Michigan State University Extension
Land Use Series

Summary of Property Takings Case Law

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This pamphlet reviews court cases on property takings. First is to review the fifth amendment of the U.S. Constitution

> "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."

The Michigan 1963 Constitution (Article 10§2; Art. X, §§ 2, Effective January 1964) states:

> "private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

For a discussion of various techniques and procedures for local planning commissions, zoning boards, and zoning appeals boards to stay out of the legal pitfalls on takings, see the *Land Use Series* pamphlet "Behavioral Approach to Avoid Takings."

Takings by Regulation

Initially takings of property referred only to when the government physically occupied or "took" someone's land. This meaning changed with *Pennsylvania Coal Co. v. Mahon* (260 U.S. 393(1922)), a centerpiece "takings" case in U.S. legal history. In order for there to be a finding of a taking as forbidden by the Constitution, the landowner must be totally without viable economic use of their property. Importantly, a zoning ordinance is not invalid solely on the basis that it prohibits or fails to permit the "highest and best use" or the most profitable use of a property.

"Thirty seven million acres is all the Michigan we will ever have"
William G. Milliken

This is a fact sheet developed by experts on the topic(s) covered within MSU Extension. Its intent and use is to assist Michigan communities making public policy decisions on these issues. This work refers to university-based peer reviewed research, when available and conclusive, and based on the parameters of the law as it relates to the topic(s) in Michigan. This document is written for use in Michigan and is based only on Michigan law and statute. One should not assume the concepts and rules for zoning or other regulation by Michigan municipalities and counties apply in other states. In most cases they do not. This is not original research or a study proposing new findings or conclusions.

Exactions

Exactions are something a municipality requires of a property owner in order to obtain approval to develop land. The something can be land, money, or other property, like a fire truck.

Nollan v California Coastal Commission (485 US 825; 107 L Ed 2d 3141 (1987)) the United States Supreme Court held that the California Coastal Commission could not require a landowner to allow public access across beachfront property in order to obtain a permit to build a new house on shoreline property.

The Supreme Court said there must be an "essential nexus" between the permit condition (i.e. the land dedication or exaction) and the burden imposed or benefit enjoyed by the new house.

Since the requested access easement had nothing to do with the impact of building the new house, the permit condition was considered invalid by the Court, even though the Commission believed that the public interest would be served by a public walkway along the beach.

Dolan v City of Tigart (512 US 374; 114 S Ct 2309; 129 L Ed 2d 304 (1994)) the United States Supreme Court confirmed that a municipality may not demand property or money unless there is an "essential nexus" between the exaction and the particular project. If, there is some essential nexus, then the Court must make an individualized determination that the required exaction is related both in nature and extent to the impact of the proposed development. General policy justifications will not suffice. The City's demands in the case were held to be disproportionate even though some nexus existed. After remand, the City agreed to settle with the Dolans by the payment of $1,500,000.00 The City also agreed to place a plaque memorializing the litigation.

Legal principles generally applicable to *exactions*:

1. Statutory authority for exactions must exist. (Exactions for work off-site are not authorized in Michigan).
2. The exaction must be reasonably related (have an "essential nexus" or reasonable connection) to the public need created by the development. This should be documented by appropriate studies or reports.
3. The exaction must not deprive the property owner of all viable economic use of the land.
4. The primary purpose of the exaction must be related to the service being provided, and not be for general revenue raising, i.e. a disguised tax).
5. The degree of the exaction demanded must be roughly proportional to the impact of the proposed development (i.e. there must be rough proportionality).

6. The municipality should document the need for any exaction with studies linking the police power objective to be achieved to the nature and extent of the condition being imposed, that is the nexus.

Takings and Exactions Case Law

Brick Presbyterian Church v. The City of New York, 5 Cow 538 (NY 1826) – Earliest court-approved governmental land use regulation for environmental purposes. The City of New York had in the 1760 given land to the Brick Presbyterian Church for a church and cemetery. The City later prohibited cemeteries on church grounds as they were determined to be hazardous to the public health due to "odors" and "vapors" from buried bodies. The Church and cemetery were on the edge of town at the time of the gift of land, but found themselves in the heart of City in the 1820s. The court agreed with the City, finding the cemetery environmentally unsafe. The deceased were exhumed and relocated to "safer" locations.

Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) – A state law required dam construction to prevent property damage from floods. The construction of a flood control dam flooded Pumpelly's land. The U.S. Supreme Court found that state flood control program as applied had unconstitutionally taken Pumpelly's land. Ordered the state to pay just compensation.

Bedford v. U.S., 192 U.S. 217 (1904) – similar facts as *Pumpelly*, but the U.S. Supreme Court found that the erosion of Bedford's land was damage as a consequence of federal governmental navigation improvements of the Mississippi River, and denied compensation as no taking had occurred. Unlike *Pumpelly*, the U.S. Supreme Court found that no "direct invasion" or taking had occurred.

Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926) – In 1922 the Village of Euclid, Ohio adopted a zoning ordinance that placed Ambler's property within three zones (industrial and two types of residential). Ambler's land was vacant, but planned for industrial development. The zoning ordinance had the effect of reducing the market value of residential tracts from $10,000 to $2,500 an acre. U.S. Supreme Court found that the Village of Euclid had acted constitutionally to control land use in advance of fast approaching industrial development. Further the ordinance did not prohibit, but guided where industrial development could occur. Court upheld the ordinance on the grounds that it protected the public health and safety (protecting children by separating industry and residences, decreased fire risk, reduced wear and tear on roads, and greater prevention of civil disorder).

Nectow v. City of Cambridge, 277 U.S. 183 (1928) – U.S. Supreme Court found that Nectow's loss of property use for industrial development outweighed the public interest promoted by Cambridge's zoning ordinance. Unfortunately, the Court did not discuss "takings", but instead simply chose to find no public benefit from the residential rezoning of Nectow's land.

Penn Central Transportation Company, et. al. v. City of New York, et. al., 438 U.S. 104 (1978) – Penn Central and UGP Properties applied to the New York City Landmarks Preservation Commission to build a 53 or 55 story office complex atop the Penn Central Station terminal. The City denied the request. The U.S. Supreme Court ruled that no taking had occurred as the Terminal could still be used as it had for the previous 65 years as a rail terminal, and that no all use of the air space above the terminal had been denied or prohibited by the historic preservation measures of the city.

Kaiser Aetna, et. al. v. U.S., 444 U.S. 164 (1979) – In Hawaii developer Kaiser Aetna began the conversion of a 6,000 privately-owned parcel, including Kuapa Pond, into a marina-style community. The U.S. Army Corps of Engineers were consulted and did not object, although no federal permit requirements existed.

Millions of dollars were spent to fill portions of the Kuapa Pond and its connection to a shoreline lagoon. In 1972 the U.S. brought suit under the Rivers and Harbors Act of 1899 to stop further construction, dredging and filling and sought public access the property as it included navigable or "public" waters. The U.S. Supreme Court found that the federal action constituted a taking. The Court found the marina was not navigable or public; Kuapa Pond had always been private under Hawaiian law; the federal government must pay compensation for physically invading the property; and that the federal government had consented the dredging and filling of the area.

Lucas v. South Carolina Coastal Council (505 U.S. 1003 [1992]) – All structures, including a house, were prohibited by the State of South Carolina in coastal dune areas. Mr. Lucas, owner of coastal dune property sued as an unconstitutional taking of private property. U.S. Supreme Court found that "if a regulation on its face denies a landowner of all economically viable use, then it is a taking," unless the use would result in a nuisance.

Michigan "Takings" Case Law

Bevan v. Township of Brandon (438 Mich 385, 475 NW2d 37 [1991]) - Township denied a request to divide a residential parcel as there was insufficient frontage on the access road, as required by its ordinance. Trial court and appeals court found the ordinance as applied was an unconstitutional taking of private property. Michigan Supreme Court reversed holding that there was no taking as the earlier courts did not look at the property as a whole. Doing so, there remains economically value use as a single-family residence.

Miller Brothers v. Michigan Department of Natural Resources (Nordhouse Dunes case) (203 Mich App 674 [1994]) – MDNR prohibition of oil and gas development in the now federal Nordhouse Dunes Wilderness Area, as hydrocarbon exploration plan submitted would violate MEPA. Ingham County Circuit Court, Court of Claims found that the MDNR denial (the Guyer order) was a taking of private property without just compensation. MDNR would allow directional drilling, but Miller Bros. never presented a directional drilling plan. Court of Appeals affirmed the lower court decision. State conservation groups intervened, Supreme Court of Michigan denied leave to appeal. In what some have called a "backroom deal", in September of 1995 Governor Engler agreed to settle the case at $90 million, almost all damages assessed by the Court of Appeals. Failure to appeal has left a "frightening precedent" – according to environmentalists. Many legal scholars consider the decision a legal blunder for failure to consider feasible and prudent alternatives of vertical drilling.

K&K Construction, Inc. v. MDNR, Slip Op Ct App 168393 (June 4, 1996) – Wanted to build a restaurant in Oakland County, and submitted a wetland fill application for a portion of a 55 acre parcel zoned commercial. MDNR denied permit. Court of Claims found for K&K, a taking and occurred and awarded $5.2 million. Court of Appeals upheld lower court stating,

> "the Constitutional provision (air, water and other resources of the State are of paramount concern to its citizens) is not a principle of nuisance and property law. The decision to build the restaurant on land, or a request to fill wetlands, do not constitute nuisances that the government may abate (citing Nordhouse). We are not aware of any common law principle preventing the building of a restaurant on the plaintiffs land."

And further,

> "thus, the generalized invocation of public interests in the state Constitution, and the legislature's declarations in (the Wetlands Act and Michigan Environmental Protection Act), do not constitute background principles of nuisance and property law sufficient to prohibit the use of the plaintiff's land without just compensation."

Current Rule on "Takings" in Michigan

Though in doubt from Nordhouse and K&K, Michigan's current approach requires an economic value comparison, before and after the regulation application. If there is economically viable use of what remains, there is no taking.

Takings Valuation

U.S. v. Reynolds, 397 U.S. 14 (1970) established the following points:

- Just compensation or "the full monetary value equivalent of property taken."
- Must be arrived at by public agencies and private landowners based on cost of reproducing property and its amenities, fair market value at that time, and resulting damage to remaining property, etc.
- People (experts) differ on existence and replacement values, especially concerning natural and cultural resources.
- Just compensation or "the full monetary value equivalent of property taken" must be arrived at by public agencies and private landowners based on cost of reproducing property and its amenities, fair market value at that time, and resulting damage to remaining property, etc. *U.S. v. Reynolds*, 397 U.S. 14 (1970).

People differ on the meaning of "public use", e.g. taking private property for a highway versus prohibiting development to protect endangered species.

- Sovereign power of eminent domain (condemnation or expropriation).
- Government regulation, such as local zoning and state environmental statues, if applied reasonably are not "takings" of private property as there is nothing inherent in the right of property ownership that allows an owner to unreasonably injure or interfere with the rights of others or unreasonably harm the public interest.

To satisfy constitutional requirements, zoning must be reasonably related to the governmental interest in protecting the public health, safety, morals or general welfare.

Regulatory takings through zoning could occur if:

- restrictions serve to take all economically viable use of land (called a categorical taking); or
- exact an interest in land from the property owner where no reasonable relationship exists between a proposed use and impacts government claims to reduce or prevent by the regulation (called a contextual taking).

Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon* (260 U.S. 393[1922]) stated "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."

Regulations must be necessary (promoting the public health, safety or welfare), understandable (not void for vagueness), made public (procedural due process and public notice), reasonable as applied, applied

the same to all (not arbitrary or capricious), not beyond or an abuse of discretion (discretionary v. ministerial acts), etc.

The Newest Court Case

The Newest Court Case: Lake Tahoe Case – April 23, 2002 (U.S. Supreme Ct. 6-3 vote) ruling was:

Public agencies may temporarily ban land development on private property without owing compensation. It is okay to preserve status quo while devising permanent development strategies. Partial takings claims are not valid.

Facts in the case were:

- Began in early 1980's
- 32 month residential building moratorium imposed by Tahoe Regional Planning Agency to seek solutions to water pollution.
- 100s of single-family lots affected.
- 0ver 400 private landowners sued stating that the temporary freeze on development represented a taking that required just compensation under the 5th Amendment. Sought $27 million.

The court concluded:

- US Supreme Court Justice John Paul Stevens "a rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision-making."
- Factors to consider: motives of planners (environmental protection/preventing over-development), landowners' expectations, the impact to property values.
- Majority: Justices John Paul Stephens, Sandra Day O'Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsberg and Stephen Breyer.
- Dissenting: Chief Justice William Rehnquist, Justices Antonin Scalia and Clarence Thomas such a ban cannot be considered a "traditional land use planning devise."

Lessons from *Lake Tahoe* include:

- Moratoria probably should not last more than one year in most circumstances (6 years in this case).
- Moratoria may still not be possible in Michigan, because Michigan zoning enabling statutes do not specifically authorize the authority.
- Agency actions must be reasonable, tied to appropriate public purposes, and done in good faith.
- Temporary bans okay if part of normal governmental actions and relate to routine permitting processes.
- State legislatures may pass new legislation regarding moratoria.
- There is nothing inherent in property ownership that guarantees a particular land use, and local government can lawfully regulate private land use if appropriately applied to protect the public health, safety and welfare (such as environmental protection and downstream land owners' rights).
- Rights in private property owners may be considered "correlative"

  right ↔ duty (one implies the other)

  privilege ↔ obligation (one requires the other)

In other words, sticks of the bundle of rights can be shortened or even denied so long as the entire bundle is not taken.

Summary

U.S. and Michigan Supreme Courts have held that there is no "taking" where property value is merely diminished, leaving some viable economic value.

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