

Penn Central Regulatory Takings

Part II

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)

(IMLA 10/22/2020)

Today: Property = A Bundle of Rights

- Property ownership in the post-industrial era consists of a bundle of rights.
  - *See Dolan v. City of Tigard*, 512 U.S. 374, 384, 393 (1994) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).[7]
- One has a right to use his property in certain ways – one does not have an unfettered right to use property in any manner.
  - *See Penn Central*, 438 U.S. at 131 (citing *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 384 (1926) (adoption of zoning regulations deprived property of 75% of its value and such diminution in value did not constitute taking – property worth $10,000/ac for industrial development and only $2,500/ac if residentially developed – relief sought was injunction declaring zoning regulations unconstitutional, not monetary damages for inverse condemnation).
- Whether there is a regulatory taking depends in large part on **how many sticks in the bundle of rights are impacted by the regulation(s) versus how many sticks in the bundle of rights remain**.
  - *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("At least where an 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.").
  - *Miller v. Schoene*, 276 U.S. 272 (1928) (Takings claims have been held without merit in a wide variety of situations when challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted, thus causing substantial individualized harm.) *See Penn Central*, 438 U.S. at 125.[8]

Purpose of Constitutional Takings Clauses

- To prevent the government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.[9]

What is a *Penn Central* taking?

- A *de facto* partial taking of private property resulting from the adoption and/or application of regulations that deprive such property of substantial value/beneficial use.[1]
- The Texas Supreme Court likens a regulatory takings case to a "venture into the 'sophistic Miltonian Serbonian Bog.'"[2]
- Whether there has been a *Penn Central* regulatory taking is determined on an *ad hoc* basis giving consideration to the facts and circumstances on a case by case basis.
- Defeating a *Penn Central* regulatory takings claim will be predicated on:
  - Understanding and clearly presenting an overview of the regulatory taking framework;
  - The evidentiary presentation made by the local government; and
  - A courts willingness to resolve whether the facts and circumstances give rise to a taking as a question of law, not a question for the fact-finder (*i.e.*, a jury).[3]

Penn Central Takings Calculus

- The Supreme Court established **three factors to** consider in making the "**ad hoc determination**" of whether local government laws/regulations affected a compensable taking. Those factors are:
  - The **economic impact** of the regulation on the claimant;
  - The extent to which the regulation interfered with the **claimant's** distinct (*i.e.*, **objectively reasonable) investment-backed expectations**; and
  - The **nature and character** of the governmental action (*i.e.*, **the local laws/regulations**).
  - Failing to satisfy one factor usually means the Penn Central claim will fail.[16]

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

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Civil Action No.

39. Additionally, this action raises related state law claims of tortious interference with contractual and business relations, arising under Maryland common law. To the extent these or any state law claims raised in this Complaint are subject to the Local Government Tort Claims Act, Sections 5-301 *et seq.* of the Courts and Judicial Proceedings Article of the Maryland Code, Plaintiffs have complied with the statute's notice provision by service of this Complaint within the statutory notice period.

40. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 1367, and 2201, and 42 U.S.C. § 3613. Plaintiffs seek an award of their attorneys' fees pursuant to 42 U.S.C. § 1988(b).

41. Venue is proper pursuant to 28 U.S.C. § 1391, as the events giving rise to the claims alleged herein have occurred, and will continue to occur, in this district and because the properties and entities that are the subject of this action are located in this district.

FACTUAL BACKGROUND

A. Governor Hogan's Declaration of Catastrophic Health Emergency

42. On March 5, 2020, Governor Lawrence J. Hogan, acting under Section 14-3A-2 of the Public Safety Article of the Maryland Code, declared a catastrophic health emergency in Maryland due to the spread of the novel coronavirus, SARS-CoV-2, and the disease it causes, COVID-19. *See* Proclamation, "Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19" (March 5, 2020), *available at* https://governor.maryland.gov/wp-content/uploads/2020/03/Proclamation-COVID-19.pdf. The Governor has since continued to renew the emergency declaration.[3]

[3] "The Governor may renew [a catastrophic health emergency declaration] for successive periods, each not to exceed 30 days, if the Governor determines that a catastrophic health emergency continues to exist." MD. CODE ANN., PUBLIC SAFETY, § 14-3A-02(c)(3).

effect, it unlawfully prohibits housing providers from exercising their renewal rights (which include the right to increase rent) in existing leases. Essentially, it arbitrarily and unlawfully foists all of its retroactive and indefinite-in-duration burdens onto housing providers as a class.

COUNT ONE

Taking Without Just Compensation – U.S. Const., Fifth Amend.; 42 U.S.C. § 1983
(Against All Defendants)

71. Plaintiffs repeat and reallege each and every allegation of this Complaint as if fully set forth herein.

72. The takings clause of the Fifth Amendment to the United States Constitution, incorporated against the States by the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation."

73. Defendants have caused, and will continue to cause, Plaintiffs to be deprived of their rights to possess, use, manage, and dispose of their property. Defendants have done so, and will continue to do so, without providing just compensation to Plaintiffs.

74. The Acts are unlawful confiscatory "regulatory takings." In a blanket manner, they prohibit any housing provider from increasing any existing tenant's rent, or assessing any late fee, for an indefinite period of time, as long as the Governor's declared catastrophic health emergency lasts, and for ninety (90) days thereafter (or three (3) months thereafter under the Howard County Act). But at the same time, they include no exceptions, and they provide for no individualized adjustment mechanisms to ensure housing providers receive reasonable returns on investments or otherwise avoid confiscatory results in their application. Without any processes for individualized consideration, they are facially unconstitutional.[13]

[13] The Court of Appeals of Maryland has observed: "A number of courts have found that rent control regulations may be considered to have a confiscatory effect 'if no rent adjustment

Other Defenses to a Regulatory Takings Claim

- Parcel as a whole rule
- Exhaustion of administrative remedy
- Potential public nuisance defense
- Causation defense



Parcel as a whole rule



- A claimant often predicates his taking claim on only a portion of a property, and how the regulations at issue impact the development of that portion, in violation of the non-segmentation principle – the parcel as a whole rule *E.g.*, if development is phased, or a property is subdivided, whether there was a regulatory taking is determined by what is allowed on the entire property, not merely what is prohibited on a portion of the property.[40]
  - "Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130.
  - Factors determining what constitutes the parcel as a whole include:
    - The treatment of the land under state and local law;
    - The physical characteristics of the land; and
    - The prospective value of the regulated land;
    - Degree of continuity;
    - Dates of acquisition;
    - How the parcels have been treated by purchaser and regulators; and
    - Extent to which the regulated lands enhance the value of other lands.[41]

Exhaustion of Administrative Remedy Defense[42]



- An administrative hearing process affords a local government the opportunity to preclude a regulatory taking.
- Before a claimant can bring a regulatory takings claim, a determination about how the regulation will be applied to claimant's property must be made and any administrative appeal process exhausted.
  - In *Penn Central*, the landowner had to appeal the staff decision to deny a permit allowing modification of the landmark to the Landmarks Preservation Commission
- With respect to zoning regulations, a claimant must attempt to obtain variances and/or a special exception and argue to the administrative hearing board that in the absence of the grant of such variances and/or special exception, no beneficial use of the property may be made, before bringing a takings claim.
  - The admin tribunal, in the first instance, must determine:
    - Whether other permissible uses of the property can be made
    - Whether through the variance or special exception process claimant can obtain permission to make some reasonable/beneficial use of claimant's property (and what conditions are appropriate to ameliorate the impact of such use on neighboring properties).

Exhaustion of Administrative Remedy
cont'd



- There is no taking prior to exhaustion of the administrative remedy
- *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) – reversing *Williamson Cty. Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)
  - As soon as there is a taking – a property owner may bring a 42 U.S.C. § 1983 claim in federal court seeking 5th Amendment just compensation
  - A town passed an ordinance requiring a person who had a cemetery on his property to allow public access to the cemetery during the day. A farmer whose property included a small cemetery where neighbors were berried (prior to subdivision) filed § 1983 claim for taking when the town inspector cited the farmer for violating the ordinance.

Exhaustion of Administrative Remedy Defense[43]
cont'd



- Where a claimant contends that a zoning regulation creates a taking, exhaustion requires:
  - Seeking variances and or a special use exception and establishing that in the absence of such variances, no beneficial use of the property can be made;
  - Submitting more than one development plan;
  - Establishing the property cannot be used for any permitted use.
  - The undue/unwarranted hardship standard generally required for a use variance is satisfied where the zoning regulations will deprive an owner of the beneficial use of his property.
- At such juncture, a local government should prepare to present evidence to the administrative zoning appeals board (BZA) of:
  - Other permitted uses that could be established on the property;
  - Appropriate buffer, setback, height, area, density or the like requirements that should be applied to applicant's desired use in order to ameliorate adverse impacts of such use to neighboring properties.

Exhaustion of Administrative Remedy Defense

cont'd



Submission of more than one development plan required in order to exhaust the administrative remedy.

The Supreme Court of Connecticut, in *Port Clinton Assoc. v. Board of Selectmen*, 217 Conn. 588 (1991), held that claimant could not maintain a regulatory takings claim where it submitted only one grandiose proposal/plan for development that was rejected by the city's administrative review board, finding the Board's position with respect to a proposed marina expansion was not final and determinable for purposes of the takings clause, where a less intense and grandiose plan might have been acceptable, even though the Connecticut Dep't of Environment issued a permit for the proposed marina expansion.

Lessons:

Suggest to a claimant that claimant submit a less intense development plan to the administrative tribunal; and

Present reasons different from those considered by the state permitting authority as to why the proposed development is unsuitable.

The Public Nuisance Defense



- A regulation that abates conditions that pose a potential public nuisance cannot give rise to a compensable taking claim even if such regulation deprives a property of all value or economically beneficial use, because no person has a right to use his or her property in such a manner as to create or give rise to a public nuisance.[44]
- Ownership never included the right to use property in a manner that constitutes a nuisance to adjoining properties
  - A regulation that abates a nuisance does not take any stick in the bundle of property rights[45]
- Common law nuisance vs. statutory nuisance
- The nuisance defense is a complete defense to a *Lucas* and a *Penn Central* takings claim.[46]

Causation Defense



- A claimant must establish that the application of the ordinance/regulations to claimant's property proximately caused the injury claimed. Causation is an amorphous topic that was discussed at some length in *Res. Invs, Inc.*, 85 Fed. Cl. at 519-524.

Can zoning area/bulk regulations affect a *Penn Central* taking?[47]

- "Area" or "bulk" zoning regulations are regulations that establish height, density, setback, minimum size, distance between buildings, or screening and buffer requirements or restrictions.
- Area Variance – Variance from bulk requirements (*i.e.*, height, setback, buffer, density, minimun size) - practical difficulties standard
- Use variance (*i.e.*, request to establish a non-permitted use in a zoning district – unnecessary (unwarranted or unreasonable) hardship standard

Area/bulk zoning regulations ≠ regulatory taking

- "The [Takings Clause] is violated only when land use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" *Lucas*, 505 U.S. at 1016.
- Rarely is the *Penn Central* takings calculus applied to zoning regulations because:
  - Zoning regulations advance public health, safety and welfare by addressing potential public nuisance factors such as noise, dust, odor, and unsightliness, and health and safety factors, such as traffic, adequate light and air, and space to recreate;
  - The Property owner has to have a vested right to the use in question;
  - Such regulations equally benefit and burden all properties/property owners within a zoning district ; and
  - Such regulations rarely render the property in question valueless.

Area/bulk zoning regulations ≠ regulatory taking
con'd

- Generally, area/bulk zoning regulations must uniformly apply to all properties within a zoning district.
- "Euclidean zoning laws … must be uniform for each class or kind of development throughout a district or zone to ensure similarly situated properties are subjected to similar regulation …. This requirement is referred to commonly as the uniformity requirement of Euclidean zoning. It originated from the Standard State Zoning Enabling Act, which was written during the 1920s by the distinguished original group of planning lawyers in the country…."
  - *Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 444 Md. 490, 511-12, n. 14 (2015).

Area/bulk zoning regulations ≠ taking
cont'd

- If area/bulk regulations comply with the uniformity rule, then they equally benefit and burden each and every property owner in a zoning district.
- Given that the purpose of constitutional takings clauses is to compensate a landowner who alone (or with a small subset of property owners) is required to bear a burden which in all fairness ought to be borne by the public at large, the uniformity rules preclude area/bulk regulations from qualifying as a taking, since such regulations benefit (by protecting a property owner from the impacts of development by neighboring property owners) and burden (by prohibiting a property owner from fully utilizing the development potential of his property) all property owners within the zoning district equally and uniformly.[48]

Area/bulk zoning regulations ≠ taking

- The administrative agency has original jurisdiction to determine whether the application of a zoning regulation and the denial of a variance will deprive the property owner of all beneficial use of the property.
- Fact that the administrative agency cannot award just compensation does not deprive it of original jurisdiction to determine:
  - Whether there are other permitted uses (in the table of permitted uses) that could be established on the property; or
  - What use should be permitted through variance or special exception and what conditions should be attached to ameliorate the adverse impact of the use being allowed through variance/special exception on neighboring properties.[49]
- The variance process is an essential tool that must be utilized to address a potential unconstitutional taking and if the application of zoning regulations deprive a property of all beneficial use, the administrative hearing board should grant the variances necessary to allow some beneficial use of the property[50]

Area/Bulk Regulations ≠ Taking[51]

- Area/bulk regulations cannot affect a taking unless:
  - They deprive a property owner of all beneficial use of his property; and
  - The property owner overcomes additional hurdles by:
    - Seeking and being denied use and/or area variances that would enable some beneficial use to be made of the property; and/or
    - Proposing more than one nonconforming plan for the development of the property.
- In short, area/bulk regulations must affect a *Lucas* taking before giving rise to a claim of inverse condemnation.

Textual Amendment of Design/Bulk Regulations

- Generally the textual amendment of design/bulk regulations will not constitute a taking unless the amended regulations preclude all reasonable or beneficial use of a property, *i.e.*, constitute a *Lucas* taking, provided such amended regulations do not apply to:
  - A prior non-conforming use (*i.e.*, a vested right)
  - Any vested right that is terminated should not be immediately terminated - a reasonable amount of time must be afforded to amortize the right and to seek alternatives – e.g., sign regulations that do not immediately apply to existing signs and provide time for deployment of an alternative, with the amount of time for phase out based on a weighing of the governmental versus the private interest - a paramount public safety interest (short phase out) versus an aesthetic interest (longer phase out).

Downzoning and Rezoning

- The *Penn Central* takings calculus has been applied to a downzoning or rezoning.[52]
- Before effecting a downzoning or rezoning, consider the following factors:
  - Does the action extinguish previously permitted uses?
  - Was the action accomplished by way of textual amendments adopted to implement a new or amended comprehensive plan?
  - How many properties were downzoned or rezoned?
  - Was the downzoning/rezoning affected to target one or a few properties, or only one class of property?

Questions of law or fact, or a mixed question of law and fact?

- The majority of jurisdictions hold that the determination of whether there has been a taking is a question of law for the court to resolve.[53]
- Plaintiff will argue that whether there has been a regulatory taking is a question of fact for a jury to resolve:
  - Because the Supreme Court characterized application of the *Penn Central* takings calculus as "an essentially *ad hoc* factual inquiry" (*Penn Central*, 438 U.S. at 124; *accord*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (stating: "This area of the law has been characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all relevant circumstances.'") the issue if for the jury
  - Remember, the Supreme Court, in *Penn Central*, also affirmed the state appellate court ruling that, as a matter of law, the Landmarks Preservation Law did not effect a regulatory taking.[54]
- Where there is a battle of experts about economic impact, courts confuse the issue of valuation of the taken property (*i.e.*, the just compensation to be awarded – generally a jury issue) with the determination of whether the diminution in value resulting from the regulations is substantial enough, in combination with the other factors, to conclude that the regulations as applied affect a taking.
- Argue a claimant's failure to establish any one of the three *Penn Central* factors should terminate the regulatory taking claim. *See*, *Res. Invs., Inc.*, 85 Fed. Cl. at 511.

Concerns with a § 1983 Action



- In the context of a claim for monetary damages for an alleged regulatory taking under 42 U.S.C. § 1983, the Supreme Court has held:
  - "[T]he issue of whether a landowner has been deprived of all economically viable use of his property is predominantly a factual question." *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 720 (1999).
  - "The jury's role in determining whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine … [is] a mixed question of fact and law." *Del Monte Dunes*, 526 U.S. at 721.
  - "We do not address the jury's role in an ordinary inverse condemnation suit." *Del Monte Dunes*, 526 U.S. at 721.
    - Presumably, an "ordinary inverse condemnation suit" is one brought pursuant to a constitutional takings clause (*e.g.*, the Fifth Amendment of the U.S. Constitution or the takings clause of a state constitution).



Monterey v. Del Monte Dunes at Monterey Ltd.,

526 U.S. 687 (1999)

Facts

Developer owned an oceanfront property that previously held an oil tank farm and terminal. The oil tanks had been removed, and only the tank pads, an industrial building complex, mounds of illegally dumped trash and debris, and a non-native invasive plant used to control erosion remained on the property.

The city, at the staff level, over a five-year period, kept approving developer's site plans for proposed residential development, all of which conformed to the multi-family zoning requirements applicable to the property. Nineteen (19) different site plans were submitted. Ultimately, the city's planning commission and/or the city council sitting as an appeals board rejected each site plan and imposed more rigorous demands for fewer units and more open space.

The city demanded that development be invisible from the highway, that a buffer be provided for a bordering state park, and that the public be provided with a beach along the oceanfront. These requirements forced development into a bowl that contained buckwheat, which was critical to the survival of Smith's Blue Butterfly, an endangered species, a conundrum that the appeals board used to deny approval of the proposed development. After rejection of the 19th proposed site plan, developer sued the city under 42 U.S.C. § 1983 alleging violations of the 14th Amendment due process and equal protection clauses and an uncompensated and unconstitutional regulatory taking.



Monterey v. Del Monte Dunes at Monterey Ltd.,

526 U.S. 687 (1999)

Holding

The Court affirmed the jury's decision that the actions of the city constituted a regulatory taking and its award of $1.45 million in damages.

Disturbing Dicta

"When the government takes property without initiating condemnation proceedings, it 'shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation.' … [T]he mere 'shifting of the initiative from the condemning authority to the condemnee' can place the landowner 'at a significant disadvantage.'" 526 U.S. at 712.

The Court analogized the suit to an action at law for damages, which would mean compensation would not be limited to the change in value of the property at issue. 526 U.S. at 714-718.

Litigation Lesson

The city, on appeal, claimed that the jury was allowed to second guess the city's public health, safety and welfare decision not to approve the proposed development.

The Court observed that such argument was waived because the city approved, and in most cases proposed, the instructions given to the jury.

It is critical to request comprehensive jury instructions in a *Penn Central* case, particularly if the Court does not decide as a matter of law whether there has been a taking.

Questions of Law or Fact

con'd

- The following sub-issues should be questions of law for the court:
  - Whether claimant has a property interest recognized by an independent source of law such as state law;
  - Whether claimant has a vested right;
  - Whether a regulation addresses a potential public nuisance;
  - Whether a regulation affects only an insufficient number of "sticks in the bundle of property rights to constitute a taking; and
  - Whether the regulations as applied have a substantial enough impact on the value or reasonable uses of the property to constitute a compensable taking;
  - Whether the ordinance/regulation requires one person or a small subset of persons to bear a regulatory burden that in all fairness and equity should be borne by the public generally.



How inverse condemnation action categorized is determinative of available damages)

- *Del Monte Dunes* teaches that how a regulatory takings claim is categorized has outcome-determinative impacts, including:
  - If viewed as a condemnation action, then damages should be limited to the damages allowed in a condemnation proceeding.
  - If viewed as an equitable or administrative action, there should be no right to a jury trial on the takings issues, only on the just compensation issue, after the court has heard any factual disputes relative to the takings issues and determined that a taking has occurred. *See Cumberland Farms v. Town of Grofton*, 262 Conn. 45, 70-71 (Conn. 2002); *Maryland Reclamation Assoc.*, 468 Md. at 411-12.
  - If viewed as a tort action for damages arising from arbitrary and capricious governmental action, all kinds of civil damages could be awarded. *See*, *Del Monte Dunes*, *supra; Brookenick Dev. Co. v. Bruce,* 2009 R.I. Super. LEXIS 1006 (2009).

Establishing the framework of a claim early is imperative

- When litigating an inverse condemnation case, consider establishing in your first pleading filed with the Court:
  - The Court must rule as a question of law whether a taking occurred, even if an evidentiary presentation is required to establish some of the facts upon which the court's determination will rest;
  - A jury is at most responsible for determining the amount of just compensation due to the property owner – consider requesting bifurcation of the takings issue from the damages issue;
  - The inverse condemnation action is equitable and damages are limited solely to the value of the property taken; and
  - The date of the taking.

Helpful citations

- Diminution in property value alone does not establish a taking and the government is not required to maintain zoning so that a landowner may enjoy the most beneficial use of his property. It is not reasonable for a landowner to presume that the zoning of his property will remain indefinitely.[55]
- The takings clause does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks and it is not the government's duty to underwrite the risk as an extension of obligations under the takings clause.[56]
- The government cannot be a guarantor, via inverse condemnation proceedings, of the investment risks a person chooses to take in the face of statutory and regulatory impediments.[57]
- Prohibition of a previously permitted profitable use of property alone does not result in a taking.[58]

Will a moratorium affect a taking?

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002)

- When a moratorium is enacted or adopted for the purpose of conducting planning and development studies to determine whether a new comprehensive plan and new land-use regulations should be adopted or existing regulations should be amended, a moratorium that is reasonable in duration (preferably not longer than one (1) year) and no longer than necessary to follow the requirements of enabling legislation should not effect a regulatory taking.
  - A moratorium is used to preclude a property owner from obtaining a vested right during the time that it takes to amend development regulations.
  - A moratorium precludes review of a proposed development under the existing regulatory regime.

$$ Damages $$

- Most states provide by statute the damages allowed in a condemnation proceeding.
- Damages are usually limited to the fair market value of the property as of the effective date of the taking and, sometimes, relocation expenses.
- Fair market value generally is defined as the price on the effective date of the taking for the highest and best use of the property that a seller, willing but not obligated to sell, would accept, and that a buyer, willing and not obligated to buy, would pay.[59]
  - Comparable sales – market data appraisal
  - Replacement cost appraisal
  - Income capitalization (lost profits) valuation
    - Existing business
    - Hypothetical business – *see* 4 Nichols on Eminent Domain



Damages
cont'd
Partial or Total Taking



- How many sticks in the bundle of property rights are impaired by the regulations?
  - Damages should be limited to the loss of value to the property, not the loss of a prospective opportunity.[60]
  - No relocation expenses should be awarded if the regulations at issue do not extinguish an existing use.
  - Two market values should be determined – one immediately before and one immediately after the adoption/application of the regulations in question?
  - If a jury is determining the damages, a jury instruction should be demanded to the effect that the government is not obtaining title to the property, instead the damages awarded are merely compensating the owner for the sticks in the bundle of property rights that will be lost as a result of the regulations in question, while owner will retain title and possession of the property.
  - If the regulation is rescinded, claimant may be permitted to seek damages for the period during which the regulations were in effect.

Damages
cont'd



- Compensation in a regulatory takings case does not include future loss of profits.[61]
- "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property related interests."[62]
- Valuation adjustments should not be made for inflation or other market uncertainties because such adjustments require the sagacity of Solomon and the wizardry of Merlin.[63]
- Tax return losses should not be considered because amortization/depreciation can convert a profit into a tax loss.[64]

Endnotes

1. (v9#4) *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Pallazzolo v. Rhode Island*, 533 U.S. 606, (2001); *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1073-74 (7th Cir. 2013); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1570-72 (Fed. Cir. 1994); *Warren Trust v. United States*, 107 Fed. Cl. 533, 567-68 (2012).

2. (v9#4) *Hearts Bluff Game Ranch v. State*, 381 S.W.3d 468, 476 (Tex. 2012).

3. (v9#4) *Res. Invs., Inc. v. U.S.*, 85 Fed. Cl. 447, 466 (2009) ("Whether or not a taking has occurred is a question of law based on factual underpinnings. *Wyatt v. U.S.*, 271 F.3d 1090, 1096 (Fed. Cir. 2001). ("Due to the 'fact intensive nature of takings claims, courts are typically reluctant to decide such claims at the summary judgment stage' …. Nevertheless, just because this is a takings case does not render summary judgment unavailable if it is appropriate to the circumstances before the court."); *Hearts Bluff Game Ranch*, 381 S.W.3d at 477; *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007). C.f. *Brookenick Dev. Co. v. Bruce*, R.I. Super Lexis 106 at *10-11 (2009) (holding that an inverse condemnation action is an action at law for which claimant has a right to jury trial).

7. (v9#2) In *City of Annapolis v. Waterman*, 357 Md. 484, 497 (2000), Maryland's highest court observed: Ownership of real estate is not allodial. "[I]t is uniformly recognized throughout this country that the ownership of property is subject to the rights of government to tax the property, to regulate reasonably its use and enjoyment under the police power of the States, and to take the same, upon payment of the value thereof, when needed for a public purpose."

*8. (*v9#2*) Miller* involved a 14th Amendment challenge to the constitutionality of Virginia's Cedar Rust Act, which allowed the state entomologist to order the removal of red cedar trees from a property where the entomologist determined that the rust disease promulgated by the tree could negatively impact apple orchards. The Act did not provide any compensation for the decrease in market value of the land caused by the tree removal or for the value of the trees.

9. (v9#3) *Murr v. Wisconsin*, 137 S. Ct. 1933. 1943 (2017); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001); *City of Monterey v. Del Monterey Dunes at Monterey Ltd.,* 526 U.S. 687, 702 (1999); *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998); *Penn Central*, 438 U.S. at 123.

Endnotes

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16. (v9#5) *Bridge Aina Lea LLC v. Land Use Comm'n*, 950 F.3d 610 (9th Cir. 2020); *Norman v. U.S.*, 429 F.3d 1081, 1094 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006); *Res. Invs. Inc.*, 85 Fed. Cl. at 511.

40. (v9#8) *See*, *Murr v. Wisconsin*, _ U.S. _, 137 S. Ct. 1933, 1945 (2017); *Cane v. Tenn., Inc. v. U.S.*, 57 Fed. Cl. 115, 121 (2003).

41. (v9#8) *Stansell & Rape Bros. v. City of McDonough*, 177 S.E. 749, 751 (Ga. App. 1934).

42. (v9#9) *Maryland Reclamation Assoc. v. Harford County*, 468 Md. 339 (2020), *cert denied*, 2020 WL 6037255 (Oct. 13, 2020).

43. (v9#11) *See* Endnote 42.

44. (v9#13) *Stop the Beach Renourishment, Inc. v. Florida*, 560 U.S. 702, 726 (2010); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 491-92 (1987); *Penn Central*, 438 U.S. at 144-45.

45. (v9#13) David Callies, *Regulatory Takings After Knick* at 99-115 (2020) – (ABA State and Local Government Section)

46. (v9#13) *Lucas v South Carolina Coastal Comm'n*, 505 U.S. 1003, 1010 (1992) (citing, *Mugler v. Kansas*, 123 U.S. 623 (1887)).

47. (v9#15) *Loyola Fed. Savings & Loan Ass'n v. Buschman*, 227 Md. 243, 249 (1961); *Montgomery Cty. v. Ro*twein, 169 Md. App. 716, 728 (2006).

48. (v9#18) *See* Slides 9 and 29-30 of IMLA Penn Central Regulatory Takings Part I, July 2020.

49. (v9#419) *Maryland Reclamation Assoc.*, 468 Md. at 401-09.

50. (v9#19) *Maryland Reclamation Assoc.,* 468 Md. at 410.

Endnotes

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51. (v9#20) "In zoning cases, in determining whether the challenged zoning regulation amounts to a taking of private property, we have said that **no compensable taking occurs so long as the zoning regulation does not deprive the owner of 'all beneficial use of the property**.'" (Emphasis added.) *Maryland-Nat'l Park & Planning Comm'n v. Chadwick*, 266 Md. 1, 10, (1979) (citing *Baltimore City v. Borinsky*, 239 Md. 611, 622 (1965)); *Cabin John Ltd. P'ship v. Montgomery Cty. Council*, 259 Md. 661, 670 (1970) ("To establish that a zoning classification amounts to confiscation it is incumbent upon the property owner to prove that that existing **zoning deprives him of all reasonable use** of his property **and** it is incumbent upon him to show that the **property could not be used for any of the permitted uses in the existing zone** (citing *Zoning Bd. of Howard Cty. v. Kanode*, 258 Md. 586 (1970)); *Montgomery Cty. Council v. Kacur*, 253 Md. 220, 229 (1969) ("The legal principles governing the taking of private property without payment of just compensation by zoning action have been set out many times before this Court. As stated in … *Borinsky* ... 'If the owner affirmatively demonstrates that the legislative or administrative determination **deprives him of all beneficial use** of property, the action will be held unconstitutional. But the restrictions imposed must be such that the **property cannot be used for any reasonable purpose**. It is **not enough** for the property owners **to show** that the zoning action results in **substantial loss or hardship**.'") "If an owner affirmatively demonstrates that the zoning action deprives him of all beneficial use of his property, the action will be held unconstitutional, but the restriction upon the property imposed by the zoning action must be such that the property cannot be used for any purpose to which it is reasonably adapted." *Pallace v. Inter City Land Co.*, 239 Md. 549, 558 (1965). "It is **not the developer's desires** with respect to the use of the property which are controlling on the issue of whether or not there has been an unconstitutional taking, **the question is whether the property can be used for any reasonable purpose**." *Id*. (citing *MacDonald v. County Bd.*, 238 Md. 549, 556-57 (1965)).

Endnotes

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52. (v9#22) *Noghrey v. Town of Brookhaven*, 92 A.D.3d 851 (2012), prior history, 48 A.D.3d 529 (2008), prior history, 21 A.D.3d 1016 (2005). *See* Endnote 12 *supra*.

53. (v9#23) *See* Endnote 3 *supra*; *Hearts Bluff Game Ranch*, 381 S.W.3d at 477; *2800 La Frontera No. 1A, Ltd, v. City of Round Rock*, 210 Tex. App. LEXIS 243, 2010 WL 143418 (2010) (ruling, "Whether zoning regulations effected a *Penn Central* regulatory taking is a matter of law for the trial court to decide." (citing, *Sheffield Dev. Co. v. City of Elgin Heights*, 140 S.W.3d 660, 673 (Tex. 2004))); *Wensmann Realty*, 734 N.W. 2d at 631; *Anchorage v. Sandberg*, 861 P.2d 554 (Alaska 1993) (reversing and entering summary judgment in favor of municipality, finding no taking under *Penn Central* calculus as a matter of law). C.f. *Brookenick Dev. Co. v. Bruce*, R.I. Super Lexis 106 at *10-11 (2009) (holding that an inverse condemnation action is an action at law for which claimant has a right to jury trial).

54. (v9#23) *See* Slide 21 – July 2020 IMLA Penn Central Regulatory Takings, Part I

55. (v9#30) *Dorman v. Township of Clinton*, 714 N.W.2d 350, 357 (Mich. App. 2006).

56. (v9#30) *Sheffield Devel. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 676 (Tex. 2004); *Taub v. City of Deer Park*, 782 S.W.2d 824, 826 (Tex. 1994).

57. (v9#30) *Sanderson v. Town of Candia*, 787 A.2d 167, 169 (N.H. 2001).

58. (v9#30) *Tiroland, Inc. v. Lake Placid 1990 Olympic Games, Inc.*, 592 F.Supp. 304, 313 (N.D. N.Y. 1984).

Endnotes
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59. (v9#32) *Norman*, 63 Fed. Cl. 231, 270 (2004), *aff'd*, 429 F.3d 1081, 1094 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006); MPJI-Cv 13:2 – 13:3 (Md.).

60. (v9#33) *Dawson Enterprises, Inc. v. Blaine Cty.*, 98 Idaho 506, 518-19 (1977) (no inverse condemnation where contract purchaser overpaid bases on gamble that zoning change would enhance the value of the property, highest and best use value is based on existing zoning).

61. (v9#34) *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945); *Yancey v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1991); *Norman*, 63 Fed. Cl. at 279-81; 4 Nichols on Eminent Domain § 12B.09[2].

62. (v9#34) *Andrus v. Allard*, 444 U.S. 51, 66 (1979)

63. (v9#34) *Norman*, 63 Fed. Cl. at 271.

64. (v9#34) *Norman*, 63 Fed. Cl. at 281.

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EXPERIENCE

Jefferson L. Blomquist has been a member of Funk & Bolton, P.A.'s Local Government Practice Group since June 1999. He has over thirty years of experience representing local governments and over ten years of experience representing county boards of education.

Mr. Blomquist has continuously represented local governments, law enforcement agencies, county councils and local government administrative tribunals between 1988 and the present. He has concentrated in local government and board of education litigation matters. This has enabled him to develop in depth knowledge of:

(i) Administrative law;
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(iv) Construction law;
(v) The Education Article of the Maryland Annotated Code and the Code of Maryland Regulations on Education;
(vi) The Maryland School Law Desk Book, the Maryland School Laws and Regulations Annotated and the reported administrative decisions of the Maryland State Board of Education;
(vii) Ethics law;
(viii) Employment law;
(ix) Environmental law;
(x) The 504 Plan (Rehabilitation Act/Americans with Disabilities Act) processes and IEP (Individual Education Program) (Individuals with Disabilities Education Act) processes;
(xi) Land use law;
(xii) Local government and board of education immunity law;
(xiii) The Maryland Open Meetings Act (OMA – Md. Code Ann. Gen. Prov. §§ 3-101 *et seq.*) and the OMA handbook published by the Office of the Maryland Attorney General;
(xiv) The Maryland Public Information Act (MPIA – Md. Code Ann. Gen. Prov. §§ 4-101 *et seq.*) and the MPIA handbook published by the Office of the Attorney General;
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GARBIS & SCHWAIT Baltimore, Maryland	August 1984 – June 1986 Civil Litigation Associate
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Phi Gamma Delta Fraternity - Treasurer, 1979, House Manager, 1978.
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PERSONAL

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Enjoy bicycling and family outings.
Enjoy woodworking.
Former church Deacon and church-school teacher.