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Takings

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I. Introduction §12.1

A man's home may be his castle, but that does not keep the Government from taking it.

Hendler v United States, [952 F2d 1364](#), 1371 (Fed Cir 1991).

As the court recognized in *Hendler*, the government has the power to take private property. There are, of course, limitations on that power. In some instances, the taking power may be exercised within the confines of a statutorily mandated procedure. Michigan has adopted the Uniform Condemnation Procedures Act (UCPA). [MCL 213.51](#) *et seq.* Under the UCPA, a governmental unit condemns private property for public use and pays the property owner just compensation. In other instances, however, the government does not intend to take private property, yet its actions have the effect of taking the property, leaving the property owner to bring a claim of inverse condemnation in the courts.

Recent decisions of the United States Supreme Court and the Michigan Supreme Court, as well as legislation enacted by the Michigan legislature, have accelerated the otherwise gradual evolution of takings jurisprudence. These decisions underscore the divergence of federal and Michigan law on constitutional protections of property ownership. Federal interpretation has expanded to permit takings of private property for economic development, while the interpretation of, and amendment to, Michigan law strictly limits the ability of the government to take private property for some quasi-public uses. With the exception of this recent divergence, the United States and Michigan constitutions' prohibitions on taking of private property for public use without just compensation have developed nearly parallel case law.

II. Constitutional Prohibitions and Statutory Considerations §12.2

Takings jurisprudence arises out of the prohibition of taking private property without just compensation found in the constitutions of the United States and Michigan. The Fifth Amendment of the United States Constitution provides "nor shall private property be taken for public use, without just compensation." [US Const, Am V](#). The Fourteenth Amendment extends this prohibition, also known as the "Takings Clause," to the states. *Chicago, B & Q R Co v Chicago*, [166 US 226](#), 239 (1897). The United States Supreme Court has explained this prohibition to mean that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transportation Co v New York City*, [438 US 104](#) (1978), quoting *Armstrong v United States*, [364 US 40](#), 49 (1960).

Michigan's constitution, containing the same prohibition against takings without just compensation, was amended in 2006, to provide, in part, as follows:

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's

principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.

'Public use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.

[Const 1963, art 10, § 2.](#)

The amendment places the burden of proof on the government to demonstrate by a preponderance of evidence that the taking is for a "public use." If the taking is for the purpose of eradicating blight, however, the standard of the burden of proof to establish a public use is clear and convincing.

If the government intends to take private property for a public use, it must follow the procedure set forth in the UCPA. It must pay just compensation as defined by the UCPA, which includes the requirement that the government agency make a "good-faith offer" of just compensation. [MCL 213.55](#). The UCPA provides for reimbursement of property owners' expert and attorney fees. [MCL 213.66](#).

III. Types of Takings §12.3

To apply the proper test to determine whether a taking occurs, a practitioner must first determine the type of taking. There are several forms of takings of private property: (1) direct government appropriation or physical invasion; (2) regulatory takings; and (3) limited land-use exaction cases where the government forces a property owner to essentially dedicate his or her land to advance a public goal or benefit. Characterization of takings, however, is often imprecise. While a physical taking, at its most basic level, is a physical occupation or intrusion, and a regulatory taking results from regulations that prevent the owner from using the property, to some degree a regulation may result in a physical occupation. See *Loretto v Teleprompter Manhattan CATV Corp*, [458 US 419](#) (1982), where a regulation requiring landlords to allow installation of cable television lines for use by tenants constituted a physical taking. Careful evaluation of the type of government action is important to ensure application of the appropriate takings analysis.

Arguably, there may be a fourth type of taking -- judicial takings. In *Stop the Beach Renourishment, Inc v Florida Dep't of Environmental Protection*, [560 US ____](#); 130 S Ct 2592; 177 L Ed 2d 184 (2010), the court unanimously ruled that no taking occurred under a Florida statute's aggressive authority to restore eroded beaches. The court relied heavily on the state's common law principles governing property rights, upholding the Florida supreme court's decision that no taking had occurred because the property owners did not own the property

(submerged lands on which the sand was deposited) allegedly taken under the statute. A four-justice plurality, however, argued:

The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.

Id. at 8 (slip opinion); 130 S Ct at ____; 177 L Ed 2d at 196. The plurality discussion of judicial takings, however, was heavily criticized by the other four justices. With the issue of whether the court would entertain a claim of a judicial taking left open, practitioners can expect to see to an influx of cases designed to place the issue squarely before the Court. At least one Michigan decision has touched upon this issue. See *Mumaugh v McCarley*, [219 Mich App 641](#); 558 NW2d 433 (1996) (trial court took private property when it redrew property lines, depriving a property owner of 85% of his lake frontage).

A. Physical Takings §12.4

A physical taking occurs when the government occupies or physically intrudes upon private property. Where the government drills water wells, effectively draining an aquifer and depriving landowners of their subterranean water rights, such rights have been appropriated and a taking has occurred. *Jones v East Lansing-Meridian Water & Sewer Authority*, [98 Mich App 104](#); 296 NW2d 202 (1980). Erosion resulting from improvements to the Mississippi River, however, was not a physical taking because there was no direct physical invasion of the property. *Bedford v United States*, [192 US 217](#) (1904). In Michigan, however, a physical taking occurred when the Department of Natural Resources constructed a boat launch and installed jetties that created erosion of a private beach above the high water mark. *Peterman v Dep't of Natural Resources*, [446 Mich 177](#); 521 NW2d 499 (1994). The difference between *Bedford* and *Peterman*, as explained by the Michigan Supreme Court, is that the plaintiffs in *Peterman* had lost more than just their beach to erosion. The loss of a large tree, grass and “fast land” was significant enough for the court to find a physical taking.

Physical intrusions may result in physical takings. Generally, the physical intrusion must be direct and immediate. Some physical intrusions are obvious, such as nuisances like “water, earth, sand, or other material, or by having any artificial structure placed on it,” by the government. *Pumpelly v Green Bay Co*, [80 US 166](#), 181 (1871) (state authorized dam caused flooding of private property). The Michigan Supreme Court has held that the effects of a recently constructed highway, creating noise, dust, pollution and vibration on neighboring property, must amount to a special injury before a property owner can recover just compensation. *Spiek v Dep't of Transportation*, [456 Mich 331](#); 572 NW2d 201 (1998). Thus, the property owner in *Spiek* did not suffer a special injury, as all property owners along the recently constructed service drive to I-696 suffered the same injury. Exacerbation of an existing problem, such as an increase in flooding, is not a direct invasion. *Sanguinetti v United States*, [264 US 146](#) (1924).

Where natural gas, stored in an underground storage field, migrates to adjoining property, there is no direct invasion of the adjoining property due to the migrant nature of natural gas. *ANR Pipeline Co v 60 Acres of Land*, [418 F Supp 2d 933](#) (WD Mich 2006).

A physical taking occurs when the government enters upon private property to install groundwater monitoring wells to monitor migrating contamination from adjacent property. *Hendler v United States*, [952 F2d 1364](#) (Fed Cir 1991).

When the government takes property by physical invasion, there is no “case-specific analysis” and the property owner’s recovery is automatic. *Ligon v City of Detroit*, [276 Mich App 120](#), 132; 739 NW2d 900 (2007).

B. Regulatory Takings §12.5

Pennsylvania Coal Co v Mahon, [260 US 393](#) (1922), is usually cited as the first regulatory takings case. In *Pennsylvania Coal*, the property owners were granted surface rights to property and waived any claim related to the coal company's express right to remove coal from underneath the surface. The state then enacted a statute prohibiting the mining of coal without leaving pillars to prevent surface subsidence. The court, stating that “the statute is admitted to destroy previously existing rights of property and contract,” concluded in a famous aphorism “while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.” *Id.* at 415.

1. Total Regulatory Takings §12.6

A total or “categorical” regulatory taking is a regulation that takes all economically viable use of the land. The preeminent decision of a categorical regulatory taking is *Lucas v South Carolina Coastal Council*, [505 US 1003](#) (1992). In *Lucas*, the property owner purchased two lots on which he intended to construct two residences. The lots were 300 feet from the beach. After the purchase, the state enacted a statute that prohibited all structures, including homes, in coastal dune areas. The court held that the property owner suffered a taking due to the statute’s effect of destroying all of the value of the property. Successful total regulatory taking cases are not prevalent, as they require a showing of elimination of all economic uses. Unsuccessful claims can be found in the Michigan cases of *K&K Construction v Dep’t of Natural Resources*, [456 Mich 570](#); 575 NW2d 531 (1998) (no categorical taking in denial of a wetland permit where the entire property, not just the affected parcel, retained value), and *Bevan v Brandon Twp*, [438 Mich 385](#), 404; 475 NW2d 37 (1991) (no categorical taking where effect of zoning ordinance creates a “disparity in value between uses,” rather than a total loss of value).

Unpublished decisions: *Sopsich v Milford Charter Twp*, unpublished opinion per curiam of Court of Appeals, issued July 23, 1996 ([Docket No. 177033](#)) (no categorical taking where township enacted an ordinance prohibiting hunting in specified areas following public hearings and review of police reports, leaving property owners with economically viable use of their land); *Brookside Acquisitions, LLC v Lyon Charter Twp*, unpublished opinion per curiam of Court of Appeals, issued November 17, 2005 ([Docket No. 257416](#)) (no categorical taking where owner failed to show that property had value only if developed with maximum

density of 130 lots); *Dan & Jan Clark, LLC v Orion Charter Twp*, unpublished opinion per curiam of Court of Appeals, issued June 25, 2009 ([Docket No. 284238](#)) (no categorical taking where owner failed to establish, in detail, the efforts it made to market the property to support a claim that it was unmarketable); *Chestnut Development, LLC v Marion Twp*, unpublished opinion per curiam of Court of Appeals, issued June 22, 2010 ([Docket No. 287312](#)) (no categorical taking occurred when the township denied plaintiff's rezoning request since plaintiff didn't establish that the property lacked value even if it were split, developed under another zoning classification or was unmarketable for some reason).

2. Partial Regulatory Takings §12.7

The most difficult type of taking for a practitioner to analyze is that of a partial regulatory taking. In a partial regulatory taking, a property owner is left with some viable uses of its property following application of a regulation. Partial regulatory takings are analyzed under what are commonly known as the “*Penn Central*” factors, in reference to the factors set forth in the landmark decision of *Penn Central Transportation Co v New York City*, [438 US 104](#), 123 (1978). In *Penn Central*, the United States Supreme Court upheld an ordinance designating Grand Central Terminal as a historic landmark. The designation subjected the property to numerous development restrictions, which limited the property's utility and thwarted the property owner's plan to construct an office building over the train station. The court set forth the following test:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Id. at 124. Using this formula, the court found no taking had occurred. The court looked at the parcel as a whole and found that the restrictions did not interfere with the property owner's present and historical use of the property. Since the property still had significant value, albeit not as an office building, there was no taking.

The courts, including the United States Supreme Court, have struggled with further refining the *Penn Central* factors. For example, the United States Supreme Court suggested, in *Agins v City of Tiburon*, [447 US 255](#) (1980), that, in addition to denying an owner economically viable use of its land, the owner must also establish that the regulation fails to substantially advance a legitimate government interest. Following the lead of the United States Supreme Court, courts across the country, including Michigan, recognized the “substantially advances” test. See *Bevan v Brandon Twp*, [438 Mich 385](#); 475 NW2d 37 (1991).

In 2005, however, the United States Supreme Court unanimously clarified its decision in *Agins* and announced that the test of “substantially advances a legitimate government interest” was not a “stand-alone regulatory test,” but rather a “formula [that] prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.” *Lingle v Chevron USA, Inc*, [544 US 528](#), 540 (2005). Accordingly, a practitioner should be careful about relying on pre-*Lingle* decisions that incorporate the “substantially advances”

formula. For a discussion of high-profile pre-*Lingle* cases that appear to turn on the application of the “substantially advances” formula, see Justice O’Connor’s opinion for the court in *Lingle*.

With its “clarification”, the United States Supreme Court in *Lingle* reiterated that the factors enunciated in *Penn Central* continue to control an analysis of a partial taking. This position is consistent with the court’s other recent opinions. See *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, [535 US 302](#) (2002) (temporary moratorium on development of lakefront properties does not amount to a taking).

The clearest enunciation of the test to be applied by the Michigan courts in a partial regulatory taking is set forth in *K&K Const v Dep’t of Natural Resources*, [267 Mich App 523](#); 705 NW2d 365 (2005). The court held:

[I]f the land-use regulation, like traditional zoning and wetland regulations: (1) is comprehensive and universal so that the private property owner is relatively equally benefited and burdened by the challenged regulation as other similarly situated property owners, and (2) if the owner purchased with knowledge of the regulatory scheme so that it is fair to conclude that the cost to the owner factored in the effect of the regulations on the return of investment, and (3) if, despite the regulation, the owner can make valuable use of his or her land, then compensation is not required under *Penn Central*.

Id. at 529. In *K&K Construction*, a land developer argued that denial of its permit to fill wetlands contained on four contiguous parcels amounted to a taking. The trial court found a total regulatory taking had occurred as to one of the parcels. Ultimately, however, the court of appeals found that no taking occurred because the property retained significant value when considered with its contiguous parcels, the developer acquired the property with knowledge of the regulations, and the regulations did not burden only the developer’s property. A similar result was reached in *Chelsea Investment Group, LLC v City of Chelsea*, ___ Mich App ___; ___ NW2d ___ (2010) ([Docket No. 288920](#)), in which the court found that no taking had occurred where a large residential development, being built in phases, was halted when the state placed a moratorium on water and sewer permits, effectively preventing the city from approving additional phases. While the plaintiff suffered an economic loss (measured by loss profit), the court found that the property still retained value. In discussing whether the city’s actions had interfered with the property owner’s investment-backed expectations, the court found no interference occurred since the development agreement between the plaintiff and the city required city approval of each phase, the plaintiff was aware of previous moratoriums, and the plaintiff admitted that it was “sensitive” to the issue of moratoriums during its negotiations with the city.

Unpublished decisions: Michigan courts continue to utilize the *Penn Central* factors, as refined by *K&K Construction*. *Divergilio v West Bloomfield Twp*, unpublished opinion per curiam of Court of Appeals, issued November 2, 2006 ([Docket No. 261766](#))

(township's restrictions on wetland permit limiting use of owner's backyard and prohibiting construction of a deck caused insufficient diminution in value and did not interfere with investment-backed expectations); *City of Gaylord v Maple Manor Investments, LLC*, unpublished opinion per curiam of Court of Appeals, issued August 8, 2006 ([Docket No. 266954](#)) (no taking where city enacted ordinance mandating connection to city water supply); and *Richfield Landfill, Inc v Michigan*, unpublished opinion per curiam of Court of Appeals, issued June 17, 2008 ([Docket No. 272519](#)) (reconsideration in light of *Lingle* did not change court's determination that no taking had occurred where sanitary landfill license was eventually granted); *Chestnut Development, LLC v Marion Twp*, unpublished opinion per curiam of Court of Appeals, issued June 22, 2010 ([Docket No. 287312](#)) (no taking occurred when township denied plaintiff's rezoning request because the government's action was consistent with its zoning laws and master plan, the economic impact of the township's decision did not destroy the value of the property, and plaintiff's investment-backed decision to purchase the property was based on knowledge that the rezoning wasn't guaranteed).

C. Exactions §12.8

Exactions occur when the government conditions development of private land on the dedication of an interest in the land for a stated public need. The decisions first establishing the standard under which such dedications will be tested are *Nollan v California Coastal Commission*, [483 US 825](#) (1987), and *Dolan v City of Tigard*, [512 US 374](#) (1994). In *Nollan*, the court found a taking by the California Coastal Commission when it conditioned the granting of a permit for a large beachfront home on the property owner providing public access through the property to the beach. The court held that there was an insufficient nexus between the stated purpose and the condition imposed on the property owner. The importance of a nexus was revisited in *Dolan*, where a commercial permit to expand a building was conditioned upon dedication of some of the owner's land to a floodplain. Once again, the court found the nexus between the stated purpose and the condition imposed on the landowner to be insufficient, and extended the rule to require a "rough proportionality" between the exaction and the harm caused by the regulated activity.

Other exaction cases include *City of Monterey v Del Monte Dunes, Ltd.*, [526 US 687](#) (1999) (although developer prevailed under another theory, its claim that an exaction occurred where city required a private open space did not amount to an exaction), and *Norman v United States*, [429 F3d 1081](#) (Fed Cir 2005) (no exaction where developer voluntarily granted a conservation easement to a non-profit association and the Army Corp. of Engineers subsequently allowed filling of wetlands). Michigan courts have seen few exaction cases, with *Dowerk v Oxford Charter Twp*, [233 Mich App 62](#); 592 NW2d 724 (1998), having some discussion of the subject. In *Dowerk*, the court found that no taking had occurred where the township required, as a condition of approval of a development, upgrading an existing private road and compliance with

road construction standards, as such requirements were in “rough proportion” to the increased use due to the development. *Id.* at 68-69.

IV. Elements of a Taking Claim §12.9

The characteristics of each type of taking are crucial to any analysis of a takings claim. Other elements, however, must be present before a takings claim can be pursued. Sometimes, what appears to be a viable takings claim fails for lack of the most obvious of elements.

A. Compensable Interest §12.10

A government action is not a taking unless the property owner has a compensable interest. Whether a property owner has a vested, or compensable interest, is frequently litigated in the context of zoning. There is extensive Michigan case law that has evolved from the rezoning of property contrary to the intent of the owners, resulting in claims of constitutional violations. In *Schubiner v West Bloomfield Twp*, [133 Mich App 490](#); 351 NW2d 214 (1984), the owner's intent to construct a three-story office building was thwarted by the township's zoning amendment that prohibited such buildings. Despite receiving conditional approval of the township's planning commission and taking numerous pre-construction actions, all at a cost of over \$100,000, the township denied the site plan. The court found that no taking had occurred and stressed the need for the owner to have a building permit to establish a vested interest. Other activities that are insufficient to create a vested interest include application for a building permit, *Franchise Realty Interstate Corp v City of Detroit*, [368 Mich 276](#); 118 NW2d 258 (1962), and preliminary operations, *Bloomfield Twp v Beardslee*, [349 Mich 296](#); 84 NW2d 537 (1957). For a related discussion of activity sufficient to create a vested interest, see *Dingeman Advertising, Inc v Algoma Twp*, [393 Mich 89](#); 223 NW2d 689 (1974) (owner obtained a building permit to construct a billboard, staked out the billboard, and had a power pole, with power, installed).

A recent example of the need for a compensable interest is found in *Dorman v Clinton Twp*, [269 Mich App 638](#); 714 NW2d 350 (2006). The property owner had envisioned using recently acquired property for an onsite public storage business, which was consistent with the zoning ordinance, but inconsistent with the master plan and the neighborhood. Although the township had encouraged the property owner to pursue a preliminary plan, the planning commission rezoned the property and denied the site plan. In analyzing the question of whether a taking had occurred, the court discussed several factors, the most significant of which was whether there was a distinct investment-backed expectation that had been destroyed by the rezoning. The focus of the court's analysis was whether the owner had certain vested interests in his intended use of the property; the court concluded that he did not because he had put little effort into researching the investment before purchasing the property. Moreover, the owner did not have a building permit or an approved site plan, nor had construction been substantially completed, all crucial factors in a Michigan court's analysis in evaluating a taking.

Other cases of interest include *Murphy v City of Detroit*, [201 Mich App 54](#); 506 NW2d 5 (1993) (business owners impacted by the relocation of a neighborhood did not have a compensable property interest), and *City of Kentwood v Sommerdyke*, [458 Mich 642](#); 581 NW2d 670 (1998)

(lapse of statutorily granted property right due to failure of owners to give notice of intent to maintain possession left owners without compensable interest).

B. Government Action §12.11

It is not enough that private property be affected by a governmental action. The governmental action must be a substantial and direct cause of the decrease in value of the property and the resulting damage must be greater than a mere diminution in value.

A simple standard to consider when evaluating a takings claim can be found in *Attorney General v Ankersen*, [148 Mich App 524](#), 385 NW2d 658 (1986). In *Ankersen*, the court found that no taking had occurred on neighboring land by the state's issuance of a license to a hazardous waste disposal operation, nor did the state's failure to subsequently supervise the operation constitute a taking. The court reiterated the recognized rule that "a plaintiff must establish (1) 'that the government's actions were a substantial cause of the decline of his property's value', and (2) 'that the government abused its legitimate powers in affirmative actions directly aimed at plaintiff's property.'" *Id.*, 561 (citations omitted).

As aptly stated by another panel of the court of appeals, "there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Murphy v City of Detroit*, [201 Mich App 54](#), 57; 506 NW2d 5 (1993). "[T]he form, intensity, and deliberateness of the governmental actions toward the injured party's property must be examined." *In re Acquisition of Virginia Park*, [121 Mich App 153](#), 160; 328 NW2d 602 (1982). See also *Hinojosa v Dep't of Natural Resources*, [263 Mich App 537](#); 688 NW2d 550 (2004) (no taking following a fire that started from a neighboring abandoned home acquired by the state through tax delinquency proceedings), and *Merkur Steel Supply Co v City of Detroit*, [261 Mich App 116](#); 680 NW2d 485 (2004) (mere promulgation and publication of plans does not constitute a taking).

Another aspect of the governmental action is its character. In *K & K Const v Dep't of Natural Resources*, [267 Mich App 523](#); 705 NW2d 365 (2005), the court looked at whether the government singled out the plaintiffs to bear the burden for a public good. In determining that no taking had occurred, the court found the character of the government's action to be a comprehensive, broadly based regulatory scheme that shifted the burdens and benefits of all citizens relatively equally. In the more recent decision of *Chelsea Investment Group, LLC v City of Chelsea*, ___ Mich App ___; ___ NW2d ___ (2010) ([Docket No. 288920](#)), the court left no doubt that governmental actions that impact all property equally will not give rise to a taking (no taking where city was unable to approve permits due to state-imposed temporary moratorium on the issuance of water and sewer permits, impacted all developments, not just plaintiff's). See also *Spiek v Dep't of Transportation*, [456 Mich 331](#); 572 NW2d 201 (1998) (a harm shared by similarly situated properties is not a taking). In fact, the character of the action has been considered to be determinative, regardless if the damage to, or interference with, the property interest, is substantial. *Heydon v MediaOne of Southeast Michigan, Inc.*, [275 Mich App 267](#); 739 NW2d 373 (2007) (statute did not cause a taking where it allowed for the installation of easements and obligated the cable companies to compensate property owners).

Even if there is substantial and affirmative action by the government to take private property for a public use, there must be harm before a taking will be compensated. The harm must be greater than a mere diminution in value and must rise to the level of a significant injury to property or an interference with use of the property. See *ANR Pipeline v 60 Acres of Land*, [418 F Supp 2d 933](#), 941 (WD Mich 2006); *Heinrich v City of Detroit*, [90 Mich App 692](#); 282 NW2d 448 (1979); and *Deltona Corp v United States*, [657 F2d 1184](#) (Ct Cl 1981) (damage alone is insufficient to prove a taking). The government's designation of property as a wetland, by itself, does not constitute a taking. *Bond v Dep't of Natural Resources*, [183 Mich App 225](#); 454 NW2d 395 (1989).

C. Public Use §12.12

A claim of any compensable taking requires that property be taken for a public or quasi-public use. If property is not taken for such a use, then a challenge under the Takings Clause is inappropriate and should be challenged under another theory. Whether a taking is for a public use is a question of law. *Wayne Cty v Hathcock*, [471 Mich 445](#); 684 NW2d 765 (2004).

1. Michigan decisions §12.13

Michigan courts take a narrower view of the meaning of "public use" than federal courts. The Michigan Supreme Court in *Wayne Cty v Hathcock*, [471 Mich 445](#); 684 NW2d 765 (2004), made it clear that takings in Michigan are analyzed with greater scrutiny than those in the federal courts and that no taking of private property for economic development will survive such scrutiny. In analyzing a condemnation of properties for a proposed mixed-use business and technology park, the court overruled its earlier and highly criticized decision of *Poletown Neighborhood Council v City of Detroit*, [410 Mich 616](#); 304 NW2d 455 (1981). In *Poletown*, the court sanctioned the city's taking of properties in an entire neighborhood and the subsequent conveyance of the properties to General Motors for the construction of an automobile assembly plant. The *Poletown* court relied heavily on federal decisions, such as *Berman v Parker*, [348 US 26](#) (1954), and its deference to the legislature's determination of a "public purpose." *Hathcock*, however, rejected the previously-condoned federal reasoning and set forth three contexts in which the transfer of private property through governmental action to a private entity is permissible: (1) where the public necessity of the extreme sort requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; or (3) where the property is selected because of facts of independent public significance, rather than interests of the private entity to which the property is being transferred. *Id.* at 476.

Following *Hathcock*, Michigan's constitution was amended in 2006 to define public use to exclude "private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues" and states that public use will be defined as how the "term is understood on the effective date of the amendment." [Const 1963, art 10, § 2](#).

Michigan courts have, in limited instances, found takings that do serve a public use even if there are private interests involved. In *City of Novi v Robert Adell Children's Funded Trust*, [473 Mich 242](#); 701 NW2d 144 (2005), the city, faced with increased traffic, proposed the installation of a new road across the landowner's property. In addition, it proposed a road "spur" that would be primarily used by a particular private industrial facility. The spur, however, would be owned,

controlled, and maintained by the city and the public would be free to use the spur. Although the owner of the industrial facility was contributing toward the project, it would have no ownership or control of the spur. As such, the spur served a public use, not under the *Hathcock* analysis, but under Michigan precedents allowing taking a road for public use.

2. Federal decisions §12.14

Federal courts have historically deferred to the government's reasoning for taking property for a public use. One of the most controversial decisions in takings jurisprudence has been the recent case of *Kelo v City of New London*, [545 US 469](#) (2005), which turned on the interpretation of "public use." The properties involved in *Kelo* were not in a blighted area, but in an area sufficiently distressed to cause the city to condemn the properties for their inclusion in a comprehensive redevelopment plan. The condemnation followed the announcement that a large pharmaceutical company would be moving onto property adjacent to the properties to be developed under the city's plan. The court upheld, in a 5 to 4 decision, the takings as constitutional, finding the city's development plan for economic development to be for a "public use." Rather than giving literal meaning to the constitutional mandate of "public use," the court noted the inadequacy of such a test and, relying on years of precedent, applied the "broader and more natural" standard of a "public purpose." *Id.* at 480. Noting that the development plan did not "benefit a particular class of identifiable individuals," *id.* at 478, the court found the public purpose of economic development, mostly in the form of job creation and increased tax revenue, *id.* at 483, for the taking to be constitutional. In its analysis, the court continued its policy of deferring to the legislative body's judgment as to what constitutes a public purpose and observed that the "public purpose" is the purpose of the development plan, rather than the subsequent use intended by the private party. The court noted that states are free to impose restrictions on state takings powers, citing *Hathcock*. *Id.* at 489 n 22.

While the decision in *Kelo* created a stir in media and political circles, it is not a significant leap in federal constitutional interpretation. In *Berman v Parker*, [348 US 26](#) (1954), the court found to be constitutional, a physical taking of private property for redevelopment, giving significant deference to the decision of the legislature to exercise its police powers for the health, safety, morals and welfare of the public, opining,

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Id. at 32 (citation omitted).

Similarly, in *Hawaii Housing Authority v Midkiff*, [467 US 229](#) (1984), the "public use" included reducing the concentration of land ownership. Thus, where the private property of the state was concentrated in ownership and the state legislature authorized a "massive taking and redistribution" of private property from landowners and lessors to lessees, the court looked to the purpose of the legislation, not the mechanics of it, to find the public purpose. The court declared that it would not disturb the public purpose determination of the legislature "unless the use be palpably without reasonable foundation." *Id.* at 241, quoting *United States v Gettysburg Electric R Co*, [160 US 668](#), 680 (1896). The state argued the purpose of the redistribution of private property was to reduce the perceived "social and economic evils of a land oligopoly." *Id.* at 241-242. See also *Strickly v Highland Boy Gold Mining Co*, [260 US 527](#) (1906), and *O'Neil v Leamer*, [239 US 244](#) (1915).

D. Just Compensation §12.15

Just compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual.

In re State Highway Comm'r, [249 Mich 530](#), 535; 229 NW 500 (1930).

While just compensation seemed an obvious remedy for physical takings, the United States Supreme Court in 1987 first directed the states to provide a remedy, in the form of money damages, for regulations found to be a taking. *First English Evangelical Lutheran Church v Los Angeles Cty*, [482 US 304](#) (1987). Attempts to determine what compensation is just in a regulatory taking have produced numerous opinions, often conflicting, due to the subjective nature of the value of property and its bundle of rights. And, the courts have not always agreed on what exactly constitutes just compensation. In part, this is because often unpredictable juries decide what constitutes just compensation, as such value is a question of fact. *City of Detroit v Detroit Plaza Ltd Partnership*, [273 Mich App 260](#); 730 NW2d 523 (2006); *Merkur Steel Supply Co v City of Detroit*, [261 Mich App 116](#); 680 NW2d 485 (2004).

A case-by-case approach must be used in analyzing the losses actually incurred as a result of a partial taking. The fair market value of the property taken and, in some instances, damages to the remaining property, are the proper measure of damages. *Oakland Cty Bd of Rd Comm'rs v JBD Rochester, LLC*, [271 Mich App 113](#), 114; 718 NW2d 845 (2006); *Dep't of Transportation v Van Elslander*, [460 Mich 127](#); 594 NW2d 841 (1999). The value of the property taken must be determined as of the date of the taking and must be based on the highest and best use of the property. *Detroit/Wayne Cty Stadium Authority v Drinkwater, Taylor and Merril, Inc*, [267 Mich App 625](#); 705 NW2d 549 (2005). The value of the property taken includes the loss of fixtures on the property. *Wayne Cty v Britton Trust*, [454 Mich 608](#); 563 NW2d 674 (1997). Sales of comparable properties may be considered in determining the value of the taken property. *Detroit Plaza Ltd Partnership*. In determining just compensation under the UCPA, both pre- and post-condemnation appraisals are admissible evidence. *Dep't of Transportation v Frankenlust Lutheran Congregation*, [269 Mich App 570](#); 711 NW2d 453 (2006).

Other less tangible damages may be appropriate in order to make the property owner whole, including the moving expenses for personal property. *Id.* See also [MCL 213.352](#) for moving expense allowances. Damages related to the interruption of business itself, such as the relocation of or purchase of new equipment and additional labor costs, have also been awarded. See *In re Grand Haven Hwy*, [357 Mich 21](#); 97 NW2d 748 (1959); *City of Detroit v Hamtramck Community Federal Credit Union*, [146 Mich App 155](#); 379 NW2d 405 (1985). Lost profits have been considered in determining the rental value of property, but they must be shown with reasonable certainty. *Merkur Steel*. See the discussion in *Drinkwater* for further guidance in consideration of lost profits in determining just compensation. See also the discussion in *Silver Creek Drain Dist v Extrusions Div, Inc*, [468 Mich 367](#); 663 NW2d 436 (2003), regarding consideration of all factors relevant to market value to determine just compensation, including discussion that contaminated property must be valued as contaminated, rather than uncontaminated with a potential recovery of remediation costs. See also *Carrier Creek Drain Drainage Dist v Land One, LLC*, [269 Mich App 324](#); 712 NW2d 168 (2005) (just compensation may include consequential damages).

Tangible, yet hard to quantify, are oil and gas rights subject to a taking. In a unique case, with underlying political implications, the Michigan Court of Appeals was asked to determine just compensation where the director of the Department of Natural Resources, at his discretion, banned drilling in a 4,500 acre preserve in which the plaintiffs owned severed mineral interests. *Miller Bros v Dep't of Natural Resources*, [203 Mich App 674](#); 513 NW2d 217 (1994). Noting that the ban on drilling could be lifted at any time, the court declared the taking to be temporary and found that just compensation should be measured by fair market *rental* value, in addition to the enhancement of the value of the property that was not taken. The case was remanded for a determination of the fair rental value of the property taken and other factors. The *Miller Bros* saga ended, however, with the intervention of Michigan's governor and the eventual approval of the legislature, resulting in the largest monetary settlement, approximately \$60 million to the primary plaintiff, for a Michigan takings case. [2005 PA 188](#).

Wetland regulations typically generate the largest number of environmental takings cases. The reason for this appears to be based on the extensive and comprehensive nature of wetland regulations and the significant limitations these regulations place on any development. Michigan's wetland statute, Part 303, [MCL 324.30301](#) et seq, provides a method and calculus for determining the loss. [MCL 324.30323](#). The statute also provides a remedy to the state in the form of an option that allows the state to modify its decision that caused the taking. This option, of course, allows the state to make a regulatory decision which takes the property, allows the state to limit the economic impact of its decision through the statutory calculus (state equalized value multiplied by two), and, if the state is unhappy with the result, authorizes the state to modify its decision to blunt the economic impact on the state's treasury. See Chapter 10 for further discussion of Part 303.

For further discussion of just compensation, see Pesick, *Eminent Domain, Calculating Just Compensation in Partial Taking Condemnation Cases*, [82 Mich BJ 34](#) (2003). See also Michigan Standard Jury Instructions, such as [SJI2d 90.18](#) and [90.12](#).

Unpublished decision: *Sundry Dev v City of Lowell*, unpublished opinion per curiam of Court of Appeals, issued November 27, 2007 ([Docket No. 270458](#)) (loss of projected future profits is not compensable, as they are too speculative).

V. Other Considerations

A. Relevant Parcel §12.16

Practitioners should be aware that owners of several parcels of contiguous property will often claim a taking just as to one parcel, without consideration of the properties as a whole. This single parcel will appear to have suffered a greater impact by the regulation than if all the properties were considered. If faced with a regulatory claim involving application of the *Penn Central* factors, practitioners should analyze the impact of the regulation to the parcel as a whole, as the whole may or may not be greater than the sum of its parts. The parcel as a whole, often called the “denominator parcel,” is not subject to segmentation so as to maximize the damage caused by the regulation. The federal courts consistently look at the impact of the regulation on the property as a whole. See *Keystone Bituminous Coal Ass’n v DeBenedictus*, [480 US 470](#) (1987) (27 million tons of coal prohibited from being mined was only a small part of the entire mining operation, therefore no taking occurred); *Penn Central Transportation Co v New York City*, [438 US 104](#) (1978); *Forest Properties, Inc v United States*, [177 F. 3d 1360](#) (1999) (no taking due to prohibition of dredging as applied to 62 acres, rather than the 9.4 acres urged by the property owner). The United States Supreme Court recently reaffirmed its commitment to the “parcel as a whole” analysis in *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, [535 US 302](#) (2002).

Michigan courts look at the parcel as a whole when determining whether a regulation, as applied, constitutes a taking. *Bevan v Brandon Twp*, [438 Mich 385](#); 475 NW2d 37 (1991) (contiguous lots owned by the same owner and purchased separately, were considered as a whole in taking analysis). See also *Volkema v Dep’t of Natural Resources*, [214 Mich App 66](#); 542 NW2d 282 (1995); *Miller Bros v Dep’t of Natural Resources*, [203 Mich App 674](#); 513 NW2d 217 (1994). For a more recent discussion of the Michigan courts’ adherence to the parcel as a whole analysis, see *K & K Const v Dep’t of Natural Resources*, [267 Mich App 523](#); 705 NW2d 365 (2005), and the court of appeals’ finding that the trial court’s valuation was clearly erroneous for failure to include contiguous parcels.

B. Temporary Takings §12.17

All regulatory takings are, by their nature, temporary, as the government is free to rescind or amend the regulation that perpetrated the taking, so as to relieve it. See *First English Evangelical Lutheran Church v Los Angeles Cty*, [482 US 304](#) (1987). A total temporary taking is uncommon. Thus, a temporary moratorium on development lasting thirty-two months is not a total or “categorical” taking. *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, [535 US 302](#) (2002).

C. Ripeness §12.18

Practitioners should take great care in determining whether a takings claim is ripe. A takings claim is not ripe for judicial review until the regulatory decision maker makes a final administrative decision regarding the regulation and its impact on the property. See *Williamson Cty Regional Planning Comm'n v Hamilton Bank*, [473 US 172](#) (1985). See also *Braun v Ann Arbor Charter Twp*, [262 Mich App 154](#); 683 NW2d 755 (2004) (claim not ripe for failure to appeal to zoning board of appeals or to seek a variance), and *Paragon Properties Co v City of Novi*, [452 Mich 568](#); 550 NW2d 772 (1996) (takings claim under a city zoning ordinance was not ripe until the property owner had applied for a variance and been denied). A decision is final and subject to review, even though a property owner failed to apply for permits for alternative uses that it did not intend to pursue. *Oceco Land Co v Dep't of Natural Resources*, [216 Mich App 310](#); 548 NW2d 702 (1996). A decision is not final, however, if a property owner's zoning request has been "tabled" by the municipality. *Frenchtown Charter Twp v City of Monroe*, [275 Mich App 1](#); 737 NW2d 328 (2007). Where a municipality rejects a development plan, but leaves open the possibility of some development, the claim may not be ripe. See *MacDonald, Sommer & Frates v Yolo Cty*, [477 US 340](#) (1986). See also *Palazzolo v Rhode Island*, [533 US 606](#) (2001).

To bring a takings claim in federal court, the claim is not ripe until the property owner has pursued a state claim of inverse condemnation in an effort to obtain just compensation. *Williamson, Montgomery v Carter Cty*, [226 F3d 758](#) (6th Cir 2000), and *Neuenfeldt v Willaims Twp*, [356 F Supp 2d 770](#) (ED Mich 2005) (requirement to bring inverse condemnation claim in state court does not apply to other federal claims, such as due process and equal protection). Practitioners should review the United State Supreme Court decision of *San Remo Hotel, LP v City and Cty of San Francisco*, [545 US 323](#) (2005) (full faith and credit clause of the United States constitution prohibits a federal court from considering takings claims that were heard and decided by a state court).

D. Statute of Limitations §12.19

A takings claim against the state must be brought within three years of the taking. [MCL 600.6452\(1\)](#); *Gleason v Dep't of Transportation*, [256 Mich App 1](#); 662 NW2d 822 (2003). A claim against other governmental entities must be brought within six years. [MCL 600.5813](#); *Hart v City of Detroit*, [416 Mich 488](#); 331 NW2d 438 (1982). See *Silverstein v Detroit*, 335 F Supp 1306 (ED Mich 1971), for guidance in determining when a taking has occurred. Takings claims against the federal government must be brought within six years after they first accrue. [28 USC 2501](#); *John R Sand & Gravel Co v United States*, [532 US 130](#) (2008).

E. Substantive Due Process and Equal Protection Claims §12.20

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." [US Const, Am V](#). Michigan's constitution contains identical language to the federal due process clause. [Const 1963, art 1, §17](#). A challenge to a governmental taking due to the lack of substantive due process triggers a formula set forth in *Agins v City of Tiburon*, [447 US 255](#) (1980). The question becomes whether the burden of the

regulation is proportional to the benefits to be achieved by the regulation and whether the benefit is a legitimate government purpose or goal. In theory, most zoning ordinances, under which governmental units exercise their police power to protect the public health, safety and welfare, meet the test. See *Village of Euclid v Ambler Realty Co*, [272 US 365](#) (1926); *Pearson v City of Grand Blanc*, [961 F2d 1211](#) (6th Cir 1992) (property owner's alleged substantive due process claim failed because city's refusal to rezone the property was rationally related to legitimate zoning concerns). From a practical standpoint, federal courts will defer to the local government's regulation of land use. Michigan courts have followed similar reasoning in addressing substantive due process claims. See *Chelsea Investment Group, LLC v City of Chelsea*, ___ Mich App ___; ___ NW2d ___ (2010) ([Docket No. 288920](#)) (no violation of due process where plaintiff was not deprived of property (only lost opportunity and profit) and the city's decision to not approve permits for subsequent phases in residential development was "reasonable and legitimate," given that the state had put a moratorium on the issuance of necessary water and sewer permits and the city had obligations to city residents superior to those owed the plaintiff). The viability of deprivation of due process claims can further be found in *Lingle v Chevron USA, Inc*, [544 US 528](#) (2005), which separated due process claims from taking claims.

Frequently, a property owner claiming a taking has occurred will also allege that the government treated it differently than other property owners in similar circumstances in violation of [US Const Am XIV, §1](#) and [Const 1963, art 1, §2](#). In *Dowerk v Oxford Charter Twp*, [233 Mich App 62](#); 592 NW2d 724 (1998), the property owner, who sought to construct four homes and extend the existing roadway, was not similarly situated to a neighboring property owner whose construction of a home was not conditioned upon improving a roadway.

F. Section 1983 Claims §12.21

[42 USC 1983](#) sets forth a procedure to state a claim under the United States Constitution for damages resulting from a state regulation that unduly interferes with one's use of land; it does not create a substantive cause of action. Accordingly, a property owner may bring a §1983 claim in federal court challenging a state action. Generally, a property owner is required to assert that it has received a final determination at the state level and, in some circuits, must demonstrate that the property owner has exhausted all state remedies, i.e., sought just compensation at the state level. See *Cormack v. Settle-Beshears*, [474 F3d 528](#) (8th Cir 2007) (takings claim due to city's annexation of property and city's enforcement of fireworks ordinance was barred for failure to exhaust inverse condemnation claim in state court), and *Bateman v City of West Bountiful*, [89 F3d 704](#) (10th Cir 1996) (taking claim for enforcement of zoning ordinance not ripe for failure to exhaust inverse condemnation claim in state court).

A property owner bringing a §1983 claim must prove that a government official, acting under the color of state law, deprived the property owner of rights, privileges or immunities guaranteed by the United States Constitution. See *Dowerk v Oxford Charter Twp*, [233 Mich App 62](#); 592 NW2d 724 (1998). See also *Electro-Tech, Inc v HF Campbell Co*, [433 Mich 57](#); 445 NW2d 61 (1989).

G. The Nuisance Exception §12.22

There may be no taking if the subject property is found to be injurious to other property or otherwise a nuisance to the public. *Keystone Bituminous Coal Ass'n v DeBenedictus*, [480 US 470](#) (1987) (regulation prohibited coal mining that would create a nuisance). In *Lucas v South Carolina Coastal Council*, [505 US 1003](#), 1029 (1992), however, the court narrowed the nuisance exception by requiring application of the principles of property law to determine whether a nuisance exists, stating “[a] law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.” *Id.* at 1029 (footnote omitted). Similarly, a legalized nuisance does not amount to a taking if it causes no unique harm to a particular property. *Spiek v Dep't of Transportation*, [456 Mich 331](#), 345-346; 572 NW2d 201 (1998).

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