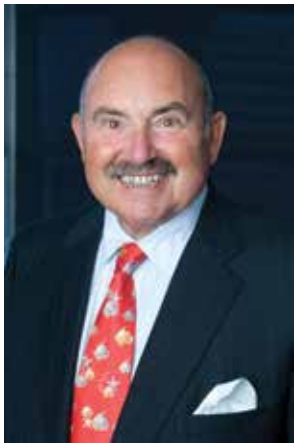
A Rose by any other Name would Smell just as Sweet—Unless It was Inversely Condemned; or, "Was that a De Facto Taking?"



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THERE ARE THREE WAYS that property can be taken, requiring the payment of just compensation pursuant to the Fifth Amendment. The first is a *de jure* taking, which in New York follows the filing of a petition to condemn in State Supreme Court, or the filing of an appropriation map in the County Clerk's office, which will result in a claim in the Court of Claims. These are the normal, or *de jure* condemnation proceedings with which we are familiar. But, a taking can also happen in two other ways. The first is by an inverse taking. The other is by a *de facto* taking.

Unfortunately, the terms "inverse condemnation" and "*de facto* taking" are used interchangeable by the courts. Inverse condemnations traditionally have been regulatory takings, which are decided on an *ad hoc* basis.

REGULATORY TAKINGS • The United States Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), has defined four types of regulatory takings. Two categories of regulatory takings generally will be deemed *per se* takings for Fifth Amendment purposes. The first is where government requires an owner to suffer a permanent physical invasion of property—however minor.

This taking occurs even if there is no permanent actual occupation of the land. *United States v. Causby*, 328 U.S. 256 (1946), provides an example wherein the United States Supreme Court held that a taking occurred when low flying military aircraft caused damages to a chicken farm when the chickens would not lay eggs. The Court

noted that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere.

Deprivation of All Economically Beneficial Use

A second categorical taking applies to regulations that completely deprive an owner of "all economically beneficial use[s]" of the property.

The leading example of a deprivation of all economically viable use of land is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, a property owner purchased property to build single family homes. South Carolina passed a Beach Front Management Act, which prohibited the construction of any permanent structures on the property. The United States Supreme Court ruled that the deprivation of all economically viable uses of the property would be a taking and remanded for findings whether the regulation would be equivalent of State exercise of private nuisance abatement. During the pendency of the action, the Act was amended to allow "special permits" for construction of structures so that the State Court found only a temporary taking.

Outside of these two narrow categories, regulatory takings challenges are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The Court in *Penn Central* acknowledged that it had been unable to develop any set formula but identified several factors that have particular significance. Primary among those factors are the economic impact of the regulation on the claimant, and in particular, the extent to which the regulation has interfered with distinct investment backed expectations. In addition, the character of the governmental action may be relevant in discerning whether a regulatory taking has occurred.

Land Use Extractions

The last category of inverse condemnation is land use extractions. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the United States Supreme Court found an unconstitutional extraction when the Commission demanded, as a condition to granting a permit to demolish an existing house on beach front property, that the Nollans provide an easement across their property. The Supreme Court held that requiring the easement could not be treated as an exercise of its land use power. The court stated that if the commission wanted the easement, it would have to acquire it by eminent domain and pay just compensation. *Id.* at 841-842.

The *Nollan* case was followed by *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Dolan involved a request for permission to expand a plumbing and electric supply store. The grant of the application was conditioned on the dedication of property by the Dolans of a strip of land as a pedestrian/bicycle pathway. While the United States Supreme Court found an essential nexus between government's objectives, it held that there was no "rough proportionality" between the pathway and the concerned traffic congestion.

DE FACTO TAKING • A *de facto* taking is a physical taking. As the Court of Appeals stated in *City of Buffalo v. J.W. Clement Company, Inc.*, 269 N.E.2d 895, 902 (N.Y. 1971), "*** the concept of *de facto* taking has traditionally been limited to situations involving a direct invasion of the condemnee's property or a direct legal restraint on its use [.]" (Citations omitted).

The Court of Appeals previously noted that "[t]he distinction has, however, at times been ignored and lower courts have been wont to confuse the concepts, often speaking of one in terms of the other." *Id.* at 903 (citations omitted). The Court of Appeals stated, "it is clear that a *de facto* taking re-

quires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property." *Id.* at 255.

Any physical occupation of an owner's property is a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982). As *Loretto* makes clear, a permanent physical occupation is never exempt from the takings clause. *Id*. Justice Marshall also noted in *Loretto* that:

> whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.
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> *Id.* at 437-38 (emphasis in original).

One would think that the distinction between the various possible takings has been well established. That is, until the Appellate Division, Second Department wrote the following, "inverse condemnation, or *de facto* appropriation, is based on a showing that an entity possessing the power of condemnation has intruded onto a landowner's property interfered with his or her property rights to such a degree that the conduct amounts to a constitutional taking, requiring the entity to purchase the property from the owner." *Corsello v. Verizon N.Y. Inc.*, 908 N.Y.S.2d 57, 68 (N.Y. App. Div. 2010) (citations omitted). Equally distressing is that the Court of Appeals affirmed, holding that the attachment of a box to plaintiff's building stated a valid "inverse condemnation" claim for just compensation. *Corsello*, 967 N.E.2d 1177, 1179 (N.Y. App. Div. 2012).

What we are talking about is a "terminal box." The box on the back of the Corsello's apartment building enabled Verizon to furnish telephone service not just to that building, but to a number of others. Clearly, the attached "terminal box" is the same type of installation as was found in *Loretto.*

In *Loretto*, the cable company installed two large silver boxes along roof cables. The cables were attached by screws or nails penetrating the masonry. As noted above, these installations were determined by the *Loretto* court to constitute a taking by virtue of a permanent physical occupation of another's property.

The point is that the Court of Appeals termed the procedure to obtain just compensation for a *de facto* taking as an inverse condemnation. A little confusing and a little unnecessary. The other take away from *Corsello* is that if the plaintiff knows of the *de facto* taking, there will be a three year statute of limitations that runs from the time of the taking pursuant to N.Y. C.P.L.R. § 214(4), provided the property owner knew or should have known of the taking. The facts set forth in the complaint indicate that plaintiffs commenced an action in 2007 alleging the affixation of a "rear wall terminal" to their property "in the 1970's or 1980's or earlier." *Corsello*, 908 N.Y.S. 2d at 63. Certainly plaintiffs had knowledge of the taking and certainly more than 3 years had passed since they acquired that knowledge. But, the action proceeded because of a saving provision set forth by Section 261 of the Real Property Law, otherwise the *Corsello* lawsuit would be barred.

This brings us to the condemnation of wetlands—land subject to regulation.

WETLANDS CONTEXT • If property has been designated as wetlands by the New York State Department of Conservation, the owner must be

granted some reasonable economic return on the property. Otherwise, the regulation will be confiscatory. In the event that no permit necessary is issued to develop designated wetlands, there is a two-step process required as set forth by the Court of Appeals in *de St. Aubin v. Flacke*, 496 N.E.2d 879, 881 (N.Y. 1986), as follows:

> If the court finds that the permit denial is supported by substantial evidence, then a second determination is made in the same proceeding to determine whether the restriction constitutes an unconstitutional taking requiring compensation. The taking determination is made on the basis of a full evidentiary hearing and if the landowner prevails the Commissioner [of Environmental Conservation] is directed at his [or her] option, to either grant the requested permit or institute condemnation proceedings.
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> (Citations omitted).

But, if wetlands property is condemned before a challenge was commenced, New York applies a formula, which applies an increment for the hypothetical challenge that would have occurred.

As the Second Department noted in *Chase Manhattan Bank, N.A. v. State*, 479 N.Y.S. 2d 983, 989 (N.Y. App. Div. 1984):

> The cost in time and money of applying for a permit and challenging in court any denial as confiscatory would naturally be taken into account by any purchaser even if there appeared to be an excellent chance of ultimate success. Hence, a showing that a challenge to the application of the Tidal Wetlands Act as confiscatory would have, at least, a reasonable probability of success in court should beget only an incremental increase in the value of the appropriate property as restricted.

More recently, the Appellate Division wrote, in *Matter of City of New York [Paolella]*, 997 N.Y.S.2d 447, 450 (N.Y. App. Div. 2014):

> Analysis of whether nonpossessory governmental regulation of property has gone so far as to constitute a taking involves factual inquiries in which three factors of particular significance have been identified: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." (Citations omitted).

The Second Department noted:

> As to the first factor, "the property owner must show by 'dollars and cents' evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return; the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue." (Citations omitted).

The Court reviewed the facts and determined that the trial court's determination that the wetlands regulation reduced the value of the property by 82%. This on its own would be insufficient to constitute a regulatory taking. But there was no issue that because of the wetlands regulations it was highly improbable that a permit to develop would be issued. Thus, the regulations effectively constituted a regulatory taking of the subject property.

The Court held that it was appropriate to add a 75% increment above the regulated value of the property.

Finally, the Court noted that adding an increment to the value of the regulated property is to be a percentage that represents the premium a reasonable buyer would pay for the probability of a successful judicial determination that the regulations were confiscatory. The percentage must be based on sufficient evidence and be satisfactorily explained.