

# 3 Takings Law

## INTRODUCTION

When considering farmland and open space preservation methods, it is important to understand how preservation tools and techniques may impact a property owner's rights. The takings issue focuses on the need to balance two competing principles, respect for the property rights of individuals and the public's ability to further the public good by regulating a property owner's potential use of land. This chapter attempts to describe the "takings" clause, and the principles used to determine if a government's action is considered a "takings". This chapter is a summary and compilation of the issues surrounding the takings law and is not intended to offer legal advice or options.



## TAKINGS LAW

Property rights are protected by the Constitution, but the degree to which they are protected and the degree to which they are limited by the interests of the general public is debatable. Some believe that few, if any, limits on private property are justified. For others, private rights are inherently limited to protect the public<sup>1</sup>.

Owning real estate is like owning a bundle of sticks. The "sticks" in the bundle are the various rights that accompany property ownership. For example, on the simplest level, a property owner may personally "use" it, let family members "use" it, "lease" it, "mortgage" it, join with others to "develop" it, "bequeath" it to heirs, or "sell" it. Each of those simple uses can be accomplished in an endless variety of ways. One of the most basic rules of takings law is that the focus of the inquiry must be on the entire "bundle," not the individual sticks. If a governmental regulation destroys the opportunity to use one or more of the sticks, but the remaining sticks give value to the bundle as a whole, no taking has occurred<sup>2</sup>.

The legal term "takings" refers to the physical acquisition of private property by government for a public purpose. It also applies when government regulation removes all economically viable use of private property in what the courts describe as a "regulatory" or "constructive" taking. The concept is based on the Fifth Amendment of the U.S. Constitution, which provides the concept that private property cannot be taken for public use unless there is just compensation<sup>3</sup>:

<sup>1</sup> *Taking Sides on Takings Issues, Public and Private Perspectives*, Thomas E. Roberts

<sup>2</sup> *Takings Law in Plain English*, Christopher J. Duerksen, Richard J. Roddewig

<sup>3</sup> *Takings: Balancing Public Interest and Private Property Rights*, Wisconsin Brief 98-2

***“No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”***

These words have come to be known as the Takings Clause. In addition, the Fourteenth Amendment of the U.S. Constitution extends due process protection to state actions:

***“No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”***

The Wisconsin property owner is offered a variety of protections. An owner whose property is adversely affected by land use regulations may file an action under the “just compensation” clause of the Wisconsin Constitution, which duplicates the wording of the U.S. Constitution. Section 32.10, Wisconsin Statutes, authorizes a property owner to file an “inverse condemnation” claim when state or local government occupies property without exercising its powers of condemnation or when a governmental restriction or refusal to renew a license deprives a landowner of a significant portion of a property’s beneficial use<sup>4</sup>.

Prior to 1922, there were two interpretations of the takings clause. The first interpretation of a “taking” was when a title to a property was taken for a highway, building, or other public use. At that time, the courts clearly stated that this type of action could not be done without just compensation. Today this is known as eminent domain. The second interpretation dealt with the “invasion” of private property. For example, in *Pumpelly v. Green Bay County (1871)*, the U.S. Supreme Court found that a dam, authorized by a state statute to control flooding, destroyed a landowner’s property by flooding his land. This was considered an “invasion” and ruled as a taking<sup>5</sup>. Prior to 1922, land use regulations for the public welfare were not considered a “takings”.

In 1922, the U.S. Supreme Court heard its first case regarding the taking clause in the case of the *Pennsylvania Coal Company v. Mahon*<sup>6</sup>. The State of Pennsylvania had passed a law prohibiting coal-mining practices that could cause buildings or streets to subside into a mine. The Pennsylvania Coal Company argued that, because they had retained mining rights, the state was “taking” their property. This landmark case held the land use regulation unconstitutional under the taking clause, stating that government regulation went “too far” thus causing a takings. Four years later in the case, *Village of Euclid v. Ambler Realty Co.*<sup>7</sup>, the Supreme Court established the basis for modern land use controls when it upheld the Village of Euclid comprehensive zoning ordinance. This case involved a piece of property that was restricted to residential use, which caused the value of the land to drop significantly. The Court decided that the ordinance served a valid public purpose and did not create a taking since the land could still be developed and sold,



<sup>4</sup> *Takings: Balancing Public Interest and Private Property Rights*, Wisconsin Brief 98-2

<sup>5</sup> *Property Rights, Land Stewardship, & The Takings Issue*, Oregon State University, Extension Service

<sup>6</sup> 260 U.S. 393 (1922)

<sup>7</sup> 272 U.S. 365 (1926)

even though the land was worth less money. Following these two court cases, the interpretation of “takings” was broadened to include “regulatory” takings which may occur when government regulations removes all economically viable use of private property, and does not serve a valid public purpose.

Beginning in the 1970’s, governmental regulation of land use expanded to include preservation of endangered species, wetlands protection, shoreland and waterways conservation, natural hazard mitigation, historic preservation, and open space conservation<sup>8</sup>. These preservation goals often times conflicted with private uses.

Over the years, several thousand cases were heard by the judicial system to determine if land use regulations violated the “takings” clause. Judges presiding over these cases found it difficult to set rules due to the fact that each case proved to be unique. In deciding whether a government action constitutes a taking, the U.S. Supreme Court has considered several factors, including<sup>9</sup>:

1. ***The extent to which the regulation interferes with the economically viable use of the property.***  
If there is a “reasonable economic use” to a person’s property following a land use regulation, a takings has not occurred, even if the value decreased significantly. Simply denying the most profitable use of land does not of itself result in a constitutional taking<sup>10</sup>.
2. ***Whether the land use regulation serves a valid public purpose.***  
Public purposes may be related to local health, safety, and welfare of its citizens as in the case of nuisance regulations, but they also may include general welfare considerations such as protection of air and water quality, agricultural and forest lands, wetlands, floodplains and sites of historic or archeological value<sup>11</sup>. If a land use regulation can demonstrate a “public good”, it is not considered a takings.
3. ***The need for the regulation versus the demands that it places on the owner.***  
The relationship between the need for regulation and the burden placed on the landowner must be considered, particularly when an owner is asked to give up a portion of the property for public use<sup>12</sup>.

In its decisions, the U.S. Supreme Court sets standards for takings to be followed by lower federal courts or state courts. Over time, principles have been established to strike a fair balance between public need in governmental, environmental and land use restrictions and private economic interests to determine if a “takings” occurred. These principles are as follows<sup>13</sup>:

1. **No Absolute Right of Use**
  - No one has an absolute right to use his property in a manner that may harm the public’s health or welfare, or damage the interests of neighboring landowner’s or the community as a whole.
2. **Reasonable Return or Use**
  - Property owners have a right to a reasonable return or use of their land, but the U.S. Constitution does not guarantee that the most profitable use will be allowed.
3. **Furthering the Public Interest**
  - Courts have and are continuing to sustain a wide variety of purposes as valid reasons for enacting environmental and land use regulations.

<sup>8</sup> *Takings: Balancing Public Interest and Private Property Rights*, Wisconsin Brief 98-2

<sup>9</sup> *Takings: Balancing Public Interest and Private Property Rights*, Wisconsin Brief 98-2

<sup>10</sup> *Property Rights, Land Stewardship, & The Takings Issue*, Oregon State University, Extension Service

<sup>11</sup> *Takings: Balancing Public Interest and Private Property Rights*, Wisconsin Brief 98-2

<sup>12</sup> *Takings: Balancing Public Interest and Private Property Rights*, Wisconsin Brief 98-2

<sup>13</sup> *Takings Law in Plain English*, Christopher J. Duerksen, Richard J. Roddewig

#### 4. Consider the Parcel as a Whole

- The focus of a “takings” case is the entire property interest, not just a portion of the property.

#### 5. No Speculative Plans

- A developer must actually submit a development plan and pursue all administrative remedies after denial of that plan before filing a takings claim in court.

#### 6. Ordinary Delays

- Normal delays in the review of applications for environmental and zoning permits, or in adopting changes to the law, do not create temporary takings.

#### 7. Having Development Pay its Way

- Local communities can insist that developments pay their own way.

#### 8. How Much is Due?

- If a government entity does over regulate, it does not have to buy the entire property.

#### 9. Protection from Serious Harm

- If a proposed use amounts to a public nuisance, then it may be forbidden – without compensation—despite a complete elimination of use or value.

## CASE STUDIES

The following U.S. Supreme Court cases are among many cases that illustrate the major factors concerning the “takings” issue and how property rights versus government actions for the public good have been addressed, and how the nine principles mentioned above helped guide the outcome.

### ***Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922)**

This was the first Supreme Court case resulting in a decision recognizing that a “takings” could result with no physical invasion. The State of Pennsylvania had passed a law prohibiting coal mining practices that might cause buildings or streets to subside into a mine. The Pennsylvania Coal Company argued that, because they had retained mining rights, the state was “taking” their property. The U.S. Supreme Court declared the land use regulation unconstitutional because, while it served a valid public purpose, it did not compensate for the mining company and was considered to be a takings<sup>14</sup>. This ruling extended the test for a taking from confiscation or invasion of property to include the individual’s rights of protection from government rules that go “too far” in restricting use of property<sup>15</sup>.

### ***Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)**

This case involved a change in the Village’s zoning ordinance that “down-zoned” the plaintiff’s land from industrial to residential. The Ambler Realty Company argued that this restriction imposed a 75 percent loss on the value of its property, thus causing a taking. The Supreme Court upheld the ordinance as a permissible exercise of police power and decided that the Ambler Realty Company did not lose all economic value of its property since the land could still be developed and sold, albeit for less money than the original zoning, therefore, no “takings” occurred (Principle 2).

### ***Just v. Marinette County*, 56 Wis.2d, 201 N.W.2d 761 (1972)**

This case involves the constitutionality of shoreland zoning regarding placing fill material within 1,000 feet of a navigable lake and 300 feet of a navigable river without a conditional use permit. The State Supreme Court held that Marinette’s shoreland zoning ordinance which prevents, with exception of

<sup>14</sup> *Takings: Balancing Public Interest and Private Property Rights*, Wisconsin Brief 98-02

<sup>15</sup> *Property Rights, Land Stewardship, & The Takings Issue*, Oregon State University, Extension Service

special permit situations, changing of natural character of land within 1,000 feet of a navigable lake and 300 feet of a navigable river because of land's interrelation to contiguous water is not unconstitutional, confiscatory, or unreasonable. The court reformulated the harm-benefit rule to reach its decision, holding that "we have a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property."<sup>16</sup>

***Penn Central Transportation Co. v. New York City*, 433 U.S. 104 (1978)**

This case was very similar to the *Euclid v. Ambler* case in that it involved zoning restrictions. This case involved a historic landmark zoning ordinance adopted by NYC, which prohibited the development of high-rise buildings on the Grand Central Terminal site. The argument stated that this zoning created a taking by removing economic value to land within the zone. The Supreme Court upheld the regulation, reaffirming the principle that a major reduction in value does not constitute a taking, as long as the owner retains some economic value in line with reasonable investment backed expectations<sup>17</sup>. The property within the zone had a reasonable return or use (Principle 2).

***Agins v. City of Tiburon*, 477 U.S. 55 (1980)**

The City of Tiburon adopted an open space land use ordinance required by state law. At the time of purchase, the owner of a 5-acre parcel hoped to build 20 homes, similar to the density allowed on other parcels in the area. Under the new ordinance, the parcel was qualified for 0.2-1 house per acre, a "down-zoning". The plaintiff's argument stated that the "down-zoning" of his property was a "taking". The Supreme Court upheld the ordinance since the landowner did not file a development plan and that the ordinance allowed the land to have residential development. The court held that the application of zoning standards to a parcel becomes a taking if:

1. The ordinance fails to "substantially advance legitimate state interests". (Principle 3)
- Or
2. The ordinance "denies an owner economically viable use of his land"<sup>18</sup>. (Principle 2)

This case also illustrates that a "takings" did not occur since the landowner did not submit any development plan (Principle 5).

***Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987)**

Similar to the 1922 Pennsylvania Coal case, the State of Pennsylvania passed a law requiring coal companies to leave 50 percent of coal beneath buildings and cemeteries to prevent collapse. The coal companies argued that the law was unconstitutional because they could not use part of their property. Furthermore, they argued that the court should focus only on the restricted portion of their property in deciding their takings claim. The Supreme Court upheld the state law stating that the property in question has to be taken as a whole and not a portion (Principle 4). When the whole parcel was considered, the coal company retained an economically viable use of their property<sup>19</sup> (Principle 2).

***Nollan v. California Coastal Commission*, 483 U.S. 85 (1987)**

This case involved the practice, termed exaction, of requiring developers to help pay for or dedicate land for public facilities as part of their development efforts. Nollan, a developer, wanted to build a beachfront home and the California Coastal Commission wanted an easement for public beach access in exchange for issuing Nollan a building permit to replace an existing house. The Supreme Court struck down the exaction stating that the commission did not show an essential connection between the need for beach access and the denial of the permit. As a result, the Court created a new standard, the nexus

<sup>16</sup> *Land Use Law, 4<sup>th</sup> Edition*, Daniel Mandelker

<sup>17</sup> *Property Rights, Land Stewardship, & The Takings Issue*, Oregon State University, Extension Service

<sup>18</sup> *Property Rights, Land Stewardship, & The Takings Issue*, Oregon State University, Extension Service

<sup>19</sup> *Property Rights, Land Stewardship, & The Takings Issue*, Oregon State University, Extension Service

requirement (Principle 7). This requirement states that if any exactions occur, they must be in response to the specific burdens imposed by the development.

***Lucas v. South Carolina Coastal Council* 505, U.S. 1003 (1992)**

In this 1992 case, the Court adopted a new “categorical” rule for cases of total deprivation of all economically viable use that adds yet more mysteries to the jurisprudence of the taking clause. The case involves beachfront property that was purchased by Lucas two years before the adoption of new shoreline regulations by the South Carolina Coastal Council after several devastating hurricanes. The shoreline requirement prohibited the owner from developing his property in any way. Lucas filed suit, claiming that the law constituted a taking of his property because the prohibition deprived him of all economically viable use of his property, and the state trial court agreed. The State Supreme Court reversed, holding that a taking does not occur when a regulation restricting the use of property is intended to prevent a “serious public harm”. The Supreme Court, in an opinion by Justice Scalia, reversed. Justice Scalia concluded there were “at least two discrete categories” of regulation that were compensable. One was physical invasion of property, and the other was regulation that “denies all economically beneficial or productive use of land”. A total denial of all use is a taking even if the purpose of the regulation is to prevent a harm rather than confer a public benefit<sup>20</sup>.

***Dolan v. City of Tigard* 512, U.S. 374 (1994)**

This case is similar to the 1992 Nollan case involving exactions. The City of Tigard adopted a comprehensive plan that included the floodplain along a creek near the plaintiff’s property be clear of structures and be preserved as open space to minimize flood damage. In addition, the plan suggested a pedestrian/bicycle pathway be constructed to provide an alternative mode of transportation in the area. The plaintiff planned on expanding the existing business and applied for a permit. The City issued the building permit with the condition that the plaintiff dedicates 10 percent of his property that was within the floodplain to the City. The Court stated that a “nexus” existed between the furthering of the public’s interest and the permit condition on the property in question (Principle 7). It was “obvious” that a nexus existed between preventing flooding along the creek and limiting development in the creek’s floodplain<sup>21</sup>.

The City failed to show how the impacts of the business were related in a rough proportion to the need for public access on a bicycle path. Public access constituted an invasion, and there was no nexus established between the requirement and the impacts of the project<sup>22</sup>. This rationale came to be known as the “rough proportionality” test.

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<sup>20</sup> *Land Use Law, 4<sup>th</sup> Edition*, Daniel Mandelker

<sup>21</sup> *Land Use Law, 4<sup>th</sup> Edition*, Daniel Mandelker

<sup>22</sup> *Property Rights, Land Stewardship, & The Takings Issue*, Oregon State University, Extension Service

## SUMMARY

This chapter presents the concept of “takings” and what tests are used to determine if a “takings” has occurred. The key points of the “takings” issue are as follows:

1. The Fifth and Fourteenth Amendments of the U.S. Constitution provide the concept that private property cannot be taken for public use unless there is just compensation.
2. Following the landmark case, *Pennsylvania Coal Company v. Mahon* in 1922, the definition of the “takings” clause expanded to consideration of the impacts of land use regulations.
3. In deciding whether a government action constitutes a taking, the U.S. Supreme Court has considered several factors, including: 1) the extent to which the regulation interferes with the economically viable use of the entire property, 2) whether the regulation serves a valid public purpose, and 3) the need for the regulation versus the demands that it places on the owner. In its decisions, the Court sets standards for takings to be followed by lower federal courts or state courts.
4. These factors have expanded into several principles as court cases became more complex. They are as follows:
  - a. No absolute right of use - No one has an absolute right to use his property in a manner that may harm the public’s health or welfare, or damage the interests of neighboring landowners or the community as a whole.
  - b. Reasonable return or use - Property owners have a right to a reasonable return or use of their land, but the U.S. Constitution does not guarantee that the most profitable use will be allowed.
  - c. Furthering the public interest - Courts have and are continuing to sustain a wide variety of purposes as valid reasons for enacting environmental and land use regulations.
  - d. Consider the parcel as a whole - The focus of a “takings” case takes into account the entire property interest, not just a portion of the property.
  - e. No speculative plans - A developer must actually submit a development plan and pursue all administrative remedies after denial of that plan before filing a takings claim in court.
  - f. Ordinary delays - Normal delays in the review of applications for environmental and zoning permits, or in adopting changes to the law, do not create temporary takings.
  - g. Having development pay its way - Local communities can insist that developments pay their own way.
  - h. How much is due - If a government entity does over-regulate, it does not have to buy the entire property.
  - i. Protection from serious harm - If a proposed use amounts to a public nuisance, then it may be forbidden - without compensation - despite a complete elimination of use or value.