Government Acquisition of Private Property

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No person shall . . . be deprived of . . . property without due process of law, nor shall private property be taken for public use, without just compensation.
— U.S. Constitution, Amendment V —

Eminent Domain

Federal, state, and local governments have the power to acquire private property for public use without the owner's consent when the proposed use of the property promotes a public purpose. The method by which the government does this is called eminent domain. Essentially, this is a forced sale of the land (or other property interests) to the government. For example, if a local government wants to build a new school on private land, the government may ask the landowner to sell the land. If she refuses to sell or asks for substantially more than the land is worth, the government may chose to go to court to condemn the land.

The court must first decide whether the condemnation is for a "public use." Public use is defined broadly as any use benefiting the public. This definition includes land taken for a public building, recreational park or an airport. If the *taking* is for a public use, (in our example a school is certainly a "public use") then the court must decide on "just compensation". Just compensation means payment to the property owner by the government and is usually determined by appraisals which establish the market value of the property. At the close of the lawsuit, the government takes title to the property and the property owner is paid the amount of just compensation determined by the court.

Takings

Physical Invasions

Sometimes government action results in a physical invasion of a landowner's property even though the government did not intend to condemn the land. In this situation, the landowner sues and asks the court for damages or "just compensation" because his property rights have been lost or "taken".

In the case of the *United States v. Causby*,[1] the Causbys owned a chicken farm beside a municipal airport. The farm was located in the glide path of the airport runway. The Army-

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Air Corps conducted training operations for multi-engine bomber airplanes directly and frequently over the Causby's chicken farm. The bombers flew close enough at times to appear to barely miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise was deafening and the bright lights from nighttime bomber operations caused as many as six to ten of the chickens per day to kill themselves by flying into the walls from fright. The total number of chickens lost in that manner was about 150. Egg production also fell off. The result was the destruction of the use of the property as a commercial chicken farm.

On the basis of these facts, the United States Supreme Court found that the United States government had taken an easement over the property on June 1, 1942, the day flight operations began, and that the value of the property destroyed and the easement taken was $2,000. The Court added that flights by airplanes of the federal Government over private lands are not a *taking*, so as to entitle owner to just compensation, unless they are so low and so frequent as to be direct and immediate interference with the enjoyment and use of the land. In such a *takings* lawsuit, the government action complained of can be action by government agents, as in the example discussed above, or it can be action by private persons who acts with the permission of the government ("licensees"). In the case of *Loretto v. Teleprompter Manhattan CATV Corp.*,[2] New York enacted a statute giving cable television companies permission to install cable lines and boxes on the roofs of privately owned apartment buildings. The apartment building owners objected arguing that even though the cables occupied at most only 1 1/2 cubic feet of the landlord's property, the owner's right to exclude was violated. They argued that permission to install cable equipment was an invasion of property and a *taking*, which required governmental compensation. The U.S. Supreme Court agreed and held the landlord's property had been taken because the cable companies were authorized by law to enjoy a permanent physical occupation of the apartment building.

Regulatory Takings

A *regulatory taking* happens when the government enacts legislation which restricts an owner's use of her private property. A *regulatory taking* is different from a *physical taking* in that no physical invasion has occurred. Not all government restrictions on the use of private property are detrimental and of those that are detrimental, not all rise to the level of a *taking*. For example, some township ordinances restrict the number of abandoned vehicles that can be left on a property. This restriction benefits all residents by reducing the number of areas where rodents and bugs can reside.

When faced with a *regulatory taking*, the landowner sues to invalidate the restriction and to recover damages for the temporary loss of use of his property during the period between the imposition of the regulations and the time when the court declares that the regulation is a *taking*. In *First English Evangelical Lutheran Church v. County of Los Angeles*,[3] the First English Evangelical Lutheran Church purchased a 21-acre parcel of land in a mountainous canyon for use as a church camp. A 1978 flood destroyed the canyon along with the church camp and in response to the flood, the County of Los Angeles adopted Interim Ordinance No. 11,855 in January 1979. The ordinance provided that "[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill

Creek Canyon . . ." The ordinance was effective immediately because the county determined that it was "required for the immediate preservation of the public health and safety . . ."

The U.S. Supreme Court held that a landowner who claims that his property has been *taken* by a land-use regulation may recover damages for the time before it is finally determined that the regulation constitutes a *taking* of his property. In this situation, a regulatory agency has two choices. The regulatory body can pay compensation for the permanent taking or choose to rescind the regulation and pay the owner damages incurred by the temporary *taking* of the property. Regulatory bodies now must ensure the ordinances they enact are constitutionally correct to avoid paying damages to a landowner whose property is wrongfully taken.

In other situations, the landowner may believe that the government restrictions have harmed his property value. The case of *Penn Central Transportation v. City of New York*,[4] helped to establish the modern law of regulatory takings. In that case, the City of New York enacted legislation to preserve numerous historical landmarks. The City designated the Penn Central Train Station as a historic landmark. The designation of "historic landmark" required the owner to maintain the outside appearance of the building to the specifications of the historic preservation commission. The owner was required to obtain approval from the commission before altering the external structure.

The owner of Penn Central Train Station requested permission to place a 55-story skyscraper on top of the train terminal. The commission rejected the idea and the owner sued the City for enacting legislation which took his property without just compensation. The owner argued that the City had deprived him of the air rights above the station, that he had suffered a substantial loss of economic value in the property, and that it was unfair that the owner should pay for a program designed to benefit the public.

The U.S. Supreme Court held for the city stating that the relevant property interest was the entire structure, and losing a part of the air rights did not amount to a taking. Further, the loss of economic value was merely an "opportunity loss", that is, the loss of an opportunity to develop the property in the future, not an interference with an existing profitable use. Finally, the Court stated that the owner had not been wrongly singled out because the unique nature of the structure demanded protection in the public interest from the decisions of private property owners.

In contrast, in the case of *Lucas v. South Carolina Coastal Council*,[5] David Lucas had paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina in 1986. He had intended to build single-family homes on the lots. However, in 1988 the South Carolina Legislature enacted the "Beachfront Management Act" which prohibited Lucas from erecting any habitable buildings. Lucas sued claiming the Act effected a taking of his property without just compensation and that the government had diminished the value of his land to a "non viable use."

The U.S. Supreme Court agreed and ruled that there should be a presumption that a taking has occurred "in the extraordinary circumstance when no productive or economically beneficial use of land is permitted . . . "[6] The Supreme Court however, limited the presumption saying that there are some circumstances where government regulation is

necessary and appropriate under the Takings Clause, even when its effect is to eliminate totally the value of private property.

The Court identified two broad categories of exceptions to the Takings Clause. The first involves proposed uses of private property that contravene traditional notions—and limitations—found in state and federal property law. For example, the State would not be liable for the destruction of a home bulldozed to stop a forest fire from burning the entire city or some other grave threat to the lives and property of others.

The second exception to the total *taking* rule involves what is known as the "nuisance exception." States should not be prevented, the court reasoned, from enacting new regulatory initiatives in response to changing conditions. The Takings Clause does not require an unchanging body of law; it protects private expectations to ensure private investment but, for example, certain wetland properties may present such unique concerns for a fragile ecosystem that the State can go further in regulating their development than the common law of nuisance would allow.

Nuisance Laws are Not Takings

A government is not required to compensate a property owner whose property constitutes a nuisance. All landowners own their land subject to the condition that they not use it in a way which will harm their neighbors or the public. When property becomes so dilapidated that it is a nuisance, a local government may order the abatement of that nuisance. Abatement of a nuisance means to remove, stop or destroy that which causes a nuisance, whether by breaking or pulling it down, or otherwise destroying it. A government may not amend their definition of a nuisance to avoid compensation of a property owner.

In the case of *German v. City of Philadelphia*,[7] the German family abandoned their three-story retail meat market in 1963 when they moved the business to a new location. The Germans took some furniture and personal effects from the second and third floors and left the rest of the building intact. The Germans also placed a hand-made sign in the window offering the shop for sale or rent and included their address and phone numbers. The City lost record of their ownership of the building and the Germans received no real estate tax bills between 1965 and 1992. The Germans never inquired into the matter, believing that a tax moratorium was in effect due to the disruption of the area caused by the plans for redevelopment. In 1973 the Germans found out from a friend that their property was scheduled to be demolished. Although never formally notified, the Germans failed to take any action to inform the City of Philadelphia of their ownership rights. Later that year, the building was demolished. In 1996, the Germans sued the City of Philadelphia maintaining that they suffered a compensable injury when they lost the option of fixing up their building before demolition. The Court held that even though the city failed to notify the Germans, because so much time had elapsed between the abandonment of the building and its demolition, the trial court's position of refusing to grant compensation was justified.

Some regulation of private property is for the good of the entire area. This type of regulation is not a compensable taking. In *Miller v. Schoene*,[8] a Virginia entomologist, ordered the destruction of a large number of indigenous ornamental red cedar trees growing on private property to prevent the infection of local apple orchards. Red cedar trees were the source or

"host plant" of the communicable plant disease know as cedar rust. The only known way to control the disease was to destroy the trees. In Virginia, the red cedar was not grown on a commercial scale whereas apple orchards were one of the principal agricultural pursuits. Many millions of dollars were invested in the orchards, which furnish employment for a large portion of the population, and had induced the development of attendant railroad and cold storage facilities.

Virginia had a law which said that any red cedar trees growing within a two-mile radius of an apple orchard were to be destroyed. The Supreme Court held that, when faced with a choice of protecting one class of property or the other, where both exist in dangerous proximity, the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another.

Summary

The U.S. and State Constitutions protect landowners and require governments to compensate them if the government takes the land for "public use". The owner need not consent.

1. A taking may occur through an action in eminent domain.
2. A physical taking may occur through a permanent physical invasion of the land by government or government's licensees.
3. A regulatory taking may occur when a law or ordinance restricts a landowner's use of land such that there remains "no viable economic use" for the land.

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[1]U.S. v. Causby, 328 U.S. 256 (1946)

[2]Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)

[3]First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)

[4]Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)

[5]Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)

[6]Id., at 1017

[7]German v. City of Philadelphia, 683 A.2d 323 (Pa. Commw. Ct. 1996)

[8]Miller v. Schoene, 276 U.S. 272 (1928)

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