The Alabama Supreme Court recently reversed a successful inverse condemnation regulatory taking judgment and, perhaps unintentionally, solved the Williamson County/San Remo Hotel conundrum of litigating regulatory takings claims in federal court. A summary of the opinion is below:


**ISSUE** – Is property protected from excessive regulations in Alabama?

**BACKGROUND** – M&N Materials, Inc. acquired several hundred acres of property for use as a rock quarry in an unincorporated area of Madison County, Alabama. Neighboring property owners and a nearby municipality, the Town of Gurley, were opposed to the rock quarry. The Alabama Legislature passed a local annexation bill that authorized the Town of Gurley to annex the quarry property. Once annexed, the Town denied a business license application filed by the quarry operator and imposed “an immediate moratorium on the acceptance of applications for use permits, building permits, right-of-way permits, zoning classification, variances, special exceptions or business licenses relating to” the quarry. Later the quarry was zoned for agricultural use which prohibited rock quarrying operations, and the operator was again denied a

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[^1]: The Alabama Supreme Court entertained oral argument in 2013 on an application for rehearing, but as of the posting of this paper the Court had not granted the application for rehearing or taken any further public action, and the opinion has not been released for official publication in the Southern Reporter.
business license. M&N sued the Town and others. The claims against the Town included an inverse condemnation claim which was initially brought under both the Fifth Amendment to the U.S. Constitution and the corresponding sections of the Alabama Constitution. When the case was removed by the defendants to federal court based on federal question jurisdiction, M&N dismissed the Fifth Amendment claim and relied only on the Alabama Constitution and state law. This allowed the case to be remanded to state court for trial. The jury returned a verdict in favor of M&N and against the Town on the inverse condemnation claim and awarded damages of $2,750,000 plus interest. The trial court added $1,200,169.20 in attorney’s fees and litigation expenses in favor of M&N for prevailing on its inverse condemnation claim. The Town appealed.

DECISION – The Supreme Court reversed and held that regulatory takings were not recognized or compensable under Alabama law, and that the only takings that were protected required some form of physical injury or damage.

Within the plain meaning of its text, § 235 does not make compensable regulatory “takings” by an entity or person vested with the privilege of taking property for public use. As set forth in our long-standing precedent, the taking, injury, or destruction of property must be through a physical invasion or disturbance of the property, specifically “by the construction or enlargement of [a municipal or other corporations’] works, highways, or improvements,” not merely through administrative or regulatory acts.


**Williamson County – San Remo Hotel**

Fifth Amendment takings claims are not ripe for trial in federal court until the owner first unsuccessfully litigates their state law claims for compensation. See, **Williamson County Regional Planning Comm’n v. Hamilton Bank**, 473 U.S. 172, 195 (1985). This is because “no [federal] constitutional violation occurs until just compensation has been denied” by the state.
Williamson County, 473 U.S. at 194, n.13. Once the owner is denied compensation under state law, their federal Fifth Amendment takings claims are ripe. Williamson County, 473 U.S. at 195. However, after litigating your state law claims for compensation, preclusion doctrines will usually prevent the owner from litigating the same claims (claim preclusion) or same issues (issue preclusion) a second time. See, San Remo Hotel v. San Francisco, 545 U.S. 323 (2005). Federal precedents also call for abstention in certain situations to avoid unnecessary conflicts between state law and the U.S. Constitution. The end result is that most federal court Fifth Amendment takings claims are not ripe until they are precluded from being re-litigated.

Until the U.S. Supreme Court revisits Williamson County, property owners in Alabama have a rare opportunity to litigate takings claims in federal court that is not available to property owners in most other states. The Williamson County/San Remo Hotel conundrum is defeated when there are no state law claims to pursue since an owner cannot be required to file a state law claim that does not exist. Williamson County, 473 U.S. at 194-195, 197; see also, Palazzolo v. Rhode Island, 533 U.S. 606 (2001). Now that the Alabama Supreme Court has taken the position that state law does not protect owners from excessive regulations that do not involve a physical disturbance or injury, regulatory takings claims are immediately ripe for litigation in federal court.²

Below is a summary of a few of the leading U.S. Supreme Court opinions on the subject of regulatory takings.

*Per Se* Takings (Categorical Takings)

When a regulation “denies all economically beneficial or productive use of land,” it is a *per se* taking without regard for the public interest advanced by the restriction. See, Lucas v.

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² Owners still must exhaust their administrative remedies and get a final decision on the application of the regulation to their property in order to make their claim ripe. See, Williamson County, 473 U.S. at 186; MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).
South Carolina Coastal Council, 505 U.S. 1003 (1992) (deprivation of all economically beneficial use is, from the perspective of a property owner, deprivation of the property itself; regulations that restrict all economically beneficial use may often be a guise of pressing that land into public service).

When a regulation amounts to a permanent physical invasion on private property, no matter how small, it is a per se taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (owners of buildings who were required by ordinance to allow antennas and cable lines to be permanently attached to the buildings suffered a compensable taking since it took away the owner’s property right to exclude others).

As Applied Takings (Balancing Test)

Regulations that do not deny all economically beneficial use and that do not work a physical taking may still be compensable regulatory takings as applied to a specific parcel of land under a three factor test: (1) the character of the governmental regulation; (2) the economic impact of the regulation as applied to the particular property; and (3) the extent to which the regulation has interfered with the property owner’s distinct investment backed expectations with respect to that property. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 122 (1978); see also Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (“Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.”).

Required Reading:
- Hadacheck v. Sebastian, 239 U.S. 394 (1915). Zoning ordinance was constitutional under nuisance law and police powers. Owner still had available uses of their land.
• **Pennsylvania Coal v. Mahon**, 260 U.S. 393 (1922). “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

• **Penn Central Transportation Co. v. City of New York**, 438 U.S. 104 (1978). Ordinance prohibiting construction on historic property was not a taking after being evaluated under the three part test: (1) the character of the governmental actions; (2) the economic impact of the action on the property owner; and (3) the extent to which the regulation has interfered with the distinct, investment-backed expectations of the owner.

• **Agins v. City of Tiburon**, 447 U.S. 255 (1980). Zoning ordinance lowering density was not a taking since it substantially advanced a legitimate public interest. See, **Lingle**.

• **Loretto v. Teleprompter Manhattan CATV Corp.**, 458 U.S. 419 (1982). Ordinance requiring building owners to allow cable companies to install structures on their buildings was a *per se* taking.

• **Bituminous Coal Assn. v. DeBenedictis**, 480 U.S. 470 (1987). The Court upheld the validity of a subsidence coal mining law on the grounds that a partial, but not total, restriction on mining coal was valid. Compare with **Mahon**.

• **First English Evangelical Lutheran Church v. County of Los Angeles**, 482 U.S. 304 (1987). Temporary moratoriums on land use or development can be takings that must be compensable for the period they were in effect.

• **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003 (1992). A regulation that denies the property owner all “economically viable uses of his land” constitutes a *per se*, regulatory takings that requires compensation regardless of the public interest advanced in support of the restraint.

• **City of Monterey v. Del Monte Dunes at Monterey, Ltd.**, 526 U.S. 687 (1999). Repeated denials of development plans for reasons that were not reasonably related to legitimate public purposes could be a *per se* taking, and that it was a jury question. See, **Koontz**.

• **Palazzolo v. Rhode Island**, 533 U.S. 606 (2001). Denial of development proposal that limited number of houses that could be built, but allowed some houses to be built, was not a *per se* taking, but may be a taking under **Penn Central** test.

• **Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency**, 535 U.S. 302 (2002). A temporary (32 month) moratorium on development was not a *per se* taking, but may be a taking under **Penn Central** test.


• **Horne v. Department of Agriculture**, 569 U.S. ___ (2013). Defendants in USDA enforcement proceedings were allowed to raise their Fifth Amendment takings claim as an affirmative defense in the enforcement action rather than being forced to pay the fine and then pursue their takings claim for paying the fine in the Court of Federal Claims.