REGULATORY TAKINGS

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Rocky Mountain Land Use Institute

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REGULATORY TAKINGS:

JUDICIAL STANDARDS OF FAIRNESS SHAPING THE LIMITS OF CATEGORICAL AND PARTIAL TAKING CLAIMS

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Synopsis

1.01 INTRODUCTION*

The notion of fundamental fairness is at the heart of all regulatory taking claims.[1] As the U.S. Supreme Court has pointed out, the Constitution's Fifth Amendment taking guarantee prohibits Government from "forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."[2] Judicial notions of fairness in the allocation of regulatory burdens continues to shape the limits of uncompensated regulation. As recently stated: "The doctrinal lines in this body of law stretching back over a century are anything but crystal clear, however, where the government seeks to adjust the mutual burdens and benefits of society a taking is less likely than when government creates a general public benefit by burdening discrete private individuals."[3]

This article presents a preliminary sketch of judicial standards of fairness that are operating to shape the legitimate scope of uncompensated regulation. Rather than providing a comprehensive and exhaustive analysis of the myriad of issues involved in regulatory takings, this article necessarily paints with a broad brush by focusing on how emerging judicial standards of fairness are shaping the major crystallized lines of regulatory taking analysis and significant problematic issues within this takings paradigm. The regulatory taking framework for analysis is limited to restrictions imposed on private land use and development.

The article examines how recent court decisions both heighten judicial scrutiny of the fairness of uncompensated regulation and shape the standards of fairness applied to regulatory taking claims. Major crystallized lines of regulatory taking analysis are examined, with the final focus of the article on standards of fairness shaping judicial analysis of partial benefit-extraction taking claims. Since the U.S. Supreme Court's decision in Pennsylvania Coal Co. v. Mahon,[4] this entire line of partial taking analysis has been largely the subject of state court decision-making. Recent decisions of the U.S. Supreme Court, however, have refocused attention once again on partial takings analysis. As the last frontier in the regulatory takings paradigm, the article explores the nature of partial taking claims and attempts a categorization of these claims into distinct lines of regulatory taking analysis.

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[1] The Fifth Amendment taking clause presupposes the fundamental unfairness of the uncompensated taking of private property for public use or benefit. In the regulatory takings context, analysis of fundamental fairness in allocation of the burdens imposed, in view of the policy of horizontal equity (the approximation of equal sharing of costs or of sharing according to capacity to pay that exists when property is taken by the expenditure of public funds) underlying the takings clause, secures and implements its original meaning and purpose. Thus "the often cited maxim that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking'." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992) citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[2] E.g., Armstrong v. United States, 364 U.S. 40, 44 (1960).

[3] Bowles v. United States, 31 Fed. Cl. 37, 49 (1994).

[4] 260 U.S. 393 (1922).

taking "fairness" of police power regulation. [10] By shifting burdens of proof and standards of deference to legislative judgment and by enhancing taking standards of when uncompensated regulation goes "too far",[11] the Court has taken the protection of individual property rights out of the dust bin of constitutional taking jurisprudence.[12] A number of post Lucas court decisions also have resurrected and legitimized partial benefit-extraction taking claims that just a few years ago were thought relegated to the antiquated province of state court decision-making.[13]

While the exact parameters of this shift toward greater protection of individual property rights, in the regulatory takings context, are difficult to determine, consider the change in judicial perspective reflected in the recent opinion of one California appellate judge:

> Were I writing on a clean slate, I would conclude that, except for cases of nuisance affecting the property rights of others, due process requires compensation for any public restriction on any lawful uses of private property, both current and prospective. I can conceive of no principled reason why the burden of all restrictions on private property for the benefit of the public should not be borne by the public.[14]

Though the above view of regulatory takings is unlikely to emerge as a dominant judicial philosophy, it clearly is not a lone voice crying in the wilderness.[15]

Recent court decisions clearly evidence a heightened respect for the Constitution's Fifth Amendment taking guarantee with respect to fundamental fairness in the allocation of regulatory burdens.[16] Emerging from this heightened

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[8] Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (there must be "rough proportionality" between "amount" of development exaction and extent of specific problem related to or need generated by particular development proposal).

[9] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (regulation that denies an owner all economically viable use of land is a categorical or per se taking unless the regulation as applied is justified under state law nuisance principles).

[10] With respect to heightened judicial scrutiny of regulatory taking claims, in the respective contexts of these cases, see: Nollan, supra note 7 at 834 n. 3 (discussing this point); Dolan, supra note 8 at 2320 (discussing this point); Lucas, supra note 9 at 2893-94 n. 6 (discussing this point).

[11] Id.

[12] See generally Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights 134 (1992); Epstein, Takings: Private Property and the Power of Eminent Domain 5-6 (1985).

[13] See discussion herein at § 1.03[4], infra.

[14] Hansen Brothers Enterprises v. County of Nevada, 35 Cal. Rptr. 2d 358, 365 (Cal. App. 1995) (Puglia J. dissenting).

[15] Recently proposed legislative initiatives in a number of states seek to provide compensation for any reduction in value caused by "public benefit" regulation unless the regulated activity constitutes a nuisance. See Washington State's Initiative 164, entitled "The Private Property Regulatory Fairness Act," that will be subject to a voter referendum in November, of 1995. See also Kmiec, "The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse," 88 Colum. L. Rev. 1630 (1988); Epstein, Takings: Private Property and the Power of Eminent Domain 108-112 (1985).

[16] See Dolan, supra note 8 at 2320 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

Recent court decisions have significantly modified the above regulatory taking paradigm.[23] The U.S. Supreme Court's decisions in Nollan[24] and Dolan[25] have brought to the forefront considerations of basic fairness in the allocation of regulatory burdens. Development exactions are now scrutinized with respect to both the nature and extent of the burdens they impose on development applications.[26] Subsequent court decisions have applied these basic fairness or nexus standards of Nollan and Dolan to a variety of types of land use conditions and restrictions as well as development exactions and impact fees.[27]

In Lucas,[28] the U.S. Supreme Court apparently rejected the argument that nothing less than complete destruction of value of an owner's land could constitute a taking,[29] limited judicial deference to legislative findings relating to the character of the government action involved,[30] and restricted the noxious use defense in denial of economically viable use taking cases to state law nuisance principles inherent in an owner's title.[31] Picking up on this suggestion in Lucas, a number of subsequent court decisions have resurrected "partial" benefit-extraction regulatory taking claims[32]. Holding that a partial regulatory loss (short of denial of all economically viable use) might constitute a taking, these courts now apply a more-or-less ad hoc analysis of considerations related to fundamental fairness in the allocation of regulatory burdens in resolving such claims, considerations, it should be noted, nearly identical to those utilized by Justice Holmes in Pennsylvania Coal Co. v. Mahon,[33] a case which, under the Penn Central and Agins taking paradigm, was once thought nearly a dead letter in takings jurisprudence.[34]

1.03 JUDICIAL STANDARDS OF FAIRNESS AND THE EMERGING REGULATORY TAKINGS PARADIGM

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[23] An early modification of this regulatory taking paradigm occurred in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that regulation requiring installation of CATV facilities on an owner's property affected a taking and establishing the physical occupation line of taking analysis discussed later herein at § 1.03[2]).

[24] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (there must be substantial nexus between "nature" of development exaction and some specific problem related to or need generated by particular development proposal).

[25] Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (there must be "rough proportionality" between "amount" of development exaction and extent of specific problem related to or need generated by particular development proposal).

[26] For discussion of the Nollan and Dolan nexus tests as essentially involving considerations of basic fairness in the allocation of regulatory burdens, see later herein § 1.03[4][a], infra. And see Public Access Shoreline Hawaii v. Hawapi County Planning, 1995 WL 515898 (Hawaii) p. 18: "[C]onditions may be placed on development without effecting a taking so long as the conditions bear an essential nexus to a legitimate state interest and are roughly proportional to the impact of the proposed development."

[27] See discussion later herein at § 1.03[4][a], infra.

[28] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (discussed later herein at § 1.03[3]).

[29] 112 S. Ct. at 2895 n. 8.

[30] 112 S. Ct. at 2898 n.12.

[31] 112 S. Ct. at 2899.

[32] See discussion later herein at § 1.03[4][a], infra.

[33] 260 U.S. 393 (1922).

[34] See Davies, "Keystone Bituminous Coal v. DeBenedictis", 7 UCLA J. Envtl. L. & Pol'y 185 (1988).

land since it has the effect of destroying one of the most essential sticks in the bundle of rights commonly characterized as property - the right to exclude others from the land.[40]

[b] The Element of Required Acquiescence

Court decisions have limited application of this elemental fairness per se rule to physical occupations involving "required acquiescence" by the owner.[41] In cases otherwise involving regulatory conditions or restrictions that burden an owner's right to exclude or possessory interests in land, the regulation may be held to effect a taking under partial benefit-extraction regulatory taking analysis. These cases directly involve judicial consideration of fundamental fairness in the allocation of regulatory burdens.[42]

[3] *Categorical Denial of All Economically Viable Use Taking Claims*

[a] Fairness as Shaping Nature of Claim

Under this now established line of regulatory taking analysis, regulation which denies an owner all economically viable use is considered a categorical or per se "total" taking of the use value of an owner's land unless the regulation as applied directly prevents a nuisance under state law. Considerations of taking fairness supporting this per se rule are set out in the U.S. Supreme Court's recent Lucas decision.[43] The Court therein pointed out that the usual assumption that the legislature, through regulation, is simply "adjusting the benefits and burdens of economic life" in a manner that secures an "average reciprocity of advantage" to everyone concerned is inapplicable in a case where an owner is denied any economically beneficial use since, from the owner's point of view, regulation, in such a case, is "the equivalent of a physical appropriation."[44] Regulation that leaves an owner without an economically viable use, poses, according to the Court, "a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[45] The flip-side of the fundamental fairness formulation in Lucas is that, though an owner is denied any economically viable use, no regulatory taking occurs if the regulation as applied

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[40] Id.

[41] See e.g., Cienega Gardens v. United States, 33 Fed. Cl. 196 (Fed. Cir. 1995) (restrictions on eviction of low-income tenants); Adamson Companies v. City of Malibu, 854 F. Supp. 1476, 1499-1501 (C.D. Cal. 1994) (mobile home rent control ordinance). See also Yee v. City of Escondido, 503 U.S. 519 (1992) (rent control ordinance); FCC v. Florida Power Corp., 480 U.S. 245 (1987); Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980) (free speech activities in private shopping center).

[42] See, e.g., Manocherian v. Lenox Hill Hospital, 84 N.Y.2d 385, 643 N.E.2d 479 (1994) (holding statute that required owners to provide renewal leases to nonprivate hospitals based on primary residency status of hospital's employee-subtenant effected partial regulatory taking); Aspen-Tarpon Springs Limited Partnership v. Stuart, 635 So. 2d 61 (Fla. App. 1994) (statute requiring mobile park owners to either buy tenant's homes or pay relocation costs held a regulatory taking). And see discussion later herein at § 1.03[4][d][ii], infra.

[43] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

[44] Id. at 2894.

[45] Id. at 2895.

[ii] Meaning of Nuisance Defense to Total Taking

The U.S. Supreme Court in Lucas held that a regulation which effects a categorical or total regulatory taking (denial of all economically viable use) could be justified if the regulation, as applied, prevents a nuisance. This defense, under Lucas, involves consideration of whether the regulation as applied is unduly restrictive and whether the regulation as applied reasonably reflects state common law nuisance principles.[53] While post-Lucas court decisions do not entirely clarify this nuisance defense, it seems clear that a regulation that, as applied, directly prevents substantial harm to the health, safety or property of others would justify such a defense.[54] Even Blackstone acknowledged the absence of any property right to interfere with or do harm to others.[55] Following the suggestion in Lucas,[56] a number of subsequent court decisions now appear to reject protection of largely general welfare or purely environmental values, such as open space, aesthetic views, wildlife habitat, or wetlands, as a sufficient basis to justify a nuisance defense to a total taking.[57]

[iii] Meaning of Whole Parcel Taking Analysis

In determining whether a total regulatory taking has occurred by denial of all economically viable use, U.S. Supreme Court cases have often looked to the value of the owner's land considered as a whole.[58] The critical issue in this analysis, which focuses on the value that remains in the property, of course, is the problem of defining the "unit of property" whose value is to furnish "the denominator of the

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[53] See Lucas, supra note 43, at 2901. And see Healing v. California Coastal Com'n, 22 Cal. App. 4th 1158, 27 Cal. Rptr. 2d 758, 767 (1994) (applying unduly restrictive aspect of nuisance defense as set out in Lucas); Lopes v. City of Peabody, 417 Mass. 299, 629 N.E.2d 1312, 1316 n. 12 (1994) (same).

[54] See, e.g., M & J Coal Co. v. U.S. 47 F. 3d 1148 (Fed. Cir. 1995) (applying Lucas to reject taking claim finding that prohibition of mining causing surface subsidence prevented imminent danger to public health and safety); State Dept. of Health v. The Mill, 887 P.2d 993 (Colo. 1994) (radioactive pollution); First English Evangelical Lutheran Church v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989), cert. denied, 493 U.S. 1056 (1990) (development in floodplain). However, the fact that government is engaged in a form of nuisance prevention regulation will not shield it from all regulatory taking claims resulting from losses to innocent parties. See Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990) (finding regulatory taking where healthy turkey breeder stock sold at 77% reduction in value as a result of USDA quarantine).

[55] See Kmiec, "The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse," 88 Colum. L. Rev. 1630, 1635 (1988).

[56] See Lucas, supra note 43, at 2898 n. 11, 2899 (characterization of environmental and general welfare purposes of statute as 'benefit-conferring" and nuisance examples in text of opinion).

[57] See Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992) (building house on lot on barrier island); Bowles v. United States, 31 Fed. Cl. 37, 51 (1994) (house on wetlands lot); Loveladies Harbor, Inc. v. United States, 28 F. 3d 1171 (Fed. Cir. 1994) (residential development of 12.5 acres of wetlands). And see Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 406 (1991) (mining of allevial valley). Cf. Boise Cascade Corp. v. Board of Forestry, 131 Or. App. 538, 886 P.2d 1033 (Or. App. 1994) (protection of spotted owl habitat) (not deciding this point). But see State, Dept. Environmental Protection v. Burgess, 1995 WL 518776 (Fla. App. 1 Dist.) (remanding for determination of whether development of wetlands would be a water pollution hazard constituting a nuisance).

[58] E.g., Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978); Keystone Bituminous Coal Assn v. DeBenedictis, 480 U.S. 470, 497 (1987). See generally 1 Ziegler, Rathkopf's The Law Of Zoning And Planning § 6.08[7] (1993) (N.Y. Clark Boardman 4th ed.).

A long line of state court decisions, both before and after Lucas, reject this "notice" approach to regulatory taking claims.[64] While conceding that purchase price may be relevant to the measure of taking damages,[65] these courts generally hold that denial of economically viable use taking claims run with the land unless the hardship was truly self-created by an act of the owner or a predecessor in title and not by simply government action.[66] This approach to the issue is supported by Justice Scalia's opinion in Nollan which expressly rejected the argument that the Nollans were barred from challenging the development exaction imposed since the regulatory policy existed at the time of their purchase.[67] Fundamental fairness in the taking formulation also may be held to support this view.[68] Rather than focusing on whether an individual owner might receive a "windfall" if an otherwise unconstitutional restriction is held invalid, court decisions rejecting the notice approach, in effect, hold, as Nollan suggests, that an owner has a reasonable investment-backed expectation that land use and development will not be burdened by unconstitutional restrictions.[69]

[4] *Partial Benefit-Extraction Taking Claims*

[a] Fairness as Shaping Nature of Claim

Under this now established, though still emerging, line of regulatory taking analysis, courts use a pre-Lucas ad hoc balancing of interests test to determine whether a regulatory burden imposed on an owner (though short of denial of all economically viable use) constitutes a partial taking.[70] This line of regulatory taking

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[64] E.g., Lopes v. City of Peabody, 417 Mass. 299, 629 N.E.2d 1312 (1994); Hoberg v. City of Bellevue, 76 Wash. App. 357, 884 P.2d 1339 (Wash. App. 1994); Somol v. Bd. of Adj. of Morris Pl., 277 N.J. Super. 220, 649 A.2d 422 (1994). See generally 3 Ziegler, Rathkopf's The Law Of Zoning And Planning § 38.06 (1993) (N.Y. Clark Boardman 4th ed).

[65] See Lopes v. City of Peabody, supra note 64, at 1315 n. 8.

[66] See Lopes v. City of Peabody, supra note 64, at 1315:

> We see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning provision first affected it. A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.

[67] See Nollan, supra note 24 at 833 n. 2: "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." And see Presault v. United States, 1995 WL 544703 (Fed. Cir.) (discussing and distinguishing this aspect of the Nollan decision from pre-existing limitations in an owner's title).

[68] The "notice" approach to the taking issue, in effect, transforms the role of the courts from policing the constitutional limits of Government action into policing the fairness of private benefits resulting therefrom. For example, if land is acquired either by gift, inheritance, or purchase, and whether or not in the latter case, the purchase price paid reflected the clear invalidity of an applicable restriction (land zoned as open space) that existed at the time of acquisition, the compensable fair market value of the land that would be due the owner if the land were directly taken by Government through eminent domain would, in either of the cases, have to reflect the probable invalidity of the restriction. See e.g., Wash v. Bd. of Adj. of Tp. of Morris, 96 N.J. 97, 474 A.2d 241, 251 (1984) (citing authorities).

[69] There are, of course, other good reasons for prohibiting Government from taking what it hasn't paid for. See Laitos, supra note 5, at 2-31 (discussing and citing the growing body of commentary on the economic benefits of heightened judicial scrutiny of regulation affecting property rights).

[70] See cases cited herein at notes 80 and 87, infra.

restrictions[80] as well as permit denials,[81] waiver requirements,[82] exactions,[83] and impact fees.[84]

Similarly, the apparent rejection of the argument by the U.S. Supreme Court in Lucas[85] that nothing short of denial of all economically viable use would constitute a regulatory taking,[86] has been picked up in subsequent court decisions that now expressly hold that, in such cases, the regulatory taking claim will be resolved by application of partial benefit-extraction taking analysis.[87] As recently stated by the U.S. Court of Appeals for the Federal Circuit:

> Nothing in the Fifth Amendment limits its protection to only 'categorical' regulatory takings, nor has the Supreme Court or this court so held. Thus there remains in cases such as this the difficult task of resolving when a partial loss of economic use of the property has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.'[88]

[b] Analysis of Character of Government Action, Regulatory Burdens, and Reciprocal Benefits

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[80] See, e.g., Adamson Companies v. City of Malibu, 854 F. Supp. 1476, 1502 (C.D. Cal. 1994) (rent control ordinance); Aspen-Tarpon Springs Ltd. v. Stuart, 635 So. 2d 61 (Fla. App. 1994) (conditions on change of use of mobile home park); Manocherian v. Lenox Hill Hospital, 84 N.Y.2d 385, 643 N.E.2d 479 (1994) (requirement on landlord relating to renewal leases); Parking Ass'n of Georgia v. City of Atlanta, 264 Ga. 764, 450 S.E.2d 200 (1994) (landscaping requirements on parking lots); Christopher Lake Dev. Co. v. St. Louis Cty., 35 F. 3d 1269 (8th Cir. 1994) (development condition relating to drainage system); Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993) (restrictions on signs).

[81] See, e.g., Bowles v. United States, 31 Fed. Cl. 37 (1994) (permit denial); Whitehead Oil Co. v. City of Lincoln, 245 Neb. 680, 515 N.W.2d 401 (1994) (permit denial).

[82] See State, Dept. of Transp. v. Heckman, 644 So. 2d 527 (Fla. App. 1994) (waiver of platting requirement in return for conveyance of right-of-way).

[83] See, e.g., Walz v. Town of Smithtown, 46 F. 3d 162 (2d Cir. 1995) (conveyance of land as condition on street excavation permit).

[84] See, e.g., Northern Illinois Home Builders Ass'n, Inc. v. County of Du DuPage, 165 Ill. 2d 25, 649 N.E.2d 384 (1995) (impact fees); Trimen Dev. Co. v. King County, 124 Wash. 2d 261, 877 P.2d 187 (1994) (dedication of land or in lieu fees).

[85] See Lucas, supra note 43.

[86] Justice Stevens, dissenting, criticized as arbitrary the notion that "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." 112 S. Ct. at 2919. In response, Justice Scalia, writing for the Court, noted that Justice Steven's analysis "errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." 112 S. Ct. at 2894 n. 8.

[87] E.g., Florida Rock Industries, Inc. v. United States, 18 F. 3d 1560 (Fed. Cir. 1994), cert. denied, 115 S. Ct. 898 (1995); Creppel v. United States, 41 F. 3d 627 (Fed. Cir. 1994); Cienega Gardens v. United States, 33 Fed. Cl. 196 (1995) ; Bauer v. Waste Management of Conn., 234 Conn. 221, 662 A.2d 1179 (1995); State, Dept. of Health v. The Mill, 887 P.2d 993 (Colo. 1994); Jones v. King Cty, 74 Wash. App. 467, 874 P.2d 853 (Wash. App. 1994); Tahoe Keys Property Owners' Ass'n v. Water Resource Control Bd., 23 Cal. App. 4th 1459, 28 Cal. Rptr. 734 (Cal. App. 1994); Cannone v. Noey, 867 P.2d 797 (Alaska 1994).

[88] Florida Rock Industries, Inc. v. United States, supra note 87, at 1570.

Most successful partial taking claims result from the perceived "benefit-extraction" character of the Government action involved, coupled with the lack of even a modicum of reciprocal benefits accruing to burdened owners. Ultimately, the partial taking issue requires judicial assessment of the "fundamental fairness" reflected in allocation of the burdens imposed. With respect to the issue of fundamental fairness, courts that have found partial takings typically have applied a type of nexus or "cause-and-effect" standard nearly identical to the U.S. Supreme Court's recently established Nollan and Dolan "substantial relationship" tests for development exactions. Justice Scalia's opinion in the partial taking case, Pennell v. City of San Jose, [96] involving a tenant-hardship rent control provision, clearly embraces this standard:

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.

This type of "basic fairness" cause-and-effect standard for partial regulatory takings has been operative in many state courts for much of this century.[97] As an operative proposition, this partial taking standard prohibits landowners from being singled out as simply convenient targets of opportunity for dealing with community needs or problems that are not of their making and that, as a matter of fairness and justice, should be paid for by the public as a whole.[98] As stated in an early court

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[96] 485 U.S. 1, 19 (1988) (Scalia J., dissenting). This type of partial taking analysis is reflected, in another context, in then California Chief Justice Rose Bird's dissenting opinion in Yarborough v. Superior Court, 39 Cal. 3d 197, 216 Cal. Rptr. 425, 702 P.2d 583 (1985) (not reaching the taking issue of whether a court-appointed attorney must be compensated for services rendered):

> No one would dare suggest courts have the authority to order a doctor, dentist or any other professional to provide free services, while at the same time telling them they must personally pay their own overhead charges for that time. No crystal ball is necessary to foresee the public outrage which would erupt if we ordered grocery store owners to give indigents two months of free groceries or automobile dealers to give them two months of free cars. Lawyers in our society are entitled to no greater privilege than the butcher, the baker and the candlestick maker, but they certainly are entitled to no less.

[97] See Ziegler, supra note 61, at § 40.04 (discussing and citing cases dealing with the validity of site specific land use conditions and restrictions).

[98] Professor Tarlock has pointed out that the harm/benefit dichotomy as a test for validity may be "so susceptible to abuse as to be useless" at least when not applied in view of ordinary and widely shared expectations about the risks that a landowner faces from public regulation of his land use choices and when the underlying policies of horizontal equity - treating like people alike - and economic efficiency are ignored. Tarlock, "Regulatory Takings," 60 Chi.-Kent L. Rev. 23, 31 (1984).

With the exception of partial taking claims related to development exactions and conditions[107] and judicially formulated doctrines relating to the protection of individual property rights[108] the other distinct lines of successful partial taking claims described herein are formulated from what little judicial precedent exists, both recent and not so recent, to arguably support these lines of analysis. As such, these lines of partial taking analysis are put forth not as widely accepted or dominant judicial doctrines but rather as simply evidencing a distinct category of possibly successful partial taking analysis as reflected in the still emerging case law dealing with this topic. Cases, where partial benefit-extraction claims have been sustained, generally may be classified as falling within one of the following six categories.

[i] Direct Taking of Property by Imposition of Development Exactions, Fees, or Conditions

Partial taking claims have been sustained in cases involving development exactions, fees, or conditions where it is clear that private property is being "taken" by Government and no cause-and-effect fairness nexus exists with respect to the exactions imposed.[109] State courts, long before the Nollan and Dolan decisions of the U.S. Supreme Court, have applied this line of partial takings analysis to all manner of development exactions and conditions.[110] This fairness nexus test has been applied by courts to development exactions involving land[111] money,[112] public improvements,[113] public facilities,[114] and public services[115] when imposed on an owner as a condition of development approval. This line of partial takings analysis expressly rejects the notion that owners wishing to develop land may be singled out to bear regulatory burdens for the purpose of addressing community problems that are not of their making and reflects the ruling in Nollan that the police power may not be sold by the extraction of unrelated benefits as a condition to development approval.[116]

[ii] Shifting of Burdens To Address Some Social Problem or Public Need

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[107] See discussion herein at §1.03[4][d][i], infra.

[108] See discussion herein at § 1.03[4][d][vi], infra.

[109] See 3 Ziegler, supra note 105, at § 40.04[5].

[110] See 5 Ziegler, supra note 105, at § 65.04 (discussion of pre-Nollan and pre-Dolan state court decisions).

[111] E.g., Onge v. Donovan, 71 N.Y.2d 507, 522 N.E.2d 1019 (1988) (discussing long line of cases on point).

[112] E.g., Andres v. Village of Flossmoor, 15 Ill. App. 3d 655, 304 N.E.2d 700 (1973) ($1,000 per building for village general fund).

[113] E.g., Cupp v. Board of Supervisors, 227 Va. 580, 318 S.E.2d 407 (1984) (road construction unrelated to development).

[114] E.g., Plote, Inc. v. Minnesota Alden Co., 96 Ill. App. 3d 1001, 422 N.E.2d 231 (1981) (village cultural center).

[115] E.g., Triesman v. Town of Bedford, 132 N.H. 54, 563 A.2d 786 (1989) (condition that privately owned helicopters be used by town's police and fire department).

[116] See Nollan, supra note 101, at 837.

[iii] Burdens Imposed on Land Use to Subsidize Some Distinct Government Function or Enterprise

Partial taking claims have been sustained in cases involving land use restrictions that are clearly imposed to support or subsidize some distinctly Government function or enterprise, such as the provision of public parks,[122] schools,[123] playgrounds,[124] roads,[125] airports,[126], flood control projects,[127] or traffic control devices,[128] where the burdens imposed are based largely on the accident of ownership of land at a particular location.[129] This line of partial taking analysis also would include cases where a distinct group of owners are disproportionately burdened by land use restrictions designed to secure the public benefit of foregoing improvements to public sewers,[130] sewerage treatment plants,[131] or roads.[132] For example, in Stevens v. Salisbury[133] the court found a partial taking with respect to portions of a zoning ordinance enacted to promote traffic safety at intersections. The invalid portion required that the ground elevation of front yards on specified portions of corner lots and retaining walls thereon be reduced to not more than three feet above curb level. The court distinguished between restrictions upon a relatively insignificant segment of an owner's land to serve a real public need and the above provisions held confiscatory that would require an owner to remove, destroy, or reduce, at his own expense, his own property to avert the city's necessity of installing a stop sign or other traffic signal at public expense. The court stated

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[122] E.g., New Products Corp. v. City of Miami, 271 So. 2d 24 (Fla. App. 1972) (zoning of land for public park).

[123] E.g., Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983) (zoning of land for public school).

[124] E.g., City of Plainfield v. Borough of Middlesex, 69 N.J. 136, 173 A.2d 785 (1961) (zoning of land for public playground).

[125] E.g., Joint Ventures, Inc. v. Dept. of Transportation, 563 So. 2d 622 (Fla. 1990) (road reservation map restriction).

[126] E.g., Sneed v. City of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963) (severely restrictive zoning near airport amounted to overflight easement).

[127] E.g., Panhandle Eastern Pipeline Co. v. Madison County Drainage Bd., 1995 WL 567277 (S.D. Ind.) (partial taking found where utility required to bury its pipelines deeper in the ground to facilitate county drainage project) citing Panhandle Eastern Pipeline Co. v. State Highway Comm'n, 294 U.S. 613, 618 (1935); Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619 (Ky. 1953) (holding confiscatory amendment to master plan designating owner's land as temporary storage basin in connection with a county flood control project).

[128] E.g., Stevens v. Salisbury, 240 Md. 556, 214 A.2d 775 (1965) (regrading of front yard instead of city's installation of traffic signal or stop sign).

[129] See Dunham "A Legal and Economic Basis for City Planning," 50 Colum. L. Rev. 650, 655 (1958) noting that the evil here is that "there is no approximation of equal sharing of cost or of sharing according to capacity to pay as there is where a public benefit is obtained by subsidy or expenditure of public funds. The accident of ownership of a particular location determines the persons in the community bearing the cost of increasing the general welfare."

[130] E.g., Westwood Forest Estates v. Village of S. Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969) (village may not uniquely burden individual owners as a result of general problem with sewer system).

[131] E.g., Charles v. Diamond, 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977) (holding in regard to development restrictions based on the inadequacy of a village sewage treatment plant that the village may not zone development out of the community "by the indirection of needless municipal delay in providing the essentials or construction" and that the validity of development restrictions in such a case would be evaluated by whether the ultimate economic cost of the benefit is being shared by members of the community at large or is being hidden from the public by being imposed on particular owners).

[132] E.g., Ozolos v. Henley, 81 A.D.2d 670, 438 N.Y.S.2d 349, 351 (1981) (denial of subdivision approval because of inadequacy of town road).

[133] 240 Md. App. 556, 214 A.2d 775 (1965).

determined "is upon whom the loss of socially desirable regulations should fall."[138] Partial taking analysis is here stated to include consideration of whether there are "direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few?"[139]

This line of partial taking analysis would appear to limit the scope of the U.S. Supreme Court's earlier Penn Central decision[140] to cases involving substantial diminution in the "exploitation" or speculative market value of land as opposed to cases where the substantial loss of value interferes with an owner's reasonable investment-backed expectations relating to the original use or development of lands preserved from development by regulation.[141] Under this line of analysis, partial taking claims could apparently be asserted against land preservation restrictions that apply to all similarly situated owners but that lack "direct compensating benefits" where the loss of value is substantial but short of a total taking. Existing court decisions rejecting taking claims based on substantial diminution in value resulting from enactment of typical zoning and similar land use restrictions[142] would not appear to be undermined by this line of partial taking analysis since such restrictions generally are thought to provide some "reciprocity of advantage" in securing a mutually beneficial environment.[143]

[vi] Judicially Formulated Doctrines Protecting Individual Property Rights

Partial taking claims have been sustained in cases involving application of judicially formulated standards for the protection of individual property rights, derived from judicial balancing of competing interests, that are designed to ensure

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[138] See Bowles v. United States, 31 Fed. Cl. 37, 52-53 (1994) (alternative holding) citing Florida Rock Industries, Inc. v. United States, 18 F. 3d 1560, 1568-73 (Fed. Cir. 1994) (remanding for finding in wetlands preservation case whether substantial diminution in value, from 10,500 per acre to 4,000 per acre, constitutes a partial taking).

[139] Florida Rock Industries, Inc. v. United States, supra note 138, at 1571.

[140] Penn Central Transp. Co. v. New York City, supra note 101, at 130 (upholding landmark preservation ordinance where owner had economically viable existing use of the land and substantial diminution in value did not interfere with reasonable investment-backed expectations but only ability to "exploit" market value of the property).

[141] See Bowles v. United States, supra note 138, at 1573 (substantial diminution in value interfering with owner's original investment-backed expectations).

[142] See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75 percent diminution in value); Hadachek v. Sebastian, 239 U.S. 394 (1915) (87 percent diminution in value).

[143] See Florida Rock Industries, Inc. v. United States, supra note 138, at 1570 (supporting this analysis). And see Tahoe Keys Property Owners' Association v. Water Resource Control Bd., 23 Cal. App. 4th 1459, 28 Cal. Rptr. 2d 734, 746-47 (1994) wherein the court rejected a partial taking claim relating to pollution mitigation fees for the Tahoe Basin based, in part, on the "special benefits" conferred on landowners in the area. The court noted:

> [The] fact that the regulatory restrictions imposed on one group are different in kind than the restrictions imposed on others does not in itself establish that the first group has been unfairly singled out to bear the burden of the governmental objective. That question must be answered by reference to such things as danger to the public interest created by the land use aspirations of the different property owners, the extent of the burdens imposed on the different property owners when compared to the burdens imposed on others, and, where applicable, the nature of any special benefits which will accrue to the different property owners by virtue of the regulatory program.