

**THE TAKINGS CLAUSE OF THE U.S. AND MAINE CONSTITUTIONS;  
HOW THEY MIGHT IMPACT LEGISLATION MODIFYING  
GROUNDWATER OWNERSHIP**

**Prepared for the Review of International Trade Agreements  
and the Management of Groundwater Resources**

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**SUMMARY**

The Takings Clause of the Fifth Amendment of the United States Constitution and Article I, § 21 of the Maine Constitution prohibit the taking of private property for public use without just compensation.<sup>1</sup> While the physical occupation of a person's property is the classic taking, the U.S. and the State Constitutions also guard against certain uncompensated regulatory interferences with a property owner's interests in his or her property.

The first question we address is whether Maine's regulation of the quantity of groundwater a property owner may withdraw and use from the property might constitute an unconstitutional taking of property under the Maine or U.S. Constitution. In their consideration of takings claims, the courts have utilized two types of analyses: first, the courts look at whether the governmental action caused a *per se* taking on its face; second, if not, the courts examine, on a case-by-case basis, the facts of a particular case to determine whether a taking has occurred. The short answer here is that such groundwater regulation would not constitute a *per se* taking, and under a fact-based *ad hoc* analysis, while it would depend on the nature of the regulation, the economic impact of the regulation, and the extent to which the regulation interfered with the property owner's investment-backed expectations, it is unlikely that a reasonable regulation of the withdrawal of groundwater would amount to an unconstitutional taking of property.

The second question under discussion by the committee is whether a taking claim could be successfully made if Maine changes from being an "absolute dominion" state to a state in which the "reasonable use" doctrine applies, or some other theory governing ownership and use of groundwater. I believe that the courts would apply the *ad hoc*, fact-based analysis and such an analysis could only be done with the context of the particular law and the particular facts in hand.

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<sup>1</sup> "... [N]or shall private property be taken for public use, without just compensation." U.S. Const., amend. V. "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Me. Const. art. I, § 21.

## OVERVIEW OF TAKINGS LAW

### A. *Per Se* (“*In Itself*”) Takings.

The Supreme Court has identified two categories of governmental regulatory action that generally are considered *per se* takings. *Langle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). Where the governmental regulation requires a property owner to “suffer a permanent physical invasion of her property” it must provide compensation or the requirement will be deemed to result in an unconstitutional taking of property. *Id.* A *per se* regulatory taking also will be deemed to have occurred where the government’s regulation would completely deprive a property owner of all economically beneficial use of the property. *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). Presumably, any regulation of a withdrawal of groundwater being contemplated by the State of Maine would not completely deprive any property owner of all economically beneficial use of the property; nor would the adoption of a “reasonable use” doctrine be likely to do so.

### B. *Ad Hoc* (or *Fact Specific*) Takings.

A more relevant analysis of the constitutionality of the State’s regulation of the quantities of groundwater which may be withdrawn by a property owner or of legislation proposing a shift in the ownership or use doctrine would be under what has been characterized by the U.S. Supreme Court as essentially an *ad hoc*, factual inquiry. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002). The courts have not adopted any bright line which would guide a determination of whether regulations enacted by governments at any level would cause an unconstitutional taking of private property. When there is no physical occupation of the land, no denial of all economically beneficial use of the land, and the government has merely regulated the use of property, determining whether the regulation rises to the level of a taking requires “complex factual assessments of the purposes and economic effects of government actions.” *Yee v. City of Escondido*, 503 U.S. 519, 522-23 (1992) (citing *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 123-125 (1978)). The three factors analyzed by the Courts in the *ad hoc* fact-based analysis are: 1) the economic impact of the action; 2) the extent to which the action interferes with distinct investment-backed expectations; and 3) the character of the governmental action. *Penn Central*, 438 U.S. at 124.

It is not possible to analyze whether a regulatory taking would occur without the context of the actual language of the regulation or legislation at issue, and the facts regarding their impact on a particular landowner, which would allow the necessary “careful examination and weighing of all of the relevant circumstances” (*Franklin Memorial Hospital v. Brenda Harvey*, 2009 U.S. App. LEXIS 17435 (1<sup>st</sup> Cir. August 5, 2009) (citations omitted)). However, under the three part test set forth in *Penn Central* and its interpretation by means courts, the following considerations are instructive.

**1. The economic impact on the property owner.** The mere diminution in the value of a parcel of property, even a significant diminution, has been found insufficient to demonstrate a taking. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993). In *Concrete Pipe*, the U.S.

Supreme Court found that the 46 percent diminution of value of a shareholder equity pension plan was not a taking. *Id.* In *Wyer v. Board of Environmental Protection and State of Maine*, the Law Court found that no taking occurred as the result of denial of a permit to build a house even though the property without the permit was worth approximately \$50,000 and with a permit it would be worth \$100,000. Under *Hall v. Board of Environmental Protection*, 528 A.2d 453, 455 (Me. 1987), a property owner must prove that the application of the regulations to his or her property renders the property substantially valueless.

The fact that a property owner might not make as much profit on his investment as he would have hoped is not a basis for a taking. See, *Curtis v. Main*, 482 A.2d 1253, 1258 (Me. 1984); *Seven Islands v. Maine Land Use Regulation Commission*, 450 A.2d 475, 483 (Me. 1982). In *Seven Islands*, the landowner claimed that because the value of the land as timberland had been destroyed, the value of the land was zero. The court found that the land retained some value and that the landowner could not claim a taking of its property simply because it could not use it in the most profitable manner. *Id.* at 482-83. In the *Wyer* case, Mr. Wyer presented evidence that he paid \$10,000 for his small beach front lot in 1977 and that it would increase in value to at least \$100,000 if a permit could be obtained. With the regulatory denial of his application the property could be sold for \$50,000, and the Court found that such a reduction did not require a finding of a taking. As the Law Court pointed out in *Seven Islands*, that “the loss of future profit . . . provides a slender reed upon which to rest a taking claim.” *Seven Islands Land Company v. Maine Land Use Regulation commission*, 450 A.2d at 482, n.10.

In a challenge to a new regulatory scheme or a new groundwater ownership/use legal framework, a court would examine the value of a landowner claimant’s property in light of the law and compare it to the value of the property without the new restrictions or legal framework and make a determination whether value of the property has been so severely diminished that it has been rendered substantially valueless.

**2. Legitimate investment-backed expectations.** The U.S. Supreme Court has stated that a landowner does not have a constitutional right to a frozen set of laws and regulations governing his or her property. “It seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the state in a legitimate exercise of its police power.” *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027. Those who do business in an already regulated field, the Court has found, “cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.” *Concrete Pipe*, 508 U.S. at 645, quoting *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211, 227 (1968). Likewise, a landowner is not entitled to rely on the maintenance of the same zoning of its property or regulatory status quo. *Board of Supervisors v. Omni Homes*, 481 S.E.2d 460, 465, n.3 (Va. 1997), (*cert. denied*, 522 U.S. 813 (1997)).

With regard to this prong of the three part takings test, the factors which would be considered would include whether the property owner knew of actual or potential regulations which might affect the investment potential when it purchased the property or developed it. One property owner’s claim of the legitimate expectation for his development was rejected by the Rhode Island Supreme Court in *Alegria v. Kenney*, 687 A.2d 1249, 1261 (R.I. 1997), with the

Court's determination that the landowner's expectations were not reasonable "[i]n view of the regulatory climate that existed when [the property owner] acquired the subject property."

For this part of the analysis, again the language of the law or regulation and the facts regarding an individual property owner's time of acquisition and investment in the property would be necessary.

**3. The character of the governmental action.** In the analysis of a regulatory restriction on use of property, the courts also examine the legitimacy of the exercise of the government's power. *Penn Central v. New York*, 438 U.S. at 2659-60. The Law Court has repeatedly found that the protection of the environment is a legitimate exercise of the State's police power:

We consider it indisputable that the limitation of property for the purpose of preserving from the unreasonable destruction the quality of air, soil and water for the protection of the public health is within the police power.

*In re Spring Valley Development*, 300 A.2d 736, 748 (Me. 1973).

With regard to this last part of the analysis, if the purpose of a legal or regulatory scheme adopted is to protect the environment, the courts are likely to find it is a legitimate exercise of the State's police power.