

## Eminent Domain: Regulatory Takings

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides that private property must not be taken for public use without payment of just compensation. (The clause is made applicable to the states through the Fourteenth Amendment.) Under the Minnesota Constitution, article 1, section 13, private property must not be taken, destroyed, or damaged for public use without payment of just compensation.

**Definition of a “taking.”** The classic taking is a direct appropriation or physical invasion of private property. Since 1922, however, the courts have recognized that a state statute or local ordinance may impose restrictions or demands on the use of private property that are so onerous that it amounts to a taking and the government must compensate the owner. *Lingle v. Chevron, U.S.A., Inc.*, 125 S. Ct. 2074, 2081 (2005) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)). In these instances, called regulatory takings, the property owner brings an inverse condemnation action to compel the government to begin eminent domain proceedings and compensate the owner. A compensable regulatory taking may be temporary or permanent. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

**Categorical or per se regulatory takings.** There are two situations in which a court could find that a regulation is clearly a taking—a categorical or “per se” taking. First, if the regulation requires an owner to allow a physical invasion of the property, however minor, the owner must be compensated. *Lingle*, 125 S. Ct. at 2081 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law requiring landlords to permit cable TV companies to install cable facilities in apartment buildings held to be a taking)).

The second situation is when the regulation denies the owner of all economically viable use of the property and the regulation is not merely an explicit statement of common law limitations already present in the title. *Lingle*, 125 S. Ct. at 2081 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

**Penn Central test.** Apart from the two situations in which the Court would find a categorical taking or taking *per se*, there is little guidance on what constitutes a regulatory taking, and courts have relied on ad hoc factual inquiries. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (historical preservation designation limited development options for railroad station not a taking). In these cases, a court will analyze a regulatory takings claim under a three-part test in which the court, considering the parcel as a whole, looks at:

- (1) the economic impact of the regulation on the owner;
- (2) the extent to which the regulation interferes with distinct legitimate, investment-backed expectations; and
- (3) the character of the government action—does it result in the equivalent of a physical invasion of the property or is it more a “public program adjusting the benefits and burdens of economic life to promote the common good.”

*Id.*; *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 114-115 (Minn. 2003) (following *Penn Central* analysis, court held that the “cloud of condemnation” over Nicollet Mall property in Minneapolis due to drawn out conflict over proposed LSGI development was a taking).

The Court does not look at whether the regulation is an effective way to achieve the stated purpose; the

focus is not on the government's purpose (once public use or purpose is established), but on the impact on the property owner's rights. *Lingle*, 125 S. Ct. 2074. Each of the tests for regulatory takings looks for the functional equivalent to an appropriation or physical invasion of private property. *Id.* at 2084.

**Minnesota's government enterprise or arbitration test.** In general, a regulation that diminishes property value alone does not constitute a taking. In Minnesota, however, a regulation that is designed to benefit a government enterprise, such as an airport, and results in a substantial diminution in value, may be a taking. *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980) (airport safety zoning ordinance that limited development and caused a substantial and measurable decline in market value was a taking). When a regulation arbitrates between competing uses, the court looks at whether the regulation deprives the property of all reasonable uses before determining that it is a taking. *Concept Properties, LLP v. City of Minnetrista*, 694 N.W.2d 804, 823 (Minn. App. 2005) ("comprehensive planning objective [is] to balance many public interests and to promote the City's particular land-use goals and rural values"), *rev. denied* (Minn. July 19, 2005).

**Development moratorium.** Local governments have authority to impose a moratorium on development in order to protect the planning process. [Minn. Stat. §§ 394.34, 462.355](#), subd. 4. During the moratorium, a property owner may have limited or no economically viable use of the property. The U.S. Supreme Court has held that under the federal constitution, a temporary regulation that denies all economically viable use of property is not a per se taking. The Court applies the *Penn Central* factors to determine if the regulation amounts to a compensable taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302 (2002); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. App. 1992) (remanded for determination of whether moratorium constituted a taking under case-specific analysis of *Penn Central*).

**Exactions.** An exaction is a government requirement that a landowner dedicate land or a property interest, such as an easement, as a condition for granting a development permit. An exaction may be found to be a taking unless the government shows that there is an essential nexus between a legitimate government interest and the condition exacted. Assuming the nexus exists, there must also be a "rough proportionality" between the planned development and the required dedication. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (permit to expand a store and parking lot conditioned on the dedication of a portion of the property for a greenway pedestrian/bicycle path held a taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-832 (1987) (permit to build a larger residence on beachfront property conditioned on dedication of an easement for public to cross a strip of property between owner's seawall and the mean high tide mark held a taking); *see also Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976) (cited in *Dolan*); *Kottshade v. City of Rochester*, 357 N.W.2d 301, 307-308 (Minn. App. 1995) (citing *Dolan* analysis); [Minn. Stat. § 462.358](#), subs. 2b and 2c (amended in 2004 to incorporate terms used in *Dolan*).

**Removal of nonconforming uses.** The 2006 Legislature enacted a number of significant changes to the statutes governing eminent domain in Minnesota. *See* [Minn. Laws 2006, ch. 214](#), effective May 20, 2006, with certain exceptions. One of the changes requires a local government to compensate the owner of a nonconforming use if the local government requires its removal as a condition of granting a permit, license, or other approval for a use, structure, development, or activity. This provision does not apply if the permit, license, or approval is for construction that cannot be done unless the nonconforming use is removed. [Minn. Stat. § 117.184](#).

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