Constitutional Law - Fifth Amendment - Takings - Regulatory Takings

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Recent Decisions

CONSTITUTIONAL LAW—FIFTH AMENDMENT—TAKINGS—REGULATORY TAKINGS—The United States Supreme Court held that in order to survive a takings challenge, a development exaction must have an essential nexus with a legitimate state interest, and also that a rough proportionality must exist between the development exaction and the burdens to be imposed by the proposed development.

*Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).*

Florence Dolan1 ("Dolan") owned a plumbing and electric retail store in Tigard, Oregon (the "City")2 as well as a 1.67 acre (71,500 square foot) plot of land at the location of the store.3 Dolan's land was zoned as part of the City's Central Business District.4 Dolan's existing store was housed in a 9,700 square foot building which was located on the eastern side of the plot.5 Fanno Creek borders Dolan's property to the west, and part of her property lies within the creek's hundred-year floodplain.6

In 1989, Dolan submitted an application to the City proposing

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1. In all proceedings of this case below the Supreme Court, John T. Dolan, husband of Florence Dolan, was also a party. Brief for Petitioner, at ii, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518). John T. Dolan was deceased prior to the filing of briefs to the Supreme Court, so the case came before the Court in the name of Florence Dolan alone. Brief for Petitioner, at ii.
4. *Id.*
5. *Id.* The site also had a gravel parking lot. *Id.*
6. *Id.* A floodplain is the "lowlands bordering a [creek] which may be covered with water during periods of flood." A. NELSON AND K. D. NELSON, DICTIONARY OF APPLIED GEOLOGY MINING AND CIVIL ENGINEERING 142 (1967). A hundred-year floodplain is "[t]he area subject to inundation from a flood of a magnitude that occurs once every 100 years on the average (the flood having a one-percent chance of being equaled or exceeded in any given year)." 7 C.F.R. § 1940.302 (1994).
improvements to her property.\(^7\) Phase One of the proposed improvements included demolishing the existing 9,700 square foot building and constructing a new 17,600 square foot building, as well as paving an additional 20,200 square feet to be used as a parking lot.\(^8\) Phase Two included an additional building on the northeast corner of the plot for related businesses and additional parking.\(^9\) This proposed use of the property was consistent with the City's zoning regulations for the Central Business District.\(^10\)

Dolan's application was granted by the City Planning Commission (the "Commission") contingent upon several conditions.\(^11\) The conditions required Dolan to dedicate to the city all of her property within the hundred-year floodplain of Fanno Creek as a public recreational greenway and for storm water drainage improvements.\(^2\) The City also required Dolan to dedicate an additional fifteen-foot strip of land adjacent to the floodplain for construction of a pedestrian/bicycle pathway.\(^12\) The total land area of this required dedication was approximately 7,000 square feet, or ten percent of the total plot owned by Dolan.\(^14\) The required conditions were imposed pursuant to the

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\(^8\) Brief for Petitioner, at 3-4.
\(^9\) Dolan, 114 S. Ct. at 2312-14.
\(^10\) Id. at 2314 (citing Tigard Community Development Code § 18.66.030) [hereinafter CDC].
\(^11\) Dolan, 114 S. Ct. at 2314. Conditions attached to development permits are often referred to as "exactions." One author defines development exactions as:

[A] form of land-use regulation in which [the government] requires a developer to give something to the community as a condition to receiving permission to develop. In the majority of cases, the requisite contribution consists of a land dedication or a monetary payment. In some cases, however, the exacted contribution may also take the form of an agreement to restrict the use of the property to which the development exaction is applied.

\(^12\) Dolan, 114 S. Ct. at 2314.
\(^13\) Id. The relevant condition provided:

The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing hundred-year floodplain [of Fanno Creek] (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area.

Id. (quoting City of Tigard Planning Commission Final Order No. 91-09 PC (1991)).
\(^14\) Dolan, 114 S. Ct. at 2314. The City claimed that the required dedication did not require the transfer of title in fee simple, but only the grant of an easement. Brief for Respondent, at 17 n.16. Dolan disputed the City's contention, but the Court did not address this issue. Petitioner's Reply to Brief for Respondent, at 7, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518).
City's Community Development Code (the "CDC"). The City had developed the CDC in accordance with Oregon law.

Dolan challenged the dedication conditions imposed by the City by appealing the Commission's decision to the Oregon Land Use Board of Appeals (the "LUBA"). Dolan argued that the conditions constituted an uncompensated taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. Because Dolan had failed to exhaust her administrative remedies by applying for a variance with the City, the LUBA denied Dolan's claim due to lack of ripeness. Dolan submitted a new application to the City in March, 1991.

15. Dolan, 114 S. Ct. at 2314. The relevant portion of the CDC read: Where landfill and/or development is allowed within and adjacent to the hundred-year floodplain, the city shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

16. Dolan, 114 S. Ct. at 2313. In 1973, Oregon enacted a statute requiring all cities and counties in Oregon to adopt comprehensive land use plans pursuant to state-wide land use goals. Id. (citing Or. Rev. Stat. Ann. § 197.175 (1991 & Supp. 1994)). The goals were to be developed by the Oregon Land Conservation and Development Commission (the "LCDC"). Or. Rev. Stat. Ann. § 197.040(2Xa) (1991 & Supp. 1994). The LCDC adopted two goals in 1975 which were at issue in this case. Brief for Petitioner, at 4. Goal 5 was "to conserve open space and protect natural and scenic resources [including] any land area that would, if preserved . . . protect . . . streams . . . enhance the value to the public of . . . neighboring parks . . . [and] enhance recreation opportunities." Brief for Petitioner, at 4 (quoting OAR § 660-15-000(5)). Goal 12 was to "provide and encourage a safe, convenient and economic transportation system [which shall] consider all modes of transportation including . . . bicycle and pedestrian." Brief for Petitioner, at 5 (quoting OAR § 660-15-000(12)).

Pursuant to these and other goals, the City developed a comprehensive land use plan which proposed, *inter alia*, an open recreational greenway and pedestrian/bicycle path along Fanno Creek. Brief for Petitioner, at 5. To implement this proposal, the plan required that landowners along Fanno Creek "[dedicate] all undeveloped land within the hundred-year floodplain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." Brief for Petitioner, at 5 (quoting Tigard's Comprehensive Plan). In order to secure these dedications, the plan required the City to "review each development request adjacent to areas proposed for pedestrian/bicycle pathways to . . . require the necessary easement or dedications for the pedestrian/bicycle pathways." Brief for Petitioner, at 6 (quoting Tigard's Comprehensive Plan).

17. Dolan, 114 S. Ct. at 2315. The LUBA is a three member administrative body appointed by the governor of Oregon with exclusive appellate jurisdiction over local government land use decisions. Petition for Writ of Certiorari, at 3 n.1, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (No. 93-518).

18. Dolan, 114 S. Ct. at 2315. The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

along with a request for a variance from the CDC regulations which mandated the conditions. The Commission denied the variance request, and to support its decision, made a series of findings to demonstrate a relationship between the burdens that would be imposed on the community by Dolan’s proposed development and the City’s required conditions. The Tigard City Council approved the denial, and Dolan again appealed to the LUBA, reasserting her constitutional claim. Using the City’s factual findings, the LUBA found that a reasonable relationship existed between the projected burdens of the proposed development and the relief from such burdens to be afforded by the City’s conditions. Therefore, the LUBA rejected Dolan’s constitutional claim and affirmed the decision of the Commission.

Dolan appealed to the Oregon Court of Appeals which affirmed the decision of the LUBA. The court applied the rationale from the Supreme Court’s decision in Nollan v. California Coastal Commission. Based upon its interpretation of Nollan, the CDC regulations provided that the city would grant a variance only where the applicant showed that compliance would cause “an undue or unnecessary hardship.” Dolan, 114 S. Ct. at 2314 (quoting CDC § 18.134.010). Dolan’s variance request did not propose alternative measures to the City’s conditions as allowed by the CDC, but simply argued that her proposed development was not inconsistent with the City’s comprehensive land use plan. Dolan, 114 S. Ct. at 2314. 

21. Id. The Commission’s findings included:

It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. [and that the pathway] could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion. [The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.]

22. Dolan, 114 S. Ct. at 2315. The LUBA assumed that the factual findings of the City were supported by substantial evidence because Dolan never challenged the factual findings or the sufficiency of the evidence used to support the City’s denial of her variance request. Dolan, 22 Or. LUBA at 622-23.


26. Dolan v. City of Tigard, 832 P.2d 853, 853 (Or. Ct. App. 1992), aff’d, 854 P.2d 437 (Or. 1993), rev’d, 114 S. Ct. 2309 (1994) (citing Nollan v. California Coastal Commission, 483 U.S. 825 (1987)). The court of appeals interpreted Nollan as setting forth a three-part test for a takings evaluation of development exactions. Dolan, 832 P.2d at 853. First, there had to be a legitimate government interest at stake. Id. Second, an essential nexus between the exaction and the governmental interest had to exist. Id. at 853-54. The third and final inquiry, and the question relevant to the
the court asserted that there had to be a "reasonable relationship" between the exactions and the burdens imposed by the proposed development.27 The court agreed with the LUBA that the findings of the City demonstrated a direct and reasonable relationship between the exactions and the impacts of Dolan's proposed development, and affirmed the LUBA's decision.28

Dolan appealed to the Supreme Court of Oregon which affirmed the lower court's decision.29 The court concluded that the City's factual findings, unchallenged by Dolan, were constitutionally sufficient to support the conditions.30

Dolan appealed the decision of the Supreme Court of Oregon to the United States Supreme Court, which granted certiorari31 to determine what degree of connection was required between an exaction and burdens of the proposed development in order to satisfy the Takings Clause.32 The Court reversed the judgment of the Supreme Court of Oregon.33 The Court began its analysis by noting that the Takings Clause of the Fifth Amendment was applicable to the states through the Fourteenth Amendment's

case at bar, was what degree of connection had to exist between the exaction and the burdens imposed by the development. Id. at 854. See notes 143-50 and accompanying text for a detailed discussion of Nollan.

27. Dolan, 832 P.2d at 854. The court described this test only as somewhere between "specifically and uniquely attributable" and "some relationship." Id.

28. Id. at 856.

29. Dolan v. City of Tigard, 854 P.2d 437, 444 (Or. 1993), rev'd, 114 S. Ct. 2309 (1994). In earlier challenges, Dolan had asserted a claim under Article I, section 18, of the Oregon Constitution (Takings Clause), but before the Oregon Supreme Court, Dolan expressly limited her appeal to a federal claim. Dolan, 854 P.2d at 438 n.2.

30. Id. at 443. Justice Peterson dissented, opining that federal precedents required that the government meet a high threshold by showing with precision that required land use conditions were made necessary by proposed development. Dolan, 854 P.2d at 448-49 (Peterson, J., dissenting). The dissent questioned the City's contention that the condition imposed upon Dolan was attributable to her proposed change in use. Id. The dissent proffered that the City decided that it needed a flood control greenway and pedestrian/bicycle path along Fanno Creek and saw development exactions as a way of getting the easements free of charge. Id.


32. Dolan v. City of Tigard, 114 S. Ct. 2309, 2312 (1994). The Supreme Court had jurisdiction pursuant to the Federal Code of the Judiciary and Judicial Procedure, which provided that, "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any . . . right . . . is claimed under the Constitution . . . of the United States." 28 U.S.C. § 1257(a) (1988 & Supp. 1994). Before the Supreme Court, Dolan was represented by Oregonians in Action Legal Center, a non-profit organization dedicated to the protection of landowner rights. Letter from Dorothy S. Cofield, Staff Attorney, Oregonians In Action Legal Center, (September 26, 1994).

33. Dolan, 114 S. Ct. at 2322. The majority opinion was authored by Chief Justice Rehnquist, who was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Id. at 2312.
Due Process Clause.\textsuperscript{34} The Court opined that had the City demanded that Dolan dedicate part of her property for public use in the absence of the development proposal, the action would have been a taking.\textsuperscript{35} The Court noted, however, that when state and local governments were engaged in land use planning, the rights of the private property owner had to be balanced with the legitimate interests of the state.\textsuperscript{36} Because the regulation placed on Dolan was in the form of a development exaction, the applicable precedent for performing this balancing was found in \textit{Nollan}.\textsuperscript{37}

The Court held that in order to survive a takings challenge, not only must a development exaction have an essential nexus with a legitimate state interest, but also a rough proportionality must exist between the development exaction and the burdens to be imposed by the proposed development.\textsuperscript{38} The Court then applied its newly defined test to the exactions demanded by the City in the case at bar.\textsuperscript{39} The Court first turned to the recreational greenway within the floodplain of Fanno Creek.\textsuperscript{40} The Court recognized that the larger impervious surface area would increase flooding pressures on Fanno Creek and that an open floodplain might relieve such pressures.\textsuperscript{41} However, the Court took issue with the City's requirement that the greenway be a

\begin{footnotesize}
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  \item \textsuperscript{34} \textit{Id.} at 2316. The relevant section of the Fourteenth Amendment provides that, "[n]o State . . . shall . . . deprive any person of life, liberty, or property, without due process of law." \textsc{U.S. Const.} amend. XIV, § 1.
  \item \textsuperscript{35} \textit{Dolan}, 114 S. Ct. at 2316.
  \item \textsuperscript{36} \textit{Id.}
  \item \textsuperscript{37} \textit{Id.} at 2316-17. The Court viewed \textit{Nollan} as creating a two-step process to determine if the imposed conditions on land development constituted a taking. \textit{Id.} at 2317. First, the Court asserted that it must be determined if an essential nexus existed between the legitimate state interest being pursued and the exaction. \textit{Id.} Second, if the exaction passed this first test, a determination was made whether the necessary degree of connection existed between the exaction and burdens which would be imposed by the proposed development. \textit{Id.} The Court never reached this second question in \textit{Nollan} because the exaction in that case did not pass the first step: the essential nexus test. \textit{Id.} Therefore, the question left open by \textit{Nollan} was how to define this necessary degree of connection in order to determine whether the exaction effected a taking. \textit{Id.} at 2312.
  \item \textsuperscript{38} \textit{Id.} at 2317-20.
  \item \textsuperscript{39} \textit{Id.} at 2320.
  \item \textsuperscript{40} \textit{Dolan}, 114 S. Ct. at 2320.
  \item \textsuperscript{41} \textit{Id.}
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Recent Decisions

Public as opposed to a private greenway, noting that the right to exclude others was "one of the essential sticks in the bundle of rights commonly characterized as property." Because the City's findings did not show how flood control would be promoted by a public greenway, the Court held that the City failed to establish the required relationship.

As to the pedestrian/bicycle pathway, the Court recognized that a larger store would increase traffic congestion within the City's Central Business District. In its findings, the City had estimated that Dolan's larger store would generate an additional 435 trips per day and then concluded that the pathway "could offset some of the traffic demand ... and lessen the increase in traffic congestion." The Court dismissed this statement as merely conclusory, and held that the City's findings failed to demonstrate the required relationship between the number of additional trips and the need for a pedestrian/bicycle pathway. The Court, therefore, reversed the judgment of the Supreme Court of Oregon and remanded the case.

In his dissent, Justice Stevens argued that the new hurdle created by the majority, the rough proportionality test, had absolutely no precedent in federal or state courts. The dissent also noted that for many years the Court had focused its analysis on whether the government action had interfered with the property rights as a whole. Therefore, the dissent contended that the Court's focus on one stick of the bundle of property rights was misguided. The dissent was also concerned that the Court's willingness to micro-manage the local government's decisions would lead to a flood of litigation in the federal courts. The dissent disagreed with placing the burden of demonstrating constitutionality on the City, noting that the Court's precedent.

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42. Id. (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
43. Dolan, 114 S. Ct. at 2321.
44. Id.
45. Id. at 2321-22 (quoting City of Tigard Planning Commission Final Order No. 91-09 PC (1991)).
46. Dolan, 114 S. Ct. at 2321-22. The Court did not define with specificity what additional showing the City needed to make in order to support its conclusion; however, Dolan had argued that the City should have conducted a study determining how many additional pedestrian, bicycle and automobile trips the new store would generate, and how those numbers compared to existing traffic loads. Brief for Petitioner, at 28-29.
47. Dolan, 114 S. Ct. at 2322.
48. Id. at 2323 (Stevens, J., dissenting). Justice Stevens was joined by Justices Blackmun and Ginsburg. Id. at 2312.
49. Id. at 2324.
50. Id. at 2325.
51. Id. at 2326.
on the Takings Clause had always required the property owner to prove that the land use regulations unreasonably impaired the economic value of the parcel as a whole.\textsuperscript{52}

The American concept of property rights has roots which extend deep into English Constitutional law.\textsuperscript{53} Indeed, important guarantees of the Magna Carta included protection from arbitrary government confiscation of property.\textsuperscript{54} In the land-abundant American colonies, early laws reflected the principles of property rights embodied in the Magna Carta, including the right to compensation when the government took private land.\textsuperscript{55} The Bill of Rights, ratified in 1791, included in the Fifth Amendment a clause drafted by James Madison which guaranteed a right to compensation for the taking of private property.\textsuperscript{56} In its first century, the Supreme Court most often applied the Takings Clause to cases involving exercise of government eminent domain powers.\textsuperscript{57} Late in the nineteenth century, however, the Court began to consider the theory that an exercise of the police powers which limited the use and value of private property, could constitute a taking as well.\textsuperscript{58}

\textsuperscript{52} Dolan, 114 S. Ct. at 2326 (Stevens, J., dissenting). Justice Souter also filed a dissent, arguing that the Court misapplied its new test to the facts and that this case was not a suitable vehicle for announcing new takings jurisprudence. Id. at 2330-31 (Souter, J., dissenting).


\textsuperscript{54} ELY, cited at note 53, at 13. The Magna Carta provided that “[n]o Freeman shall be... disseised... except by the lawful judgment of his peers and by the law of the land.” Id. (quoting the Magna Carta). The Magna Carta also declared that the king had to make payments for property seized. ELY, cited at note 53, at 23.

\textsuperscript{55} ELY, cited at note 53, at 13-24.

\textsuperscript{56} Id. at 54-55. The Takings Clause provides that “private property [shall] not be taken for public use, without just compensation.” U.S. CONST. amend. V.

\textsuperscript{57} ELY, cited at note 53, at 91-92. Eminent domain is the “right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good.” BLACK’S LAW DICTIONARY 523 (6th ed. 1990).

\textsuperscript{58} ELY, cited at note 53, at 92. Police power is defined as the: [P]ower of the state to place restraints on the personal freedom and property rights of persons for the protection of public safety, health, and morals or the promotion of the public convenience and general prosperity. The police power is subject to limitations of the federal and state constitutions, and especially to the requirement of due process. BLACK’S LAW DICTIONARY 1156 (6th ed. 1990). Originally, the guarantees in the Bill of Rights only afforded protection against actions of the federal government. ELY, cited at note 53, at 54. The Takings Clause was later held to be applicable to the states through the due process clause of the Fourteenth Amendment. See Chicago, B. & Q. R.R. Co. v. City of Chicago, 166 U.S. 226, 236-37 (1897).

The theory that an exercise of the police powers can effect a taking is often referred to as regulatory takings. See William J. Patton, Affirmative Relief for Regu-
In *Mugler v. Kansas*, the defendant had been engaged in the manufacturing and sale of beer for several years before Kansas passed a law prohibiting the manufacture and sale of all intoxicating liquors. The constitutional issue was whether the Kansas statute constituted a taking of defendant’s beer making establishment because the law effected a significant diminution of the value of the property. The Court held that no taking had occurred. The Court reasoned that as long as the state was engaged in a valid exercise of police powers for purposes of protecting the health, safety or morals of the public, the principles of eminent domain did not apply. The Court further reasoned that by preventing property owners from using their property in a noxious way, the state should not have to bear the burden of compensating individual owners for pecuniary losses, even if the prohibited use was legal when the owners began operating. Therefore, the Court concluded that a valid exercise of state police powers for the purpose of abating a nuisance could not be deemed a taking upon property.

The first Supreme Court case to recognize that an exercise of the police power could effect a taking was *Pennsylvania Coal Co. v. Mahon*. Pennsylvania’s Kohler Act of 1921 prohibited the...
mining of anthracite coal in such a way as to cause subsidence beneath any structure used for human habitation, with certain exceptions. The plaintiffs had acquired the surface estate from the defendant coal company in 1878 by a deed which expressly reserved in the defendant, the right to mine all coal from the subsurface. The issue was whether the Kohler Act effected a taking of the property rights that the defendants had in the coal.

In this famous opinion by Justice Holmes, the Court held the statute to be an invalid taking without compensation. The Court did not view the law as prohibiting a public nuisance, but as conferring a benefit upon the private surface property owners who were short-sighted in failing to acquire the support estate. The Court also recognized that the coal companies suffered a great loss because the state had destroyed their right to mine certain coal and to profit by it, which, constitutionally, was no different than a taking. In finding the statute invalid, the Court concluded that the state could use its police powers to regulate property, but if such regulation "goes too far," the state's action was then a taking.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

(d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.

(e) Any cemetery or public burial ground.

52 PA. CONS. STAT. § 661 (1966).


69. Id. at 412. Pennsylvania recognizes three separate estates in land: the surface estate, the mineral estate, and the support estate. See Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 478 (1987). Beginning in the 1890's, coal companies began severing the mineral and support estates from the surface estate, and conveying away the latter. Keystone, 480 U.S. at 478. As part of the transaction, the coal companies generally secured a waiver of claims for damages resulting from the mining of coal. Id.

70. Pennsylvania Coal, 260 U.S. at 413.

71. Id. at 414.

72. Id. at 413-15.

73. Id. at 414. Indeed, the Court admonished that, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Id. at 416.

74. Id. at 415. The Court did not expound a specific proposition to be used to determine when a regulation "goes too far" noting that such a determination depended upon the particular facts of the case. Id. at 413.

The dissent viewed the Kohler Act as preventing a public nuisance, and that its purpose did not cease to be public simply because certain benefits were incidentally imposed upon private parties. Pennsylvania Coal, 260 U.S. at 417-18 (Brandeis, J., dissenting). The dissent also propounded that the measure of the value of the...
The Court addressed the regulatory takings issue in the context of a wartime emergency in *United States v. Central Eureka Mining.* The War Production Board ordered the closure of gold mines in order to reserve mining workers and equipment for the mining of copper and other nonferrous metals that were essential to the war effort. The issue was whether this wartime order constituted a taking of the mine owner's right to operate and profit from the gold mines. The Court held in favor of the government. The Court noted that the order was not a physical seizure of the gold mines. The Court also found that the order was reasonably related to the war effort, and that the temporary restrictions placed on the gold mine owners were insignificant when compared to the importance of the legitimate interest that the government was pursuing. Therefore, the Court determined that any incidental loss to property owners effected by a legitimate government wartime regulation was not a taking.

The Court addressed the issue of burden of proof for a regulatory takings claim in *Goldblatt v. Town of Hempstead.* The appellants owned a lot which had been used for sand and gravel mining since 1927. In 1958, the Town of Hempstead passed an ordinance prohibiting any excavation below the water table, which effectively prohibited any further mining on the appellants' lot. The issue was whether the ordinance constituted a taking of the appellants' property. The Court held...
there to be no taking. Citing *Pennsylvania Coal*, the Court noted that an otherwise valid exercise of police power was not a taking unless the regulation was too onerous (i.e., "goes too far"). Affording the state the presumption of constitutionality, the Court determined that the appellants failed to carry their burden of showing the ordinance to be an invalid exercise of police power. Further, because there was no evidence in the record demonstrating diminution of the value of the lot, the Court concluded that the appellants failed to show that the regulation had gone too far. In *Goldblatt*, the Court established that in challenging a land use regulation under the Takings Clause, the burden was on the landowner to demonstrate either that the law was not a valid exercise of police power or that it went too far in diminishing the value of the property.

In the half-century after *Pennsylvania Coal*, the Supreme Court addressed very few regulatory takings cases. *Central Eu- reka Mining* and *Goldblatt* may be the only two notable examples of such decisions handed down by the Supreme Court in that period. With the next case, the Court began an era of greater involvement in defining when a land use regulation rose to the level of a taking.

The first objective standard for evaluating a regulatory taking claim was defined in *Penn Central Transportation v. City of New York*. In 1967, the City of New York had designated the Grand Central Terminal (the "Terminal"), owned and operated by the appellants, an historic landmark. The City of New York denied the appellants a permit to construct an office building over the Terminal in order to preserve the appearance of its facade. The issue was whether the permit denial had effected

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86. Id. at 592-96.
87. Id. at 594 (citing *Pennsylvania Coal*, 260 U.S. at 415).
88. *Goldblatt*, 369 U.S. at 595-96. For that purpose, the Town of Hempstead claimed that the regulation was justified as a safety measure. Id. at 595. Exercise of police power was valid if it is reasonably related to a legitimate government interest. Id. at 594-95. Here, the government benefitted from the presumption of reasonableness, and the record lacked any evidence to the contrary. Id. at 595-96.
89. Id. at 594.
90. Id. at 594-96.
91. 438 U.S. 104 (1978). Justice Brennan, writing for the majority, noted that Supreme Court takings jurisprudence to date had been a series of "ad hoc, factual inquiries." *Penn Central*, 438 U.S. at 124.
93. *Penn Central*, 438 U.S. at 117-18. The New York City Landmarks Preser-
a taking of the appellants' property. The Court held that no taking had occurred.

The Court first considered the validity of the City's landmark laws in general. The Court rejected the appellants' argument that the City's landmark laws were inherently unfair or discriminatory because they imposed burdens only on selected property owners. The Court observed that the selection of landmark sites was part of a comprehensive plan to preserve structures with historic or aesthetic value throughout the city. The appellants also argued that cases in which the government was preventing a noxious use of land were distinguishable because the appellant's proposed office building was a beneficial use. The Court rejected this argument as well, finding that the alteration of a historic landmark could be considered harmful.

Having established that the City's landmark laws were valid in general, the Court next turned to the question of whether the regulation of the appellants' property had gone too far and therefore rose to the level of an impermissible taking. The Court noted that the appropriate focus of the takings determination was on the parcel of property as a whole (i.e., the entire landmark site) and rejected the appellants' claim that the City of New York had taken the air rights above the Terminal, irrespective of the value of the rest of the site. The Court found that even with the City's restriction, the appellants could continue to use the property as it had been used for the last sixty-five years, and the appellants would be able to make a reasonable return on its investment from operation of the Terminal.

In addition, the Court concluded that the City of New York had not denied the appellants all use of the air rights above the terminal, but had given the appellants transferable development

Note: The text contains numbers indicating citations to legal authorities, which are not included in the natural text representation.
rights which could be used at several sites near the Terminal. Because these rights had some value, the Court determined that they also had to be considered in determining whether a taking had occurred. Therefore, the Court concluded that as long as a land use regulation was substantially related to a legitimate state interest and allowed the landowner to retain a reasonable return on its overall investment, the regulation would not be deemed a taking.

The Court became more receptive to regulatory takings claims with Kaiser Aetna v. United States. A marina developer made improvements to its private pond and marina causing the pond to become connected to Maunalua Bay and the Pacific Ocean. The connection caused the private pond to become a "navigable water of the United States" subject to regulation by the Army Corps of Engineers (the "Corps"). The issue before

104. Penn Central, 438 U.S. at 137. Under New York City Zoning law, the owner of a landmark could sever, sell, and transfer its unused height and density development rights to another property, which could be a site adjacent to or across the street or intersection. See Margaret Giordano, Note, Over-Stuffing the Envelope: The Problems with Creative Transfer of Development Rights, 16 FORDHAM URB. L.J. 43, 43-44 (1988). The purchaser of the development rights could then build a structure which exceeded the height and density restrictions allowed by the zoning designation of the receiving parcel. Id. at 44.

105. Id. at 137.

106. Id. at 135-38. The dissent, focusing exclusively on the "air rights" portion of the parcel, noted that the City had literally destroyed this substantial property right belonging to the appellants. Id. at 143 (Rehnquist, J., dissenting). Further, the dissent asserted that there were two exceptions to the rule that government destruction of property constituted a taking, and the case at bar did not fall into either exception. Id. at 138. First, citing Mugler, the dissent opined that the prohibition of a property use which constituted a nuisance was not a taking. Id. at 144-45 (citing Mugler, 123 U.S. at 669). In Penn Central, the City of New York was not prohibiting a nuisance, but requiring the appellants to maintain their property so as to confer a benefit on sightseeing New Yorkers and tourists. Penn Central, 438 U.S. at 145-46 (Rehnquist, J., dissenting). The second exception, the dissent concluded, existed where the government prohibited a non-noxious use, but the property owner gained a reciprocity of advantage, such as with zoning (i.e., a property owner whose property may lose some value from zoning restrictions reciprocally benefits from similar restrictions placed on the property of his neighbors). Id. at 147. The dissent distinguished zoning restrictions from New York's landmark laws in that the appellants received no reciprocal benefits from the 400 other designated landmarks throughout New York City. Id. The restrictions on the appellants, therefore, constituted a taking, and did not become non-compensable simply because the government had allowed them to retain a "reasonable rate of return." Id. at 149-50.


108. Id. at 165-67. The site at issue was located on the Hawaiian island of Oahu. Id. at 165.

109. Id. at 168-69. The authority of the Corps over navigable waters of the United States was established by the Rivers and Harbors Appropriations Act of 1899. Id. at 168 (citing 33 U.S.C. § 403 (1988 & Supp. 1994)). The law requires a permit from the Corps prior to commencement of any structural modifications to
the Court was whether the government could prohibit Kaiser Aetna from denying the public access to the pond, i.e., impose a navigational servitude, without effecting a taking. The Court held that the imposition of a navigational servitude constituted a taking. The Court noted, in a majority opinion by Justice Rehnquist, that the right to exclude others was an essential stick within the bundle of rights afforded by property ownership. Therefore, the Court held that the government's creation of a public right of access on private property was a regulation which "goes too far" and amounted to a taking.

The Court applied the regulatory takings analysis to zoning ordinances in Agins v. City of Tiburon. In Agins, the developers purchased five acres of land in the City of Tiburon for residential development. The City of Tiburon subsequently rezoned the property. The developers sued, claiming that the rezoning prevented residential development of the tract, completely destroying its value. The Court rejected this claim as facially inconsistent with explicit terms of the ordinance, and therefore limited the issue to be decided to whether the mere enactment of a zoning law effected a taking. The Court began the analysis by noting that zoning ordinances were a valid exercise of police power in that they advanced the legitimate government goal of controlling urbanization. As to the burdens that zoning restrictions imposed upon the developers, the Court concluded that there was a benefit of reciprocity from the burdens placed on other landowners. Even with the restrictions


110. Kaiser Aetna, 444 U.S. at 172. This was the sole issue before the Court because the developer did not appeal the portion of the lower court decision which held that the pond was now subject to the Corps' permit regulations. Id. at 169 n.3.

111. Id. at 180.

112. Id. at 179-80. The Court found the right to exclude others to be so fundamental an element of property rights that the government must compensate the landowner before destroying it. Id.

113. Id. at 178. The Court noted that imposition of the navigational servitude was not a mere regulation of property, but constituted an actual physical invasion. Id. at 180.


115. Agins, 447 U.S. at 257.

116. Id. The new zoning designation was "Residential Planned Development and Open Space Zone, RPD-1" with density restrictions which would limit development to between one and five single-family residences in the five-acre parcel. Id.

117. Id. at 258.

118. Id. at 259-60. Zoning ordinances have been generally considered constitutional since such laws had survived Fourteenth Amendment equal protection and due process challenges. See Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).


120. Id. at 262. The zoning law also applied to the surrounding properties
tions, the Court found that the landowners were still able to fulfill reasonable investment expectations by submitting development proposals to the City of Tiburon. Accordingly, the Court determined that the zoning ordinances, on their face, did not effect a taking.

The Court created its first category of de facto takings in *Loretto v. Teleprompter Manhattan CATV.* The State of New York passed a statute prohibiting any landlord from interfering with the installation of cable television facilities across his property and from demanding payment for such installation from the cable television company beyond the one-time, one dollar fee authorized by the statute. The installed cables provided service to appellant's tenants and were part of the cable "highway," providing service to other buildings on the block. The issue was whether the state's regulation requiring the appellant to allow the cable equipment on her property constituted a taking.

Citing *Penn Central,* the Court noted that takings jurisprudence generally involved "ad hoc [factual] inquiries." Nonetheless, the Court recognized that important factors to consider in making such inquiries were the severity of the interference with investment-backed expectations and the character of the governmental action. The Court characterized the cable statute as a permanent physical invasion and reasoned that this type of governmental action was of unusually serious character. Such character, therefore, was not simply an important factor in deciding whether a taking had occurred, but was determinative. Therefore, the Court held that a government action which effected a permanent physical occupation was a de facto taking without regard to other factors such as the value of

within the zone, assuring careful and orderly residential development, thereby benefiting all burdened properties. *Id.*

121. *Id.* The Court found that the appellants could build up to five houses on their five-acre parcel. *Id.*

122. *Id.* at 259.

123. 458 U.S. 419 (1982).

124. *Loretto,* 458 U.S. at 423-24. Pursuant to the statute, the local cable television company had installed approximately 36 feet of one-half inch cable along the appellant's Manhattan apartment building, and two large silver cable boxes which were fastened to the masonry of the building by various bolts, nails, and screws. *Id.* at 422.

125. *Id.*

126. *Id.* at 421.

127. *Id.* at 432 (citing *Penn Central,* 438 U.S. at 124).


130. *Id.*
the public benefit or the insignificance of the burden on the landowner.\textsuperscript{131}

The Court again analyzed a Pennsylvania statute which placed restrictions on underground coal mining in order to prevent mine subsidence in \textit{Keystone Bituminous Coal Association v. DeBenedictis}.\textsuperscript{132} As implemented by the Pennsylvania Department of Environmental Resources, the Subsidence Act required fifty percent of the coal beneath certain structures to be left in place.\textsuperscript{133} The issue was whether the Subsidence Act, on its face, constituted a taking of the petitioners' property.\textsuperscript{134} The Court held that this takings challenge to the Subsidence Act must fail.\textsuperscript{135}

The \textit{Keystone} Court distinguished this case from \textit{Pennsylvania Coal}.\textsuperscript{136} The Court found that a legitimate public interest was served by the Subsidence Act.\textsuperscript{137} As to the second part of the test, the \textit{Keystone} Court found that the petitioner had not demonstrated that the Subsidence Act caused the mining of bituminous coal in Pennsylvania to be economically impracticable.\textsuperscript{138} The Court rejected the argument of the petitioner that they were

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\textsuperscript{131} Id. at 426-441.
\textsuperscript{132} 480 U.S. 470 (1987). The relevant section of the Bituminous Mine Subsidence and Land Conservation Act ("Subsidence Act") provides:
In order to guard the health, safety and general welfare of the public, no owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervision over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of the following surface structures in place on April 27, 1966, overlying or in the proximity of the mine:
(1) Any public building or any noncommercial structure customarily used by the public, including but not being limited to churches, schools, hospitals, and municipal utilities or municipal public service operations.
(2) Any dwelling used for human habitation; and
(3) Any cemetery or public burial ground; unless the current owner of the structure consents and the resulting damage is fully repaired or compensated.
\textsuperscript{133} 52 PA. CONS. STAT. § 1406.4 (1966 & Supp. 1994).
\textsuperscript{134} \textit{Id.} at 476-77.
\textsuperscript{135} \textit{Id.} at 474.
\textsuperscript{136} \textit{Id.} at 501-02.
\textsuperscript{137} \textit{Id.} at 484-85. The majority noted the two-part test laid down in \textit{Pennsylvania Coal}: that the government action would be found to be a taking if it did not substantially advance legitimate public interest or if it denied the landowner all economically viable use of the land. \textit{Id.} at 485 (quoting \textit{Agins}, 447 U.S. at 260).
\textsuperscript{138} \textit{Keystone}, 480 U.S. at 485. The Court deferred to the findings of the Pennsylvania legislature that such regulations were necessary in order to preserve the health, safety, and general welfare of the public. \textit{Id.} This was contrasted with the finding of the majority in \textit{Pennsylvania Coal} that the Kohler Act was designed to primarily benefit private parties who failed to purchase the support estate. \textit{Id.} at 486 (citing \textit{Pennsylvania Coal}, 280 U.S. at 414).
\textsuperscript{139} \textit{Keystone}, 480 U.S. at 495-98.
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denied all economically viable use of certain narrowly defined portions of their property, holding that the takings test required a comparison of the relative value of that taken with that which remained.\textsuperscript{139} Considering such relative values, the effect of the Subsidence Act required operators to leave in place only about two percent of all their coal.\textsuperscript{140} The Court also rejected the petitioner's argument that the Subsidence Act completely destroyed the value of the support estate, which was recognized in Pennsylvania as a separate interest in land.\textsuperscript{141} The Court concluded that a takings challenge to a land use regulation would fail if the landowner could neither overcome the presumption that the government action pursued a legitimate public interest nor demonstrated that the action deprived him of economically viable use of his property as a whole.\textsuperscript{142}

The Court was receptive to the landowners' takings claim in its first exaction case, \textit{Nollan v. California Coastal Commission}.\textsuperscript{143} The appellants in \textit{Nollan} owned beachfront property in Ventura County with an existing small bungalow.\textsuperscript{144} When the appellants applied to the state for a permit to demolish the bungalow and replace it with a larger house, the state granted the permit subject to the condition that the appellants allow a public easement across their property in order that the public may have easier access between the public beaches.\textsuperscript{145} The issue was whether the state's demand for this development exaction constituted a taking.\textsuperscript{146}

The Court noted that had the state demanded the easement unconditionally, a taking would have occurred because the pub-

\textsuperscript{139} \textit{Id.} at 496-97. The Court recognized that takings law did not divide up the parcel into discrete segments to determine if the rights to a particular segment had been lost. \textit{Id.} at 497 (quoting \textit{Penn Central}, 438 U.S. at 130-31).

\textsuperscript{140} \textit{Keystone}, 480 U.S. at 496. In contrast, the majority in \textit{Pennsylvania Coal} found ample evidence that the Kohler Act rendered entire mines unprofitable. \textit{Id.} at 498-99 (citing \textit{Pennsylvania Coal}, 260 U.S. at 414).

\textsuperscript{141} \textit{Keystone}, 480 U.S. at 500. Because the support estate had no inherent value unless it was owned by either the owner of the surface estate or the owner of the mineral estate, it was essentially one of the sticks within a bundle of property rights and could not be considered in a vacuum from the petitioners' property as a whole. \textit{Id.}

\textsuperscript{142} \textit{Id.} at 485-502. The dissent propounded that the opinion in \textit{Pennsylvania Coal} was the cornerstone of takings jurisprudence, and that the language and the holding of the case deserved greater deference than that which was given by the majority. \textit{Id.} at 508 (Rehnquist, J., dissenting). Furthermore, the dissent viewed the factual differences between \textit{Pennsylvania Coal} and \textit{Keystone} as trivial. \textit{Id.} at 508-09.

\textsuperscript{143} 483 U.S. 825 (1987). See note 11 for the definition of an exaction.

\textsuperscript{144} \textit{Nollan}, 483 U.S. at 827. Local public beaches lie to the north and to the south of the appellants' private property. \textit{Id.}

\textsuperscript{145} \textit{Id.} at 828.

\textsuperscript{146} \textit{Id.} at 827.
lic easement amounted to a "permanent physical occupation." The permit condition, the Court reasoned, did not constitute a taking if the condition served the same legitimate state interest as would the denial of the permit. Therefore, the Court held that the state had to demonstrate an essential nexus between a development exaction and the public interest burdened by the grant of the development permit, or else the exaction would be deemed a taking. Using this standard, the Court found that the state failed to demonstrate an essential nexus between the interest to be advanced by denying the permit for the larger house (protecting the public's ability to view the beach from the road, according to the state) and the right of lateral access across the appellants' beach.

The Court created another category of de facto takings in *Lucas v. South Carolina Coastal Council*. The statute at issue was the Beachfront Management Act (the "Act") which prohibited the petitioner from erecting any permanent habitable structure on his two beachfront lots. The restriction had rendered the lots valueless. The issue was whether this total economic deprivation effected a taking. The Court held that absent a showing by the state that the statute did no more than prohibit a common law nuisance, a taking had occurred.

Although recognizing that takings jurisprudence involved "essentially ad hoc, factual inquiries," the Court nevertheless

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147. *Id.* at 831 (quoting *Loretto*, 458 U.S. at 432-33 n.9).
149. *Id.* at 836-42.
150. *Id.* at 837-39. The Court rejected the contention of the state that the blockage of the view from the road would create a "psychological barrier" to beach access in the collective mind of the public, and such "psychological barrier" could be alleviated by affording the public greater lateral access across the beach. *Id.* at 838.

The dissent considered the majority's insistence on an exact match between the condition and the burdens imposed by the proposed development as too restrictive of the state's ability to exercise its police powers. *Id.* at 845-46 (Brennan, J., dissenting). The dissent also found that the condition in the case was minimally intrusive and did not interfere with the appellants' investment-backed expectations. *Id.* at 853-55 (citing *Penn Central*, 438 U.S. at 124). In addition, the dissent concluded that the appellants received a reciprocity of advantage by gaining permission to proceed with their development. *Nollan*, 483 U.S. at 856 (citing *Pennsylvania Coal*, 260 U.S. at 415).

153. *Lucas*, 112 S. Ct. at 2889. The law prohibited development too close to South Carolina's beach/dune system in order to protect people and property from storms, high tides, and beach erosion. *Id.* at 2898 n.11.
154. *Id.* at 2896. The trial court's finding was not challenged before the Supreme Court. *Id.* at 2896 n.9.
155. *Id.* at 2889.
156. *Id.* at 2901-02
noted that there were two discrete categories of cases in which a taking would be found without a fact specific evaluation of the public interest to be advanced by the regulation. The first was where the regulation caused a permanent physical invasion of the property. The second, as in the instant case, was where the regulation prohibited all economically beneficial use of the land. The only exception to this second proposition was if the regulation prohibited a use that was not part of the original title of the estate; most notably, if such use would be preventable through a court action under the state's existing common law of public or private nuisance. Therefore, the Court concluded that a land use regulation which rendered property valueless was a de facto taking unless the state showed that the regulation did no more than codify existing common law nuisance doctrine.

Justice Holmes' opinion in Pennsylvania Coal was the first recognition that a state's exercise of its police power could be deemed a taking if it goes too far. In the seven decades since that decision, the Court has struggled to define where "too far" is. The Court's series of "ad hoc factual inquiries" has been permeated with an occasional per se rule, i.e., Loretto (permanent physical occupation always amounts to a taking) and Lucas (total deprivation of value is always a taking unless regulation simply prohibits a nuisance). Unfortunately, the "ad hoc factual inquiries" fail to provide reliable precedent. Cases which are seemingly factually similar, such as Pennsylvania Coal and Keystone, yield opposite results without the latter opinion overruling the former. Predictability of a Supreme Court ruling in a regulatory takings case depends more upon the ideology of the Court at the time of the decision than upon any Court precedent. It appears as if the outcome in a given case is deter-

157. Id. at 2893.
159. Lucas, 112 S. Ct. at 2893.
160. Id. at 2899-900.
161. Id. at 2896-901. The case was remanded to the South Carolina Supreme Court for a determination of whether background principles of state nuisance and property law would prohibit Lucas' proposed development. Id. at 2901-02.

The dissent took issue with the majority's placing of the burden to demonstrate constitutionality upon the state, thereby dispensing with the usual presumption afforded the legislature. Id. at 2909 (Blackmun, J., dissenting). The dissent also objected to the creation of a new per se category of takings which obviated the need for any case-by-case inquiry. Id. at 2910.

163. Loretto, 458 U.S. at 426-41.
164. Lucas, 112 S. Ct. at 2896-2901.
mined first and supporting rationale is developed later. If the
decision is pro-police power, the rationale generally involves
affording the government a presumption of constitutionality,
focusing on the economics of the parcel as a whole, and viewing
the purpose of the regulation as prohibiting a nuisance. Con-
versely, if the decision is pro-landowner, the rationale generally
involves placing the burden of proof on the government to justify
interference with a constitutional right, focusing on that portion
of the property which is restricted or taken, and viewing the
purpose of a regulation as conferring a benefit upon the public.

The "technical" holding of Dolan is that in order to survive a
takings challenge, not only must a development exaction have
an essential nexus with a legitimate state interest, but also that
a rough proportionality must exist between the development
exaction and the burdens to be imposed by the proposed develop-
ment.165 However, this case is seminal because of the underly-
ing assumptions in the Rehnquist opinion: that the focus of the
analysis is on the portion of the property affected by the regula-
tion as opposed to the parcel as a whole, and that the burden of
proof is on the state to demonstrate constitutionality.

The ideology of the Court in recent years has been moving
from pro-police power to pro-landowner, with Chief Justice
Rehnquist leading the way with his vigorous dissents in Penn
Central and Keystone. Beginning with Nollan in 1987, those
dissents have formed the basis for a line of pro-landowner ma-
jority opinions culminating in Dolan in 1994.166 Such opinions,
however, may have limited "technical" applicability. Nollan and
Dolan are both development exaction cases, and Lucas involves
the rare case in which the trial court found a total economic
loss.

Therefore, it is important to analyze these cases with a pro-
spective view, i.e., where does the Rehnquist Court go from here
with the regulatory takings issue? Justice Rehnquist may be
expected to retain his 5-4 Dolan majority in future regulatory
takings cases, if any, in the 1994-1995 Supreme Court Term. The
newest Supreme Court Justice, Stephen Breyer, is an un-
known factor in the equation, having heard only one reported

166. The takings ideology of the current majority is highlighted by recent dicta:
"[T]he Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights
as the First Amendment or Fourth Amendment, should [not] be relegated to the
status of poor relation." Dolan, 114 S. Ct. at 2320. "We view the Fifth Amendment's
Property Clause to be more than a pleading requirement, and compliance with it to
be more than an exercise in cleverness and imagination." Nollan, 483 U.S. at 841.
land use regulatory takings case in his entire career on the Court of Appeals for the First Circuit.\textsuperscript{167}

One of the most important modern questions left without a definitive answer by Supreme Court takings opinions to date is how does takings affect federal wetlands regulation. Private property owners may not develop lands classified by federal rules as wetlands absent a permit from the Army Corps of Engineers (the “Corps”).\textsuperscript{168} No Supreme Court decision to date has directly addressed the question of the criteria for determining when a permit denial by the Corps would be a taking.\textsuperscript{169} A pro-landowner decision in such a case could significantly curtail the government’s ability to engage in wetlands protection. The nation would be forced to come to terms with the fact that if we as a society value preservation of wetlands, then we as a society must be willing to foot the bill.

Melody A. Hamel

\textsuperscript{167} See Adamowicz v. Town of Ipswich, 772 F.2d 5 (1st Cir. 1985) (per curiam). After receiving answers to certified questions from the Supreme Judicial Court of Massachusetts interpreting state zoning law, the court of appeals agreed with the district court’s conclusion that the plaintiff was permitted to build and, therefore, could not assert a federal taking claim since nothing had been taken. Adamowicz, 772 F.2d at 7.


\textsuperscript{169} The Court previously held that the broad scope of the Corps’ wetlands definition itself did not violate the Takings Clause. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-27 (1985). The Court propounded that whether a permit denial constituted a taking was a case specific question which depended upon the landowner’s ability to use the property after the permit denial. Riverside Bayview Homes, 474 U.S. at 127 n.4. The Court did not address this question as it applied to the developer in this case, because the appropriate vehicle for making this determination was a compensation suit in the United States Claims Court as opposed to a facial challenge to the statute in federal district court. Id. at 129 n.6.

A recent court of appeals decision directly addressing the question of when a permit denial by the Corps effected a taking was Loveladies Harbor. See Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994). In this decidedly pro-landowner decision, the appeals court agreed with the finding of the Claims Court that the permit denial effectively deprived the landowner of all economically feasible use of the 12.5 acres at issue. Loveladies Harbor, 28 F.3d at 1181-82. In making this determination, the court focused on the regulated 12.5 acres, rejecting the Government’s contention that the developer’s profit from the rest of its original 250 acre tract should be considered. Id. at 1180. Finding a total loss, the court then addressed the Lucas question, and concluded that the Government had failed to show that common law nuisance doctrine would have prohibited the filling of the wetlands in this case. Id. at 1183.