ROADMAP OF REGULATORY TAKINGS AND EMINENT DOMAIN

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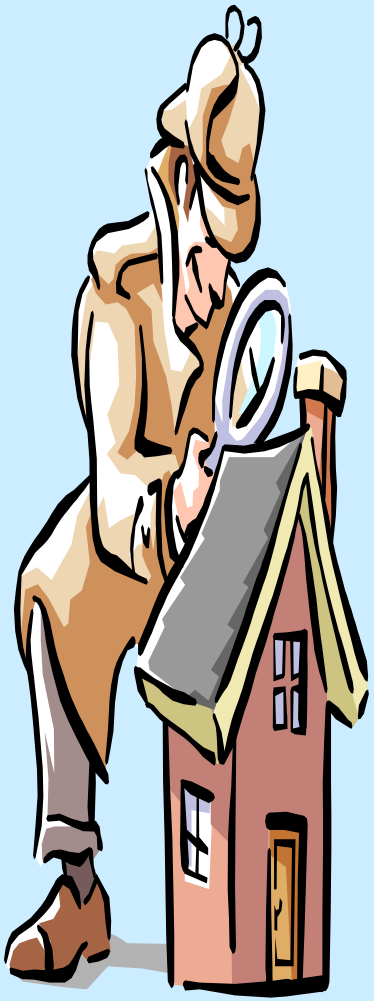
The author thanks his excellent law clerks for their fine research, graphics, preparation, and updates of this presentation. Giles Krill (1998), Sarah Grilli (2000), Marsha DeGeer (2001), Andrew Meeks (2002), Brian Falk, Luke Legere (2005), Sidra Vitale (2006), Amaan Husain (2008), and Peter Vetere (2010).

THE ESSENCE OF THE TAKINGS DOCTRINE

- The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation."
- Although "property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

- Rather than prohibiting the government from taking private property, the Takings Clause merely "places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

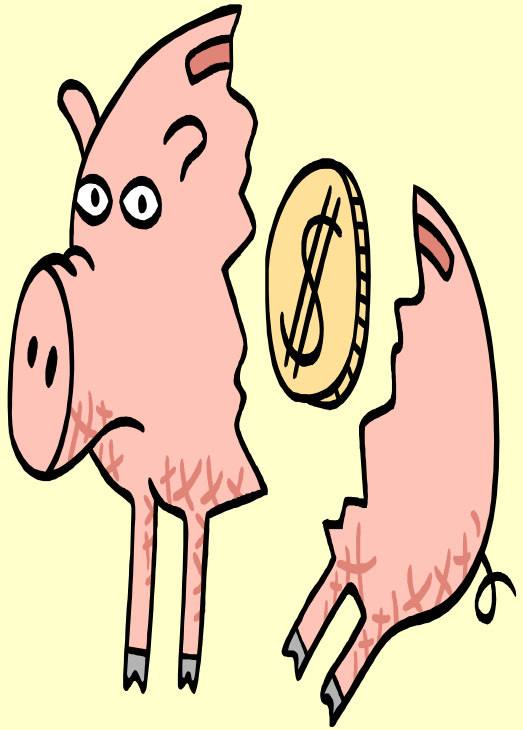
THE ESSENCE OF EMINENT DOMAIN



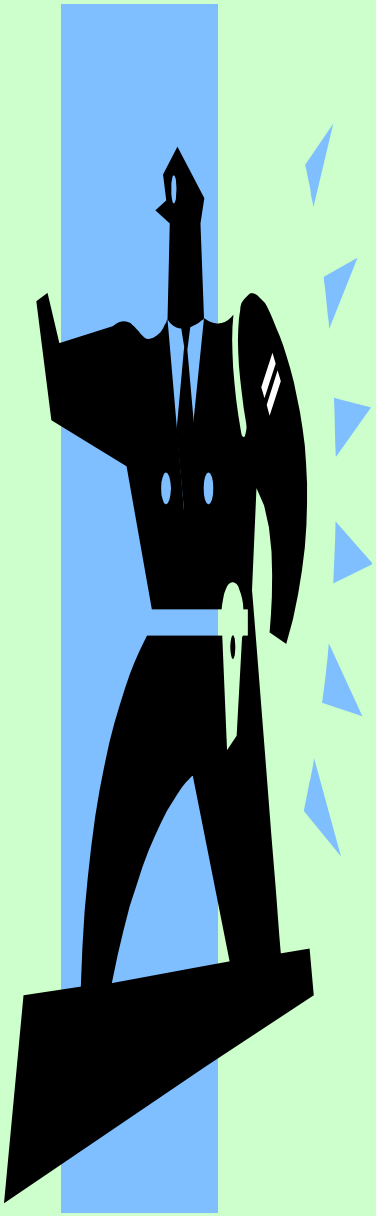
- The Eminent Domain Power refers to governmental authority to take property pursuant to the Takings Clause of the Fifth Amendment, state constitutions, or statutes.
- Government uses eminent domain to become the owner of real estate for streets, highways, parks, schools, and other public buildings or uses like easements for access, drainage, or construction.
- The typical remedy for an unhappy landowner is to seek (in a jury trial) more money than was awarded at the time of the taking, or (from a judge) invalidation of the taking.

INVERSE CONDEMNATION

- "Inverse Condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.' " *Agins v. City of Tiburon*, 447 U.S. 255 (1980).
- In other words, inverse condemnation is a de facto taking of property by eminent domain, without the usual safeguards and money.
- Thus, inverse condemnation is a landowner's cause of action to sue the government for money or invalidation or both.



CRITERIA FOR VALID LAND USE RESTRICTIONS



- Any state or local restriction must advance a legitimate state police power purpose, meaning it must be substantially related to protection of the public health, safety, welfare, or morals.
- Any federal restriction must fit within the Commerce Clause or another power of the federal government.
- The means chosen to implement the restriction must be closely related to accomplishing the valid purpose supporting it.
- There must be no undue impact on the landowner, determined by balancing the impact on the landowner with the public purpose supporting the restriction.

THE TAKINGS DOCTRINE AS IMPLEMENTED IN COURT

- A regulatory taking of one's property is not appealed to an agency or other government body.
- A court determines if the restriction fails to meet the legal standards, and so a regulatory taking has occurred.
- The landowner, as plaintiff, tries to prove that the taking is an "unconstitutional taking without compensation."

Standing to sue

Is the right party filing suit? *(threshold hurdle)*

1. Suffered injury in fact?
2. To an interest cognizable under a statute or common law principle?
3. Causally connected to the conduct complained of?
4. Redressible by the court? *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

yes →

no ↓

Case dismissed.

Exhaustion of remedies

Have complete administrative remedies been sought? *(threshold hurdle)*

Has compensation been sought through judicial procedures of the state? *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

yes →

no ↓

Case dismissed.

Ripeness

Is the case ripe for court review? *(threshold hurdle)*

Has the agency decision-maker arrived at a final decision?

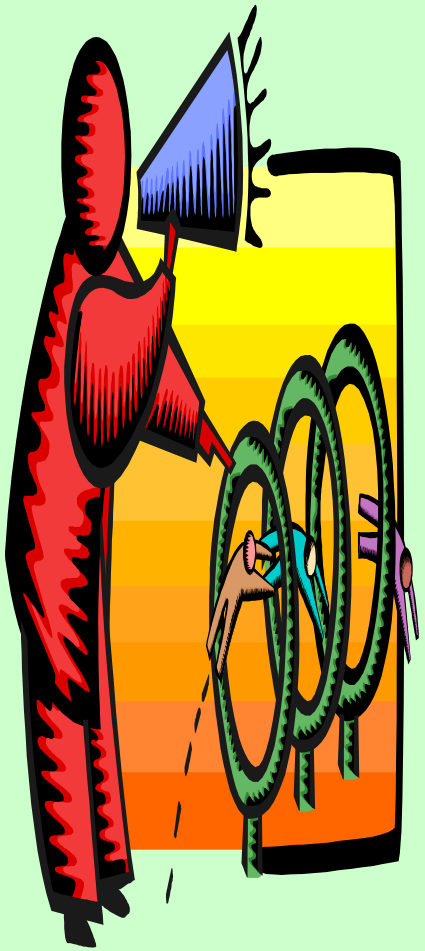
Is it clear what can and can not be built? *Williamson County; Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

yes →

no ↓

Case dismissed.

PROVING THAT A TAKING HAS OCCURRED



- If the plaintiff survives defense motions on standing, exhaustion, and ripeness, the ensuing trial involves proof of a per se taking or a traditional taking.
- A per se taking is automatic, and leads directly to an award of money damages.
- A traditional taking involves proving multiple factors during a lengthy trial.
- These are sometimes distinguished simply as per se takings and *Penn Central* balancing test takings.

PER SE TAKINGS TEST

Is there a physical invasion?

no

Interference with a fundamental property right (i.e. right to transfer and exclude others)? *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

no

Is use of property otherwise limited?

yes

yes

Per Se Taking: Damages awarded. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

yes

Greater likelihood of proving a Per Se Taking. Regulation has a heavier burden under *Nollan* and *Dolan* analysis.

no

No Per Se Taking.

Is there a limitation by a temporary moratorium on development activities? *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 122 S. Ct. 1465 (2002).

yes

no

Has some kind of limitation affected the reasonable economic uses of the property?

yes

yes

no

Unlikely to be a Per Se Taking if the moratorium was enacted to provide planning body with adequate time to avoid hasty decisions or prohibitive expenses and is supported by relevant data. *Penn Central* three-factor balancing test applies at trial. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 470 (1986); *Tahoe-Sierra*.

No Per Se Taking.

yes

Is there a total wipeout of all reasonable economic uses of the property?
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

no

Unlikely that a Per Se Taking will be found, but proceed with *Penn Central* three-factor balancing test at trial.

yes

Can the deprivation be justified by a regulation which emulates state nuisance law or other well-established principles of property law?
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); *Lucas.*

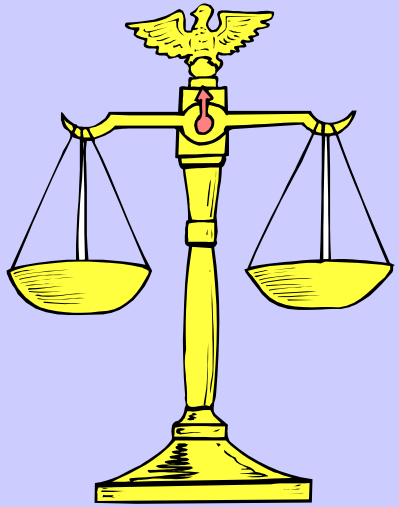
yes

No Per Se Taking.

no

Per Se Taking: Damages awarded.
Lucas.

PENN CENTRAL BALANCING TEST



1) What is the economic impact of the government regulation on the landowner?

2) Does the regulation interfere with the landowner's reasonable, investment-backed expectations?

3) What is the character of the governmental action?

(All three factors must be weighed to determine whether a taking has occurred. *Penn Central; Tahoe-Sierra*.)

1) What is the economic impact of the government regulation on the landowner?

Is there a substantial decrease in the value of the property? *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987); *Keystone Bituminous.*

no

Continue to second factor.

yes

Can this be offset by balancing the public and private interests? *Eastern Enterprises v. APFEL,* 524 U.S. 501 (1998).

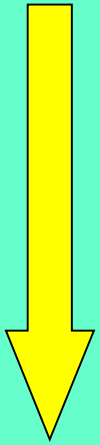
no

yes

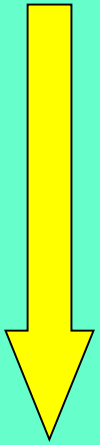
No taking.

2) Does the regulation interfere with the landowner's reasonable, investment-backed expectations?

Was the land purchased in the midst of heavy regulation?

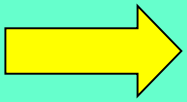
yes 

No taking, even though theoretically there still is a right to challenge the regulation.

no 

Is only one portion of the parcel interfered with?

no 

yes  No taking. *Palazzolo.*

2) Investment-backed expectations (cont'd)

no →

Did the landowner enter the project with good intentions to meet every regulatory requirement, but was stifled by a government entity clearly acting on a subversive agenda? *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Good v. United States*, 189 F.3d 1355 (1999).

no → ***Continue to third factor.*** →

yes ↓

Possibly a taking. Also, landowner may be entitled to a §1983 jury trial with damages, so long as all available state remedies and procedures have been exhausted. *Del Monte Dunes.*

3) What is the character of the governmental action?

Is it related to a proper public purpose (health, safety, welfare and morals)? Sometimes called the "Purpose Test."

yes →

Is this regulation a rational means of furthering that proper public purpose? Sometimes called the "Means Test."

yes →

no ↓

no ↓

Plaintiff wins. Remedy either invalidation of government action, or compensation, or both.

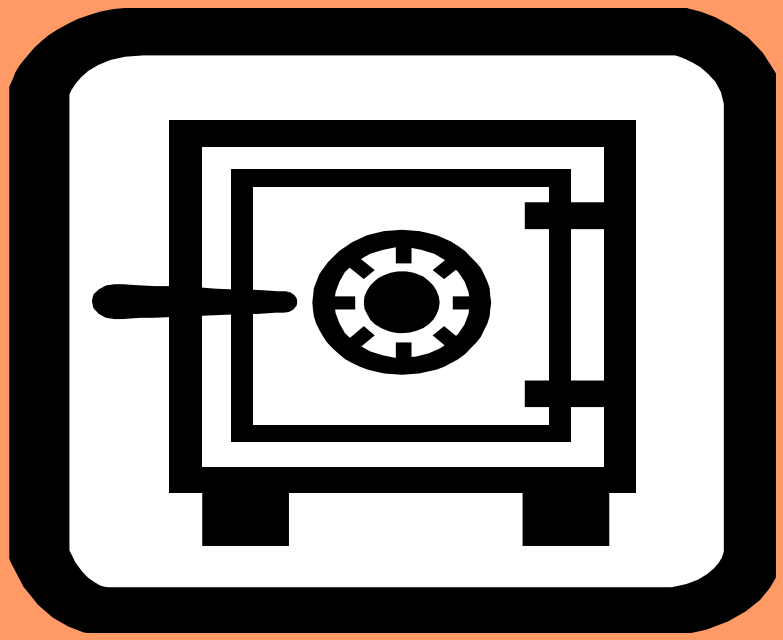
GOVERNMENT WINS

LIMITATIONS ON TAKINGS REMEDIES

- It is difficult for a landowner to prove that a regulatory taking has occurred, even harder to collect money.
- No state has more than a handful of cases declaring that a land use regulation rises to the level of a taking, and most merely invalidate it.
- Only in recent years has the U.S. Supreme Court begun to hear many regulatory taking cases.
- Plaintiffs lose the vast majority of takings cases. They give headlines about Supreme Court cases weight far beyond what the cases actually say.

ACCESS TO COMPENSATION

Trial is over. Sometimes there is a second phase at trial, on the amount of monetary damages for a taking proven in the first phase. Here the landowner seeks the diminution in fair market value occasioned by the government restriction. This area of law is in its infancy. One thing is clear: the plaintiff must prove actual, not theoretical damages, in the same manner and with the same care and attention to detail, or the safe will not swing open.

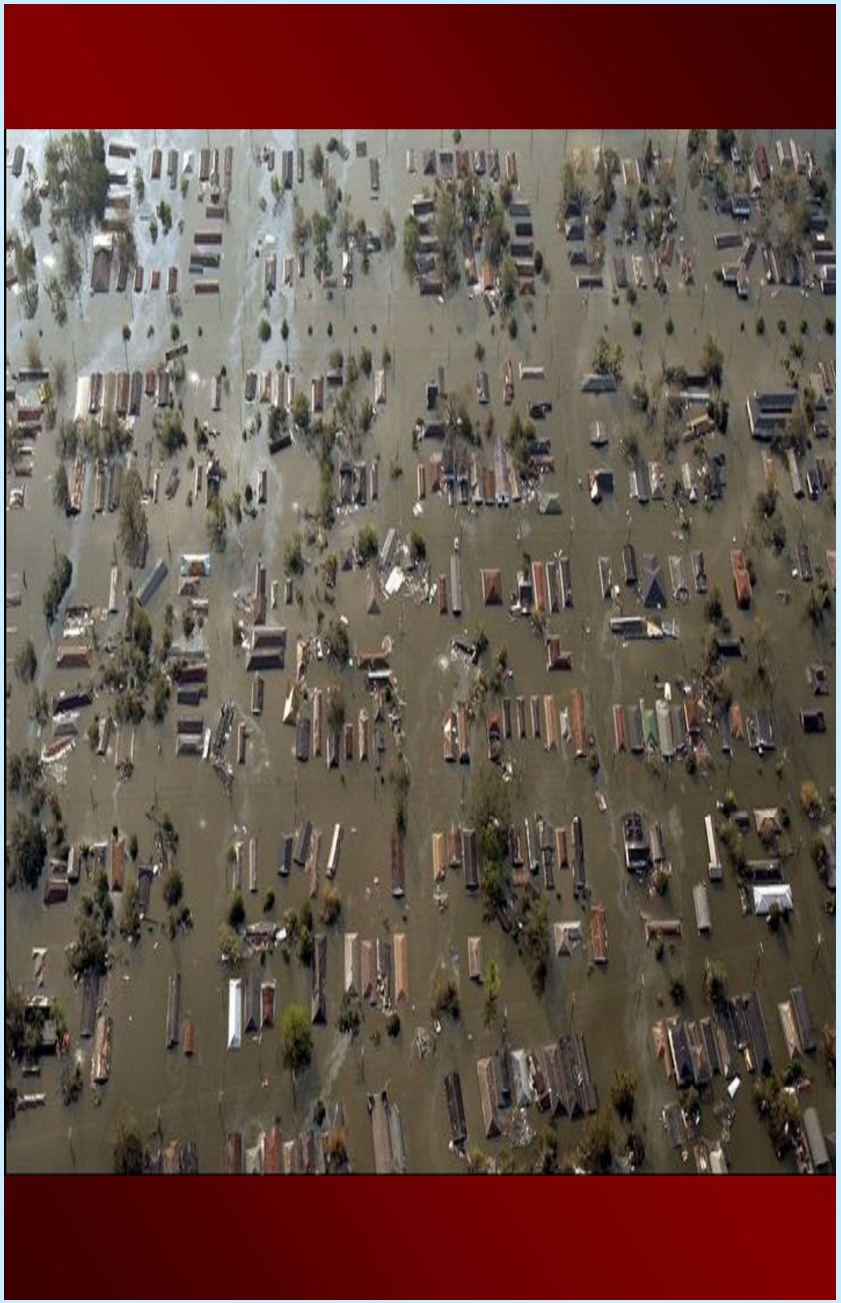


STATE COURT EXAMPLE

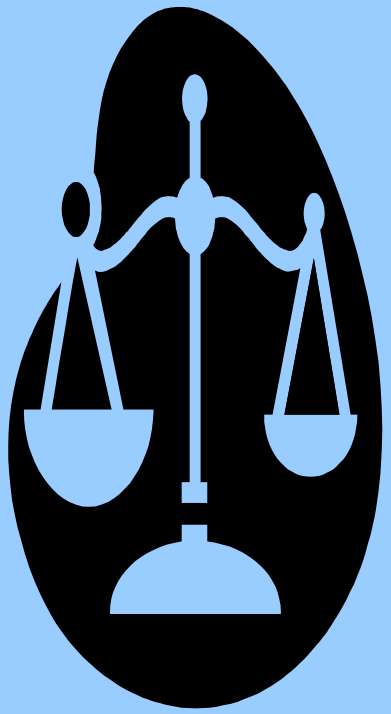
- The Massachusetts Supreme Judicial Court reviewed the result of a *Penn Central* trial, ruling on Chatham's ban on construction of homes in the coastal floodplain. *Gove v. ZBA of Chatham*, 444 Mass. 754 (2005).
- The trial court and the Appeals Court had ruled after a full trial on the merits that the ban was related to legitimate state interests, did not deny the owner all economically beneficial use, and did not deprive the owner of investment-backed expectations.
- The SJC upheld the Appeals Court and the ban as being related to legitimate interests such as protection of rescue workers and damage to neighboring property. There was no taking, as the property still had value.

PRACTICAL LESSONS

- The SJC's prescient ruling in *Gove* came just weeks before Hurricane Katrina ravaged three states.
- The timing of the ruling served to underscore the importance of local land use controls avoiding flood hazards.
- The ruling also illustrated the difficulty of landowners prevailing on regulatory takings claims in full *Penn Central* trials.

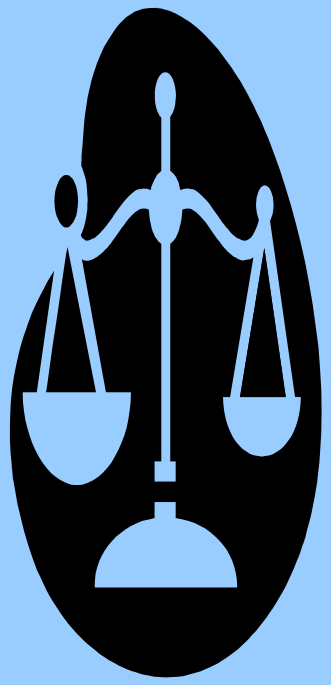


EVOLVING REGULATORY TAKINGS JURISPRUDENCE



- The Supreme Court in 2005 announced that the inquiry into whether a regulation substantially advances legitimate state interests is not a valid stand-alone test for determining whether a regulatory taking has occurred. *Lingle v. Chevron, U.S.A., Inc.*, 125 S.Ct. 2074 (2005).
- The Court emphasized that a plaintiff claiming a taking may succeed only by proving
  - a physical invasion of her property *(Loretto*),
  - a complete deprivation of all economically beneficial use of her property *(Lucas*),
  - a taking under the *Penn Central* balancing test, or
  - that a land-use exaction (in exchange for granting a permit) lacks an essential nexus to the same interest that would otherwise allow the permit granting authority to deny the permit, or that the exaction is not roughly proportional to the impact of the proposed development (*Nollan* and *Dolan).*

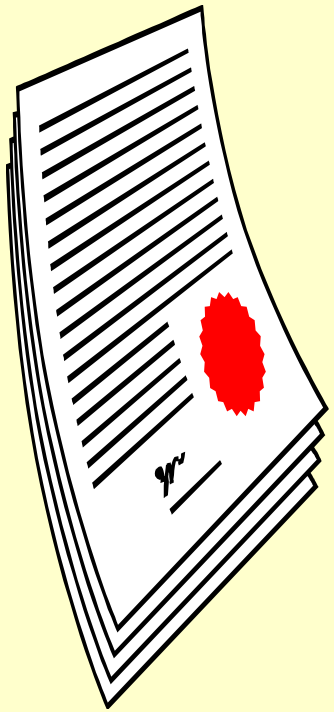
MORE EVOLVING JURISPRUDENCE



- The practical effect of the Court's ruling in *Lingle* is to require a plaintiff bringing a takings claim to identify her personal injury with specificity.
- No longer may a landowner argue that a government regulation constitutes a taking of her property merely because the regulation fails to substantially advance a legitimate state interest.
- That argument fails to account for "the magnitude or character of the burden a particular regulation imposes upon private property rights," and does not "provide any information about how any regulatory burden is distributed among property owners." *Lingle.*
- In other words, the "shotgun with buckshot" is no longer part of a plaintiff's arsenal. A successful takings claim requires the plaintiff to use a high caliber rifle.

PRACTICAL TIPS FOR BRINGING OR DEFENDING REGULATORY TAKINGS CLAIMS

- Begin most claims in state court first.
- Focus on the purpose, means, and impact of the regulation.
- First target any per se taking, whether a physical invasion of property or a total deprivation of all reasonable economic use.
- Otherwise, plan for a lengthy trial under the *Penn Central* test, and be prepared to utilize plenty of expensive expert witnesses.
- Attack land use restrictions both facially and as applied to the plaintiff's property.
- Seek money, invalidation, or both.
- Critique permit denials and conditions under *Nollan* and *Dolan*.



EVOLVING EMINENT DOMAIN JURISPRUDENCE: KELO

- Also in 2005, the Supreme Court allowed New London, Conn., to take private property, pursuant to the power of eminent domain, and transfer it to a private developer to be used in implementing an economic development plan. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).
- The Court's authority in reviewing the taking "extend[ed] only to determining whether the [government's] proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution."
- The ruling hinges on a broad understanding of the term "public use," and a great deal of deference to the City's judgments.

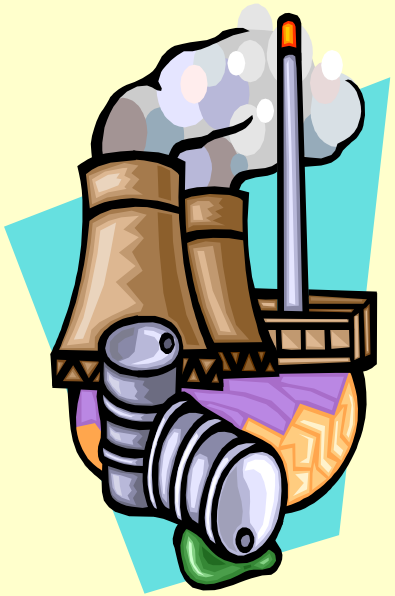
MORE KELO: IT'S THE PLAN, NOT THE PARCEL

- The development plan is a legislative act of local or state government, to which a court naturally defers.
- The *Kelo* plan was a public-private partnership moving a distressed community toward a shared vision of economic improvement and community values.
- The *Kelo* decision supporting eminent domain for economic development was no surprise to urban renewal planners.
- "Public use" is traditionally broadly defined, not limited to "public projects".

STILL MORE KELO: PUBLIC USE AS PUBLIC PURPOSE

- A 20th Century Idea -- Old, narrow definition of public use as physical use by the public was hard to quantify. What percent of the public would need access for a use to qualify?
- A broader interpretation of public use as purpose allows the court to defer to legislative judgments as well.
- Community redevelopment need not be piecemeal, but may be planned as a whole. *Berman v. Parker* 348 U.S. 26 (1954).
- Promoting economic development is a traditional function of government. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).
- It is the taking's purpose, not the mechanics, that matters in determining public use. *Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).*
- Can one landowner stand in the way of lifting up an entire community?
- Kelo doesn't give permission for the state to take property from one person and give it to another, though some may claim it does.

PRACTICAL TIPS FOR LANDOWNERS DEALING WITH EMINENT DOMAIN



- Sue before the Statute of Limitations runs, banning your right to bring a claim. Comply with statutory procedures.
- Critique the Public Use test closely, as it favors the government.
- Recognize that the City of New London in *Kelo* relied on years of public plans and studies so the facts of that case are limited.
- Consider inverse condemnation for physical and other intrusions on land or interference with use and enjoyment.

REACTIONS TO KELO

- Proposed state constitutional amendments or ballot measures to limit eminent domain power, most of which passed (2006):
  - Some tightened taking procedures generally;
  - Others directly prohibited taking for private projects;
  - Several narrowed the definition of "public use" to exclude economic development .
- States researched their existing eminent domain practices.
- Bills filed in state legislatures to scrutinize economic development takings more carefully than other takings.
- Fake grassroots movements filed referendum petitions invoking *Kelo* to actually target regulatory takings.
- Ballot initiatives long on anti-*Kelo* rhetoric incidentally proposed government compensation for any diminution in real estate value.

COMMON THEMES

- Revisiting old arguments on government use of land.
- Baiting with Kelo, switching to shutting down government.
- Demonizing planners.
- Moving from strict land use policy to no land use policy (Oregon).
- Demanding “traditional property rights” without the obligations.
- Relying on the free market to protect public health, safety and welfare.

STATUTORY COMPENSATION FOR REGULATORY TAKINGS

- In 2004, Oregon voters approved a statutory provision requiring compensation for landowners whose property is devalued by government restrictions on land use (Measure 37).
- By March 12, 2007, 7,562 Measure 37 claims, totaling over $3 billion in total costs, for compliance payments or land use waivers had been filed spanning 750,898 acres statewide in Oregon.
- In response, the Legislature placed Measure 49 on the November 6, 2007 special election ballot. It passed with 62% in favor
- The Legislature stated that it would restrict the damaging effects of Measure 37 by limiting some of the development that measure permitted in two ways:
    - First, subdivisions are not allowed on high-value farmlands, forestlands and groundwater- restricted lands. Claimants may not build more than three homes on such lands.
    - Second, claimants may not use this measure to override current zoning laws that prohibit commercial and industrial developments, such as strip malls and mines, on land reserved for homes, farms, forests and other uses.

FOLLOWING IN OREGON'S FOOTSTEPS

- In response to *Kelo* and, presumably, the fallout from Oregon's Measure 37, 13 states placed similar bills limiting eminent domain and regulatory takings powers on their ballots in 2006.
- Ten such bills in Arizona (Prop 207), Florida (Amendment 8), Georgia (Amendment 1), Louisiana (Amendment 5(c)), Michigan (Proposal 06-4), Nevada (Question 2), New Hampshire (Question 1), North Dakota (Measure 2), Oregon (Measure 39) and South Carolina (Initiative 933) passed.
- Statutory compensation initiatives for regulatory takings on ballots in California (Prop 90), Idaho (Prop 2) and Washington (Initiative 933) failed.
- Initiative 154 in Montana, designed to effect many of the same changes as Oregon's Measure 37, was found to be illegally on the ballot to begin with due to "'pervasive fraud' by out-of-state, paid, signature-gatherer(s)," and thus was never considered by voters. 334 Mont. 265 (2006).

REGULATORY TAKINGS UPDATE

States seem to be rethinking their positions on statutory compensation for regulatory takings:

- A 2007 Texas initiative allows a governmental entity to sell property acquired through eminent domain to its immediately previous owner at the original purchase price, if the public use of the property has been canceled, if no progress is made toward that public use by a prescribed deadline, or if the property is unnecessary to accomplish that public use.

- On June 3, 2008 California voters passed Question 99 which bars state and local governments from using eminent domain to acquire an owner-occupied residence, as defined, for conveyance to a private person or business entity and creates exceptions for public work or improvement, public health and safety protection, and crime prevention.

- In Nevada, voters reaffirmed their previous commitment to stricter takings standards by voting "Yes" on Questions 2 on November 4, 2008. A new section within Article 1 of the Nevada Constitution now provides that the transfer of property taken in an eminent domain action from one private party to another private party is not considered taken for a public use.

JUDICIAL TAKINGS:
Stop the Beach Renourishment, Inc. v. Florida D.E.P.

- An eight-justice majority of the Supreme Court held that the Florida Supreme Court did not take property without just compensation when it found that the Florida DEP's approval to restore eroded beach did not deprive landowners of their littoral rights.
- The landowners' right to subsequent accretions was subordinate to the State's right to fill submerged land, and under Florida property law the resulting exposure of previously submerged land was treated as an avulsion (with ownership rights to the State).

- The landowners' littoral rights were not abolished, they just were not implicated because of the doctrine of avulsion.

JUDICIAL TAKINGS (cont'd)
Stop the Beach Renourishment, Inc. v. Florida D.E.P.

Do judicial takings exist?

- While all participating justices (Stevens recused himself) agreed that there was no taking in this case, they differed about whether a "judicial taking" could occur.
- Scalia, Roberts, Thomas, and Alito thought so: "If a court declares that what was once an established right of private property no longer exists, it has taken that property in violation of the Takings Clause." The other four justices declined to adopt the doctrine.
- Kennedy and Sotomayor would have preferred that judicial decisions determining the rights of property owners be analyzed under the Due Process Clause.
- Breyer and Ginsburg believed that a takings analysis was not necessary to decide the case.

- The lesson is that land use practitioners must wait for a future case to see how (or if) the Court applies the doctrine of judicial takings.

Stop the Beach Renourishment
IMPACT ON NEW ENGLAND PROPERTY LAW

- Governmental erosion, recreation, transportation, and navigation projects (such as beach renourishment, parkland creation, coastal highways, dredging, and dock and marina construction) continue to enjoy a green light where they do not implicate private real estate rights. The decision validates state legal principles that recognize the government's right to fill, utilize and undertake coastal projects on submerged lands.
- State supreme courts dodged a bullet. As always, they will decide real estate claims between landowners and government, and between landowners in a large array of legal controversies with no constitutional consequences. They continue free to interpret and apply state property law, even redefine and modernize it, without being subject to legal attack in federal court for judicial takings claims.
- The decision has long-term consequences on adapting to climate change. Filling submerged lands and relocating public infrastructure may be needed to protect public health, safety and welfare and defend property from sea-level rise and coastal storms. Zoning and other land use laws may be reformed to ban or restrict building, improving, repairing, or replacing private structures and uses in flood hazard areas.

ARGUE THE LAW BUT READ THE BENCH

- The importance of considering the U.S. Supreme Court Justices' perspectives on property rights cannot be overstated. Likewise for your state Supreme Court.
- Many of the Supreme Court's decisions in regulatory takings and eminent domain cases have involved a fair amount of editorializing by the Justices.
- For instance, *First English*, *Palazzolo*, and *Lucas* all contained language indicating that the Justices' points of view factored into their reasoning.
- With a new Chief Justice and Associate Justice on the bench, one may only speculate as to how future takings cases will be decided.