The Takings Clause and Local Public Health Agencies

The Takings Clause in the Fifth Amendment of the U.S. Constitution provides that private property shall not “be taken for public use, without just compensation.” It sounds simple, but it has been a highly debated issue that continues to be argued and litigated in our courts. As recently as June of 2013, the U.S. Supreme Court handed down a decision that once again highlights the limits of local government land use powers.\(^1\)

The Takings Clause applies to both the federal government, through the Fifth Amendment to the Constitution, and also to the states, through the Fourteenth Amendment. Some state constitutions have provisions similar to that found in the U.S. Constitution.\(^2\) This brief will provide a basic introduction to the Takings Clause and how it can affect local public health agencies and the ability of local governments to promote public health in their communities.

This area of law continues to grow in complexity and can create significant fiscal exposure for state and local governments. For this reason, legal counsel should be consulted for advice on whether a specific government action is considered an unconstitutional taking requiring just compensation.

Introduction

Police powers enable local governments to regulate and enforce laws for the public’s health, safety and welfare. This is an inherent set of powers reserved to the states through the Tenth Amendment of the Constitution. The reserved power doctrine leaves to the states those rights and powers not delegated to the United States.\(^3\) This broad authority allows local governments to act in a myriad of ways to promote public health including, but not limited to, isolation and quarantine, abatement of nuisances, and regulating property. Local governments may exercise their police powers through regulations that place limitations on property through zoning ordinances, land use restrictions, environmental regulations, and other legal requirements limiting how property can be used. Furthermore, federal and state governments have the power of eminent domain, or condemnation, which allows them to confiscate private property for a public use through a formal proceeding.\(^4\) When a public agency takes property through eminent domain, it must compensate the property owner.

A local government’s authority to regulate property seems broad and expansive. And in many respects it is. However this power is not without constitutional limitations. At times a regulation enacted through a government’s police power may eliminate the economic value or use of property. In these situations, even though there has been no eminent domain or condemnation proceeding initiated, the governmental agency may have effected a “taking” that warrants payment of
compensation to the property owner. The Takings Clause is a constitutional protection against such acts and restricts government power.

The theory behind the Takings Clause is that government may not take from one private party to enrich another, and just compensation is required so individuals do not bear public burdens, which should be absorbed by the community. It is a mechanism used to protect individuals’ private property from unwarranted government intrusions without proper compensation. Takings claims are also referred to as inverse condemnation claims because the property owner sues the government instead of the reverse as in a condemnation (eminent domain) action.

What is Public Use?
A government action is invalid, regardless of whether just compensation has been paid or not, unless the taking is for a public use. However, the Takings Clause cannot be used to determine the validity of a government action; it only requires compensation when government action amounts to a taking. A takings claim assumes the government action is valid and therefore would meet the public use requirement.

To satisfy the public use requirement, the taking must be “rationally related to a conceivable public purpose.” This threshold is fairly low and only requires that the government rationally could have believed that its act would carry out the public purpose. In Kelo v. City of New London, the city sought to use the power of eminent domain to seize private property which was to be conveyed to private developers. This land was then to be used for a development project for the purpose of creating jobs, increasing tax and other revenues, and revitalizing the city. Property owners argued the development project did not qualify as a public use within the meaning of the Takings Clause in the Fifth Amendment. The Supreme Court held that there was a legitimate public purpose even though the private property was being conveyed to a private developer. The city’s development plan served a public purpose despite benefiting private parties.

It remains to be seen whether any government action within its police power may be a deemed a public purpose following the broad definition of public purpose in the Kelo case. Governments acting to protect a community’s health, safety, and welfare serve a public purpose. However, not all states may define public purpose as broadly as Kelo. States may restrict government action and provide more protection for private property owners. For example, Florida law explicitly prohibits taking property to abate or eliminate nuisance, slum, or blight conditions. Local governments in Florida may still adopt and enforce ordinances to abate or eliminate nuisance, but they may not take property through eminent domain as it is not considered a public purpose under Florida law.

Because of this interplay between state and federal constitutional provisions, it is important to consider whether state law restricts governmental actions that would otherwise be permitted under the Federal Constitution. As noted above, some state constitutions or statutes may narrowly define public use and, like Florida, specify actions that do not have a “public purpose”. Even if it is determined that the government acquisition of property is for a public use or purpose, it may still require compensation because it constitutes a compensable taking.

What is a Taking?
A takings claim generally asserts the government has intruded on or interfered with the use of private property without compensation. It cannot be used to claim a government action is prohibited, but only that the action amounts to a taking and the property owner must be paid for the government intrusion. Government has the authority to acquire private property for public use through eminent domain, but it must compensate the owner. When the government fails to compensate the property owner, the property owner may have a valid takings claim. A property owner asserting a takings claim may only seek financial compensation and cannot attempt to invalidate the government action.

There are two types of takings, physical and regulatory. In a physical taking the government actually occupies private property. For example, a physical taking occurs when a local government decides to convert private property into public parks to improve community health and wellness. If the government does not provide just compensation to the property owner for the property used, there is a taking subject to Fifth Amendment protections. In a regulatory taking the government regulation deprives the property owner of all economically viable uses of his or her property. A reviewing court may then determine that a taking has occurred because the regulation essentially eliminates the owner’s property
rights. Of course, not all regulations have this type of drastic impact and courts are typically reluctant to order payment of compensation in a regulatory taking case. Nonetheless, such claims may be asserted by the property owner. Government action regulating food nutrition and smoking can potentially lead to takings claims. These two types of takings will be discussed in further detail later.

**What Constitutes Property?**

To bring a takings claim, an individual must show ownership of a valid property interest. Property interests not only refer to ownership of physical property such as land and the owner’s right to use the property, but also include the right to exclude others. Almost all interests in land such as mineral rights, leases, easements, liens, life estates, and restrictive covenants are considered property for purposes of the Takings Clause. Valid property interests may also exist in trade secrets, copyrights, and other intangible assets. In reviewing a takings claim, courts consider the owner’s relationship to the “property” rather than focusing solely on the type and status of the property interest itself.

Despite a seemingly broad definition of property interests, it excludes things such as permits and licenses, government benefits (unless contractual), uses or access rights which are dependent on government authorization (especially in a context of pervasive government control), the ability to conduct a business (as opposed to the business’ assets), and wildlife prior to the time when a person catches and possesses the animal. The Takings Clause does not cover statutory entitlements such as welfare payments, unemployment compensation, and public employment even though these are benefits afforded due process protections. Furthermore, not all property interests are recognized for Takings Clause purposes. As noted below, where “background principles” limit property interests by virtue of state nuisance and property laws, the Takings Clause is not applicable.

**Background Principles**

For local boards of health and other public health agencies, the “background principles” doctrine provides a significant defense to takings claims. Background principles are restrictions on property recognized by state nuisance and property laws. If a background principle of state law prohibits or limits a certain use of property at the time of purchase, then it is not a recognized property right and therefore cannot constitute a compensable taking. A regulation will not result in a compensable taking if the government can demonstrate the regulation only bans conduct that constitutes a public nuisance pursuant to “background principles of nuisance and property laws.” When “existing rules or understandings that stem from an independent source such as state law” prevent an owner from putting his property to a certain use, the owner is not entitled to compensation under the Takings Clause.

Background principles apply to all takings claims. They are not specifically defined, but stem from nuisance laws, public health and safety needs, environmental protection standards, and other public interests. In *Raynor v. Maryland Department of Health*, the court upheld the seizure, destruction, and testing of a pet ferret that bit a child and could have spread the rabies virus. The court held that the taking of the ferret was not compensable because it was intended to abate a nuisance. The owners were entitled to a pet ferret, but they were not entitled to a pet ferret that may be a health risk to others. Background principles enabled the department of health to physically take personal property without compensation.

In *Colorado Department of Health v. The Mill*, the Colorado Supreme Court held that use restriction on a uranium disposal site did not constitute a compensable taking because Colorado common law nuisance principles do not permit activities that spread radioactive contamination. Under Colorado state law, any unlawful pollution or contamination of the environment constitutes a nuisance. The owner had no right to use the property in this way. Therefore, the Colorado Department of Health’s regulation of the owner’s property was not a compensable taking. The department of health was able to take physical property through a regulation without compensating the owner.

Background principles can be a powerful tool for local public health agencies and governments. If the government can prove at the outset of the case that the contested use of the property was prohibited when the property was purchased, the takings claim can be rejected before further analysis. Public health agencies need to look at their state’s nuisance and property laws to define background principles.
Physical Takings

Physical takings are typically easier to recognize and analyze than regulatory takings. It is the actual physical invasion or occupation of private property for public use. These are characterized as per se takings and traditional cases include government encroachment upon private property to build public roads, parks, or other structures.  

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court ruled the authorized installation of a small cable television box by a public agency amounted to a compensable taking. The Supreme Court has also ruled the act of frequently and regularly flying military aircraft in low altitudes amounted to a physical taking. Government-caused destruction of property and access restrictions are also considered physical takings.

In the majority of physical takings claims the economic impact, size of the area, and the government interest in occupying the property are irrelevant. A physical taking can occur no matter how minor the intrusion is and without regard to the public benefit, as in *Loretto*. If the government physically occupies private property, it is a compensable taking, unless the government can prove a background principle applies.

Regulatory Takings

Regulatory takings were first addressed in *Pennsylvania Coal Co. v. Mahon*. Before *Pennsylvania Coal*, physical takings were the only recognized form of takings. In *Pennsylvania Coal*, Mahon was given the surface rights to a parcel of land while Pennsylvania Coal Co. retained the mining rights. In 1921, Pennsylvania passed the Kohler Act, which prohibited Pennsylvania Coal from mining. The Supreme Court held that the Kohler Act went too far and amounted to a regulatory taking requiring just compensation. The Act completely prevented Pennsylvania Coal from exercising its right and profiting from their mining rights. The Court noted that property may be regulated to a certain extent, but when the regulation “goes too far” it may constitute a taking (Penn Coal case). The Court never clearly addressed when a regulation may go “too far,” but the decision in *Pennsylvania Coal* established local government police powers were limited.

The doctrine on regulatory takings has been constantly evolving since *Pennsylvania Coal*, but there are a few basic factors to understand. A regulatory taking is when a regulation denies an owner the economically viable use of his land or interferes with another fundamental attribute of property ownership. The underlying basis for a regulatory taking is that a regulation goes so far that it results in an impact equivalent to the government’s power of eminent domain. Regulatory takings claims are ruled on a case-by-case basis and are fact specific, but they can be characterized as either a categorical/complete taking or a non-categorical/partial taking.

Categorical/Complete Regulatory Takings

Categorical/complete takings occur when a regulation results in a total loss of economic use and value to the property owner. These are subject to the *Lucas* rule: “…government regulation completely eliminating the economic use of land is a per se ‘total taking’.” This rule comes from *Lucas v. South Carolina Coastal Council*, the leading case in complete regulatory takings. In *Lucas*, land was purchased for the purpose of building beachfront lots, but South Carolina passed the Beachfront Management Act after its purchase but before development, which prevented the owner from building on the property. The Supreme Court held that the regulation amounted to a complete taking as it rendered the property valueless. The Court held that regulation that “denies all economically beneficial or productive use of land” is a categorical taking unless the use is prohibited by nuisance or other property laws.

Cases of complete regulatory takings are few and far between but they are more likely to be considered a taking unless existing nuisance or property law prohibits the intended use of the property. Most regulatory takings claims will fall under non-categorical/partial regulatory takings and present additional issues.

Non-Categorical/Partial Regulatory Takings

Non-categorical/partial takings are analyzed under the *Penn Central* balancing test. In *Penn Central* the owner of Grand Central Station, declared a landmark by New York City’s historic preservation ordinance, sought to build a 55-story building above the station. The city denied the construction permit and Penn Central brought a takings claim, arguing the city’s denial amounted to a taking because it denied the opportunity to make economic gains. The Supreme Court
concluded the city’s action did not constitute a taking by applying a balancing test and weighing the following factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action.\(^\text{24}\)

The *Penn Central* balancing test is applied on a case-by-case basis and requires application of the facts of the case. There are, however, certain elements to be aware of for each factor. The economic impact addresses the economic loss to the owner. If there is a total economic loss, it may outweigh the other factors and result in applying the *Lucas* rule previously explained under categorical/complete regulatory taking. However, if it there is only a diminution in property value, the economic loss factor by itself will most likely not constitute a taking. There is no set calculation or limit on how much of an economic loss will be favorable towards a successful takings claim.

In analyzing an owner’s investment-backed expectations, two questions arise: (1) Did the claimant have actual investment-backed expectations, and (2) were they objectively reasonable.\(^\text{25}\) Courts may look at the owner’s expectation when they purchased the property and whether they could have anticipated the agency’s actions in passing regulations that affect the property. Factors that may be relevant in considering whether an owner’s investment-backed expectations were reasonable include: Is the owner involved in a highly regulated field; at the time of property purchase, was the owner aware of problem that led to regulation of property; and could the regulation have been reasonably anticipated.\(^\text{26}\)

The character of the government action requires balancing the public interest against the burden on the property owner. If a regulation creates a public benefit, it may amount to a taking and require just compensation. However, if a regulation is created to avoid a public harm and protect the public health, safety, and welfare, the government’s action may be more defensible and might not be deemed a compensable taking.

Regulatory takings claims where there is only a partial economic loss are usually difficult to bring, especially when deference is given to government interests. When it comes to public health, courts tend to give much deference to government action. However, the factors are flexible enough that if a court finds a public agency has acted unfairly, it may find a compensable taking. Background principles and defenses to takings claims make it much more difficult to bring a successful takings claim.

**Defense to Takings Claims: Destruction by Necessity**

Other than using background principles as previously discussed to defend takings claims, destruction by necessity may be a useful defense for public health officials to render a taking not compensable. This emergency exception provides that damage or destruction to property pursuant to a valid exercise of the police power often requires no compensation under the Takings Clause. *Miller v. Schoene* is an oft cited case to defend a taking as destruction by necessity. In the case, Miller was ordered to cut down red cedar trees on his property due to a risk in spreading cedar rust plant disease to a nearby apple orchard. The Supreme Court upheld the order holding the state had a great interest in protecting the apple trees, which had a greater value to the public.\(^\text{27}\)

It’s feasible that this defense can be used by public health officials to prevent grave threats to the lives and property of others. In *First English Evangelical Lutheran Church v. County of Los Angeles*, the court held that a temporary prohibition on construction in a flood zone did not amount to a compensable taking because the public interest in preventing injury or death far exceeded the cost to the property owner in being unable to construct on the property.\(^\text{28}\)

**Takings Issues in Public Health: Smoking Bans**

Takings claims are common in property law, as they tend to regulate property use. However, public health issues are not immune to such claims. Smoking bans are one such issue where the takings claim has been argued in court. Several cities and states have instituted smoking bans to address public health concerns related to smoking. Despite the health benefits of banning smoking in public places such as restaurants and bars, some of these laws have been challenged as unconstitutional under the Takings Clause.

In 2003, the city of Toledo, Ohio adopted the Clean Indoor Air Ordinance and instituted a smoking ban in enclosed public places, including restaurants and bars. Restaurants and bars could only allow smoking in a separate smoking lounge that
met ordinance requirements. Several restaurant, bar, and bowling alley proprietors filed a complaint arguing Toledo's smoking ban constituted a regulatory taking. The proprietors argued they lost or were going to lose customers as a result of the smoking ban and consequently, that the smoking ban denied them an economically viable use of their properties. The 6th Circuit court held the smoking ban did not constitute a taking because it had no effect on the proprietors' businesses. The smoking ban merely regulated the conditions under which smoking is prohibited. The court recognized the construction of a separate smoking lounge would require expenditure of money, but an ordinance does not amount to a taking merely because compliance would require spending money. 29

In 2006, Ohio passed the Smoke Free Workplace Act, a state law prohibiting smoking in the workplace and public places. Businesses could be penalized for violations. A local bar, cited for multiple violations of the smoke-free law, argued that the ban was essentially a regulatory taking. Using the Penn Central balancing test, the Ohio Supreme Court did not find the Smoke Free Workplace Act amounted to a regulatory taking. The Court noted the state law protected the public health in a minimally invasive way. 30 Several other states have addressed takings challenges to tobacco legislation, but no court has yet to uphold a takings claim. 31

Conclusion

Local governments have broad powers to protect the public's health, safety, and welfare and have a number of tools and legal means to promote public health. However, these broad powers have limitations. In some instances, the government may be required to justly compensate private property owners to achieve public health goals. Courts recognize local governments' authority to regulate land use, but they also recognize individual rights to private property. When regulating property, governments should prioritize achieving an outcome that balances public and private interests to avoid unconstitutional regulations.

SUPPORTERS

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1 No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Constitution. Amend. V.

2 According to the Fourteenth Amendment, “....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....” U.S. Const. amend. XIV, § 1. This incorporates certain Bill of Rights provision, including the Takings Clause, and makes them applicable to states. See Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Chicago, B. & O. R. Co. v. City of Chicago, 166 U.S. 226 (1897). States have provisions similar to the Takings Clauses in their own constitutions; for example, Michigan's constitution provides that “Private property shall not be taken for public use without just compensation...” Mich. Const. art. X, § 2.
The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.” U.S. Const. amend. X. The Constitution delegates certain powers to the federal government in Article I, Section I. The power to regulate or govern public health, safety, and welfare is not an explicitly delegated power to the federal government and thus reserved to the States.

Eminent domain is the forced sale of private land to the government for public use. States have their own laws on eminent domain proceedings.


After Kelo, Michigan’s constitution was amended to say public use “does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.” Mich. Const. art. X, § 2.

Fla. Stat. § 73.014.

For claims that a government action is prohibited, look to other theories such as substantive due process. A takings claim assumes the government action is proper.

See Wyatt v. United States, 271 F. 3d 1090, 1096 (Fed. Cir. 2001).

See Ruckelshaus v. Monsanto, 467 U.S. 986, 1003 (1984) (holding that a trade secret, despite its intangible nature, is a recognized property right protected by the Takings Clause. It is the owner’s right to possess, use and dispose of intangible and tangible interests that makes it property).


Raynor v. Maryland Dep’t of Health & Mental Hygiene, 676 A.2d 978 (Md. App. 1995).

Colorado Dep’t of Health v. The Mill, 887 P.2d 993 (Colo. 1994).


United States v. Causby, 328 U.S. 256 (1946).


See Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1349 (Fed. Cir. 2004).


D.A.B.E., Inc. v. City of Toledo, 393 F.3d 692 (N.D. Ohio 2003), aff’d 393 F.3d 692 (6th Cir. 2005).

Wymsyo v. Bartec, Inc., 132 Ohio St. 3d, 167 (Ohio 2012).

Fame Operating Co. v. Chanos, 217 P.3d 546 (Nev. 2009) (holding Nevada’s Clean Indoor Air Act did not amount to a taking and business owners being subject to certain regulations does not result in the government taking complete control over their airspace or building property); Knight v. City of Tupelo, 2006 U.S. Dist. LEXIS 90947 (N.D. Miss. 2006) (holding Tupelo’s smoke-free ordinance did not amount to a taking and recognizing “with an ever increasing number of cities and state around the country banning smoking in public places, it is unreasonable for business owners not to recognize the possibility that their businesses could be subjected to the same sort of regulation”); Lexington Fayette County Food and Beverage Ass’n. v. Lexington-Fayette Urban Cnty. Gov’t, 131 S.W.3d 745 (Ky. 2004) (holding Lexington’s smoke-free law in restaurants and bars does not amount to a taking and the power to protect public health is at the top of the government’s public powers); City of Tucson v. Grezaffi, 23 P.3d 675 (Ariz. Ct. App. 2001) (holding Tucson’s smoke-free ordinance constitutional because “the deprivation of the most beneficial use of property and diminution in value are not sufficient in and of themselves to constitute a taking”).