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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

MAR APR 2024
VOL.65 NO.02



Public Good Meets Private Property: the Hydra-Headed Takings Clause

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The Supreme Court recently declared that constitutional questions are to be analyzed through the societal lens in effect when that seminal document was written. A current firearms case illustrates the complexity of applying Eighteenth Century norms in a contemporary context. An opinion later this Term should provide further insights into the Court's "history and tradition" jurisprudence.

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PRIVATE PROPERTY AND PUBLIC GOOD: THE HYDRA-HEADED TAKINGS CLAUSE

By: Erich Eiselt, IMLA Deputy General Counsel and Director of Legal Advocacy

America's founders enshrined in twelve words the principle that private property may not be taken for public use without just compensation. That tenet continues to spawn ever-increasing debate, challenging the meaning of property, the parameters of a Taking, and the character of use. Local governments are at the epicenter of that conflict.

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Public Good Meets Private Property: the Hydra-Headed Takings Clause

By: ERICH EISELT,
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The Fifth Amendment is an interesting amalgam, melding five constitutional protections. Three relate to criminal justice (indictment by grand jury, freedom from self-incrimination, and prohibition against double jeopardy). A fourth mandates Due Process before the deprivation of life, liberty, or property. And last but certainly not least is the subject of this note--the Takings Clause: "Private property shall not be taken for public use without just compensation."

As with virtually every provision in the Bill of Rights, interpretation of the Fifth Amendment Takings Clause is continually evolving. Some will argue that Takings, a principle made applicable to the states through the Fourteenth Amendment and also contained in every state constitution,[1] is relentlessly expanding in favor of hitherto unknown private property interests, to the detriment of the public. Others will view it as just the opposite: a crusade against ever-encroaching governmental overreach. Regardless of the perspective, IMLA's legal advocacy activities have afforded a front row to some of these contests, discussed below.

Prolog-The Primacy of Private Property, and its Limits: First, prefatory comments. The Takings cases garnering IMLA's participation build on more than two centuries of deliberation. Protection of private property has been a fundamental pillar of American democracy since our founding: as James Madison framed it in the Federalist papers: "Government is instituted no less for the protection of the property than of the persons of individuals."[2] But the Bill of Rights established that private property was never sacrosanct as against the federal government, which would require access to lands and facilities needed to accommodate a growing populus.

The United States Supreme Court first recognized federal eminent domain power in 1875 in *Kohl v. United States*.[3] The case involved a landowner's challenge to the power of the United States to condemn his land in Cincinnati, Ohio for use as a customs house and post office building. Justice William Strong called the authority of the federal government to appropriate property for public uses "essential to its independent existence and perpetuity."[4] That authority likewise resided in the States:

> No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.[5]

Local Government and Zoning Power: Subdivisions of states--local governments--would also exercise authority over private property, not only through eminent domain, but as a function of their police powers, by controlling use and development of real estate within their boundaries. In 1916, reacting to the deprivation of airspace and seven acres of sunlight from nearby urban dwellers by the newly constructed 42-story Equitable Life building, New York City instituted the nation's first citywide zoning law.[6] As the New York City Department of Planning site puts it:

> The groundbreaking Zoning Resolution of 1916, though a relatively simple document, established height and setback controls and designated residential districts that excluded what were seen as incompatible uses. It fostered the iconic tall, slender towers that came to epitomize the city's business districts and established the familiar

scale of three- to six-story residential buildings found in much of the city. The new ordinance became a model for urban communities throughout the United States as other growing cities found that New York's problems were not unique.[7]

Local authority over private property development would not go unchallenged. In 1924, a federal court in the Northern District of Ohio found that the zoning map enacted by the Village of Euclid worked a compensable taking of property rights from Ambler Realty Corporation, owner of 68 undeveloped acres in the municipality.[8] Two years later, in a groundbreaking reversal, the Supreme Court upheld Euclid's zoning scheme, determining that the legislation had a rational basis and comported with Fourteenth Amendment Due Process requirements.[9] *Village of Euclid v. Ambler Realty Co.* acknowledged that impairment of development rights could be considered in evaluating the constitutional challenges to a proposed zoning provision—but found the developer's assertions about lost profits to be conjectural and insufficient to override the Village's societal goals.

While striking down subsequent zoning measures which bore an inadequate relation to the public health, safety, morals, or general welfare,[10] the Court would continue to confirm the viability of local zoning regulations which satisfied rational basis standards, including a decision nearly 50 years later, in *Village of Belle Terre v. Boraas,* upholding an ordinance which limited occupancy of single residential dwellings to "family" members.[11] Today, while constitutional imperatives must be observed, there is little doubt that local governments have the authority under police power to exert significant control over the character and extent of land use within their jurisdiction. One arena, among many, in which that authority has been applied is housing—a topic of heightened interest today: whereas zoning power has often been exercised to limit growth and prohibit nonconforming usage, arousing challenges from developers and business interests, now that authority is increasingly wielded to encourage residential density and stimulate commercial activity, instigating lawsuits from existing homeowners.[12]

Regulatory Takings: The judicial latitude granted to governments in zoning matters was based primarily in Due Process and rational basis analyses, but implicit in those deliberations was an inquiry into the degree of economic diminution visited on the landowner: in the case of *Euclid*, for example, the injury had not been clearly demonstrated. The scenario where governmental regulations effectively deprived a landowner of *all* economic use of its property had been considered in a 1922 case brought by a coal company after the Pennsylvania legislature passed a regulation prohibiting mining where it might cause subsidence affecting nearby homes. In *Pennsylvania Coal Co. v. Mahon*,[13] the Court found that the legislative measure unconstitutionally eviscerated the mining company's property rights. Writing for the majority, Justice Holmes found that police power was inadequate to justify the mining prohibition, and warned of Fifth Amendment overreach:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.[14]

In the following decades, the Court continued to evaluate claims by landowners whose property interests were diminished by governmental regulation, but no clear analytic parameters emerged. That vacuum was addressed in 1978, when Penn Central Railroad found itself blocked by a New York City landmarks preservation law from developing airspace above its property encompassing Grand Central Station. *Penn Central Transportation Co. v. New York City* [15] would uphold the City's regulation, while providing some additional guidelines: to determine whether such a restriction on property use amounts to a taking, the Court would henceforth apply a flexible approach considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.[16]

Nexus and Proportionality: While remaining a touchstone for Fifth Amendment regulatory Takings analysis, the *Penn Central* test would be joined by a paradigm more challenging for local governments. Enter *Nollan*, *Dolan*, and *Koontz*. There the Court grappled with the requirement by local adjudicative entities that property owners provide exactions, whether in the form of financial payment or property interests, as a condition to building on their land.

In *Nollan*, homeowners desired to replace their 500 square foot beachfront bungalow with a 2500 square foot residence. Finding that the expansion would block views of the ocean, the California Coastal Commission conditioned the issuance of a construction permit on the couple's conveying a public easement across a 25-foot wide swathe of their land bordering the tideline.[17] That posture was upheld by the California Court of Appeal but did not survive at the United States Supreme Court. Writing for a 5-4 majority, Justice Scalia found unacceptable the lack of nexus between the Commission's easement requirement and the original purpose of the building restriction: "Unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion."[18]

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In *Dolan*, the owner of an Oregon plumbing and electrical supply business was told by the City of Tigard Planning Commission that she could expand her store and pave her parking lot if she dedicated land to a public greenway and helped develop a pedestrian and bicycle path in order to relieve projected traffic congestion; a *quid pro quo* which failed the Court's "unconstitutional conditions" test.[19] And in *Koontz*, a Florida water Management District refused to issue a wetlands building permit despite the property owner's offer to deed the District with a conservation easement on nearly three-quarters of his property: the District required a smaller development and a larger conservation easement, or the landowner's paying contractors to make improvements to District-owned wetlands several miles away.[20] Writing for a 5-4 majority, Justice Alito advised in *Koontz* that:

> [U]nder*Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.[21]

In the aftermath of *Nollan/Dolan/Koontz*, IMLA has seen Takings litigants increasingly asserting an "unconstitutional conditions" basis for their claims. While a more flexible *Penn Central* four-factor test may be urged by governmental actors, they increasingly face the demand that their property-related actions demonstrate (1) an "essential nexus" between a legitimate governmental interest and the required exaction (per *Nollan*) and (2) "rough proportionality" between the exaction and projected impact of the landowner's permitted use (per *Dolan*).

The Adjudicatory Versus Legislative Debate: Somewhat obscured behind the unconstitutional conditions lens in the *Nollan/Dolan/Koontz* trilogy was another common element. In each, an adjudicatory actor--appointed under or subject to executive authority--decided on a one-off basis what concession was appropriate in exchange for issuance of a building permit. Those adjudicative bodies did not undertake the findings, impact studies, public hearings, and other indicia of Due Process and reasonableness that might otherwise justify the government's requisites.

In contrast to the measures which failed constitutional scrutiny in *Nollan/Dolan/Koontz*, legislatively derived, generally applicable fees or concessions required of property owners to obtain development permits had, until recently, been granted latitude by some courts, particularly in California. Two decades ago, a California Supreme Court decision provided one rationale for such a distinction—legislative accountability to the electorate:

> A city council that charged extortionate fees for all property development …would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls."[22]

That logic played a role in *Building Industry Association-Bay Area v. City of Oakland*,[23] a 2019 case in which IMLA filed an amicus brief supporting the City. There, the Ninth Circuit rejected a Takings challenge to an Oakland ordinance which required developers to spend a small percentage (up to one percent) of the project budget to displaying art in areas freely accessible to the public, or, alternatively, to pay that amount directly into a city fund set up to further those public art goals. The court found that such a program did not force developers to cede property, but even if it had, the measure averted heightened scrutiny because it was legislatively derived:

> We find that the Ordinance conditions, which merely regulate how developers may use their property rather than forcing developers to cede property rights to the city, do not facially amount to a taking. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Moreover, even assuming that they did, BIA is precluded by our precedent from raising its claim in this posture, both because it is a facial claim and because the claim challenges a legislative act, rather than an adjudicative land-use determination.[24]

The legislative safe harbor is increasingly under fire. In 2022, IMLA provided amicus support to the Metropolitan Government of Nashville defending a case brought by two landowners who objected to the government's requirement that, as a condition of granting them permits to build or expand their homes, the applicants would be required to build sidewalks on their properties or contribute to an in-lieu sidewalk fund.[25] There, Nashville had argued that its legislatively derived permit program, intended to address the City's severe paucity of sidewalks, was immune from traditional exaction analysis because the City Council was subject to voter removal, and the generally applicable sidewalk measure had been subject to public hearings and related transparency. The Sixth Circuit reversed the lower court's grant of summary judgment to the City, finding that, irrespective of the provenance of the sidewalk ordinance, it did not satisfy the requisite nexus and proportionality standards.[26]

> [T]the parties here disagree over the "test" that we should use to judge whether the sidewalk ordinance commits a taking. The landowner plaintiffs ask us to apply the "unconstitutional-conditions" test that the Supreme Court adopted to assess conditions on building permits in *Nollan v. Califor-*

nia Coastal Commission, 483 U.S. 825 (1987). Nashville responds that the Court has applied *Nollan's* test only to ad hoc administrative conditions that zoning officials impose on specific permit applicants—not generally applicable legislative conditions that city councils impose on all permit applicants. For legislative conditions, Nashville says, we should turn to the deferential "balancing" test that the Court adopted to assess zoning restrictions in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978). We side with the landowner plaintiffs. Nothing in the relevant constitutional text, history, or precedent supports Nashville's distinction between administrative and legislative conditions. *Nollan's* test thus should apply to both types, including those imposed by the sidewalk ordinance.[27]

The adjudicative versus legislative argument recently made its way to the Supreme Court. *Sheetz v. County of El Dorado*,[28] another case where IMLA provided amicus support to the local government, arose when California's El Dorado County Board of Commissioners adopted a General Plan which conditioned the issuance of a building permit on the landowner's payment of a traffic impact mitigation (TIM) fee to finance the widening of existing County roadways and construction of new roads. The County did not make individualized analyses as to the traffic impact of each project, but based the TIM fee on a formula which considered the geographic zone of the proposed structure and the nature of the building involved (single-family residential, multi-family residential, general commercial).

Under that formula, the County agreed to issue a building permit to landowner George Sheetz, who sought to build a single-family modular home on his property, on the condition that he pay a TIM fee in the amount of $23,420. He paid, obtained the permit, and promptly challenged the TIM fee as violating the Takings Clause. Citing *Nollan* and *Dolan*, he argued that the TIM fee was an unconstitutional condition because the County had not made an "individualized determination" as to the "essential nexus" and "rough proportionality" between the amount of the fee and the traffic impact resulting from his project.

The California Court of Appeal held in favor of the County. It found that, in contrast to the one-off, ad hoc, adjudicative mechanisms in *Nollan* and *Dolan*, the TIM fee program had been legislatively derived and was generally applicable to all County landowners pursuant to a fully transparent formula. These differences meant that a lesser degree of scrutiny was appropriate for the TIM fee—one which the County satisfied.

Sheetz appealed, obtaining Supreme Court certiorari on the following question: "whether a permit exaction is exempt from the unconstitutional conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation."[29] At oral argument on January 9, 2024, the Justices seemed uniformly skeptical of the presumption that a legislatively-derived measure inherently escapes heightened scrutiny: as Justice Gorsuch put it, there appeared to be "radical agreement" on that point. But many questions arose; some Justices queried whether the TIM fee was actually a tax, while others asked whether an impact fee was even subject to traditional Fifth Amendment Takings analysis at all.

Among other points, IMLA's amicus arguments—raised in a brief filed jointly with the City and County of San Francisco and IMLA's affiliates in the Local Government Legal Center--emphasized the importance of impact fees to local governments, particularly given the impediments localities face in raising taxes and the legal mandate that they balance their budgets. IMLA and the other amici also pointed out that many impact fees are the product of robust nexus studies used by localities as they craft fee structures, and pointed out the impracticality and cost which would result if individualized impact assessments of the sort demanded by Mr. Sheetz were to become mandatory.[30]

On one level, the *Sheetz* litigation presented a concerning possibility that impact fees nationwide could be deemed invalid under rigorous unconstitutional conditions analysis. Indeed, Justice Alito seemed willing to position the fee directly in the crosshairs of *Nolan/Dollan/Koontz*, offering the Sheetz counsel an opportunity to characterize the permit requirement as a "no building easement" demanded by the government.[31] But given the narrow parameters of the Question Presented by the Court and the subsequent tenor of oral argument, the consensus seems to be that the issue will be remanded to the California courts on relatively narrow grounds, leaving intact generally applicable impact fees, so long as supported by reasonable economic and policy rationales.[32]

The Right to Exclude as a Protected Property Right: IMLA has also been involved in another continually-evolving element in the Takings debate—the degree of governmentally-caused or authorized intrusion on private property which will offend the Constitution. The right to exclude others from one's land is undeniably one of the fundamental "sticks" of property ownership. We know from *Nollan* that granting the public a permanent high tide easement across private beachfront, unless closely tethered to the right being sought by the landowner, violates the Fifth Amendment. We also know from another foundational Supreme Court decision--*Loretto v. Teleprompter Manhattan CATV Corp*.-- that a governmental mandate which grants a third party the right of continuous presence on private property, even if the "presence" is no more than cable television wires and a small device attached to a building, constitutes a *per se* physical Taking.[33]

Other Supreme Court precedent illustrates that the intrusion need not be permanent to fail Fifth Amendment scrutiny. Intermittent low-altitude governmental overflights that impair a landowner's

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enjoyment of property is a Taking.[34] So is seasonal flooding caused by the government, as confirmed in *Arkansas Game and Fish Commission v. United States*,[35] another case where IMLA filed an amicus brief. Against that background, it was predictable that governmentally-mandated physical entry onto private property by third parties, even if only periodic, would be the subject of a Takings challenge.

Cedar Point Nursery v. Hassid [36] scrutinized a California law that required agricultural businesses to allow labor organizers onto their land three times a day for 120 days each year. A divided panel of the Ninth Circuit held that, although the regulation effected an uncompensated easement, it did not constitute a *per se* physical taking of private property because it did not allow continuous occupation.[37] Not surprisingly, the litigants disagreed as to the proper test to apply: while the labor union argued that a more nuanced *Penn Central* inquiry was appropriate, the nursery owner pointed to *Loretto's per se* analysis as the applicable reference.

The question presented in *Cedar Point* was whether the uncompensated appropriation of an easement that is limited in time effects a *per se* physical taking under the Fifth Amendment. The Court found that depriving landowners of their right to deny entry, even if the deprivation is only intermittent, violates the Takings Clause:

> [G]overnment authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property—to literally "take access," as the regulation provides. Cal. Code Regs., tit. 8, §20900(e)(1)(C). It is therefore a per se physical taking under our precedents.[38]

IMLA joined an amicus brief filed by a broad group of local government associations, arguing that occasional governmental entry onto private property was vital to civic order:

> State and local officials, and their delegees, routinely must enter onto private property as an incident to the exercise of their multitudinous duties. From restaurant inspections to guardian ad litem home visitations, limited purpose physical intrusions by governments are a ubiquitous feature of American life. . . . [Petitioners] posit that a landowner's right to exclude others not only comprises a distinct property interest in toto, but also that it is divisible into micro-interests abridged by anyone who intrudes for any period of time. In this way, each governmental entry onto private land, no matter how fleeting or unobtrusive, is transmogrified into a direct appropriation of a property interest—a classic taking.[39]

Illustrating the value of voicing to the Court the concerns of government, whether as a party or as an amicus, Chief Justice Roberts made it clear that *Cedar Point* is not fatal to legitimate health, safety, and related public functions:

> The Board, seconded by the dissent, warns that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property. See post, at 11–14. That fear is unfounded. . . [T]he government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. . . . When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the of the Court constitutional conditions framework should not be difficult to satisfy.[40]

The Right to Exclude and the Right to Evict: If the right to exclude is girded by the Takings Clause, is the right to evict similarly protected? That question is at the heart of a recent case where IMLA signed onto an amicus brief supporting a member. In *El Papel LLC v. City of Seattle*,[41] two landlords asserted that the covid-based eviction moratoria imposed by the City and by the State of Washington violated the Fifth Amendment.

The Ninth Circuit affirmed the lower court Takings outcome in favor of the governments, specifically rejecting the landlords' reliance on *Cedar Point*:

> While the Landlords make some compelling points, *Cedar Point Nursery* does not support their claim. Unlike in *Cedar Point Nursery*, where a state regulation required agricultural employers to grant entry onto their property to union organizers for up to three hours a day so that the organizers could solicit support for unionization, *see* 141 S. Ct. at 2069–70, Seattle's eviction restrictions did not impose a physical occupation on the Landlords, *see Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land."). Nor did Seattle's restrictions compel the Landlords to use their property for a specific purpose. The Landlords here chose to use their property as residential rentals; the tenants' occupancy was not imposed over the Landlords' objection in the first instance. *Cf. Yee*, 503 U.S. at 528 (finding that the government had not "required any physical invasion of [the owners'] property" by the park owners' existing tenants). And the challenged regulations allowed the Landlords to evict their tenants for some specified

> purposes. . . . Although the Landlords assert that Seattle's eviction restrictions deprived them of their right to exclude, this right is not absolute in the landlord/tenant context. (*citations excluded*).[42]

In late January 2024, the *El Papel* plaintiffs petitioned the Supreme Court for certiorari, foreseeable in part due to their representation by the Pacific Legal Foundation (PLF). That group has filed in numerous similar cases, implicitly challenging *Yee* and arguing that any law limiting a landlord's right to evict a tenant, even if delayed temporarily in support of basic tenant fairness, violates a fundamental precept of property ownership.

Although certiorari was denied in *El Papel* in late February, the question seems destined for further debate: the Eighth Circuit has reached a diametrically opposite conclusion on the *El Papel* issue. *Heights Apartments v. Walz* challenges a Covid-era temporary eviction moratorium (Executive Order) issued by Minnesota Governor Tim Walz—similar to the Seattle measure-- and those authorized by more than 30 states, the Supreme Court of North Dakota, the 116th Congress, and the Trump Administration.[43] In *Heights*, the Eighth Circuit found, citing *Cedar Point*, that the landlords had stated a Takings claim sufficient to reverse a lower court's dismissal:

> Heights alleges the [EOs] effectuated physical takings because they forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation. The Walz Defendants contend that no physical taking has occurred because landlords were not deprived of their right to evict a tenant. Rather, they argue, the [EOs] imposed only a restriction on when a landowner could evict a tenant, making it similar to Yee v. City of Escondido, 503 U.S. 519 (1992) (finding a rent control ordinance was not a physical taking). Since the parties briefed this issue, the Supreme Court decided Cedar Point Nursery, which is instructive in this case. . . . The Court explained:
>
> "Whenever a regulation results in a physical appropriation of property, a per se taking has occurred." Id. at 2072. It is immaterial whether the physical invasion is "permanent or temporary," "intermittent as opposed to continuous," or whether the government is directly invading the land or allowing a third party to do so.…
> According to Heights' complaint, the [Orders] "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant." Heights has sufficiently alleged that the Walz Defendants deprived Heights of its right to exclude existing tenants without compensation. The well-pleaded allegations are sufficient to give rise to a plausible per se physical takings claim under Cedar Point Nursery.[44]

Governor Walz sought rehearing en banc and failed; five judges would have granted his request, and one authored a vigorous dissent.

Further landlord cases seek Supreme Court review. *Kagan v. City of Los Angeles* challenges a law which requires one year's notice before terminating a lease and evicting the tenant.[43] The Ninth Circuit upheld that provision, generating this argument in PLF's request for cert:

> This decision is irreconcilable with physical takings precedent from this Court, such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). *Loretto* and *Cedar Point* hold that government-authorized physical invasions of property, whether by things or people, qualify as a per se, physical taking of property. *Cedar Point*, 141 S.Ct at 2072. Moreover, a physical occupation is a taking whether it is for one year or a hundred. Thus, that a property owner may be able to remove their property from the rental market, after an unwanted tenant is permitted to remain for a year, does not cure the taking. A year-long, unwanted occupation is still a violation of the owner's right to exclude strangers from the property, and a taking. Id. at 2074.[44]

The petitioner in *Kagan* argues that, under *Cedar Point*, a Fifth Amendment violation occurs as soon as any such impairment in a landlord's rights is permitted, even without any actual entry:

> [A] completed intrusion into property is not needed to state a physical takings claim. A per se, physical taking arises as soon as government *authorizes* the occupation of property. *Cedar Point*, 141 S.Ct. at 2072.[45]

Other versions of the debate about a landlord's right to evict have sought answers at the Supreme Court. The Court recently considered petitions in two Takings cases arising from the Second Circuit, each challenging New York City laws designed to protect tenants. In *74 Pinehurst LLC v. City of New York* (no. 22-1130), owners of smaller New York City apartment buildings (10 to 33 units) challenge the City's Rent Stabilization Law (RSL). The RSL allows landlords to evict tenants under limited circumstances, including for breach of the lease, if the unit will be undergoing extensive rehabilitation, or if a family member requires housing in the unit. But beyond minimal exceptions, the RSL probits eviction of rent-paying tenants. The Second Circuit found no physical takings claim because Petitioners voluntarily entered the rental market in the first instance and could, in some circumstances, evict tenants who breach their leases. The Petitioners contended

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otherwise: the RSL grants tenants and their successors a perpetual right to renew the lease, which "strips owners of their right to exclude others from their property and prevents them from living in their own apartments."[46] The result, they say, violates the Court's *per se* Takings jurisprudence in *Loretto* and *Cedar Point* and departs from *Penn Central's* regulatory Takings analysis.[47]

The question presented in *74 Pinehurst* was "(1) Whether a law that prohibits owners from terminating a tenancy at the end of a fixed lease term, except on grounds outside the owner's control, constitutes a physical taking; and (2) whether allegations that such a law conscripts private property for use as public housing stock, and thereby substantially reduces its value, state a regulatory takings claim."[48]

Under the same rubric, the Petition in *335-7 LLC v. City of New York* (no. 22-1170) queried whether the RSL and related regulations which inhibit eviction effect any or all of the following: a per se physical taking (by expropriating petitioners' right to exclude); a confiscatory taking (by depriving petitioners of a just and reasonable return); or a regulatory taking (as an unconstitutional use restriction of petitioners' property).[49]

On February 20, 2024, as this article was being written, the Court denied cert in *74 Pinehurst* and *335-7 LLC*. But there is at least one vote for further consideration of the landlord-tenant Takings debate. As Justice Thomas put in in his dissent from denial:

> [T]o evaluate their as-applied challenges, we must consider whether specific New York City regulations prevent petitioners from evicting actual tenants for particular reasons. Similarly, petitioners' facial challenges require a clear understanding of how New York City regulations coordinate to completely bar landlords from evicting tenants. The pleadings do not facilitate such an understanding. However, in an appropriate future case, we should grant certiorari to address this important question. It remains to be seen whether the Court will seize upon such an opportunity to further expand the ambit of private property rights shielded under the Takings umbrella, and to check governmental efforts at protecting tenants.[50]

Law Enforcement Damage as a Taking: A recently emergent debate in another arena of Takings litigation seems unremarkable at first but requires close attention by local governments. It has long been virtually beyond question that damage to property caused during legitimate police activity is not a compensable Taking. In *Lech v. Jackson*,[51] IMLA provided amicus support to Greenwood Village, Colorado after a local couple sued the City's police chief and others to recover for extensive injury to their home caused by law enforcement as they pursued a barricaded gunman who repeatedly shot at police. The Circuit affirmed the district court's grant of summary judgment to the defendants, agreeing that the destruction was not, as plaintiffs argued, a species of eminent domain. Rather, citing numerous other Circuits, it held that officer-caused damage in the course of enforcing the criminal code is a legitimate exercise of police power, not susceptible to Takings-based compensation.[52]

That question of law was challenged by a Texas district court in 2022 as it considered Vicki Baker's suit to recover for damage to her home after City of McKinney police pursued a suspect who had entered the premises with a 15-year old hostage.[53] Baker conceded that officers' extensive use of teargas and destruction of her garage door and fence were legitimate police actions but disagreed that further analysis was foreclosed—a position the lower court adopted:

> The City asks this Court to adopt what would constitute a per se rule—that destruction to private property resulting from the exercise of valid police power cannot constitute a Fifth Amendment Taking. Neither the Supreme Court nor the Fifth Circuit have directly found a taking that requires just compensation when destruction of property results from the exercise of valid police power. The City correctly points out that other circuits have foreclosed recovery under similar circumstances. . . However, both the Fifth Circuit and the Supreme Court have suggested such action could amount to a taking.[54]

The court denied the City's motion to dismiss. Baker's claim went before a jury, which which found McKinney liable for $60,000 in damage to her residence and furnishings[55]

On appeal to the Fifth Circuit, the City sought IMLA's amicus assistance. Among other points, IMLA's brief emphasized the negative consequences which would result if police—or fire departments, EMTs, and other first responders—considered the costs to their departments before acting. The City and IMLA were pleased with the Circuit's reversal of the district court:

> We conclude that, as a matter of history and precedent, the Takings Clause does not require compensation for damaged or destroyed property when it was objectively necessary for officers to damage or destroy that property in an active emergency to prevent imminent harm to persons.[56]

Vicki Baker's case would not end there, and her Fifth Circuit trajectory is now coinciding with a similar police damage claim at the Sixth Circuit. In 2022, Mollie and Michael Slaybaugh sued the Town of Smyrna, Tennessee and Rutherford County for extensive damage to their home.[57] Officers had pursued the Slaybaugh's adult son to the residence based on a felony arson and murder warrant in the death of a neighboring county sheriff's deputy. The son was known to be armed and

refused to exit, prompting police to fire some 35 teargas cannisters into the house. The Slaybaughs sought more than $70,000 in damages—a claim which was denied by the Middle District of Tennessee.

Appealing to the Sixth Circuit, the Slaybaughs cited the still-valid Texas district court holding in favor of Vicki Baker.[58] The appellees-Rutherford and Smyrna-then cited the Fifth Circuit *Baker* reversal. While the Fifth subsequently denied *en banc* review in *Baker*, six of seventeen judges would have re-heard the case, and two authored a spirited dissent from the denial, criticizing what they view as the majority's improperly narrow application of the Takings Clause.[59] Unsurprisingly, the Slaybaughs' counsel promptly provided that dissent to the Sixth Circuit.

As noted by the district court in *Baker*, the Supreme Court has not formally opined on the intersection of police-caused damage and the Takings Clause. That status may soon change; the Institute for Justice, counsel for the homeowners in both *Baker* and *Slaybaugh*, has just petitioned the Court for certiorari in *Baker*. If granted, IMLA will have yet another opportunity to advocate for the interests of local government.

The Surplus Equity Conundrum: While the Court has yet to opine on the law enforcement property damage issue, last year it ruled emphatically on another facet of Takings: governmental retention of amounts in excess of unpaid real property taxes, interest, and penalties. *Tyler v. Hennepin County*--another case where IMLA filed as an amicus--was brought by PLF on behalf of an elderly homeowner who had not paid property taxes on her empty former residence and failed to answer notices about the potential governmental sale of her home. [60] Under Minnesota law, once a statutory timeframe passed without action by the taxpayer, absolute title vested in the County, which could then sell the property and retain the proceeds. The eventual $40,000 sales price exceeded the $15,000 owed to the County by Ms. Tyler, and she sued to recover the surplus.

The County argued that Minnesota's notice requirements, various redemption opportunities, lengthy timeframe before forfeiture, and other factors safeguarded Tyler's constitutional rights. The Court disagreed, ruling 9-0 that state law alone does not define "property" for Fifth Amendment purposes and that retention of the home's sales price in excess of amounts owed by Ms. Tyler to the County was unconstitutional.[61] While the Court clearly rejected the proposition that state law is the sole source of property rights under the Takings Clause, its statement that courts must "also look to 'traditional property law principles,' plus historical practice and this Court's precedents" left many questions unanswered. The decision does not provide clarity as to when the Takings actually occur or how the property is to be valued. And it creates significant issues for more than a dozen states with real property forfeiture regimes similar to Minnesota's.

***Knick*-The Private Property Shortcut:** As impactful as the foregoing precedents may be on Takings litigation, a decision that focused on process as much as on defining property rights, is arguably even more significant. Until 2019, it had been settled law for more than three decades that landowners seeking state law Takings recourse had to first pursue their remedies via inverse condemnation proceedings at state court, litigating whether compensation would be paid, and how much.[62] Rose Mary Knick, owner of 90 acres in rural Pennsylvania, became the object of an ordinance passed by Scott Township requiring unfettered public access to gravesites on private property. Initially directed to resolution at a state forum, she instead pursued a Section 1983 claim in federal court.

When the Third Circuit upheld dismissal of her case, she obtained Supreme Court certiorari, represented by the PLF. IMLA joined a large group of local government advocates in an amicus brief which emphasized that state law Takings compensation issues were most effectively resolved in state courts and that Knick's property rights were appropriately protected under such a process.

A 6-3 majority held for Knick. As Justice Roberts summarized the holding:

> We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it. That does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.[63]

Conclusion

The foregoing is not a complete catalog of the campaigns between private property owners and local governments where IMLA has provided amicus support. But this brief survey of real property Takings cases should serve to highlight the continuing pressures which localities will face as landowners wield a robust Fifth Amendment arsenal. IMLA looks forward to continuing its support of local governments in that debate.

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Notes

1. Emilio Longoria, Properly Construing the Just Compensation Clause, 64 Bost. Col. L. Rev. 6, at.1379-80 (2023).
2. James Madison, *Federalist Papers* 54.
3. 91 U.S. 367, (1975).
4. *Id.* at 371
5. *Id.* at 371-72..
6. *City Planning History-2016 Zoning Resolution*, New York City Department of City Planning, City Planning History - DCP (nyc.gov).
7. *Id.*
8. Ambler Realty Co. v. Village of Euclid, 197 F. 307 (1924).
9. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
10. *See for example* Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928): "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." (citing *Village of Euclid*).
11. 416 U.S. 1 (1974).
12. *New York Supreme Court Upholds Town of Yorktown Zoning Law,* The Bcw, Nov. 29, 2023 (validating town's overlay districts formed to stimulate economic activity and add housing via multifamily and mixed-use development) NYS Supreme Court Upholds Town of Yorktown Zoning Law - Business Council of Westchester (thebcw.org)
13. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
14. *Id.*
15. 438 U.S. 104 (1978).
16. *Id.* at 124. The Court reasoned that the railroad still enjoyed the economic benefit it had always obtained from its operation of Grand Central-user fees, rents, and the like.
17. Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
18. *Id.* at 837.
19. Dolan v. City of Tigard, 512 U.S. 374 (1994).
20. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605 (2013).
21. *Id.*
22. San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643, 671 (Cal. 2002).
23. 775 Fed.Appx. 348 (2019).
24. *Id.* at 349.
25. Knight v. Metropolitan Government of Nashville and Davidson County, 67 F.4th 816 (6th Cir. 2023).
26. *Id.* at 818.
27. *Id.*
28. Sheetz v. County of El Dorado, No. 22-1074 (2024).
29. Petition for Certiorari, *Sheetz*.
30. IMLA Amicus Brief in Support of Appellee, *Sheetz*.
31. Oral argument, *Sheetz*, transcript at p. 13.
32. Amy Howe, *Court split over California man's takings dispute*, SCOTUSblog, Jan. 9, 2024.
33. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) construed a New York state law requiring property owners to permit installation and maintenance of cable television wires on their premises. After losing at the New York Court of Appeals, Jean Loretto, owner of a five-story apartment building on Manhattan's West Side, successfully argued at the United States Supreme Court that mandated installation of a ½-inch diameter cable and two 1½-cubic foot boxes on her roof was a Taking.
34. United States v. Causby, 328 U.S. 256 (1946). While invalidating the common law doctrine ("*ad coelum*") that landowners' rights extend indefinitely into the airspace above the subject property, the Court ruled that low elevation flights, below the public airspace, worked a compensable Taking.
35. 538 U.S. 623 (2012). In *Arkansas Fish and Game*, the state entity sought just compensation under the Takings Clause for six consecutive years of Army Corps of Engineers-caused flooding during the growing season, destroying more than 18 million board feet of hardwood timber. The Court of Federal Claims' $5.7 million award to the state was reversed at the Federal Circuit; a unanimous Supreme Court reversed in turn, restoring the award.
36. Cedar Point Nursery v. Hassid, No. 20-107 (2021).
37. *Id.*
38. *Id.*
39. IMLA amicus brief, *Cedar Point*.
40. *Id.* The Court cited pesticide inspections, hydroelectric project investigations, pharmaceutical inspections, and nuclear material inspections as the type of governmental functions that should satisfy unconstitutional conditions analyses.
41. No. 22-35656 (9th Cir. Oct. 26, 2023).
42. *Id.*
43. Kagan v. City of Los Angeles, No. 21-55233 (9th Cir. Nov. 10, 2022).
44. Petition for Certiorari, Kagan v. City of Los Angeles, NoA. 22-739 (April 2023).
45. *Id.*
46. Petition for Certiorari, *74 Pinehurst LLC v. City of New York*.
47. Not surprisingly, the Petition cites to Justice Thomas' comment that the Court's "current regulatory takings jurisprudence leaves much to be desired." Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of certiorari)
48. *Id.*
49. Petition for Certiorari, *335-7 LLC v. City of New York*.
50. Denial of Certiorari, *74 Pinehurst LLC* and 335-7 LLC, Feb. 20, 2024, Thomas, J. dissent.
51. No. 1801-51 (10th Cir. Oct. 19, 2019).
52. *Id.*

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72. *Id.*
73. *Id.* at 3.
74. *Id.*
75. *Id.*
76. *Id.* at 4.
77. *Id.* at 2-4.
78. Letter to the Clerk from Applicants at 2, Bevis v. City of Naperville, No. 23A486 (U.S. Dec. 14, 2023), http://tinyurl.com/22mfw3ce.
79. *Id.*
80. Range v. Garland, No. 21-2835, 5-6 (3d Cir. 2023).
81. 18 U.S.C. §922(g)(1)(2022).
82. Andrew Willinger, *SCOTUS Gun Watch - Week of 2/5/24*, Duke Center for Firearms Law (Feb. 2, 2024), http://tinyurl.com/59ehtw7s.
83. Supreme Court of the United States, Docket Search, supremecourt.gov, http://tinyurl.com/2s3prdmk.
84. Transcript, at 50.
85. Antonyuk v. Chiumento, Nos. 22-2908 (L), 22-2972 (Con); 22-2933; 22-2987; 22-3237, 16 (2d Cir. 2023).
86. *Id.* at 16-17.
87. *Id.*
88. *Id.* at 16-20.
89. *Id.* at 21-23.
90. *Id.*
91. *Id.*
92. *Id.* at 15.
93. *See id.* at 16-31 *for a more in-depth discussion on the parties and procedural history.*
94. *Id.*
95. *Id.*
96. *Id.* at note 116.
97. *Id.* at 15.

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53. Baker v. City of McKinney, No. 21-CV-0176 (E.D. Tex. June 22, 2022).
54. *Id.*
55. *Id.*
56. Baker v. City of McKinney, No. 22-40644 (5th Cir. Oct. 11, 2023).
57. Slaybaugh v. County of Rutherford, et al, No. 3:23-cv-00057 (M.D. Tenn. Aug. 23, 2023).
58. Appellants' Brief, Slaybaugh v. County of Rutherford, et al, No. 23-5765 (6th Cir. Nov. 17, 2023).
59. Denial of rehearing en banc, Baker v. City of McKinney, No. 22-40644 (6th Cir. Feb. 14, 2024), Elrod, Oldham dissent.
60. Tyler v. Hennepin County, No. 22-166 (2023).
61. *Id*
62. Knick v. Township of Scott, 139 S.Ct. 2162 at 2167-68 (2019).
63. *Id.*

