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A Framework for Analysis of the Takings Issue

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A FRAMEWORK FOR ANALYSIS OF THE "TAKINGS" ISSUE

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A little bit of my background in this area, so you know where I came from, I went to law school at William and Mary beginning in 1970, right after the first earth day, and I was interested in environmental issues at that point in time. I got involved with the Chesapeake Bay Foundation and some other groups and was part of the drafting of the wetlands legislation for the Virginia legislature. As somebody helping to draft that legislation, the takings issue was a critical part of thinking about how to draft the legislation. My interest in this area started then, and, obviously, continued on with the environmentalist perspective.

As a professor, teaching Property and Land Use Planning, the takings issue arose in another context, and that was in the zoning context. Over the past decade I have to read all of the Supreme Court cases concerning this issue. What I would like to do this morning, first of all, is develop a broad conceptual framework that should act as a point of reference for the whole day. It should provide us a place to put all the different issues that are involved with the takings issue.

One of the things we have to recognize from the beginning when talking about takings is that there is no clear roadmap, nobody has a clear roadmap. There was a conference held this summer with national experts from all over the country, coming with all kinds of topics and the consensus was that takings is a muddle, and there is a lot of truth to that. Because if you try and get too specific about predicting outcomes for future cases, it just is not really feasible. However, I do think there is a framework and one that helps us understand the great majority of the cases or potential fact patterns that are involved. It is a fact that there is a gray area, there always has been a gray area in this area, and will continue to be a gray area, it is the nature of the beast. This issue is not like an IRS revenue ruling or a provision of the UCC, there is just no way any court is going to be able to nail it. I will show you why as we get further into it. I am also, to some degree, going to have to simplify in this overview some of the material, and I recognize that I am going to be leaving out a few of the finer points of the cases simply because to get into them causes more confusion than help. Also, I would like to

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treat my session as a classroom session and urge the members of the audience to ask questions as I am going through it, because if each step is not clear it is not going to work and I need to make sure that everybody is with me as we go through.

Well, what is a takings? First thing we do is look at the language of the Constitution, on page one of your outline of materials, which I really commend to your use as a very useful outline and quick source of reference to many of the cases that are involved.[1] This whole issue starts with the U.S. Constitution and an equivalent provision of the state constitution which says "nor shall private property be taken for public use without just compensation."[2] This is the Fifth Amendment to the U.S. Constitution. All amendments to the U.S. Constitution are set as limitations on government action to protect individuals from over intrusive government activity and it is relatively clear that at the time of the drafting of this amendment that the reference was to the titled property, literal titled property. The state, the king at the time, does not have the right, although the king in England use to take the right literally, to come in and move you off your piece of land and use the land. They decided that while the state should have the power to obtain title to land as is required by the public good, that when they do so, they must pay for it and they must pay the fair value for it. That is the beginning point of what this amendment means. It stood as that for a long, long time, approximately 120 to 150 years. The provision was triggered only by a taking of the title of a piece of private property. It was not until 1922 in the *Pennsylvania Coal* case[3] that the U.S. Supreme Court significantly expanded the reach of that amendment to deal with what we are now talking about today as regulatory takings. An action wherein the government does not take the title, but imposes such limitations upon the use of the land that we say it is "as if" it is an equivalent of the taking of the title, and therefore compensation should be paid.

Recognize that the takings analysis is a judicial activity. It is a check by the courts on the other two branches of government, the legislative and the executive branch. It is a determination as to the appropriateness of the action of the legislature or the executive branch by the judiciary. The only appeal to their decision is, of course, ultimately to the U.S. Supreme Court. Once the Supreme Court says

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1. *See* Outline in Appendix.
2. U.S. CONST. amend. V.
3. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

"what is a taking and what is not a taking" that is it, we are stuck with it, unless you change the members of the court, in which case, of course, you sometimes can get a different outcome.[4] Over a period of time it has become clear that the takings limitation on state action apply to the federal and state local government, to the legislative activities of all levels of government, as well as to decisions by executives within the government, i.e., the Department of Interior, Environmental Protection Agency, state agencies, local zoning boards, or whoever exercises executive decision making power. The issuance of a § 401 water permit,[5] a state wetlands permit, local zoning variance, whatever it is, those are all executive activities and they are also subject to limitation of the Fifth Amendment.

Now when does it arise as an issue? And this is something that we do have to sort out, to understand exactly when you ought to look to the limitations of the Fifth Amendment as a constraint. The first requirement is that you must have property. Two primary categories of property are personal property and real property. The limitation of government action applies to personal property as well as real property. We do not hear too much about the personal property side of it because it really does not arise too often, but it can arise. There is a case that refers to eagle feathers.[6] The Endangered Species Act[7] was passed by the federal government. It made it illegal to sell eagle feathers, because eagles were listed as an endangered species and it was illegal to sell a species or a part or product of a species. There was a person who brought a suit saying that the legal restraint constituted a taking in that it took away the right to sell. The Supreme Court basically said "sorry about that," the public policy interest in preserving species is more important than private individual right to sell and basically waved it off and was not impressed with the takings claim. The government did not take the eagle feathers away from them, but the law clearly restrained considerably what could be done with those eagle feathers. You could not ship them interstate, you could not sell them. So it did limit the use of private property, and more recently, the Supreme Court reaffirmed that it has a blasè attitude about protecting personal property. That is not the focal point

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4. *Compare Pennsylvania Coal and* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

5. 33 U.S.C. § § 1281, 1284, 1341, 1342 (1988)

6. United States v. Dion, 476 U.S. 734 (1986).

7. 16 U.S.C. §§ 1531-1544 (1988).

of our concern here today. Today we have a concern with real property.

There are several examples of real property ownership to which the takings limitation might apply. The obvious one is full ownership, if you own land in full, in a fee simple, then government actions which limit the use of the land potentially are subject to the limitation. But even if you do not have full ownership, if you only have a partial ownership, a partial interest in real property, it may, nevertheless apply. A mineral interest is an example of a partial ownership. The mineral right holder of a piece of land does not own the full fee, only the right to exploit the mineral. But, nevertheless, that is a property right and as such is subject to takings limitation. You may also have, and here is where you start to push into a gray area, a contract right or a license from a government agency to make use of a public resource, at some point and in some circumstances, it will crystalize into being recognized as a property right, and once you say that word, then the Fifth Amendment applies to it. Normal contracts do not constitute property. That you have a contract with the government does not normally give you property right, but when you have certain contracts about real property, sometimes they do say that it can be considered a property right, and this can get very confusing.

Often one of the areas that this comes up in is in water rights areas. Out West the issue of water rights is a very serious issue, worth lots of money and lots of lawyers litigate water right issues all the time. In Michigan we are under a different system and we do not tend to have the takings issue arising very often.[8] I would suggest to you that there are three major categories, or three different types of interference we will be talking about; interference with the title itself, interference with possession and interference by regulation.

Interference with the title itself would normally arise under the category of eminent domain. Eminent domain is the process by which a state obtains, involuntarily, title to a piece of land owned by a private individual. I think one of our other speakers is going to

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8. Question from the audience: What if a developer has a contract to purchase land, and the local government changes the zoning, destroying the value of the land. Is the government action subject to the limitations of the Fifth Amendment?

Answer: That may be fact specific, but I would think that you certainly have a shot at using the limitation where the agreement between the land owner and the developer clearly gives that person a right to purchase the property, where there are words like an option to purchase, or something else like that. Where there is an interest in land created by that contract, then I think the developer has a shot at it, but you would have to see the specific language involved in the contract.

spend some time talking about this, so I will not spend a lot of time on it. What is relatively clear is that it is a power the state has, and that the State may exercise that power within certain limitations. But that is not regulatory takings, that is not what most of the debate is about these days.

Next we have the issue of possession. This is quite important. One of the premier characteristics of real property as defined in the United States, in our capitalist system, is the right to exclude others. If you have full ownership of land, you have the right to exclude others. And that is one of the things that the court protects. They recognize that if you do not have the right to exclude others, then you may not functionally have title to the land. If you have title, but are not able to keep other people off of it, you have lost one of the premier rights of land ownership.

The third category is regulation. In reading all the cases and preparing for today, I have decided that, as many lawyers as there are, there may be as many different ways of breaking this down, but I have come up with just two categories that I think most of the fact patterns fit. These categories allow us to understand some of the differences in why things come out the way they do. The first category is what I call extractions, extractions before development. An extraction before development occurs when somebody goes into a local zoning board and says "I would like to develop this land and I want to put four houses on it" and the local zoning board says "alright you can do that if you pay us for putting in the sewer, and if you set back your house fifteen feet." They may then list the 8,000 other things that a developer has to do before the building permit is signed. Those are extractions, promises. Some of them are fairly simple and straightforward, but they can get complicated. Sometimes the extractions are money, sometimes the extractions are property itself. Some local governments have said, for example, that if the developer wants to put in a subdivision, they must donate 10% of their land to the city to be set aside as parks within the subdivision. Well that is an extraction, they have taken the land as quid pro quo for getting the permit to develop.

The second major category of regulation is prohibitions, prohibitions of development that are imposed for purposes of protecting some natural resource. The resource may be a wetlands, may be a watershed, may be a flood plain, may be sand dunes, it could be a wide assortment of natural resources that government simply does not want the individual to develop at all, and therefore basically imposes a prohibition.

Let me give you a couple of hypotheticals and see if we can figure out where they would fit within this grid. What if the Department of Natural Resources ("DNR") passes a regulation that says no one may hunt ducks within 100 yards of the Red River? We have a property owner, Mr. X who owns land on the Red River, he claims that the regulation constitutes unlawful taking of his property right to hunt ducks. What do we think? Does it fit in here? Well, as a first inquiry, is it a government action that is at question? Yes. The action is subject to the Fifth Amendment limitation. Is property involved? No, because what is it being interfered with? The claim is the right to hunt. Is the right to hunt a property right? The vast majority of cases say no, the right to hunt is not a property right, it is a privilege to be allowed or disallowed by the state. Is the right to hunt a specifically recognized attribute of ownership of land? And again the answer is no. So if it is not a property right you stop at that point, there is nothing else to do. You may attack the decision based on other legal basis, you can say it is arbitrary or capricious, you can say it is without lawful purposes, or other things, but you will not be able to use the Fifth Amendment as the process to attack. State control of hunting has to do with the long term existence of what is called the state ownership doctrine which has to do with the right of the state to control access to wildlife. This doctrine has been in existence for such a long period of time that it simply has never been a right of the individual control of wildlife, the state has always retained that right. And the right to hunt is simply a way to get to those animals which are controlled by states, not by local property owners. It is somewhat unique, but it is an assertion you see in a number of cases and the courts have dealt with it and said no.

Second hypothetical, DNR again, in order to protect ducks on the Red River adopts a regulation that says there will be no development within 100 yards of the river, a protected habitat. Is the Fifth Amendment able to act as a limitation on that? It is real property; we are dealing with a full owner; it is a regulation that is a prohibition; and it is going to be subject to Fifth Amendment analysis. The right to develop is one within the bundles of ownership rights, a right that is recognized by all the courts. Now at the moment I do not want to suggest the outcome, we will come back to that, but clearly this would be subject to Fifth Amendment analysis.

What if they passed a regulation, this would likely be done by local government rather than the DNR, but it is a regulation that says "all persons wishing to develop land on the Red River must donate an easement for public use of the land within 100 yards of the shore-

line." What is the property right that is that issue? The right to exclude others. So again, you have real property, full ownership, state regulation, but it is an extraction for development rather than a prohibition. It also may be an interference with the right to develop as well, but it clearly is an interference with the right to exclude others.

How is the court going to decide these conflicts? Where do you draw the line? How much is too much? This is where all the lawyers get into trouble in trying to articulate a "one rule covers all" fact pattern. It just simply does not exist. I would suggest to you that the general parameter of how a court approaches this issue is: what is fair? That is a very big statement, but I think that is really what is operating in the back of the mind of the judges. Now, this is fair in a very complex context - we will be talking about that context in just a minute - but, when you look at the courts and you see the results, it often comes down to them saying "yes, that seems right, the outcome seems fair." They use all sorts of words and rules to get there, but focus on what is the outcome. Is an owner allowed to proceed? Or is an owner not allowed to proceed? I would also suggest that in this area, in particular, we are subject to the judicial outlook of the individual judges. What is fair? One context in which fairness is determined, is the mind of the judge. How does that person think about "fair"? How do they weigh various factors? How much do they believe in judicial restraint? How much do they believe in an activist government? How much do they think public policy for protection of the environment is a very strong versus a weak point of view? Which judges are on the Supreme Court will make a difference in the outcome of some of these cases. The last three or four cases before the Supreme Court have been close five to four decisions. Change one judge and you have a different result. That is why we cannot be too focused on the minutia of these cases, I think, because it may all be different in two or three years. I do think we need to understand the boarder context as to what is an appropriate activity for local and state government.

The other thing I would suggest to you is that the cases are very fact specific. The courts write their opinions dealing very much with the case directly before them, and if you do not have one that is real close to the same facts, you get into the gray area very quickly. The courts spend a lot of time looking at the facts in each case. It is not a matter of public policy or "the rule should be," it is what happened right here: what did the government really say, what did the private party want, what is the degree of interference, what is the evaluation

of the property before and after the activity? All sorts of very strong details are involved.

From a fairly old Supreme Court case comes the proposition that we must allow for the petty larceny of the state. It is understood that when you adopt any regulation it infringes somewhat on the freedom of the individual that owns that property. For example, there might be a requirement that all buildings have fire extinguishers. That is a regulation, it is a limitation, it means you have to spend money, you have to put it somewhere you may have wanted to put something else. That is a petty larceny, it is a very small interference given the overriding public concerns about fires, I think everyone would agree this is not an inappropriate regulation, but it is a regulation that interferes. One of the broad policy questions in this area is: when should private parties bear the cost of the regulatory burden? When should the public bear the cost? If the public is to bear the burden it is usually through the paying of taxes. We want a particular public policy outcome, and the question is how do we reach that goal? The goal might be safety from fire. Well, you can either make the private parties buy the fire extinguishers, or you could have the public pay for the fire extinguishers and then give them to the private parties. You can do it either way. For the most part, we do not have the public buying the fire extinguisher and then giving it to the private party, we simply make the private party get their own. We have decided we do not have to have the public pay for it. It gets back to what is fair and what is appropriate.

What about a rather benign thing as we now view it, but when you look at it, is really substantial. You want to put in a house or a new development on a piece of land and you go in to the city and they say "that is fine, but you have to put in a sidewalk in front of your house," a sidewalk is a substantial interference, it means you cannot develop that part of the land, you have to spend the money to put in the cement and this invites the public to walk on it. So you have an interference with possession. But I think most of us accept that that seems like a reasonable thing for a locality to do. We like sidewalks, we do not like to walk in the street. We do not like to walk in the mud and everybody gives up a little bit in a subdivision to receive the public benefit that derives from sidewalks. But it is an interference with property rights, but not an unfair one. Most people and judges would not find it to be an illegal "takings."

Now what do we do about developing some rules for helping decide when the state has gone too far? What test has the Supreme Court adopted to help sort the appropriate from inappropriate action?

As for our first category, an interference with title, there is no discussion, if title is taken, payment must be had.

There is a simple rule dealing with the second category, interference with possession. The Supreme Court had a case a couple of years ago regarding possession called *Loretto v. Teleprompter Manhatten CATV Corp.*,[9] which clarified the court's position, and I think it remains a pretty firm rule. I do not think we will see much variation under the second category. The rule is a per se rule. That means if there is a determination by the court, that a particular activity results in allowing either the government or third parties to have physical access to private land, it is a Fifth Amendment violation for which compensation must be paid. In that particular case the state law allowed cable company owners to come upon the building of landlords and place their boxes and their connections, on the roofs of these buildings without the permission of the land owners. The impact of the rule was diminished when on remand of the case the value of the taking or interference was found to be to one dollar per property.[10]

For the third category of extractions and extracting development permits, under the most recent Supreme Court case in the area, which is *Dolan v. City of Tigard*,[11] we now say that there is a two part test. In the first part, to justify the extraction there must be a showing by the government that there is an appropriate nexus between the burdens of land development and the requirement that the city is imposing, or the government agency is imposing. The nexus between the burden of development and the requirement of the city[12] — what does that mean? Well, let us say, for example, you want to develop a grocery store on a piece of land. But one of the requirements for you to get the appropriate building permit was that you had to contribute one percent of the value of the land towards the building of schools. The building of schools is clearly an appropriate good public purpose, but is there an appropriate nexus between that extraction of money for public schools and the development? The answer is no. Grocery stores do not have anything to do with increasing the demand for educational needs. If the extraction was applied to a developer of townhouses, then there would be that nexus, you are creating places

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9. 458 U.S. 419 (1982).
10. *Loretto*, 458 U.S. 419.
11. 114 S. Ct. 2309 (1994).
12. *Dolan*, 114 S. Ct. at 2316-18. *See generally* Brenda Quick, *Dolan v. City of Tigard: The Case That Nobody Won*, 1995 DET. C.L. REV. 79.

where people are going to live and that is going to create an increase in the number of children, therefore, you might argue that the city needs some help in developing their educational facilities. The issue of nexus is discussed considerably in the *Nollan*[13] case.

In the *Dolan* case, the most recent one, the Court created the next step of the analysis and said that assuming that nexus exists there must be a reasonable relationship between the public concern and what is extracted. For example, in that case there was an expansion of a hardware store, a fairly substantial expansion, and it was such an expansion that the city expected increased traffic to go to the store. Officials were concerned about the impact of increased traffic, which is an appropriate public concern. As a result, they requested there be a bike path put in the adjacent flood plain. The court did not find that there was a reasonable relationship between the concern and what was imposed upon them, it went too far. It looked like the city was trying to get something and that they did not want to pay for it. The city wanted to get an extraction of the owners right of possession that they ought to pay for with public funds. The city has a right to put a bike path down a flood plain if it wants to, it is probably a public good that would be justified, but the city ought to pay for it said the Supreme Court.

Next category, protections and prohibitions. This does get fuzzy here. The Supreme Court has said that the public has a right, or the government has a right, to prohibit nuisance activities, to prohibit destruction activities. Almost any regulation, however, can be cast in terms of preventing a particular harm. There is great difficulty in knowing how much harm you have to be talking about to know when the Fifth Amendment has to be considered. This is when it gets particularly fact specific, as to the courts, and the difficulty in predicting what is going to happen. The classic case here is wetlands protection statutes. You cannot have development and protection of wetlands co-exist. You can have one or the other. The nature of wetlands are such that they have to remain with their physical integrity or they are not wetlands. Is the destruction of wetlands a nuisance activity? Let me give you an example of what has been accepted as an appropriate regulation. A very old Supreme Court case[14] discusses a regulation that the city of Los Angeles imposed on property owners that said you could not put a brick factory in the middle of the city. This was done because the making of bricks

13. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
14. Hadacheck v. Sebastian, 239 U.S. 394 (1915).

created air pollution so as to constitute a public nuisance. The Court said this regulation was acceptable, and cities could prohibit the use of that land to prevent the nuisance. The Supreme Court case that created the takings was the *Pennsylvania Coal* case, written by Justice Holmes. Here the state said coal owners may not take out coal if it is under a private dwelling even if you have the full property right to do so. That was a regulation to protect houses from falling into holes, but the court in that case found that the prohibition went too far, that it interfered with the ownership of the coal owner's rights. Justice Brandis has a marvelous dissent which recharacterized the same facts the majority had, so that, the actions of the state were considered lawful. The *Pennsylvania Coal* case discussed earlier is a relatively short case and I commend it to your reading. Justice Holmes and Justice Brandis are two of the most articulate Supreme Court justices we have had in this century and their different attitudes set out the dilemma we are still enmeshed in today about how you decide what is fair. Justice Brandis did not think the regulation was unfair and found that it was an appropriate exercise of the police power. Justice Holmes did not agree.[15] It was a close case obviously, another close decision. It would seem in today's world the mind set of the judiciary is predisposed to think that a public good is being obtained with the protection of natural resources.

The idea of protecting wetlands or protecting sand dunes, protecting interfaces between land and water, gives a presumption of public good, but it still can go too far. So we go back to our hypothetical where you own land on the Red River, but may you develop the wetlands? Most recent state supreme court cases have held that the state probably can put that limitation in effect. Let me suggest to you the normal fact pattern which has occurred, that is the wetlands owned are a percentage of the full ownership of the piece of land. So when the courts go to look at the land, they say "what is the degree of interference?" If you were allowed to develop 80% of your land, but you cannot develop 20%, then it is much harder for the owner to say that there has been a takings. The Supreme Court has said that if the value of the land basically goes to economic zero, you do have a violation. Everybody agrees on that. One of the key phrases is "when all reasonably backed investment expectations are eliminated, you have a takings." You cannot just say "property value per se." If you were fooled when you bought the property, and a reasonable

15. *Pennsylvania Coal*, 260 U.S. at 393.

business person would have understood that the land was not developable under existing law and you paid more than scrub value for the land, you do not have a reasonably backed investment expectation. But when you have an elimination of land value down to zero, then the court is willing to say that you have incurred a regulatory takings.

There are some cases like this but these seem to have occurred primarily in Florida where there are huge wetlands, thousands of acres of wetlands. A developer comes in and buys 100 acres of wetlands and then cannot get a permit to develop them. There the takings is entire. There is nothing they can do with that land whatsoever, and that is a takings. If they file in a court of claims in a federal court, assuming that you are talking about a federal water permit that is involved, then you will be able to receive, when you turn the deed over, the value of that land at the time of the takings.

These tests are useful primarily for people who have bought land before new regulations or new laws are passed. At this point in time, if you buy 100 acres of mangrove swamp, you are a fool if you think you are going to put up a new housing development. It is simply not a reasonable expectation to be able to do that given the state of the law. So it is to protect people who would be buying a burden if they were not aware at the time they bought the land.[16]

If a track of land can not be commercially developed, but is a place to do birdwatching, does it not still have value? Although environmentalists would love to say that birdwatching ought to give land high value, and if we limit a landowner to just birdwatching, they should be pleased. But I think the reality of the capitalist system is that this activity is not going to give value to land. Where that does come into play is when you have less than 100% interference. In other words, you can impose limitations that may reduce the value of the land 50% or 70%. Then what do you do? How does the court look at a mixed reduction, a less than full reduction? And that is where the courts get into what I refer to as the balancing test. The

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16. Question from the audience: If you bought a track of land with one idea, to farm it for example, but later, before a new zoning code was adopted, decided to commercially develop the track, would this be interference with "reasonably backed investment expectations?

Answer: Yes, I think you could change your expectations up until that time, you cannot change it when the law you are attacking is implemented, it is too late to say "I meant to do this." But if you have owned land for twenty to thirty years, you certainly can evolve your expectation over a period of time, but once a law becomes into effect, you cannot, after that, have new expectations.

balancing test looks at public benefit and private harm. Public benefit can be the protection of ecological interest. Clearly this is an accepted idea within the judicial system, that ecological protection has value. And so if the public seeks to promote that through adoption of regulations, it is seeking to promote a value.

One area of regulation, which has been used in the Detroit area which I think is fascinating and takes us right to the edge of whether or not it is lawful or not lawful, is city regulations that deal with the protection of trees, individual trees on lots. The regulations are trying to promote saving old trees by saying you cannot build a house unless you get a permit and show how you are going to minimize the destruction of trees. One ordinance did not allow you to cut down any trees. The public benefit there is not quite as strong as protection of wetlands which is a known ecological area of high impact and high need to protect, whereas with trees on a residential lot it is a little bit harder to identify how strong is the public interest. So it seems to me that you can get quicker to finding that there is an unlawful taking or an inappropriate regulation of activity.[17]

Let us go back to the regulation which limited development within 100 yards of the river. Now presume we have a track of land with 30% within the restricted area. How would you think the court would go about looking at that? Courts do allow diminuation of value, if it reaches zero you know you have gone too far. How far can the value be diminished before it is an illegal takings? Each fact seems to be a little different. If they froze the access to land, said you could not walk on your land, then you have a takings, because clearly the right to posses would mean the right to go upon and use. So government can talk about a development restriction, but it cannot freeze you off your own land for access purposes. What is the value of the regulation? We were focusing at first on the degree of harm, and that is important, and that is a factual determination of how much interference. What was the percent reduction in value? But you also have to look at what is being protected by the regulation. Does this 100 yard restriction make sense? Why 100 yards? Is that really

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17. Thomas Nord, *Court Says Tree Law's Too Vague*, DET. NEWS, Feb. 27, 1995, at 1B. The Michigan Court of Appeals upheld a lower court ruling that had held a 1989 West Bloomfield ordinance, aimed at preserving woodlands, unconstitutional. The law had been established to protect woodlands and to restrict efforts to clear them. The law was challenged when a business man removed 30 trees from a 24 acre tract of land designated as protected woodlands. The West Bloomfield township board will now have to decide whether to appeal the decision to the Michigan Supreme Court. *Id.*

necessary or appropriate? What if this is a pile of dredge material, totally useless ecologically? Does it make any sense to prohibit the development of that? Not really. In fact, you might think it a public good in promoting its development. Again, you have to be fairly fact specific and you do need to look at both components when you do a balancing test. If the ordinance adopted did not allow for exceptions to the permits, for variances, then the ordinance could be in trouble. One of the clues for a troubled ordinance is when there is a total prohibition with no variance procedures allowed. If you limit development within 100 yards of the Red River for eighteen miles up and down the river and there is no way to accommodate unusual fact patterns in the ordinance, then I think you have an attackable ordinance.

The problem of small losses adding up to big losses is exactly what the wetlands awareness was about in the 1960's and 1970's. You can look at the early cases and you can see that some judges just did not understand it, did not accept it and therefore the state lost. The ordinances or laws were struck down. It is the nature of our judicial system, the courts are the final arbitrars here. The state has to convince the judges of the public values, that is what an attorney has to understand from the beginning. If this is an unusual public good that is being promoted, that has not been generally accepted by society, then you are going to have a special problem of educating the judge. That is the burden plaintiff has, I do not think there is any way around it. Now the idea that stopping the incremental loss of wetlands, is a public good, is broadly accepted. Even very conservative judges, who might otherwise be protective of private property rights, find that as a public good. Now how much weight they give to it may be something else, but the concept is now in the broader community. If there is a very diffuse interest, how much can you expect the individual to bear the burden of that? What is fair? In our system of capitalism, we do have to recognize the premises. Property ownership brings with it the right to utilize that property and ecological concerns are overlays in limitations on that but they have to be specifically identified and promoted. You cannot just generally say "we do not want to change the ecology of Michigan, therefore we are not going to develop anymore," that is just not going to work, so there is no clear answer to the dilemma, it is a matter of public policy.

I hope that these thoughts have provided some useful organization of what is a complex topic.