

STREAM PROTECTION ORDINANCES

FIFTH AMENDMENT TAKING CONSIDERATIONS

I. INTRODUCTION

Proper regulation drafting requires an analysis of the effects of constitutional guarantees and rights on the proposed regulation. Regulations that affect the use of private property require a standard Fourteenth Amendment due process and equal protection analyses, but as importantly, they require an analysis under the Fifth Amendment Takings Clause of the United States Constitution. This analysis is defined by court decisions that interpret very general constitutional language (i.e., "nor shall private property be taken for public use, without just compensation") in the context of case-specific factual circumstances.

Stream protection ordinances are prime examples of property use regulations that must be developed with a comprehensive understanding of "takings" jurisprudence to help minimize the potential for successful constitutional challenges to the ordinance. By analyzing judicial opinions concerning takings law and applying some of the central concepts during the drafting process, a constitutionally valid stream protection ordinance can be developed. Several general principles derived from takings jurisprudence serve as guides:

1. Create regulations that substantially advance the legitimate state and governmental interest of protecting the health and safety of the community and, specifically, by preserving and protecting riparian corridors and providing appropriate flood and storm water management systems through the process of natural water courses.
2. Create regulations that do not result in a total diminution in value, but instead leave some economically viable or productive use for each regulated parcel of land.
3. Create regulations that identify specific beneficial as-of-right uses to portions of the property within the protection zones.
4. Create reasonable variance and appeals mechanisms by which adversely affected property owners, under certain unusual circumstances, may seek relief, from the restrictions is the stream protection ordinance.

II. TAKINGS: PHYSICAL AND REGULATORY

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without just compensation. *Palazzolo v. Rhode*

Island, 121 S.Ct. 2448 (2001). It does not prohibit the government from taking property. It just requires that if it does so it must pay the owner just compensation. The difficult question is what constitutes a taking. While the most obvious taking occurs when the government physically encroaches upon or occupies private land for its own proposed use. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982), the Supreme Court recognizes that there are instances when government actions do not physically encroach upon or occupy the property, yet still affect and/or limit its use to such an extent that a "taking" occurs. *Pennsylvania Coal Co. v. Mahon*, 43 S.Ct. 158 (1922) ("while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking").

Though the concept of "regulatory taking," as opposed to a "posessory taking," exists to protect private property interests from the imposition of unreasonable or excessive governmental restrictions on the use of land, the Supreme Court has also recognized that "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* Furthermore, the "mere regulation or the use of land has never constituted a "taking" or a violation of due process under federal or state law." *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash. 1990). The task in any given case is to determine when a regulation or government action exceeds constitutional bounds and therefore requires just compensation.

Two additional concepts to be considered prior to preparing regulations, are that:

(1)) one landowner should not be forced "to bear burdens which in all fairness should be borne by the public as a whole." *Armstrong v. U.S.*, 80 S. Ct. 1563 (1960); and

(2) "landowners do not have the right to use their property in a manner injurious to the community." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232, 1245-46 (1987); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) ("An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."); *Rowe v. Town of North Hampton*, 553 A.2d 1331 (N.H. 1989).

It is the tension between these two concepts that has made "regulatory takings" law so difficult to define and predict. Nevertheless, the Supreme Court has provided a fair amount of guidance to assist government in making decisions concerning the regulation of property rights and uses. The primary takings concepts, as set forth by the courts, are identified in this memorandum to help to serve as guidance in the creation of a fair and defensible stream protection ordinance.

III. "FACIAL" v. "AS-APPLIED" TAKINGS CHALLENGES

A "facial" takings challenge is one based on the concept that the adoption of the regulation, in and of itself, amounts to a taking. In facial challenges, the analysis is independent of the property owner asserting the claim's specific circumstances of the. *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 101 S.Ct. 2352 (1981).

The Supreme Court has noted that a property owner faces "an uphill battle in making a facial attack" on a statute as a taking. *Id.* A property owner must show that the regulation's "mere enactment" amounted to a taking. *Lake Nacimiento Ranch Co. v.*

San Luis Obispo County, 841 F.2d 977 (9th Cir. 1987), amended 841 F.2d 872 (1988). Facial attacks can usually be defeated by establishing an economically viable use. "Generally, the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property." *Id.* Where a regulation in question provides for variances and "special uses," the courts typically rule that that "fact alone logically prevents the ordinance from being over-restrictive on its face." *Id.*

Accordingly, rather than engaging in detailed analysis of the regulation's effect on a specific piece of property, courts will simply find that uses available in the language of the ordinance, either as-of-right or via variance, insulates it from facial attack. Because successful "facial" challenges can be virtually eliminated by incorporating a variance mechanism into the ordinance, the remainder of this memorandum will focus on methods of minimizing successful "as-applied" challenges.

Key: Create a meaningful variance, special use and/or appeal mechanism to ensure that the mere enactment of the regulation does not deprive the owner of all economically viable use of the property.

IV. PHYSICAL TAKING

The Supreme Court has made clear that any action by government that results in a permanent physical occupation or invasion of a landowner's property is a *per se* taking of property. No matter how minute the intrusion, and no matter how weighty the public purpose behind it, compensation is required. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3175 (1982). The intrusion must, however, be of a nature that subtracts from the owner's full enjoyment of the property. *United States v. Causby*, 66 S. Ct. 1062, 1067 (1946).

While some cases have examined physical occupations in the context of the "Character of the Government's Action" factor of the *Penn Central* multi-factor balancing test, stating that the extent of a government's physical occupation of property should be considered in determining how heavily this factor weighs in the balance, it has become clear that a permanent occupation is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily consider." *Loretto*, 102 S. Ct. at 3174. It becomes a *per se* takings. A permanent occupation effectively destroys the rights to possess, use and dispose of property. *Id.*, at 3176, citing *United States v. General Motors Corp.*, 65 S. Ct. 357, 359 (1945).

In *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), the city required Ms. Dolan to dedicate the portion of her property lying along a creek on her property within the 100-year floodplain for a greenway system (to which the public would be allowed access) and for improvement of a storm drainage system. The City also required the dedication of an additional 15-foot strip of land adjacent to the floodplain for a pathway as a condition of approval of the expansion of her hardware store. The Court termed the dedication requirement a "permanent recreational easement," and questioned "why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.* The Court also made a point that the required public access to the greenway resulted in her loss of ability to exclude others from her property; the loss of "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.*, quoting *Kaiser Aetna v. United States*, 100 S. Ct. 383, 393 (1976). The Court ultimately held that the dedication requirements constituted a taking of Ms. Dolan's property.

Key: Do not require that the property owner allow public access to any portion of the property within the setback or protection zone for recreational, trail or other public use, unless there is a willingness to purchase, or otherwise acquire, an interest in land that provides for the requisite access.

V. REGULATORY TAKING

A. Lucas Takings

Where physical occupation of land is not at issue, the Supreme Court's cases identify two basic forms of regulatory taking. In *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), the Court held that, subject to "certain qualifications," denial of "all economically beneficial or productive use of land" constitutes a taking. In *Lucas*, the owner of two beachfront lots was denied "all economically viable use" of his property by the South Carolina Beachfront Management Act. Saying that "there are good reasons for its frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of a common good, that is, to leave his property economically idle, he has suffered a taking," *Id.* and the Court established a "categorical rule" that "total regulatory takings must be compensated." The situation involving the denial of 100 percent of the economically viable use of the land, unless the regulation reinforces a common law nuisance principle is known as a "categorical" or "*per se*" taking. Importantly, however, to the extent that some economically beneficial or productive use remains as-of-right, or is available by way of a variance or special use mechanism, the *per se* taking analysis is not applicable, and the court returns to a balancing of interests -- a more detailed, multi-factor analysis that will be implemented by the courts to determine the existence of a taking.

Key: Ensure that regulated land is left with an economically beneficial use.

B. Traditional Takings

A regulation that places limitations on land, but that does not eliminate all economically beneficial use, is not a *per se* taking. It may, however, result in a taking. Whether it does, depends on a complex analysis of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), quoting *Penn Central Transportation Co. v. City of New York*, 98 S. Ct. 2646 (1978). These factors have become known as the *Penn Central* factors.

Shortly after the *Penn Central* factors were established, the Supreme Court had another opportunity to fine-tune the takings test. In *Agins v. City of Tiburon*, 100 S. Ct. 2138 (1980), the Court stated that the application of a general zoning law to a particular property becomes a taking if the ordinance either: (1) "does not substantially advance legitimate state interests" or (2) "denies an owner economically viable use of his land." *Id.* at 2141. The *Agins* Court held that the City of Tiburon's open space ordinances substantially advanced a legitimate governmental goal, that of discouraging premature and unnecessary conversion of open-space land to urban uses, and was a proper exercise of the City's police power to protect its residents from the effects of urbanization.

While in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987), the Court acknowledged that the *Agins* two-prong test has “become an integral part of our takings analysis,” the *Palazzolo* and the *Tahoe-Sierra* Courts (the two most recent Supreme Court land use taking cases) conspicuously failed to cite *Agins* in their opinions.¹

The Supreme Court has accepted certiorari on the case of *Linda Lingle, Governor of the State of Hawaii, and Mark J. Bennett, Attorney General of the State of Hawaii v. Chevron USA, Inc.*, S. Ct. No. 04-163, (Cert. Granted: October 12, 2004) in which the Court has agreed it will answer the question of:

[w]hether the Just Compensation Clause authorizes a court to invalidate state economic legislation on its face and enjoin enforcement of the law on the basis that the legislation does not substantially advance a legitimate state interest, without regard to whether the challenged law diminishes the economic value or usefulness of any property.

Many followers of "takings" jurisprudence have felt for years that *Agins'* first prong, whether a regulation substantially advances a legitimate state interest, is an improper mingling of the 5th Amendment Takings Clause and the 14th Amendment's Substantive Due Process provisions, in that this inquiry is not relevant to whether a taking has occurred, but is the essence of this 14th Amendment inquiry, i.e., whether the means justify the ends. This very important decision is expected in the Spring of 2005.

Until the decision in *Lingle* is rendered, it is impossible to know which form of analysis a particular court will use in a potential takings case concerning a stream protection ordinance. Therefore it will be valuable here to address each of the “prongs,” “factors,” and other relevant considerations courts may consider. This will assist the practitioner in creating a legally defensible ordinance.

C. Substantially Advance Legitimate State Interests

Takings claims historically have been evaluated with great deference by the Courts, specifically when it comes to what constitutes a legitimate state interest and the relationship required between the regulation and the public interest. Courts generally grant greater deference to regulations designed to achieve some legitimate objective than to regulations designed to achieve other objectives. For example, safety concerns such as loss of life resulting from flooding would support more intrusive regulations than would concerns such as aesthetics. Although a court's willingness to defer to legislative determinations on this issue will vary based on the nature of the governmental objective, those state interests that are considered by courts to be legitimate governmental interests is extremely broad and the government is given the widest latitude in the exercise of its discretion in this regard. See *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993); *Hawaii Housing*

¹ The failure of the majority in *Palazzolo* to cite *Agins* may not be all that surprising. Justice Kennedy is the author of that majority opinion and in *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998), he, concurring in the judgement and dissenting in part, expressed his position that *Agins'* first prong (“substantially advances”) “is in uneasy tension with our basic understanding of the Takings Clause... .” and constitutes an improper entanglement of 14th Amendment substantive due process and takings jurisprudence.