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An Update on the Law of Unconstitutional Takings

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co., v. Mahon*, 260 U.S. 393, 415 (1922).

"After all, if a policeman must know the Constitution, then why not a planner?" Brennen Dissenting, San Diego Gas and Electric Co. v. City of San Diego, 10 I S. Ct. 1287 (1981).

"These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from forcing some people to alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole." *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) *citing Armstrong v. United States*, 364 U.S. 40, 49 (1960).

"A central dynamic of the Court's regulatory takings jurisprudence thus is its flexibility. This is a means to reconcile two competing objectives central to regulatory takings doctrine: the individual's right to retain the interests and exercise the freedoms at the core of private property ownership, * * * and the government's power to "adjus[t] rights for the public good." *Murr v. Wisconsin*, 137 S. Ct 1933 (2017).

INTRODUCTION

Federal taking claims are based on the Fifth Amendment to the United States Constitution that provides:

> "[N]or shall private proper ty be taken for public use without just compensation."

This paper summaries the law relating to inverse or regulatory condemnation claims.[1] This paper is by its nature abbreviated and is not designed to supply individual

[1] For simplicity, this paper refers to these kinds of taking claims as "regulatory takings" claims.

legal advice. The law in this area is complex and driven by the particular facts of each case. The necessity of careful consideration of facts and the thoughtful analysis of legal precedents is underscored by the United States Supreme Court's recent decision in *Murr v. Wisconsin* 137 S. Ct 1933 (2017), which decides that even the identification of the "property" that is subject to the taking analysis, is based upon factual inquiry.

Unconstitutional taking are claims brought under the Fifth Amendment[2] to the United States Constitution and assert that the government has unconstitutionally taken private property without providing just compensation, even though the government has not instituted eminent domain proceedings to do so.

There are four basic kinds of regulatory taking claims. They are (l) per se physical occupation taking claims, (2) categorical taking claims - where the deprivation of all economically beneficial use is alleged, (3) taking claims asserting that even though there remains some economically beneficial use of property, the application of regulations nonetheless take property (partial takings), and (4) unconstitutional conditions/exactions taking claims.

The first two (per se/categorical claims) are analytically similar. Partial taking claims and claims asserting the imposition of unconstitutional conditions follow separate analyses, with partial takings being by far the most complicated. While analytical clarity is helpful to practitioners, when courts actually apply taking rules to taking claims, the applicable legal concepts are often mixed, producing the confusing body of law that characterizes this area.

It is important to recognize that for many years, there had been a fifth type of taking claim – the "facial" taking claim characterized by *Agins v. City of Tiburon*, 447 U.S. 255, 65 L.Ed 2d 106 (l 980). The *Agins* test was a two part test to determine whether the adoption of a regulation effected a taking. The relevant questions under this test were (l) does the regulation substantially advance a legitimate governmental interest? (2) does the regulation deprive the owner of economically viable use of property? Almost no one had ever been successful in asserting an *Agins* style taking claim until Chevron USA - the oil company – against legislation adopted by the State of Hawaii restricting oil companies' ability to own and lease gas stations. However, Chevron's victory was short lived. The United States Supreme Court used the occasion of Chevron's victory to strike down the *Agins* test under which Chevron had prevailed, rightfully pointing out *Agins* embodied a substantive due

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[2] In Oregon, the parallel state constitutional provision is Article 1 Section 18, which provides:

> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.

process test, that had no place in the analytically distinct matter of alleged 5th Amendment takings. *Lingle v. Chevron USA*, 544 U.S. 528 (2007).

Introduction - Per Se/Categorical Taking Claims

The per se category is best illustrated by *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 73 L. Ed. 2d 868 (1982) (*Loretto*). The categorical category is best illustrated by *Lucas v. South Carolina Coastal Counci*l, 505 U.S. 1003 (1992) (*Lucas*). In per se and categorical cases, the application of a regulation to property deprives the landowner of an entire property interest.

For physical invasion (per se) claims, the government either occupies or has given itself the right to occupy private property - without paying for the privilege. The physical invasion generally is not the result of natural causes or conditions, but rather is a physical occupation or condition resulting from governmental action, even governmental action that forbids the removal of the invading material. *See Arkansas Fish and Game Com'n v. United States* 133 S.Ct. 511 (2012) *(*temporary flooding due to federal land management policies can constitute a temporary taking), *and see Beta Trust v. City of Cannon Beach*, 33 Or. LUBA 576 (1997) (while declining to decide the case on "ripeness" grounds, LUBA distinguished government actions that lead to physical occupation of private property and natural processes that occupy private property – *i.e.* windblown sand covering a seawall making it ineffective – and characterized the latter as not being subject to a "physical invasion" analysis); *see also Teegarden v. United States*, 42 Fed. Cl. 252 (1998) (failing to allocate firefighting resources to petitioner's property that was then destroyed by a wildfire, is not a compensable taking under physical invasion or any other theory).

Lucas style categorical taking claims break into two essential elements:

> (1) the imposition of a regulation deprives a landowner of all or nearly economically beneficial use of property (including to personal property)[3], and (2) the property right deprived is recognized under state law, and the use at issue does not constitute a nuisance.

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[3] *See Horne v. Dep't of Agriculture, 135 S.Ct 2419 (2015)* (raisin transfer requirement is a per se taking of raisins)*; Andrus v. Allard*, 444 US 51 (1979) (prohibition on possessing or selling eagle feathers not an unconstitutional taking), *and see* the majority opinion dictum from *Lucas* stating:

> "[l]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that the new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).***." *Lucas, supra* 505 U.S. at 1027-28.

Introduction - Partial or "Ad Hoc" Taking Claim

These claims include circumstances where the application of regulations to particular property, that leaves beneficial use, is nevertheless alleged to be an unconstitutional taking of property. These types of takings have long been called "*Penn Central*"[4] style takings and have historically been analyzed (usually unsuccessfully[5]) under the three *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L.Ed.2d 631 (1978), factors: (1) the character of the invasion, (2) the economic impact of the regulation as applied to the particular property, (3) the property owner's distinct investment backed expectations with respect to that property. However, the Supreme Court's decision in *Murr v. Wisconsin*, 137 S. Ct 1933 (2017), made these and other factors also applicable to the identification of the property that is taken. Somewhat prophetically, Professor Steven Eagle argued that the *Penn Central* test was really composed of four factors, one of which involves the "parcel as a whole" issue that *Murr* gets to. Steven J. Eagle, The Four Factor Penn Central Regulatory Takings Test, Penn State Law Rev Vol 118:3, p 601. http://www.pennstatelawreview.org/118/3/3%20-%20Eagle%20(final)%20(PS%20version).pdf

Introduction - Unconstitutional Conditions

Conditions of approval can be challenged as constituting unconstitutional takings of property requiring just compensation under the analysis articulated in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The combined tests from the Nollan and Dolan cases are:

1. Does the condition further a substantial/legitimate governmental interest? (*Nollan*)

2. Is the particular condition imposed related to the substantial legitimate governmental interest that is served? (*Nollan*)

3. Are the impacts of the development are roughly proportional to the condition imposed. (*Dolan*)

II. NOTICE RULE

It is generally not a defense to a taking claim that the property owner had notice of the restriction alleged to effect an unconstitutional taking when the property was purchased/acquired. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court explained that post-enactment notice to a property owner of a restrictive regulation, does not absolve the government

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

[5] An example of a successful *Penn Central* style taking is *Florida Rock Industries v. United States*, 45 Fed. Cl. 21 (l999).

of the obligation to pay for a taking occasioned by the regulation. The Supreme Court recently affirmed this view in *Murr, supra*, 133 S. Ct at 1945, but modified it:

> "A valid takings claim will not evaporate just because a purchaser took title after the law was enacted. *See* *Palazzolo*, * * * (some 'enactments are unreasonable and do not become less so through passage of time or title'). A reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. See *ibid.*('[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned'). In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations."[6]

The *Palazzolo* Court had stated:

"[A] state, by ipse dixit, may not transform private property into public property without compensation." (Citations omitted.) *Palazzolo*, *supra,* 533 U.S. at 628.

"* * *

> "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. *Palazzolo*, *supra,* 533 U.S. at 628.
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> "* * *
>
> "It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Luca*s, which is explained in terms of those common, shared understandings permissible limitations derived from a State's legal tradition. * * *. A regulation or common law rule cannot be a background principle for some owners but not for others." *Palazzolo, supra* 533 U.S. 629-630.

In *McQueen v. South Carolina Coastal C*ouncil, 530 S.E.2d 628 (2000), the United States Supreme Court granted certiorari and the state court decision was "vacated and the case is remanded to the Supreme Court of South Carolina for further consideration in light of *Palazzolo* v. *Rhode Island*, 533 U.S. ___ (2001)". In *McQueen*, an intermediate state

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[6] Thus, while the Supreme Court in *Murr* purported to affirm its *Palazzolo* holding in this regard, *Murr* makes prior notice of a restrictive regulation now potentially relevant to the "reasonable investment backed expectation" factor to be considered in determining not only whether property was unconstitutionally taken but also what property was taken. It seems that substantive due process principles will creep into this part of the analysis to decide whether the pre-acquisition regulation is "reasonable."

appellate court determined that the total denial of the right to construct a bulkhead on the beach and to fill behind it was the denial of all economically beneficial use of the property requiring the bulkhead and the South Carolina Supreme Court reversed. The state supreme court noted the similarities between the facts in *McQueen* and those in *Lucas*, but applied the notice rule to foreclose a finding of a taking and an award of just compensation. Specifically, the state supreme court stated that because McQueen acquired his property after the restrictive regulation was in place, he was not entitled to compensatory relief. Because the "notice rule" has been discredited in *Palazzolo*, the United States Supreme Court reversed and remanded in light of *Palazzolo*.

The principle that notice of a restriction does not obviate a taking claim, was also articulated in *Nollan,* 483 U.S. 825, 834 n 2 that:

> "Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."
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> "So long as the [California Coastal Commission] could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

III. THE FOUR KINDS OF TAKING CLAIMS

- Per Se/Categorical Takings

Per se cases are relatively easy. These occur where the government either physically occupies property or demands the right to do so. Such constitutes an unconstitutional taking of the affected property, no matter how important the public interest served or how di minimus the impact may be. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). At issue in *Loretto* was a state statute requiring landlords to allow cable TV equipment to be installed on their property for a onetime payment of one dollar. The United States Supreme Court characterized that requirement as a per se taking requiring just compensation. The Oregon Supreme Court has had no trouble with these types of cases. In *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or 458 (1995), the Oregon Supreme Court applied the per se rule of *Loretto* to a requirement that GTE allow other companies to "collocate" wires with GTE' wires and decided the requirement that GTE allow third parties to place wires on GTE property was a compensable physical invasion taking. *See also Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68, 87 (2011), *aff'd* 247 Or App 719, *rev. den*., 352 Or 170 (2012) (condition requiring a conservation easement requires an exaction that is subject to the *Dolan* analysis).

Categorical cases are hard. These are cases where the property owner alleges that the imposition of a regulation or regulations has deprived him or her or all or substantially all beneficial use of property. Thus, in *Lucas*, the court acknowledged the imposition of a regulation, the effect of which reduced 90 percent of the value of the subject property could be

considered a "total taking."[7] However, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the United States Supreme Court determined that a reduction in value from more than 3.1 million dollars to a $200,000 value, or about a 94 percent diminution in value, made a *Lucas* style taking analysis unwarranted. Rather, in such circumstances, the Supreme Court stated whether the subject regulation permitting the landowner to construct a "substantial residence" on an 18 acre parcel must be analyzed under *Penn Central*. *Palazzolo, supra* 533 U.S. 631-32.

Temporary deprivations of all economically beneficial use can also constitute a categorical taking. The seminal case concerning temporary takings is the United States Supreme Court's decision in *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). *First English* holds that temporary land use restrictions that deprive a property owner of all economically beneficial us e of property require payment of just compensation, unless a state law background principle (nuisance) excuses the payment of just compensation.

In *First English*, the county banned construction of buildings in a flood plain, pending the adoption of permanent regulations. The U.S. Supreme Court held a temporary restriction on development that prohibited all use of property could be a taking and remanded the case to the county for a determination whether the temporary period of delay required by the regulation was a "normal delay" which should be expected by a landowner.

However, the United States Supreme Court took a dim view of temporary takings in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). In the *Tahoe* case, at issue was a moratoria from 1981-1984. The moratoria in fact had been much longer – more than 20 years – but the court only reviewed the moratoria between the years 1981-1984. The Court explained that moratoria are not per se takings. Rather, the Court explained that moratoria must be analyzed under the *Penn Central* factors. The Court also explained that the "parcel as a whole" rule prohibited breaking land ownership into temporal dimensions that considered only the period of the moratorium.

In *Arkansas Game and Fish Comm'n. v. United States*, 133 S.Ct. 511 (2012), the United States Supreme Court affirmed that temporary takings – in that case flooding – can constitute a taking, explaining:

> "Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.' *First English*, 482 U.S., at 321. See also *Tahoe-Sierra*, 535 U.S., at 337 ('[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be "given exclusive significance one way or the other.).

[7] In *Lucas*, the Supreme Court observed "When, for example, a regulation on requires a developer to leave 90 percent of a rural tract in its natural state, it is unclear whether we should 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 mere diminution of value of the tract as a whole." *Lucas, supra* n 7.

> "Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case."

Defenses to categorical taking claims are (1) the alleged taking is not categorical in fact and must be analyzed under *Penn Central*, (2) redefining the "property" taken (*Murr)*, (3) establishing that the disputed regulatory limitation inures in the title to the property, or (4) the uses of the property the owner is deprived of, constitutes a nuisance. *Lucas*, *supra*, 505 U.S. at 1027.

However, these defenses merit caution. In *Lucas*, the Supreme Court observed that a use of property is presumptively not a nuisance if other people are similarly and lawfully using their property. *Lucas, supra* 505 U.S at 1031. In this regard, the Supreme Court in *Lucas* was correct, as it turns out on the facts. After the litigation, and after So. Carolina was required to buy Lucas' property, the state turned around and sold it to a developer:

> "[South Carolina] promptly turned around and sold them to a developer who proceeded to build the very homes that Lucas had been forbidden to build. The state regulators' environmental zeal lasted only as long as they thought they could stick Lucas with the cost of the proverbial free lunch. But when faced with the tab themselves, preservation of Lucas' lots suddenly ceased being environmentally important." Michael Berger and Gideon Kanner, The Need for Takings law Reform: A View from the Trenches - A Response to Taking Stock of the Takings Debate 877, 867; Gideon Kanner, Not with a Bang, But a Giggle: The Settlement of the Lucas Case.

Further, when Oregon's public beach law was challenged, Justice Scalia wanted to take certiorari and, when cert was denied, filed a dissent on the denial of cert in *Stevens v. City of Cannon Beach*, 505 U.S. 1207 (1994), in which Justice O'Connor joined, stating:

> "[A] State may not deny rights protected under the Federal constitution *** by invoking nonexistent rules of state substantive law. Our opinion in *Lucas* *** would be a nullity if anything that a State court chooses to denominate a ' background law' * * * could eliminate property rights."

Murr, *supra* 137 S. Ct. at 1944-45, contains a similar warning to states considering using that decision to adopt laws on consolidating property in order to avoid taking claims:

> "The Court explained [in *Palazzolo*] that States do not have the unfettered authority to "shape and define property rights and reasonable investment-backed expectations," leaving landowners without recourse against unreasonable regulations.

> "By the same measure, defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations. For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value."

And *see Deupree v. State of Oregon*, 173 Or App 623 (2001), holding that a restriction on highway access did not deprive property owner of all economically beneficial use, explaining:

> "[W]here the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest."

- "Partial" – Penn Central Style Takings

Where the imposition of a regulation or regulations are alleged to deprive a property owner of his or her property, but the disputed regulation(s) leave some beneficial use, the taking is analyzed under *Penn Central*, as informed by *Murr*. *Murr* effectively merges the determination of what property is taken with the analysis of whether a taking has occurred at all. This "partial" taking analysis thus must be analyzed under the following paradigm. While the analysis is confusing, the key is to keep in mind that the Supreme Court is seeking fairness: to avoid foisting public burdens on a property owner s/he should not be required to bear and to ensure that burdens placed on the development of property a proportional. *Steven Eagle, supra* Volume 118:3, p 614.

1. *What is the property that was taken*?

It has long been unclear how to identify the property that is taken. The "denominator" question has plagued unconstitutional taking jurisprudence for decades – beginning largely with the famous United States Supreme Court decision in *Penn Central*.[8] There, the developer

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[8] *Compare* the *Lucas*, majority opinion at *supra* n7 with Justice Blackmun's dissent at 505 U.S. 1054:

> The threshold inquiry for imposition of the Court's new rule, 'deprivation of all economically valuable use,' itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how 'property' is defined. The "composition of the denominator in our 'deprivation' fraction," ante, 505 U.S. at 1017, n.7, is the dispositive inquiry. Yet there is no "objective" way to define what that denominator should be. "We have long understood that any land-use

wanted to build additional stories for an office building in the airspace atop Penn Central station in New York City. The city denied the developer's request. The United States Supreme Court in *Penn Central* affirmed that denial, explaining:

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the "landmark site." *Penn Central, supra*, 438 U.S. at 130-31.

Murr, supra, 137 S. Ct. at 1952 (Roberts, C.J., dissenting), drives the point home:

> "Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant "private property" narrowly. This incentive threatens the careful balance between property rights and government authority that our regulatory takings doctrine strikes: Put in terms of the familiar "bundle" analogy, each "strand" in the bundle of rights that comes along with owning real property is a distinct property interest. If owners could define the relevant "private property" at issue as the specific "strand" that the challenged regulation affects, they could convert nearly all regulations into *per se* takings.
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> "And so we do not allow it. * * *"

After *Murr*, identifying the relevant parcel for purposes of the taking analysis applies a three-factor test.

First, "courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law." "Second, courts must look to the physical

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> regulation can be characterized as the 'total' deprivation of an aptly defined entitlement. . . . Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation . . . ." Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1614 (1988).

And Justice Blackmun's continuing dissent at 505 U.S. 1066:

> "In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the 'denominator' in the takings 'fraction,' rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence."

characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation." Third "courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. A law that limits use of a landowner's small lot in one part of the city by reason of the landowner's nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law." *Murr, supra* 137 U.S. 1945-46.

Applying this three-factor test in *Murr*, the Court held that the Murrs' property should be evaluated as a single parcel and the Wisconsin state court did not err in doing so. ***But see Lost Tree Vill. Corp. v. United States***, 100 Fed. Cl. 412, 427–30 (2011) (deciding the opposite of Murr – that scattered landholdings should not have been aggregated to determine the relevant parcel for the takings analysis), ***rev'd***, 707 F.3d 1286 (Fed. Cir. 2013), ***cert den*** 137 S. Ct. 2325 (2017) (cert was denied four days after *Murr* was decided.

2. The Factors for Determining Whether a Taking Has Occurred– Ad Hoc Balancing Test

A. *Character of the Invasion*

This prong inquires about the nature of the property interest that is interfered with. In Penn Central, the Supreme Court explained:

> A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (*citing United States v. Causby*, 328 U.S. 256 (1946), as an example of a case involving a physical invasion).

B. *Economic Impact of the Regulation*

This prong seeks to compare the value of the property before and after the regulatory interference (i.e. is there a severe diminution in value?)

C. *What Are the Owner's Distinct Investment-Backed Expectations*?

This prong asks whether the owner has pursued a property right in the investment, and whether he or she as the property owner done so without knowledge that the disputed regulation would deny the fruits of the investment? In *Murr*, the inquiry was recast as the owners "reasonable investment backed expectations.

Note that this prong is not an inquiry into the needs of the city or county or other government, rather the focus is on the impacts of the proposed development to determine the severity of the impact on the distinct investment backed expectations.

- "Unconstitutional Conditions"

There was a period of time when governmental actors successfully argued that the unconstitutional conditions analysis applied only to exactions of real property. *See West Linn Corp Park v. City of West Linn*, 349 Or 58 (2010); *and see Dudek v. Umatilla County*, 187 Or App 504, 514-15. However, in *Koonze v. St. Johns River Water Dist.,* 133 S. Ct. 2586 (2013), the United States Supreme Court laid that dispute to rest and held that the unconstitutional conditions analysis applies to monetary as well as real property exactions. *And see Ehrlich v. Culver City*, 19 Cal. Rptr. 2d 468 (Cal. Ct. App. 1993), *cert. granted, judgment vacated and remanded* in light of *Dolan*, 114 S. Ct. 273 I (1994) (conditions requiring the payment of fees as a prerequisite to development. The U.S. Supreme Court remanded the city's decision in *Ehrlich* to the California courts in light of *Dolan*. In turn, the California Supreme Court after remand decided the disputed impact fees are subject to *Dolan* analysis); *and see Clark v. City of Albany*, 137 Or. App. 293 (1995) (determining findings were insufficient to establish the requisite *Dolan* relationship between traffic generated by the development proposal and the need for the locally required street improvements deciding: "The findings must compare the traffic and other effects of the proposed fast food restaurant to the street and frontage improvements." The court further explained: "[t]he fact that Dolan itself involved conditions that required a dedication of property interests does not mean that it applies only to conditions of that kind." S*ee also Altimus v. State of O*regon, 513 U.S. 801, 115 S. Cl. 44 (1994). *But see West Linn Corp Park v. City of West Linn*, 349 Or 58 (2010).

Similarly, there was a period of time after *Dolan*, when commentators and some courts argued that the way government could avoid liability for unconstitutional conditions was to propose them, and threaten or actually deny the development application if the property owner objected. However, in *Koontz, supra*, the United States Supreme Court established that taking liability attaches in this situation explaining:

> "[L]and use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take * * * So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable." *Koontz, supra* 133 S. Ct. at 2594.

> "The principles that undergird our decisions in Nollan and Dolan do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine. See, e.g., Perry, 408 U.S., at 597 (explaining that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests' * * *); Memorial Hospital, 415 U.S. 250 (finding unconstitutional condition where government denied healthcare benefits). In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."
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> "A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of Nollan and Dolan simply by phrasing its demands for property as conditions precedent to permit approval. Under the Florida Supreme Court's approach, a government order stating that a permit is "approved if" the owner turns over property would be subject to Nollan and Dolan, but an identical order that uses the words "denied until" would not. Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent. * * *." *Koontz, supra* 133 S. Ct. at 2595.

Local governments must undertake the "rough proportionality" analysis required by Dolan regardless of whether a local ordinance requires it. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007), *aff'd* 218 Or App 229 (2008). Moreover, where local government standards would otherwise require an exaction that would violate *Dolan* or *Nollan*, local government may either not apply such standard to demand the exaction or it may compensate the landowner for the exaction the standard requires. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009) (where road standard requires dedication of property interest that is not "roughly proportional" to the impacts of the proposed development, County is free not to impose such requirement for road dedication and allow a developer to improve a substandard local street to less than full collector standards); *accord Dudek v. Umatilla County,* 187 Or App 504 (2003).

Nollan asks: is there a legitimate governmental purpose to support the imposition of the condition? And if so then (2) Is there an essential nexus between the legitimate governmental purpose and the condition imposed? Thus in *Barnes v. City of Hillsboro,* 61 Or LUBA 375 (2010), aff'd 239 Or App 73 (2010), citing *Nollan* and *Dolan,* LUBA reversed a city ordinance requiring as a condition of approval for all residential developments near Hillsboro airport the granting of an "avigation easement" for noise, vibration, fumes, dust and fuel particle emissions, in service of an objective to reduce land use conflicts. LUBA held that the requirement for the condition did not reduce land use conflicts but rather simply made it more difficult for a property owner to bring a taking claim, failing both *Nollan*. In *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62, 76 (2002), *rev'd on other grounds,* 186 Or App 710 (2003), LUBA decided that a

condition of approval requiring an easement for pedestrian access provided an adequate nexus between the purpose of the standard and the condition, meeting the *Nollan* test.

Dolan adds to the *Nollan* analysis by asking: is there rough proportionality between the condition imposed and the impacts of the development, both in nature and extent? Thus, in *McClure v. City of Springfield,* 37 Or LUBA 759 (2000) *and after remand* 39 Or LUBA 329 (2001), *aff'd,* 175 Or App 425 (2001), *rev den* 334 Or 327 (2002), LUBA decided that the city's condition of approval on a partition proposal for land dedications for street right of way, sidewalk and "clipped corner" failed the "rough proportionality" test of *Dolan*. In the court of appeals decision in McClure, the court explained, among other things:

> "The city explained the need for the M Street dedication, utilizing a detailed calculation to demonstrate that the exaction represented a proportional response to the increase in traffic--19 vehicle trips per day--that the proposed development was expected to generate. The city did not, however, explain how the 8th Street sidewalk and clipped corner dedication requirements were relevant or proportional to the expected impacts. Rather, the city's findings appear either to omit consideration of those exactions or to assume implicitly that they are part of the total required dedication. We have no difficulty accepting that sidewalks and clipped corners can advance a community's interest in safe streets, but in the absence of findings explaining how the proposed exactions further that aim--and do so proportionally to the effects of the proposed partitioning--the justification required by *Dolan* is missing. We therefore agree with LUBA that the city has not adequately justified the proposed 8th Street sidewalk and clipped corner exactions of property. We therefore affirm LUBA's decision in those respects."

However, the court of appeals also rejected the developer's argument explaining the fact that the street to which a dedication condition related was not yet improved did not mean that the dedication requirement lacked rough proportionality as a matter of law.

Moreover, in *Carver v. City of Salem*, 42 Or LUBA 305, *aff'd* 184 Or App 503 (2002), LUBA held that a city must apply the *Dolan* analysis to conditions of approval requiring dedication of land (there, the requirement was to dedicate one (1) acre for a park), regardless of whether the developer chooses to develop in an underserved area. LUBA held that the choice to develop in an underserved part of the city is not the equivalent of a waiver of the developer's constitutional rights under *Dolan*. Further, LUBA decided that SDC credits are not adequate "just compensation" because the amount of the SDC credits (1) do not relate to fair market value of the property taken, (2) does not include any severance damages to the remainder of the parcel and (3) does not ensure the owner will receive compensation in fact.

The burden is on government to establish that the conditions are not a taking under above analysis. *But see Lincoln City Ch. Of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999) (local government has the burden of demonstrating rough proportionality but not the burden of producing the evidence on which the rough proportionality determination is based.

Particularized findings are required to establish *Dolan* compliance, but *Dolan* makes it clear that such findings need not have mathematical precision:

> "No precise mathematical inquiry is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."

The requirement for detailed findings is clear from the *McClure v. City of Springfield, supra*, cases. Further, in *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615 (1994), the Oregon Court of Appeals observed that *Dolan* requires detailed findings of traffic and "other related phenomena and the relationship of a proposed development to them * * *." Regarding off-site improvements required by the county in its decision, the court stated the inquiry is not on off-site versus on-site improvements. The comparison is instead:

> "[B]etween the traffic and other effects of the subdivision and the subdivision frontage improvement that the county has required." 131 Or. App. 622.

The court of appeals further explained the findings deficit in the *J.C. Reeves* case:

> "The difficulty is that the county's findings do not make the comparison at all, or at least not with the specificity that Dolan requires. They simply posit the relationship between subdivision-generated traffic and the need for the improvements. Also, the county relics on the fact that some of the improvements are required by its zoning ordinance. As we said in *Schultz v. City of Grants Pass* *** the character of the condition remains the type that is subject to the analysis in *Dolan*' ** * whether it is legislatively required or a case-specific formulation. The nature, not the source of the imposition is what matters." 131 Or App 622-23.

In *Schultz v. City of Grants Pass*, 131 Or. App. 220 (1994), the Oregon Court of Appeals held that in the context of an application to partition property, there are no impacts to mitigate with conditions of approval. Moreover, it is improper for local government to assume any particular level of development beyond that proposed.

IV. RIPENESS

The ripeness requirement says that taking claims regarding the application of highly discretionary local regulations to particular property, will not be reviewed on the merits until it is clear to the judiciary how far the regulating government will go to limit the use of the privately held property. The ripeness rule in the unconstitutional takings context began with the seminal cases of *Williamson County Regional Planning Commission v. Hamilton Bank of Williamson County*, 473 U.S. 176 (l 985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1987). The ripeness rule is not a jurisdictional requirement, but rather a prudential requirement to apply in appropriate circumstances to avoid sticking judicial noses into local affairs. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, l 17 S. Ct. 1659, 1664-65 (1997).

The ripeness rule usually does not make sense to apply in per se physical occupation cases, because it is clear from the physical occupation how far the disputed regulation goes. Similarly, ripeness is not typically required when a property owner claims a "facial" taking has occurred. *See Nike Inc., v. City of Beaverton*, 35 Or LUBA 57, *aff'd* 157 Or App 397 (1998).

However, for all other types of types of taking claims, ripeness must be established. In the Oregon context, this means seeking approval from the highest local decision maker. It does not mean one must appeal to LUBA to ripen a takings claim. *West Linn Corp Park v. City of West Linn*, 349 Or 58, 77 (2010). Nevertheless, ORS 197.796 provides that to accept the benefits of an approval with alleged unconstitutional conditions, the land use applicant must raise the taking claim in the local permit proceedings and then either challenged the allegedly unconstitutional condition at LUBA within the 21-day deadline for filing local land use appeals or must file a complaint for just compensation within six months of the imposition of the disputed condition. ORS 197.796 specifically provides that such an applicant need not seek a variance (ORS 197.796(3)).

In Oregon, the ripeness rule has played out to require that where a party claims the application of the Endangered Species Act (ESA) deprives him of all economically viable use, that party must apply for an incidental take permit from the federal government before a taking claim is ripe. *Boise Cascade v. State*, 164 Or. App. 114 (1999), *rev den* 331 Or 244, *cert den* 532 U.S. 923 (2001).

Ripeness has three prongs: (1) there must be a final local decision, (2) administrative remedies must be exhausted, including pursuit of variances as well as alternative development options, and (3) as a prerequisite for bringing a federal claim, avenues for achieving state compensation must be exhausted. However, note that while it is the generally held view that adequate state procedures must be exhausted in state court, this was not required in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) (federal court can exercise supplemental jurisdiction to satisfy this prong). To the extent a state's procedures deprive claimants of their right to a jury trial on the issue of whether a taking occurred, there may be an argument that the state procedures are inadequate. *See City of Monterey v. Del Monte Dune*s, Ltd, 119 S. Ct. 1624 (1999) (Seventh Amendment to the United States Constitution protects right to jury trial in a federal taking claim); *see also Lakin v. Senco Prods., Inc*., 329 Or. 369, 987 P.2d 476 (1999) (right to jury trial in Oregon state court proceedings).

Generally, a developer must submit "at least one" development application for beneficial uses of property to occur. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985). Futility may excuse compliance with the second prong of the ripeness test (applying for development approval), if under state or local law, there is no possibility that agency can grant relief. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 n 8 (1997). In *Palazzolo, supra* 533 U.S. 626, the United States Supreme Court also noted that futile land use applications need not be submitted simply for the sake of submitting them and provided guidance on what must be done to ripen a takings claim:

> "Thus, the reasoning goes, we cannot know for sure the extent of permitted development on Petitioner's wetlands. This is belied by the unequivocal nature of the wetlands regulations at issue under the Council's application of the regulations to the subject property. *Palazzolo, supra* 533 U.S. at 619.
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> "* * * * *

> "While a landowner must give a land-use authority an appropriate opportunity to exercise its discretion once it becomes clear that the agency lacks discretion to permit any development, or it is clear the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo, supra* 533 U.S. at 620.
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> "Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use. * * * *Palazzolo, supra* 533 U.S. at 622.

Caution is warranted, however, before arguing futility. For example, in *Curran v. State by & Through ODOT*, 151 Or. App. 781, 788 n.10 (1997), the Oregon Court of Appeals determined it was not futile to apply for an ODOT access permit even though plaintiffs engineering report establishes the alternative access that ODOT stated it will require is unreasonable. Specifically the court stated:

> "The engineer's report states that the location suggested by ODOT for an alternative access route is not reasonable. The report does not assess, however, the feasibility of constructing a road at any other location on the property."

Further, LUBA has explained that it will not presume it would be futile for an owner to apply for a comprehensive plan amendment or zone change, to ripen a taking claim. *Young v. Clackamas County*, 24 Or LUBA 526; *aff'd* 120 Or App 248 (1993), *rev. den.* 317 Or 485; *Larson v. Multnomah County*, 24 Or LUBA 591 (1992), aff'd 121 Or App 119 (1993). However, on review of the LUBA decision in *Larson*, the court of appeals affirmed LUBA, but suggested that plan amendments weren't necessarily required in all cases to ripen a takings claim:

> "Although we do not now decide whether a plan or zoning amendment must invariably be sought to achieve ripeness, we do hold that at least one application must be made after the initial denial, if any is available, and that a plan or zone change must be sought if only it is available. *Larson v. Multnomah County*, 121 Or App at 123.

It appears that LUBA will not allow evidentiary hearings for the purpose of ripening a taking claim. *Larson v. Multnomah County*, 24 Or LUBA 591 (1992), aff'd 121 Or App 119 (1993).

In any case, *Palazzolo* provided welcome clarification for the development community where before *Palazzolo* local governments had argued that as many as five (5) different development applications would not be enough to ripen a takings claim. *See City of Monterey v. Del Monte Dunes, Ltd*., 119 S. Ct. 1624 (1999); *and see Kanner Hunting the Snark, not the Quark: Has the United States Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law*? The Urban Lawyer (Spring 1999). Property owners could spend years trying to determine what uses government will let them make of their property, only to have the statute of limitations for takings claim expired before the claim even ripened.