

ZONING AND PLANNING LAW REPORT



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RECENT DEVELOPMENTS IN REGULATORY TAKINGS LAW: WHAT COUNTS AS "PROPERTY?"

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I. Introduction

The takings clauses of the federal and various states' constitutions forbid the taking of "property" in the absence of a public use for the property and the payment of just compensation.¹ In cases where the government affirmatively exercises its eminent domain power, there usually is no issue whether the thing to be taken qualifies as property. In regulatory takings cases, however, the foundational issue considered by the courts is whether the right allegedly taken is "property" at all. This article summarizes recent takings decisions from the federal and state courts considering that issue.

II. Court-Appointed Attorney's Service Is Property for Purposes of the Takings Clause

In a decision that attorneys will certainly love, the South Carolina Supreme Court held that lawyers have a property interest in their services, and that the state ef-

fected a taking when it limited a court-appointed criminal defense lawyer to statutory fees:

We hold today that the Takings Clause of the Fifth Amendment to the United States Constitution is implicated when an attorney is appointed by the court to represent an indigent litigant. In such circumstances, the attorney's services constitute property entitling the attorney to just compensation.²

Brown was appointed as defense counsel in a case in which Howard was charged with serious felonies, "including first degree criminal sexual conduct, two counts of kidnapping, two counts of armed robbery, and possession of a weapon during the commission of a crime."³ South Carolina law limits attorneys' fees in indigent criminal defense matters to \$3,500,⁴ and Brown asked the court for permission to withdraw from his representation of Howard, "stating that his obligations to an appointed capital case were taking up substantial amounts of time."⁵ The court declined Brown's repeated "belligerent" requests.

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When Brown refused to continue, the court threatened him with contempt, so he decided to continue with his representation of Howard. After trial, the court awarded \$17,268 for costs for investigative work and expert fees (in excess of the statutory cap of \$500), but did not exercise its discretion to award Brown attorney's fees in excess of the statutory \$3,500.⁶ Brown appealed. The Supreme Court of South Carolina held:

[Brown] presents the issue as one of law: may a trial court properly deny a request to exceed the statutory cap for attorney's fees based on the attorney's unprofessional conduct? We answer that question "yes" under the unique and compelling circumstances presented. Given the egregious level of Appellant's inexcusable conduct and persistent disregard of the trial court's orders, we find the trial court did not abuse its discretion in refusing to award fees in excess of the statutory cap.⁷

The South Carolina Bar Association appeared as *amicus curiae* and argued that when attorneys' services are conscripted for the public good, the Takings Clause is "implicated," even though the practice of law is a regulated profession.⁸ Although upholding the trial court's refusal to compensate Brown beyond the statutory maximum under the circumstances of the case, the South Carolina Supreme Court agreed with the *amicus* position regarding the Takings Clause, holding that the legislature recognized, in § 17-3-50 of the South Carolina Code, "the inherent fairness in providing for an award of attorney's fees and costs in appointed cases." The court concluded, however, that this is not simply a matter of legislative benevolence, but is required by the U.S. Constitution:

What the legislature has recognized for statutorily authorized appointments, we now find is additionally entitled to constitutional protection. We extend the constitutional protection to all court-ordered appointments.⁹

The court did not limit its holding to criminal appointments, but included appointment in all cases (the opinion noted that courts have the discretion to appoint counsel in "extraordinary" circumstances when "necessary to render justice").¹⁰ The court rejected the Bar's call for specific guidelines for attorney compensation, and "decline[d] to set bright-line rules." The court left it up to the trial courts for determination case-by-case. "The question of a taking is one of law. The question of what constitutes a fair attorney's fee under the circumstances would be one of fact, subject to an abuse of discretion standard of review." Finally, the court

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concluded that its holding would take effect starting in Fiscal Year 2012 (an odd ruling, since one might think that if compensation was constitutionally required, it would not matter that payment had not been budgeted for the current fiscal year).

A single justice dissented and would not have reached the issue raised by the *amicus*, since Brown himself did not raise the argument. Generally speaking, *amicus* cannot raise issues which the appellant does not, and such issues are considered waived. The dissenting justice also concluded that the trial court abused its discretion by denying fees in excess of the statutory cap, since the only reason stated by the trial court was that Brown acted petulantly and unprofessionally. The statute requires consideration of whether the fee request is “reasonable.”¹¹

III. No Right to Own Property Free of Regulation

California, if you weren’t already aware, produces raisins. Lots of raisins. It accounts for 99.5% of the U.S. crop and 40% of the world crop.¹² But since the 1920s, supply has exceeded demand by 30 to 50 percent, and since the 1940s, the U.S. Department of Agriculture has regulated the raisin industry to even out the fluctuation in supplies and prices by creating “annual reserve pools” that remove extra raisins from the market. The USDA regulations, in the form of “marketing orders,” require raisin “handlers” (those who process and pack agricultural goods for distribution) to set aside a certain percentage of raisins from the domestic open market, upon pain of civil and criminal penalties if they do not. The reserve raisins can only be sold for resale in export or secondary markets, with the proceeds used to pay for administration of the regulatory program, and any balance being distributed among raisin “producers.”

In *Horne v. U.S. Dep’t of Agriculture*,¹³ the U.S. Court of Appeals for the Ninth Circuit dealt with raisin farmers’ claims that these regulations worked a taking of their property. The court first rejected the farmers’ argument that because they had altered the nature of their business, they were no longer “handlers,” but had become “producers,” and were not subject to the reserve requirement. The court concluded they qualified as “handlers,” and thus were required to fork over between 30 and 47 percent of their crop to the reserve under the regulations.¹⁴ The court was therefore required to address the farmers’ takings claims.

The plaintiffs asserted that the reserve requirement was a physical taking of their raisins under *Loretto v.*

Teleprompter Manhattan CATV Corp.,¹⁵ and *Kaiser Aetna v. United States*.¹⁶ The Ninth Circuit acknowledged their “logic has some understandable appeal” because raisins are property and they were being taken, but held there was no taking because “their argument rests on a fundamental misunderstanding of the nature of property rights and instead clings to a phrase divorced from context.”¹⁷ The court recognized that a simple physical appropriation would be a taking. “No one suggests the government could come onto the Hornes’ farm uninvited and walk off with forty-seven percent of their crops without offering just compensation, even if the seizure itself were justified.”¹⁸ But the reserve requirement in the marketing orders was not the same thing:

[A] forcible taking is not what the Raisin Marketing Order accomplishes. Far from compelling a physical taking of the Hornes’ tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. Simply put, it is a use restriction, not a direct appropriation. The Secretary of Agriculture did not authorize a forced seizure of forty-seven percent of the Hornes’ 2002-03 crops and thirty percent of their 2003-04 crops, but rather imposed a condition on the Hornes’ *use* of their crops by regulating their sale. As we explained in a similar context over seventy years ago, the Raisin Marketing Order “contains no absolute requirement of the delivery of [reserve-tonnage raisins] to the [RAC]” but rather only “a conditional one.”¹⁹

Relying on the rationale of *Yee v. City of Escondido*,²⁰ the court viewed the raisin sale business as voluntary. In *Yee*, the Supreme Court upheld a mobile home rent control ordinance against a physical takings challenge, since the landowners were not required to use their property as a mobile home park, and thus, as the *Horne* court put it, “acquiesced in the regulation not under government compulsion but of their own accord.”²¹ Same for the raisin industry; no one was forcing the plaintiffs to participate: “Their argument is founded on an erroneous belief that they have a property right to ‘market their [raisins] free of regulatory controls.’”²² The court distinguished the ability to sell personal property, such as raisins, from the right to develop real property (as in *Nollan*²³ and *Dolan*,²⁴ two cases where the government was prohibited from conditioning the right to build on the owner’s agreement to surrender the right to compensation).²⁵ The

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government's power to regulate commerce "ought to put a property owner on notice 'of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)'."²⁶ Personal property is different from real property, and the right to sell personal property is subject to the government's power to regulate the market.²⁷ For a sense of what really drove the result, one only need recognize that the USDA regulations actually benefitted the plaintiffs economically by making the market for non-reserve raisins more profitable.²⁸

Finally, the court seemed to mix apples and oranges (or should that be raisins and prunes?) when it applied the *Lucas* "economic wipeout" test and "parcel-as-a-whole" analysis to the plaintiffs' raisins. The court concluded that the regulations couldn't be a taking because the USDA did not require the plaintiffs to surrender their entire crop. Apparently, the court forgot that the plaintiffs only argued that the regulations resulted in a physical taking, not a *Lucas per se* taking, or a *Penn Central ad hoc* regulatory taking. Rather than muddle it up with fruitless analysis of whether the regulations take one raisin or millions, the court should have just stuck to holding that the right to sell raisins in a highly-regulated commercial market is not "property" and it therefore was not taken. That would be better than this confusing and ultimately unnecessary passage, since in physical takings, the U.S. Supreme Court has noted that it really doesn't matter how much of the property is being taken, or what is left over.²⁹

A separate panel of the Ninth Circuit applied a similar rationale in a case holding that state law generally defines what interests qualify as "property," but intimated that a state's power do so may be limited. In *Vandevere v. Lloyd*,³⁰ the plaintiffs asserted that Alaska's commercial fishing regulations worked a taking or a due process violation because they shortened the fishing season and limited the number of fish that could be harvested under the plaintiff's entry permits and fishery leases. In an earlier "nearly identical case" in Alaska state courts, the plaintiffs made similar arguments:

The salmon fishers filed a complaint on October 25, 2005, alleging that the regulations "constitute unlawful takings or damage to [their] property interest in violation of the United States and Alaska Constitutions." They sought "a declaration that these government actions are unconstitutional and unenforceable without just compensation

paid to the plaintiffs for a taking or damage to their property."³¹

In that case, the Alaska Supreme Court concluded that the fishers did not have a property interest in their fishing permits under either the takings or due process clauses of the U.S. or Alaska Constitutions, and had a limited property interest in their shore fishery leases, and dismissed their claims. The plaintiffs instituted their federal claims in 2007, one year before the Alaska Supreme Court ruled against them, asserting pretty much the same claims.³²

When things like licenses and permits are involved, the state has the last word on the rights such property embodies.

The more intriguing part of the opinion comes in footnote 4 in the opinion's discussion of whether federal or state law controls on the threshold question of what is "property" for constitutional purposes. The court acknowledged that states define property, but in the footnote suggested that there are limitations on a state's authority to do so:

We pause to observe that any branch of state government could, in theory, effect a taking. *See, e.g., Stop the Beach Renourishment, Inc. v. Fla Dep't of Envtl. Prot.*, ____ U.S. ___, 130 S. Ct. 2592, 2601-02 (2010), 177 L.Ed.2d 184 (2010) (plurality) (writing that a state court, as well as a state legislature, can "take" private property). We also note that a federal court remains free to conclude that a state supreme court's purported definition of a property right really amounts to a subterfuge for removing a pre-existing, state-recognized property right. That is, we need not take a state court at its word as to the kind of analysis that it is performing. *See, e.g., Webb's Fabulous Pharmacies*, 449 U.S. at 160-64 (holding that a state may not simply recharacterize private property as public property by *ipse dixit*).

To take a far-fetched example, if a state enacts a statute to evict 10 people from their homes to create a park, the state's courts could not avoid a conclusion that a "taking" had occurred by holding that the 10 people never had a property right in their houses. *See, e.g., Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 448 (2d Cir. 1980) ("[A]lthough the primary source of prop-

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erty rights is state law, the state may not magically declare an interest to be 'Non property' after the fact for Fourteenth Amendment purposes if, for example, a longstanding pattern of practice has established an individual's entitlement to a particular governmental benefit."); *accord Winkler v. County of DeKalb*, 648 F.2d 411, 414 (5th Cir. 1981) (agreeing with that statement in *Quinn*).³³

The court held that when so-called "new property" is involved, state law is the final arbiter on what it includes. Thus, when things like licenses and permits are involved, the state has the last word on the rights such property embodies. The Ninth Circuit relied upon an earlier case distinguishing between "new property" (public employment, welfare assistance, state licenses, etc.) and "old property" (which includes the more traditional forms of property based in the common law).³⁴ State law defines the former, and thus can curtail or limit it with little constitutional interference, while federal courts applying the constitution make the final call on the latter.

At least in the Ninth Circuit. The court contrasted a First Circuit case holding that federal courts have the final say in defining property in both circumstances, and thus a state cannot limit licenses or the like with a completely free hand.³⁵ The Ninth Circuit rejected that case's rationale, concluding that:

[i]t would be anomalous to conclude that, in the absence of a statutory or contractual provision for compensation, the state must compensate those regulated when the state regulates an interest that the state itself created in the first place and explicitly made subject to future regulation. In any event, [Schneider v. California Dept. of Corrections, 151 F.3d 1194 (9th Cir. 1998)] is the law of our circuit and we are bound to follow it.³⁶

In other words, under the rationale of *Schneider*, Alaska would be free to limit the fishing licenses. Thus, the Ninth Circuit relied on the Alaska Supreme Court's conclusion in the prior 2008 Alaska Supreme Court opinion, which held that "the entry permits are not property interests."³⁷ The Ninth Circuit analyzed the shore fishery leases similarly, and concluded that the plaintiffs waived their regulatory takings claim because the leases themselves contained provisions in which the plaintiffs acknowledged the state's right to regulate their rights under the leases.³⁸

The North Dakota Supreme Court applied a similar rationale to reject a takings claim in *Bala v. North*

Dakota.³⁹ In that case, the court affirmed a dismissal for failure to state a claim on a takings challenge to the state and federal governments' enforcement actions against a horse racing enterprise that missed about \$10 million in excise tax payments. Here's the fact summary from the opinion:

In 2003, state and federal authorities began investigating RSI's account wagering activities. The State, through the North Dakota Racing Commission, determined nearly \$9 million from approximately \$99 million in account wagering bets was owed as excise taxes and brought a civil lawsuit against Bala and RSI to collect the taxes, and a receiver was appointed to manage RSI. RSI paid almost \$2 million of the taxes, and after Bala filed for bankruptcy on behalf of RSI, the State made a priority claim for the remainder of the excise taxes in the bankruptcy court. State and federal criminal charges were also brought against Bala, RSI, and others involved. After Bala was convicted of numerous federal law violations by a federal court jury, the state criminal proceedings were dismissed. Bala's federal court convictions were ultimately overturned based on insufficiency of the evidence. However, Bala and RSI's subsequent petition for a certificate of innocence, a prerequisite to seeking damages against the United States for wrongful imprisonment, was denied.⁴⁰

Rather than be thankful to have avoided spending time in a federal or North Dakota penitentiary, "[i]n April 2009, Bala and RSI brought this action against the State, claiming the State took RSI's property without just compensation in violation of the takings clauses of the state and federal constitutions."⁴¹ The plaintiffs asserted their "interests" were property taken in violation of both the federal and state constitutions, in that they collected cash and the state took excise taxes. The state moved to dismiss for failure to state a claim, which the trial court granted.

The North Dakota Supreme Court made short work of each of the takings claims and affirmed the dismissal. First, the court correctly noted that the government was not exercising its eminent domain power, but rather its police power: "[a]ssuming for purposes of argument that the State 'took' anything from Bala and RSI in this case, we conclude the State was exercising its police power rather than its eminent domain power."⁴² Unfortunately, the court stopped there, as if that conclusion was the end of its analysis. The problem is, that is always the case where the plaintiff alleges a regulatory taking; by

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definition, a regulatory taking is the *de facto* taking of property by the government exercising some power *other* than the eminent domain power.⁴³ The court should have explained why it was not a regulatory taking for the government to try and obtain the \$10 million the plaintiff was obligated by law to pay, but did not. On the second point, the court's analysis was more on the mark. It concluded that the plaintiff did not possess "property" protected by the Takings Clause because "gambling in North Dakota is a 'highly regulated' industry."⁴⁴ An owner can hardly claim to have unfettered rights to property when the property itself depends on the state for its existence, or is subject to such heavy regulation that an owner cannot have a reasonable expectation of doing whatever he pleases with it.⁴⁵

The Takings Clause of the U.S. Constitution's Fifth Amendment is not necessarily the last line of defense for property owners.

IV. Substantial Decrease in Value is a Regulatory Taking ... Under the State Constitution

Land use lawyers use the terms "takings," "Takings Clause," and "Fifth Amendment rights" as convenient shorthand for the rights of property owners to object, or to obtain compensation, when a government act has so interfered with their rights that it might as well have exercised eminent domain.⁴⁶ These terms usually reference rights under the U.S. Constitution, even though, ever since the Supreme Court's decisions in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*⁴⁷ and *Kelo v. City of New London*,⁴⁸ state courts—and state constitutional law—have taken the front seat in challenges to regulatory actions as takings, and affirmative exercises of eminent domain power as lacking a public purpose. So every now and then, we need a reminder that the Takings Clause of the U.S. Constitution's Fifth Amendment is not necessarily the last line of defense for property owners.

The Minnesota Supreme Court's decision in *DeCook v. Rochester Int'l Airport Joint Zoning Board*⁴⁹ provided the nudge. In that case, court held that a \$170,000 decrease in market value caused by an airport zoning ordinance was a compensable regulatory taking. Applying the Minnesota Constitution's takings clause,⁵⁰ the court held that when a regulation designed to benefit

a "specific public or governmental enterprise" causes a "substantial and measurable decline in market value," compensation is due, even if it might not be a taking under the federal *Penn Central* test. Although the court did not conclude that Minnesotans enjoy a broader definition of "property" under the state constitution than under the Fifth Amendment, the result in the case—that a state law taking may be easier to find—ends up in nearly the same position.

In 2002, the Airport Joint Zoning Board adopted an ordinance which increased the size of a runway safety zone that included the DeCook property. Most of the DeCook land was outside of "Safety Zone A," but those regulations "allow fewer land uses" on their property:

On September 18, 2002, the Board enacted Ordinance No. 4, the ordinance at issue in this case. Ordinance No. 4 changed the land-use regulations within Safety Zone A so that fewer uses were allowed than previously permitted under Ordinance No. 3. For example, although Ordinance No. 4 continued to prohibit dwellings within in Safety Zone A, it also prohibited all "buildings, temporary structures, exposed transmission lines, or other similar above-ground land use structural hazards." Permissible land uses within Safety Zone A under Ordinance No. 4 included "agriculture (seasonal crops)[,] horticulture, animal husbandry, raising of livestock, wildlife habitat, lighted outdoor recreation (non-spectator), cemeteries, and automobile parking," and those uses that "will not create, attract, or bring together an assembly of persons thereon." The Board also increased the size of Safety Zone A. For the DeCook property, that meant a total of 47 acres was within Safety Zone A as defined by Ordinance No. 4—the 19 acres previously located within Safety Zone A as defined by Ordinance No. 3 and an additional 28 acres.⁵¹

Relying on *McShane v. City of Faribault*,⁵² the DeCooks asserted that the application of Ordinance No. 4 to their land was a taking. In *McShane*, the Minnesota Supreme Court concluded that a runway safety zone regulation was a taking because "where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations."⁵³

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The trial court dismissed the complaint, but the Court of Appeals reversed and remanded for trial. On remand, the jury found that Ordinance No. 4 diminished the value of the land by \$170,000.⁵⁴ The trial judge, however, believed that the *McShane* test was not materially different from the *Penn Central* test for ad hoc regulatory takings under the Fifth Amendment,⁵⁵ and concluded that a \$170,000 diminution in value could not be a taking as a matter of law. The trial judge concluded that the DeCooks did not meet any of the three *Penn Central* factors (economic impact of the regulation on the property owner, the regulation's interference with distinct investment-backed expectations, and the character of the government action), and focused on the economic impact factor to conclude that a \$170,000 decrease in value was "minimal" when compared to the overall value of the land. The jury's finding resulted in a diminution of value of either 3.5% or 6.14%, depending upon whose appraiser's view of the land's valuation was accepted. Either way, it was not enough, in the trial judge's view.

The Court of Appeals reversed, and the Minnesota Supreme Court agreed to review the case. The issue before the court was whether a \$170,000 reduction in value was a taking, and whether the *McShane* test or the *Penn Central* test controlled. The court held that *Penn Central* is one of the tests for a taking, but not the only test when the state constitution's takings clause is being applied. The court held that the Minnesota Constitution provides property owners more rights than required by the Fifth Amendment, and there is a distinction between land use regulations that are part of a comprehensive plan, and those "enacted 'for the sole benefit of a government enterprise,'" such as an airport.⁵⁶ The court held that in the latter circumstance, compensation is due when the regulation causes a "substantial and measurable" diminution of the property's value. On the legal issue of whether \$170,000 qualified as "substantial," the court concluded:

[T]he \$170,000 diminution in the value of the DeCook property caused by Ordinance No. 4 is substantial. Not only is there merit to the argument advanced by the DeCooks—that by any definition \$170,000 in damages is substantial—it is also worth noting that the damages awarded by the jury exceeded the purchase price paid by the DeCooks for the entire 240-acre parcel less than 15 years before enactment of Ordinance No. 4, which caused the diminution in value suffered by the DeCooks. Because we conclude as a matter of law that the application of Safety Zone A to the

DeCooks' property resulted in a substantial diminution in the value of the DeCooks' property, we hold that a regulatory taking occurred under the Minnesota Constitution.⁵⁷

An earlier decision from Minnesota further highlights the difference between takings under the Fifth Amendment and under state constitutions. In *Interstate Companies, Inc v. City of Bloomington*,⁵⁸ the Minnesota Court of Appeals presaged the decision in *DeCook* by holding that the Minnesota Constitution's takings clause provides "broader protection to property owners than the federal constitution."⁵⁹

The case involved claims that noise from an airport, a building moratorium, and height restrictions resulted in a taking by inverse condemnation of the plaintiffs' properties. The trial court granted the government's motion for summary judgment. The Court of Appeals reversed, concluding that the evidence the plaintiffs presented, when viewed in the light most favorable to the property owners, pointed to the need for a trial and not summary adjudication. The property owners submitted an appraisal that showed an approximately 50% decline in value attributable to the regulations, their own testimony that they expected their properties to be developed in roughly the same manner as that of their neighbors, and evidence that their properties were bearing more than their fair share of the burdens of the airport regulations.

The Minnesota Constitution's takings clause is broader than that of the Fifth Amendment, in that it provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."⁶⁰ The Court of Appeals held that although the *Penn Central* three-part test "provides the basic framework for analysis" to determine whether the regulation effects a "taking," the Minnesota Constitution provides more protection because it requires compensation when property is "damaged" or "destroyed," as well as "taken," and thus "where land use regulations, such as the airport zoning ordinance here, are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measureable decline in market value as a result of the regulations."⁶¹ The court concluded:

The Minnesota Constitution provides broader protections to property owners than does the United States Constitution when property is taken, damaged, or destroyed for a public or governmental use. Courts must consider whether a

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property owner has suffered a substantial and measurable decline in property value because of a governmental regulation, and a private property owner may not be forced to a bear a burden for the benefit of the general public. Where the evidence is in controversy, the issue of whether a property owner has demonstrated a substantial diminution in value is a fact question for determination by the factfinder.⁶²

The U.S. Court of Appeals for the Sixth Circuit employed a similar rationale when it concluded, in *McCarthy v. City of Cleveland*,⁶³ that the Ohio Constitution's takings clause might allow the plaintiffs to raise a takings challenge, even if they had no claim under the federal constitution. The court dismissed a claim that the city's red light and traffic camera ordinance resulted in a taking of property because it imposed liability for traffic law violations on the owner of a motor vehicle and not the driver. The plaintiffs had leased their cars but received traffic citations in connection with their operation of the cars, even though the plaintiffs were lessees and not the owners of the cars. They did not contest the citations and paid their fines. They then filed federal takings claim in state court (as required by *Williamson County*), but the city (as allowed by *Chicago v. International College of Surgeons*⁶⁴) removed the case to federal district court. The Sixth Circuit distinguished two U.S. Supreme Court cases, in which the Court had found a taking of funds, by noting:

In [those cases], the state law at issue operated to seize a sum of money from a specific fund. The statutes found to effect takings did not, as the Cleveland ordinance does, merely impose an obligation on a party to pay money on the happening of a contingency. Cleveland did not seize funds from Plaintiffs' bank accounts. Instead, Plaintiffs, on receiving the traffic citations, paid the money demanded without protest or appeal.⁶⁵

Because the challenged ordinance did not seize or otherwise impair an identifiable fund of money, the plaintiffs had failed to plead a cause of action under the Takings Clause.

The court declined to address a due process claim on the grounds that it was belatedly raised, but reversed the district court's judgment on the plaintiffs' supplemental state law claims. Because the Ohio Constitution's takings clause "affords greater protection than the federal Takings Clause," the district court should not have assumed that the resolution of the federal tak-

ings claim against the plaintiffs also resolved the state law issues the same way.⁶⁶ The court remanded the case to the district court for consideration of the Ohio takings claim by exercise of supplemental jurisdiction, or a remand to the Ohio courts should it decline to consider that claim.

V. Conclusion

As the cases summarized in this article illustrate, the foundational issue of what interests qualify as "property" for purposes of the federal Takings Clause and similar state constitutional provisions remains an unsettled issue, and the lower courts have not settled on a consistent method to analyze it.

NOTES

1. *See*, e.g., U.S. Const. amend. V; Cal. Const. art. I, § 19.
2. *Ex Parte Brown*, 393 S.C. 214, 711 S.E.2d 899, 902 (2011).
3. *Brown*, *supra* n. 2, 711 S.E.2d at 900.
4. *See* S.C. Code Ann. § 17-3-50(A).
5. *Brown*, *supra* n. 2, 711 S.E.2d at 900.
6. A practice note: attorneys should not expect to receive judicial largesse if they refuse to stand up when addressing the court, do not accept the court's rulings even after their objections are noted and preserved, and "consistently refuse[] at different points throughout the pre-hearing[,] trial and ... trial of [a] case to continue." *Brown*, *supra* n. 2, 711 S.E.2d at 901.
7. *Brown*, *supra* n. 2, 711 S.E.2d at 902.
8. *See Brief of S.C. Bar as Amicus Curiae*, *Brown v. Howard*, No. No. 26991 (filed Aug. 20, 2010) (available at <http://tinyurl.com/6gsyy94>).
9. *Brown*, *supra* n. 2, 711 S.E.2d at 903.
10. *Brown*, *supra* n. 2, 711 S.E.2d at 904 (citing *Ex parte Dibble*, 279 S.C. 592, 310 S.E.2d 440, 443 (Ct. App. 1983)).
11. *Brown*, *supra* n. 2, 711 S.E.2d at 905 (Pleicones, J., dissenting).
12. *See* <http://www.calraisins.org/about/the-raisin-industry/>.
13. *Horne v. U.S. Dept. of Agriculture*, 2011 WL 2988902 (9th Cir. 2011).
14. *Horne*, *supra* n. 13, 2011 WL 2988902 at *4.
15. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).
16. *Kaiser Aetna v. U. S.*, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979).
17. *Horne*, *supra* n. 13, 2011 WL 2988902 at *6.
18. *Horne*, *supra* n. 13, 2011 WL 2988902 at *6.
19. *Horne*, *supra* n. 13, 2011 WL 2988902 at *6 (emphasis in original) (citing *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985, 989 (C.C.A. 9th Cir. 1938)

(rejecting a takings challenge to a reserve requirement under walnut “marketing order”)).

20. *Yee v. City of Escondido*, Cal., 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992).

21. *Horne*, *supra* n. 13, 2011 WL 2988902 at *7.

22. *Horne*, *supra* n. 13, 2011 WL 2988902 at *7 (quoting *Cal-Almond, Inc. v. U.S.*, 30 Fed. Cl. 244, 246 (1994), aff’d, 73 F.3d 381 (Fed. Cir. 1995), *reh’g denied*, *in banc suggestion declined*, (Apr. 1, 1996)).

23. *Nollan v. California Coastal Com’n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

24. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

25. *Horne*, *supra* n. 13, 2011 WL 2988902 at *8.

26. *Horne*, *supra* n. 13, 2011 WL 2988902 at *8 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)).

27. This rationale seems little different from the “notice” defense the U.S. Supreme Court rejected in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). For example, what if the government adopted a regulation requiring that upon sale of land that’s used as rental property, an owner must donate a percentage of it to some public purpose? Would the fact that the owner is choosing to sell the land versus develop it offer a valid distinction, or is there something just fundamentally different about personal property that renders it subject to regulation to the point of nonexistence?

28. See *Horne*, *supra* n. 13, 2011 WL 2988902 at *9. It’s pretty much the same equities that underlay the U.S. Supreme Court’s decision in *Stop the Beach Re-nourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010): a court likely will not look kindly upon a takings case where property owners appear ungrateful for government help, even when they profess not to want it. In that case, the property owners asserted that a state program that replenished the beaches in front of their land worked a taking after a hurricane washed the sand away. The Court concluded that the Florida Supreme Court did not alter state common law, and thus did not judicially take beachfront property owners’ rights to accreted land.

29. See, e.g., *Loretto*, *supra* n. 15 (the cable box had a minimal footprint).

30. *Vandevere v. Lloyd*, 644 F.3d 957 (9th Cir. 2011).

31. *Vanek v. State*, 193 P.3d 283, 286 (Alaska 2008).

32. While their federal claims would not be subject to the *San Remo Hotel* full faith and credit rule at the time of the filing of the federal court action because the state court litigation was not final, it seems as though they would have been when the Ninth Circuit appeal was heard, because the Alaska Supreme Court made a final decision in 2008. But again, no mention of *San Remo Hotel* in the opinion, only the conclusion that the question of whether property has been taken is a question of federal law, and that on such questions the federal courts “owe no deference to state courts.” *Vandevere*, *supra* n. 30, 644 F.3d at 964. Oddly, the Ninth Circuit did not reference either *Williamson County* or *San Remo Hotel*.

33. *Vandevere*, *supra* n. 30, 644 F.3d at 963.

34. *Schneider v. California Dep’t of Corrections*, 151 F.3d 1194 (9th Cir. 1998).

35. See *Hoffman v. City of Warwick*, 909 F.2d 608 (9th Cir. 1990).

36. *Vandevere*, *supra* n. 30, 644 F.3d at 966.

37. *Vandevere*, *supra* n. 30, 644 F.3d at 966 (quoting *Vanek*, *supra* n. 31, 193 P.3d at 285).

38. *Vandevere*, *supra* n. 30, 644 F.3d at 967-69.

39. *Bala v. State*, 2010 ND 164, 787 N.W.2d 761 (N.D. 2010).

40. *Bala*, *supra* n. 39, 787 N.W.2d at 763 (citations omitted).

41. *Bala*, *supra* n. 39, 787 N.W.2d at 763.

42. *Bala*, *supra* n. 39, 787 N.W.2d at 765.

43. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

44. *Bala*, *supra* n. 39, 787 N.W.2d at 765.

45. See also *Epice Corporation v. Land Reutilization Authority of City of St. Louis*, 2010 WL 3270114, *3 (E.D. Mo. 2010), judgment aff’d, 416 Fed. Appx. 595 (8th Cir. 2011) (“The Court agrees with these courts in finding that the foreclosure of a tax lien involves the taxing power, not the eminent domain of the government.”).

46. See *Lingle*, *supra* n. 43.

47. *Williamson County Regional Planning Com’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

48. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 10 A.L.R. Fed. 2d 733 (2005).

49. *DeCook v. Rochester Intern. Airport Joint Zoning Bd.*, 796 N.W.2d 299 (Minn. 2011).

50. Minn. Const. art. I, § 13.

51. *DeCook*, *supra* n. 49, 796 N.W.2d at 302-03.

52. *McShane v. City of Faribault*, 292 N.W.2d 253, 18 A.L.R.4th 531 (Minn. 1980).

53. *McShane*, *supra* n. 52, 292 N.W.2d at 258-59.

54. *DeCook*, *supra* n. 49, 796 N.W.2d at 304.

55. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), *reh’g denied*, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198 (1978).

56. *DeCook*, *supra* n. 49, 796 N.W.2d at 306 (quoting *McShane*, *supra* n. 52, 292 N.W.2d at 257-58).

57. *DeCook*, *supra* n. 49, 796 N.W.2d at 308-09 (footnote omitted).

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- 58. *Interstate Companies, Inc. v. City of Bloomington*, 790 N.W.2d 409 (Minn. Ct. App. 2010), review granted, (Jan. 26, 2011) and review denied, (Apr. 27, 2011) and stay vacated, (Apr. 27, 2011).
- 59. *Interstate Companies*, *supra* n. 58, 790 N.W.2d at 413.
- 60. Minn. Const. art. I, § 13.
- 61. *Interstate Companies*, *supra* n. 58, 790 N.W.2d at 414 (quoting *McShane*, *supra* n. 52, 292 N.W.2d at 258-59 (footnote omitted)).
- 62. *Interstate Companies*, *supra* n. 58, 790 N.W.2d at 416.
- 63. *McCarthy v. City of Cleveland*, 626 F.3d 280 (6th Cir. 2010).
- 64. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997).
- 65. *McCarthy*, *supra* n. 63, 626 F.3d at 284 (citations omitted).
- 66. *McCarthy*, *supra* n. 63, 626 F.3d at 287.

OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

Blaesser & Weinstein, *Federal Land Use Law & Litigation* §§3:1 et seq.

Salkin, *American Law of Zoning* §§16:1 et seq.

Ziegler, Rathkopf's *The Law of Zoning and Planning* §§6:1 et seq.

RECENT CASES

U.S. Court of Appeals for the First Circuit holds that developer whose construction was delayed was denied due process.

San Gerónimo Caribe Project, Inc. was developing a mixed residential, commercial and tourist project in San Juan, Puerto Rico. By 2007 San Gerónimo had invested over \$200 million in the project. After unfavorable publicity, the Department of Justice of Puerto Rico issued an opinion, contradicting an opinion issued in 2002, stating that San Gerónimo lacked valid title to some of the land on which it was building, because the land in question, having been gained from the sea, was public property.

The Governor of Puerto Rico, without affording San Gerónimo a hearing, ordered all permits for the project suspended and all construction halted for 60 days. At a subsequently scheduled hearing before the Regulations

and Permits Administration of Puerto Rico (ARPE), San Gerónimo offered evidence of its title but was told that the nature of the hearing was not adversarial and that the validity of its title would not be considered.

A week after the hearing, ARPE issued an order similar to that issued by the Governor, without addressing San Gerónimo's proprietary interest. San Gerónimo ultimately obtained relief from the Puerto Rico courts in various proceedings in which it was held that ARPE had violated San Gerónimo's due process rights, that San Gerónimo had title to the land on which it was building, and that ARPE had erred in suspending San Gerónimo's permits and halting the construction.

San Gerónimo sued in the U.S. District Court under 42 U.S.C.A. § 1983, alleging violation of its due process rights and other claims. The action was dismissed on the grounds that San Gerónimo's procedural due process claims were barred by the *Parratt-Hudson* doctrine, and that its claims were also subject to dismissal under the doctrine of qualified immunity.

On appeal, the U.S. Court of Appeals for the First Circuit affirmed, on the grounds that the defendants in San Gerónimo's suit were entitled to qualified immunity. Before reaching that issue, however, the court analyzed whether San Gerónimo's procedural due process claims were barred by the *Parratt-Hudson* doctrine, and concluded that they were not.

Under the *Parratt-Hudson* doctrine, noted the court, when a plaintiff is deprived of property by "random and unauthorized conduct" of state officials, the issue of whether his due process rights were violated is limited to the adequacy of postdeprivation remedies provided by the state. After an extensive review of case law, the court held that the conduct of the defendants did not fit within the *Parratt-Hudson* doctrine. To suspend San Gerónimo's permits, they could have undertaken an ordinary adjudicative process involving a formal hearing and other procedural safeguards, but instead chose to employ an emergency procedure which denied due process to San Gerónimo. This was not "random and unauthorized conduct," but predictable overreaching by government officials who had broad discretion to choose the manner by which property interests might be deprived. Postdeprivation remedies therefore were not sufficient to afford due process to San Gerónimo.

Having reached this conclusion, however, the court agreed with the court below that the defendants were protected by qualified immunity. The state of the law regarding the *Parratt-Hudson* doctrine, said the court, was not sufficiently clear, at the time the defendants act-

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ed, to put them on notice that their actions violated due process. *San Gerónimo Caribe Project, Inc. v. Acevedo-Vila*, 2011 WL 2436607 (1st Cir. 2011).

Florida District Court of Appeal holds that state right-to-farm act did not bar enforcement of county ordinances adopted prior to effective date of act.

Richard Wilson and his two business entities owned and operated a nursery on several parcels of land in Palm Beach County. A County agent conducted a site visit in connection with another matter, and the County later issued a notice of violation, indicating that Wilson was in violation of the County's Unified Land Development Code (ULDC) because he was operating the nursery without the proper zoning approval. Although maintaining that his activities were protected by the state Right to Farm Act, Wilson advised the County that he would comply with its demands under protest.

Wilson later sought a special permit with respect to operating his business on part of his land, and the County responded by allowing the business to operate only if numerous conditions were met. Wilson went to court, seeking declaratory and injunctive relief on the grounds that, *inter alia*, the special permit conditions violated the Right to Farm Act. The County moved for, and was granted, summary judgment.

On appeal, the Florida District Court of Appeal, Fourth District, affirmed in part and reversed in part. The court agreed with the County that the Right to Farm Act did not prohibit it from enforcing ordinances adopted after the Act's effective date. The plain language of the Act prevented counties from *adopting* ordinances relating to agriculture; the Act said nothing about enforcement of ordinances already in place. If the legislature had wanted to bar enforcement of ordinances, it clearly could have done so.

This meant that the County could enforce against Wilson almost all of the zoning provisions that it sought to enforce. One provision, however, had been enacted after the effective date of the Right to Farm Act. Although the County argued that the provision's requirement of issuance of a special permit was merely procedural, the court noted that the provision imposed requirements as to setbacks, buffers adjacent to parking, loading, and internal roads, and hours of operation of large commercial vehicles. The record did not show that there were no genuine issues of material fact as

to whether the provision would affect Wilson's farming operations, and so the County should not have been granted summary judgment on that issue. *Wilson v. Palm Beach County*, 62 So. 3d 1247 (Fla. Dist. Ct. App. 4th Dist. 2011).

Supreme Court of New Hampshire holds that non-abutting property owners lacked standing to appeal planning board decision approving subdivision.

Golf Course Investors (GCI) sought and received approval from the Town of Jaffrey for a "major subdivision application" allowing it to convert a building into a four-unit condominium with two detached garages. Seven Town residents who owned non-abutting properties appealed the decision to the Zoning Board of Appeals.

At a public hearing on the appeal, GCI contended that the residents did not have standing to bring the appeal, but the ZBA held that they did have standing, and ruled in favor of the residents. GCI appealed the ZBA's decision to the superior court, which ruled that the residents did not have standing to bring their appeal, and vacated the ZBA's decision.

On appeal by the Town, the Supreme Court of New Hampshire affirmed the superior court. To have standing, noted the court, the residents had to be "aggrieved" by the decisions they sought to appeal, which in turn meant that they had to show some direct, definite interest in the outcome. To determine whether a non-abutting owner has such an interest, a trier of fact may consider such factors as the proximity of the owner's property to the site in question, the type of change proposed, the immediacy of the injury claimed, and the owner's participation in the administrative hearings.

Turning to the record of the case, the court noted that the properties of the residents who sought to appeal were located at various distances from the GCI property, ranging from about 450 feet to about 2,400 feet. The record showed that GCI did not intend to dramatically alter the footprint of the building on its property, nor change its visual character. There was a complete lack of evidence as to the nature and extent of any injury to the residents' properties. The residents alleged no more than a general interest in preventing the Town from approving plans that would violate the Town's zoning ordinance. The court concluded that the Town had failed to show that the superior court's decision was unsupported by the evidence or was legally

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erroneous. *Golf Course Investors of NH, LLC v. Town of Jaffrey*, 20 A.3d 846 (N.H. 2011).

Court of Appeals of North Carolina holds that height limitation imposed by historic preservation commission was arbitrary.

Douglas Smith owned property in a historic district in the Town of Beaufort, on which stood a 16-foot, two-inch building known as the "Carpenter Cottage." He had purchased the property intending to demolish the Carpenter Cottage and build a two-story building in its place.

After litigation concerning Smith's plans, a court ordered Smith and the Town, including two members of the Beaufort Historic Preservation Commission, to engage in mediation. The parties reached a proposed settlement under which Smith agreed to seek approval for a one-and-one-half story building with the condition that if Commission granted approval, all pending litigation concerning the matter would be dismissed.

Smith submitted plans for a one-and-one-half story building that would be 29 feet tall. A neighbor objected that the building would obstruct her view of the waterfront and thereby reduce the value of her home. Although the Commission approved the demolition of the Carpenter Cottage (which was beyond repair), it required that Smith reduce the height of his proposed building to 24 feet. Smith offered evidence that he could not reduce the height below 27 feet, three inches, but the Commission denied permission for the building because it exceeded 24 feet in height.

Smith appealed to the Town's Board of Adjustment (BOA), which found the 24-foot height limitation to be arbitrary and capricious, and directed the Commission to grant Smith the permission he sought. Smith's neighbor sought judicial review of the BOA's decision, but the superior court upheld the decision.

On appeal, the Court of Appeals of North Carolina affirmed the superior court. After ruling that the neighbor had standing to bring the case, the court noted that state law provides that a historic preservation commission can take no action other than to prevent construction that is incongruent with the special character of a landmark or district. The Commission had determined that any structure over 24 feet in height on Smith's property would be incongruous with the historic district, but there was no substantial evidence to support that finding. Although there were other residences in the district that were between 20 and 22 feet in height, the

residences closest to Smith's property ranged from 26 to 35 feet in height. The law did not allow the Commission to "cherry pick" certain properties in the district to make its congruity determination; that determination had to be based on the total physical environment of the district. It was clear that the 24-foot limit had not been based on any particular principle, but rather was based merely on the Commission members' personal preferences. *Sanchez v. Town of Beaufort*, 710 S.E.2d 350 (N.C. Ct. App. 2011).

Supreme Court of Virginia holds that whether particular property was personal property or fixtures was for jury in action to determine just compensation for condemnation.

The Transportation Commissioner of the State of Virginia condemned land and improvements thereon owned by Taco Bell of America, Inc., for a highway construction and maintenance project. In the course of a jury trial to determine the amount of just compensation, the Commissioner argued that 42 specified items on the property, including things such as warming ovens, freezers, tables and chairs were not fixtures because they could be moved off the property. Therefore, the Commissioner argued, their value could not be included in determining just compensation.

Taco Bell and the Commissioner offered conflicting expert testimony as to whether the 42 items were fixtures or personalty. At the close of all evidence, the Commissioner moved the court to remove from the jury the question of whether the items were fixtures or personalty. The court granted the motion, ruling that the items were personalty because they could be moved.

On appeal, the Supreme Court of Virginia reversed and remanded. The court noted that while it was undisputed that all of the items in question could be moved, that is not the test for determining whether an item is a fixture. Taco Bell had presented evidence that the items were of the type needed for the purpose to which it had devoted the property, and that it had intended that the items were to remain on the property for the life of the business, i.e., that it had an intent to make the items a permanent accession to the realty. Considering the evidence in the light most favorable to Taco Bell, the court held that the question whether the items were fixtures or personalty should have gone to the jury. *Taco Bell of America, Inc. v. Com. Transp. Com'r*, 282 Va. 127, 710 S.E.2d 478 (2011).

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