Takings Law, *Lucas*, and the Growth Management Act

John M. Groen *
Richard M. Stephens **

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* John M. Groen is an attorney with the Pacific Legal Foundation (PLF), a non-profit, tax-exempt public interest law firm based in Sacramento, California, and operating a project office in Bellevue, Washington. B.A. (1981), Claremont McKenna College; J.D. (1987), McGeorge School of Law, University of the Pacific.

** Richard M. Stephens is a land use attorney in Bellevue, Washington. B.A. 1982, Bob Jones University; J.D. (1985), Pepperdine University School of Law.

I. INTRODUCTION

In 1990, Washington embarked on a major revision to the state laws governing land use planning. Driven by the need to update Washington planning policies in order to meet the challenge of rapid growth in the Puget Sound area, the Washington State Legislature adopted the Growth Management Act of 1990 with further amendments in 1991 and 1992 (GMA).[1] The central features of the GMA require cities and counties to adopt new comprehensive plans and development regulations,[2] establish urban growth boundaries,[3] increase protection of lands designated as critical areas,[4] and prohibit development unless transportation systems satisfy certain service standards.[5]

A primary concern is whether the GMA can achieve its growth management objectives without violating the Fifth

1. 1990 Wash. Laws 1972, 1st Ex. Sess., ch. 17 (amended by 1991 Wash. Laws 2903, 1st Sp. Sess., ch. 32, and 1992 Wash. Laws 1050, ch. 227) (codified at WASH. REV. CODE ANN. ch. 36.70A (West 1991 & Supp. 1993),WASH. REV. CODE ANN. ch. 47.80 (West Supp. 1993), and WASH. REV. CODE ANN. ch. 82.02 (West 1991 & Supp. 1993)).

2. WASH. REV. CODE ANN. §§ 36.70A.040, .070 (West 1991).

3. *Id.* § 36.70A.110 (West 1991 & Supp. 1993).

4. *Id.* § 36.70A.060.

5. *Id.* § 36.70A.070(6)(e) (West 1991).

Amendment to the United States Constitution, which states as follows: "Nor shall private property be taken for public use, without just compensation."[6] The principle is now well established that land use regulations may cause a "taking" even though legal title remains with the private owner. Under the "regulatory takings" doctrine, a land use restriction may have such a drastic effect on the owner's interests that the property is considered taken for public use.[7] The constitutionally required remedy is payment of just compensation.[8]

Evaluating liability under the regulatory takings doctrine has long been difficult. The general rule was set in 1922 in *Pennsylvania Coal Co. v. Mahon*,[9] where Justice Holmes explained that "while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking."[10] But over fifty years later, in *Penn Central Transportation Co. v. New York*,[11] the Supreme Court admitted that clear standards for determining just what is "too far" were still lacking.[12] In addition, the takings issue has been confounded by doctrinal inconsistencies between the regulatory takings principle of *Pennsylvania Coal* and the conflicting view represented by the 1887 case of *Mugler v. Kansas*.[13] In sharp contrast with *Pennsylvania Coal*, *Mugler* held that a valid police power regulation could not result in a taking.[14] Although *Pennsylvania Coal* was often viewed as rendering

6. U.S. CONST. amend. V. *See also* WASH. CONST. art. I, § 16 ("No private property shall be taken or damaged for public or private use without just compensation having first been made.").

7. *See generally* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

8. First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304 (1987). The government may choose to repeal a regulation that is held to effect a taking, but damages must still be paid for the "temporary taking" that occurred while the regulation was in effect. *Id.* at 321.

9. 260 U.S. 393 (1922).

10. *Id.* at 415 (emphasis added).

11. 438 U.S. 104 (1978).

12. *Id.* at 123-24.

13. 123 U.S. 623 (1887).

14. *Mugler* involved a challenge to a state law prohibiting the manufacture and sale of intoxicating liquors. The plaintiff, a beer distiller, contended that the law rendered his brewery valueless and sought compensation under both a due process and takings theory. The decision points out that "all property is held under the implied obligation that the owner's use of it shall not be injurious to the community," *id.* at 665, and that under this principle, "regulating and abating nuisances is one of its ordinary functions." *Id.* at 667. The Court upheld the law as a legitimate exercise of

Mugler obsolete, the Supreme Court nevertheless has, on occasion, continued to cite *Mugler* without addressing its conflict with *Pennsylvania Coal*.[15] Not surprisingly, this unresolved tension has been a source of much confusion and misinterpretation.[16]

The *Pennsylvania Coal/Mugler* dichotomy reached its peak with the Supreme Court's 1987 decision in *Keystone Bituminous Coal Assoc. v. DeBenedictus*.[17] Although *Keystone* was a *Pennsylvania Coal* "too far" type of regulatory taking case, the Court quoted *Mugler* at length[18] and stated that the early *Mugler* era cases were not subsequently overruled by *Pennsylvania Coal*.[19] As a result, one court concluded that *Pennsylvania Coal* had been reduced as "a precedent pretty much limited to its own peculiar facts."[20] However, three months later, the Supreme Court in *First English Evangelical*

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the police power and rejected the distiller's claim for compensation under the Takings Clause. *Id.* at 668-69.

15. *See, e.g.*, Keystone Bituminous Coal Assoc. v. DeBenedictus, 480 U.S. 470, 489 (1987); Goldblatt v. Hempstead, 369 U.S. 590, 592-93 (1962); Miller v. Schoene, 276 U.S. 272, 280 (1927).

16. The fundamental conflict between *Mahon* and *Mugler* and resulting confusion has been recognized by many commentators and courts. *See, e.g.*, FRED BOSSELMAN, THE TAKING ISSUE 118-36 (1973); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L.R. 1057, 1063 (1980); Florida Rock Industries, Inc. v. United States, 8 Cl. Ct. 160, 170-71 (1985), *cert. denied*, 479 U.S. 1053 (1987); Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 901 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); Barbian v. Panagis, 694 F.2d 476, 485 n.7 (7th Cir. 1982).

17. 480 U.S. 470 (1987).

18. *Id.* at 489. The *Keystone* Court also referenced *Miller v. Schoene*, 276 U.S. 272 (1928), where the uncompensated destruction of ornamental cedar trees was justified to prevent a disease from spreading and destroying valuable apple orchards. *See Keystone*, 480 U.S. at 490. However, *Miller* is distinguishable as being within a narrow "public necessity/emergency doctrine" applicable to the physical destruction of property. *See* discussion *infra* part II.B.6.b.

Another case relied on in *Keystone* was *Plymouth Coal Co. v. Commonwealth of Pennsylvania*, 232 U.S. 531 (1914). Justice Stevens referred to *Plymouth Coal* as a case illustrating that a state's interest in safety for coal miners excuses a regulation from takings claims. *Keystone*, 480 U.S. at 488. However, *Plymouth Coal* did not involve a takings claim but was only a procedural due process case. Chief Justice Rehnquist has correctly noted that *Plymouth Coal* does not address modern takings analysis issues. *See id.* at 514 (Rehnquist, C.J., dissenting).

19. *Keystone*, 480 U.S. at 490. Specifically, the Court stated: "We reject petitioners' implicit assertion that *Pennsylvania Coal* overruled these cases which focused so heavily on the nature of the State's interest in the regulation." *Id.* The *Mugler* era cases to which the Court was referring included *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and *Reinman v. Little Rock*, 237 U.S. 171 (1915).

20. Allied-General Nuclear Serv. v. United States, 839 F.2d 1572, 1576 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988).

Lutheran Church of Glendale v. Los Angeles[21] strongly reaffirmed the regulatory takings principle and stated that *Pennsylvania Coal* was "established doctrine."[22]

Faced with such conflicting signals from the nation's highest court, it is understandable that the Washington State Supreme Court has struggled recently in attempting to reconcile the Supreme Court cases into a coherent set of rules. Especially illustrative is *Orion Corp. v. State*,[23] which discusses the divergent lines of authority represented by *Pennsylvania Coal* and *Mugler*.[24] In *Orion*, and later in *Presbytery of Seattle v. King County*,[25] the Washington court attempted to reconcile this conflict.[26] The court retained the basic regulatory takings doctrine, but narrowed its application using a "threshold inquiry" designed to screen out most regulatory taking claims.[27] Specifically, the court focused on the public purpose for a regulation and insulated the government from takings liability where the challenged regulation protected public safety, health, the environment, or the fiscal integrity of the area and did not otherwise destroy fundamental attributes of ownership.[28]

However, subsequent to the Washington decisions, the legal landscape in United States Supreme Court takings precedent has been changed dramatically by the landmark decision in *Lucas v. South Carolina Coastal Council*.[29] Of particular

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21. 482 U.S. 304 (1987).

22. *Id.* at 316.

23. 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988) (*Orion* II).

24. *Id.* at 645-52, 747 P.2d at 1075-78.

25. 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990).

26. *Id.* at 329, 787 P.2d at 912.

27. In explaining the purpose of the threshold inquiry, the Washington State Supreme Court admitted its concern that the prospect of paying just compensation for regulatory takings may intimidate legislative bodies from adopting certain land use regulations. *Id.* at 332 n.20, 787 P.2d at 913-14 n.20 (quoting *Orion* II, 109 Wash. 2d at 649, 747 P.2d at 1077). Accordingly, the court explained that the effect of the threshold inquiry would be to diminish potential takings claims and redirect those claims into due process challenges. *Id.* at 332-33, 787 P.2d at 914. It is worth noting that similar concerns regarding the spectre of financial liability did not dissuade the United States Supreme Court from enforcing the compensation remedy. In *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), the Court was "not unmindful" of the "inhibiting financial force" of the compensation remedy upon the "degree of freedom of the land-use planning function." *Id.* at 317. However, such considerations "must be evaluated in light of the command of the Just Compensation Clause." *Id.*

28. *Presbytery*, 114 Wash. 2d at 333, 787 P.2d at 914.

29. 112 S. Ct. 2886 (1992).

significance is the *Lucas* Court's discussion of *Mugler* and the ultimate rejection of that case as a limitation on the regulatory takings doctrine. Additionally, *Lucas* rejects a public purpose/ harm prevention rationale as a basis for avoiding takings. And finally, an obvious result of *Lucas* is that the Washington "threshold inquiry" set forth in *Orion* and *Presbytery of Seattle* is now inconsistent with federal precedent.[30]

In light of *Lucas* and the recent constitutionally questionable Washington decisions, government entities charged with implementing the GMA may have a more difficult time avoiding takings liability than previously thought. Accordingly, this Article first seeks to clarify the modern takings analysis as refined by *Lucas*. Second, Washington takings precedent is contrasted with the federal approach and several key changes are suggested to make state law consistent with controlling federal precedent. Third, key aspects of the GMA are identified that can be expected to raise takings implications. By identifying potential trouble spots in the GMA now, hopefully some takings will be avoided without resort to litigation in the future.

II. ANALYSIS OF REGULATORY TAKINGS LAW

A. Historical Background

1. The Early Cases

Early in this country's history, the law became settled that ownership of private property is not absolute. Rather, ownership is qualified by an "implied limitation" whereby the owner's use may not be injurious to the use of lands owned by others.[31] Relying on this limitation, early state court decisions reasoned that a state may adopt land use restrictions that regulate or prohibit injurious and noxious uses of private property.[32] The Supreme Court eventually recognized that this implied limitation "lies at the foundation of the police power."[33]

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30. *See* discussion *infra* part II.B.

31. Commonwealth v. Alger, 7 Cush. 53 (Mass. 1853); Commonwealth v. Tewksbury, 11 Met. 55 (Mass. 1846).

32. *See* classic discussion in *Alger*, 7 Cush. at 84-86.

33. Richmond, Fredericksburg & Potomac Ry. Co. v. Richmond, 96 U.S. 521, 528 (1878); *see also* Mugler v. Kansas, 123 U.S. 623, 667 (1887) (police power "rests upon the fundamental principle that everyone shall so use his own as not to wrong and injure another").

The Takings Clause was not immediately applied to land use regulations adopted under the police power. Rather, takings principles evolved from the simple, physical concept of "direct appropriation" and progressed gradually toward the more abstract regulatory taking concept.[34] Accordingly, the early takings cases were state court decisions that typically required an actual physical appropriation from the owner. Even when government actions resulted in significant damage to private property, the state court decisions often denied compensation because, in the literal sense, there had been no "taking" (i.e., an appropriation of property by the government).[35] The corollary to the direct appropriation rule was that a police power restriction on the mere use of land was not a taking.[36]

This limited view was strongly criticized by early commentators. In 1857, Theodore Sedgwick observed that the state cases that denied compensation in the absence of an actual appropriation resulted in less constitutional protection than was afforded by the English government.[37] From Sedgwick's perspective, justice should have required a broader construc-

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34. *See* Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 225-29, 260 (1931).

35. *See, e.g.*, *Tewksbury*, 11 Met. 55; Baker v. Boston, 12 Pick. 183 (Mass. 1831); Callender v. Marsh, 1 Pick. 417 (Mass. 1823); Coates v. New York, 7 Cow. 585 (N.Y. 1827); O'Connor v. Pittsburgh, 18 Pa. 187 (1851); Green v. Borough of Reading, 9 Watts 382 (Pa. 1840).

In his 1857 treatise on constitutional law, Theodore Sedgwick recounted a number of state cases where compensation was denied even though physical destruction or severe injury to property had occurred. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 520-23 (1857). Based on this review, Sedgwick concluded that: "It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious." *Id.* at 519.

36. One of the leading cases was *Alger* where the Massachusetts Supreme Court explained that:

> [A]lthough it may diminish the profits of the owner . . . [a land use restriction] is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain.

Alger, 7 Cush. at 86.

For an excellent and concise review of the state cases that developed the early distinction between police power regulations and direct appropriation takings, *see* BOSSELMAN, *supra* note 16, at 106-14; SEDGWICK, *supra* note 35, at 501, 505-09.

37. SEDGWICK, *supra* note 35, at 524. *See generally id.* at 523-24 (contrasting American cases with the English disposition in similar cases where private property is damaged as a result of public works such as highway and railway construction).

tion of the Takings Clause from the very beginning.[38]

Similarly, Justice Smith of the New Hampshire Supreme Court stated that a misconception of the term "property" was why a number of early state cases had not applied the takings provision to police power restrictions of use.[39] Justice Smith explained that the term property referred not only to land, but also to the rights of the owner in relation to the land, including the right of use.[40]

> The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make "property" valuable. Among these elements is, fundamentally, the right of use, including, of course, the corresponding right of excluding others from the use. . . . "To deprive one of the use of his land is depriving him of his land;" for, as Lord Coke said,—"What is the land but the profits thereof?" The private injury is thereby as completely effected as if the land itself were physically taken away.[41]

These criticisms of the state cases were soon vindicated by the United States Supreme Court. In its first significant ruling interpreting the term "taking," the Supreme Court in *Pumpelly v. Green Bay & Mississippi Canal Co.*[42] rejected the argument that in order to effect a taking property must be

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38. SEDGWICK, *supra* note 35, at 524. Sedgwick states:

> I cannot refrain from the expression of the opinion, that this limitation of the term *taking* to the actual physical appropriation of property or a divesting of title is, it seems to me, far too narrow a construction to answer the purposes of justice . . . [I]t seems very difficult in reason to show why the State should not pay for property of which it destroys or impairs value, as well as for what it physically takes.

Id. (emphasis in original).

39. Eaton v. B. C. & M. R. R., 51 N.H. 504, 511 (1872). Justice Smith explained:

> The constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read,—"No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable."

Id.

40. *Id.*

41. *Id.* at 512 (citing People v. Kerr, 37 Barb. 357, 399 (N.Y. App. Div. 1862) (Sutherland, J.); Wynehamer v. People, 13 N.Y. 378, 396 (1856) (Comstock, J.)).

42. 80 U.S. 166 (1871).

actually appropriated from the owner.[43]

In *Pumpelly*, a government authorized dam resulted in the flooding of private land and thereby "worked an almost complete destruction of [the property's] value."[44] The Court explained that the purpose of the Takings Clause is to protect the rights of the individual; therefore, it would be an unsatisfactory result if the government could destroy value entirely without making compensation merely "because, in the narrowest sense of that word, it is not taken for public use."[45] The Court added that a literal construction

> would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[46]

Like Sedgwick, the Court determined that a literal interpretation would result in less constitutional protection than was afforded under English law, and the takings provision would thus become an instrument of oppression rather than protection to individual rights.[47]

Pumpelly is significant in Supreme Court takings jurisprudence because it establishes at the outset that a "taking" does not require a direct exercise of the power of eminent domain. Moreover, the Court recognized that government actions may result in a taking when the practical effect is to deny the owner the use of property. The Court stated that "there are

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43. Prior to *Pumpelly*, the Court recognized that states have an inherent sovereign power of eminent domain, West River Bridge Co. v. Dix, 47 U.S. 507 (1848), and on two occasions restated without significant analysis the narrow view of takings recognized by state courts. *See* Legal Tender Cases, Knox v. Lee and Parker v. Davis, 79 U.S. 457, 551 (1871); Smith v. Corporation of Washington, 61 U.S. 135, 147-49 (1857).

44. *Pumpelly*, 80 U.S. at 177. The defendant contended that everyone who buys property on a navigable river purchases subject to the superior rights of the commonwealth and that the flooding damage is a consequential result of the government's right to improve navigation. *Id.*

45. *Id.* at 177-78.

46. *Id.* at 178.

47. *Id.* at 179. In rejecting the literal interpretation, the *Pumpelly* Court also expressly stated its awareness of the numerous state cases that upheld various government projects without redress for damages to private property. The Court clarified that while denial of compensation was correct in some applications, the Court was of the opinion that the state cases had "gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it." *Id.* at 180-81.

numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it."[48]

Hindsight reveals that these considerations foreshadowed the eventual acknowledgement of the regulatory takings doctrine in *Pennsylvania Coal Co. v. Mahon*.[49] Although that doctrine was not fully acknowledged until 1922, *Pumpelly* demonstrates that protecting the owner's right of reasonable use is necessarily within the historical purposes of the Takings Clause.

2. The *Mugler* Era

A key role in the development of takings jurisprudence was held by *Mugler v. Kansas*.[50] The rationale of this decision, however, is often misinterpreted as supporting a noxious-use exception to the regulatory takings doctrine. To understand *Lucas*' subsequent explanation of *Mugler*, a close review of *Mugler*'s historical context is necessary.

Mugler involved a challenge to a state law prohibiting the manufacture and sale of intoxicating liquors.[51] The plaintiff, a beer distiller, contended that the law rendered his brewery valueless.[52] On review, the Court concluded that liquor prohibition was a legitimate exercise of the state's police power because intoxicants were a source of much "misery, pauperism, and crime,"[53] and that the liquor business "had become a nuisance to the community."[54] Mugler, however, contended that even if prohibiting the manufacture of liquor was a proper exercise of the police power, compensation was nevertheless required for the resulting diminution in value to his property.[55]

The Court first rejected Mugler's due process theory for compensation. Although property owners may incur economic burdens resulting from otherwise valid police power regulations, those burdens were not recoverable under the due process guarantee of the Fourteenth Amendment. The Court

48. *Id.* at 179.

49. 260 U.S. 393 (1922).

50. 123 U.S. 623 (1887).

51. Mugler presented these arguments in defense to an action brought by the state for violation of the statute. *Id.* at 653.

52. *Id.* at 657, 664.

53. *Id.* at 658-59.

54. *Id.* at 667.

55. *Id.* at 664.

explained that due process was not incompatible with the implied limitation that property is owned subject to valid police power regulation.[56] Similar to Justice Holmes' later explanation in *Pennsylvania Coal* that government "could hardly go on" if required to pay for every change in the law,[57] Justice Harlan in *Mugler* likewise explained that the existence and safety of organized society could not be burdened with the condition of compensating individual owners for the pecuniary losses they may sustain.[58] Accordingly, compensation was not available under the due process guarantee.

The Court also rejected Mugler's takings theory for compensation. In rejecting the takings claim, the Court ignored the principles expressed in *Pumpelly* and instead simply applied the sharp distinction developed in the early state cases between physical takings under eminent domain and police power restrictions of use.[59] The Court concluded that an exercise of the police power for legitimate purposes "is very different from taking property for public use."[60] The *Mugler* decision thus became the leading authority for the proposition that a police power restriction on the use of land could not result in an eminent domain taking.[61] This view continued to

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56. In the words of the Court:

> The principle that no person shall be deprived of life, liberty, or property, without due process of law . . . has never been regarded as incompatible with the principle . . . that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

Id. at 665 (citing Boston Beer Co. v. Massachusetts, 97 U.S. 25, 32 (1877); Commonwealth v. Alger, 7 Cush. 53 (Mass. 1853)).

Significantly, the Court did recognize that the Fourteenth Amendment applies when "it is apparent that [a regulation's] real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law." *Id.* at 669.

57. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

58. *Mugler*, 123 U.S. at 669.

59. *Id.* at 668-69. *Pumpelly* was distinguished on its facts as involving a physical invasion or practical ouster of possession, whereas *Mugler* was no more than a use restriction under the police power. *Id.* *See also* Transportation Co. of Ohio v. Chicago, 99 U.S. 635, 642 (1879) (characterizing *Pumpelly* as an extreme case distinguishable as involving a physical invasion or practical ouster of possession). The Supreme Court subsequently applied *Pumpelly* in several cases involving physical encroachment upon private property. *See, e.g.*, United States v. Lynah, 188 U.S. 445 (1903) (overflow of rice plantation was a taking); *cf.* Bedford v. United States, 192 U.S. 217 (1904) (compensation denied where government caused erosion of property).

60. *Mugler*, 123 U.S. at 669.

61. Professor Joseph Sax likewise concluded that the takings issue in *Mugler* turned not on the economic consequences of the government action, but on the qualitative distinction between the police power and eminent domain. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 38-39 (1964). *See also* John W.

dominate judicial thinking until *Pennsylvania Coal* was decided in 1922.

It is significant that the taking claim was rejected not because of any special noxious qualities of the proposed use, but solely because of the distinction between government appropriations under eminent domain and government restrictions of use under the police power. Later Supreme Court cases confirm that the takings conclusion in *Mugler* did not hinge on public health or nuisance abatement objectives, but turned on the fact that the regulation was construed as a valid exercise of the police power.[62]

By effectively blocking Takings Clause review of land use regulations, *Mugler* limited constitutional review to substantive due process claims.[63] When a taking claim was raised, the analysis often went no further than to recite the *Mugler* rule that a police power restriction on the use of property could not effect a taking.[64] *Reinman v. Little Rock*[65] and *Hadacheck v.*

Ragsdale, Jr., *A Synthesis and Integration of Supreme Court Precedent Regarding the Regulatory Taking of Land*, 55 UMKC L. REV. 213, 227-29 (1987).

62. *See, e.g.*, Chicago, Burlington & Quincy Ry. v. Illinois, 200 U.S. 561 (1906). In that case, a drainage district required the tearing down of a private bridge so that available farmland could be increased. The public purposes were purely economic objectives to improve commerce and the general welfare. *Id.* at 585. There was no concern for public health or safety. The owner of the destroyed bridge argued that this takings claim was different from *Mugler* because here the government purpose was not to abate a nuisance or otherwise protect public health, safety, or morals. The Court, however, rejected that distinction. Under *Mugler's* broad rule, even where general welfare and economic purposes are the sole basis for regulation, a valid police power use restriction cannot effect a taking. The Court stated:

> Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety, *any more than under a police regulation having no relation to such matters, but only to the general welfare*. The foundations upon which the power rests are in every case the same.

Id. at 592-93 (emphasis added). *See also* Sweet v. Rechel, 159 U.S. 380, 398-99 (1895) (rejecting the argument that public health or nuisance abatement purposes could alone be a sufficient basis for denying compensation).

63. Regulations were also occasionally challenged on procedural due process grounds. *See, e.g.*, Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914). In addition, the rule denying compensation to landowners for consequential damages, except when property had been actually appropriated, caused some states to adopt constitutions providing that property shall not be "taken *or damaged* for public use without compensation." Richards v. Washington Terminal Co., 233 U.S. 546, 554 (1914) (emphasis in original).

64. A good example of the *Mugler* era review is *Powell v. Pennsylvania*, 127 U.S. 678 (1888). In that case, Pennsylvania had enacted a law prohibiting the manufacture and sale of oleomargarine (imitation butter). The effect was to destroy the plaintiff's valuable business and render his buildings and machinery useless. The Court stated that the case was "governed by the principles announced in *Mugler v. Kansas*." *Id.* at

Sebastian,[66] for instance, are classic examples of the limited review available under the *Mugler* era.

3. *Pennsylvania Coal* and the Birth of the Regulatory Takings Doctrine

Although the recent *Lucas* decision adds much to our understanding of the regulatory takings doctrine, the modern analysis remains grounded in *Pennsylvania Coal Co. v. Mahon*.[67] Indeed, *Lucas v. South Carolina Coastal Council*[68]

683. Accordingly, the only issue discussed was whether the law was a valid exercise of the police power. Applying the standard from *Mugler*, the Court found the legislation valid because it was not shown there was "no real or substantial relation" to the legitimate police power objectives of public health and preventing fraudulent sales. *Id.* at 684. Once the legislation was upheld as a proper exertion of the police power, the takings claim was summarily rejected with one sentence at the end of the opinion: "This [takings] contention is without merit, as was held in *Mugler v. Kansas*." *Id.* at 687. *See also* Chicago, Burlington & Quincy Ry., 200 U.S. 561, 583-84 (1906); New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453, 462 (1905); Chicago, Burlington & Quincy Ry. v. Chicago, 166 U.S. 226, 252 (1897).

65. 237 U.S. 171 (1915). At issue in *Reinman* was a city ordinance prohibiting operation of livery stables within a densely populated business district. The city considered livery stables in that area to constitute a nuisance. *Reinman*, 237 U.S. at 174, 176. Although the plaintiffs alleged substantial losses if required to relocate their business, a taking claim was not presented to the Supreme Court. *Id.* at 173. Rather, the plaintiffs contended that because they had operated the livery business in that location for a long period of time, prohibiting that use was "unreasonable and arbitrary" and thus a violation of the due process and equal protection guarantees of the Fourteenth Amendment. *Id.* at 177. The Court rejected the argument and explained that regulating the location of livery stables in a thickly populated city was within the proper range of police power activity. Significantly, the *Reinman* decision lacks any takings analysis whatsoever.

66. 239 U.S. 394 (1915). In *Hadacheck*, a city ordinance sought to abate a public nuisance by prohibiting the manufacture of bricks within city limits. The effect of the ordinance was to diminish the value of plaintiff's property from $800,000 to $60,000. Although the petition alleged a taking without compensation, the Supreme Court's opinion completely ignores this charge and reviews the ordinance only as an exercise of the police power under due process and equal protection standards. The Court pointed out that the only limitation on the police power is that it "not be exerted arbitrarily or with unjust discrimination." *Id.* at 411. The Court analogized to *Reinman* and concluded that the police power was properly exercised. In *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), the United States Court of Appeals for the Federal Circuit properly recognized that *Hadacheck* "appears to belong to the period when it was held a valid 'police power' regulation could not also be an exercise of eminent domain. The case generally considered to have broken with this analysis came later: *Pennsylvania Coal Co. v. Mahon*." *Id.* at 901.

67. 260 U.S. 393 (1922). The modern era in takings jurisprudence is most significantly marked by *Pennsylvania Coal*. However, several earlier cases also illustrated that *Mugler's* mechanical distinction between the police power and eminent domain would give way, and that the principles expressed in *Pumpelly* would be applied in a larger context. *See, e.g.*, Martin v. District of Columbia, 205 U.S. 135, 139 (1907). *See also* Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908);

expressly reaffirms the importance of the 1922 decision.[69] *Lucas* directs attention to that part of *Pennsylvania Coal* where Justice Holmes explained, in a manner similar to the principles first expressed in *Pumpelly*, that regulation under the police power which prohibits the economic use of property "has very nearly the same practical effect for constitutional purposes as appropriating or destroying it."[70] Meaningful protection from uncompensated acquisition therefore requires application of the Takings Clause to use restrictions under the police power.[71]

Pennsylvania Coal represents a dramatic advance in takings law from the narrow rule applied in *Mugler*.[72] No longer

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Interstate Consolidated Ry. v. Massachusetts, 207 U.S. 79, 87 (1907); Rideout v. Knox, 19 N.E. 390, 392 (1889).

Among these early cases, the most significant was *Block v. Hirsh*, 256 U.S. 135 (1921), where the Court recognized that the police power may be exercised to restrict property rights only to a certain extent without providing compensation. *Id.* at 156. The question was whether the regulation went "too far." *Id.*

There were also several early state court decisions that recognized the inherent difficulty of attempting to maintain the sharp distinction between police power restrictions on use and takings by eminent domain. *See* Commonwealth v. Alger, 7 Cush. 53, 86 (Mass. 1853) (stating that it is often difficult to distinguish between the police and eminent domain powers); Commonwealth v. Tewksbury, 11 Met. 55, 59 (Mass. 1846) (stating that it is extremely difficult to lay down any general rule).

68. 112 S. Ct. 2886 (1992).

69. Justice Scalia explained that prior to *Pennsylvania Coal*, it was generally thought that the Takings Clause applied only to a direct appropriation of property or to the equivalent of a practical ouster of possession. *Id.* at 2892. However, in *Pennsylvania Coal*, the Court recognized that meaningful protection against physical appropriations must also include protection against government power to redefine ownership interests: "If instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature would be to extend the qualification more and more until at last private property disappear[ed].' " *Id.* at 2892-93 (quoting *Pennsylvania Coal*, 260 U.S. at 415).

70. *Pennsylvania Coal*, 260 U.S. at 414 (cited with approval in *Lucas*, 112 S. Ct. at 2892).

71. *Lucas*, 112 S. Ct. at 2892.

72. It is unfortunate that the majority in *Pennsylvania Coal* did not directly reference *Mugler* or explain how the advance in takings law would affect prior precedent. However, the break from *Mugler* is made apparent by the argument presented by Justice Brandeis' dissent in *Pennsylvania Coal*. Justice Brandeis expressly relied on *Mugler* and *Hadacheck* in arguing that a legitimate exercise of the police power cannot be a taking. *Pennsylvania Coal*, 260 U.S. at 417-18 (Brandeis, J., dissenting); *see also* San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 650 n.16 (1981) (Brennan, J., dissenting) (interpreting Brandeis' dissent as arguing the absolute position that valid police power regulation cannot cause a taking); Florida Rock Indus., 791 F.2d 893, 901 (Fed. Cir. 1986) ("Justice Brandeis' dissent cites *Mugler v. Kansas* and *Hadacheck v. Sebastian* and points out quite clearly how the Court [in *Pennsylvania Coal*] is breaking with its precedents.").

could the takings issue be resolved simply by concluding that the challenged regulation was a legitimate exercise of the police power.[73] Rather, a regulation must also be analyzed to determine whether the degree of interference with the private owner's rights went "too far" and must be recognized as a taking. That question would ultimately "depend[ ] upon the particular facts" of the case.[74]

B. Where are We Now? Takings Law After Lucas

1. The *Lucas* Facts and Procedural History

In *Lucas v. South Carolina Coastal Council*,[75] the issue was whether a regulatory taking occurred when a state law blocked construction of a house on beachfront property. In 1986, David Lucas paid $975,000 for two residential lots, intending to build single family homes on the parcels.[76] The parcels were zoned for single family residential construction and there were no restrictions upon such a use.[77] Other homes already existed on lots immediately adjacent to Lucas' lots and throughout the area.[78]

Two years after Lucas' purchase of the property, the South Carolina Legislature enacted the Beachfront Management Act.[79] Pursuant to the Act, the South Carolina Coastal Council prohibited home construction seaward of a newly established setback line.[80] Lucas' lots were entirely seaward of the line. Construction of any habitable structure was completely foreclosed[81] and, at best, Lucas could build a walkway or small

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73. *See* Florida Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 170-71 (1985), *cert. denied*, 479 U.S. 1053 (1987) (reviewing cases since *Pennsylvania Coal* that have consistently rejected the *Mugler* analysis); Morton Thiokol, Inc. v. United States, 4 Cl. Ct. 625, 630 (1984) (stating that *Mugler* analysis has "disappeared over the horizon"); Barbian v. Panagis, 694 F.2d 476, 485 n.7 (7th Cir. 1982) (stating that "the Court has retreated from [*Mugler*] in more recent decisions"). *See also* Frank Michelman, *Property as Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1108 (1981) (stating that police power servitude met its Waterloo in *Pennsylvania Coal*).

74. *Pennsylvania Coal*, 123 U.S. at 413.

75. 112 S. Ct. 2886 (1992).

76. *Id.* at 2889.

77. *Id.* at 2890.

78. *Id.* at 2889.

79. *Id.* (citing Beachfront Management Act, S.C. CODE ANN. § 48-39-290 et seq. (Law. Co-op. Supp. 1990)).

80. *Id.* at 2889-90 (citing S.C. CODE ANN. § 48-39-290(A) (Law Co-op. Supp. 1988)).

81. *Id.* at 2889.

deck on his property.[82]

The central purpose of the Act was to prevent erosion of the beach/dune system resulting from construction of houses on oceanfront property.[83] The South Carolina State Legislature found that preserving the beach/dune system was "extremely important" to the people of the state in part because the system "protects life and property by serving as a storm barrier" and "provides habitat for numerous species of plants and animals, several of which are threatened or endangered."[84] Lucas did not challenge the validity of the Act as a lawful exercise of the police power, nor did he take issue with the public purpose for adopting the Act.[85]

Following a bench trial, the South Carolina Court of Common Pleas found that the construction ban on Lucas' property "deprive[d] Lucas of any reasonable economic use of the lots."[86] The court thus concluded that Lucas' property had been taken and ordered payment of just compensation of approximately $1.2 million.[87]

Relying on *Mugler* and *Keystone Bituminous Coal Assoc. v. DeBenedictus*,[88] the South Carolina Supreme Court reversed.[89] The state court ruled that the significant public purposes for the Act shielded the state from liability under a takings claim even though the property owner was denied all economically viable use of the property.[90] The court reasoned that when a regulation respecting the use of property is designed "to prevent serious public harm,"[91] no compensation is owing under the Takings Clause, regardless of the impact on the property owner.[92] The United States Supreme Court

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82. *Id.* at 2889-90 n.2 (citing S.C. CODE ANN. §§ 48-39-290(A)(1), (2) (Law. Co-op. Supp. 1988)).

83. *See* S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1991).

84. *Lucas*, 112 S. Ct. at 2896 n.10 (quoting S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1991)). Other public purposes for the Beachfront Management Act included promoting tourism, providing a natural environment for South Carolina residents to spend their leisure time, preserving the unique beach/dune system vegetation and generally preventing the effects of erosion. *Id.*

85. *Id.* at 2890, 2896.

86. *Id.* at 2890.

87. *Id.*

88. 480 U.S. 470 (1986).

89. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C.), *rev'd*, 112 S. Ct. 2886 (1992).

90. *Id.* at 898-902.

91. *Id.* at 899 (citing Mugler v. Kansas, 123 U.S. 623 (1887)). *See generally Lucas*, 112 S. Ct. at 2890.

92. *Lucas*, 404 S.E.2d at 899; *Lucas*, 112 S. Ct. at 2890.

granted review.[93]

2. The *Lucas* Categorical Test: Denial of All Economically Viable or Productive Use

The Supreme Court's takings analysis in *Lucas* recognizes at least two situations in which regulatory action is "categorically" compensable without need for further inquiry. The first is when government regulation compels the owner to suffer a physical invasion of the property.[94] The second is "where a regulation denies all economically beneficial or productive use of land."[95] This second theory was at issue in *Lucas*.

The *Lucas* Court held that a taking is categorically established when a government regulation denies all economically viable or productive use of the property. The basis for the rule is that, from the landowner's point of view, a total deprivation of beneficial use is the practical equivalent of a physical appropriation.[96] In addition, the Court pointed out that requiring property to be left in its natural state, without economically beneficial or productive options for its use, creates a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[97] Quoting Justice Brennan, the Court reasoned that "the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation. . . ."[98] Accordingly, where property is required to be left economically idle in the name of the common good, *Lucas* establishes that a taking

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93. Lucas v. South Carolina Coastal Council, 112 S. Ct. 436 (1991).

94. *Lucas*, 112 S. Ct. at 2893. *See generally* Yee v. Escondido, 112 S. Ct. 1522, 1528 (1992) (holding that a physical taking occurs where government "*requires* the landowner to submit to the physical occupation") (emphasis in original); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that placement of cable television equipment on apartment building is an invasion); United States v. Causby, 328 U.S. 256 (1946) (finding a physical invasion of air space); Hendler v. United States, 952 F.2d 1364 (9th Cir. 1991) (holding that installation of wells for monitoring and extracting migrating hazardous substances and repeated parking of government vehicles on private property is an invasion).

95. *Lucas*, 112 S. Ct. at 2893. *See generally* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Assoc. v. DeBenedictus, 480 U.S. 470, 495 (1986); Agins v. Tiburon, 447 U.S. 255, 260 (1980).

96. *Lucas*, 112 S. Ct. at 2894.

97. *Id.* at 2895.

98. *Id.* (quoting San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 652 (1982) (Brennan, J., dissenting)).

has occurred.[99]

a. The Test Does Not Require a Showing of No Value

Three issues need to be discussed regarding the economically viable use test. First, contrary to the dissent's assumption, the test does not require that property be rendered valueless.[100] The test does not focus on the value of the regulated parcel, but rather on whether any "beneficial or productive *use*" can be made of the parcel.[101] For example, if a particular parcel is required to be left in its natural state as open space or wildlife habitat, without beneficial or productive options for its use, it triggers the *Lucas* categorical takings rule.[102] Even though such property is required to be left in its natural state, the land is likely to retain some market value. For example, speculators may attach value to the property in anticipation that someday government restrictions might change and the property could become economically productive again. Or individuals and organizations that desire to preserve land in its natural state may have an interest in purchasing the property for conservation purposes.[103] This residual market value, however, does not affect the takings analysis.[104] To rule otherwise strips the economically viable use test of all meaning because property is rarely, if ever, rendered completely valueless. Accordingly, the language in *Lucas* should be read precisely to mean that a taking categorically occurs where regulation blocks all beneficial and productive use to the owner.

b. The Relevant Parcel Issue

The second issue concerning the economically viable use test involves defining the parcel to be considered when measuring whether all productive use has been denied. The Supreme Court has previously indicated that in some circumstances the unit of property to be considered for takings pur-

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99. *Id.*

100. *Id.* at 2908 (Blackmun, J., dissenting); *id.* at 2919 (Stevens, J., dissenting).

101. *Lucas*, 112 S. Ct. at 2893 (emphasis added).

102. *Id.*

103. *See, e.g.*, Formanek v. United States, 18 Cl. Ct. 785, 797 (1989) (offers by the Nature Conservancy and the Minnesota Department of Natural Resources to purchase restricted property for wildlife habitat).

104. *See id.* at 798 (finding that conservation group's offer to purchase land did not disqualify takings claim).

poses is the "parcel as a whole."[105] However, the Court later explained that its prior "verbal formulations do not solve all the definitional issues that may arise in defining the relevant mass of property. . . ."[106] The *Lucas* decision illustrates that this issue has not been resolved with regard to the economically viable use test.

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would 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 a mere diminution in value of the tract as a whole.[107]

Lucas explains that the Court's prior decisions have been inconsistent and that there remains "uncertainty regarding the composition of the denominator of in our 'deprivation' fraction . . . ."[108]

Although *Lucas* does not attempt to resolve the relevant parcel question, the Court did suggest that the answer may lie in the owner's reasonable expectations as shaped by the state's law of property. Particularly, a court may consider whether and to what degree the "interest in land" alleged to be taken has been accorded legal recognition and protection.[109] This suggestion may provide a rationale for a number of past Supreme Court decisions in which a distinct interest in property (e.g., a right to exclude others or a right to devise) was

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105. Penn Central Transp. Co. v. New York, 438 U.S. 104, 130-31 (1978); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (aggregate bundle of property rights must be "viewed in its entirety").

106. Keystone Bituminous Coal Assoc. v. DeBenedictus, 480 U.S. 470, 497 (1987). The inadequacy of these verbal formulations was clearly revealed in *Hodel v. Irving*, 481 U.S. 704 (1987). Despite the prior ruling in *Andrus*, 444 U.S. 51 (1979) (prohibition on sale of eagle feathers held not to be a taking), the Court in *Hodel* held that denial of a single strand of property interest was a taking. *Hodel*, 481 U.S. at 718. Justice Scalia, joined by Chief Justice Rehnquist and Justice Powell, concurred, but wrote separately to express the view that *Hodel* was indistinguishable from the situation in *Allard* and therefore concluded that *Hodel* "effectively limits *Allard* to its facts." *Id.* at 719 (Scalia, J., concurring). Justice Brennan also wrote a separate concurrence, joined by Justices Blackmun and Marshall, responding to Justice Scalia by stating that *Allard* is not limited to its facts and that *Hodel* is the unusual case. *Id.* at 718 (Brennan, J., concurring). In *Lucas*, the majority indicated that *Allard* may be distinguished on the ground that it involved personal property rather than realty. *Lucas*, 112 S. Ct. at 2899-2900.

107. *Lucas*, 112 S. Ct. at 2894 n.7.

108. *Id.*

109. *Id.*

held to have been taken, even though the parcel as a whole remained substantially intact.[110]

The broader rationale of *Lucas* provides a further basis for resolving the relevant parcel question. *Lucas* reasoned that a formal condemnation and a regulation that requires property to be left in its natural state have the same effect on the owner.[111] Of course, a formal condemnation often applies to only a portion of a larger parcel and compensation is required for the portion taken.[112] Similarly, a regulation that denies all use of a portion of a larger parcel functions like a condemnation of that portion. Thus, compensation should be awarded.[113]

This view is supported by *American Savings & Loan Assoc. v. Marin*.[114] In this case, the United States Court of Appeals considered the relevant parcel question and recognized that where the challenged government action divides the subject property into discrete segments by application of different zoning designations, the property must be analyzed as separate parcels for takings purposes.[115] The court relied in part on *Nectow v. Cambridge*,[116] in which a zoning restriction applied to only a portion of a larger parcel. Based on a finding that "no practical use can be made of the land," the court invalidated the zoning restriction.[117] Several other cases similarly

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110. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990) (deprivation of reversionary interest); Hodel v. Irving, 481 U.S. 704 (1987) (deprivation of right to devise property to heirs); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (right to interest on a sum of money); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (right to exclude); United States v. General Motors Corp., 323 U.S. 373 (1945) (mechanics lien).

111. *Lucas*, 112 S. Ct. at 2894-95 (practical equivalence of negative regulation and appropriation).

112. Compensation will also be awarded for severance damages when the government condemns only a portion of a larger parcel. Bauman v. Ross, 167 U.S. 548, 575 (1897); United States v. 429.59 Acres, 612 F.2d 459, 464 (9th Cir. 1980).

113. There may be situations where portions of a parcel are required to be vacant and economically unproductive, and yet do not result in a taking of that portion. For example, a typical building setback from a street, sidewalk, or property boundary is not a taking. The Supreme Court's suggestion to consider the reasonable expectations of the owner and the degree to which state law affords legal recognition and protection of the particular interest in the land may be a sufficient basis to distinguish the typical building setbacks from other instances where a portion of the parcel is set aside for achieving a particular public objective. *See Lucas*, 112 S. Ct. at 2894 n.7.

114. 653 F.2d 364 (9th Cir. 1981).

115. *Id.* at 369-70.

116. 277 U.S. 183 (1928).

117. *Id.* at 186-88. The entire tract of land contained 140,000 square feet of which 29,000 square feet was zoned residential. The larger portion of the property was unrestricted. *Id.* at 186. The master found that no practical use for residential

recognize takings of the regulated portion of a larger parcel.[118] Ultimately, the Court must resolve the uncertainties acknowledged in *Lucas*.

c. *What Is an "Economically Viable Use"?*

A final problem with the "economically viable use" test is that the Supreme Court has never fully defined the term. One interpretation, generally expressed by government attorneys, is that the test requires a showing that no income stream whatsoever is available for the property. For example, suppose a vacant parcel in a major downtown city is purchased for a fair market value of $1 million, but it is subsequently rezoned so that rather than development of an office building, the only permitted use is for a hot dog stand. The argument has been made that because the hot dog stand can produce income, the rezoning action would not result in a denial of all economically viable use.[119] The problem with this extreme view is that, while the hot dog stand may be a beneficial use, it is not a "viable" use when considered in light of the circumstances of the parcel. The better view, and the one that is consistent with the language of the test, is that the court must consider the actual viability of a use in the marketplace under the circumstances in which the property is found when a regulation is imposed. Therefore, in the hypothetical, the operation of a hot dog stand is not an economically viable use and, because no other economically viable uses are permitted, the rezoning works a taking.

This interpretation is consistent with Supreme Court

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purposes could be made of the regulated portion because there could not be an adequate return on the investment for that use. *Id.* at 187.

118. Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) (measuring deprivation of economically viable use by reference to 51 acres rendered unusable rather than entire original 250 acre tract); Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990) (taking of 98 acres of 1560 acre tract); Aptos Seascape Corp. v. Santa Cruz, 188 Cal. Rptr. 191 (Cal. Ct. App. 1982), *appeal dismissed*, 464 U.S. 805 (1983) (following American Savings & Loan Ass'n v. Marin, 653 F.2d 364 (1981), and distinguishing *Penn Central*, 438 U.S. 104 (1978), as not involving contiguous property for which different zoning designations were adopted); Fifth Avenue Corp. v. Washington County, 581 P.2d 50 (Or. 1978) (dividing 20 acre parcel for takings analysis purposes based on different zoning designations within the parcel).

119. This position was the view of Mr. Robert Liberty, attorney for 1000 Friends of Oregon, when responding to this hypothetical during questioning at oral argument before the Oregon Supreme Court in *Dodd v. Hood River County*, 1993 LEXIS 99 (Or. July 22, 1993). The audiotape of the March 4, 1993, hearing is available through the Court Clerk or the Pacific Legal Foundation.

cases. Indeed, the Court's varied references consistently indicate that the test involves determining whether a remaining use is profitable, economically productive, or commercially viable. For example, the taking in *Pennsylvania Coal* was based on the determination that the regulation made it *"commercially impracticable"* to mine certain coal.[120] In *Penn Central*, there was no taking because the challenged regulation did not interfere with "Penn Central's present ability to use the Terminal for its intended purposes and in a *gainful fashion*."[121] The regulations continued to permit "Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment."[122] Similarly, in *Nectow v. Cambridge*,[123] a residential zoning designation was unconstitutional based on a finding that "no practical use can be made of the land in question for residential purposes, because . . . there would not be adequate return on the amount of any investment for the development of the property."[124] Many state and federal courts have also ruled that permitting a reasonable return on the investment is necessary to constitute an economically feasible use and to prevent government regulation from causing a taking.[125]

3. The Ad Hoc Inquiry: Interference with Reasonable Investment-Backed Expectations

If neither of the *Lucas* categorical tests results in a taking, the court next performs an ad hoc factual inquiry into whether the regulation unfairly shifts public burdens onto private owners.[126] Footnote eight of *Lucas* confirms that this ad hoc

120. *Pennsylvania Coal*, 260 U.S. at 414 (emphasis added).

121. *Penn Central*, 438 U.S. at 138 n.36 (emphasis added).

122. *Id.* at 136.

123. 277 U.S. 183 (1928).

124. *Id.* at 187 (quoting findings of master).

125. *See, e.g.*, Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 901-03 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (consideration of fair market value); Nemmers v. Dubuque, 764 F.2d 502, 504-05 (8th Cir. 1985) (reasonable return on the difference in value with and without the regulation); Ranch 57 v. Yuma, 731 P.2d 113 (Ariz. 1986) ("reasonable return on the property"); Hornstein v. Barry, 530 A.2d 1177 (D.C. 1987), *vacated*, 537 A.2d 1131 (D.C. 1988) ("reasonable financial return"); Westchester Professional Park Assoc. v. Bedford, 458 N.E.2d 809, 816 (N.Y. 1983) ("zoning classification will be held confiscating . . . if no reasonable return can be obtained from the property as zoned"); Orion Corp. v. State, 109 Wash. 2d 621, 642, 747 P.2d 1062, 1073 (1987), *cert. denied*, 486 U.S. 1022 (1988) ("present, possible and reasonably profitable use").

126. *See Penn Central*, 438 U.S. at 123-24.

review is available even though a regulation does not deny the owner all economically viable use of the property and does not trigger the *Lucas* categorical taking rule. The Court explained as follows:

> [T]he landowner whose deprivation is one step short of complete . . . might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally.[127]

The Court relied on *Penn Central*, which established that the takings analysis will often be an "ad hoc, factual inquir[y]" that considers factors such as the economic impact of regulation and the extent of interference with investment-backed expectations.[128]

The Supreme Court has repeatedly stressed the importance of determining whether the government action unfairly shifts public burdens onto private individuals.[129] Most recently, in *Yee v. Escondido*,[130] the Court again indicated that it must determine whether ad hoc factors "suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole."[131] Likewise, the takings conclusion should be measured against this principle to ensure consistency with fundamental notions

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127. *Lucas*, 112 S. Ct. at 2895 n.8 (quoting *Penn Central*, 438 U.S. at 124).

128. *Penn Central* also identifies the "character of governmental action" as a factor to be considered. *Penn Central*, 438 U.S. at 124. However, *Penn Central* indicates that this factor merely recognizes the distinction between governmental action that causes a physical invasion and governmental action of a regulatory character, noting that a taking is more readily found in the physical invasion context. *Id.* Accordingly, *Lucas* correctly omits this distinction from the ad hoc inquiry because it is already understood that the subject matter is a use restriction, not a physical occupation taking. Of course, the character and purpose of a regulation may still have a bearing in showing that public burdens are unfairly shifted onto the shoulders of individuals.

129. In *Armstrong v. United States*, 364 U.S. 40 (1960), the Court explained that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens that, in all fairness and justice, should be borne by the public as a whole." *Id.* at 49. *See also Penn Central*, 438 U.S. at 123-24 (following *Armstrong*); *Nollan*, 483 U.S. at 835-36 n.4 (citing *Armstrong* as setting forth one of the "principal" rationales for the Takings Clause); *Pennsylvania Coal*, 260 U.S. at 416 (stating that "the question at bottom is upon whom the changes desired should fall"); *First Church*, 482 U.S. at 318 (referring to the *Armstrong* principle as "axiomatic").

130. 112 S. Ct. 1522 (1992).

131. *Id.* at 1526.

of fairness and justice and to prevent government from shifting public burdens and objectives onto private owners.

4. The Substantial Advancement Test

In addition to the above grounds, *Agins v. Tiburon*[132] established that a taking also occurs if a land use regulation fails to substantially advance legitimate state interests. This test provides an independent ground on which to base a taking.[133]

The substantial advancement test appears more like a due process test than a takings test. Indeed, the language derives from the substantive due process standard employed in *Nectow v. Cambridge*[134] and *Village of Euclid v. Ambler Realty*.[135] Like due process review, the test considers the means (substantially advance) and purposes (legitimate state interests) of the challenged regulation. However, despite its origins and similar character, the Supreme Court has recognized that this standard is a takings test, not a due process test. In effect, the test represents a blending of some due process principles into takings law.[136]

However, because it is a takings test, the substantially advance standard involves a higher degree of judicial scrutiny than the rational basis standard employed in substantive due process review. In *Nollan v. California Coastal Commission*,[137] the Supreme Court explained:

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132. 447 U.S. 255, 260 (1980).

133. *Yee*, 112 S. Ct. at 1532 (stating that the allegation that a regulation does not substantially advance a legitimate state interest "does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property. . . ."). *Nollan* also illustrates that where a regulation fails to substantially advance legitimate purposes, the takings conclusion is not altered by the fact that there may remain an economically viable use of the property. *Nollan*, 483 U.S. at 830.

134. 277 U.S. 183, 188 (1928) (holding that a land use restriction cannot be imposed if it does not bear a substantial relation to the public interest).

135. 272 U.S. 365, 395 (1926).

136. *See Agins*, 447 U.S. at 260 (citing *Nectow*, 277 U.S. 183 (1928)); *see also Penn Central*, 438 U.S. at 127 (stating that a "use restriction . . . on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."). *Penn Central* refers to language in Justice Stevens' dissent in *Moore v. East Cleveland*, 431 U.S. 494 (1977), where Stevens explained that the due process and takings guarantees were "fused" into a single standard. *Id.* at 514 (Stevens, J., concurring) (citing *Nectow*, 277 U.S. 183 (1928); *Euclid*, 272 U.S. 365 (1926)).

137. 483 U.S. 825 (1987). For a second application of *Agins*' substantially advance standard, *see* Justice Scalia's dissent in Pennell v. San Jose, 485 U.S. 1, 15-24 (1988) (Scalia, J., dissenting).

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could *rationally have decided*' that the measure adopted might achieve the State's objective."[138]

The heightened scrutiny applicable to takings claims ensures that the police power is not used as a disguised means to take property without paying compensation. *Nollan* explains that when property rights are restricted through police power regulations, there is a risk that the government chose to use regulatory power instead of the eminent domain power simply to avoid the compensation requirement of the Fifth Amendment.[139] Accordingly, courts apply the substantially advance standard to determine whether the police power is legitimately being used to regulate rather than to take property without compensation.[140]

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138. *Nollan*, 483 U.S. at 834 n.3 (citations omitted; emphasis in original). *See also* Seawall Assoc. v. New York, 542 N.E.2d 1059, 1068 (N.Y.), *cert. denied*, 493 U.S. 976 (1989) (*Nollan* requires semi-strict or heightened scrutiny); Surfside Colony, Ltd. v. California Coastal Comm'n, 277 Cal. Rptr. 371, 377 (Cal. Ct. App. 1991) ("*Nollan*, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls." (footnotes omitted)); *but see* Commercial Builders of Northern California v. Sacramento, 941 F.2d 872, 874 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992); Blue Jeans Equities West v. San Francisco, 4 Cal. Rptr. 2d 114, 118 (Cal. Ct. App.), *cert. denied*, 113 S. Ct. 191 (1992).

139. The Court stated:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

Nollan, 483 U.S. at 841 (emphasis in original). *See also Lucas*, 112 S. Ct. at 2895 ("[R]egulations that leave the owner of land without economically beneficial or productive options for its use . . . 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.") (emphasis added).

140. For example, in *Nollan*, the California Coastal Commission purported to be exercising its regulatory power over development along the coast. However, close scrutiny revealed that the public access condition did not address regulatory concerns related to the proposed development, but was in fact an attempt to use the regulatory

Although the test can be applied to any land use regulation, the most common application is to review the constitutionality of exactions imposed on property owners as a condition of receiving a development permit.[141] Under the substantially advance test, an exaction must bear an "essential nexus" to the mitigation of harms *caused by* the proposed project.[142] If the exaction is unrelated to mitigating legitimate concerns related to the project, the purpose for imposing the exaction is not regulatory, but confiscatory, and the exaction will therefore fail to substantially advance a legitimate regulatory objective and will result in a taking.[143]

5. *Lucas*' Rejection of *Mugler* and the "Public Purpose" Rationale for Denying Compensation

A key aspect of the *Lucas* decision is its clarification of *Mugler v. Kansas*[144] and other early takings cases. Although decided over a century ago, *Mugler* causes much of the present day confusion regarding regulatory takings. Indeed, *Mugler*'s distinction between police power regulations and eminent domain[145] has at times been misconstrued as supporting some type of "noxious use" or "harm prevention" exception to the modern takings analysis.[146] However, *Lucas* finally explains that the harmful or noxious use principle embodied in the *Mugler* era cases was merely the Court's early formulation of the justification for imposing police power regulations on private land.[147] While prevention of harmful use provides a justification for the exercise of the police power, *Lucas* explains that the "noxious use logic cannot serve as a touchstone to distinguish regulatory 'takings'. . . ."[148]

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power to acquire an easement over property without providing compensation. *See Nollan*, 483 U.S. at 837-39.

141. *See, e.g.*, Commercial Builders of Northern California v. Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992); Surfside Colony Ltd. v. California Coastal Comm'n, 226 Cal. App. 3d 1260 (Cal. Ct. App. 1991); Unlimited v. Kitsap County, 50 Wash. App. 723, 750 P.2d 651, *rev. denied*, 111 Wash. 2d 1008 (1988).

142. *Nollan*, 483 U.S. at 836-37.

143. *Id.*

144. 123 U.S. 623 (1887).

145. *See* discussion *supra* part II.A.

146. *See, e.g.*, Allied-General Nuclear Services v. United States, 839 F.2d 1572, 1576 (Fed. Cir.), *cert. denied*, 488 U.S. 820 (1988); First English Evangelical Lutheran Church of Glendale v. Los Angeles, 258 Cal. Rptr. 893, 898-99 (Cal. Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

147. *Lucas*, 112 S. Ct. at 2898-99.

148. *Id.* at 2899. The Court also explained that it had already rejected the view

Lucas also clarified the applicability of the "implied limitation" that the owner's use of property shall not be injurious to the use of others.[149] The South Carolina Coastal Council argued that because property is held subject to this implied limitation, the state may, through regulation, eliminate all economically viable use of property provided the regulation is characterized as preventing harmful or noxious uses.[150] The Court rejected this interpretation of the implied limitation. Justice Scalia explained that the position advocated by the Coastal Council was "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[151] In effect, the *Lucas* response reaffirmed *Pennsylvania Coal*, in which Justice Holmes explained that while "some values are enjoyed under an implied limitation, and must yield to the police power . . . the implied limitation must have its limits."[152] *Pennsylvania Coal* therefore established that one of those limits is the regulatory takings doctrine.

In addition to rejecting the idea that *Mugler* and the implied limitation principle limited takings liability,[153] *Lucas*

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that *Mugler* and its progeny were premised on any noxiousness concepts. *Id.* at 2897 (citing *Penn Central*, 438 U.S. at 133-34 n.30).

149. See discussion *supra* part II.A.

150. *Lucas*, 112 S. Ct. at 2900.

151. *Id.*

152. *Pennsylvania Coal*, 260 U.S. at 413. The Court reasoned in part that unchecked expansion of the police power would eventually lead to the abrogation of private property. *Id.* at 415.

153. The *Mugler* era cases may continue to have some limited applicability in the takings field. Specifically, the cases may assist in the *Agins* determination of whether a regulation substantially advances a legitimate state interest. *Lucas* states that the harmful or noxious use principle of *Mugler* was "simply the progenitor" of the more contemporary statement that a taking occurs where regulation fails to "substantially advance legitimate state interests." *Lucas*, 112 S. Ct. at 2897; *cf. Mugler*, 123 U.S. at 661 (stating that statute must have a "real and substantial relation" to legitimate objectives of government). This limited viability of *Mugler* makes sense because the *Agins* substantial advancement test involves a blending of substantive due process principles into the takings analysis.

Significantly, in *Keystone*, the Court stated that the *Mugler* era cases were not subsequently overruled by *Pennsylvania Coal*. *Keystone*, 480 U.S. at 490. However, the application of the *Mugler* era precedents applied only to the analysis under the *Agins* substantial advancement test. *Id.* at 485-93. The Court went on to separately analyze the degree of interference with the use and value of the coal deposits, and *Mugler* was of no concern to that discussion. *Id.* at 485, 493-502. *See also* Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1176-77 n.10 (Fed. Cir.) (recognizing limited applicability of *Mugler* and that *Keystone* separately considered whether there was a denial of economic use), *cert. denied*, 112 S. Ct. 406 (1991).

By limiting any continued relevance of *Mugler* to the inquiry under the

also addressed the contention that the protection of public safety and prevention of beach erosion and loss of wildlife habitat were public purposes that justified insulating the state from takings liability. The Court rejected such insulation theories. *Lucas* explains that the difference between a "harm-preventing" regulation and a benefit-conferring regulation is "often in the eye of the beholder."[154] For example, the Beachfront Management Act at issue in *Lucas* could be described as either preventing harm to South Carolina's ecological resources or as conferring upon the state the "benefits" of an ecological preserve.[155] Because the same interests can be described in either fashion, *Lucas* explained that it would be pointless to have the outcome of the case hang on such harm prevention terminology.[156]

The Court further reasoned that if a noxious use justification could insulate regulations from the compensation requirement, such insulation "would virtually always be allowed."[157] Because a noxious use justification can be created for practically every land use regulation, the test would be nothing more than "a test of whether the legislature had a stupid staff."[158] Such an approach would nullify the regulatory takings doctrine as a limit to the exercise of the police power.[159] The

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substantial advancement test, the doctrinal conflict between *Mugler*, *Pennsylvania Coal*, and *Keystone* goes away. To the extent that the *Mugler*-era cases demonstrate what kind of land use regulations are *legitimate exercises of the police power*, *Keystone* correctly notes that *Pennsylvania Coal* did not overrule them. However, as to whether an otherwise legitimate regulation goes too far, based on the degree of interference with private use and value, *Mugler* must continue to be recognized as irrelevant and its contrary holding obsolete.

154. *Lucas*, 112 S. Ct. at 2897.

155. *Id.* at 2898.

156. *Id.* at 2898 n.11.

157. *Id.* at 2899.

158. *Id.* at 2898 n.12.

An example of how virtually any land use regulation may be cast in substantial harm-preventing characterizations is found in *Agins v. Tiburon*, 447 U.S. 235 (1980). The city council there adopted an open space and zoning ordinance to help protect the city residents from the "ill-effects of urbanization." *Id.* at 261. The city council found that the ordinance was

> in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire, and flood, and other demonstrated consequences of urban sprawl.

Id. at 261 n.8.

159. *Lucas*, 112 S. Ct. at 2899.

Lucas Court thus rejected the harm prevention rationale as a limitation of takings liability.

6. Special Cases: No Takings Liability Where Pre-existing Limitations Preclude Compensation

One of the most intriguing aspects of *Lucas* is the discussion of pre-existing conditions that may limit a landowner's right to compensation. Specifically, *Lucas* explained that takings claims must be analyzed in light of the particular estate and corresponding rights that the owner possesses.[160] Accordingly, where the owner's title is itself limited by background principles of property law that otherwise preclude the owner from engaging in a particular use, such use can be prohibited by a government without providing compensation, even though the owner is left without alternative economic uses. Thus, compensation is not due when there is a "pre-existing limitation upon the landowner's title"[161] that would prevent the owner from engaging in the proposed use. *Lucas* explained that such pre-existing limitations "must inhere in the title itself" and cannot be newly legislated or decreed.[162] For example, common law nuisance principles preclude one owner from using property in a manner that causes flooding of a neighbor's property.[163] Because a common law nuisance action by the neighbor could successfully enjoin the flooding activity, a regulation that achieves the same result would not cause a taking even though alternative uses might not be available. Therefore, no property right is taken because the regulatory restriction merely restates or duplicates an applicable pre-existing limitation.

The problem is determining whether a pre-existing limitation applies.[164] *Lucas* offers only two examples of when back-

160. *Id.*

161. *Id.* at 2900.

162. *Id.*

163. *Id.*

164. In an effort to clarify, Justice Scalia provides an example of a pre-existing limitation that inheres in the title itself. *See Lucas*, 112 S. Ct. at 2900. The example compares Scranton v. Wheeler, 179 U.S. 141 (1900), with Kaiser Aetna v. United States, 444 U.S. 162 (1979). In *Scranton*, a riparian property owner held title subject to a pre-existing navigational servitude in favor of the government. *Scranton*, 179 U.S. at 156. *Scranton*, therefore, holds that the assertion of the servitude by government was not a taking. *Id.* at 165. In contrast, *Kaiser Aetna* demonstrates that if a navigational servitude is asserted where the private title was not subject to such a pre-existing limitation, the imposition will be a taking. *Kaiser Aetna*, 444 U.S. at 178-80. The *Lucas*

ground principles of state property law might limit the owner's inherent rights and thereby preclude compensation. The first is when the government restricts uses that could be precluded under principles of common law nuisance. The second is the "public necessity" or "public emergency" doctrine.

a. Common Law Nuisance

Lucas recognizes that an owner does not have an unrestrained right to use property in a manner that constitutes a nuisance. Typically, nuisance is defined as conduct that unreasonably interferes with the private use and enjoyment of property.[165] What qualifies as an unreasonable interference depends on the circumstances of the particular case.[166] The factors considered include (1) the degree of harm to other lands that would result from the proposed activity, (2) the social value of the activity and its suitability to the locality, and (3) the relative ease by which the harm can be avoided.[167] *Lucas* states that courts must rely on these principles of common law to determine whether a particular use is an unreasonable interference with neighboring property.[168]

Several factors in *Lucas* suggest that these common law nuisance principles will only rarely have a bearing on the compensation question. The first factor is that at the threshold level, the proscribed use must be sufficiently unreasonable that an adjoining owner could have successfully maintained a nuisance action to enjoin the activity. Thus, the mere imposition of an external effect on adjacent properties does not necessarily translate into an unreasonable interference and a nuisance. As recognized in *Lucas*, "[p]ractically all human activities . . . interfere to some extent with others or involve some risk of interference."[169] What must be shown is that the activity is unreasonable under the common law principles. The government regulation acts as a substitute for the private nuisance action and may do "no more than duplicate the result that

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Court points out that "similar treatment must be accorded confiscatory regulations." *Lucas*, 112 S. Ct. at 2900.

165. RESTATEMENT (SECOND) OF TORTS § 826 (1977).

166. *Id.* § 826 cmt. b.

167. *Lucas*, 112 S. Ct. at 2901; *see* RESTATEMENT (SECOND) OF TORTS § 826, cmts. b & c (1977).

168. *Lucas*, 112 S. Ct. at 2901. The Court specifically directed attention to the factors identified in the RESTATEMENT (SECOND) OF TORTS for guidance in this determination. *Id.* at 2901.

169. *Id.* at 2898 (quoting RESTATEMENT (SECOND) OF TORTS § 822 cmt. g (1977)).

could have been achieved in the courts" by adjacent landowners.[170]

The *Lucas* Court cautioned lower courts on this issue: "We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."[171] By directing lower courts to apply precedent objectively and reasonably, the Court implied that it anticipates that some lower courts may be tempted to apply broadly and unreasonably common law nuisance principles to avoid government liability for takings.

A second narrowing factor is the Court's placement of the burden on the government to show that a pre-existing limitation applies. In directing a remand to the state courts, *Lucas* explained that the state must identify background principles of nuisance and property law that prohibit the use intended for the property.[172] On remand, the state failed to meet this burden.

The third limiting factor is that a legislature cannot simply label an activity a nuisance and thereby avoid compensation. Legislative findings of a nuisance cannot circumvent the duty of a court to determine whether, under common law principles, a particular prohibited action constitutes a nuisance. *Lucas* teaches that a legislative characterization of a use as "noxious," or a regulation as "harm preventing," does not determine the takings question.[173] Similarly, a legislative characterization of a use as a "nuisance" cannot automatically preclude compensation.[174]

Finally, the Supreme Court stated that the nuisance exception applies narrowly. In *Lucas*, the Court pointed out that common law principles "rarely support prohibition of the 'essential use' of land."[175] Two examples identified in *Lucas* illustrate such rare situations. First, the Court explained that an owner would not be entitled to compensation if a government precluded filling in a private lake where the displaced

170. *Id.* at 2900.

171. *Id.* at 2902 n.18 (emphasis in original).

172. *Id.* at 2901-02.

173. *Lucas*, 112 S. Ct. at 2899.

174. *Id.* at 2898 n.12.

175. *Id.* at 2901 (citing Curtin v. Benson, 222 U.S. 78, 86 (1911)).

water would flood neighboring land.[176] Second, the Court indicated that compensation would not be available if government prohibits construction of a nuclear generating plant on an earthquake fault line. In contrast, in a more common situation, such as in *Lucas*, where the owner simply wanted to build a home, the Court opined that it was "unlikely" that common law principles would prevent construction.[177] Not surprisingly, the South Carolina Supreme Court has now ruled that there are no pre-existing limitations inherent in *Lucas*' property rights that would preclude building a home on his property.[178]

Decisions of several lower courts recognize that this nuisance rationale has fairly limited applicability. Activities such as limestone mining, underground coal mining, stripmining, and filling of wetlands have all been held not to be nuisances.[179] Although predating the *Lucas* decision, these results illustrate the relatively narrow application of a nuisance justification for extinguishing, without compensation, all economic use of property.

b. Public Necessity/Emergency Cases

The second limitation inherent in an owner's title, arising out of background principles of property law, involves the public necessity/emergency doctrine.[180] The common law has long held that government may, with immunity, physically destroy private property in certain situations to avert an immediate danger.[181] For example, structures in the path of a conflagration may be razed to create a firebreak without triggering the

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176. *Id.* at 2900.

177. *Id.* at 2901.

178. Lucas v. Carolina Coastal Comm'n, 424 S.E.2d 484, 486 (1992) (order on remand). Thus, Lucas is entitled to damages for a temporary taking, and, if permits to build are not issued, the taking will become permanent and additional damages will be required. *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304 (1987).

179. *See, e.g.*, Whitney Benefits v. United States, 926 F.2d 1169, 1177 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (1991) (holding that mining is not a noncompensable nuisance); Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 166-67 (1990) (holding that limestone quarries in a wetland are not a noncompensable nuisance); Western Energy Co. v. Genie Land Co., 737 P.2d 478, 482 (Mont. 1987) (holding that strip mining of coal in Montana is not within any nuisance exception).

180. This doctrine refers to "litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of fire' or to forestall other grave threats to the lives and property of others." *Lucas*, 112 S. Ct. at 2900 n.16 (citing Bowditch v. Boston, 101 U.S. 16, 18-19 (1880); United States v. Pacific RR, 120 U.S. 227, 238-39 (1887)).

181. United States v. Caltex, Inc., 344 U.S. 149, 154 (1952).

compensation requirement.[182] Other typical cases involve diseased plants, fruit, or animals that are destroyed so that the disease is prevented from spreading and wiping out healthy stocks or endangering public health.[183]

The basis for denying compensation in public necessity/emergency cases comes from the ancient prerogative powers of the English crown that could be exercised without compensation.[184] Unlike most of the king's prerogatives, which were integrated into the power of eminent domain, the emergency power has survived as a separate institution.

> The power to raze houses in a conflagration was historically one of the long list of ancient prerogative powers of the English Crown which, like most of the prerogatives, the crown could exercise without compensation. Most of the prerogatives have disappeared . . . . The emergency power, however, has survived not so much as an exception to the normal rule of compensation but as the survivor of an older institution.[185]

Accordingly, the Supreme Court has observed that a denial of compensation in this unique category of cases is based "as much upon tradition as upon principle."[186]

Although often incorrectly referred to as a regulatory taking case, *Miller v. Schoene*[187] is a public necessity case. *Miller* involved the purposeful destruction of ornamental cedar trees in response to the threat of a disease spreading to valuable apple orchards in the area. As in other public necessity cases, the state was forced to destroy the cedar trees to avert an even

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182. *See* Bowditch v. Boston, 101 U.S. 16 (1880).

183. *See generally* Annotation, *Owner's Right Under Fifth or Fouteenth Amendment to be Compensated for Property Destroyed by Public Authorities—Supreme Court Cases*, 97 L. Ed. 164 (1953). This line of authority was also followed by the Supreme Court in *United States v. Caltex, Inc.*, 344 U.S. 149 (1952), where compensation was denied when an oil terminal was destroyed by the United States military so as to prevent the facility from falling to the advantage of the invading enemy. *See also* United States v. Pacific Railroad Co., 120 U.S. 227, 234 (1887) (denying compensation for destruction of bridges during civil war); HENRY E. MILLS ON THE LAW OF EMINENT DOMAIN § 3 (2d ed. 1888) (preventing property from falling into the hands of the enemy is not compensable).

184. Stoebuck, *supra* note 16, at 1067 (1982); *Bowditch*, 101 U.S. at 18-19.

185. Stoebuck, *supra* note 16, at 1067.

186. *Pennsylvania Coal*, 260 U.S. at 415-16 (citing *Bowditch*, 101 U.S. 16 (1879); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923)).

187. 276 U.S. 272 (1927).

greater area-wide destruction of private property.[188]

Obviously, tradition and ancient prerogatives of the English crown provide little basis for any further extension of this unusual exception to the compensation requirement. Rather, recent cases illustrate that courts will closely review whether an actual emergency necessitates the destruction of private property to avert an impending peril, and if the justification is lacking, compensation will be required for the lost property.[189]

III. WASHINGTON STATE LAW IN THE POST-*LUCAS* ERA

Since 1987, perhaps no state supreme court has struggled with takings law like the Washington Supreme Court. To its credit, the Washington court has recognized the doctrinal blurring and tensions in federal takings law that existed prior to *Lucas*.[190] However, in responding to the difficulties presented by previously unresolved inconsistencies between *Mugler* and *Pennsylvania Coal*, the Washington court developed a unique approach to takings law. Most significantly, Washington's "threshold inquiry," which automatically screens out many takings challenges, is inconsistent with *Lucas* and should be abandoned.[191]

A. The Threshold Inquiry: Preventing Harm Rationale

Washington's recent struggle with federal takings precedent begins primarily with the 1987 decision in *Orion Corp. v. State*.[192] In *Orion*, the state supreme court recognized the conflict between *Pennsylvania Coal* and *Mugler*.[193] The Washington court, however, interpreted *Keystone* and *Mugler* to

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188. The Court explained that physical destruction of the cedar trees was not a taking because

> the state was under the necessity of making a choice between the preservation of one class of property and that of the other. . . . When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another.

Id. at 279.

189. Yancy v. United States, 915 F.2d 1534 (Fed. Cir. 1990); Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 521 So. 2d 101 (Fla.), *cert. denied*, 488 U.S. 870 (1988).

190. *See* Orion Corp. v. State, 109 Wash. 2d 621, 645-48, 747 P.2d 1062, 1075-77 (1987), *cert. denied*, 486 U.S. 1022 (1988).

191. *See* Presbytery of Seattle v. King County, 114 Wash. 2d 320, 329, 787 P.2d 907, 912, *cert. denied*, 111 S. Ct. 284 (1990).

192. 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988).

193. *Id.* at 645-46, 747 P.2d at 1075-76.

insulate from compensation regulations that prevent public harms:

> As we read the *Keystone Coal Ass'n* opinion, exercises of the police power cannot be characterized as a compensable taking whenever the state imposes land use restrictions in order to safeguard the "*public* interest in health, the environment, and the fiscal integrity of the area." This insulation from the takings analysis continues, even if the regulation denies a landowner all economically viable use of the property.[194]

This analysis was further refined in *Presbytery of Seattle v. King County*.[195] Under *Presbytery*, the reviewing court applies a "threshold inquiry" to determine whether the regulation is susceptible to a takings analysis. If the regulation may be characterized as preventing harm to the public interest in health, safety, the environment, or the fiscal integrity of the area, and does not destroy a fundamental attribute of ownership, the regulation is insulated from the takings analysis.[196] This initial determination considers whether the "predominant goal of the regulation" is harm prevention rather than conferring a public benefit.[197]

In conflict with *Presbytery*, *Lucas* holds that the question of whether a regulation "prevents harm" or "confers a public benefit" is irrelevant because such characterizations are in the eye of the beholder. *Lucas* states that it is "pointless" to make the takings issue "hang upon this terminology."[198] In contrast with *Presbytery*, the *Lucas* Court concluded that the "noxious-use logic cannot serve as a touchstone" to determine regulatory takings.[199] By eliminating the harm prevention/benefit conferral rationale, *Lucas* directly undermines the core component of Washington's threshold inquiry.

A creative attempt to reconcile *Presbytery* with *Lucas* was

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194. *Id.* at 654, 747 P.2d at 1080 (emphasis in original; citations omitted). The court similarly stated:

> No compensable taking can occur as long as regulations substantially serve the legitimate public purpose of prohibiting uses of property injurious to the *public* interest in health, the environment, or the fiscal integrity of the community. At most, such regulations would be subject to invalidation as an unreasonable burden, violative of substantive due process.

Id. at 657, 747 P.2d at 1081 (emphasis in original).

195. 114 Wash. 2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990).

196. *Id.* at 329-30, 787 P.2d at 912.

197. *Id.* at 329 n.13, 787 P.2d at 912 n.13.

198. *Lucas*, 112 S. Ct. at 2898 n.11.

199. *Id.* at 2899.

made by the Washington State Court of Appeals in *Powers v. Skagit County*.[200] The court suggested that the effect of *Lucas* was to impose a "prethreshold step" on the *Presbytery* framework.[201] Specifically, if Powers could show he was entitled to a categorical taking under *Lucas*, compensation would be required. But if the categorical test was not met, the Court of Appeals would apply the *Presbytery* threshold inquiry.[202] Of course, under the *Presbytery* inquiry, the challenged building restrictions would be insulated from Powers' takings claim because the restrictions were adopted to safeguard the public interest and health.[203]

The obvious problem with *Powers* is that it does not reconcile *Lucas* and *Presbytery*. The suggestion that the *Lucas* categorical test can be applied first, and then followed by *Presbytery*'s "harm prevention" inquiry, does nothing to address the fundamental conflict between *Presbytery*'s "harm prevention" inquiry and *Lucas*' rejection of that approach. In short, the *Powers* attempt to follow both *Presbytery* and *Lucas* ends up missing a key point of *Lucas*—that is, the harm prevention rationale of *Presbytery* simply does not answer the takings question.

While Washington's threshold inquiry may reflect an attempt to provide a set of rules for regulators and landowners to rely on, any certainty comes at the price of screening out legitimate takings claims and removing the protection of the Fifth Amendment. Moreover, the approach is directly undermined by *Lucas*. Washington courts should now abandon the threshold inquiry and realign state precedent with federal law.

B. Fundamental Attributes of Ownership

Assuming that *Presbytery*'s threshold inquiry is abandoned, a question arises regarding the validity of the fundamental attribute of ownership component of that inquiry. Specifically, *Presbytery* allows a taking claim to go forward if the regulation impairs a fundamental attribute of ownership, defined as the "right to possess, to exclude others and to dispose of property."[204]

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200. 67 Wash. App. 180, 835 P.2d 230 (1992).
201. *Id.* at 190, 835 P.2d at 236.
202. *Id.*
203. *Id.* at 193, 835 P.2d at 237.
204. *Presbytery*, 114 Wash. 2d at 330, 787 P.2d at 912.

This aspect of *Presbytery* works to the detriment of property owners because a key attribute of ownership is missing from the *Presbytery* list: the right to make reasonable use of property.

It is uncertain why the right to use property was left off the *Presbytery* list, especially because the Washington Supreme Court has long recognized such a right as fundamental. In *Lange v. State*,[205] the court stated the following:

> We have repeatedly recognized that "property," as used in the constitutional phrase, encompasses many rights. . . . "The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right." Article I, section 16 was intended to protect all the essential elements of ownership which make property valuable. "Ownership" in property has long been conceived as a "complex of rights" including the right [of] use.[206]

Once it is recognized that the right of use is itself a fundamental attribute of ownership, there is no longer any point in asking, as a threshold inquiry, whether a land use regulation impairs a fundamental attribute of ownership. Virtually all land use restrictions infringe on the right of use and thereby trigger a potential taking. Of course, often the degree of interference with the owner's right of use will not be sufficient to result in a taking. But each land use restriction is open to review under the takings analysis to determine whether the impairment of use goes too far and unfairly shifts the burden of achieving public objectives to individuals.[207]

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205. 86 Wash. 2d 585, 547 P.2d 282 (1976).

206. *Id.* at 590, 547 P.2d at 285 (quoting Ackerman v. Port of Seattle, 55 Wash. 2d 400, 409, 348 P.2d 664, 669 (1960)) (citations omitted). *See also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 833-34 n.2 (1987) (stating that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit' "); United States v. General Motors Corp., 323 U.S. 373, 378 (1944) (stating that the term "property" includes the right to possess, use and dispose of it; constitutional provision addesses every sort of interest in property).

207. After this article went to print, the Washington Supreme Court issued its decision in *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993). The *Guimont* decision now recognizes that the "holding in *Lucas* requires a reordering of the *Presbytery* threshold analysis." *Id.* at 598, 854 P.2d at 8. *Guimont* revises the analysis so that the first question asked is whether the land use restriction impairs a fundamental attribute of ownership. *Id.* at 599-601, 854 P.2d at 8-9. Significantly, *Guimont* now recognizes that "[i]n light of *Lucas*" the fundamental attributes of ownership include the "right to make *some* economically viable use of the property."

C. The Substantial Advancment Test

A third issue in Washington takings law concerns the application of the *Agins* substantial advancement test[208] when reviewing the constitutionality of development fees and exactions. The leading case is *Nollan v. California Coastal Commission*,[209] in which the Supreme Court applied the substantial advancement test to review whether an exaction, or permit condition, is a legitimate exercise of regulatory power.[210] At issue was the California Coastal Commission's demand that, as a condition to rebuilding their beachfront home, the Nollans would have to give up one-third of their property for a public access easement.[211] The Supreme Court recognized that providing public access was a legitimate goal. However, the problem was the Commission's *means* of acquiring the easement.[212] Because the Nollans' proposed house did not impair any existing rights of public access, the easement requirement was unrelated to mitigating any adverse impacts caused by the project. Accordingly, the exaction was not a legitimate land use regulation,[213] but was simply a means of "extorting" public benefits from the Nollans through a leveraging of the permit-

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Id. at 602, 854 P.2d at 10 (emphasis in original). Accordingly, regardless of the public purposes for a land use restriction, *Guimont* correctly recognizes that a taking must be found, and compensation provided, where the land use restriction destroys all economically viable use of property.

The Washington Supreme Court, however, did not complete the task of revising *Presbytery*. The court recognized that the other half of *Presbytery*'s threshold inquiry—asking whether the regulation can be characterized as harm preventing rather than benefit conferring—may yet be undermined by *Lucas*. *Id.* at 604 n.5, 854 P.2d at 11 n.5. However, the court determined that it was not necessary to go further in dismantling *Presbytery* in the *Guimont* decision. *Id.* Accordingly, finishing the task of bringing Washington law into conformity with United States Surpeme Court precedent will require further litigation.

208. *See supra* part II.B.4.

209. 483 U.S. 825 (1987).

210. *Id.* at 834-35 n.3.

211. *Id.* at 827.

212. *Id.* at 834-35.

213. *Id.* at 838-39. Specifically, the Court stated:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.

Id.

ting authority, and thus it was a taking without compensation.[214]

In an analagous situation, permit applicants in *Sintra, Inc. v. Seattle*[215] and *Robinson v. Seattle*,[216] were also subject to exactions imposed as conditions to issuance of development permits. At issue in both cases was a Seattle ordinance which required that property owners, as a condition to converting low-income housing units to another use, either build replacement units or pay a substantial fee to the city's low-income housing program.[217] While providing low-income housing may be a legitimate objective of government, the question, as in *Nollan*, was whether the means of acquiring such public benefits was constitutional.

The Washington State Supreme Court in *Robinson* determined that Seattle's low-income housing problem was not caused by the individual property owners who applied for redevelopment permits, but was the result of social forces within the city as a whole.[218] The court explained that requiring permit applicants to pay a fee to a city housing fund was an unfair shifting of social burdens onto a discrete segment of the community.[219] In effect, the property owners were being asked to remedy a public problem that was not of their making. Likewise, in *Sintra* the court explained that the regulation went beyond preventing harm and required the additional improper step of providing housing. "[T]his burden was unfairly allocated to individual property owners, rather than equally distributed among all citizens."[220] As the court succinctly stated in *San Telmo Associates v. Seattle*,[221] "Quite simply, the municipal body cannot shift the social costs of development on to a

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214. *Id.* at 837.

215. 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, 113 S. Ct. 676 (1992).

216. 119 Wash. 2d 34, 830 P.2d 318, *cert. denied*, 113 S. Ct. 676 (1992).

217. *Id.* at 43, 830 P.2d at 324-25.

218. *Id.* at 55, 830 P.2d at 331.

219. In so finding, the court stated:

> [T]he City may not constitutionally pass on the social costs of the development of the downtown area to current owners of low income housing. The problem must be shared by the entire city, and those who plan to develop their property from low income housing to other uses cannot be penalized by being required to provide more housing.

Id. at 53, 830 P.2d at 330 (quoting San Telmo Assoc. v. Seattle, 108 Wash. 2d 20, 25, 735 P.2d 673, 675 (1987)).

220. *Sintra*, 119 Wash. 2d at 15-16, 829 P.2d at 773.

221. 108 Wash. 2d 20, 735 P.2d 673 (1987).

developer under the guise of regulation."[222]

Significantly, this analysis in *Sintra* and *Robinson* parallels the concerns expressed in *Nollan*. Singling out the Nollans to remedy a public problem, "although they had not contributed to it more than other coastal landowners,"[223] would violate the purpose of the Takings Clause in barring government from forcing some people alone to bear public burdens that ought to be borne by the public as a whole.[224] In the same manner, in *Sintra* and *Robinson*, providing low-income housing was a proper objective for government to pursue—the problem was the lack of legitimate regulatory justification for imposing the remedy on landowners. Under *Nollan*, using the permitting authority to shift such social costs is a taking.

Although *Sintra* and *Robinson* have been applauded for concluding that the low-income housing fee violates due process, both decisions contain analysis that is of concern. Specifically, despite what should have been a clear application of *Nollan*, the *Robinson* decision held that there was no facial taking because the property owners were not denied all use of the property.[225] The problem with this analysis is that it ignores the *Nollan* basis for a taking. The United States Supreme Court has stated that whether there has been a denial of all economic use is irrelevant to the substantial advancement test applied in *Nollan*. For example, in *Nollan*, the owners were not denied all use of their land;[226] the Nollans received their permit. But this had no effect on the analysis of the impropriety of the condition attached to the permit. Likewise, in *Yee v. Escondido*,[227] the Court stated that whether a regulation meets the substantially advance test "does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property. . . ."[228] Justice Scalia has similarly explained that the degree of economic impairment is "irrelevant" and "will in no way assist this inquiry" where a regulation is challenged under the substantial advancement test.[229] Accordingly, *Robinson* mistakenly over-

222. *Id.* at 24, 735 P.2d at 675.

223. *Nollan*, 483 U.S. at 835 n.4.

224. *Id.* at 835-36 n.4, (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

225. *Robinson*, 119 Wash. 2d at 53-54, 830 P.2d at 330.

226. *Nollan*, 483 U.S. at 830.

227. 112 S. Ct. 1522 (1992).

228. *Id.* at 1532.

229. Pennell v. San Jose, 485 U.S. 1, 19 (1988) (Scalia, J., dissenting).

looks a clear basis for finding the development fee exactions unconstitutional under the Takings Clause.

A related misanalysis of *Nollan* is present in *Sintra*. In that case, the Washington court stated that the housing fee did not present a *Nollan* case "because no physical invasion has been affected" by the ordinance.[230] *Sintra* thus wrongly interpreted *Nollan's* nexus analysis as being limited to cases where the demanded condition involves some physical invasion onto property.

This characterization of *Nollan* as merely a physical invasion case is unfounded. The Supreme Court decision in *Yee*, issued six weeks prior to *Sintra*, expressly rejected the notion that *Nollan* was a physical invasion case or that its principles were limited to a physical invasion context. In *Yee*, the property owners attempted to characterize a rent control provision as working a physical invasion taking.[231] The Supreme Court explained that the rent control provision did not result in a taking by physical occupation, but instead suggested that the ordinance should have been analyzed as a potential regulatory taking.[232] Citing *Nollan*, the Court explained that the rent control ordinance may cause "a *regulatory* taking" depending on "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."[233] This inquiry under *Nollan* "has nothing to do with whether the ordinance causes a *physical* taking."[234]

While the exaction in *Nollan* involved a physical easement in land, *Yee* is clear that *Nollan's* nexus analysis is based on constitutional principles that do not change simply because the government demands money rather than land. For example, if the coastal commission had demanded that the Nollans pay $10,000 to the public treasury rather than give up an easement, the unconstitutionality of imposing such an unrelated condition would not have been any different.[235] The only difference is that the commission's "plan of extortion"[236] would have

230. *Sintra*, 119 Wash. 2d at 17 n.7, 829 P.2d at 773 n.7.

231. *Yee*, 112 S. Ct. at 1526-27.

232. *Id.* at 1528.

233. *Id.* at 1530 (emphasis in original).

234. *Id.* (emphasis in original).

235. As illustrated in *Nollan*, the same principle precludes government from forbidding people from shouting fire in a crowded theater while also granting dispensations to those willing to contribute $100 to the public treasury. *Nollan*, 483 U.S. at 837.

236. *Id.* at 837.

yielded money instead of property. That difference, however, cannot transform the illegal leveraging of the permitting authority into a legal leveraging. Similarly, *Nollan* applies to *Sintra* and *Robinson* even though money was the subject of the exactions. In every case, the controlling question must be whether the condition imposed on the property owner is a legitimate mitigation of a substantial adverse impact actually caused by the proposed development. If not, the condition is unconstitutional.

The Washington State Supreme Court should be applauded for its sensitivity to the practical need for a "body of cogent, workable rules upon which regulators and landowners alike can rely. . . ."[237] However, to be cogent and workable, those rules must be consistent with federal precedent. The challenge ahead will be for Washington courts to recognize where the problems lie in its prior cases and to correct those misinterpretations. The sooner this is complete, the better.

IV. TAKINGS IMPLICATIONS OF THE GROWTH MANAGEMENT ACT

Having set forth the regulatory takings doctrine and the modern analytical framework as established by recent Supreme Court decisions, most notably *Lucas*, attention may now turn to an analysis of potential takings resulting from Washington's Growth Management Act.

The primary focus of the GMA is to require each city and county[238] to prepare a new comprehensive plan and development regulations to guide the orderly growth of the community.[239] The new plan will be composed of various elements including a land use element, housing element, capital facilities element, utilities element, transportation element, and a rural element for counties.[240] The plan must be internally consistent and be coordinated and consistent with the plans of adjoining communities.[241] Consistency is also required for the develop-

237. *Sintra*, 119 Wash. 2d at 5, 829 P.2d at 768.

238. *See* WASH. REV. CODE ANN. § 36.70A.040 (West 1991) (criteria for determining whether a particular county or city is required to plan pursuant to the process established by the GMA).

239. *Id.* § 36.70A.040(1). A comprehensive plan generally consists of maps and descriptive text covering objectives, principles, and standards used to develop the local planning policies embodied in the plan. *Id.* § 36.70A.070.

240. *Id.* § 36.70A.070(1)-(6).

241. *Id.* § 36.70A.070.

ment regulations that will implement the plan.[242]

While claims alleging that the mere enactment of a law results in a taking can sometimes be successful, pursuing such "facial" takings claims is generally an uphill battle.[243] This will likely be true for most aspects of the GMA. Because of the flexibility built into the GMA and the discretion left with local government, potential takings liability will depend on how the GMA policies are applied to a specific parcel. Accordingly, the takings implications of the GMA will necessarily depend on the facts of each particular case. A thorough analysis of the various regulatory takings tests should be conducted to evaluate whether, in the particular case at hand, a taking claim should be pursued. What follows is a general overview of several broad aspects of the GMA that, depending on the application to particular parcels, are likely to raise potential takings.

A. Urban Growth Boundaries

One of the most significant features of the GMA is the requirement that counties adopt "urban growth areas."[244] Based on population growth projections, the urban growth areas must designate densities sufficient to accommodate projected growth over the next twenty years.[245] Cities are automatically within each county's urban growth area.[246] The purpose of these designations is to concentrate growth within the area and to discourage growth outside the area in order to avoid urban sprawl.[247]

The general requirement that urban growth areas be established does not in itself raise any particular taking question. Zoning property for particular purposes has been a com-

242. *Id.* § 36.70A.120. The consistency requirement is a major policy change from Washington law, which previously had no requirement that zoning regulations be consistent with the comprehensive plan. The effect will be to significantly enhance the role of the comprehensive plan in guiding development and growth in Washington. *See, e.g.*, DeBottari v. City Council of the Norco, 217 Cal. Rptr. 790, 795 (Cal. Ct. App. 1985) (stating that consistency requirement between comprehensive general plan and zoning regulations is the "linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law"); *see also* Lesher Communications, Inc. v. Walnut Creek, 802 P.2d 317 (Cal. 1990).

243. *See, e.g.*, Pennell v. San Jose, 485 U.S. 1 (1988).

244. WASH. REV. CODE ANN. § 36.70A.110 (West 1991 & Supp. 1993).

245. *Id.* § 36.70A.110(2).

246. *Id.* § 36.70A.110(1).

247. *Id.* § 36.70A.110(3).

mon land use practice for many years. One may view the growth area requirement as simply another type of zoning comprised of two large overlay zones: the urban growth area and everything else. Accordingly, the takings implications of the urban growth area designations are no different than zoning generally.

Typically, a zoning designation will meet the *Agins* requirement that the regulation substantially advance legitimate state interests.[248] In other words, in most instances the setting of urban growth boundaries will be a legitimate exercise of the police power. The more likely potential taking is where the impact of the urban growth designation "goes too far" in its degree of interference with the economic use of particular parcels. For example, the GMA specifies that development can occur outside the urban boundary only if the development is "not urban in nature."[249] Accordingly, property that is located outside a designated urban growth area will have restricted development potential. Under the new restrictions, if a particular parcel is denied all economically viable use, a taking will be categorically established under *Lucas*.

Similarly, even if all use is not precluded, a taking may occur where the setting of a growth boundary undermines reasonable investment-backed expectations of the property owner.[250] For instance, it is possible that property outside the urban growth area may have previously been zoned for fairly intensive development. A property owner who invested in such property relying on the intensive zoning may be able to successfully claim that the redesignation outside the urban growth boundary frustrates reasonable investment-backed expectations. A cautious local government may choose to avoid this potential problem by setting the urban growth boundary line to include all land currently zoned for intensive development.

Takings liability may also occur where the drawing of urban growth boundaries causes a particular parcel to suffer a significant diminution in value.[251] Under the ac hoc takings test,[252] a taking may be found when the economic impact on the claimant leads to the conclusion that the urban growth

248. *See supra* part II.B.4.

249. WASH. REV. CODE ANN. § 36.70A.110(1) (West 1991 & Supp. 1993).

250. *Lucas*, 112 S. Ct. at 2895 n.8; *see* discussion *supra* part II.B.2.

251. *Lucas*, 112 S. Ct. at 2895 n.8.

252. *See* discussion *supra* part II.B.3.

boundary unfairly places the economic burden on a few property owners rather than on the community as a whole. Of course, the creation of the boundary itself will cause dramatic differences between the value of undeveloped property inside the boundary and the value of similar property outside, regardless where the boundaries of the urban growth area are located. For instance, those on the inside can rest assured that the supply of developable land is now artificially limited, and hence more valuable. Those on the outside will be prohibited from entering the market. This type of government line-drawing is marked by discretion and political fervor combined with substantial economic impacts on those who are excluded from the urban area, and it may result in situations in which a court would conclude that the economic burden of the new regulation should be borne by society as a whole.[253]

Whether the designation of urban growth boundaries will cause a taking of property that lies outside the boundary will also depend on how the GMA provisions are interpreted. For example, the GMA provides room for flexibility by allowing development outside the urban growth area if the development is not characterized as urban. Indeed, the definition of "urban growth" is quite limited and may allow for a reasonable degree of development outside the urban boundary.[254] The term urban growth refers only to development that is "intensive" enough to be incompatible with the primary use of land for agricultural and mineral resources.[255] This definition could provide the flexibility needed to avoid many takings pitfalls if it is utilized to allow various less intensive but still economi-

253. The economic disparities caused by the line drawing can be reduced if a large supply of developable land is included within the urban growth area. Drawing the line to provide a large supply of developable land reduces the government's interference with the market by articially reducing the supply. The smaller the urban growth area, the smaller the supply of developable land, and the greater the disparity in land values driven by the line drawing.

254. The GMA defines "urban growth" as follows:

> "Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.

WASH. REV. CODE ANN. § 36.70A.030(14) (West 1991).

255. *Id.*

cally viable and beneficial uses of property.[256]

B. Resource Areas

The GMA requires a local government to identify resource lands within its jurisdiction[257] and to impose development regulations on them.[258] "Resource lands" are defined as agricultural lands,[259] forest lands,[260] and mineral resource lands.[261] As with much of the GMA, there is little detail as to what local government must do to satisfy the requirement of adopting development regulations for resource lands. The GMA simply requires that regulations must "assure the conservation of agricultural, forest, and mineral resource land" so designated.[262] The main purpose appears to be to protect the long-term commercial use of these lands.[263]

The most probable takings implication involving resource lands stems from the actual designation of such lands. Local government should be careful to designate each parcel of resource land under the standard set forth in the GMA. That is, an area may be designated and conserved as a resource land only if the land has long-term commercial significance for agriculture, forest, or mineral use. The temptation, however, may be to paint large areas with a broad brush and thus make less precise classifications regarding each parcel of land. Because a planner's vision may overlook the natural characteristics of a

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256. For example, the addition of a small number of homes on the family farm could be viewed as not being urban growth and thus could be an approved development even though the property lies outside the urban growth area.

257. *Id.* § 36.70A.170 (West 1991).

258. *Id.* § 36.70A.060 (West 1991 & Supp. 1993). Forest and agricultural land within urban growth areas may not be designated as resource areas unless a program for transfer of development rights is in place. *Id.* § 36.70A.060(4). The legislature also provided for the Department of Community Development to adopt guidelines for classifying resource lands. *Id.* § 36.70A.050 (West 1991).

259. *Id.* § 36.70A.030(2).

260. *Id.* § 36.70A.030(8).

261. *Id.* § 36.70A.030(11).

262. *Id.* § 36.70A.060(1) (West 1991 & Supp. 1993).

263. For instance, the GMA states as follows:

> Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner in accordance with best management practices, of these designated land for production of food, agricultural products, or timber, or for the extraction of minerals.

Id. Similarly, the amendments to the GMA require notice to adjoining lands that a "variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration." *Id.*

particular parcel, or other factors such as size, historical use, or proximity to logical growth areas, some parcels may be inappropriately designated. This would create a takings risk if the resource designation is not a commercially viable use, yet it becomes locked into such use by the GMA designation.[264]

The best approach to avoid this potential takings liability, and the approach mandated by the GMA, is to make sure that every individual parcel designated as resource land meets the required standard of long-term commercial significance. Long-term commercial significance includes "the growing capacity, productivity, and soil composition of the land for long-term commercial production, *in consideration with the lands's proximity to population areas, and the possibility of more intense uses of the land.*"[265] In other words, properly designated resource land must, by definition, have long-term commercial viability and thus, in most instances, will not be taken by denying all economically viable use.

The Department of Community Development (DCD) guidelines spell out factors to be considered for determining whether agricultural land should be allowed a more intensive use.[266] These factors, if applied to permit other uses of agricultural land, may allow local government to avoid takings claims. By giving local government flexibility to allow other uses when it makes no economic sense to continue the agricultural use, the guidelines provide local government with an option that can avoid many of the potential takings problems.[267] It

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264. *Lucas*, 112 S. Ct. at 2894. *See* discussion *supra* part II.B.2.

265. WASH. REV. CODE ANN. § 36.70A.030(10) (1991) (emphasis added).

266. These factors are as follows:

(a) The availability of public facilities;
(b) Tax status;
(c) The availability of public services;
(d) Relationship or proximity to urban growth areas;
(e) Predominant parcel size;
(f) Land use settlement patterns and their compatibility with agricultural practices;
(g) Intensity of nearby land uses;
(h) History of land development permits nearby;
(i) Land values under alternative uses; and
(j) Proximity of markets.

WASH. ADMIN. CODE § 365-190-050(1) (Supp. 1991).

267. Similar policies are evident in regulation of forest and mineral resource lands. For instance, one factor is "[t]he proximity of forest land to urban and suburban areas and rural settlements: Forest lands of long-term commercial significance are located outside the urban and suburban areas and rural settlements." *Id.* § 365-190-060(2). This recognizes that forest land that is near "rural settlements" may not be

will be up to local government, however, to take advantage of this flexibility to allow property owners reasonable use of their land.

C. Critical Areas

As with natural resource lands, the GMA requires that critical areas be designated.[268] And, as with natural resource regulations, the takings implications of critical area regulations depend on how the regulations are actually applied. The greater the severity and more dramatic the impact on the private property owner, the greater the risk a taking will occur.

The GMA refers to five types of critical areas: wetlands,[269] areas with a critical recharging effect on aquifers used for potable water,[270] fish and wildlife habitat conservation areas,[271] frequently flooded areas,[272] and geologically hazardous areas.[273] The GMA merely requires that each county and city "adopt development regulations that protect critical areas."[274]

As with all takings implications of the GMA, it is difficult to tell whether property will be taken until development regulations are adopted and applied to individual parcels. Moreover, the DCD Minimum Guidelines[275] have several elements that reinforce property rights and avoid unnecessary takings.[276]

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suitable for limiting the property to forest use. Another factor is "[t]he size of the parcels: Forest lands consist of predominantly large parcels." *Id.* § 365-190-060(3). By taking into account the economic fact of life that small forest lands are less likely to have an economically viable use if limited to growing trees, the guidelines protect local government from taking small forest lands by restricting their use to forest uses when such use is economically infeasible due to the small size of the parcel. By excluding from the resource designations those lands that may be used for agricultural purpose, but without long-term commercial significance, the legislature has protected local government from taking property.

268. WASH. REV. CODE ANN. § 36.70A.170(d) (West 1991).

269. *Id.* § 36.70A.030(17) (defining wetlands). This provision provides limited protection to property owners who have intentionally created wetlands.

270. WASH. ADMIN. CODE § 365-190-080(2) (Supp. 1991) (providing guidelines for determining aquifer recharging areas).

271. *Id.* § 365-190-080(5) (establishing fish and wildlife habitat conservation area guidelines).

272. *Id.* § 365-190-080(3) (establishing frequently flooded area guidelines).

273. WASH. REV. CODE ANN. § 36.70A.030(9) (West 1991) (defining geologically hazardous areas). The DCD Minimum Guidelines provide further help in delineating these areas. *See* WASH. ADMIN. CODE § 365-190-080(4) (Supp. 1991).

274. WASH. REV. CODE ANN. § 36.70A.060 (West 1991 & Supp. 1993).

275. *See* WASH. ADMIN. CODE ch. 365-190 (Supp. 1991).

276. *See* WASH. REV. CODE ANN. § 36.70A.020(6) (West 1991) ("Private property shall not be taken for public use without just compenstion having been made. The property rights of landowners shall be protected from arbitrary and discriminatory

Although the force of the Minimum Guidelines is unclear,[277] its purpose statement provides that "[p]recluding incompatible uses and development *does not mean a prohibition of all uses or development.* Rather, it means governing *changes* in land uses, new activities, or development that could adversely affect critical areas."[278]

Accordingly, protecting critical areas does not require prohibiting all uses or development. However, if local governments adopt strict development regulations for critical areas that block all viable economic uses, or substantially diminish property values, or interfere with reasonable investment-backed expectations, the agency will be exposed to potential

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actions."). *Id.* § 36.70A.370 (West Supp. 1993) (providing for the Attorney General to establish a process by which local government and state agencies can evaluate the takings implications of their decisions). In addition, although a private party may not seek judicial review to compel compliance under RCW § 36.70A.370, a failure to follow the Attorney General's process may constitute a basis for relief under the Administrative Procedure Act. *See id.* §§ 36.70A.370(4), 34.05.570(3)(c).

As to federal agencies, Executive Order 12,630 requires a takings implication assessment to be conducted before federal regulations are promulgated, but the order expressly states that the required procedures do not "create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person." Exec. Order No. 12,630 § 6, 53 C.F.R. 859 (1988). However, the federal government has recognized the following:

> [N]otwithstanding Section 6 of the Executive Order, the individual takings analysis or other document developed by a department or agency pursuant to applicable quidelines would be part of the administrative record and would, in accordance with generally applicable principles of adminstrative review, be considered by a reviewing court in deciding whether agency action complies with the requirement of other applicable statutes, including the Administrative Procedure Act.

Letter from Richard B. Stewart, Assistant Attorney General, Land and Natural Resources Division, to Senator Steve Symms (Oct. 1, 1990)(on file with authors).

277. It is unclear whether these "guidelines" are intended to be advisory or mandatory. Normally, the use of the word "guidelines" rather than "regulations" or "requirements" would suggest that the role of DCD in classifying natural resource land is purely advisory. *Compare In re* Marriage of Lee, 57 Wash. App. 268, 788 P.2d 564 (1990), *with* Cornejo v. State, 57 Wash. App. 314, 788 P.2d 554 (1990); San Juan County v. Department of Natural Resources, 28 Wash. App. 796, 626 P.2d 995, *rev. denied*, 95 Wash. 2d 1029. However, subsection (3) states that the guidelines "shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state." WASH. REV. CODE ANN. § 36.70A.050(3) (West 1991). Immediately following that statement, the statute backs down from the apparent preemptive force of these guidelines by stating that the "intent of these guidelines is to *assist* counties and cities in designating the classification" of resource lands. *Id.* (emphasis added). It is unclear as to whether these guidelines are binding on local government because they are "minimum" standards or whether they are only advisory to "assist" local government, but can be ignored to account for "regional differences."

278. WASH. ADMIN. CODE § 365-190-020 (Supp. 1991) (emphasis added).

liability. Indeed, several recent cases illustrate the significant takings implications raised by the GMA policies of prohibiting development of wetland areas. For example, in *Loveladies Harbor, Inc. v. United States*,[279] the deprivation of all economically viable use of the wetlands portion of a property was held a compensable taking even though most of the original two hundred fifty acre tract had been developed. The court measured the difference in value before and after the government action and found the substantial diminution in value of wetlands property sufficient grounds for a taking.[280] Moreover, the court rejected the notion that filling a wetland is a nuisance activity that could be precluded without regard to the compensation requirement of the Fifth Amendment.[281]

The contention can be made that an owner has never had a right to fill and develop wetlands and thus has not lost anything when government precludes such activity. However, such an argument cannot stand because the filling of wetlands has not been a common law nuisance. The very existence of legislative protections of wetlands indicates that common law nuisance principles were insufficient to prevent the filling of weltands in the past. As explained in *Florida Rock Industries, Inc. v. United States*,[282] it is perfectly appropriate for the government to "draw[ ] a line in time" and no longer allow an activity to begin which was once allowed.[283] But to do so, "may indicate, as it does in this case, that a single plaintiff should not bear a burden that should be borne by the public at large."[284] Accordingly, in *Florida Rock*, the court concluded that mining could not be considered a common law nusiance that could be prohibited without any takings implications because mining is

279. 21 Cl. Ct. 153 (1990).

280. The diminution in value was over 99%. *Id.* at 160. *See also* Formanek v. United States, 26 Cl. Ct. 332 (1992) (finding diminution in value from $933,921 to $112,000).

281. *Loveladies*, 21 Cl. Ct. at 154. *See* James S. Burling, *Property Rights, Endangered Species, Wetlands and Other Critters—Is It Against Nature to Pay for a Taking?* 27 LAND & WATER L. REV. 309 (1992).

282. 21 Cl. Ct. 161, 154 (1990). *See also* Gil v. Inland Wetlands & Watercourses Agency of Greenwich, 593 A.2d 1368 (Conn. 1991) (finding that property owner had reasonable expectation of being able to build on wetlands, but failed to show that no development would be allowed); Vatalaro v. Department of Environmental Regulation, 601 So. 2d 1223 (Fla. 1992) (finding that denial of septic permit in wetland caused a taking of the property).

283. *Florida Rock*, 21 Cl. Ct. at 169.

284. *Id.*

allowed on other property.[285] Similarly, the Supreme Court in *Lucas* found that the prohibition on building a home could not be insulated from a takings challenge on some harm preventing rationale because "the statute permits owners of *existing* structures to remain."[286]

Hence, because wetlands have been filled in times past, regulation cannot escape a takings challenge on the notion that the property owner never had the right to develop wetlands. Moreover, that argument has even less appeal when applied to buffers for wetlands and other critical areas, such as wildlife conservation areas. The need for wildlife conservation areas and wetlands is due to development by society at large. The Just Compensation Clause should be invoked to ensure that society in general pays the cost for meeting the public's desire to preserve or conserve rather than placing that cost solely on those who still own wetlands or wildlife habitat areas.[287]

A key takings issue that is likely to arise as a result of restrictions for critical areas is the relevant parcel issue.[288] For example, if a portion of a parcel is designated as a critical area and buffer zone, but the remaining portion of the parcel is not so designated and may be put to productive use, has there been a taking of the regulated portion? This is an open question but, as discussed previously, *Lucas* strongly suggests that requiring property to be left in its natural state, for example, as a wetland or wildlife habitat, may result in a taking of the regulated portion even though the owner may retain use of the remaining portions of its property.[289] The GMA critical areas requirement is likely to be a fertile ground for litigation on this point.

Critical area and buffer zone restrictions are also susceptible to a claim that such designations result in a taking of a conservation easement. The Fifth Amendment protects any

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285. *Id.* at 167.

286. *Lucas*, 112 S. Ct. at 2898 n.11 (emphasis in original).

287. One of the problems in prohibiting development in wildlife conservation areas is that the supply of wildlife habitat has decreased because society generally has allowed the conversion of property to other uses. In placing blame, those individuals who should be exonerated are those owning property that is still suitable for habitat. Nevertheless, the regulation for protecting wildlife habitat is likely to place all of the burden on those individuals who, by definition, are not the ones to blame. The Washington Supreme Court recognized this principle in a different context in *San Telmo Assoc. v. Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (1987).

288. *See* discussion of relevant parcel issue *supra* part II.B.2.b.

289. *Lucas*, 112 S. Ct. at 2894 n.7; *see* discussion *supra* part II.B.2.b.

distinct property interests recognized by state law,[290] and Washington recognizes conservation easements as distinct interests in real property. The Revised Code of Washington (RCW) 64.04.130 provides:

> A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land, whether the right or interest be appurtenant or in gross, may be held or acquired by any state agency, federal agency, county, city, town, or metropolitan municipal corporation, or nonprofit nature conservancy corporation. Any such right or interest shall be classified as real property.[291]

This statute treats the transfer of a right for the purpose of conservation as a separate and legally recognizable interest in property. Because a conservation easement is a distinct interest in property, local government runs a risk that by imposing restrictions to conserve critical areas for the public good, it may take a conservation easement even though it has not taken a fee simple interest in the property.[292] While an easement presumably has less value than the entire fee, the easement is not without value and compensation should be required.[293] The conservation easement argument is particu-

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290. For instance, the Supreme Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), held that a law which allowed the government to keep the interest earned from money deposited in an interpleader action caused a taking of that interest income in violation of the Fifth Amendment. The Court found that interest on a deposited sum of money was a property interest under state law and, therefore, protected by the Fifth Amendment. Similarly, the Court in *Lucas* expressly recognized that easements could be distinct property interests taken by government regulation even if the entire property is not. The Court stated:

> The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.

Lucas, 112 S. Ct. at 2895.

291. WASH. REV. CODE ANN. § 64.04.130 (West Supp. 1993).

292. For instance, in *Austin v. Teague*, 570 S.W. 389 (Tex. 1978), the court found that a scenic easement was taken by denial of a permit application. The City "by indirection acquired the scenic easement at no cost" and was, therefore, liable for a taking of that easement. *Id.* at 394.

293. In *McLennan v. United States*, 24 Cl. Ct. 102 (1991), *aff'd*, 994 F.2d 839 (Fed. Cir. 1993), the Internal Revenue Service denied a tax deduction for a property owner who conveyed a scenic easement for conservation to a charitable organization. The easement restricted some uses of the land but allowed others, including the right to

larly applicable to critical areas and buffers because the easement has a distinct geographic border and is imposed for the general public benefit of conservation.

Restrictions on the use of land to protect critical areas may turn out to be the primary subject on which takings battles are waged. Unlike resource protections, which can be imposed only if owners are left with economically viable use of their land, the GMA does not similarly protect landowners subject to critical area restrictions. Local government can avoid the takings implications of critical areas restrictions only by limiting the extent and scope of regulation.

D. Precondemnation Blight

Several provisions of the GMA direct local jurisdictions to make plans to acquire suitable property for various public purposes. For example, land for open space corridors within and between urban growth areas may be acquired for recreation, wildlife habitat, trails, and connection of critical areas.[294] Similarly, cities and counties are required to estimate an acquisition date for lands identified as useful for utility and transportation corridors, landfills, sewage treatment facilities, recreation, schools, and other public uses.[295] In the same mode, essential public facilities, which are typically difficult to site, such as airports and correctional facilities, must be identified and sited.[296]

All of these statutes raise potential takings implications under the doctrine commonly known as planning blight or precondemnation blight. Planning or precondemnation blight generally refers to the

> detrimental conditions that befall land slated for public acquisition. Either the project is undesireable and depresses values for some distance around its proposed boundaries, or, whatever the nature of the project, the affected land will surely be taken (or so the market believes) and hence, becomes virtually useless to the private sector of the

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build several homes. The court ruled that the easement was a separate interest in property that had value, and the owners of the property were entitled to a deduction on their income taxes.

294. WASH. REV. CODE ANN. § 36.70A.160 (West 1991 & Supp. 1993). The county or city may seek to acquire the open space corridors by purchase of the fee simple or lesser interests. *Id.*

295. *Id.* § 36.70A.150.

296. *Id.* § 36.70A.200 (including state education facilities, state or regional transportation facilities, solid waste handling facilities, mental health facilities, and group homes).

market.[297]

Many states have recognized that a taking may occur through precondemnation planning activities.[298] Typically, precondemnation blight occurs where there is unreasonable delay between a government's announced intention to acquire a particular property and the actual acquisition.[299] For example, announcing plans to acquire property for future highway expansion and placing the property on a reservation map for such purposes may depress land values and result in a taking.[300]

The Washington State Supreme Court has not yet held that unreasonable delay or other preacquisition planning activities may result in a de facto taking of property.[301] However, the court recognized in *Lange v. State*[302] that precondemnation

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297. Gideon Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 J. URB. L. 861, 891-92 (1975).

298. *See generally* Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME L. REV. 765 (Apr. 1973). *See also* Klopping v. Whittier, 500 P.2d 1345 (Cal. 1972); Textron, Inc. v. Wood, 355 A.2d 307 (Conn. 1974); Lincoln Loan Co. v. State Highway Comm'n, 545 P.2d 105 (Or. 1976); Commonwealth Dep't of Transp. v. DiFurio, 555 A.2d 1379 (Pa. 1989); Brookings v. Mills, 412 N.W.2d 497 (S.D. 1987); Smith v. San Francisco, 275 Cal. Rptr. 17 (Cal. Ct. App. 1990); *In re* Virginia Park, 328 N.W.2d 602 (Mich. Ct. App. 1982); Mentzel v. Oshkosh, 432 N.W.2d 609 (Wis. Ct. App. 1988).

299. *See, e.g.*, Martino v. Santa Clara Valley Water District, 703 F.2d 1141, 1147 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983) (finding that unreasonable delays or conduct in the acquisition process may constitute a taking); Richmond Elks Hall v. Richmond Redevelopment, 561 F.2d 1327, 1330 (9th Cir. 1977) (finding taking where public project directly and substantially interferes with property rights and thereby impairs value); Jones v. People *ex rel.* Dep't of Trans., 583 P.2d 165, 171 (Cal. 1978).

300. *See* Joint Ventures v. Department of Trans., 563 So. 2d 622 (Fla. 1990) (ten year map reservation for possible highway expansion); Orlando/Orange County Expressway Auth. v. W&F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 1991) (upholding summary judgment for temporary taking liability from the filing of a reservation map); Lincoln Loan Co. v. State Highway Comm'n, 545 P.2d 105 (Or. 1976) (upholding cause of action for condemnation blight where complaint alleged that over ten year period the Highway Commission published notice that property would be taken for transportation purposes); *but see* Selby Realty Co. v. San Buenaventura, 514 P.2d 111 (Cal. 1973) (holding adoption of general plan with proposed extension of residential street not a taking).

301. *See* Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988) (choosing not to recognize "at this time" a cause of action based on oppressive preacquisition conduct).

302. 86 Wash. 2d 585, 547 P.2d 282 (1976). *See also* WASH. REV. CODE ANN. § 8.26.180(3) (West 1992) ("Any decrease or increase in the fair market value of the real property to be acquired prior to the date of valuation caused by the public improvement for which such property is acquired . . . will be disregarded in determining the compensation for the property."); United States v. Virginia Elec. and Power Co., 365 U.S. 624, 636 (1961) ("It would be manifestly unjust to permit a public

activities may be so closely connected to the falling market value of a property slated for acquisition that the measure of just compensation must be based on the earlier value. *Lange* established the principle in Washington that precondemnation activities have a bearing on property values and should be considered when determining the measure of compensation. In the same manner, *Lange* provides the foundation for Washington to recognize that precondemnation activities may have such an effect on property values that a de facto taking results, requiring compensation through an inverse condemnation action.

The numerous directives in the GMA for local agencies to identify properties to be slated for public acquisition are likely to raise precondemnation blight questions. For example, if a particular property is publicly identified for acquisition, private development or sale becomes economically infeasible, yet substantial delay and uncertainty in the acquisition process could persist because of lack of funds or other reasons. Where such precondemnation activities cause substantial property devaluation, the situation will be ripe for Washington courts to recognize an inverse condemnation cause of action.

E. Impact Fees

The GMA provides authority for cities and counties to finance public facilities by imposing impact fees on development projects.[303] Specifically, impact fees are authorized for public streets and roads, parks, open space, schools, fire protection, and recreation facilities.[304] The intent is for new growth and development to pay a proportionate share of the cost of

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authority to depreciate property values by a threat . . . of the construction of a government project and then to take advantage of this depression in the price which it must pay for the property when eventually condemned.") (quoting 1 L. ORGEL, VALUATION UNDER EMINENT DOMAIN § 105 at 447 (2d ed. 1953)).

303. *See* WASH. REV. CODE ANN. § 82.02.050-090 (West Supp. 1992). After July 1, 1993, impact fees may only be collected if the local jurisdiction has a comprehensive plan adopted in compliance with code requirements. *Id.* § 36.70A.070 (West 1991). Impact fees are imposed through local ordinances. The GMA still permits impact fees based on voluntary agreements, permit fees, special assessments, utility charges, and SEPA and subdivision dedications. *Id.* § 82.02.020 (West 1981).

304. *Id.* §§ 82.02.050(4), .090(7) (West Supp. 1992). The listed public facilities must also be addressed in a capital facilities element of a comprehensive land use plan. *Id.* § 82.02.050(4). In order to retain authority to impose impact fees, the capital facilities plan must identify deficiencies in public facilities serving existing development and the means by which existing deficiencies will be eliminated within a reasonable period of time, *id.* § 82.02.050(4)(a), additional demands placed on existing facilities by new

new facilities needed to serve the new growth areas.[305] However, local government "must provide for a balance between impact fees and other sources of public funds and cannot rely solely on impact fees."[306]

Two constitutional takings issues are raised by impact fees. First, are impact fees a constitutional vehicle for raising revenue to finance the types of public facilities specified in the GMA? Second, assuming that impacts fees are facially constitutional, does the particular fee being imposed on a development project comport with constitutional standards? These questions will be addressed in turn.

1. Impact Fees as a Facial Taking

It is well-settled that exactions imposed as a condition to receiving a development permit can result in a regulatory taking in violation of the Fifth Amendment.[307] Under *Nollan*, exactions are legitimate only if they mitigate a need or burden *caused by* the development project.[308] If the project is not the responsible source of the identified problem, a permit condition that addresses that problem is not a legitimate regulatory action but an unconstitutional leveraging of the permitting authority.[309]

Significantly, this nexus requirement involves more than simply identifying some connection or linkage between a project and a social need. Rather, the proposed development must be a substantial factor in causing the harm so that it is fair to require the developer to solve the harm.[310] In other words,

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development, *id.* § 82.02.050(4)(b), and additional facilities required to serve new development, *id.* § 82.02.050(4)(c).

305. *Id.* § 82.02.050(1)(b).

306. *Id.* § 82.02.050(2).

307. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

308. *Id.* at 835-36. *See* Pennell v. San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) (stating that an exaction must have a "cause-and-effect relationship between the property use . . . and the social evil. . . .").

309. *Nollan*, 483 U.S. at 837.

310. *Pennell*, 485 U.S. at 15. Although the majority in *Pennell* found the takings claim not ripe, and, therefore, did not reach the merits of the takings issue, Justices Scalia and O'Connor dissented on the ripeness question and went forward to address the merits of the takings claim. The reasoning of the dissent was not controverted by the majority. Justice Scalia reiterated that the purpose of the Takings Clause is 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." *Id.* at 19 (Scalia, J., dissenting) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). Further, he stated:

> Traditional land use regulation . . . does not violate this fairness principle

there must be an *element of responsibility*, similar to the proximate cause concept applied in tort law, that justifies placing liability on the developer.

Applying this nexus analysis to the GMA calls into question the constitutionality of impact fees for schools, open space, recreation areas, and other population serving facilities. For example, while there is an obvious "connection" between housing developments and schools, can it be said that housing developments *cause* the need for schools? Arguably not. Schools, open space, parks and recreation facilities serve people, not housing developments. Indeed, a subdivision is built to respond to the housing needs of people just as a school is built to meet the education needs of people. In short, population growth is the responsible factor in creating the need for more schools, parks, hospitals, and other public services.

Housing development, however, does not cause population growth; rather, it is just another symptom of population growth. Accordingly, the applicant for permits to build homes is not the responsible cause for society's need for schools and other public services and should not be singled out to pay special fees to help finance those facilities.

Does this mean that all impact fees are unconstitutional? Certainly not. Dedication requirements or fees to address needs that are attributable to the project itself, such as streets, curbs, gutters, lighting, and sewers, are properly imposed. However, where an exaction is not part of the project, but instead addresses a more general community concern, the burden should be paid for through taxes, not development fees. Washington case law has long recognized this distinction. In *Hillis Homes, Inc. v. Snohomish County*,[311] the Washington State Supreme Court considered two local ordinances that required new subdivisions to pay fees for parks, schools, and fire protection.[312] The court reasoned that "[n]either ordinance makes any provision for regulation of residential developments. Therefore, it appears that the primary purpose, if not

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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.

Id. at 20.

311. 97 Wash. 2d 804, 650 P.2d 193 (1982).

312. *Id.* at 806-07, 650 P.2d at 194.

the only purpose of both ordinances, is to raise revenue rather than to regulate residential developments. For this reason, we hold that the ordinances impose a tax."[313]

Similarly, in *San Telmo Associates v. Seattle*,[314] a development fee to help finance a city housing fund was defended as "merely a regulation on development."[315] The court responded that the "municipal body cannot shift the social costs of development on to a developer under the guise of regulation."[316]

Properly understood, impact fees are a regulatory device imposed through the police power (not the taxation power) and thus may be imposed only if they actually regulate the development itself. Fees for general community needs such as schools or recreation facilities, however, do not regulate the development but are simply a politically acceptable off-budget way to raise revenue to pay for various public facilities that are needed by a growing population.[317] If these development fees are not legitimate regulatory devices, then, unless otherwise authorized and uniformly applied as a tax, collection of such fees is a taking under *Nollan*.

The danger of allowing development fees for financing general public facilities is that it opens the door for an unlimited array of fees to finance all sorts of social agendas. For example, in *Commercial Builders of Northern California v. Sacramento*,[318] the court upheld a fee imposed on commercial projects to help finance a city low-income housing fund. The majority concluded that there was a sufficient link between commercial development and an increased demand for low-income housing on the theory that commercial development would facilitate job opportunities for low-income workers who might migrate to Sacramento and need affordable housing.[319] In a sharp dissenting opinion, Judge Beezer argued that the housing fee ordinance was "a transparent attempt to force

313. *Id.* at 810, 650 P.2d at 196.

314. 108 Wash. 2d 20, 735 P.2d 673 (1987).

315. *Id.* at 24, 735 P.2d at 674.

316. *Id.* at 24, 735 P.2d at 675.

317. *Pennell*, 485 U.S. at 22 (Scalia, J., dissenting). *See also* Commercial Builders of Northern California v. Sacramento, 941 F.2d 872, 876 (9th Cir. 1991) (Beezer, J., dissenting) (stating that "legislators find it politically more palatable to exact payments from developers than to tax their constituents"), *cert. denied*, 112 S. Ct. 1997 (1992).

318. 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

319. *Id.* at 874.

commercial developers to underwrite social policy."[320] Thus,

> [t]he new workers attracted by the new jobs associated with the new development surely will increase the demand for all manner of goods and services. If Sacramento has shown a sufficient causal connection in this case, we can be expected next to uphold exactions imposed on developers to subsidize small business retailers, child-care programs, food services and health care delivery systems.[321]

Judge Beezer's concerns are not hollow portends. Already, Los Angeles has adopted ordinances creating an Arts Development Fee and Trust Fund that requires developers to pay the city up to one percent of their building valuation to help support art projects.[322] The enactment of the Town of Greenfield, California, is more extreme. Located in the Salinas Valley, this small town reportedly requires residential developers to include two bicycles with each newly constructed house.[323] The nexus? New development is associated with air pollution and, of course, bicycle use reduces air pollution. The requirement has been imposed on at least two new developments.[324] As Judge Beezer suggested, "state and local governments have begun to stretch the use of exactions to the breaking point."[325]

Not far removed from the Greenfield ordinance is Washington's Mobile Home Relocation Assistance Act, which authorizes local governments to adopt ordinances requiring mobile home park operators to pay tenant relocation assistance to displaced tenants as a condition to leaving the mobile home park business.[326] Although property owners are not responsible for causing the low-income status of tenants, such a fee requires the property owner to address the financial needs of tenants. Under the analysis outlined above, the constitutionality of such a requirement is clearly suspect.[327]

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320. *Id.* at 876 (Beezer, J., dissenting).

321. *Id.* at 878.

322. LOS ANGELES, CAL., ORDINANCE, §§ 166,724 and 166,725 (Mar. 8, 1991).

323. *See Town Pledge: 2 Bikes in Every Home*, SACRAMENTO UNION, Feb. 20, 1992, at A5.

324. The Greenfield mayor admits: "I don't know whether they'll use the bikes or hock them and take the money and run. But at least we're doing something about this brown air in Salinas Valley." *Id.*

325. *Commercial Builders*, 941 F.2d at 877 (Beezer, J., dissenting).

326. *See* WASH. REV. CODE ANN. ch. 59.21 (West 1990 & Supp. 1991).

327. *See* Guimont v. Clarke, 121 Wash. 2d 625, 854 P.2d 23 (1993).

2. Constitutionality of Fees as Applied to Particular Properties

Although population growth, not housing development, is logically the responsible factor causing the need for additional public facilities, the GMA assumes that fees for such purposes are facially constitutional. The next question is whether the particular fee imposed on a project complies with constitutional standards. Fortunately, the provisions in the GMA attempt to ensure that particular fees are not excessive. For example, the statement of legislative intent provides that new growth and development only pay a *proportionate share* of the cost of new facilities.[328] The legislature further declared its intent that impact fees are to be imposed only through "established procedures and criteria so that specific developments do not pay arbitrary or duplicative fees for the same impact."[329] The GMA provides a three-pronged statutory standard that must be met in order to impose any fee. An impact fee (1) may only be imposed for system improvements that are *reasonably related* to the new development, (2) may not exceed a *proportionate share* of the costs of system improvements that are reasonably related to the new development, and (3) must be used for system improvements that will *reasonably benefit* the new development.[330]

The key constitutional issue raised is whether the application of the "reasonably related" standard will result in imposition of fees that fail to meet the heightened scrutiny "substantial advancement" test of *Nollan*. The phrase "reasonably related to new development" is clarified, however, by the GMA's definition of "impact fee." To be reasonably related, the local government must show that the new development "creates additional demand and need for public facilities."[331]

Overall, the GMA demonstrates an intent to limit and closely scrutinize impact fees to ensure that they are justified

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328. WASH. REV. CODE ANN. § 82.02.050(1)(b) (West Supp. 1992).

329. *Id.* § 82.02.050(1)(c). The local ordinance must allow the fee to be adjusted to account for unusual circumstances in particular cases to ensure that impact fees are imposed fairly. *Id.* § 82.02.060(4). The developer may submit studies and data to justify an adjustment to the fee amount. *Id.* § 82.02.060(5).

330. *Id.* § 82.02.050(3).

331. *Id.* § 82.02.090(1). *See also* Miller v. Port Angeles, 38 Wash. App. 904, 691 P.2d 229 (1984), which holds that fees for road improvements that are "directly related" to the traffic generated by the development are permissible regulatory measures, not taxes. *Id.* at 910, 234 P.2d at 234.

and proportional to the actual impacts caused by the project. If this intent is followed, local governments may avoid potential takings.[332] However, if fees are imposed where only a minor or indirect nexus exists, *Nollan*'s takings limitation applies. In addition, local governments may be tempted to or may improperly impose fees where mitigation has already been provided through another mechanism, or may improperly place the burdens of pre-existing deficiencies onto new growth, or may shift public burdens onto the developer that are unrelated to the project. In any of these situations, local governments risk violating the constitutional standards in *Nollan*.

F. Transportation Requirements

A major policy theme of the comprehensive plan is the concept of "concurrency." The concurrency requirement prohibits new growth unless transportation improvements are concurrently developed to accommodate the increased traffic impact.[333] Two potential takings issues are likely to arise.

1. Temporary Takings

Under the GMA concurrency policy, the capacity of the existing transportation system can limit or delay development. The potential takings question is whether such delay causes a "temporary taking." The leading case on this issue is *First English Evangelical Luthern Church of Glendale v. Los Angeles*,[334] which established that temporary takings are no different in principle from permanent takings. The general rule is that if a government regulation denies all economically viable use, then the owner will be entitled to compensation for the time the regulation was in effect.[335] However, not all government delays of development will cause a compensable temporary taking. The Supreme Court in *First Church* recognized that "normal delays in obtaining building permits, changes in

332. Judge Beezer indicated that on-site and off-site improvements (e.g., roads, schools, parks, and sewage treatment plants) are generally upheld. Commercial Builders of Northern California v. Sacramento, 941 F.2d 872, 872 (9th Cir. 1991) (Beezer, J., dissenting), *cert. denied*, 112 S. Ct. 1997 (1992). Here, the requirement solves a problem actually caused by the development and the development is also directly benefitted or served by the improvement.

333. WASH. REV. CODE ANN. § 36.70A.070(6)(e) (West 1991).

334. 482 U.S. 304 (1987).

335. *Id.* at 319. *See also* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (recognizing temporary taking as basis for jurisdiction where permanent taking was not ripe for judicial review).

zoning ordinances, variances, and the like" are not temporary takings.[336] The delay must be unreasonable, excessive, or extraordinary.[337]

The key to determining whether a temporary prohibition on development due to transportation inadequacies is a normal delay rather than an unreasonable or extraordinary delay, should be whether the government entity is acting in good faith to solve the transportation deficiency within a reasonable period of time.[338] If the local government does not act in good faith to solve the infrastructure needs within a reasonable period of time, the burden of the problem becomes placed solely on those landowners who have not yet developed their property. As stated by the California Supreme Court in upholding a temporary building moratorium, "[w]e must presume that the City . . . will attempt in good faith" to solve the problem.[339] However, if the local government establishes unrealistic or unattainable traffic standards, new development can be unfairly delayed or completety foreclosed without a good faith or realistic attempt to solve the underlying problem. The traffic issue then becomes merely an excuse for preventing some owners from being able to make use of their property. This should result in a temporary taking under *First Church* and *Lucas*.

2. Mitigation Requirements

A second issue is the reasonableness of traffic improvement requirements placed upon specific projects. *Nollan* applies to the mitigation of traffic impacts. Under *Nollan*, mitigation requirements may be imposed only to address the actual impacts on traffic caused by the particular project.[340]

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336. *First Church*, 482 U.S. at 321. *See also* Valley View Indus. Park v. Redmond, 107 Wash. 2d 621, 733 P.2d 182 (1987) (recognizing the possibility of interim taking but not for mere delay in processing permit applications).

337. *See* Norco Construction Inc. v. King County, 801 F.2d 1143, 1145 (9th Cir. 1986).

338. *See* Associated Home Builders of the Greater Eastbay, Inc. v. Livermore, 18 Cal.3d 582, 610 (Cal. 1976).

339. *Id. See* TOCCO v. New Jersey Council on Affordable Housing, 576 A.2d 328 (N.J. Super. Ct. App. Div. 1990), *cert. denied*, 111 S. Ct. 1389 (1991) (holding that eighteen month development moratorium not a taking where purpose of moratorium was to allow municipality opportunity to meet fair share obligations for low and moderate income housing).

340. *Nollan*, 483 U.S. at 837.

Cobb v. Snohomish County, 64 Wash. App. 451, 818 P.2d 1106 (1991) (opinion withdrawn from publication in Pacific Reporter), demonstrates the case specific impact

However, the temptation may be to have particular projects mitigate transportation problems associated with the region as a whole and not caused by the particular development or subdivision at issue. In such a scenario, singling out a particular project to be delayed or, alternatively, requiring that that project provide the improvement, is an illegitimate exaction under *Nollan*.

V. CONCLUSION

The difference between federal and state law protections of individuals' property rights creates great uncertainty for property owners, government officials, and their attorneys. Because the Washington State Supreme Court's latest declarations on takings law protection is on shaky ground, litigation should focus on the more solid foundation provided by the United States Supreme Court in *Lucas*.

How the takings principles will interact with the GMA remains to be seen. Only when the GMA is implemented and local regulations are adopted will it become clear whether any property is taken by them. Fortunately, the GMA gives local government the opportunity to be flexible, to avoid imposing harsh burdens on property owners, and to retain existing property values. Devaluation by downzoning and other extreme restrictions on productive uses are not mandated. Good public policy, fiscal responsibility, and fairness suggest that local government should seize the opportunities within the context of the GMA to avoid constitutional violations and the accompanying financial burdens on the local taxpayers. But if the opportunities to be flexible are ignored and burdens are inequitably shifted to private landowners, the responsible government entity must be prepared to answer the command of the Just Compensation Clause.

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analysis required for determining whether a traffic mitigation requirement is legitimate. In *Cobb*, a proposed development did not have any traffic impact on lanes that were operating at a level of service (LOS) D, but instead contributed traffic to other lanes at the same intersection that were operating at better than LOS D. *Id.* at 455. Under the Snohomish County Code, traffic impacts could be mitigated only if a LOS of D resulted after completion of the project. *Id.* But because Cobb's development impacted the intersection generally, which had some lanes at LOS D, the county decided to require mitigation fees. The court held that the county violated RCW 82.02.020. *Id.* at 458-59. The court placed burden of proof on the county to show that the fees were "reasonably necessary" to mitigate direct impacts of the development. *Id.* at 459.