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NEW TAKES ON OLD TAKES: A TAKINGS LAW UPDATE

Wendie L. Kellington
Attorney at Law
Lake Oswego, OR

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"After all, if a policeman must know the Constitution, then why not a planner?" Brennen Dissenting, *San Diego Gas and Electric Co. v. City of San Diego*, 101 S. Ct. 1287 (1981).

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co., v. Mahon*, 260 U.S. 393, 415 (1922).

"These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from forcing some people to alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole." *Palazzolo v. Rhode Island,* (United States Supreme Court, June 28, 2001), *citing Armstrong v. United States*, 364 U.S. 40, 49 (1960).

I. GENERAL SUMMARY OF TAKING CLAIMS

Federal taking claims are based on the Fifth Amendment to the United States Constitution that provides:

> "[N]or shall private property be taken for public use without just compensation."

The focus of this paper is on inverse condemnation claims or claims that the government has taken private property, but has not instituted eminent domain proceedings to do so.

There are five basic kinds of inverse condemnation taking claims. They are (1) the per se physical occupation claim, (2) categorical claim where the deprivation of all economically beneficial use is alleged, (3) facial taking claims, (4) as applied taking claims, and (5) unconstitutional conditions/exactions taking claims. The first two are analytically very similar and are analyzed in concert in this paper. The remainder are marked by different analytical premises. While there are a number of ways to look at taking claims, maintaining an analysis of these five different kinds of claims as a point of beginning is quite helpful. Of course, when courts actually apply taking rules to taking claims, they often mix concepts, producing the confusing body of law that characterizes this area. Nevertheless, having a basic taking law platform to work from can only aid the lawyer: whether government side or private side – in the legal analysis.

A. Per Se/Categorical

The per se category is best illustrated by the *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 73 L. Ed. 2d 868 (1982) (*Loretto).* The categorical category is best illustrated by *Lucas v. South Carolina Coastal Council,* 112 U.S. 2886, 120 L. Ed. 2d 798 (1992) (*Lucas*). In these categorical cases, the application of a regulation to property deprives the landowner of an entire property interest. *Lucas* claims for just compensation under the Fifth Amendment, then, break into two essential elements: (1) the imposition of a regulation totally deprives a landowner of a right in property (it can apply to personalty, but the court is less protective of personalty)[1], and (2) the right deprived is recognized under state law and is not a nuisance, the government owes compensation.

For physical invasion (or the per se claims), the government either occupies in fact or has given itself the right to occupy private property – without paying for the privilege. The physical invasion generally is not the result of natural causes or conditions, but rather is a physical occupation or condition resulting from governmental action, even governmental action that forbids the removal of the invading material. *Beta Trust v. City of Cannon Beach*, 33 Or. LUBA 576 (1997); *see also Teegarden v. United States*, 42 Fed. Cl. 252 (1998) (failing to allocate firefighting resources to petitioner's property that was then destroyed by a wildfire, is not a compensable taking under physical invasion or any other theory).

B. Facial Taking Claims (Regulation Imposes a Taking on Its Face)

These are challenges to the enactment of a regulation. Rarely do these situations result is successful taking claims because courts take the position they do not know how the regulations will be unconstitutionally applied.

A two part "*Agins*" test (*Agins v. City of Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106 (1980)) is applied to determine whether the adoption of a regulation effects a taking. The relevant questions under this test are (1) does the regulation substantially advance a legitimate governmental interest? (2) does the regulation deprive the owner of economically viable use of property?

C. "As Applied" Partial Taking Claim

These claims include circumstances where the application of a regulation to particular property is a taking of some interest in property that is less than the whole, although the regulation may not effect a taking on its face. To determine whether there is a taking under this category, apply the three *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L.Ed.2d 631 (1978), factors, which require an examination of the following: (1) the character of the invasion, (2) the economic impact of the regulation as applied to the particular property, (3) the property owner's distinct investment backed expectations with respect to that property. *Palazzolo v. Rhode Island*, (United States Supreme Court,

June 28, 2001), slip op 11, however, makes clear that no one of these factors is dispositive of the taking question.

Moreover, as a footnote to the *Penn Central* balance, it appears the property as a whole analysis in *Penn Central* has evolved to favor the *Lucas* "bundle of sticks" approach to protect entire and discrete state law recognized property interests. Thus, when analyzing under the three-part test (as well as a per se taking), consider whether state law recognizes a discrete property interest in the property right being interfered with. For example, if the regulation at issue deprived the property owner of the right to lease land, while less than a take of the fee, it is a total take of a discrete property interest, less than the whole, but compensable as a taking nevertheless.

There are few successful *Penn Central* taking claims as a practical matter. *See District Intown Properties Ltd. Partnership v. District of Columbia*, 23 F. Supp. 2d 30 (D.D.C. 1998), *aff'd*, 198 F.3d 874. Most partial take claims end up being characterized as a total take if the court plans to award compensation. However, a recent successful taking claim under this analysis resulted in *Florida Rock Industries v. United States*, 45 Fed. Cl. 21 (1999).

D. Unconstitutional Conditions (*Nollan/Dolan*)

A condition of approval will not result in a judicial determination of an unconstitutional taking if:

- The condition furthers a substantial/legitimate governmental interest +
- The condition is related to the interest that is served +
- The impacts of the development are roughly proportional to the condition imposed.

Keeping these basic categories in mind will greatly assist in applying the rules of the game to situations that arise in practice.

II. SPECIFIC ISSUES

A. Ripeness

The ripeness requirement says that taking claims regarding the application of highly discretionary local regulations to particular property, will not be reviewed on the merits until it is clear to the federal judiciary how far the regulating government will go to limit the use of the privately held property. *See Palazzolo, supra,* slip op 7. The ripeness rule has been called a jurisdictional requirement, but more recently the United States Supreme Court termed it as also prudential requirement for courts to apply in appropriate circumstances to avoid sticking judicial noses into local affairs. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 1664-65 (1997).

The seminal ripeness cases are now: *Palazzolo, supra; Suitum, supra; Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County,* 473 U.S. 176 (1985);*MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1987)*; *see also Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *as amended*, 830 F.2d 968 (1987), *cert. denied*, 484 U.S. 1043, 108 S. Ct. 775 (1988), Ripeness has three prongs: (1) there must be a final local decision, (2) administrative remedies must be exhausted, including pursuit of variances as well as alternative development options, and (3) as a prerequisite for bringing a federal claim, avenues for achieving state compensation must be explored. While it is the generally held view that adequate state procedures must be exhausted in *state* court, this was not required in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) (federal court can exercise supplemental jurisdiction to satisfy this prong).

To the extent a state's procedures deprive claimants of their right to a jury trial on the issue of whether a taking occurred, there may be an argument that the state procedures are inadequate. *See City of Monterey v. Del Monte Dunes, Ltd.*, 119 S. Ct. 1624 (1999) (Seventh Amendment to the United States Constitution protects right to jury trial in a federal taking claim); *see also Lakin v. Senco Prods., Inc*., 329 Or. 369, 987 P.2d 476 (1999) (right to jury trial in Oregon state court proceedings); *cf. Buckles v. King County*, 191 F.3d 1127 (9th Cir. 1999). *See* Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J Land Use & Envtl. L 91 (1994).

Governmental units generally appreciate the ripeness rule because it gives them an opportunity to avoid taking claims by thoroughly reviewing "at least one" development application and allowing beneficial uses of property to occur within the regulatory environment. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985). This, as a practical matter, has meant that a land use applicant must apply for at least two different alternative development proposals and obtain a final decision from the highest local decision-maker denying both alternative applications, before seeking judicial review. Oftentimes, however, at a waste of private and public resources, a private property owner must apply for many, many more uses to no avail. *See City of Monterey v. Del Monte Dunes, Ltd.*, 119 S. Ct. 1624 (1999);[2] *see also* Kanner, *Hunting the Snark, not the Quark: Has the United States Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law*? The Urban Lawyer (Spring 1999). Property owners may spend years trying to determine what uses government will let them make of their property. Whether this is fair depends upon the perspective of the person asking the question. Government side litigants argue this is perfectly acceptable. *See* Lazarus *Litigating Suitum v. Tahoe Reg'l Planning Agency in the United States Supreme Court*, 12 J. Land Use & Envtl. Law 179 (1997). Private property owners argue the converse.

Palazzolo provided badly needed clarification regarding the ripeness rule. It began its analysis by stating:

> "While a landowner must give a land-use authority an appropriate opportunity to exercise its discretion, once it becomes clear that the agency lacks discretion to permit any development, or it is clear the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazollo, supra*, slip op 7.

Thus, the Court explained that only to the extent there is discretion to exercise, creating doubt as to permissible uses of private property, will the ripeness rule come into play.

As noted, the perennial ripeness question has been how many development applications are enough to satisfy the ripeness test as a matter of law? The federal ripeness rule requires that "at least" one meaningful application be submitted and that a variance be sought that would allow the approval of the requested development. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997*)*; *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985); *Greenbrier (Lake County Trust Co. No. 1391) v. United States*, 40 Fed. Cl. 689 (1998). Again, *Palazzolo* provides some needed clarity. In Palazzolo, the governmental defendants argued that the petitioner needed to file more applications for "less grandiose" plans. The Supreme Court replied as follows to this assertion:

> "Thus, the reasoning goes, we cannot know for sure the extent of permitted development on Petitioner's wetlands. * * * This is belied by the unequivocal nature of the wetlands regulations at issue under the Council's application of the regulations to the subject property." *Palazzolo, supra*, slip op 7.

Because the governmental decisionmakers had been clear that they would not authorize fill, the Court stated there was no point to filing additional development applications. The *Palazzolo* Court made clear that the exercise of filing applications to ripen a claim was not a end in and of itself:

> "The ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use." *Palazzolo, supra*, slip op 8.

In *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.), *cert. denied*, 115 S. Ct. 193 (1994), the court determined that property owners must submit "one formal development plan"; *see also Howard W. Heck & Assoc., Inc. v. United States*, 134 F.3d 1468 (D.C. Cir. 1998). In *Eastern Minerals Int'l v. United States*, 36 Fed. Cl. 541, 548 (1996), the court determined: "Each plaintiff must satisfy the threshold requirement of a single meaningful application to yield a ripe

takings claim." *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 938 F.2d 153, *on remand,* 808 F. Supp. 1484, *aff'd in part and rev'd in part,* 34 F.3d 753, *opinion amended,* 42 F.3d 1306, *cert. denied, California v. Tahoe Sierra Preservation Council*, 115 S. Ct. 1401, *on remand,* 992 F. Supp. 1218 (9th Cir. 1991) (ripeness requirement does not require property owner to seek amendment to regional plan for claim to be ripe); *but see Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995) (landowner must seek rezoning, variances and a meaningful application for a taking claim to be ripe for judicial review); *see also* Kanner, *Hunting the Snark, Not the Quark: Has the United States Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law*? The Urban Lawyer, Spring 1999. As noted, federal legislation has been promoted to clarify federal ripeness law to enable the federal courts and litigants to have some certainty regarding the circumstances in which a federal taking claim may be reviewed on the merits. *See* "The Private Property Rights Implementation Act of 1999" (H.R. 2372). However, for a vast majority of governmental regulators and landowners, *Palazollo* will be adequate to clarify this issue without new legislation.

Regarding the confluence of the first, second and third prong of the ripeness rule, the following frustrating case is illustrative in its unfair consequences. In *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478 (D.N.M. 1995), the plaintiff's first federal suit was dismissed on ripeness grounds because the property owner never sought compensation in state court. Then, the plaintiff's second suit in state court for inverse condemnation (without any federal claims pleaded) was dismissed for lack of standing. The plaintiff's third suit, again in federal court, alleging federal constitutional violations was dismissed because the federal claims were not raised in state court - even though the state court had already decided that the property owner lacked standing to bring its action there. The plaintiff was out of court based on a sort of jurisdictional shell game in which no court ever heard his claim on the merits and it was clear he could not ever have his claim heard on the merits.

1. Ripeness and Physical Invasions/Per Se Cases

The general rule is that when government occupies property, the claim is ripe from the moment of physical occupation. If the government actually occupies or requires the occupation of private property, the taking claim is ripe in the sense that a final governmental decision has obviously been reached. Accordingly, it is generally unnecessary to seek other kinds of development approvals when government occupies or requires the public occupation of private property. *Nelson v. City of Lake Oswego*; 126 Or. App. 416, 422, 869 P.2d 350 (1994); *Ferguson v. Mill City*, 120 Or. App. 210, 852 P.2d 205 (1993); *see also Nike v. City of Beaverton*, 35 Or. LUBA 57 (1998); *Harris v. City of Wichita*, 862 F. Supp. 287, 291 (D. Kan. 1994), *aff'd,* 74 F.3d 1249 (9th Cir. 1996).

However, according to one court, the fact that government will certainly invade private property in the future by closing and relocating an access road, does not necessarily mean the claim is ripe if the relocation is subject to access permit requirements and the private property owner has not applied for governmental permission to relocate the access road to another reasonable location. *Curran v. State by & Through ODOT*, 151 Or. 781 (1997).

Therefore, even in the context of physical invasion claims, it is important to consider whether your client's case presents a physical invasion taking in the context of the *Williamson County* ripeness considerations. Missing a ripeness hurdle can foreclose the taking claim. So, for example, an alleged physical invasion in the nature of a de facto conservation easement was not recognized by a court in reviewing a taking claim arising from the Columbia River Gorge Commission's denial of a development application for partition and permission to construct dwelling. *Miller v. Columbia River Gorge Comm'n*, 118 Or. App. 553, 848 P.2d 629 (1993).

2. Ripeness and the "As Applied"/Partial or "Categorical Regulatory Taking Cases

The ripeness doctrine applies to cases where the application of a regulation deprives a property owner of all economically beneficial use (categorical takings) or a part thereof (partial takings). The only limits to the application of the ripeness doctrine in this regard are (1) the alternative

approval method must not be a "late created special permit procedure" (*Lucas*), and (2) the application the doctrine of futility (*MacDonald Sommer and Frates*, 477 U.S. 340, 91 L.Ed.2d 285 (1986)). Futility has been elusive for most property owners to show. *See Joyce v. Multnomah County*, 114 Or. App. 244, 248 (1992). ("[P]etitioner's arguments, however, come to little more than a weighing of the evidence that he anticipates would be produced against him in variance or permit proceedings that have not been held.") Nevertheless, the newly explained limits of the reach of the ripeness rule, as explained in *Palazzolo*, should enable more property owners to get their regulatory takings claims to the attention of the judiciary under the futility doctrine.

Where a party claims the application of the Endangered Species Act (ESA) deprives him of all economically viable use, the Oregon Court of Appeals has held he must apply for an incidental take permit from the federal government before his taking claim is ripe. *Boise Cascade v. State*, 164 Or. App. 114 (1999).

3. Ripeness and Facial Claims

Facial challenges to regulations are generally ripe under the finality prong, the moment the challenged regulation or ordinance is adopted. *Cope v. Cannon Beach*, 317 Or 339, 342, 855 P.2d 1083 (1993); *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997); *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997); *Sinclair Oil Corp., v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996); *Whitney Ben., Inc. v. United States*, 18 Cl. Ct. 394, 407, *aff'd*, 926 F.2d 1169, 1171 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991) (a facial taking occurred upon enactment of federal statute); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 924 (1994). Nevertheless, where a facial claim is argued as an unconstitutional conditions claim, ripeness rules may be applied by some courts. *Nike v. City of Beaverton*, 35 Or. LUBA 57 (1998), *aff'd,* 157 Or. App. 397 (1998); *but see Heal v. Hearings Bd.*, 96 Wn. App. 522 (1999).

4. Ripeness and Conditions of Approval

As noted, at least as to conditions requiring the government to occupy private property, the finality prong of the *Williamson County* rule

generally has not been employed to prevent judicial review. *Nelson v. City of Lake Oswego;* 126 Or. App. 416 (1994); *Schultz v. City of Grants Pass*, 131 Or. App. 220 (1994). In *J.C. Reeves Corp. v. Clackamas County*, 131 Or. App. 615 (1994), the Oregon Court of Appeals determined that an unconstitutional conditions claim was appropriate for review without subsequent ripening events, although it did not couch its analysis in ripeness terms.

In Oregon, LUBA has determined that the ripeness rule applies to claims alleging unconstitutional conditions. *Reeves v. City of Tualatin*, 31 Or. LUBA 11, 13-14 (1996); s*ee also Dolan v. City of Tigard*, 20 Or. LUBA 411 (1991) (unconstitutional conditions allegation not ripe in the absence of a request for a variance and a denial thereof). LUBA's holdings regarding ripeness of unconstitutional conditions in *Reeves* and *Dolan* have not been specifically tested. This holding, however, seems contrary to the ripeness rule of *Palazzolo* in the sense that when government imposes conditions of approval, it seems reasonably clear how far the government will go in imposing conditions of approval.

Nevertheless, there is some uncertainty about whether the imposition of conditions of approval alleged to be unconstitutional requires the claimant to seek additional land use approvals before the taking claim is ripe. Some state statutes may even purport to make ripening an unconstitutional conditions claim a statutory prerequisite. *See* ORS 197.796 (asserting that an unconstitutional conditions taking claim must raised in local permit proceedings and then brought either to LUBA within the 21-day deadline for filing local land use appeals or a complaint for just compensation must be filed within six months of the imposition of the conditions). While it seems relatively clear that the reason for a ripeness rule argues against the serial application prong being applied to unconstitutional conditions, each case should be evaluated on its own with reference to local law.

5. The Ripeness Rule and the Futility Exception

Under federal precedents, the futility exception is appropriate where the process for obtaining a permit is so burdensome or futile that it "effectively deprives the property of value" or "[n]o reasonable landowner would find a door left open for obtaining a

permit." *Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 236 n.1 and 236-38 (1996), *vacated without op. by* 121 F.3d 727, *on remand*, 45 Fed. Cl. 154 (1999). The doctrine of futility excuses the requirement that a landowner seek a variance in circumstances where the application submitted was for development of a nature and intensity that did not expressly conflict with any particular provision of the applicable zoning ordinances. *Del Monte Dunes v. Monterey*, 920 F.2d 1496, *appeal after remand*, 95 F.3d 1422, *reh'g granted,* 118 F.3d 660, *reh'g en banc denied*, 127 F.3d 1149, *aff'd, City of Monterey v. Del Monte Dunes, Ltd.*, 119 S. Ct. 1624 (1999).

Also, futility theoretically can excuse successive applications for permits on other land owned or leased by the taking plaintiff where it is obvious the regulating authority would deny subsequent permits in the same manner as permits had been denied on other property. *Eastern Minerals Int'l v. United States,* 36 Fed. Cl. 541 (1996); *see also Palazzolo, supra; see also City of Houston v. Kolb*, 982 S.W.2d 949 (Tex. App. 1999) *cert. denied* 120 S. Ct. 2690 (2000). *Kolb* is especially interesting because the City of Houston had denied the requested development approval on the basis that the City had plans to construct a major road through the property. Accordingly, the existence of the City's plans and its statements of its intentions to hold fast to those plans, established it would be futile to seek other development approvals for the subject property.

Futility has been employed to excuse filing a local appeal of a city engineer's denial of a permit to the planning commission. *City of Albany v. Oxford Solid Waste Landfill*, 476 S.E.2d 729 (1996). In *City of Albany*, the court reasoned futility was appropriate in such a case because:

> "the trial court found that the [permit application] was rejected by the City Engineer because he was instructed by the City Manager at the direction of the Albany City commission not to issue the permit. In light of these peculiar facts, it is obvious that to require Oxford to pursue an administrative appeal before the City's

> Planning Commission would be a futile act."

City of Albany v. Oxford Solid Waste Landfill, 476 S.E.2d 729 (1996).

On the other hand, in *Curran v. State by & Through ODOT*, 151 Or. App. 781, 788 n.10 (1997), the Oregon Court of Appeals determined it was not futile to apply for an ODOT access permit even though plaintiff's engineering report establishes the alternative access ODOT states it will require is unreasonable. Specifically the court stated:

> "The engineer's report states that the location suggested by ODOT for an alternative access route is not reasonable. The report does not assess, however, the feasibility of constructing a road at any other location on the property."

As noted, *Palazzolo* makes clear that where the regulations themselves do not provide discretion or the government has already made determinations that reasonably show the permissible uses of property, there is no constitutional reason to submit what would then be an additional, futile development applications simply for the sake of submitting such applications.

Finally, futility may also excuse compliance with the second prong of the ripeness test if, under state or local law, there is no possibility that the plaintiff can obtain just compensation through an inverse condemnation action. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 n 8 (1997); *see also Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993).

III. THE DETAILS OF THE FIVE KINDS OF TAKING CLAIMS

A. Per Se/Categorical Takings

These are the total taking situations described above[3] (i.e., no economically beneficial use remains after regulation or the regulation

requires government to physically occupy some part, or all of, one's land). Once a categorical taking is established, the burden shifts to government to establish why the prohibition is constitutional. This requires a showing by government that the prohibition is contemplated under the title to the subject property or that the uses of the property constitute a common law nuisance. Of course, the best defense to these claims is the regulation does not amount to a categorical taking at all; i.e., there is some economically beneficial use of property that remains or that the regulation does not require a physical occupation of property.

One area of confusion is that some courts improperly determine that only those physical invasions that interfere with "substantial interests" in property warrant just compensation. *See State of Oregon v. Winters*, 170 Or App 118 (2000) in which the Oregon Court of Appeals determined that a temporary road easement taken by the state was not a compensable physical invasion style taking. The court determined a compensable taking is generally defined as any "substantial interference with private property rights." This is wrong and inconsistent with federal law:

> "Our cases establish that even a minimal permanent physical occupation of property requires compensation under the taking Clause." *Palazzolo, supra, citing Loretto, supra* 458 U.S. 419, 427 (1982).

Regarding categorical takings, an analysis of key cases follows.

1. *Palazzolo v. Rhode Island (United States Supreme Court June 28, 2001)*

A categorical taking results if the disputed regulation effects a total taking of all economically beneficial or productive use[4] of property[5] (not the "economically viable" test used in *Agins*). In a categorical style taking, a court does not apply the *Penn Central* "fairness factors" analysis to categorical taking claims.[6] However, if there is some value remaining for an economically beneficial use, then the taking must be analyzed as a *Penn Central* style partial take, rather than a categorical take.

A. Notice Rule

Palazzolo is perhaps most important in the context of the so-called notice rule. *Palozzolo* holds that post-enactment notice to a property owner of a restrictive regulation, does not absolve the government of the obligation to pay for a taking occasioned by the regulation. The Court stated:

> "[A] state, by ipsie dixit, may not transform private property into public property without compensation." (Citations omitted.) *Palazzolo, supra* slip op 10.

The Court went on to state:

> "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Palazzolo, supra* slip op 11.

The Court reaffirmed its statements in *Nollan,* 483 U.S. 825, 834 *n* 2 that:

> "So long as the [California Coastal Commission] could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

2. *Luc*as

In analyzing categorical taking claims, the following language from *Lucas* is important:

> "* * * regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating some serious public harm."

Under *Lucas*, the inquiry is (1) what constitutes a total deprivation of property interest(s),[7] and (2) the nature of the property interest alleged

to be totally deprived.[8] To determine the answer to these questions, look to the deprivation required by the regulations themselves and to the reasonable expectations of the property owner. For example, where specific water rights are recognized by a state, the deprivation of these rights may be a taking. Similarly, if state law recognizes conservation easements, requiring the dedication of the equivalent of a conservation easement may also be a taking under this analysis. The lesson for government is to be careful in identifying new property rights under state law and, for developers, to identify such rights when regulatory deprivations occur.

In determining what constitutes the property to be analyzed for determining a total taking, both government and developers should keep in mind the following admonition from the U.S. Supreme Court in a personal property rights case (*Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California.*, 113 S. Ct. 2264 (1993)):

> "We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. [Citing *Lucas*]. While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that '[t]he property of [Concrete Pipe] which is taken is in its entirety' * * * we rejected this analysis years ago in *Penn Central* * * * where we held that a claimant's parcel of property could not be divided into what was taken and what was left for purposes of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is

> whether the property taken is all, or only a portion of the parcel in question. *Accord Keystone Bituminous* (*Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472 (1987) * * *.
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> * * * * *
>
> [O]ur cases have long held that mere diminution in value of property, however serious, is insufficient to demonstrate a taking."

Id. at 2290-91.

A categorical taking may be a total taking of a smaller interest that is less than the whole. While this may seem to conflict with *Concrete Pipe*, no one ever said the law of unconstitutional takings was completely coherent. Consider the following from *Kaiser Aetna v. United States*, 444 U.S. 164 (1979):

> "Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. As [previous text in opinion] indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualifiedly more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent or nature of the invasion." (citations omitted)

Therefore, it appears reasonably clear that small physical occupations of real property are compensable takings. However, genuinely small losses of value resulting from the imposition of a governmental regulation, probably are not compensable takings. Nevertheless, in a case with enough lost value to warrant litigating the matter, *Palazzolo* makes clear that there is the potential for diminution of value cases that will warrant the payment of just compensation under the Takings Clause.

3. Example of *Loretto* Style cases

a. GTE Northwest, Inc. v. Public Utility Commission

GTE Northwest, Inc. v. Public Utility Commission, 321 Or 458 (1995), applied the per se rule of *Loretto* in the context of utility regulation. Regardless of the pervasive regulatory environment of the communications industry, the requirement that GTE allow other companies to "collocate" wires in GTE's was a compensable *Loretto* style physical invasion. *See also Verizon Communications Inc. v. FCC*, 219 F.3d 744, *cert granted* 531 U.S. 511 (January 22, 2001).

(b) **Bargmann v. Nebraska, 600 N.W. 797 (1999)**

In *Bargmann*, the court determined that the city government's failure to regulate development in a floodplains did not constitute a taking of property when the plaintiff's property flooded. However, the court determined that the state had liability since it had approved the construction contract that caused the flooding at issue.

(c) **Echevarrieta v. City of Rancho Palos Verdes**, 103 Cal. Rptr 165 (Jan. 3, 2001) in which the court determined that a view protection ordinance preventing cutting of trees did not constitute a physical occupation style taking.

4. Examples of *Lucas* Style Cases

a. Palazzolo v. Rhode Island, (United States Supreme Court June 28, 2001)

While pleaded alternatively as a *Lucas* case, the United States Supreme Court stated it was not one. The case involved a property the value of which had been diminished from $3,150,000 to $200,0000 or a diminution of some 94% of the property value. However, the Court spent a great deal of time noting that in total taking situations where there is no economically viable use of property under the restrictive regulation, the fact that a property owner may have acquired his property with notice of the restrictive regulation does not foreclose the payment of just compensation.

b. McQueen v. South Carolina Coastal Council530 S.E.2d 628 (S.C. 2000) cert granted, reversed and remanded 2001 WL 721005 (2001).

While the intermediate state appellate court determined that the total denial of the right to construct a bulkhead and to fill behind it was the denial of all economically beneficial use of that property, the South Carolina Supreme Court reversed. Noting that the similarities between the instant case and *Lucas*, the South Carolina Court applied the notice rule to foreclose just compensation. Specifically, the court stated that because McQueen acquired his property after the restrictive regulation was in place, he was not entitled to compensatory relief. Of course, this view of takings under the "notice rule" has been discredited in the recent Supreme Court decision in *Palazzolo*, as noted above. The United States Supreme Court seems to have made its view of McQueen's total taking case case clear in this regard as it accepted certiorari and reversed and remanded the *McQueen* case in light of *Palazzolo*.

c. Good v. United States, 189 F 3d 1355 (Fed. Cir. 1999).

The rationale of the *Good* case was reversed by the United States Supreme Court in *Palozzolo. Good* erroneously held that *Lucas*:

> "did not hold that the denial of all economically beneficial or productive use

> of land eliminates the requirement that the landowner have reasonable investment-backed expectations of developing his land." *Id* 1361.

d. Del Monte Dunes v. City of Monterey, 526 U.S. 687 (1999).

After rejecting five different development applications, the City of Monterey was sued on the theories that the City's development denials took all economically beneficial use of the subject 36-acre property as well as advanced no legitimate governmental interest. The property owner won on both counts and the Supreme Court also held that the legitimate governmental interest question was properly submitted to the jury.

e. Loveladies Harbor v. United States

In *Loveladies Harbor v. United States*, 28 F.3d 1171 (1994), the nuisance exception did not apply to avoid a compensable taking, as the court determined the government failed to carry its burden to show the state could have prevented the fill under its law of nuisance.[9] Rather, the property interest in the development of the 12.5 acres was vested in the owner as a matter of state property law, so it was not within the power of the state to regulate it without compensation under a common law nuisance theory.

f. Steel v. Cape Corp.

Steel v. Cape Corp., 677 A.2d 634 (1996), holds that denial of a proposal to rezone property on the basis that the new zoning district because the rezone would make school facilities inadequate was a regulatory taking citing *Dolan* and *Nollan*. This case does not categorize well under the traditional tests because it blends a variety of principles. The court determined:

> "While the provision of public facilities is a legitimate concern of the County, the burden of providing adequate schools is disproportionately placed upon [the plaintiff] when residential use is denied them while being granted to its neighbors."

Id. at 650-52.

Of course, even though a regulation may well deprive a property owner of all economically beneficial use, just compensation may not be awarded in all cases. To understand this, one must understand the exceptions to the categorical taking rule.

g. Two exceptions to *Lucas* categorical taking rule:

Even if the landowner establishes a total deprivation, no compensation is due if the disputed regulation prevents a nuisance[10] (maintaining a nuisance is not one of the ownership sticks in the bundle of property rights[11]). In addition, no compensation is due where the effect of the regulation inures in the title under *established* principles of state law.[12] *Palazzolo* makes clear that the kind of background principles of state law referred to in this *Lucas* context, however, are limited. *Palozzolo* first makes clear that *Lucas* does not stand for the proposition that:

> "any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment. Slip op 11.

The *Palazzolo* Court went on to state:

> "It suffices to say that a regulation and that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings permissible limitations derived from a State's legal tradition. * * *. *A regulation or common-law rule cannot be a background principle for some owners but not for others*." (Emphasis supplied). Palazzolo, *supra* slip op 11.

5. Pre-*Palazollo* Cases Dealing with the *Lucas* Exceptions:

(i) *Landgate v. California Coastal Commission*, 17 Cal. 4th 1006 (1998); see

also *Buckley v. California Coastal Commission*, 68 Cal App 4th 1786 (1998) holding that the improper assertion of authority over land, preventing all economically beneficial use thereof, does not constitute a taking during the period of the prohibition, because judicial reversal of bureaucratic bungling is considered a normal delay in the development approval processes.

(ii) *Ali v. City of Los Angeles*, 77 Cal. App 4th 246 (1999). At issue was the denial of a demolition permit for a structure damaged by fire. The court treated as beyond dispute that, in the absence of being rebuilt, the structures on the subject property lacked any economic viability. The California Court determined that because the government's delay in refusing to issue the demolition permit was "so unreasonable from a legal standpoint" as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no purpose other than to delay any development other than for a SRO hotel, that it constituted a taking.[13] Therefore, if bureaucratic bungling is "so unreasonable from a legal standpoint" to be considered arbitrary, then such arbitrariness is not a "normal delay" in the development approval process.

(iii) *Boise Cascade v. State*, 164 Or. 114 (1999), holding, among other things, there is no background principle of state law that bars property owners from knocking down bird nests.

(iv) *M & J Coal v. United States*, 47 F3d 1148 (1995) determines that restrictions under federal mining laws, that might otherwise be compensable as a taking are not compensable

because those restrictions were part of the owners' title to begin with.

(v) *Hoeck v. City of Portland*, 57 F3d, 781, 789 (9th cir. 1995) cert. denied 516 U.S. 1112, regards a municipal ordinance making the maintenance of dilapidated buildings a nuisance. This case holds that a municipal order to tear the dilapidated building down, did not constitute a compensable taking.

(vi) *Atlas Corporation v. United States*, 895 F.2d 745 (Fed Cir. 1990), regarding the imposition of an environmental regulation[14] requiring the cleanup of uranium mine tailings, which cleanup was alleged to cost more than the value of the mill property at issue. The clean up requirement was nevertheless determined not to be a total taking.

(vii) *Heal v. Hearings Bd.*, 96 Wn. App. 522 (1999), holds that the adoption of a steep slope ordinance has to be based on the best scientific data available to support foreclosing building opportunities on parts of particular properties. Otherwise, the ordinance would violate principles of proportionality and be unconstitutional.

(viii) Dissent on cert in *Stevens v. City of Cannon Beach*, 505 U.S. 1207 (1994) by Scalia, in which O'Connor joined, states:

> "[A] State may not deny rights protected under the Federal constitution * * * by invoking nonexistent rules of state substantive law. Our opinion in *Lucas* * * * would be a

> nullity if anything that a State court chooses to denominate a 'background law' * * * could eliminate property rights."

B. Where Do Moratoria Fit In?[15]

1. Moratoria could be alleged to be a taking on either a facial or as applied challenges.

The seminal case concerning temporary takings (and therefore moratoria) is the United States Supreme Court's decision in *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). *First English* holds that temporary land use restrictions that deprive a property owner of all economically beneficial use of property require payment of just compensation, unless a state law background principle (nuisance) excuses the payment of just compensation. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), governmental regulations depriving a property owner of all economically viable use of property, were held to be compensable under the Takings Clause of the United States Constitution. Together, these cases state that temporary development regulations that forbid all economically viable use of property are compensable under the Fifth Amendment to the United States Constitution. Both cases recognize potential exceptions. Nevertheless, both cases are important in understanding temporary taking issues and the issues surrounding development moratoria.

Some lower courts have been reluctant to apply First English and Lucas to temporary taking and moratorium situations. Certiorari is pending in such a case: *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 16 F. 3d 764 (9th Cir. 2000), *cert granted* 69 USLW 3505, June 28, 2001. This case will hopefully resolve the law about when a temporary restriction that deprives a land owner of all economically baneful use of property, is a compensable taking: that is to the extent the *First English* and *Lucas* precedents are unclear. The question the high court certified is:

> "Whether the [California] Court of Appeals properly determined that a temporary moratorium on land

development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?"

2. Moratoria imposed outside of statutory authority or time limitations can give, and have given rise to, 42 USC § 1983 liability.

In *Mission Springs, Inc., v. City of Spokane*, 134 Wash. 2d 947, 952-54 (1998), the city failed to approve a project and instead ordered a traffic study before granting final permit approval, against the advice of its city attorney. The Washington court held that the city council's delay and the failure to allow the requested permits to be granted violated the plaintiff's due process rights.

3. Issues consider regarding whether a moratorium constitutes a taking.

a. Is there a substantial governmental purpose?

b. Does the moratorium deprive property owners of all economically beneficial use or is there some economically beneficial use that can be applied for.

c. Is the moratorium of a finite duration?

d. To what extent is the government taking action to remedy the circumstances giving rise to the moratorium?

e. Watch the outcome in *Tahoe-Sierra*.

IV. FACIAL CHALLENGE TO LAND USE REGULATIONS

This situation involves the allegation that the mere enactment of a regulation constitutes a "taking." The general taking rule articulated by *Agins* applicable to this situation[16] is a taking may be found if :

A. The regulation fails to substantially advance a legitimate state interest; OR

B. The regulation denies an owner economically viable use of his land.

Even though the *Agins* analysis is typically understood in the context of facial taking claims, the trial court applied the first prong of *Agins* to determine a categorical taking had occurred in *Del Monte Dunes v. City of Monterey*, supra. The United States Supreme Court stated in *Del Monte Dunes* that the first *Agin*s prong was an adequate formulation of one of the total takings tests, and also that the question posed under *Agins* was properly submitted as a jury question. Moreover, a stop work order was recently determined to give rise to compensation liability under the Takings Clause on the basis of the failure of the stop work order to advance a legitimate governmental interest. *Frevach v. Multnomah County*, 2000 WL 1875839 (D.C. Or December 21, 2000). However, generally, the *Agins* prongs are used in the context of facial claims only.

Another case to consider in the context of facial claims is *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), in which steep-slope development provisions required operators to restore mined slopes to their original contour. The lower court characterized this as "economically and physically impossible." The lower court also held that even if the restoration was accomplished, the restored land was worth "practically nothing." The lower court held the substantial interference of the regulation constituted a constructive taking that required compensation. The lower court held the regulations "deprive the coal operators of any use of [their] land, not only the most profitable * * *." [17]

The Supreme Court reversed the lower court, determining takings issues must be resolved by factual inquiries conducted with respect to specific property. The mere enactment of the Surface Mining Act did not constitute a taking. The Act only regulated surface mining and did not prohibit it. Furthermore, the Act did not prevent other beneficial use of the land. The Supreme Court stated "in the posture in which these cases come before us, there is no reason to suppose that 'mere enactment' of the Surface Mining Act has deprived appellees of economically viable use of their land." [18]

In *Homebuilders Association of Northern California v. City of Napa*, 2001 WL 615185 (Calif. App Ct. June 6, 2001), the court

determined that a facial challenge to an ordinance requiring 10 percent of all new housing to be affordable to certain segments of the population furthered a legitimate governmental interest. The court also held that there was no occasion to subject such ordinance to the Nollan/Dolan analysis as those analyses did not apply to facial claims. Similarly, an Oregon appellate court has determined that a local ordinance requiring the imposition of conditions of approval and shifting the *Dolan* burden to the property owner, did not as a facial matter, constitute a taking of property. *Lincoln City Chamber v. City of Lincoln City*, 164 Or. App. 272, 991 P.2d 1080 (1999). Contrast these with the reverse outcome in *Heal v. Hearings Bd.*, 96 Wn. App. 522 (1999), decided by the Washington Court of Appeals. *Heal* invalidated the adoption of a City of Seattle "steep" slope ordinance on the grounds that the ordinance authorized the imposition of unconstitutional conditions of approval. Specifically, conditions of approval could be imposed under the ordinance that the government would not be required to show satisfied the *Nollan* nexus and the *Dolan* rough proportionality standard. In this regard, the Washington Appellate Court stated:

> "While the United States Supreme Court has said that the nexus and rough proportionality rules do not apply to outright denial of a project, we decline to adopt the dicta that *Nollan* and *Dolan* may be applied only to dedications of land required to allow a development to proceed. *City of Monterey v. Del Monte Dunes*, [119 S. Ct. 1624 (1999).]"

Remember, in the context of a challenge to the face of an enactment, the Supreme Court reads 'economically viable use' very narrowly and states the mere fluctuation in property value, absent extraordinary delay, is an incident of ownership and does not constitute an unconstitutional taking. A dissenting opinion in a U.S. Supreme Court decision not to grant certiorari in a taking case should cause practitioners to pause. In *Parking Assoc. of Georgia, Inc. v. City of Atlanta,* 115 S. Ct. 2268 (1995), Justices Thomas and O'Conner took the position

the *Dolan* rough proportionality analysis should be applied to legislative determinations. At issue was an ordinance requiring existing surface parking lots to have certain landscaping and requiring that one tree be planted for every eight parking stalls.[19]

V. "AS APPLIED" REGULATIONS THAT LEAVE THE PROPERTY OWNER SOME ECONOMICALLY BENEFICIAL OR PRODUCTIVE USE (TRADITIONAL TAKING ANALYSIS)

Where the application of a regulation to property does not produce a loss of all economically beneficial use, apply the *Penn Central*, factors which are:[20]

A. Character of the Invasion

1. If there is physical invasion of property, a taking occurs no matter how small, and one must utilize the per se or categorical taking analysis of *Lucas*. The case is no longer subject to the Penn Central balancing act, but rather the *Lucas* analysis applies.

2. Is the use prohibited by nuisance or nuisance-like laws? Probably not a taking if the proposed use is a nuisance or nuisance-like activity. (*Lucas* strongly suggests that for a use to be a nuisance, it must be a nuisance under common law principles, and **not** statutory amendments).

3. Reciprocity of advantage - balance quid pro quo: Here, the question is whether the challenged regulation, as applied to the property, is simply a part of a public program adjusting the benefits and burdens of economic life.

B. Economic Impact of the Regulation

1. Compare the value before and after the regulatory interference (severe diminution in value).

2. Nature of the property interest interfered with.

There are a number of state courts that have misunderstood the taking analysis and have determined that the only taking is a categorical taking. The recent United States Supreme Court decision in *Palazzolo v. Rhode Island* makes clear that partial takes under *Penn Central* are alive and well.

In a partial taking situation, look at the property right itself. Also, note that while *Penn Central* is still good law, *Lucas* questions it and calls the whole property analysis applied by the **state court** in the *Penn Central* case "extreme." Nevertheless, it is probably safe to analyze taking claims for less than all of the economically beneficial uses of property with reference to what part of the "bundle of sticks," was interfered with in order to determine what the government "took." In fact, *Palazzolo* holds that partial takes should be analyzed and should bring relief in some cases. *See also Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21 (1999) (approving partial taking analysis and determining compensation due the private property owner); *but see Deupree v. State of Oregon*, 173 Or App 623 (2001) (restriction on highway access did not deprive property owner of all economically beneficial use).

Remember, if the right interfered in the application of the disputed regulation is the right to exclude others, forget the partial taking analysis and move to the per se or "unconstitutional conditions" analysis. *Loretto; Nollan; Lucas; Dolan*.

C. What Are the Owner's Distinct[21] Investment-Backed Expectations?[22]

1. Has the owner pursued a property right in the investment, **and**

2. Done so without knowledge that the disputed regulation would deny the fruits of the investment?

a. Simple denial of the right to exploit some property interest is usually not enough to show a taking. However, the *Nollan* and *Lucas* language is relevant to the effect that building on one's land is not a discretionary governmental benefit

and the *Dolan* unconstitutional conditions analysis.

b. Do not look to the needs of the city or county or other government, rather look to the impacts of the proposed development to determine whether the disputed regulation is one falling within reasonable investment-backed expectations.[23]

c. So called *Nollan* footnote 2 issue which was fully supported by a majority of the Supreme Court *in Palazzolo*:

In *Nollan,* the United States Supreme Court stated:

> "Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

Nollan v. Calif. Coastal Comm'n, 483 U.S. 835 (1987).

This footnote and *Palazollo* mean the fact that property may be subject to regulations that can give rise to unconstitutional conditions at the time the claimant acquired the property, does not make the uncompensated imposition of those conditions lawful. So long as the government would have been required to pay the prior landowner for the exaction under the proposed condition, the landowner had the power to pass his unencumbered title to another. In other words, the purchaser took what his seller had to sell and government cannot turn such private property into public property simply because of the transfer of title. The purchaser stands in the equivalent position of his seller. Otherwise, government could always avoid the Taking Clause by enacting restrictive regulations knowing that otherwise compensable property rights would be

lost between sale and purchase, but the government would not have to compensate any party for the lost property.

VI. "UNCONSTITUTIONAL CONDITIONS" ANALYSIS OF *DOLAN* AND *NOLLAN*

A. Generally:

The unconstitutional conditions analysis applies where local government imposes conditions of approval on a land use approval. *See Third & Catalina v. City of Phoenix*, 895 P.2d 1115 (1994) (distinguishing between "as applied" and unconstitutional conditions cases).

One of the questions about unconstitutional conditions is whether there is a reason to limit the *Dolan* analysis to conditions requiring governmental physical occupation of property. In this regard, some courts take the position that the *Dolan* analysis applies only to physical invasions of real property. *See Clajon Production Corp. v. Petra*, 70 F.3d 1566 (10th Cir. 1995) ("Based on a close reading of *Nollan* and *Dolan*, we conclude that those cases [and the tests outlined therein] are limited to the context of development exactions where there is a physical taking or its equivalent).[24] *See also* David Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan and What State and Federal Courts are Doing About It*, (Winter 1999). This analysis narrowly applying *Dolan* rough proportionality to only physical invasion cases, lacks strong legal support. What principled basis limits the *Dolan* analysis to physical invasions? *See Ehrlich v. Culver City*, 114 S. Ct. 2731 (1994) (United States Supreme Court remanded local imposition of conditions of approval requiring impact fees "in light of *Dolan*")

Moreover, in Oregon, the taking analysis regarding unconstitutional conditions clearly applies to more than just land use conditions of approval requiring the physical occupation of real property. *Clark v. City of Albany*, 137 Or. App. 293 (1995); *see also Altimus v. State of Oregon*, 513 U.S. 801, 115 S. Ct. 44 (1994), *after remand, State of Oregon v. Altimus*, 137 Or. App. 606 (1995) (the potential for prospective conditions of approval requiring dedications of land as an offset to money damages, is subject to

the *Dolan* standard). Furthermore, other courts that have considered the issue have also specifically concluded that monetary exactions are subject to *Dolan*. For example, in *Benchmark Land Co. v. City of Battleground*, 972 P.2d 944, 949 (Wash. Ct. App. 1999), *aff'd* ___ Wash App ___ (December 15, 2000), the city, pursuant to its ordinances, required the developer to make half-street improvements in connection with a subdivision application. On appeal, the court concluded that the rough proportionality analysis applies to monetary exactions, and that a city ordinance requiring payment of a fee for half-street improvements must be roughly proportional to the impacts of the development. *Accord San Remo Hotel v. City and County of San Franscisco*, 100 Cal. Rptr 2d 1 (2001) rev allowed 101 Cal.Rptr2d 653 (2000).

Nevertheless, the issue seems to come up repeatedly in the context of impact fees. The 9th Circuit has recently held that money is indeed property to which the taking clause applies in *Washington Legal Foundation v. Legal Foundation of Washington*, 236 F3d 1097, *en banc hearing granted* 248 F3d 1201 (2001). Accordingly, the idea advanced by some that money is not entitled to the protection of the taking clause, seems fairly clearly to be unwarranted. Moreover, in a recent dissent on certiorari in *Lambert v. City and County of San Francisco* (March 27, 2000) Justices Scalia, Kennedy and Thomas make clear that they would have applied *Dolan* and *Nollan* to a decision denying a permit for development on the basis that the developer claimed the fee required to gain approval constituted a taking. Among other things, this dissent on Cert. states:

> "The first two conceivable bases for the Court of Appeal's decision are so implausible as to call into question the state court's willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal."

These "implausible bases" were that the refusal to pay the impact fee "played no role in the decision" and that the denial was based "solely on concerns of compliance with zoning criteria."

B. If the Answer to All Three Questions *Below* Is Yes, Then There Is No Unconstitutional Condition Requiring Compensation:

1. Is there a legitimate governmental purpose to support the imposition of the condition?

2. Is there an essential nexus between the legitimate governmental purpose and the condition imposed?

3. Is there rough proportionality between the condition imposed and the impacts of the development, both in nature and extent?

a. Burden is on government to establish that the conditions are not a taking under above analysis.

b. Particularized findings are required, but *Dolan* makes it clear that such findings need not have mathematical precision:

> "No precise mathematical inquiry is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."

C. Post-*Dolan* decisions

1. *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998)

A four-member plurality opinion invalidated the application of a regulation, on the basis of the Fifth Amendment. The "swing" voter – Justice Kennedy – wanted to invalidate the act on due process grounds and not Fifth Amendment grounds.

The regulation, a Coal Industry Retiree Health Benefit Act provision, applied to increase a retirement fund's liability to certain of the fund's members. Four members of the majority of the court would have invalidated the Act on the basis of *Penn Central*, *infra*. The four

dissenters would have upheld the law based on the due process clause and would not have applied the Fifth Amendment.

Some commentators speculate that this case has significance to impact fee *Dolan* claims because the "swing" majority voter, Justice Kennedy, wanted to apply due process and not a taking theory to an economic deprivation. The author believes that the *Eastern Enterprises* case so lacks a majority view that it is difficult to give it much weight on any issue, but it does not in any case mean that monetary exactions are immune from Fifth Amendment liability. Some courts have determined that *Eastern Enterprises* has little precedential value for precisely this reason. *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc*., 2001 WL 118155 (6th Cir. Feb. 13, 2001).

Moreover, it is important to keep in mind that governmental damage liability was found by the Supreme Court in Eastern Enterprises, regardless of how one counts the justices' noses. In other words, the plaintiff won in *Eastern Enterprises*. What this all may signal is that the United States Supreme Court is indeed more willing than previous to determine governmental action is arbitrary or otherwise unfair. *See also Village of Willowbrook v. Olech*, ___ U.S. ___, 120 S. Ct. 1073, 145 L.Ed 1060 (2000) (applying equal protection to award a claimant relief). In this regard, caution by governmental actors may well be warranted.

Accordingly, complaints alleging Fifth Amendment takings, should also consider including due process and equal protection claims.

2. *Ehrlich v. Culver City*, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993*), cert. granted, judgment vacated and remanded in light of Dolan*, 114 S. Ct. 2731 (1994)

Ehrlich involved the imposition of conditions requiring the payment of fees as a prerequisite to development. The U.S. Supreme Court remanded the city's decision in *Ehrlich* to the California courts in light of *Dolan*. The California Supreme Court decided *Ehrlich* after remand on March 5, 1996, and held the disputed impact fees are subject to *Dolan* analysis.

3. *Burton v. Clark County*, 958 P.2d 343 (Wash. Ct. App. 1998), holding that a condition requiring a road dedication for a three-lot land division failed to meet the rough proportionality standard.

> "The government may not use the permitting process as a vehicle for solving public problems not created or exacerbated by any project."

Id. 354 n.42

4. *Clark v. City of Albany*, 137 Or. App. 293 (1995)

The Oregon court remanded under *Dolan* determining the findings were insufficient to establish the requisite relationship between traffic generated by the development proposal and the need for the locally required street improvements. "The findings must compare the traffic and other effects of the proposed fast food restaurant to the street and frontage improvements." This case also holds the *Dolan* analysis applies not only to physical occupations of land, but also to requirements that developers construct off-site improvements. Specifically, the court stated:

> "[t]he fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies only to conditions of that kind."

5. *J.C. Reeves Corp. v. Clackamas County*, 131 Or. App. 615 (1994).

The Oregon Court of Appeals observed that *Dolan* requires detailed findings of traffic and "other related phenomena and the relationship of a proposed development to them * * *." Regarding off-site improvements required by the county in its decision, the court stated the inquiry is not on off-site versus on-site improvements. The comparison is instead:

> "[B]etween the traffic and other effects of the subdivision and the subdivision frontage improvement that the county has required."

131 Or. App. 622.

The court explained that the danger to avoid is the following:

> "The difficulty is that the county's findings do not make the comparison at all, or at least not with the specificity that *Dolan* requires. They simply posit the relationship between subdivision-generated traffic and the need for the improvements. Also, the county relies on the fact that some of the improvements are required by its zoning ordinance. As we said in *Schultz v. City of Grants Pass* * * * 'the character of the condition remains the type that is subject to the analysis in *Dolan*' * * * whether it is legislatively required or a case-specific formulation. The nature, not the source of the imposition is what matters."

131 Or. App. 622-23.

Also important in this case is the determination that a condition of approval deleting a one-foot "spite strip" shown on a site plan to separate the subject property from a neighboring property is not an unconstitutional condition.[25] In this regard, the court stated:

> "The condition is an appropriate device for providing the adjacent property with the access that the proposed development would otherwise eliminate or impair."

131 Or. App. 624. 3.

6. *Schultz v. City of Grants Pass*, 131 Or. App. 220 (1994).

The Oregon Court of Appeals held that in the context of an application to partition property, there are no impacts to mitigate with conditions of approval. It is improper for local government to assume any particular eventual level of use consistent when no specific development proposal is submitted. In other words, a local government may not impose conditions of approval based on intensive potential and future

uses of property, rather than the particular more limited use for which the applicant is seeking approval.

Schultz assumes there are additional local opportunities to impose needed conditions of approval at the time when intensive development is proposed. This may be important. In *J.C. Reeves*, the court specifically stated the *Schultz* analysis did not foreclose the constitutionality of the spite strip condition of approval, even though its elimination would facilitate the future development of the neighboring property. The *J.C. Reeves* court stated *Schultz* was not analogous:

> "The present and future effects on access to the neighboring property that were the basis for the [spite strip] condition are the result of this proposed development of petitioner's property. Unlike the situation in *Schultz*, no further applications or development, with the concomitant opportunity for the county to consider further developmental conditions need to occur or be presented in order for the proposed development to have the impacts on access that the required elimination of the strip is aimed at preventing. * * *." *J.C. Reeves, supra*, 131 Or. App. 614.

Therefore, *J.C. Reeves* may have narrowed the holding in *Schultz* by suggesting that if there are no subsequent opportunities to condition development approvals, then the subject development is the one that authorizes use of property and that decision may then be the stage where conditions of approval may constitutionally be imposed.

7. *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994).

Oversizing condition of approval regarding drainage system was held violative of *Dolan*. Specifically, the developer of a 42-acre property for residential purposes was required to install a drainage system that would serve an entire watershed and not the proposed development. The court stated:

> "The County's objective to prevent flooding may be rational, it may not be rational to single out the [plaintiff] to provide the entire drainage system." *Id*. at 1274.

D. Post-*Dolan* Waiver

Once case holds that unconstitutional conditions taking claims are waived if the claimant accepts the benefits of a permit and does not object to the alleged unconstitutional conditions during the local processes and file a timely administrative claim. *L.A. Dev. v. City of Sherwood*, 159 Or. App. 125, *rev. denied*, 329 Or. 61 (1999), *cert. denied*, 120 S. Ct. 788 (2000

E. Choice of Forum

A takings claimant may well be subject to principles of res judicata regarding the federal taking claim while state procedures are being employed. *See Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 278 (1998); *Bayou Des Familles Dev. Corp., v. United States*, 130 F.3d 1034 (Fed. Cir. 1997); *see also Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1306 (11th Cir. 1992).

In *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 278 (1998), the taking plaintiff specifically reserved his federal taking claims and chose only to litigate his state taking claims in state court. The plaintiff in *Dodd* utilized both *Pullman* (*Railroad Com. of Texas v. Pullman Co.*, 312 U.S. 496 (1941)) and *Burford* (*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)) abstentions to achieve the goal of reserving the federal claims.

While the abstentions utilized in *Dodd* succeeded in avoided claim preclusion in federal court, the abstentions were insufficient to avoid issue preclusion. Accordingly, after the plaintiff lost in state court on his taking claim, the federal court held that the state court proceeding on the state taking claim resulted in issue preclusion on the federal taking claim. Issue preclusion was applied by the court because the court found (1) the Oregon LUBA proceeding involved "identical" issues to those under the

federal taking claim; (2) those issues were actually litigated at LUBA and were essential to LUBA's final decision on the merits; (3) the plaintiffs were afforded a full and fair opportunity to litigate their taking claims at LUBA; (4) LUBA's appeal hearing had appropriate procedural safeguards, including findings based on a record; (5) the LUBA proceeding was the kind of proceeding to "which the [Oregon Courts] will give preclusive effect."

It was important to the Ninth Circuit that the *Dodd* plaintiffs did not ask LUBA for an evidentiary hearing and, therefore, claims regarding the equivalency of the LUBA and proceeding and a federal trial were unavailing.

Since *Dodd*, however, the United States Supreme Court decided *City of Monterey v. Del Monte Dunes, Ltd.*, 119 S. Ct. 1624 (1999), holding that a taking plaintiff has a right to a jury trial on the issue of whether a compensable taking of private property occurred. No jury trial is of course possible in a LUBA proceeding. Accordingly, it seems clear that LUBA review would not meet the res judicata tests, although this issue is untested and caution is warranted.

VII. HISTORICAL PERSPECTIVE

A few illustrative United States Supreme Court cases of the evolution of private property in the context of the taking analysis follow:

A. *Mugler v. Kansas,* 123 U.S. 623, 31 L.Ed. 205 (1887)

The U.S. Supreme Court upheld a Kansas law declaring all breweries of intoxicating beverages to be public nuisances. The Court held the prohibition of breweries of intoxicating beverages is not a taking because of the substantial relation between the protection of the public health safety and morals and the disputed regulation.

B. *Hadacheck v. Sebastian,* 239 U.S. 394, 60 L.Ed. 348 (1915)

A municipal ordinance prohibited brick manufacturing that resulted in an 87.5 percent diminution in value of a private property interest. The ordinance was held to not impose a taking.

C. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)

A statute was enacted prohibiting the mining of coal and the plaintiffs had a deeded interest in mining coal. The Supreme Court held the statute went "too far" and was a taking. This was the first regulatory taking case in which a taking was found.

D. *Euclid v. Ambler Realty*, 272 U.S. 365 (1926)

A zoning ordinance was adopted that rezoned and, thus devalued Ambler Realty's property by 75 percent (rezoning was from commercial industrial to residential). The Supreme Court held this devaluation did not constitute a taking. The Court stated the concept of zoning is constitutional and the down zoning at issue was not a taking because it was not clearly arbitrary and unreasonable and had a substantial relation to the health, safety morals and general welfare of the town. The Supreme Court stated:

> "In every ordered society, the State must act as umpire, to the extent of preventing one man from using his property or rights as to prevent others from making a correspondingly full and free use of their property and rights. The abstract right of a man to build a firetrap is limited by the rights of other people not to have their houses subject to the peril created by it. The right of a man to maintain a nuisance on his own property is limited by the rights of others not to be subjected to the danger of its proximity. Accordingly, the so-called police power is an inherent right on the part of the public umpire to prevent misuse of property or rights which impair the health, safety or morals of others, or affect prejudicially the general public welfare."

E. *Miller v. Schoene*, 276 U.S. 272, 72 L.Ed. 568 (1928)

The U.S. Supreme Court stated the taking clause does not require the state to compensate owners of cedar trees the government ordered

destroyed to prevent the spread of disease to apple orchards. Importantly in *Miller*, the Court deferred to legislature's determination of what constituted a nuisance.

VIII. SUMMARY

The law of unconstitutional takings is now, and always has been, complex. Local government attorneys and planners should take a hard look at fact situations in light of recent cases and the aggressive planning programs that may significantly alter settled expectations regarding property investments. There is little room for automatic reactions that any case is, or is not, a taking. Rather, such determinations about whether a particular regulation works a taking, can only be made based on thoughtful analysis and consideration.

Clearly, a property owner cannot be required to give up a constitutional right in exchange for a governmental benefit where the right sacrificed has little or no relationship to the benefit. If government imposes regulations on private property to such an extent that they take all economically beneficial use of property; so interfere with settled expectations so as to constitute a partial taking; or require the application of unconstitutional conditions, then government may impose the regulation, but it must pay the property owner just compensation when it does so.

[1] The majority opinion in *Lucas* includes curious dictum in this regard, stating:

> "[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that the new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). * * *." *Lucas, supra* 505 U.S. at 1027-28.

[2] The *Del Monte Dunes* plaintiff submitted five (5) different development applications and all five were rejected. The *Del Monte Dunes* Plaintiff sued the city for a taking of its private property. The city predictably first defended on the basis that the taking claim was still not ripe. The Ninth Circuit rejected the city's defense and ruled the claim was indeed ripe. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 (1990). Thus, the Ninth Circuit sent the case to trial on the taking claim on the merits, nine (9) years after the first land use application, for a use allowed on the subject property, had been submitted. The property was zoned by the city for intensive residential use authorizing

1000 housing units on the property. Notwithstanding the intensive range of permitted uses, the Del Monte Dunes' initial proposal was for 344-residential units. The final proposal rejected by the city was for 190-residential units.

[3]"Total taking" is used somewhat loosely here. In *Lucas*, the court acknowledged the imposition of a regulation, the effect of which reduced 90 percent of the value of the subject property could be considered a "total taking." Nevertheless, in *Palazzol*o, the United States Supreme Court determined that a reduction in value from more than 3.1 million dollars to a $200,000 value, or about a 94 percent diminution in value, meant a *Lucas* style taking analysis is unwarranted. Rather, in such circumstances, the Supreme Court stated such an allegation of a taking that leaves this kind of value representing an economically beneficial use, should be analyzed under *Penn Central*. The difference may well be a recognition that property required to be left in a natural state may have some value, but it is not a value representing an economically viable or productive use of land. Therefore, requirements such as what which was at stake in *Lucas,* i.e. that property be left natural, may well be properly analyzed as a categorical taking notwithstanding there may be some value to the lot as more space for a neighboring piece etc. On the other hand, a regulation causing a dramatic property devaluation and that leaves a minimal economically productive use should not be analyzed as a categorical taking precisely because of the economically productive use of the property allowed.

[4]The *Lucas* majority appears to equate economically beneficial or productive use with developmental uses.

[5]The meaning of "property" is often difficult to establish. Generally, the property rights bundle consists of the following elements: (1) right to exclusive possession (including right to quiet enjoyment), (2) right to use property, (3) right to dispose of property. In the *Penn Central* case, the Supreme Court stated the following regarding property:

> "Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. * * * This Court focuses * * * on the nature and extent of the interference with rights in the parcel as a whole -- here the city tax block designated as the landmark site."

In *Andrus v. Allard*, the Supreme Court stated the following concerning property (albeit personal property -- eagle feathers):

> "[T]he denial of one traditional property right does not always amount to a taking. At least where the owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety."

However, of the following language from the Rehnquist *Keystone Bituminous* dissent (which dissent has now been adopted, for the most part, as the current Supreme Court majority view), where Justice Rehnquist states:

> "[W]here the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest."

[6]Thus, no case-specific inquiry is warranted into the public interest advanced in support of regulation.

[7]In *Lucas*, the U.S. Supreme Court made it clear that a deprivation of less than the property owner's total bundle of property rights could be a "total deprivation" of all economically productive or beneficial uses of property:

> "When, for example, a regulation requires a developer to leave 90 percent of a rural tract in its natural state, it is unclear whether we should analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution of value of the tract as a whole."

[8]Justice Scalia cites the Rehnquist dissent in *Keystone* and *Penn Central* condemning the parcel as a whole rule. The composition of the "land" that is taken will be an increasingly fertile battleground, especially in wetlands disputes.

[9]*Id*. at 1183.

[10]However, the Court has stated that a proposed use of property is presumptively not a nuisance if others in the area are doing it. It was on this basis that the court was unimpressed by the government's argument that it was protecting life and property from flooding and hurricanes. Specifically, there were houses similarly situated nearby that the government was not interfering with. In this regard, it is noteworthy that after the Supreme Court's decision in *Lucas*, South Carolina settled the case and bought the two disputed *Lucas* lots:

> "[South Carolina] promptly turned around and sold them to a developer who proceeded to build the very homes that *Lucas* had been forbidden to build. The state regulators' environmental zeal lasted only as long as they thought they could stick *Lucas* with the cost of the proverbial free lunch. But when faced with the tab themselves, preservation of *Lucas*' lots suddenly ceased being environmentally important." Michael Berger and Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches – A Response to Taking Stock of the Takings Debat*e 877, 867; Gideon Kanner, *Not with a Bang,*

But a Giggle: The Settlement of the Lucas Case, Takings: Land Development Conditions and Regulatory Conditions After Dolan and Lucas 308 (David L. Callies ed. 1996).

It is situations like these that undermine state nuisance and background claims.

[11]It is fairly safe to assume the "sticks in the bundle" of property rights do not include nuisance, reasonable delays, and some governmental regulation of property.

[12]However, preserving historic buildings, coastal views and natural ecosystems has not been associated with nuisance and regulations requiring the same that deprives of economically beneficial use would likely be total deprivations requiring compensation. The Court in *Lucas* singled out natural resource protection and historic preservation as examples of potential taking situations.

[13] The *Ali* Court specifically stated:

> "The City's delay of the demolition permit was so unreasonable from a legal standpoint as to be arbitrary and not in furtherance of any legitimate governmental objective. * * *" *Ali,, supra* 77 Cal. App 4th at 257.

[14]Uranium Mill Tailings Radiation Control Act of 1978, Sec. 2-302, 42 U.S.C.A. Secs. 7901-42.

[15]Keep in mind the pre-*Lucas* case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 US 304, 107 S Ct 2378. In *First English*, the county banned construction of buildings in a flood plain, pending the adoption of permanent regulations. The U.S. Supreme Court held a temporary restriction on development that prohibited all use of property could be a taking and remanded the case to the county for a determination whether the temporary period of delay required by the regulation was a "normal delay" which should be expected by a landowner. There is some dispute regarding whether the *Lucas* "categorical taking" holding applies only to permanent deprivation cases; however, the *First English* case would seem to clarify that dispute and make it clear that temporary deprivations are indeed subject to the taking analysis. However, a number of courts are reluctant to acknowledge what otherwise seems to be the plain holding of *First English*. *See Griffith v. State of New Jersey*, L-2456-95 (NJ App Div May 15, 2001) (determining that bringing a taking claim is part of the "normal delays" in the development approval process); *see also Landgate v. California Coastal Comm'n., supra*. As noted, the strength of the *First English* rule is likely to be reaffirmed in *Tahoe-Sierra* when the Supreme Court revisits the issue in that case next year.

[16]However, note that in *Agins* the U.S. Supreme Court did not reach the merits of the taking claim on ripeness grounds.

[17] *Id.* at 441.

[18] *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 296-97 (1981).

[19] Of course, the United States Supreme Court in *City of Monterey v. Del Monte Dunes* made clear that the *Dolan* analysis applies to the imposition of unconstitutional

conditions and implies (in dicta) that the *Dolan* analysis does not fit well in other kinds of regulatory taking cases. However, the sentiment of these two members of the court is important. It represents the shift in judicial attitudes reflecting greater contemplation of taking cases that was true in past decades.

[20]In *Penn Central*, an unsuccessful taking claim was brought against the application of regulations prohibiting construction of additional stories on historic structure. The property owner alleged it had the right to construct its building into the airspace above and, therefore, the city had unconstitutionally taken that airspace.

The Supreme Court stated the nature and extent of the regulation's interference with the property had to be evaluated in relation to the entire parcel, not just the airspace that was claimed to have been taken:

> "Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. * * * This Court focuses * * * on the nature and extent of the interference with rights in the parcel as a whole -- here the city tax block designated as the landmark site."

Of course, this statement must be juxtaposed against the dissent in *Keystone Bituminous* (which, for all practical purposes is probably the current majority view), which argued that a support estate was a separate unit of property. In this regard, Justice Rehnquist stated:

> "[W]here the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest."

[21] Distinct investment backed expectations are often referred to by courts as "reasonable investment backed expectations or RIBEs. However, one can imagine that a distinct investment backed expectation and a reasonable one may not be the same thing. A distinct investment backed expectation may not be reasonable to a particular judge, but never the less may well be distinct. Therefore, using the language of Penn Central in the context or the "distinct investment backed expectations" is probably wise – at least for lawyers representing property owners.

[22]Note that a vested right is a right to a particular use. Therefore, investment-backed expectations extend to the use(s) contemplated under any vested right.

[23]*See* n.19.

[24] This analysis may indeed be circular. The "equivalent" of a physical invasion may be a total deprivation of some interest in property, even though it is less than the whole – just as a physical invasion requiring appropriation of an easement for a bikeway is a total deprivation of that part of a private property interest.

[25]One should note the court made it clear it was simply assuming, as the parties had done, that the condition requiring the elimination of the "spite strip" was subject to the *Dolan* analysis in the first place.