

## Regulatory Takings

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Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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## Regulatory Takings

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The United States Supreme Court revolutionized the law of regulatory takings in 1987 when it held that a local government must pay just compensation for temporary regulatory takings.<sup>[62]</sup> In that same year the U.S. Supreme Court decided two other cases that dealt with regulatory takings.<sup>[63]</sup> Since those decisions, regulatory taking cases have flooded the courts as property owners seek to recover for the diminution in the value of their property resulting from the enforcement of police power regulations affecting private property. Not surprisingly, most of these cases involve land use regulations adopted by local governments.

Although the inverse condemnation statute would not appear to be applicable by its terms to a regulatory taking of private property where no physical invasion or interference is involved, the U.S. Supreme Court<sup>[64]</sup> and a Tennessee court<sup>[65]</sup> have held that an inverse condemnation action could be maintained based on unreasonable restrictions placed on the use of property by a regulation adopted under the police power.

A regulation adopted under the police power can result in a taking of private property for which the payment of just compensation is required if the regulation denies the owner economically viable use of his or her property.<sup>[66]</sup> Temporary moratoria on development are not subject to a per se taking rule and may withstand a taking claim. The standards set out in *Penn Central Transportation Co. v. New York City* apply in these cases.<sup>[67]</sup> A Unreasonable denials of proposals for development, however, may engender liability under 42 U.S.C. 1983, and a jury trial is available to determine these claims.<sup>[67B]</sup>

The taking test requires an inquiry into whether the regulation denies the property owner the economically viable use of his or her property.<sup>[68]</sup> This is a highly fact-specific inquiry that is not subject to a set formula.<sup>[69]</sup> Whether a taking has occurred is a question of degree and cannot be determined by general propositions.<sup>[70]</sup> The courts have used ad hoc factual inquiries, relying on factors such as the character of the governmental action, the economic impact of the regulation on the property owner, the interference with reasonable investment-backed expectations, and the nature and extent of the interference with the rights in the property as a whole.<sup>[71]</sup> Where a state regulation prohibits all economically beneficial use of land, to be imposed without necessity of compensation, it must do no more than duplicate what could otherwise be done under the state's nuisance laws.<sup>[71A]</sup>

In considering the economic impact of the regulation on private property, the courts recognize that the mere diminution of property value, or the substantial reduction of the attractiveness of the property to potential purchasers, or the denial of the ability to exploit a property right the owner previously believed was available, will not suffice to establish a taking.<sup>[72]</sup> The inquiry must instead focus on the value of the remaining uses to which the property may be put<sup>[73]</sup> and a comparison of the owner's investment or basis with the market value of the property subject to the regulation.<sup>[74]</sup> When considering whether the regulation interferes with the owner's investment-backed expectations, the court must determine that the expectations were reasonable, or at least consistent with the law in force at the time the expectation was formed.<sup>[75]</sup> The purchase price is only one of the factors that should be considered in determining whether a regulation interferes with reasonable investment-backed expectations.<sup>[76]</sup>

Courts applying these factors have found takings in instances where there was no value for the uses remaining for the property after the adoption of the regulation<sup>[77]</sup> and where there was a loss of 96 percent of the possible rate of return on an investment.<sup>[78]</sup> Courts have rejected takings claims where valuable uses of the property remained after the imposition of the regulation, even if those uses were not the most valuable uses.<sup>[79]</sup>

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### Notes:

[62] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987).

[63] *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 129 L. Ed. 2d 304 (1994).  
*Keystone Bituminous Coal Association v. DeBenedictis*, *supra*.

[64] *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[65] *Davis v. Metropolitan Government of Nashville and Davidson County*, 620 S.W.2d 532 (Tenn. Ct. App. 1981). *Phillips v. Montgomery County*, 442 S.W.3d 233 (Tenn. 2014).

[66] *Lucas v. South Carolina Coastal Council*, *supra*; *Keystone Bituminous Coal Association v. DeBenedictis*, *supra*; *Agins v. City of Tiburon*, *supra*; *In re Billing and Collection Tariffs of South Central Bell*, *supra*.; *Phillips v. Montgomery County*, *supra*.

[67A] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

[67B] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

[68] *Lucas v. South Carolina Coastal Council*, *supra*; *Keystone Bituminous Coal Association v. DeBenedictis*, *supra*; *Agins v. City of Tiburon*, *supra*.

[69] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); *Penn Central Transportation Co. v. City of New York*, *supra*.

[70] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

[71] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, *supra*; *Keystone Bituminous Coal Association v. DeBenedictis*, *supra*; *Penn Central Transportation Co. v. City of New York*, *supra*; *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 105 S.Ct. 1018, 89 L.Ed.2d 166 (1986).

[71A] *Lucas v. South Carolina Coastal Council*, *supra*.

[72] *Penn Central Transportation Co. v. City of New York*, *supra*; *Kirby Forest Industries, Inc. v. United States*, 467 U.S.1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991); *Esposito v. South Carolina Coastal Council*, *supra*; *Moore v. City of Costa Mesa*, 886 F.2d 260 (9th Cir. 1989); *Baytree of Inverrary Realty Partners, v. City of Lauderhill*, 873 F.2d 1407 (11th Cir. 1989); *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986).

[73] *Allied-General Nuclear Services Inc. v. United States*, 12 Cl. Ct. 372 (Cl. Ct. 1987); *Deltona Corp. v. United States*, 228 Ct. Cl. 476, 657 F.2d 1184 (Cl. Ct. 1981).

[74] *Florida Rock Industries, Inc. v. United States*, *supra*.

[75] *Cienega Gardens v. U.S.*, 331 F.3d 1314 (CA. Fed., 2003); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984); *Furey v. City of Sacramento*, 592 F. Supp. 463 (E.D. Calif. 1984); *Ciampitti v. United States*, 22 Cl. Ct. 310 (Cl. Ct. 1991); *Deltona Corp. v. United States*, *supra*.

[76] *Florida Rock Industries, Inc. v. United States*, *supra*; *Furey v. City of Sacramento*, *supra*.

[77] *Florida Rock Industries, Inc. v. United States*, 21 Cl.Ct. 161 (Cl.Ct. 1990).

[78] *Cienega Gardens v. U.S.*, *supra*.

[79] *MC Properties v. City of Chattanooga*, 994 S.W. 2d 132 (Tenn. App. 1999); *Keystone Bituminous Coal Association v. DeBenedictis*, *supra*; *Penn Central Transportation Co. v. City of New York*, *supra*; *Midnight Sessions Ltd. v. City of Philadelphia*, *supra*; *Esposito v. South Carolina Coastal Council*, *supra*; *Baytree of Inverrary Realty Partners v. City of Lauderhill*, *supra*; *Moore v. City of Costa Mesa*, *supra*; *Ciampitti v. United States*, *supra*.

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