

Question 5

Paula has owned and farmed a parcel consisting of 100 acres for many years. Last year, in compliance with County regulations, she expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. She recently submitted a development application to County seeking to construct 30 homes on those 10 acres. County then determined that the 10 acres constitute protected wetlands that, under a state law enacted recently, had to be left undeveloped to protect certain endangered species. On that basis, County denied the development application.

Paula brought an action claiming that County's denial of the development application constituted a regulatory taking in violation of the U.S. Constitution. It was stipulated that the 10 acres are worth \$4,000,000 if development is permitted and \$200,000 if it is not.

The trial court ruled that County's denial of Paula's development application did not constitute either (1) a total or (2) a partial taking.

Did the trial court correctly rule that County's denial of Paula's development application did not constitute:

1. A total taking? Discuss.
2. A partial taking? Discuss.

Question 5

Constitutional Law

Paula has owned and farmed a parcel consisting of 100 acres for many years. (Paula has a “property” interest in her land) Last year, in compliance with County regulations, she expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. (The regulation has an economic impact on Paula as she already expended a “substantial” amount of money) She recently submitted a development application to County seeking to construct 30 homes on those 10 acres. County then determined that the 10 acres constitute protected wetlands that, under a state law enacted recently, (Law making is state action and this is a lawful exercise of the state’s police power. No facts show this state law, even though “recently” enacted after Paula’s reliance, arbitrarily singles out her particular parcel for different, less favorable treatment than the neighboring ones) had to be left undeveloped to protect certain endangered species. (Protecting endangered species is a lawful exercise of the state’s police power and an example of a legitimate governmental interest) On that basis, County denied the development application. (The County’s denial of Paula’s application gives her standing to sue. The case is ripe for review. It is interesting to note that Paula may continue to use the property precisely as it has been used for the past many years)

Paula brought an action claiming that County’s denial of the development application constituted a regulatory taking in violation of the U.S. Constitution. (The only issue in Paula’s complaint is whether there is a “regulatory taking” under the Fifth Amendment) It was stipulated that the 10 acres are worth \$4,000,000 if development is permitted and \$200,000 if it is not. (These figures determine the extent to which the regulation interferes with Paula’s reasonable investment-backed expectations. However, it is clear that the regulation does not “totally” eliminate Paula’s investment-backed expectation and all economic value of her property. Also, just compensation under the takings clause is determined by the reasonable value of the property *at the time* of the taking)

The trial court ruled that County’s denial of Paula’s development application did not constitute either (1) a total or (2) a partial taking.

Did the trial court correctly rule that County’s denial of Paula’s development application did not constitute:

1. A total taking? Discuss.
2. A partial taking? Discuss.

“Takings law is full of these ‘all or nothing’ situations.” – Justice Scalia

A Deeper Look Inside the Essay

This essay was not too popular amongst many test-takers and most found not too much to write about. A profound discussion into the Taking Clause required the applicant to know, in depth, the principles and rules behind certain cases. Few people probably studied Takings Clause to such an extreme or as the United States Supreme Court has referred to it as the “*Mugler* line of cases.” In recent years, the examiners have tended to test Constitutional Law on specific cases, *e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), or specific constitutional provisions, both on the **MBE** and the essays. This essay is no exception.

Small fact patterns are usually law driven and a bit tough to discuss, whereas long fact patterns require much more of a factual application, and in my opinion, are easier. This essay is a good example of that rule of thumb. It really required knowing the Takings Clause in depth. An issue most applicants briefly went over during bar review and law school. If you didn’t know the extent of the laws below, you were not the only one. In fact, if you did, that is amazing in itself. **Note:** The author of this essay has taken it almost directly from the case *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The facts of that case are eerily similar to this fact pattern. A quick glance of the syllabus of that case will reveal this truth.

Model Answer by One-Timers ©

1. Did the trial court correctly rule that County’s denial of Paula’s development application did not constitute a total taking?

The trial court was correct to rule that County’s denial of Paula’s development application did not constitute a “total” taking because the effect of the state regulation did not deny Paula all economically beneficial use of the property.

In order to determine whether a total taking occurred, preliminary issues of justiciability need to be reconciled.

Standing

A plaintiff has standing when she has a direct and substantial interest in the outcome where a ruling by the court will redress an injury. A plaintiff must demonstrate that she suffered an injury in fact or that she faces an imminent threat of harm.

Here, Paula has suffered actual harm as the County denied the development application whereby she sought to construct 30 homes on 10 acres of property she owned. This decision has cost Paula substantial amounts of money in both development prospects as well as her costs from determining the economic feasibility of developing her property. Thus, Paula has a concrete stake in the outcome.

Ripeness

A takings claim challenging application of land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding their application to the property at issue. *Palazzolo v. Rhode Island*, 533 U.S. 606, 12 (2001). Once it becomes clear that the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

On these facts, the County has reached a final decision in determining that Paula’s land must be left undeveloped to protect certain endangered species. No facts show otherwise. Therefore, Paula’s case is ripe for review.

State Action

County's determination that Paula's 10 acres constitute protected wetlands, under state law, is certainly within the realm of state action. This is a non-issue.

Police Power

States have the power to regulate for the health, safety, and general welfare of its citizens but cannot do so in violation of some other constitutional provision.

Here, Paula will not take issue with the validity of the regulation as a lawful exercise of the state's police power. The health, safety, morals, or general welfare would be promoted by prohibiting development of her land to protect certain endangered species. Protecting the environment is an example of a legitimate governmental interest. Therefore, the state's actions are valid.

Fifth (5th) Amendment – Takings Clause

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. It does not prohibit government takings of property, but only requires just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Even a minimal "permanent physical occupation of real property" requires compensation under the Clause. The Supreme Court has also recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. While property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.

Fifth Amendment's guarantee is designed to bar 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.

A plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a "physical" taking, a *Lucas*-type "total" regulatory taking, or a *Penn Central* "partial" taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

Physical Invasion Taking

Physical invasion or intrusion of property is sufficient but is not necessary to establish a taking within the meaning of the Fifth Amendment. When a property owner suffers a permanent physical invasion of her property, no matter how minute the intrusion, and no matter how weighty the public purpose behind it, there is a taking and courts will require just compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Here, the County has not "physically" invaded Paula's property. Moreover, Paula's action claimed that County's denial constituted a regulatory taking. Thus, this issue is moot. However, a regulation could still be considered a taking even without a physical invasion.

Total Taking (The “Lucas” Rule)

Regulatory actions generally will be deemed *per se* takings for Fifth Amendment purposes where the regulation completely deprive an owner of “*all* economically beneficial use” or completely eliminates the investment-backed expectation and economic value of her property. A *per se* taking is compensable without case specific inquiry. That “total” deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.

In the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge the usual assumption that the legislature is simply adjusting the benefits and burdens of economic life. Regulations that leave the owner of land without economically beneficial or productive options for its use, by requiring land to be left substantially in its natural state, carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. In short, when the owner of real property has been called upon to sacrifice “all” economically beneficial uses in the name of the common good, that is, to leave her property economically idle, she has suffered a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003.

Here, Paula’s claim that the County’s denial of her development was a “total” taking in that it deprived her of all economically beneficial use is contradicted by undisputed evidence that she has \$200,000 in value remaining on the parcel of her 10 acres. Her parcel is not rendered valueless.

In the *Lucas* context the complete elimination of a property’s value is the determinative factor. But, a state may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of Paula in this case, however. The County’s denial still permits her to own, transfer, and farm the remaining 10 acres. The denial does not leave the property “economically idle.”

Therefore, all economically beneficial use is not deprived because the portion in question can still be farmed. Her property retains \$200,000 in value even with the state law protecting endangered species. For those reasons, she has not suffered a “total” taking.

Anything less than a complete elimination of value, or a total loss, requires the kind of analysis applied in *Penn Central*.

2. Did the trial court correctly rule that County’s denial of Paula’s development application did not constitute a partial taking?

The trial court was correct to rule that County’s denial of Paula’s development application did not constitute a “partial” taking because Paula still has the primary expectation concerning the use of her parcel and the impact on Paula is for the common public good.

Partial Taking (The “Penn Central” Factors)

While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. A partial regulatory taking is not subject to any set formula for determining how far is too far. Courts prefer to engage in essentially *ad hoc*, factual inquiries. Whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely upon the particular circumstances in that case.

In engaging in these essentially *ad hoc*, factual inquiries, Supreme Court decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. The government may execute laws or programs that adversely affect recognized economic values.

More importantly, in instances in which a state tribunal reasonably concluded that “the health, safety, morals, or general welfare” would be promoted by prohibiting particular contemplated uses of land, the Supreme Court has upheld land use regulations that destroyed or adversely affected recognized real property interests which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.

However, a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a taking. Whether the interference with an individual’s property is of such a magnitude that there must be an exercise of eminent domain and compensation to sustain it, inquiry may be narrowed to the question of the severity of the impact of the law on the owner’s parcel.

The *Penn Central* factors have given rise to vexing subsidiary questions and have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules. It requires a careful examination and weighing of all the relevant circumstances. Each one will be discussed in turn.

The regulation’s economic impact on the landowner

The focus here is upon the magnitude of the County’s denial and the regulation’s economic impact on Paula. Essentially, whether it is discriminatory, in that the County’s decision arbitrarily singles out her particular parcel for different, less favorable treatment than the neighboring ones.

Here, there are no facts to show that land use control to protect certain endangered species is part of some comprehensive plan under the recently enacted state law. In fact, last year, in compliance with County regulations, Paula expended a substantial amount of money in determining the economic feasibility of developing 10 acres. Thereafter, she submitted a development application to County seeking to construct 30 homes on those 10 acres. Her application was denied.

To support the County’s denial, it is a “state” law and likely embodies some type of comprehensive plan to preserve and protect certain endangered species wherever they might be found in the state. The County’s basis for Paula’s denial was based on that state law and may have been pursuant to its plan.

Without showing the County’s denial was inevitably arbitrary or unprincipled, or at least subjective, singling out Paula for disparate and unfair treatment, may not be enough to overcome this factor.

The extent to which the regulation interferes with her reasonable investment-backed expectations

The more drastic the reduction in value of the owner's property, the more likely a taking is to be found. A very drastic diminution in value, *i.e.*, much more than 50%, is required and the degree to which it interferes with legitimate property interests. Case law has supported 75% diminution in value caused by zoning law and 87 1/2% diminution in value overall of a property.

Here, Paula expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. She did so in reliance on and in compliance with County regulations. More importantly, the 10 acres are worth \$4,000,000 if development is permitted and \$200,000 if it is not. This is a 500% loss in value minus, of course, the cost of developing, housing, etc... Thus, the extent to which the regulation interferes with her reasonable investment-based expectations is quite substantial.

On the other hand, the state may point out that Paula may continue to use the property precisely as it has been used for the past many years. In fact, Paula has yet to begin actual development of the property. Of course, taking into consideration the amounts she expended determining its economic feasibility. Essentially, the law is not interfering with what must be regarded as Paula's primary expectation concerning the use of the parcel. She is likely not only to profit from the land but also to obtain a "reasonable return" on her investment.

Still, this factor seems to weigh in Paula's favor due to the drastic reduction in value of her property.

Character of the government action

The regulation affects property interests through a public program adjusting the benefits and burdens of economic life to promote the common good of protecting endangered species. This is reasonably necessary to the effectuation of a substantial public purpose, but it has an unduly harsh impact upon Paula's use of the property. Legislation designed to promote the general welfare commonly burdens some more than others.

Here, there are no facts to show whether Paula is uniquely burdened by the legislation. If she is solely burdened and unbenefited then this would more likely be a taking. If it is part of an orderly implementation of a comprehensive public program and just so happens Paula is one of the burdened property owner's then the regulation is likely non-compensable.

Conclusion

On balance, it seems the state law and therefore the County's denial is not a "partial" taking under the principles of *Penn Central*. The government action is for a legitimate state interest, Paula still has the primary expectation concerning the use of her parcel, and assuming the state law was not enacted arbitrarily, the impact on Paula is for the common public good. While a court may award Paula the substantial amount she expended in reliance on current County regulations, it will not award her an amount anywhere near the \$4,000,000 the property would be worth *if* developed.

Based on that *rationale*, the trial court correctly ruled on County's denial of Paula's development application in that it did not constitute a "partial" taking within the meaning of the Fifth Amendment. It is so ordered.

Organization and structure: Answering the calls of the question and numbering according to how the examiners provide it. Answering each call specifically and addressing each issue within. Making logical coherent arguments supported by the law and facts. **9%**

1. Did the trial court correctly rule that County’s denial of Paula’s development application did not constitute a total taking?

31%

Standing

Ripeness

State Action

Police Power

Fifth (5th) Amendment – Takings Clause

Physical Invasion Taking

Total Taking (The “Lucas” Rule)

2. Did the trial court correctly rule that County’s denial of Paula’s development application did not constitute a partial taking?

60%

Partial Taking (The “Penn Central” Factors)

The regulation’s economic impact on the landowner

The extent to which the regulation interferes with her reasonable investment-backed expectations

Character of the government action

Conclusion

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