

July 9, 2015
Hearing on
“The State of Property Rights In America Ten Years After *Kelo v. City of New London*”

United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Statement
by
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I. Introduction

Chairman Goodlatte, and honorable committee members, as an attorney with the Pacific Legal Foundation, a nonprofit, public interest organization dedicated to the protection of individual liberties and private property rights, I thank you for this opportunity to provide comments concerning property rights in America.

I have been asked to identify and discuss key legal issues concerning the regulatory takings doctrine of the Fifth Amendment. While there are numerous legal controversies that could be discussed, my focus here will be on two key issues that are high priority for Pacific Legal Foundation, and which have broad impact on the constitutional protection of citizens' private property rights.

At the outset, takings claims arise in a “nearly infinite variety of ways.” *Arkansas Fish and Game Commission v. United States*, 133 S. Ct. 511, 518 (2012). Certainly the Clean Water Act and its regulation of wetlands on private land has produced many takings claims and is a prime source of conflict between landowners and the federal government. This is why the recent efforts to redefine “waters of the United States” so as to greatly expand regulatory jurisdiction is important to many Americans. On this subject, Pacific Legal Foundation attorney M. Reed Hopper provided testimony and substantial written comments on February 4, 2015 at the Joint Hearing on “Impacts of the Proposed Waters of the United States Rule on Local and State Governments,” United States House of Representatives Committee on Transportation and Infrastructure, and the United States Senate Committee on Environment and Public Works.¹

For purposes here, my role is to help identify how the rules in the takings analysis are applied by the courts. In the limited time, I will draw attention to several examples of American citizens who have experienced the tremendous difficulties and legal obstacles that often preclude realizing the constitutional protection of just compensation. Quite simply, pursuing and winning a takings claim is not easy.

We have recognized, however, **no magic formula** enables a court to judge, in every case, whether a given governmental interference with property is a taking. In view of the **nearly infinite variety of ways** in which government actions or regulations can affect property interests, the Court has recognized **few invariable rules** in

¹In addition to development of Takings Clause jurisprudence, PLF has been heavily involved in litigation defining the scope of federal jurisdiction under the Clean Water Act, and its attorneys were counsel of record in *Rapanos v. United States*, 547 U.S. 715 (2006) and *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012). Although these comments will not directly address Clean Water Act issues, regulation of wetlands has been an arena that has resulted in severe impact on property owners and resulted in regulatory takings under the principles discussed here.

this area.

Arkansas Fish and Game Commission, 133 S. Ct. At 518 (emphasis added).

Pacific Legal Foundation has long been in the forefront of litigation defending private property rights, and has been involved in most of the Supreme Court land use cases addressing the Takings Clause since *Agins v. City of Tiburon*, 447 U.S. 255 (1980). PLF's attorneys were counsel of record in key precedent setting cases, including the landmark decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and subsequently, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (subsequent purchasers may bring takings claim resulting from already existing regulations); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (takings claim ripe for judicial review), and *Koontz v. St. John's River Water Management District*, 133 S. Ct. 2586 (2013) (the *Nollan* unconstitutional conditions doctrine applies to monetary exactions as well as exactions of land).

These comments will first briefly identify the basic principles and analytical framework of a regulatory takings claim under the Supreme Court's precedents. The comments will then shift to specific areas of concern, using several examples to highlight how these difficult legal doctrines have very clear and direct impacts on the lives of everyday citizens.

II. A Very Brief Overview of the Regulatory Takings Analysis

The Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." While *Kelo v. City of New London* is concerned with the scope of government power to take private property through direct condemnation for "public use," takings of private property also result from regulatory actions of government. The regulatory takings doctrine is founded on the principle that the impact of an otherwise valid police power regulation may go "too far" so that fairness and justice require compensation to the landowner. The general rule was set in 1922 in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922) where Justice Holmes explained that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Id.* at 415.

A. *Penn Central* Multi-Factor Analysis of a Taking

Ever since *Pennsylvania Coal*, the struggle has been to determine when a regulation "goes too far" and triggers the command of just compensation. The United States Supreme has repeatedly recognized that there is no "set formula" for determining when a regulation goes too far, and instead the takings analysis turns on the "particular facts" of the case. *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 123-24 (1978). This *ad hoc*, factual inquiry is guided by fairness and justice. As stated in *Armstrong v. United States*, 364 U.S. 40, 49 (1960),

The Fifth Amendment's guarantee ... was designed to bar Government from forcing some people alone to bear public burdens which, in all

fairness and justice, should be borne by the public as a whole.

While there is no “set formula” for analyzing a *Penn Central* taking, the Supreme Court has recognized that factors of particular significance are (1) the extent of economic impact on the owner, (2) the degree of interference with reasonable investment backed expectations, and (3) the character of the government action. *Penn Central*, 438 U.S. at 124. These factors are not exclusive, but are the core considerations in the multi-factor analysis. Ultimately, what is required is a “careful examination and weighing of **all the relevant circumstances.**” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) quoting *Palazzolo*, 533 U.S. at 636 (emphasis added) (O’Connor, J., concurring).

The *Penn Central* multi-factor analysis has emerged as the primary basis for determination of a taking. Obviously, this means it is very difficult for both landowners and government agencies to predict with certainty whether a taking will be found if a matter goes to litigation. Ultimately, the particular facts of the case must be considered in light of the guiding principle of fairness and justice for whether the individual alone, or the public as a whole, should bear the economic burden of the regulation.

B. Categorical Taking Based on Physical Invasion

While the *Penn Central* factual inquiry is the key analysis of a regulatory taking claim, there are two situations that the Supreme Court has established a definite rule for liability. One of these is a taking based on government authorized physical occupation. Although occurring much less frequently than a *Penn Central* claim, the Supreme Court has recognized that a *per se*, or categorical, taking occurs when a regulation authorizes an actual physical invasion or occupation of private property. *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982) (installation of cable equipment on the side of a private building); *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (physical invasion takings occur where government “requires the landowner to submit to the physical occupation”).

In these cases, the degree of physical invasion has little bearing on whether a taking occurs. For example, in *Loretto*, the government authorized invasion was nothing more than installation of a thin cable and two boxes on a building. Regardless of the extent of invasion, an owner has a right to exclude others and, when abridged, is entitled to compensation.

The recent Supreme Court decision in *Horne v. Department of Agriculture*, decided June 22, 2015, is an example of such a categorical taking. In that case, the Agricultural Marketing Agreement Act of 1937 required that a percentage of raisin growers’ crops be physically set aside and sold or otherwise disposed of by the Government, without any compensation to the private growers. The Court ruled this was a “clear physical taking.” Slip op. at 8. Of particular significance, the Court ruled that the protection of the Takings Clause applies to both real and personal property. As stated by the Court: “It protects ‘private property’ without any distinction between different types.” Slip op. at 5. Accordingly, the fact that the subject of the taking was

raisins, rather than land, was of no consequence.

C. Categorical Taking For Denial of All Economically Viable Use

Like government authorized physical invasions, a “categorical” taking also occurs where a regulation denies *all economically viable use* of private property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 103, 1015 (1992) (emphasis added). A landowner will often be tempted to pursue a taking based on “denial of all economically viable use,” but this can be a difficult test to meet, especially in light of the “relevant parcel” issue that will be discussed below. Because of the high bar of showing a denial of all economic use, many litigants will ultimately pursue the taking claim under the *Penn Central* multi-factor analysis where the economic impact is but one fact, among many, that will be considered in the takings determination.

Although *Lucas* at times implies that this categorical test requires a complete elimination of value (*Lucas*, 505 U.S. at 1019 n.8), the decision otherwise emphasizes that a taking under the “economically viable use” test does not require the property to be rendered valueless. Rather, it involves an analysis of the uses allowed under the regulation and whether they are economically productive, economically beneficial, economically feasible, or viable. *Id.* at 1016-19. The Court stressed that its “prior takings cases evince an abiding concern for the productive use of, and economic investment in, land. *Id.* at 1019 n. 8.

[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property *economically idle*, he has suffered a taking.

Id. at 1019 (emphasis added). See also *Pennsylvania Coal*, 260 U.S. at 414 (coal mining rendered “commercially impracticable”); *Florida Rock Industries, Inc. v. United States*, 18 F. 3d 1560, 1571 (Fed. Cir. 1994) (“are alternative permitted activities economically realistic in light of the setting and circumstance, and are they realistically available”).

Because the facts in *Lucas* included a complete elimination of all value, there has been disagreement as to whether the categorical rule is limited to situations where the regulation renders the property valueless. Of course, that would be a very narrow rule because virtually all property will retain some residual value, even where it has no viable economic use. A recent decision of the United States Court of Appeals for the Federal Circuit provides some clarification on this point. In *Lost Tree Village Corporation v. United States*, ___ F.3d ___ (June 1, 2015) the Federal Circuit ruled that the existence of some residual land value that is derived from noneconomic uses does not preclude the *Lucas* categorical rule. Slip op. at 4 - 7.

The government argues that this court’s precedent characterizes *Lucas* as applying only in the narrow circumstance in which all value, regardless of source, has been lost. We disagree. ... When

there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land. Typical economic uses enable a landowner to derive benefits from land ownership ... We affirm the trial court's holding that the government's permit denial constituted a per se regulatory taking under *Lucas* because Plat 57's residual value is not attributable to any economic uses.

Id. (emphasis by the court).

In summary, even where there might be some residual value in a parcel, the *Lucas* categorical rule applies if the regulation denies all economically viable uses, and any residual value is not derived from an economic use. If there is not a taking under this rule, the court may still find a taking under the *Penn Central* ad hoc, factual inquiry.

D. Unconstitutional conditions doctrine

In the land use context, the protection afforded by the unconstitutional conditions doctrine has been significantly clarified by the Supreme Court. The doctrine was applied in the seminal cases *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). More recently, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) and *Koontz v. St. John's River Water Management District*, 133 S.Ct. 2586 (2013) the role of the doctrine was more sharply defined. The Supreme Court has recognized that these decisions “provide important protection against the misuse of the power of land-use regulation.” *Id.* at 2591. The Court recognized the reality that “land-use applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits.” *Id.* at 2594.

Under this doctrine, government may not use the permitting authority to coerce applicants to give up constitutional rights in order to secure a permit.

[T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by government.

Lingle, 544 U.S. at 547 (quoting *Dolan*, 512 U.S. at 385). Accordingly, when government conditions its permit-approval on an exaction of some protected property interest, the exaction must bear an “essential nexus” to mitigating an adverse impact of the proposed project. *Nollan*, 483 U.S. at 837. In addition, the exaction must be “roughly proportional ... both in nature and extent to the impact of the proposed development.” *Dolan*, 512 U.S. at 391. See generally *Lingle*, 544 U.S. at 546-47 and *Koontz*, 133 S.Ct. at 2595.

III. Two Key Issues in Today's Regulatory Takings Jurisprudence

A. The Relevant Parcel Issue

In applying either the *Penn Central* multi-factor takings analysis, or the *Lucas* categorical taking for a denial of all economically viable use, the court is required to first determine the relevant parcel of land that is subject to the regulatory takings analysis. This is not always an easy task, and has been the source of much litigation. As stated in *Lucas*, “Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.” *Lucas*, 505 U.S. at 1016 n.7.

When, for example, a regulation requires a developer to leave 90 % of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. ... Unsurprisingly, this uncertainty regarding the composition of the denominator in our “deprivation” fraction has produced inconsistent pronouncements by the Court.

Id.

The general rule has long been stated that a court is to consider “the parcel as a whole.” *Penn Central*, 438 U.S. at 130-31. But this begs the question. What is the whole parcel? And to this question, the Court has not provided an answer. See John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi L. Rev. 1535, 1542 (1994) (“The Court has not articulated a method for defining the ‘parcel as a whole.’”).

Of course, how the relevant parcel is defined is often the key to determining a taking. Landowners want to define the parcel narrowly, focusing on the portion or interest that is subject to the regulation. Government tends to define the parcel broadly to show that the landowner has not been denied all economic use of all of the private land.

The issue is best understood by considering two examples being litigated today.

1. *Murr v. State of Wisconsin and St. Croix County*, 359 Wis.2d 675 (2014)

The plaintiffs in this case are a typical American family. They are Donna Murr, and her siblings Joseph Murr, Michael Murr, and Peggy Heaver. In 1960, their parents purchased a 1.25 acre waterfront lot in a large subdivision on the St. Croix River and built a family recreation cabin. They placed title to the parcel in their private plumbing company.

In 1963, the parents purchased the adjacent Lot E. This was a separate purchase of a discrete and legal lot that was also created by the St. Croix Cove subdivision. That lot, also 1.25

acres, has remained vacant and was held for investment purposes.

In the mid-1970s, new land use regulations limited the development to the “net project area” that was remaining after subtracting slope preservation zones, floodplains, road rights of way and wetlands. The two lots contain approximately .48 and .50 acres of net project area.

Under the regulations, both of these lots purchased by the Murrs parents are now treated as “substandard” because they each have less than one acre of “net project area.” However, the regulations also have a “grandfather clause” that allows development of substandard lots that existed as “lots of record” prior to adoption of the new regulations in 1976. This makes sense and has allowed almost all of the lots in the subdivision to be developed because they all predated the new regulations.

Sounds fine so far. But here is the kicker. The grandfather clause allowing development is only allowed for lots that are in separate ownership from abutting lands. But the Murrs’ parents in 1994 transferred title in Lot F from the plumbing company to their children, and in 1995 they transferred Lot E to their children. The adjoining lots were therefore under common ownership.

Because of the common ownership of the adjoining lots, the lots were forced to merge and neither can be sold or developed as a separate parcel. If the properties were not under common ownership, each would be able to be separately developed because they were pre-existing lots of record.

After being denied variances and special exceptions, the Murr siblings brought a claim for a regulatory taking of their property. On December 23, 2014, the Court of Appeals of Wisconsin held that the relevant parcel for applying the takings analysis was the “parcel as a whole” which the Court ruled was **both parcels combined together**, rather than each discrete and separate parcel. The Wisconsin court rejected the takings claim by proclaiming a “rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.”

Of course, once the “parcel as a whole” is defined to be both contiguous parcels, the Murrs clearly have substantial economic use remaining because they have an existing recreational cabin on one lot. This problem with defining the parcel as a whole to include adjoining lots in common ownership is recurring throughout the country. It arises in multiple contexts, from agricultural operations concerning multiple separate tracts, to the typical American family such as the Murrs.

Pacific Legal Foundation has agreed to represent the Murrs and in August 2015 will be filing a petition for writ of certiorari to the Supreme Court of the United States.

2. Kinderace v. City of Sammamish

This case presents the “relevant parcel” question in an entirely different context than the Murrs. Here, Kinderace is a developer who wanted to build a pizza restaurant on Parcel 9032, in the City of Sammamish, Washington. The property is in a major commercial area, situated on a busy arterial, and is surrounded by other development including a bank, a Starbucks, and a City owned storm water facility.

Parcel 9032 is approximately 3/4 acre in size and is completely encumbered by wetlands and stream critical area buffers, leaving only 83 square feet along the southern boundary available for development. A small creek (George Davis Creek) cuts diagonally through the entirety of Parcel 9032. The City concedes that under new critical area buffers, all economically viable use is precluded, thus apparently meeting the *Lucas* test for a categorical taking. After all, the entire Parcel 9032 is completely precluded from any economic development. But there is more to the story.

In 2003, Kinderace was also developing the adjoining Parcel 9058 with a KFC fast food outlet and a day care facility. The developers realized that a storm water pond would be required for the proposed development. Accordingly, they purchased Parcel 9032 with the intent that the area to the **north** of George Davis Creek would serve well as an area for the storm water pond. At that time, the buffer from the creek was 25 feet on each side, thereby leaving enough room on the north side for the pond.

When they purchased Parcel 9032, the developers knew that George Davis Creek precluded a single development that encompassed both sides of the creek. Accordingly, from the beginning, the plan was to utilize the north portion for the detention pond to serve Parcel 9058, and retain the large area **south** of the creek for future development. Consistent with that plan, the developers requested and secured approval from the City for a boundary line adjustment so that the area north of the creek became included as part of Parcel 9058. The area south of the creek was retained for future development as Parcel 9032.

The KFC outlet and daycare were approved and constructed. At that time, the substantial area south of the 25 foot buffer remained available for development.

Unfortunately, in 2006, the City adopted new restrictions that greatly expanded environmentally critical area buffer requirements. As a result, the entire area south of the creek is now precluded from development except for the 83 square foot sliver of land.

Kinderace sought and was denied a reasonable use exception to allow development of the pizza restaurant on Parcel 9032. In rejecting Kinderace’s subsequent takings claim, the trial court concluded that the relevant parcel for takings analysis purposes is Parcel 9032 combined with the adjacent Parcel 9058. Of course, because Parcel 9058 is developed with commercial buildings, there was no taking of the “parcel as a whole,” as that was defined by the trial court.

The Kinderace facts therefore present a recurring issue facing property owners in all types of similar contexts. Parcel 9032 is a discrete and separate parcel that, absent the severe buffers, would have independent economic viability. Nevertheless, the use of a portion of the property for a detention pond to serve Parcel 9058 gave the trial court a basis to conclude that the “parcel as a whole” must be this larger unit combined.

The case is now on appeal to the Washington Court of Appeals, and PLF is providing the representation in the appellate proceedings. PLF will contend that the better rule is that proposed by John Fee.

The regulatory taking inquiry should instead focus on whether the property interest proposed to have been taken is in fact substantial enough to warrant Fifth Amendment protection as an independent bundle of rights.

...

[A]ny identifiable segment of land is a parcel for purposes of regulatory takings analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments.

Fee, 61 U. Chi L. Rev. at 1557.

Under this proposed rule, the relevant parcel depends on the ability to make independent economic use of the regulated portion. This is consistent with the purpose of the Fifth Amendment to protect rights in property, while also precluding takings claims of areas set aside by setbacks and buffers where that restricted area otherwise does not have independent economic use. In the *Kinderace* example, but for the extreme buffers, Parcel 9032 obviously had independent economic use available for use as a pizza restaurant.

In evaluating government regulations, particularly in the context of imposing new and broad reaching environmental buffers, the relevant parcel issue will continue to present significant legal problems for property owners and government. All effort should be made to limit buffers and similar restrictions so that economic viability is not eliminated for private owners. Pacific Legal Foundation will continue its efforts to seek precedent from the Supreme Court that provides more a more protective approach for property owners beyond the general statement of considering the “parcel as a whole.”

B. *Williamson County* Ripeness Requirement To Seek State Remedies

The ripeness doctrine in regulatory takings law has been a barrier for landowners seeking to protect their constitutional rights in federal court. This stems from the Supreme Court’s decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). The Court there established that before a takings claim is ripe in federal court, compensation must first be pursued in state court through the procedures available

under state law.

Because of *Williamson County*, a plaintiff may not simultaneously file a claim pursuant to state remedies in state court while also seeking compensation under the Takings Clause in federal court. *Sansotta v. Town of Nags Head*, 724 F.3d 533, (4th Cir. 2013). However, a plaintiff may seek state law remedies in state court and include the federal takings claim in that same case, as long as state law remedies are being pursued. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 346 (2005).

This background provided the strategy employed by the government in many cases of removing the federal takings claim to federal court, and then seeking dismissal of that claim based on ripeness. But the Fourth Circuit in *Sansotta* did not succumb to that devious strategy.

Here, the owners did exactly what *San Remo* permits: they filed both their takings claims and their inverse condemnation claim, see N.C. Gen Stat. 40A - 51, in state court. The town then removed the case to federal court as it was permitted to do... because the complaint raised a question of federal law. The town then invoked the *Williamson County* state litigation requirement and asserted the Owner's taking claim was unripe.

Sansotta, 724, F.3d at 544-45. The Fourth Circuit continued:

Because *Williamson County* is a prudential rather than a jurisdictional rule, we may determine in some instances, the rule should not apply and we still have the power to decide the case. This case is such an instance.

Id. at 545.

Unfortunately, not all federal courts have received the message. In *Perfect Puppy, Inc. v. City of East Providence*, __ F. Supp. 3d __ (March 31, 2015), the District Court dismissed the federal takings claim after removal from state court. Slip op. at 7. The case is proceeding on appeal to the First Circuit. Representation is being provided by Pacific Legal Foundation in an effort to apply the *Sansotta* decision to the First Circuit, or alternatively, to ultimately have the issue determined by the Supreme Court.

The ripeness rule illustrates one of the many issues facing litigants seeking to protect their federal constitutional rights. In an ongoing effort concerning these and other issues, Pacific Legal Foundation appreciates the interest and concern of this committee.