

A. PHYSICAL TAKING CLAIMS

A physical taking occurs when a public agency regulation requires a physical presence on a property, no matter how small. The reason for this *per se* rule is that permanent physical takings impose a unique burden. Even a minimal invasion "eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests."[79]

Property may be physically occupied by an object, such as a small cable television box, or by people, such as hikers using a trail. In deciding whether a compensable taking has occurred, the size of the area occupied, the economic impact, and the public purpose are almost always irrelevant: if the public agency required the physical invasion, it is a compensable taking.

The leading U.S. Supreme Court case on this point is *Loretto v. Teleprompter Manhattan CATV Corp.*[80] There, New York City required landlords to permit cable television companies to install cable equipment on their buildings to ensure that cable television was generally available to renters. Some of the equipment served the tenants; other equipment was part of the citywide cable network, which, in densely populated New York City, ran across buildings and rooftops.

[78] *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 664 (2002); *Herzberg v. County of Plumas*, 133 Cal. App. 4th 1 (2005).
[79] *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 539 (2005); *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-832 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).
[80] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The owner of an apartment building asked the cable company to remove plates, boxes, wires, bolts, screws and two small boxes. The cable company refused, citing the city ordinance. The owner claimed that the ordinance required the forced physical occupation of her apartment building.

The U.S. Supreme Court agreed. It found that any permanent physical occupation authorized by a public agency—even if "no bigger than a breadbox"—is a compensable taking, without regard to the public interests being served.[81] But the ultimate result of this case was probably not what the owner was hoping for. The New York Court of Appeals found that the statutory payment of $1 was sufficient compensation for the intrusion.[82]

Ms. Loretto's townhouse in New York City. The cable box was installed on the roof. After the U.S. Supreme Court upheld her taking claim, a lower court awarded damages of one dollar.

Since a permanent physical invasion is a *per se* taking, property owners have sought to classify more and more regulations as physical invasions. What seems to be a simple rule has become more complex in practice. Physical invasions are at issue primarily in the following types of regulations:

- ***Allowing the public agency or a third party to use private property.*** Even the smallest physical occupation by the public agency itself, or by a third party authorized by the public agency to use the property, can be considered a compensable taking. One case found a compensable taking when the Army Corps of Engineers drilled monitoring wells drilled on private property to track groundwater pollutants.[83]

  In another case, the Corps required a marina owner to allow public boat access into a newly dredged, privately-owned marina. A court found that the Corps' action constituted a compensable taking, because the private owner was required to allow members of the public onto his property.[84] (A California court may have reached a different result because the right of access to all navigable waterways and the Pacific coast below the high tide line belongs to the state. A court, therefore, also would have to determine whether such a claim asserted an actual property right under the background principles doctrine.) (See page 13).

- ***Controlling Tenant Evictions.*** Rent control ordinances occasionally limit a landlord's ability to evict tenants or to increase rents when tenants vacate their units. Landlords have claimed that these provisions allow a physical invasion of their property because

[81] *Id.* at 421-24, 426, 436-38 and n.16 (1982).

[82] *Loretto v. Group W Cable*, 522 N.Y.S.2d 543 (N.Y. App. Div. 1987).

[83] *Hendler v. United States*, 175 F.3d 1374 (Fed. Cir. 1999).

[84] *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). Note, however, that a requirement to dedicate a public access easement does not necessarily constitute a taking.

the landlords are compelled to permit renters to permanently occupy their property or to pass on controlled rents to new tenants.

Generally, there is no forced physical occupation in this situation so long as two conditions are met: 1) the owner must have *voluntarily* invited renters onto the property, and 2) the owner must be able to end the tenancy by changing the property's use.[85] For example, a San Francisco law provided that even if a group of owners purchased an apartment building, only one tenant could be evicted to allow an owner to move in. The court found that this could have the effect of denying landlords the right to exclude others from their property and might be a physical invasion.[86]

- ***Physical Interference with Use and Enjoyment of Property.*** There is also a narrow set of cases when publicly-authorized uses may have such serious and unique effects on nearby property that they are considered to create a physical invasion. One case involved World War II bombers flying only 67 feet above a chicken farm, blowing leaves off the trees and causing at least 150 chickens to die from fright. The airplanes created a compensable taking because the flights were so low and so frequent that they made the property uninhabitable.[87] Similar cases exist for extremely pungent odors and smoke emanated from neighboring public uses that were so invasive they were deemed to amount to a physical occupation of property.[88]

In addition, it's important to keep in mind that there are exceptions to the extent that the physical invasion is necessary to protect public health and safety or is otherwise consistent with background principles of state property law. (See pages 13 to 16).

[85] *Yee v. City of Escondido*, 503 U.S. 519, 526-29 (1992); *see also Dawson v. Higgins*, 610 N.Y.S.2d 200 (N.Y. App. Div. 1994), *appeal dism'd on other grounds*, 616 N.Y.S.2d 476 (1994.), *cert. denied sub nom. Dawson v. Halperin*, 513 U.S. 1077 (1995) (ban on landlords' evictions of 20-year tenants for owner move-in did not effect physical or regulatory taking of landlords' property).

[86] *Cwynar v. City and County of San Francisco*, 90 Cal. App. 4th 637, 659 (2001).

[87] *United States. v. Causby*, 328 U.S. 256 (1946). However, as a rule, any airplane flying higher than 1,000 feet in an urban area or 500 feet in a rural area will not be considered to cause a physical invasion. *See Argent v. United States*, 124 F.3d 1277 (Fed Cir. 1997).

[88] *Richards v. Washington Terminal Company*, 233 U.S. 546 (1914).

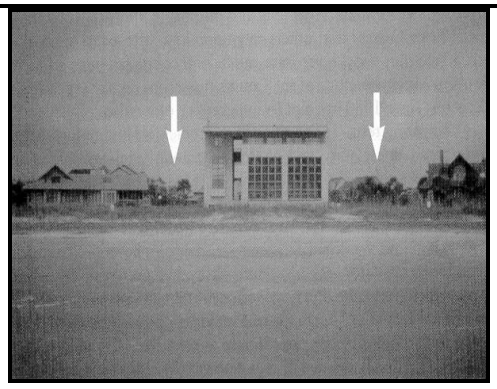
B. ECONOMIC LOSS AND DIMINUTION OF VALUE

The most common type of takings claim—and the one most likely to be threatened upon a project denial—are claims base on economic loss or the diminution in a property's value that results from an action or denial. Here there are two different types of claims: 1) those that claim that the regulation causes a total economic loss and 2) those that claim that the loss is less than total.

1. Total Regulatory Claims – 100 Percent Reduction in Value

In the rare circumstance that a regulation wipes out all of a property's value, the public agency's action is usually a compensable taking, regardless of the public purpose it serves.[89] It is difficult, however, for an owner to show that a regulation has left a property with no value whatsoever. If the property retains *some* value, there will not be a categorical taking (and the case should be evaluated as a partial taking).[90]

The leading case for this proposition is *Lucas v. South Carolina Coastal Council*.[91] There, David Lucas purchased two beachfront lots on a barrier island for $975,000. The properties were unstable and had been under water for roughly half of the previous 40 years. However, beachfront homes had already been built on nearly every other lot in the area.



Before and After. David Lucas owned two undeveloped properties in a predominantly developed coastal community. After the case, the lots were developed.

Two years after Mr. Lucas purchased his property, South Carolina adopted the Beachfront Management Act to limit damages associated with hurricanes (debris from

[89] *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002) (stating that the categorical test is reserved for the "'extraordinary case' in which a regulation permanently deprives property of all value….")

[90] *Id.* at 331 ("The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework."); *See* n.26.

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

buildings on barrier islands can be blown inland during violent hurricane winds). The Act had the effect of prohibiting any structures on Mr. Lucas' property.

Mr. Lucas argued that the regulation destroyed the entire value of his property. The U.S. Supreme Court agreed and articulated the rule that a *per se* taking occurs whenever a regulation wipes out all value and leaves "no economically viable use."[92]

There are two qualifiers to this rule, which are discussed in more detail at other parts of this primer.

1. No compensable taking occurs if the state can demonstrate that preexisting background principles of nuisance and state property law would otherwise prohibit the intended use of the property. *Lucas* referred to the background principles as the "logically antecedent inquiry."[93] Thus, the background principle analysis is part of the threshold inquiry related to whether there is a property interest at stake (see pages 13-16). When such a condition exists, the owners' proposed use is not part of the owner's title to begin with.

2. The total taking must occur on the whole parcel. A landowner cannot claim that a regulation wipes out all value of a portion of a parcel (such as a wetland) when the remainder can be put to some economic use. (See pages 27 to 35). However, in the absence of any nuisance or background principle, a regulation that wipes out all of a property's value remains a *per se*, compensable taking.

2. Partial Takings – Diminution in Value Less Than 100 Percent

The issue of lost economic value becomes more complicated when a regulation reduces property value but does not wipe it out entirely. These cases usually involve "complex factual assessments of the purposes and economic effects of government actions."[94] Indeed, partial takings can be thought of in at least three ways:

1. Economically (straightforward diminishment of property value);

2. Spatially (prohibiting or limiting all development on a portion of the property, such as a wetland); and

3. Temporally (limiting development for a period of time, such as a moratorium).

[92] *Id.* at 1020.
[93] *Id.* at 1027.
[94] *Yee* v. *Escondido*, 503 U.S. 519, 523 (1992).

Given this complexity, courts resist the temptation to adopt *per se* rules in either direction.[95] Instead, courts analyze partial takings claims using three separate factors —often called the *Penn Central* test—to determine whether a compensable taking occurred:[96]

- ***The economic impact of the regulation***. Typically this is the amount that the property has been devalued. The economic loss to the property as a whole must be extreme. Takings have not been found even when the diminution of value is more than 90 percent.[97] In recent years, however, a handful of conservative courts outside California have found a compensable taking with losses of only 70 to 75 percent of value.[98]

- ***The "investment-backed expectations" of the property owner.*** This test could be rephrased as, "What did the property owners expect when they purchased the property? Should the owners have anticipated the agency's actions?" It might also be a "fairness" factor: has the public agency acted fairly, given what the owners could reasonably have anticipated and the inherent risk of property ownership? There are no detailed guidelines explaining how to apply this test. However, often courts will consider the purchase price of the property,[99] how typical the regulation is for the type of property, and whether the existing use of the property may be continued.
- ***The "character" of the regulation***. In *Penn Central*, the "character of the governmental action" was described as "the degree to which the challenged regulation

A Grand Proposal? A depiction of the 50 story office tower proposed to be built over Grand Central Station. The city denied the application, but permitted the owner to develop other nearby buildings above the 50 story limit imposed for the area under the zoning code.

[95] *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring).
[96] *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).
[97] *See, for example, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 319 n.15 (2002) (citing examples of large diminution in value found not to be a taking); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (loss in value of more than 75 percent not a taking); *Hadacheck v. Sebastion*, 239 U.S. 394, 405 (1915) (loss in value of more than 90 percent not a taking); *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (95 percent reduction in value not a taking).
[98] *See, for example, Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994) (value loss of 62.3 percent might create a taking), *on remand*, 45 Fed. Cl. 21 (Fed. Cl. 1999) (73.1 percent loss of value was a taking).
[99] *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring). The timing of the regulation's enactment relative to the acquisition of title is not "immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance." *Id*.

approaches a physical invasion" instead of "some program adjusting the benefits and burdens of economic life to promote the common good."[100] In other words, the more the public agency's action was like a physical invasion of property, the more likely it was to be considered a compensable taking. However, several courts have misconstrued the "character" factor to refer to the importance of the public agency's goals as opposed to the burden on the property owner.[101] This emphasizes the significance of findings and statements of purpose in ordinances to demonstrate the importance of the public agency's goals.

If a regulation "goes too far" with respect to one or more of these factors, the action will be found a compensable taking.[102] These factors are not "balanced" by mathematical formula, but instead serve as important guideposts.[103] Courts must engage in "ad hoc, factual inquiries" that examine the particular circumstances of the case.

The most important factors are the first two: the magnitude of the regulation's economic impact and the degree to which it interferes with investment-backed expectations of the property owner.[104] The third factor, the regulation's character, does not usually determine whether a compensable taking has occurred, but to the extent that there is a degree of subjectivity in this test, may influence how the court ultimately interprets the other two.[105]

It is often difficult to predict the outcome of some cases. Historically, however, landowners have had significant challenges in establishing a compensable taking under the *Penn Central* test; only in a few instances has the test been applied in a way that found a compensable taking.

For example, courts have rejected takings claims when the regulation has effectively diminished value by as much as 95 percent. However, this should not be interpreted by agencies as immunizing them from all liability for regulatory takings. Courts will look at the regulation in its entirety and are likely to scrutinize carefully those that push the envelope of fairness.

Indeed, the *Penn Central* factors provide courts with the flexibility to find a compensable taking when the courts believe that a public agency has treated a property owner unfairly. Agencies should always take care to implement a carefully crafted regulation. When it

[100] *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See also Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).
[101] *See, for example*, *Action Apartment Assn v. Santa Monica Rent Control Bd.*, 94 Cal. App. 4th 587, 606 (2001).
[102] *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922). *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002).
[103] *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring). *See also*, Anthony Saul Alperin, *The "Takings" Clause: When Does A Regulation "Go Too Far"?*, 31 Southwestern University Law Review 169 (2002).
[104] *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).
[105] *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

comes to taking considerations, they should be doubly prepared if the regulation will have the effect of diminishing the value of property by more than 70 percent.

THE VALUE OF A TITLE SEARCH

Important issues in takings cases include the economic impact of the regulation, the owner's expectations at purchase, any background restrictions on land use, and whether the claimant has a property interest. A title search—a review of the deeds and other ownership records—can provide important information about all of these issues.

Property Interest. A title report will show if the claimant now owns or ever owned the property. A person who does not actually own an interest in the property does not have standing to bring suit.

Title Exceptions. The title search will show what exceptions to title were listed at purchase. Exceptions can include easements, public trust exclusions, private restrictions on use, and other limitations on the property. The claimant cannot claim a compensable taking for interests that are not part of the title.

Economic Impact. In California, the purchase price is available from the county assessor because it serves as the basis for property taxes under Proposition 13. If the owner purchased at a low price, claims of high economic losses might be defeated.

Whole Parcel. If there is any question about the ownership, consider doing title searches of all contiguous properties. If the plaintiff or a related entity owns adjacent property, the agency may be able to argue that the "whole parcel" includes all contiguous property, not just the parcel that is the subject of the lawsuit. Consequently, the economic impact of the regulation will be substantially diminished.

Investment-Backed Expectations. The claimant's investment-backed expectations depend in part on the regulations in effect when the claimant purchased the property. The title report will show the purchase date, allowing the agency to determine the regulations in effect at the time of purchase. A low purchase price may also provide evidence that the claimant did not have a reasonable expectation of significant development potential.

3. Exceptions: Background Principals and Public Safety

There are three exceptions to keep in mind when examining a diminution in value claim. Two have already been discussed: background principles of state property law (which is actually antecedent to this inquiry) and public safety (see pages 13-16).

4. Exception: The Whole Parcel Rule

Under the whole parcel rule, a claimant must claim a taking of the entire parcel, not just a portion of the parcel. When faced with a diminution in value claim, one of the first questions that should be asked is: "What is the property?" Is it all of the property in a single ownership? Or is it only the part of the property affected by the regulation? For example, if one acre of a hundred-acre parcel is reserved for wetlands, is the "property" the one-acre that has lost one hundred percent of its value or the entire hundred-acre parcel that has lost only one percent of its value?

This is the "whole parcel" problem. Generally, courts must consider the entire parcel, not just the part that is most affected by the regulation. Or put in a way that relates to the bundle of sticks metaphor: when an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a compensable taking.[106]

The U.S. Supreme Court considered this issue in two recent cases. The first concerned a 20-acre parcel in Rhode Island.[107] Eighteen acres were salt marsh; two acres were dry upland. The state denied an application to fill 11 wetland acres for a beach club. The owner claimed that the denial deprived him of all economically viable use of his property and created a total regulatory taking.

Invoking the "parcel-as-a-whole" rule, however, the U.S. Supreme Court found that there was no *per se* taking. The uplands could be developed and had a value of at least $200,000. The Court sent the case back to the Rhode Island courts for an inquiry under the *Penn Central* factors. Ultimately, courts in Rhode Island said that no partial taking had occurred.[108]

In the second case, the U.S. Supreme Court applied the parcel-as-a-whole rule to a challenge to a temporary moratorium imposed on property owners in the Lake Tahoe basin.[109] The moratorium was necessary for the governing agency to adopt regulations to

[106] *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).
[107] *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).
[108] *Palazzolo v. State ex rel. Tavares*, 785 A.2d 561 (R.I. 2001).
[109] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

The property where Mr. Palazzolo proposed his beach resort was mostly coastal wetland marsh. All but one of the upland portions of the property had been sold in the 1960's, resulting in the property's "panhandle" shape. The Rhode Island courts determined that since he could still build a home on the property, the coastal restrictions did not amount to a compensable taking.

protect Lake Tahoe's pristine clarity. The property owners sought compensation for a 32-month period in which development was entirely prohibited.

The Court declined to view the property interest in temporal segments. Ultimately, the Court found that takings challenges to moratoria merely involve a temporary reduction in property value, not a permanent, total destruction of value, and should be evaluated on a case-by-case basis using the *Penn Central* factors.

An important factor in deciding the boundaries of the "whole parcel" is whether the owner has treated the properties as one economic unit for purposes of financing and development. The "whole parcel" may include non-contiguous parcels if the owner treats them as a single parcel for purposes of development.[110] Generally, the "whole parcel" for purposes of a takings claim includes all contiguous parcels under the same ownership. Separate parcels are more likely to be treated as a "unified whole" when the parcels are contiguous, under single ownership, purchased at the same time (or close in time), subject to the same zoning, treated by the owner as one economic unit, treated by the public agency as one unit, financed together, interdependent for planning purposes, or in the same jurisdiction.[111]

The whole parcel issue often arises when an owner develops contiguous parcels piecemeal, when a separate parcel is created on an undevelopable piece of land, or when parcels have different zoning. California courts have looked at the actions of the local agency in deciding what is the "whole parcel:" for example, whether the local agency

[110] *See, for example, Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) ("whole parcel" includes all parcels included in development plan); *Ciampitti v. United States*, 22 Cl. Ct. 310, 320 (1991) (value of non-contiguous lots that purchaser treated as a single parcel for purposes of purchase and financing was to be considered in determining whether denial of permits for filling wetland portion deprived owner of all economically viable use of the property).

[111] *See, for example, East Cape May Associates v. State of New Jersey*, 693 A.2d 114, 128-9 (N.J. App. 1997) (describing factors); *Vulcan Materials v. City of Tehuacana*, 369 F.3d 882 (5th Cir. 2004) (finding that parcels in different jurisdictions should be treated separately).

planned the property as a whole, or allowed increased densities on the developable part of the site in return for limited development on the sensitive part of the site.[112]

Agencies can avoid the issue by requiring a master plan for all contiguous parcels under one ownership, applying the same zoning to the entire site, and refusing to create undevelopable parcels.

5. Normal (and "Abnormal") Delays in Permit Processing

In *Tahoe-Sierra*, the Court noted that delays involving routine public agency processes to obtain building permits, variances, and zoning changes are a normal part of the development process. As such, they are not generally compensable.[113] But one unanswered question after the U.S. Supreme Court's invalidation of the "substantially advance" test in *Lingle v. Chevron U.S.A.* is the extent to which "abnormal" permit processing delays will be considered a compensable taking.

Prior to the invalidation in *Lingle*, normal processing delays were acceptable unless the public agency acted unreasonably or in bad faith. For example, in *Landgate v. California Coastal Commission*, a delay caused by the Commission's incorrect assertion of jurisdiction over a lot line adjustment was a "normal" delay because the Commission's assertion was plausible (even if ultimately judged incorrect).[114] However, in *Ali v. Los Angeles*, the city delayed issuing a demolition permit for a former single room occupancy hotel, seeking assurance that replacement housing would be built. The court said that such a condition was in clear violation of the Ellis Act, a state statute, and therefore was not a normal delay.[115]

This line of cases, however, may no longer conform to federal constitutional law. The *Lingle* case says that the Just Compensation Clause may not be used to invalidate or determine the legitimacy of a public agency action.[116] When this conclusion is applied to abnormal permitting delays, it suggests owners would have to establish elements such as "bad faith" by some other constitutional or statutory means (such as procedural due process).

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[112] *Twain Harte Assocs., Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71, 86-8 (1990) (listing factors used in determining the "whole parcel"); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 499-500 (1982) ("whole parcel" includes all parcels when increased density allowed on part of site); *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981) (county's review of development application would determine if property treated as one parcel or two).

[113] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 335 (2002); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[114] *Landgate Inc. v. California Coastal Comm'n*, 17 Cal. 4th 1006, 1025 (1998).

[115] *Ali v. City of Los Angeles*, 77 Cal. App. 4th 246, 256 (1999).

[116] *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).

On the other hand, it is not entirely clear that the U.S. Supreme Court would not still be willing to consider processing delays under the Just Compensation Clause. Three arguments could be made in support of continued application of the clause.

1. Because an improper delay is similar in effect to a temporary taking, it is relatively easy to determine damages. Thus, the typical case will be different from the case presented in *Lingle v. Chevron U.S.A.*, when the challenger was seeking to invalidate a public agency action when no economic damages existed.

2. Under *Penn Central's* second prong, the owner's reasonable investment-backed expectations, developers should reasonably expect only normal delays in the permit process. Abnormal delays therefore, could be compensable.

3. *Del Monte Dunes* (when the court considered whether a jury trial was appropriate to establish liability for five successive denials of a development project) stands for the proposition that the court is interested in allowing courts to consider basic fairness in reviewing regulations.[117]

In many ways, this point is merely academic. Whether or not brought under the Just Compensation Clause, Due Process Clause, or some other standard, courts remain concerned about fairness. Put another way, property owners have a reasonable expectation that local agencies will seek to enforce their laws in good faith. The lesson for public agencies is to design and implement fair processes that appropriately balance the benefits and burdens of land use regulation.

C. UNCONSTITUTIONAL EXACTION CLAIMS

Imposing conditions on development can also be a source of takings challenges. Local agencies are usually on solid footing here, particularly if they have adopted the condition by an ordinance that is applicable to a broad class of landowners.[118]

In contrast, adjudicative land use exactions—specifically, project-by-project demands for easements allowing public access as a condition of obtaining a development permit[119] are subject to "heightened scrutiny."[120] This test has nothing to do with the reduction in property value caused by a regulation. Rather, it examines whether the condition is

[117] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).
[118] *See San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002).
[119] *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005). This is also commonly referred to as the *Nollan-Dolan* standard. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).
[120] *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).

closely related and proportional to the harm associated with the development. The agency must demonstrate that there is an essential nexus (a direct relationship) and rough proportionality between the condition imposed and the impact of the development.

The reason for applying heightened scrutiny is that courts are concerned that public agencies might unfairly "leverage" their permit approval authority to obtain excessive conditions from a single property owner. The heightened scrutiny standard is not an impossible obstacle for public agencies to overcome. The amount of the dedication need not exactly balance the impact of the development; the local agency need only show an approximate mathematical justification for the requirement.[121]

1. Development of the Heightened Scrutiny Standard

A more exacting (or "heightened") scrutiny occurs when a public agency creates ad hoc exactions. The standard was developed under two U.S. Supreme Court decisions: *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. The standard is therefore referred to as the "*Nollan/Dolan* test."

In *Nollan v. California Coastal Commission,* the Nollans wanted to build a new home on a beachfront lot in Ventura County.[122] When they applied to the California Coastal Commission for a construction permit, the Commission determined that the house would block views from Highway 1 to the ocean. The Commission required a public access easement across the beach at the front of the Nollans' lot to mitigate this impact.

The U.S. Supreme Court found that there was no connection between the impact of the house—blocking views from Highway 1—and the required dedication of public access on the back side of the property along the beach. The Commission could have attached conditions to preserve the views from the highway, such as reducing the height of the house or even providing a viewing area for the public. But the requirement for beachfront access had nothing to do with the blockage of views. Without an "essential nexus" between the condition and the impact, the Court concluded the condition was unconstitutional.

In *Dolan v. City of Tigard,* Florence Dolan asked for permission to expand her hardware store by 8,000 square feet.[123] The city of Tigard approved the store but required her to dedicate land to the city for a floodplain easement and for bicycle and pedestrian paths. The purpose was to mitigate the effect of the additional runoff and traffic created by the project.

The U.S. Supreme Court agreed that there was an "essential nexus" between the dedications and the project's impact; the floodplain easement would mitigate the effects

[121] *See* "Fees and Dedications," an overview of fees and dedications that includes a practical 12-step guide to creating a well-tailored development fee, available at www.ca-ilg.org/fees.
[122] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).
[123] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

of additional runoff, and the bicycle path could reduce automobile traffic. However, the dedications were not proportional to the actual impact of Mrs. Dolan's hardware store. There was no finding that explained why the floodplain had to be dedicated to the public to prevent flooding; and the city simply found that the bicycle path "could" reduce traffic, rather than providing any data explaining how trips would be reduced. The implications of the Court's ruling was to required agencies make individualized findings showing that their conditions are "roughly proportional" to the impact of the project.

Nollan and *Dolan* have probably had more impact on the practice of planning in California than any other court decisions. Their impact has been particularly severe on local efforts to obtain dedications of land for streets, trails, and utilities. Before the decisions, many California agencies required dedications when their general plans showed that streets would be widened, trails created, or utility lines placed on property where development was planned. The requirements were generally upheld so long as they were related to the project and did not have a serious economic impact on the property.

The "essential nexus" and "rough proportionality" test also places the burden of proof on public agencies, but most can meet it. Agencies can require the developer pay for impact studies as a processing cost or the analyses can occur as part of the environmental review process. Established methods exist for quantifying impacts on capital facilities such as sewer, water, roads, and parks.

When California courts have invalidated a dedication, it is because the agencies did not conduct *any* individualized study of the project itself to justify the dedication.[124]

[124] *Surfside Colony Ltd. v. California Coastal Comm'n*, 226 Cal. App. 3d 1260, 1269 (1991) (invalidating an easement dedication to prevent erosion, because no study of the property justified the dedication); *Rohn v. City of Visalia*, 214 Cal. App. 3d 1463, 1475 (1989) (finding a dedication for street widening unconstitutional because there was no evidence it was needed for traffic generated by the project).

The Nollan Property. 1. The original structure on the Nollan property as viewed from the road. 2. The property built out as viewed from the beach. 3. A view of the beach, presumably from below the mean high tide line.

The Dolan Property. 1. The original hardware store. 2. How the property looks today. Note that several additional businesses are now located on the property, an issue that was not addressed in the Dolan case. 3. The bike path along Fanno Creek. The back of the A-Boy Hardware store is to the right.

2. Fees and Conditions on Development

The relevant law with respect to fees may well be statutory, as opposed to constitutional. The California Mitigation Fee Act requires that fees imposed to mitigate a development should be reasonably related and proportional to the stated impacts.[125] Courts are generally more deferential to fees that have the following characteristics:[126]

- Are the result of legislative action
- Applicable to a class of development or property owners, and
- Imposed by a fixed formula (thereby eliminating the discretion to apply the fee differently to different developments)

Local agencies commonly meet this standard by imposing area-wide fees justified by "nexus studies" that define long-term infrastructure needs, calculate the cost of the infrastructure, and allocate a fair portion of the costs among all development. However, case law does not require a nexus study,[127] though the Mitigation Fee Act requires local agencies to make certain findings when imposing such fees.

What about ad hoc fees that are not the result of legislative actions but are imposed on individual developments? Experts disagree. The *Ehrlich* case is the last word on the issue from California courts, which suggests that heightened scrutiny applies.[128] Subsequent decisions have distinguished between fees and dedications, however.[129] Moreover, the heightened scrutiny standard was tied to earlier cases applying the now repudiated "substantially advance" test,[130] although some point to verbiage in the *Lingle* decision repudiating the substantially advance test which also indicates that the *Lingle* decision did not disturb these earlier cases.[131]

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[125] Cal. Gov't Code §§ 66000 and following; s*ee also Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).
[126] *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 668-72 (2002).
[127] *See San Remo Hotel*, 27 Cal. 4th at 668-9 (holding that there need only be a "reasonable relationship" between the impact of the project and the intended use and amount of the fee).
[128] *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (1996) (regulatory takings challenge to recreational facilities and public art fees).
[129] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). *See also Kitt v. United States*, 277 F.3d 1330, 1336 (Fed. Cir. 2002) (finding that regulation requiring the payment of money is not subject to Just Compensation Clause), *modified on other grounds* 288 F.3d 1355 (Fed. Cir. 2002), *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (finding that regulation requiring payment of money cannot be deemed a taking). *See also* Timothy J. Dowling, Douglas T. Kendall & Jennifer Bradley, *The Good News about Takings* (American Planning Association: 2006) (interpreting *Lingle* as clarifying that *Nollan* and *Dolan* are limited to dedications of land).
[130] *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S.. 374 (1994).
[131] *See Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).

At this point the issue is unresolved. Given the rarity of ad hoc developer fees, it is unclear if and when California courts will address this issue.

For more information about imposing fees on development, see www.ca-ilg.org/fees.

3. Dedications of Property

Heightened scrutiny arose from cases when public agencies required dedications of public access as a condition of approval. The test applies not only to outright dedications of property, but also to dedications of easements and rights of entry. As a consequence, public agencies cannot require that property be dedicated for trails, coastal access, road widening, or any other purpose unless the project itself created the need.

An issue that has not been resolved in California is whether heightened scrutiny applies when dedications are required by ordinance, rather than on a project-by-project basis. In particular, it is not clear if heightened scrutiny applies to parkland dedications required by local ordinances adopted in accordance with the Subdivision Map Act.[132] Most probably, heightened scrutiny does apply; the California Supreme Court has said that requirements to dedicate property receive "the highest scrutiny."[133] Local agencies should adopt specific findings showing nexus and rough proportionality whenever they require land to be dedicated.

[132] Cal. Gov't Code § 66477.

[133] *Santa Monica Beach, Ltd. v. Superior Court,* 19 Cal. 4th 952 (1999). Also note that in *Dolan v. City of Tigard,* 512 U.S. 374, 379-80 (1994), the dedications at issue were imposed pursuant to a local development *ordinance*. This strict rule exists in part because easements and dedications are much like physical invasions; they take away the owner's right to exclude others.

V. STEP 7 AND INTERESTS OF "FAIRNESS AND JUSTICE": REMEMBER THE FAIRNESS FACTOR

The Fifth Amendment of the U.S. Constitution does not mention regulatory takings. Even strict constructionist Justice Antonin Scalia admits that the concept of a regulatory taking was not thought of when the constitution was drafted.[134] Then the question is: Where does the doctrine of takings come from? How have the rules and tests discussed here emerged?

The answer is from underlying concepts of fairness and justice that underlie the Just Compensation Clause.[135] Indeed, as the oft-quoted passage states, the Just Compensation Clause bars "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."[136] Equally important, however, is the principle of reciprocity of advantage:[137] "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[138] In other words, fairness and justice cuts both ways.

When read in this light, the three separate taking tests make more sense—at least from the point of view of a deciding judge. Two narrowly carved *per se* rules (physical invasion and total regulatory taking) protect against the most onerous outcomes; one narrow heightened scrutiny test (unconstitutional exactions) offsets an unfair bargaining position when ad hoc dedications are concerned.

Finally a broad, multi-factored catch-all (partial takings) governs the vast majority of cases, allowing "complex factual assessments of the purposes and economic effects of government actions."[139]

Thus, it is important for public agency staff to remember that the takings analysis is ultimately concerned about fairness. This is particularly important because courts have mostly eschewed any "set formula" for determining when "justice and fairness" require

[134] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

[135] *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 304 (2002).

[136] *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (emphasis added).

[137] *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393, 415 (1922).

[138] *Id.* at 413. *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 338 n.31 (2002) ("Moreover, under petitioners modified categorical rule, there would be no *per se* taking if TRPA simply delayed action on all permits pending a regional plan. Fairness and justice do not require that TRPA be penalized for achieving the same result, but with full disclosure.").

[139] *Yee* v. *Escondido*, 503 U. S. 519, 523 (1992).

that economic injuries be compensated.[140] This is both good and bad news for public agencies.

It is good news when local agencies have adopted a regulation that furthers a well-developed plan and balances the benefits and burdens of a regulation. Thus, in *Tahoe-Sierra*, the Court upheld a strict moratorium that presented clear reciprocity of advantage: all affected landowners would ultimately enjoy their proximity to a well protected natural resource, and property values would continue to increase as a result.[141]

Another "good fact" was present in a case challenging the city of Napa'sinclusionary housing ordinance. The court wrote approvingly of the broadly representative Napa Affordable Housing Task Force that proposed the ordinance. It also noted the "significant benefits" available to developers in exchange for inclusionary units and the city's ability to waive the requirements to avoid unfair results.[142]

The Del Monte property (outlined above) sits along the beach at one of the main entry points to the city off the Pacific Coast Highway.

On the other hand, it can be bad news when procedures seem unduly burdensome or unintentionally yield harsh results. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[143] the developer filed five successive applications, each for less density than the last. Even though the city could cite good reasons for each denial, Supreme Court Justice Scalia stated in oral argument that after the fifth denial, one begins "to smell a rat."

The lesson is that local agencies should be sensitive to the appearance of their actions. When a public agency repeatedly denies applications for development, it should make it clear that the developer repeatedly failed to comply with a consistent standard and avoid the appearance that the agency was changing the rules.

[140] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002) (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

[141] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 341 (2002) (citing *Growth Properties, Inc. v. Klingbeil Holding Co.*, 419 F. Supp. 212, 218 (D. Md. 1976).

[142] *Home Builders Association v. City of Napa*, 90 Cal. App. 4th 188, 194 (2001). The challenge to this test was made under the substantial advance test. California courts have yet to test the validity of this test under the California Constitution.

[143] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

The takings tests—and the partial taking test in particular—allow for a degree of court interpretation and discretion. As a result, a court's philosophical beliefs concerning property rights may influence a decision in a takings case. Because takings law allows for flexibility, a court's perception of public agency fairness or unfairness to the property owner can strongly influence the final outcome. Regulations imposed as part of an overall plan are more likely to be viewed as fair and equitable. Ad hoc regulations are likely to be judged with more scrutiny.

VI. Conclusion

The scope of the Just Compensation Clause touches on issues of affordable housing, smart growth, historic preservation, local government finance and myriad other issues. This primer has only scratched the surface of the law of regulatory takings. Given the case-by-case balancing approach that is currently favored by the courts, it is difficult to predict how courts may treat individual cases. Courts are often sympathetic to the benefits of long term planning, but they also want programs that will be implemented in a way that is fair to landowners. More information about this issue is available on the Institute's online Takings Resource Center (www.ca-ilg.org/takings).

Appendix: Eleven Tips for Avoiding Takings Claims

1. PLAN IN ADVANCE.

An up-to-date and comprehensive general plan supported by the community lays a solid foundation for all land use regulation. It is the "constitution for all future development" in California.[144] A regulation supported by a comprehensive plan is more likely to be supported by the courts. All property owners can participate in community-wide planning efforts, and the courts believe that, as a result, there is less chance that small groups of property owners will be singled out for harsh treatment.[145]

Up-to-date plans also create more realistic expectations among landowners. If a plan has community support, landowners are more likely to propose new land uses that are consistent with the general plan.

- ***Adopt Area Wide Impact Fees.*** A general plan gives a basis for adopting fees on a citywide or countywide basis, because the impacts of growth can be quantified and area wide solutions adopted. Legislatively adopted fees will be upheld so long as there is a "reasonable relationship" between the fee and the impacts being mitigated.[146]

- ***Limit General Plan Amendments.*** Denials based on lack of conformance with the general plan may be hard to justify if the community has no history of requiring projects to conform to the plan. Communities may only process plan amendments up to four times each year.[147]

2. REQUIRE DEVELOPERS TO SUBMIT A MASTER PLAN FOR *ALL* OF THEIR PROPERTY

California courts give great weight to the agency's treatment of the property in deciding the boundaries of the "whole parcel."[148] If a public agency approved one plan for the *entire* property, the courts are likely to agree that the "whole parcel" includes the entire property. Agencies can then preserve the most ecologically sensitive parts of the site without being liable for a compensable taking.

3. DON'T CREATE UNDEVELOPABLE LOTS

[144] *Lesher Communications Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 540 (1990).
[145] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 340-1 (2002); *San Remo Hotel v. City & County of San Francisco*, 27 Cal. 4th 643 (2002).
[146] *San Remo Hotel v. City & County of San Francisco*, 27 Cal. 4th 643, 671 (2002).
[147] Cal. Gov't Code § 65358(b).
[148] *Twain Harte Assocs., Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71, 86-8 (1990) (listing factors used in determining the "whole parcel"); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 499-500 (1982) ("whole parcel" includes all parcels where increased density allowed on part of site); *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981) (county's review of development application would determine if property treated as one parcel or two).

If a city or county allows a landowner to sever sensitive environmental areas (such as hillsides, wetlands, or buffer areas) from an otherwise usable parcel, the agency may be exposed to a takings claim from subsequent owners based on the limitations on use imposed at the time of the severance.[149]

4. BE CONSISTENT AND FAIR

Interests of fairness and justice inform much of takings law. Though local agencies generally enjoy the benefit of the doubt in terms of burden of proof, the case-by-case balancing test provides courts with a great deal of discretion when the facts suggest that landowners are being treated unfairly.

- ***Send Clear Signals.*** Avoid encouraging projects that have little chance to be approved.

- ***Treat All Applicants Alike.*** Don't play favorites and don't punish even unpleasant applicants. Personal "animus" is not a "legitimate state interest."[150]

- ***Don't Change Reasons for Denials.*** Courts become suspicious when agencies deny successive applications for the same property. Apply the same standards to each application to demonstrate that it is the developer who is not following the rules, not the agency.[151]

5. EXPLAIN AND JUSTIFY DECISIONS IN WRITING

In a lawsuit, the court will second-guess every decision made by the local agency. Written justification for every disputed issue, even during the administrative process, can help convince the court that the decision was made in good faith and to advance the public interest.[152]

- ***Avoid Conclusory Findings.*** Findings must "bridge the analytical gap" between the public goals and the agency's decision.[153] Often findings simply repeat the goals. ("The setback will improve stream quality.") To "bridge the gap," simply provide reasons. ("The setback will protect the water quality in Smith Creek because, according to the environmental study, the presence of natural vegetation in the buffer will reduce sedimentation in the runoff by 42 percent.")

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[149] *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994) (excluding previously developed land from relevant parcel).
[150] *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004).
[151] *Compare Toigo v. Town of Ross*, 70 Cal. App. 4th 309, 331-2 (1998) (finding case not ripe when applicant submitted successive applications not conforming with city's consistent direction) *with Del Monte Dunes, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506 (1990) (finding additional applications would be futile after city denied five successively smaller applications).
[152] *See, for example, Landgate, Inc. v. California Coastal Comm'n*, 17 Cal. 4th 1008, 1024-5 (1998) (finding that Commission's good faith reliance on Attorney General's erroneous, but plausible, legal opinion was not the basis for a taking).
[153] *Topanga Assoc. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974).

- ***Explain How Regulations Further a Public Purpose*.** Findings are not usually required for legislative acts, such as adoption of general plans and zoning ordinances. However, it is good practice to include statements of legislative intent in land use ordinances.

6. CONSIDER ALLOWING ECONOMIC VARIANCES.

State law permits variances when zoning would create a hardship because of unusual physical characteristic of the property (For example, an odd shape or steep slopes). Agencies may choose to allow variances when a regulation causes economic hardship or causes a compensable taking.

Providing for an economic variance has two advantages.

1. If the property owner intends to claim a compensable taking in court, the owner will first need to file an application for the economic variance (to exhaust all available remedies). The agency can then adjust its position if the ordinance would indeed cause a hardship.

2. Economic variances protect against "facial" takings claims, when a landowner claims that the mere adoption of a regulation constitutes a compensable taking. If the owner can apply for an exception, the ordinance is not unconstitutional on its face.[154]

- ***Be Careful About Economic Variances for Exactions.*** If a court concludes that a fee ordinance allows the public agency to bargain with landowners over payment of the fee, it is more likely to conclude that the fees are in actuality imposed on a case-by-case basis and impose heightened scrutiny. The criteria upon which a variance would be granted should be firmly established.

[154] *Home Builders v. City of Napa,* 90 Cal. App. 4th 188, 194-5 (2001). *County of Alameda v. Superior Court*, 133 Cal. App. 4th 558 (2005).

7. DON'T FORBID ALL USE OF THE PROPERTY

In highly sensitive areas subject to extensive regulation, identify permissible low impact, economically viable uses. Examples include agriculture, horticulture, and forestry in rural areas and low-density residences in urban areas.

- ***Consider Purchasing Key Properties.*** If the agency simply does not want development on the property, it should attempt to purchase either the property itself or development rights, rather than adopt regulations that seem a disguised method of acquiring the land for public use. Nonprofit land trusts, such as the Nature Conservancy and Trust for Public Land, are experienced in raising funds and negotiating with property owners. For more information, see *Funding Open Space Acquisition Programs: A Guide for Local Agencies in California* (www.ca-ilg.org/openspace).

8. DON'T SAY ANYTHING THAT SHOULD NOT APPEAR IN THE RECORD

Charges of bias and bad faith can serve as the basis for a claim that the agency's actions were not based on a legitimate state interest. One takings claim was based in part on allegations that an agency head folded his arms and looked at the ceiling in disgust while an applicant was speaking.[155] Assume that all e-mails will find their way into any lawsuit.

- ***Don't Make Predictions.*** Elected officials and staff should avoid ad hoc statements – either positive or negative – that predict the final agency action. All applicants should be apprised that the ultimate authority to act on a project rests with the final decision-making body, usually the governing body.

9. CONSIDER USING DEVELOPMENT AGREEMENTS

A development agreement is a contract between a developer and a city or county that "locks in" certain development standards as of an agreed-upon date in exchange for benefits to the agency.[156] As long as the agreement is in effect, the agency's development standards cannot be changed. In return, developers usually provide extensive public benefits. Because development agreements are not required to build a project, communities can negotiate for benefits beyond what *Nollan/Dolan* would permit. See *Development Agreement Manual: Collaboration in Pursuit of Community Interests* (www.ca-ilg.org/devtagmt).

10. BE ALERT TO RISKY SITUATIONS

Some types of agency actions seem to attract more takings claims.

- ***Protection of Wetlands and Endangered Species.*** Agencies cannot simply require properties to remain entirely in open space to protect wetlands and endangered

[155] *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 946 (9th Cir. 2004).
[156] *See* Cal. Gov't Code §§ 65864 and following.

species. Wetlands and habitat areas can be preserved if they are part of a large development site. However, protecting these valuable resources is best done on a regional basis. Agencies can designate large wetlands and habitat areas that will be purchased or dedicated (a mitigation bank) and require mitigation fees from those allowed to develop in sensitive areas. Transferable development rights (TDRs) can also be used to provide compensation (allowing an owner to sell development rights to another property), but the courts have not yet decided if TDRs can be used to avoid a takings claim.[157]

- ***Test Cases and Applicants Raising Constitutional Claims.*** Be alert to correspondence raising constitutional claims, particularly when property rights legal foundations are representing a property owner. Cities and counties are so frequently threatened with lawsuits that they may ignore the issues raised. Groups such as the Pacific Legal Foundation have brought many takings cases. If an agency is faced with a novel takings claim, groups such as the Institute for Local Government in Sacramento and Community Rights Counsel in Washington, D.C. can provide assistance.

11. DON'T BE INTIMIDATED

Successful regulatory takings are relatively rare. The courts recognize that public agencies must achieve a fair balance between private property rights and community needs. The courts have squarely endorsed land use regulation in general and permit public agencies broad latitude in balancing individual property rights and community interests.

[157] *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 728 (1997) ("we do not decide whether or not these TDR's may be considered in deciding the issue whether there has been a taking in this case").