REGULATORY TAKING

By Caroline A. Edwards, Esq.

I. INTRODUCTION

a. The focus of these materials is an overview of the law on regulatory takings as they pertain to real estate interests. Regulatory takings is used to mean claims that property has been "taken" by the government through the adoption and enforcement of regulations. Excluded from this discussion are other types of takings claims against the government, including those in which the government acts directly in a manner that results in physical invasion, for example, a decision to install improvements that results in downstream flooding.

b. Citations of all referenced cases are located at the end of the article.

c. The basis for takings claims – 5th and 14th Amendments

   i. 5th Amendment:

      1. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

         a. Prohibits the federal government from depriving persons of property without due process of law;
         b. Prohibits the federal government from taking private property for public use, without just compensation.

   ii. 14th Amendment, Section 1:

      1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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c. Prohibits states and local government from depriving any person of property without due process of law.

d. Terminology
   i. What is Regulatory Taking?
      1. When a governmental regulation prohibits or limits the use of private property such that the owner is deprived of its benefits.
   ii. Regulatory Taking v. Condemnation
      1. Condemnation is an affirmative procedural act in which the governmental entity takes title to the property by filing legal documents, in return for compensation to the owner.
   iii. Regulatory Taking v. Inverse Condemnation
      1. Inverse Condemnation occurs when the governmental entity takes actions which result in a property owner being deprived of the benefit of the property, without following the legal steps of condemnation. Regulatory taking is a category of inverse condemnation. Inverse condemnation also includes other types of actions – for example, a governmental entity closing a public access to a property might be challenged as inverse condemnation.

II. POLICE POWER

a. Used in the analysis of whether a governmental entity has exceeded its authority.
b. Derived from the 10th Amendment to the Constitution:
   i. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
c. First used in *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419 (1827).
d. Generally thought of as authority conferred on states and delegated to local governments to place restraints on individual rights to protect the public health, safety and welfare.
e. The police power gives the government the right to take actions that impact private property rights for public benefit. These actions do not always require the payment of compensation. However, compensation is required when those actions go "too far" – when they force individuals to bear burdens which should be borne by the public as a whole.

III. THE FIRST DECISION RECOGNIZING REGULATORY TAKING – PENNSYLVANIA COAL CO. v. MAHON – U.S. SUPREME COURT 1922

a. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
b. In 1878, Pennsylvania Coal Co. ("Company") entered into an agreement to mine coal under the surface of Mahon's property. In 1921, Pennsylvania passed the Kohler Act which prohibited miners from mining coal that supported buildings on the surface. When the Company notified Mahon of its intention to mine coal, Mahon filed suit to stop the mining under the Kohler Act. The Company challenged the Kohler Act on the basis that it violated the Takings Clause of the Fifth Amendment to the Constitution.
c. U.S. Supreme Court held that the Kohler Act did violate the Fifth Amendment. The state's actions in adopting the law exceeded its police powers in that it significantly diminished the value of property rights without a strong public interest reason for doing so.

IV. THE VALIDATION OF ZONING AS AN AUTHORIZED GOVERNMENTAL POWER – VILLAGE OF EUCLID v. AMBLER REALTY CO. – U.S. SUPREME COURT 1926

a. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926)
b. Ambler Realty Co. ("ARC") owned 68 acres. In 1922, the Village passed a zoning ordinance dividing the Village into several districts and defining the use and size of buildings permissible in each district. ARC's property was located in several districts, which restricted the types of buildings that could be constructed. ARC asserted that the zoning significantly reduced the value of the land and that buyers would be deterred from purchasing the land. ARC sued the Village claiming that the zoning ordinance violated the protections of liberty and property under the Fourteenth Amendment's due process and equal protection clauses.
c. The Court held that a zoning ordinance was a valid exercise of police power, and that ARC's claim for damages was speculative and did not overcome the Village's authority under the police power. The Court found that the zoning ordinance was not arbitrary or unreasonable, and was not unconstitutional. The Court stated:
    i. "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare."
    ii. "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that

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such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

d. The Village had argued that ARC's claim was not ripe, because ARC had not applied to the zoning board for relief, and had not obtained a building permit. The Court rejected this argument, on the basis that ARC was challenging the zoning ordinance as a whole, not specific provisions of the ordinance.

V. TYPES OF REGULATORY TAKING - CATEGORICAL TAKING

a. Categorical regulatory taking is when a government action falls into a particular category, such that compensation is required without having to determine the public interest being advanced.

b. Two types of categorical takings: when a regulation requires a physical invasion of a property, and when regulatory action causes a property to lose all of its economic value.

c. Physical invasion of property

i. *Loretto v Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

1. New York law required landlords to permit cable television companies to install cable tv facilities on rental property, and limited the amount the landlord could charge the cable tv company. Loretto purchased an apartment building and discovered cables serving the tenants and cables serving other buildings.
2. Loretto brought suit claiming that the installation of the cables was a taking without just compensation.
3. Court held that the physical occupation of the property constituted a taking, and that there was no requirement to determine the economic impact of the taking.
4. "…when the "character of the governmental action," *Penn Central*, 438 U.S., at 124, 98 S.Ct., at 2659, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."
5. The Court remanded for a determination of the compensation due.

d. Loss of all economic value

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

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1. Lucas bought two residential lots on a barrier island with the intention of building two single family homes. Subsequently, the State enacted a law which barred the erection of any habitable structures on the land. Lucas sued the agency claiming that although the law might be a valid exercise of the State's police power, it resulted in a taking of his land under the Fifth and Fourteen Amendment requiring payment of just compensation.
2. Claim that the ban on construction deprived owner of "all economically viable use" of the property.
3. "Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70–odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in ... essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (quoting *Goldblatt v. Hempstead,* 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S.Ct. Rev. 1, 4. We have, however, described at least **two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint**. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation… The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins,* 447 U.S., at 260, 100 S.Ct., at 2141; see also *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987); *Hodel v. Virginia Surface Mining &*

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Reclamation Assn., Inc., 452 [505 U.S. 1016]U.S. 264, 295–296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981). As we have said on numerous occasions, [112 S.Ct. 2894] the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins, supra,* 447 U.S., at 260, 100 S.Ct., at 2141 (citations omitted) (emphasis added). [505 U.S. 1017]" (footnotes omitted) (Emphasis added)

ii. Determining the loss of all economic value
    1. What is the parcel against which the takings test is applied? (the denominator problem – see discussion in Section X)
    2. Are other uses permitted?

VI. TYPES OF REGULATORY TAKING - PARTIAL/NONCATEGORICAL TAKING – THE *PENN CENTRAL* ANALYSIS - WHEN THERE IS NO PHYSICAL INVASION, AND WHEN THE REGULATION DOES NOT DEPRIVE THE OWNER OF ALL ECONOMIC VALUE

a. *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978).
b. The owner of Grand Central Station challenged the New York Landmarks Preservation Law ("LPL") as a taking. The LPL was adopted to protect historic landmarks, and Grand Central Station was designated as such a landmark, which triggered regulations impacting the rights to develop the property.
c. The U.S. Supreme Court held that the LPL did not constitute a taking. In so finding, the Court developed an analysis for circumstances in which the owner has not been deprived of all economic value of the property. This test continues to be followed.
d. The Three Prong *Penn Central* Test
    i. The economic impact of the regulation on the claimant;
    ii. The extent to which the regulation has interfered with distinct investment-backed expectations; and
    iii. The character of the governmental action.

VII. TYPES OF REGULATORY TAKING – PARTIAL/NON-CATEGORICAL TAKING AFTER *PENN CENTRAL*

a. *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987).
    i. State conditioned issuance of a building permit for building addition on the owner's grant of an easement to the public to cross their beach to get to the public beach.

ii. U.S. Supreme Court found no taking had occurred:
    1. Police power includes the ability to impose conditions on development
    2. Preservation of public access to the ocean is a legitimate exercise of police power.
    3. Conditions were an effort to balance the impact of the development and the state interests and there is a reasonable relationship between the two.
    4. Character of the government action is the imposition of a condition on permit approval which allows the public continued access to the coast. Resulting physical intrusion is minimal.
    5. Character of the regulation is a condition on approval of a development request submitted by the owner.
    6. Economic impact – owners allowed to more intensively develop their property, thereby increasing its value.
    7. Investment-based expectations – owners had no reasonable expectation of being able to exclude the public, based on state law.

b. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)
    i. The Planning Agency imposed moratoriums on development totaling 32 months, pending a comprehensive land use plan for the area. Property owners affected by the moratoria filed suit claiming that the actions constituted a taking without just compensation.
    ii. The U.S. Supreme Court held:
        1. Moratoriums are not *per se* categorical takings because owners were not permanently deprived of economic use of the property.
        2. *Penn Central* requires looking at the parcel as a whole, which includes the term of years during which a taking occurs. Permanent deprivation of use is a taking of the parcel as a whole, but a temporary restriction that diminishes the value is not a taking as a whole, because the property will recover value when the moratorium ends.
        3. The analysis should be based on the *Penn Central* approach, and should look at the specific circumstances of individual cases.

c. *Dolan v. City of Tigard,* 512 U.S. 374 (1994).
   i. Approval of an application to expand a store and pave a parking lot was conditioned upon dedicating land for a public greenway, and dedicating land for a pedestrian/bicycle path. The greenway was intended to minimize flooding that would be made worse by the increases in impervious surface associated with the development. The pedestrian/bicycle path was intended to relieve traffic congestion.
   ii. The owner requested variances from the conditions, which were denied. She appealed, claiming that the land dedication requirements were not related to the development, and were a taking without just compensation.
   iii. The US Supreme Court held that a taking had occurred:
      1. The requirement to dedicate land was a taking of property without just compensation.
      2. "The government may not require a person to give up the constitutional right – here the right to receive just compensation when property is taken for a public use - in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit."
      3. Citing to *Nollan*, the Court stated that the first determination is whether there is an "essential nexus" between a legitimate state interest and the permit condition.
      4. If the essential nexus exists, then it must be determined whether the degree of the "exaction" from the condition is related to the projected impact of the development.
      5. The prevention of flooding and reduction of traffic congestion were both found to be legitimate public purposes.
      6. The court held that the required nexus exists between the public purposes and the conditions imposed.
      7. However, the Court held that the degree of exactions required by the permit conditions do not show a reasonable relationship/rough proportionality with the impact of the development.
      8. As to the greenway, the owner was already required to provide 15% open space; there is also no reason given for

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why the greenway was required to be open to the public, rather than private, if flood control is the issue. The owner would have lost the right to exclude others from her property.

9. As to the pedestrian/bicycle path, there was no showing that the additional traffic to be generated by the development reasonably related to the requirement to dedicate the pathway easement.

d. *Koontz v. St. Johns River Water Management District,* 570 U.S. 595 (2013).
   i. Koontz requested a permit to develop land. Permit issuance was conditioned on Koontz reducing the size of development and subjecting the undeveloped portion of the property to a conservation easement, or on Koontz improving wetlands owned by the District several miles away. Permit was denied when Koontz refused the condition.
   ii. US Supreme Court held that a taking had occurred:
      1. The standards for land use permits contained in *Nollan* and *Dolan* are applicable when a permit is denied because the owner refused to comply with the conditions imposed.
      2. The standards for land use permits contained in *Nollan* and *Dolan* must be met when the demand is for a monetary payment.
      3. Conditions on permit must have a nexus to the land use.
      4. There must be a "rough proportionality" "between the property that the government demands and the "social costs of the applicant's proposal."

e. *Murr v. Wisconsin,* 582 U.S. ____, 137 S.Ct. 1933 (2017).
   i. Facts:
      1. Two adjoining lots (Lot E and Lot F) along the St. Croix River in Wisconsin were purchased separately in 1960. Thereafter, state and local regulations were adopted preventing the sale or use of adjoining riverside lots under common ownership as separate building lots unless each has at least one acre of land that is suitable for development.
      2. Parents purchased each lot separately, then transferred Lot F to Owners in 1994 and Lot E in 1995.
      3. Each lot exceeds one acre in size, but each has less than one acre suitable for development due to topography. Together,

Lots E and F contain less than one acre suitable for development.

4. Lot F contained a cabin; Lot E was vacant.
5. Owners could not sell or develop separately due to regulations – regulations merged the two lots.
6. Owners applied for variances and were denied; then, filed suit claiming regulatory taking.
7. Owners wanted the analysis of the effect of the regulations to be based upon Lot E only (the vacant lot).
8. State Court denied the takings claim.

ii. Held – the U.S. Supreme Court held that the regulations did not constitute a taking.

1. See Section X below for a discussion of *Murr* on the issue of the unit of property against which to assess the takings claim.
2. Court held that Lot E and Lot F must be evaluated as a single parcel.
3. Considering the lots as a single parcel, there is no taking which entitles the owners to just compensation.
    a. Not deprived of all economically beneficial use (so not a *Lucas* taking). Can use the properties together for residential use.
    b. No taking under a *Penn Central* analysis.
        i. No severe economic impact
        ii. Owners cannot claim reasonable expectation that could sell or develop the lots separately, in light of the regulations.
        iii. Regulations in question are reasonable land use regulations.

VIII. TYPES OF REGULATORY TAKING - TEMPORARY TAKINGS

a. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987).

i. A 1978 flood destroyed buildings which were part of a church retreat center and recreational area for handicapped children. After the flood, the County adopted an interim ordinance prohibiting the construction or reconstruction of a building in an interim flood protection area that included the church property. The Church filed

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suit claiming that the ordinance deprived it of all use of the property and seeking compensation.

ii. U.S. Supreme Court found that compensation for the taking was required:

1. This was considered a temporary taking, because it dealt with the time after the interim ordinance was adopted and before its validity was ruled upon.
2. Under the Just Compensation Clause, when a taking has occurred as a result of governmental regulation, the landowner can recover damages for the time before there is a final determination that the regulation constitutes a taking.
3. Invalidation of the ordinance in question, without paying compensation for the period prior to invalidation, is a constitutionally insufficient remedy.

IX. TYPES OF REGULATORY TAKING - CHALLENGE TO THE ENACTMENT OF THE REGULATION

a. Challenge to the regulation on its face, not the application of the regulation.
b. Not often successful because the court cannot evaluate how the regulation is being applied.
c. *Agins v. City of Tiburon,* 447 U.S. 255 (1980).
   i. Facts:
      1. Agins acquired 5 acres of unimproved land, intending to develop it for residences. After the acquisition, state law was adopted requiring the City to prepare a general plan governing land use and the development of open space land.
      2. City adopted two ordinances modifying existing zoning requirements restricting the residential development permitted for Agins' property.
      3. Agins never sought approval to develop land under the zoning ordinance, but instead filed a complaint challenging the adoption of the ordinances.
      4. Agins claimed inverse condemnation with damages of $2 million, and requested a determination that the zoning ordinances were facially unconstitutional.
      5. The California Superior Court sustained the City's demurrer that the complaint failed to state a cause of action, which was affirmed by the California Supreme Court.

ii. Held: the U.S. Supreme Court held that the zoning ordinances are not facially unconstitutional, and do not, on their own, take property without just compensation.
    1. The zoning ordinances in question substantially advance legitimate governmental goals.
    2. The burdens and benefits of the City's exercise of police power is shared by all owners, and the benefits must be considered when looking at any diminution in market value resulting from the zoning ordinance.
    3. The limitation of development under the ordinances does not prevent the best use of the land or extinguish a fundamental attribute of ownership.
    4. Agins has the right to pursue reasonable investment expectations by submitting a development plan – so, the impact of the regulations has not denied owners the justice and fairness guaranteed by the 5th and 14th Amendments.

iii. The *Agins* Test for determining whether the adoption of a regulation is a taking:
    1. Does the regulation substantially advance a legitimate governmental interest?
    2. Does the regulation deprive the owner of economically viable use of property?

d. *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.,* 452 U.S. 264 (1981)
    i. "Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking. The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land." (Citations omitted). The Surface Mining Act easily survives scrutiny under this test."

e. *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470 (1987).
    i. Claim that the enactment of the PA Bituminous Mine Subsistence and Land Conservation Act and the regulations adopted under the

Act, preventing removal of 50% of the coal under an existing structure, was a taking under the Fifth Amendment.

ii. The U.S. Supreme Court held that no taking had occurred:

1. This was a case challenging the enactment of the legislation, not the enforcement, so the question was whether the mere enactment constituted a taking.
2. The Act is intended to serve legitimate public interests, as distinguished from the statute in *Pennsylvania Coal v. Mahon.*
3. There is no finding that the Act makes it impossible for the mining company to profitably engage in business, or that there has been undue interference with investment-backed expectations. Additionally, there is no evidence that any mines or mining operations have been unprofitable.
4. Affected coal is only 2% of the company's coal available for mining.
5. "But even if we were to accept petitioners' invitation to view the support estate as a distinct segment of property for "takings" purposes, they have not satisfied their heavy burden of sustaining a facial challenge to the Act. Petitioners have acquired or retained the support estate for a great deal of land, only part of which is protected under the Subsidence Act, which, of course, deals with subsidence in the immediate vicinity of certain structures, bodies of water, and cemeteries. The record is devoid of any evidence on what percentage of the purchased support estates, either in the aggregate or with respect to any individual estate, has been affected by the Act. Under these circumstances, petitioners' facial attack under the Takings Clause must surely fail."

X. THE DENOMINATOR PROBLEM – WHAT IS THE PROPERTY TO BE CONSIDERED WHEN EVALUATING A TAKINGS CLAIM

a. *Murr v. Wisconsin,* 582 U.S. ____, 137 S.Ct. 1933 (2017). See facts in Section VII above.

i. Issue: "What is the property unit of property against which to assess the effect of the challenged governmental action?"

1. The test for regulatory taking compares the value that has been taken from the property with the value that remains.
2. There is no one test for determining the extent of the "property unit."

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3. Courts should consider:
    a. Treatment of land, "in particular how it is bounded or divided, under state and local law." This bears on the owner's reasonable expectations. This consideration should be given "substantial weight."
    b. Physical characteristics of the property, including physical relationships of tracts, topography, and surrounding environment.
    c. Value of the property under the regulation in question, "with special attention to the effect of burdened land on the value of other holdings."
4. Court refused to adopt a hard line rule to determine the property that is the subject of the analysis.
5. Court held that, using these criteria, Lot E and Lot F must be evaluated as a single parcel.
    a. State and local law provided that the two lots were merged, and therefore must be treated as a single parcel.
    b. Physical characteristics of the parcels as adjoining each other support treatment as a single parcel. Also, the topography and shape "make it reasonable to expect their range of potential uses might be limited."
    c. Lot E (the vacant lot) brings value to Lot F by providing increased privacy and recreational space. This supports considering the two lots as a single parcel. Also, valuation of the two lots together is far greater than the sum of the value of the individual lots.
6. Considering the lots as a single parcel, there is no taking which entitles the owners to just compensation.

b. *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978).
    i. The U.S. Supreme Court would not limit the property to only a portion of the ownership rights (in this case, air rights), stating that the law of takings "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."

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c. *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.,* 452 U.S. 264 (1981).
    i. Challenge to the constitutionality of the federal Surface Mining Control and Reclamation Act of 1977, before the Act had been enforced. The Act regulated surface mining and contained environmental enforcement standards. Claim that prohibition of mining in certain areas (steep slopes) is not a taking for various reasons. Court stated that the lower court finding that a taking had occurred "suffers from a fatal deficiency: neither appellees nor the court identified any property in which appellees have an interest that has allegedly been taken by operation of the Act."
d. *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470 (1987).
    i. Coal mining causing subsistence damage to existing buildings was prohibited under the PA Bituminous Mine Subsistence and Land Conservation Act. The Department of Environmental Resources adopted regulations under the Act requiring that 50% of the coal beneath a structure protected by the Act to be kept in place. Mining company filed for an injunction against enforcement. The complaint cited to Pennsylvania's recognition of separate estates in land (support, surface and mineral estates).
    ii. Keystone asserted that 90% of the coal to be mined had been severed from the surface estates in the years 1890-1920 and that the surface owners that had granted the mineral estates had signed waivers of damages resulting from coal removal.
    iii. Keystone asserted that the requirement preventing removal of 50% of the coal required it to leave 27 million tons of coal in place, and that because Keystone owned this coal and could not mine it, it was a taking under the Fifth Amendment.
    iv. The U.S. Supreme Court held that no taking had occurred:
        1. The Act required the company to leave only 2% of their available coal in place.
        2. The Court rejected the owner's argument that the support estate of 27 million tons of coal should be considered a separate segment of property to be evaluated for the taking claim.
        3. The Court recognized that Pennsylvania regards the support estate (the right to remove coal, earth, etc.) as a separate interest in land that can be separately conveyed, but found

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that the interests are not considered separately for a takings claim, citing to *Penn Central* (dealing with air rights).

4. The Court further noted: "in practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated…Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking."
5. The takeaway from *Keystone* is that even if state law recognizes separate, conveyable estates, it is unlikely that the individual estate in land will alone be considered when evaluating a takings claim.

e. *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001).
   i. The petitioner claimed before the Supreme Court that the portion of the property containing wetlands should be evaluated alone, because the upland portion is distinct. The Court refused to evaluate this claim because it had not been raised below; however, the Court did state (citations omitted):
      1. "This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction… Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, *e. g., Keystone Bituminous Coal Assn.* v. *DeBenedictis,* 480 U. S. 470, 497 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas, supra,* at 1016-1017, n. 7, a sentiment echoed by some commentators…."

f. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002).
   i. The U.S. Supreme Court would not look only at the period during which a temporary moratorium was in effect, and then decide whether or not there was a total taking during that period.

XI. RIPENESS – WHAT IS REQUIRED TO BRING A REGULATORY TAKINGS CLAIM?

a. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).
   i. Challenge to a zoning ordinance. Even though the applicant did not apply for a building permit or request relief from the zoning board, the Court held that the matter was ripe because "the attack

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is directed, not against any specific provision or provisions, but against the ordinance as an entirety."

b. *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59 (1978).
    i. Environmental group and others challenged a federal law that limited liability for nuclear accidents as unconstitutional. The Court held that the case was ripe: there was a live case or controversy, appellees will sustain immediate injury from the operation of power plants, and the injury would be redressed by the relief requested.
c. *Agins v. City of Tiburon,* 447 U.S. 255 (1980).
    i. Owners purchased undeveloped land for residential development. Thereafter, the city adopted a zoning ordinance that zoned the property to single family detached dwellings, accessory buildings and open space, and that would have permitted from 1-5 dwellings on the property. The owners brought suit claiming taking without just compensation, and sought a declaration that the zoning ordinance was unconstitutional. The owner did not file for approvals for development under the ordinances. The Court held that because the owner had not yet applied for development approvals, "there is as yet no concrete controversy regarding the application of the specific zoning provisions." The Court further held that the enactment of a zoning ordinance does not itself constitute a taking as the ordinance is a proper exercise of police power.
d. *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.,* 452 U.S. 264 (1981).
    i. Challenge to the Surface Mining Control and Reclamation Act of 1977 before it was enforced. The Act regulated surface mining. The Court held that claims that certain provisions of the Act violate the Just Compensation Clause of the Fifth Amendment are not ripe, because no administrative relief from the provisions had been sought.
e. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985).
    i. Planning approval for a residential subdivision had been granted, and later the zoning ordinance was changed to reduce permitted density. Later plans were disapproved. Based on the disapproval, a claim was made that the land was taken without just compensation.

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Court held that a claim for just compensation was premature because there had been no final decision regarding the application of the ordinance to the property, and the applicant had not followed the procedures under state law to obtain just compensation. "[A] claim that the application of governmental regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."

f. *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725 (1997).
    i. Owner owned an undeveloped lot which was ineligible for development under regulations of the Regional Planning Agency; however, the property was entitled to Transferable Development Rights (TDRs) that could be sold. The owner did not sell the TDRs, but challenged the determination that the property was undevelopable as a regulatory taking. The Court held that the owner was not required to sell the TDRs before making a regulatory takings claim. The agency's determination of that the lot was undevelopable was a final determination and so the claim was ripe.

g. *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001).
    i. Owner owned waterfront property, and filed multiple development proposals, all of which were denied. Owner filed an inverse taking claim that the regulations violated the Fifth and Fourteenth Amendments by taking property without just compensation by depriving him of all economically beneficial use of the property. The lower court found that the claims were not ripe because the owner had not applied for approval to develop the specific development upon which the damages claim was based. The Court held that since the agency had advised the owner that he could not fill wetlands, he obviously could not fill the wetlands and then build the proposed development. "And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point."

XII. STANDING

a. *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59 (1978).
    i. Price-Anderson Act limited liability for nuclear accidents and required the nuclear plants to waive legal defenses in the event of a

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substantial nuclear accident. The Act was challenged as unconstitutional by residents living nearby a plant an environmental organization and a labor union.

ii. The challengers did have standing to challenge the constitutionality because the Act allowed the nuclear plants to be built, and the result of the construction could include an increase in nearby radiation, reduction in property values and other impacts.

b. *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001).

i. Owner owned waterfront property, and filed multiple development proposals, all of which were denied. Owner filed an inverse taking claim that the regulations violated the Fifth and Fourteenth Amendments by taking property without just compensation by depriving him of all economically beneficial use of the property. The lower court found that the owner could not bring the claim because the owner had purchased the property after the regulations were adopted. The Supreme Court held that taking title to property after a regulation goes into effect does not preclude a challenge to the regulation.

XIII. PENNSYLVANIA REGULATORY TAKINGS CASES

a. *Millcreek Township v. N.E.A. Cross Co.,* 620 A.2d 558 (Pa. Cmwlth. 1993).

i. Companies negotiated leases to explore for natural gas and develop wells. Before wells were developed, the Township enacted an ordinance which restricted zoning districts in which wells could be developed, excluding the districts on which the companies held leases. Suite was filed for determination of de facto taking and appointment of board of view.

ii. The Court noted that the Eminent Domain Code provides the right to file for appointment of Board of View when no declaration of taking has been filed.

iii. The Court held that even though the leases lapsed before the Petition for appointment of viewers was filed, the companies had standing. The leases were in force when the ordinance was enacted, and the claim is that the enactment took their leasehold interests. The harm occurred before the leases expired.

b. *Miller and Son Paving, Inc. v. Plumstead Township,* 717 A.2d 483 (Pa. 1998).

i. Miller and Son purchased property and filed a curative amendment claiming that the zoning ordinance did not permit quarrying. After the Commonwealth Court found that the zoning ordinance did

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exclude quarrying, Miller and Son separately filed a petition for a Board of view, asserting that the zoning ordinance unconstitutionally exclude quarrying and seeking damages.

ii. Issue: Does an exclusionary zoning ordinance constitute a per se taking of property?

iii. Delays relating to legal challenges to zoning ordinances do not automatically constitute a taking, because viable uses may remain.

iv. Because the owner was not denied all use of the property, and was ultimately granted the right to quarry, no taking occurred during the period before the ordinance was deemed unconstitutional.

c. *Machipongo Land and Coal Company, Inc. v. Commonwealth of PA,* 799 A.2d 751 (Pa. 2002).

i. The Court held that the transfer of ownership of the property after the enactment of the regulation did not divest the owner of standing, citing to *Palazzolo.*

ii. The owner argued that the impact of the regulation was the same as though the Commonwealth had physically removed the coal, and therefore the *Loretto* standard should be applied (a taking occurs if there is any physical invasion). The Court rejected this argument, since the regulation in fact did not authorize the Commonwealth to remove coal.

d. *Nolen v. Newtown Township,* 854 A.2d 705 (Pa. Cmwlth. 2004) – a moratorium on development was not a taking, because there were other uses of the property available that were not affected by the moratorium.

e. *Tobin v. Centre Township,* 954 A.2d 741 (Pa. Cmwlth. Ct. 2008) - High fees for submission of subdivision plan for a large number of residential lots is not a de facto taking, because uses of the land other than development are available. An inability to put property to its most profitable use is not a taking. Further, the claim was not ripe because the developer did not follow the procedures in the Municipalities Planning Code for challenging a fee for review of a land development plan.

XIV. HOW TO BRING A REGULATORY TAKINGS CASE (PROCEDURALLY) IN PENNSYLVANIA

a. Ripeness determination

i. Before bringing a takings claim, exercise all available remedies so the claim is ripe.

ii. For example, if the impact is caused by zoning ordinance provisions, the property owner must seek relief from the zoning

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hearing board. A challenge to the validity of the zoning ordinance should also be considered.

1. If the zoning hearing board denies the relief requested, the decision should be appealed, until a final decision on the matter is reached – all administrative remedies should be exhausted.

b. File Petition to Appoint Board of View asserting inverse condemnation pursuant to the Eminent Domain Code, 26 Pa.C.S.A. Section 101 et seq., at 26 Pa.C.S. Section 502(c).
   i. File in the county in which the property is located. 26 Pa.C.S. Section 301.
   ii. Petitioner must serve a certified copy of the Petition for appointment of viewers and the Court order appointing the viewers on all other parties by registered mail, return receipt requested, and also to all mortgagees and other lienholders of record by mail. 26 Pa.C.S. Section 504(b).
   iii. Under 26 Pa.C.S. Section 709, when a condemnee institutes proceedings under Section 502(c) (rather than the condemnor initiating a Declaration of Taking), a judgment awarding compensation to the condemnee "shall include reimbursement of reasonable appraisal, attorney and engineering fees and other costs and expenses actually incurred."
c. The Court appoints three viewers – in counties of the first class, an alternate viewer may be appointed as well. 26 Pa.C.S. Section 504(a).
d. The governmental entity can file preliminary objections to the Petition to Appoint a Board of View under 26 Pa.C.S. Section 504(d).
   i. Preliminary objections must be filed within 30 days after receipt of notice of the appointment of viewers.
   ii. Objections to the form of the Petition, to the appointment or qualifications of viewers, or to the legal sufficiency or factual basis of a Petition are waived unless they are included in preliminary objections.
   iii. Answer (with or without new matter) may be filed within 20 days of the date of service of preliminary objections. Reply to new matter may be filed within 20 days of the date of service of the Answer.
   iv. The court must conduct an evidentiary hearing, or order that evidence be taken by deposition or otherwise, if an issue of fact is

raised in the preliminary objections. Evidence is not taken by the viewers on preliminary objections.

e. Issues with bringing a Fifth Amendment claim in Federal court:
    i. May have a ripeness issue if state remedies were not exhausted;
    ii. *Williamson* requires owners to seek compensation first in state court before bringing a claim in Federal court.
    iii. The case of *Knick v. Township of Scott* (Case No. 17-647; comes from the US Court of Appeals, Third Circuit) was argued before the U.S. Supreme Court on October 3, 2018, and deals with the issue of whether owners can bring a takings claim directly in Federal court.

XV. CONCLUSION

a. Analytical framework for a takings claim
    i. Is the claim ripe?
    ii. Does the property owner have standing?
    iii. Determine the property against which the takings claim is to be brought (the denominator question).
    iv. Does the regulation effect a categorical taking?
        1. Does the regulation involve a physical invasion of any kind?
        2. Does the regulation deprive the owner of all economic value of the property?
    v. If not – does the regulation constitute a non-categorical taking under the *Penn Central* analysis:
        1. The economic impact of the regulation on the claimant;
        2. The extent to which the regulation has interfered with distinct investment-backed expectations; and
        3. The character of the governmental action.
    vi. Also consider the *Nollan/Dolan* analysis for determining whether conditions imposed under a regulation constitute a non-categorical taking:
        1. Does the regulation serve a legitimate public purpose?
        2. If so, does the public purpose have an essential nexus with the conditions imposed?
        3. If so, do the conditions imposed have a reasonable relationship/rough proportionality with the impact of the development?

b. Recognize that takings cases are extremely fact sensitive. U.S. Supreme Court consistently notes that flexibility is required to reconcile the

government's police power to act for the public good, and individual property rights.

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