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The Art of Stripping: How the Government Applies the Takings Clause to Strip You of Your Property

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THE ART OF STRIPPING: HOW THE GOVERNMENT APPLIES THE TAKINGS CLAUSE TO STRIP YOU OF YOUR PROPERTY

SUPREME COURT OF NEW YORK
RICHMOND COUNTY

In re City of New York[1]
(decided May 7, 2012)

I. INTRODUCTION

The Plaintiffs, Lawrence and Liana Paolella, owners of Staten Island property consisting entirely of wetlands, challenged the taking of their property that resulted from the implementation of the State of New York's Freshwater Wetlands regulations.[2] The property was acquired by the City of New York as part of the New Creek Bluebelt Phase 4 project.[3] These regulations required the Paolella property to be left vacant, prohibiting any reasonable productive development of the property.[4] Plaintiffs brought suit after being denied a permit to develop the property due to the enforcement of the State's Freshwater Wetlands regulations.[5] In June 2007, the City of New York took title of the Paolella property. A subsequent property condemnation proceeding was initiated and just compensation was to be determined for the government's taking of the Paolella property.[6] At issue was the amount sought by the Plaintiffs as just compensation.[7] The Plaintiffs alleged that the restrictions on their property, imposed by the State's

[1] *In re City of New York*, No. 4018/07, 2012 WL 1676889 (N.Y. Sup. Ct. May 7, 2012).
[2] *Id.* at *2.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *In re City of New York*, 2012 WL 1676889, at *1-2; *see id.* at *2 (explaining how to calculate "just compensation" owed to property owners where they successfully show there was a "regulatory taking" by the state).
[7] *Id.* at *1.

Freshwater Wetlands regulations, constituted a regulatory taking and that the State failed to provide the Plaintiffs with just compensation, in violation of Article I, section 7(a),[8] of the New York State Constitution.[9]

Using the per se doctrine, the City argued that the property's economic value was not completely destroyed because there was some demand for wetlands in the area.[10] Hence, the court decided that the regulation did not constitute a taking under the per se doctrine because the Plaintiffs did not suffer a total loss in value in the property.[11] While the Plaintiffs' claim failed under the per se doctrine, it survived under the ad hoc doctrine.[12] As set forth in *Penn Central Transp. Co. v. City of New York*,[13] to determine a regulatory taking under the ad hoc doctrine, the court balances three essential factors: "(1) '[t]he economic impact of the government's 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.' "[14] Under this approach, the court must balance each factor and make a determination based upon the extent of the economic impact of the government's regulation and the degree of interference the regulation has on the claimant's property interests.[15]

In assessing the first factor, the character or nature of the governmental action, the court considered whether the regulation "amount[ed] to a physical invasion or [whether it] merely affect[ed] property interests to promote the common good."[16] The court found that the wetlands regulations provided no benefit to the restricted property owner, even though they did "provide a general public benefit."[17] Additionally, the regulation failed to benefit any owners of

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[8] N.Y. CONST. art. I, §7(a) ("Private property shall not be taken for public use without just compensation.").

[9] *In re City of New York*, 2012 WL 1676889, at *1.

[10] *Id.* at *2-3.

[11] *Id.* at *3.

[12] *Id.* at *3-4.

[13] 438 U.S. 104 (1978).

[14] *In re City of New York*, 2012 WL 1676889, at *3 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

[15] *Id.* at *4 (citing Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005)).

[16] *Id.* (citing *Lingle*, 544 U.S. at 539).

[17] *Id.*

property adjacent to the wetlands.[18] Instead, the restriction disproportionately burdened a limited group of people, owners of wetlands.[19] Further, the City failed to explain how the restrictions would promote the common good.[20] Of more importance, the court pointed out that "the character of the regulations" prohibited all development of the Plaintiffs' property because they deprived the Plaintiffs of "any alternative uses that would provide a reasonable economic return."[21] Accordingly, this factor weighed in favor of the Plaintiffs because the government restricted the Plaintiffs' use of the property in a way that did not further a public purpose.

Next, the court addressed the extent to which the regulation interfered with distinct investment backed expectations maintained by the Plaintiffs at the time they purchased the property.[22] In order for this factor to weigh in their favor, the Plaintiffs had to prove that they purchased the property with a reasonable expectation of development or that they purchased the property for the purpose of development.[23] The Plaintiffs merely argued that they owned the property before the wetlands regulations were enforced and provided no investment backed expectations in the property.[24] As a result, the argument failed to show evidence of any expectation the Plaintiffs had for the property when they purchased it.[25] Therefore, the court found that this factor was not satisfied because the wetlands regulations cannot interfere with non-existent expectations in the property.[26]

Finally, the court analyzed the economic impact of the wetlands regulation on the Plaintiffs' inability to develop the property.[27] The court first turned to *Keystone Bituminous v. DeBenedictis*.[28] In *Keystone*, the United States Supreme Court established that economic impact was determined by evaluating the difference between the value that had been taken from the property and the value that remained

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[18] *Id.*
[19] *In re City of New York*, 2012 WL 1676889, at *4.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *In re City of New York*, 2012 WL 1676889, at *4.
[25] *Id.*
[26] *Id.*
[27] *Id.* at *4-5.
[28] *Id.*; Keystone Bituminous v. DeBenedictis, 480 U.S. 470 (1987).

in the property.[29] In *In re City of New York*, the court ultimately agreed with appraisal values produced by the City's appraiser.[30] The value of the Plaintiffs' property with the regulation was $185,000, while the market value of the property, if it were not subject to the regulation, was just over one million dollars.[31] Simply put, by attaching the regulation to the wetland, the City caused the Plaintiffs' property to drop in value by eighty-two percent.[32] The next inquiry was whether the eighty-two percent diminution in property value constituted a regulatory such that the Plaintiffs would be entitled to just compensation.[33]

Accordingly, the court analyzed a number of federal and state cases where courts balanced the factors under the ad hoc doctrine, together with the diminution in property value, and found that the regulations constituted regulatory takings.[34] The court established that diminished value alone would not establish a per se taking. However, the diminution in property value, together with the requirement that the property remain vacant and be prohibited from any productive use would establish a regulatory taking that would require just compensation.[35] The court reasoned that the eighty-two percent diminution in Plaintiff's property value, together with the regulation's requirement that the property remain vacant, would deny the Plaintiffs "any productive use of the property" and would likely result in a successful regulatory takings claim.[36] Although an 82% diminution in value was enough to constitute a taking in this case, state and federal courts have never explicitly established a bright line percentage in loss necessary to establish a taking. The question, therefore, must turn on whether a particular diminution percentage can establish a taking.

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[29] *Keystone*, 480 U.S. at 497.
[30] *In re City of New York*, 2012 WL 1676889, at *6.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *In re City of New York*, 2012 WL 1676889, at *6.
[36] *Id.*

II. PROTECTING ECONOMIC RIGHTS UNDER THE TAKINGS CLAUSE

Courts have the authority to decide whether the government acquired private property for a public use.[37] Initially, the Fifth Amendment's Takings Clause applied only to the federal government. The United States Supreme Court, in *Barron v. Mayor of Baltimore*,[38] dismissed a takings claim, reasoning that the Takings Clause did not apply to the states because it was developed in response to fears of abuse by the federal government.[39] The Court in *Penn Central* established that the Fifth Amendment Takings Clause was "made applicable to the [s]tates through [incorporation of the Due Process Clause of] the Fourteenth Amendment."[40] A state's power of eminent domain is an inherent attribute of the state's police power to protect its public "health, safety, and general welfare."[41]

Pursuant to the Fifth Amendment Takings Clause, private property shall not "be taken for public use, without just compensation."[42] The first requirement in the Takings Clause is that the private property must "be taken for public use," or public purpose.[43] Public use was defined as "the use which the public [may] freely . . . enter upon . . . under terms common to all, [and] the right to use by the public where everyone has the right to share in its benefits."[44] Under the rational basis test, public purpose means that there must be a reasonable relationship between the taking and the purpose for the taking.[45] The court examines (1) whether the taking advances a legiti-

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[37] D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280, 1312 (2010).

[38] 32 U.S. 243 (1833).

[39] *Id.* at 250-51 ("[T]he [F]ifth [A]mendment to the [C]onstitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.").

[40] *Penn Cent.*, 438 U.S. at 122 (citing Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897)).

[41] N.Y.C. Hous. Auth. v. Muller, 1 N.E.2d 153, 155 (N.Y. 1936) (finding that if "the public health, safety, or general welfare" of the state is threatened, the government has the power to do what is "necessary and appropriate").

[42] U.S. CONST. amend. V.

[43] *Id.*

[44] Sidney Z. Searles, *The Law of Eminent Domain in the U.S.A.*, C97 ALI-ABA 333, 338 (1995).

[45] Keri Ann Kilcommons, *A Survey of Supreme Court Takings Jurisprudence: The Impact of* Del Monte Dunes *on* Nollan, Dolan, Agins, *and* Lucas, 9 N.Y.U. ENVTL. L.J. 532, 540

mate public purpose, such as protecting the public health, safety, or general welfare; (2) whether the taking reasonably relates to that legitimate public purpose; and (3) whether the taking interferes with the landowner's investment-based expectations.[46] Public use also encompasses any public advantage, including urban renewal, redevelopment of commercial areas, removal of undesirable living conditions, and revitalization of the economic community.[47]

The second requirement of the Fifth Amendment Takings Clause is just compensation. Just compensation is made when the landowner is paid the reasonable value of the property for the taking.[48] Usually, fair market value is used to determine the reasonable value.[49] While there is no set formula for determining just compensation for a taking, it is usually determined "by comparing the property [subject to the taking] with recent sale prices for similar property in the same area."[50] The purpose of just compensation is to remedy a loss to the landowner for the government's encroachment on the landowner's property rights.[51] Due process guarantees that hearings will be held to determine the amount of compensation, but does not require a trial by jury.[52] Unlike most jurisdictions that allow a trial by jury, either at the outset or after an appointed commissioner has already decided the case, New York courts hold these hearings without a jury.[53]

While the judicial process differs among the states, the substantive law on the types of takings has remained the same. The United States Supreme Court has long recognized two types of takings: physical takings and regulatory takings.[54] A typical physical

(2001).

[46] *Id.* at 541 (citing City of Monterey v. Del Monte Dunes at Monterey, LTD., 526 U.S. 687, 702 (1999)).

[47] Searles, *supra* note 44, at 341 (quoting People *ex rel*. Urbana v. Paley, 368 N.E.2d 915, 920-21 (Ill. 1977)).

[48] *Id.* at 344.

[49] *Id.* at 344-45.

[50] *Id.* at 344.

[51] *Id.*

[52] Searles, *supra* note 44, at 356.

[53] *Id.*

[54] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (concluding that a cable television line, notwithstanding its minor occupation of property, constituted a physical taking); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (reasoning that a coastal protection law, preventing the landowner from building houses, was a regulatory taking).

taking "is a direct government appropriation . . . of private property" that must be compensated.[55] A regulatory taking occurs when the government "goes too far" in regulating the use of property so that it becomes onerous to the landowner.[56] A regulatory taking may also occur if the governmental regulation strips the property of "*all* economically beneficial us[e]."[57] The government need not pay compensation for regulating the use of property; compensation is required only if the regulation constitutes a regulatory taking.[58]

The following case note focuses on regulatory takings and evaluates the different approaches used in federal and state courts. Specifically, it will focus on weighing the governmental regulation's economic impact on the property's remaining use and value under the ad hoc approach. Additionally, this case note will discuss the significance of federal and subsequent state court decisions made in *In re City of New York*. Finally, this note will examine the policy issues involving the absence of a bright-line rule for evaluating a taking based on a regulation's impact on the remaining economic value of property.

III. FEDERAL PRECEDENT

The seminal case establishing the test for a regulatory taking was *Pennsylvania Coal Co. v. Mahon*.[59] The issue in *Pennsylvania Coal* was whether, under the Kohler Act, the government could take away Pennsylvania Coal Company's rights to mine their own property.[60] The Kohler Act prohibited "the mining of anthracite coal in such a way . . . [that] cause[d] the subsidence of" residential struc-

[55] *Lingle*, 544 U.S. 528, 537-38 (2005); Ann K. Wooster, Annotation, *What Constitutes Taking of Property Requiring Compensation Under Takings clause of Fifth Amendment to United States Constitution—Supreme Court Cases*, 10 A.L.R. FED. 2d 231 (2006).

[56] *Lingle*, 544 U.S. at 537 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (internal quotation marks omitted) ("[R]egulation may be . . . so onerous that its effect is tantamount to a direct appropriation or ouster . . . .")).

[57] *Id.* at 538 (quoting *Lucas*, 505 U.S. at 1019) (internal quotation marks omitted).

[58] *See* Yee v. City of Escondido, 503 U.S. 519, 522-23 ("[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.").

[59] 260 U.S. 393 (1922).

[60] *Id.* at 412 (pointing out that the coal company owned both the subsurface property and the surface property).

tures, unless the surface was owned by the same owner of the underlying coal.[61] The Court concluded that enforcement of the Kohler Act was a regulatory taking that required just compensation because the government had extended its police power "too far."[62] It reasoned that the Act deprived the plaintiff of all previously existing property interests.[63] This total deprivation was tantamount to a permanent physical invasion, as if the government was taking away all of the coal from the plaintiff.[64] Thus, as a result of the Act, the economic impact and interference with the property owner's expectation to generate income was substantially affected.[65] The private property was valuable because the plaintiff was entitled to mine and profit from the subsurface coal.[66] Enforcement of the regulation against Pennsylvania Coal Company was equivalent to destroying the property and depriving the owners of any use of the property for which it was acquired.[67] The Court also found that because the property was privately owned, the Act could not be sustained because the private act of mining resulted in no interference with the public interest.[68]

More than half a decade after *Pennsylvania Coal*, the Supreme Court recognized regulatory takings under an ad hoc approach. The United States Supreme Court, in *Penn Central*, addressed the issue of whether a New York City Landmarks Preservation Law, which placed restrictions on the development of individual historic landmarks, constituted a taking, and thus, required the payment of just compensation.[69] In *Penn Central*, the plaintiffs sued the defendant for denying their application to construct a fifty-five-story expansion on top of Grand Central Terminal and a fifty-three-story expansion that required tearing down a part of the terminal.[70] The trial court granted an injunction to the plaintiffs, barring the defendant from im-

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[61] *Id.* at 412-13.

[62] *Id.* at 415-16.

[63] *Id.* at 413.

[64] *Pennsylvania Coal*, 260 U.S. at 414 (specifying that when a regulation becomes so onerous, the government must exercise eminent domain and just compensation to constitutionally enforce the regulation).

[65] *Id.*

[66] *Id.* at 414.

[67] *Id.* at 415.

[68] *Id.* at 413-14 ("A source of damage to such a house is not a public nuisance . . . . The damage is not common or public . . . . [T]he surface is owned by the owner of the coal.").

[69] *Penn Cent.*, 438 U.S. at 107.

[70] *Id.* at 116-17.

peding the plaintiffs' construction of any structure above the terminal.[71] The trial court also awarded the plaintiffs declaratory relief of damages for the time during which the plaintiffs were prevented from constructing a building.[72] Defendant appealed the judgment and the New York Supreme Court, Appellate Division reversed, holding that the Landmarks Preservation Law was instituted for the public purpose of protecting landmarks.[73] The plaintiffs appealed and the New York Court of Appeals held that there was no taking, in part, because the landmark regulation permitted the terminal continue being used as a terminal, the plaintiffs failed to show they could not earn a reasonable return on their investment in the terminal, and the development rights above the terminal remained valuable to the plaintiffs if they developed a suitable construction plan similar to plans developed by nearby office buildings.[74] On appeal, the United States Supreme Court reviewed all of the factual inquiries and applied the *Penn Central* factors to determine whether there was a regulatory taking under the Fifth Amendment.[75] Those factors included the economic impact of the regulation on the plaintiffs, the extent of the regulation's interference with the plaintiffs' "distinct investment-backed expectations," and the "character of the governmental action."[76] Because there is no formula for determining when a governmental regulation goes "too far," and thus constitutes a taking, courts consider the facts on a case by case basis.

First, the Court reviewed the character of the regulation.[77] The regulation was enacted to "enhance the quality of life by preserving the character and desirable aesthetic features of [the] city."[78] The Court indicated that preservation of specific structures and areas with historic significance was a permissible governmental goal.[79] It rejected the plaintiffs' argument that any regulation imposed on individual landmarks constitutes a taking, requiring just compensation.[80]

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[71] *Id.* at 119.
[72] *Id.*
[73] *Id.*
[74] *Penn Cent.*, 438 U.S. at 121-22.
[75] *Id.* at 123.
[76] *Id.* at 124 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)).
[77] *Id.* at 128-29.
[78] *Id.*
[79] *Penn Cent.*, 438 U.S. at 108, 129.
[80] *Id.* at 131.

The Court reasoned that "preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."[81] Second, the Court found that the regulation did not interfere with the plaintiffs' distinct investment-backed expectations in the property because Grand Central Terminal's "designation as a landmark" permitted its continued use "as a railroad terminal [with] office space and concessions."[82] The plaintiffs were still able to obtain a reasonable return on their investment even where the terminal remained a railroad terminal.[83]

Lastly, the Court weighed the economic value of the property. The plaintiffs argued that they could no longer effectively use the space above the terminal and that, as a result, the regulation diminished the profits that would have been derived from the construction of the fifty-five-story office building.[84] The Court found, however, that a reduction in property value alone could not establish a taking.[85] It also found that the economic impact of the regulation was minimal because the plaintiffs could still build a structure above the terminal.[86] Therefore, the plaintiffs' possible profits were not completely diminished.[87] The defendant merely denied the plaintiffs' request to construct a fifty-five-story structure because it could damage the character of the Terminal.[88] Further, the Court pointed out that the plaintiffs also retained its pre-existing air rights, which could be transferred for a valuable amount.[89] After weighing all three factors, the Court held that the defendant's Landmarks Preservation Law was not a regulatory taking of the plaintiffs' property.[90]

The Supreme Court later recognized the per se approach, in which an automatic regulatory taking could be established under particular circumstances. This approach was established in *Lucas v.*

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[81] *Id.* 134.

[82] *Id.* at 136.

[83] *Id.*

[84] *Penn Cent.*, 438 U.S. at 136.

[85] *Id.* at 131.

[86] *Id.* at 137.

[87] *Id.* at 136-37 (suggesting that the Commission did not prohibit any type of construction above the terminal).

[88] *Id.*

[89] *Penn Cent.*, 438 U.S. at 137.

[90] *Id.* at 138.

South Carolina Coastal Council.[91] In *Lucas*, the plaintiff bought two beachfront lots in 1986 with the purpose of building residential units on those two lots.[92] The Beachfront Management Act was enacted in 1988, and barred plaintiff from building any type of permanent habitable structures on those two parcels.[93] The Court held that the regulation completely destroyed the plaintiff's property value and denied him all economically beneficial and productive use in his property.[94] It reasoned that when the landowner sacrifices "*all* economically beneficial uses in the name of the common good," thus leaving the land economically idle, the landowner has suffered a taking.[95]

In *Dolan v. City of Tigard*,[96] the Court rejected the ad hoc approach and instead employed a rough proportionality test.[97] Under this test, where the government creates a regulation that requires a property owner to dedicate his property to governmental use, the government must present evidence that the loss to the owner is roughly proportionate to the public interest served by the regulation.[98] If the government fails to make this "sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development," then the government has not met its burden and a taking is found.[99] The Court held that the City failed to make an individualized determination for a policy to support the pathway and floodplain dedications.[100] It reasoned, specifically, that the City failed to make any findings that a bicycle-pedestrian pathway would resolve traffic congestion.[101] The Court further reasoned that there was no reasonable relationship between the city's floodplain easement and the landowner's proposed development because the proposed development would not encroach on any of the City's existing space.[102] The heightened scrutiny under the

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[91] 505 U.S. 1003 (1992).

[92] *Id.* at 1006-07.

[93] *Id.* at 1007.

[94] *Id.* at 1029.

[95] *Id.* at 1019 (emphasis in original). The Court points out that this per se rule applies absent long-standing common law or nuisance statute. *Lucas*, 505 U.S. at 1029-30.

[96] 512 U.S. 374 (1994).

[97] *Id.* at 389.

[98] *Id.* at 389-90.

[99] *Id.* at 391.

[100] *Id*.

[101] *Dolan*, 512 U.S. at 395.

[102] *Id.* at 394.

rough proportionality test forces local governments to "prepare detailed research reports and present complex calculations [and] bear heavy costs in preparing such detailed reports."[103]

More recently, the Court in *Lingle v. Chevron U.S.A. Inc.*[104] recognized two approaches that a challenge against a governmental regulation as a regulatory taking could be made.[105] The per se theory established by *Lucas* may be used when a governmental regulation completely deprives an owner of "all economically beneficial" use of the property.[106] The ad hoc theory, established by *Penn Central*, applies when a governmental regulation does not completely deprive an owner of all economically beneficial use of the property, but instead allows a court to evaluate the three *Penn Central* factors to determine whether the governmental regulation effects a regulatory taking requiring just compensation.[107]

Before 1815, only eight states had adopted takings clauses, and, as a result, there was a scarcity of cases interpreting state takings clauses.[108] Today, many states have adopted the principals of the Takings Clause of the Fifth Amendment and most state takings clauses now closely paralleled the Fifth Amendment Takings Clause.[109] New York, specifically, has consistently used both the ad hoc categorical approach and the per se rule, found in the respective paradigmatic takings clause cases, *Penn Central* and *Lucas*.[110]

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[103] Inna Reznik, *The Distinction Between Legislative And Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 244-45 (2000).

[104] 544 U.S. 528 (2005).

[105] *Id.* at 548.

[106] *Lucas*, 505 U.S. at 1019.

[107] *Penn Cent.*, 438 U.S. at 124 (specifying the three factors to be the economic impact of the regulation, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of governmental action); *Lingle*, 544 U.S. at 538 (pointing out that in the absence of any set formula, the *Penn Central* factors are used to evaluate regulatory takings claims).

[108] FRED BOSSELMAN ET AL., THE TAKINGS ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENT AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 106-07 (U.S. Government Printing Office 1973); Nicole Garnett, *No Taking Without A Touching: Questions from an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 773 (2008).

[109] Garnett, *supra* note 108, at 774.

[110] Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. SCH. L. REV. 345, 380-81 (1998).

IV. NEW YORK STATE PRECEDENT

New York courts have often adopted the ad hoc approach to determine whether governmental regulations constituted regulatory takings. In addition, the New York Constitution allows regulatory takings if they are made with just compensation.[111] New York courts have consistently explained that in order for a landowner to successfully establish a regulatory taking, he must show that the governmental regulation barred him from using his property for the purpose for which it was acquired.[112] This resembles the *Penn Central* ad hoc approach based upon reasonable investment-backed expectations in the property. To satisfy this burden, the landowner must provide detailed evidence of the economic return that he or she expected from his projected usage of the land.[113] Because the United States Supreme Court has not set a bright line rule for evaluating the regulation's economic impact on the property, New York state courts weigh heavily on the property's remaining economic uses. That is not to say that New York courts do not consider the diminution in value of the property.

Courts in New York may sometimes give greater weight to diminution in property value than they give to possible economic uses. In *Chase Manhattan Bank, N.A. v. State*,[114] the Appellate Division of the New York State Supreme Court held that the State's condemnation of plaintiff's property under the New York State Tidal Wetlands Act could be successfully challenged as a regulatory taking.[115] Plaintiff owned 5.91 acres of land classified as tidal wet-

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[111] N.Y. CONST. art. I, § 7(a) (providing in pertinent part: "Private property shall not be taken for public use without just compensation.").

[112] De St. Aubin v. Flacke, 496 N.E.2d 879, 885 (N.Y. 1986) (suggesting that once the town denies, with prejudice, the landowner's request for a permit to develop his property into single-family residences, the regulation then precludes the landowner from using his land for the purpose for which it was acquired); Spears v. Berle, 397 N.E.2d 1304, 1308 (N.Y. 1979) (explaining that in determining whether a regulation barred the landowner from using his land for the purpose for which it was purchased, courts consider evidence of the property's value, purchase price, the uses for which it may have been acquired, or the possible gains from permitted uses).

[113] *Spears*, 397 N.E.2d at 1308; *see also De St. Aubin*, 496 N.E.2d at 885 ("[T]he property owner must show by 'dollar and cents' evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable economic return . . . .").

[114] 497 N.Y.S.2d 983 (App. Div. 1984).

[115] *Id.* at 986.

lands.[116] The State enacted the Tidal Wetlands Act,[117] which proscribed residential use of the property, and subsequently appropriated the plaintiff's property for environmental purposes.[118] Consequently, the plaintiffs sued the State for compensation for the regulatory taking. The Appellate Division agreed that, under the Tidal Wetlands Act, the "highest and best use" of the property was recreational at most.[119]

The 'diminution in property' value was used by the court, in tandem with the impact on the economic use of the property, to determine whether a regulatory taking existed. The court agreed that, with the regulation intact, the property's value was worth $7,400.[120] Conversely, without the regulation, the property would be worth about $53,781.[121] The regulation reduced plaintiff's property value by 86% and thus deprived plaintiff of all financially rewarding uses of the property by restricting it to recreational usage.[122] Under these circumstances, the 86% diminution in property value and the regulation's limit on the property to be used solely for recreational purposes provided a reasonable probability that there would likely be a successful constitutional challenge to the regulation as a regulatory taking.[123]

In *Friedenburg v. New York State Department of Environmental Conservation*,[124] the court reviewed the regulation's effect on the property's economic value in tandem with its effect on the property's economic use. The plaintiffs challenged the Department of Environmental Conservation ("DEC") wetlands regulations, which proscribed utilization of the waterfront property, as a regulatory taking which required just compensation.[125] The 2.5-acre parcel was purchased in 1962, and passed to the owner's estate, the plaintiffs, in

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[116] *Id.* at 985.

[117] N.Y. Comp. Codes R. & Regs. tit. 6, § 661.1 (1977).

[118] *Chase Manhattan Bank*, 497 N.Y.S.2d at 985 (claiming that the drainage on the wetlands was poor, that mosquito ditches infested area, and tidal flow was present under or around the property).

[119] *Id.* at 990 (stating that it based this conclusion on the State's appraiser who valued the property at $7,400 according to the restrictions of the Tidal Wetlands Act).

[120] *Id.*

[121] *Id.* at 991.

[122] *Id.* at 992.

[123] *Chase Manhattan Bank*, 497 N.Y.S.2d at 992.

[124] 767 N.Y.S.2d 451 (App. Div. 2003).

[125] *Id*. at 453.

1973.[126] The plaintiffs were denied a permit to construct a single-family residence multiple times. In 1989 the Village of Southampton adopted the DEC's wetlands regulations, which restricted any development of the property.[127] Subsequently, the plaintiffs brought suit against the DEC, and requested permission for the building; in the alternative, the plaintiffs sought payment for a violation of the Takings Clause.[128] The New York Appellate Division applied the ad hoc factors pursuant to *Penn Central*, and held that the restrictions constituted a regulatory taking.[129] It reasoned that the property value was reduced by 95%, and the property could no longer be used for the purpose for which it was purchased because the regulations required that the property be left in its natural state.[130]

Unlike the court in *Friendenburg*, some courts do not find a reduction in property value to be a compelling factor. In *Gazza v. New York State Department of Environmental Conservation*,[131] a regulatory takings issue arose when the landowner purchased property knowing that it had been designated as protected tidal wetlands, and was denied a building permit for a residence.[132] The court examined the facts under the ad hoc approach and held that the regulation did not constitute a taking.[133] It then reasoned that there was no investment-backed interest of the landowner in building a house at the time he purchased the property, because he knew the property was designated tidal wetlands.[134] Furthermore, the property's economic value

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[126] *Id*.

[127] *Id.*

[128] *Id.*

[129] *Friedenburg*, 767 N.Y.S.2d at 458 (stating that the three factors used to determine whether there was a regulatory taking are "the economic impact of the regulation, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of governmental action"); *see also Penn Cent.*, 438 U.S. at 124 (explaining that the character of the government action considers whether such action is a physical invasion by the government or an interference with a public purpose such that it arises from a public program "adjusting the benefits and burdens of economic life to promote the common good.").

[130] *Friedenburg*, 767 N.Y.S.2d at 459, 461 (explaining that the court agrees with the appraiser's detailed findings that although the DEC would permit certain activities on the wetlands, those same activities would not be approved by the Southampton Trustees, the Southampton Zoning Board of Appeals, and the Village Board).

[131] 679 N.E.2d 1035 (1997).

[132] *Id*. at 1036.

[133] *Id.* at 1041-42, 1043.

[134] *Id.* at 1037, 1042.

had not been destroyed by the regulation because the property could be used for recreational purposes.[135] A part of the court's ad hoc analysis on the economic viability of the property was the diminution in property value. Although neither party presented this argument, the court nonetheless specified that diminution in property value is generally insufficient to establish a taking, regardless of the value.[136]

Time and again, many cases in New York have focused on the economic use of the property rather than the diminished property value.[137] The Appellate Division of the New York Supreme Court, in *Putnam County National Bank v. City of New York*,[138] applied *Penn Central's* ad hoc approach and held that there was no regulatory taking, because the economic impact on the plaintiff's property was insufficient to outweigh the City's enforcement of the Watershed Regulations.[139] Plaintiff acquired the property for the purpose of dividing it into thirty-six lots and operating a central sewage system.[140] The City then enacted the Watershed Regulations and revoked plaintiff's permit for a central sewage system.[141] Subsequently, the plaintiff obtained a permit for an alternate proposal, where the property would be divided into seventeen lots and operates with subsurface septic systems.[142] The plaintiff then sold the property for $1.4 million, and alleged the property value was reduced by 80% due to the regulations.[143] The 80% diminution in value had no impact on the court's decision, because the plaintiff was nevertheless permitted to significantly develop the property and obtain a reasonable economic return.[144] The court reasoned that a regulation could not be rendered a taking, even if it "substantially reduced" the property value or "deprive[d] the property of its most beneficial use," so long as the land was capable of producing a reasonable return in light of the regula-

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[135] *Id.* at 1042 (stating that "a regulation [that] 'deprives the property of its most beneficial use does not render it unconstitutional.' " (quoting *Goldblatt*, 369 U.S. at 594)).

[136] *Gazza*, 679 N.E.2d at 1042.

[137] For cases that have put an overwhelming focus on the "economic use" *Penn Central* factor see Putnam Cnty. Nat'l Bank v. City of New York, 829 N.Y.S.2d 661 (App. Div. 2007), and *De St. Aubin*, 496 N.E.2d 879, *Chase Manhattan Bank*, 497 N.Y.S.2d 983.

[138] 829 N.Y.S.2d 661 (App. Div. 2007).

[139] *Id.* at 663.

[140] *Id.* at 662.

[141] *Id.*

[142] *Id.*

[143] *Putnam Cnty. Nat'l Bank*, 829 N.Y.S.2d at 662.

[144] *Id.* at 663.

tion.[145]

In 2007, the court in *In re City of New York* concluded that there was a regulatory taking.[146] The court took the ad hoc approach and weighed the *Penn Central* factors.[147] Specifically, when it evaluated one of the factors— the economic impact of the regulation on the property— it considered both the remaining economic use and the diminution in the economic value.[148] Together, the regulation prohibiting structural development and the 82% reduction in property value presented a successful regulatory takings claim.[149] Thus, the court awarded the Plaintiffs $810,000 as a "just compensation" award under the regulatory Takings Clause in the New York Constitution, which also satisfied the requirements of the Takings Clause of the Fifth Amendment.[150] Although the *Penn Central* factors were created to analyze federal takings claims, *In re City of New York's* use of the same factors shows that the New York State Constitution's Takings Clause is comparable to the Takings Clause of the Fifth Amendment. Furthermore, the absence of a specifically established percentage of diminution in the value of property allowed this court to apply and balance the other *Penn Central* factors.

V. CONCLUSION

At first glance, the value of Plaintiffs' Staten Island property appeared completely diminished because the government regulation forced the Plaintiffs to leave the property vacant. If the court found the property completely diminished, the court would have applied the per se analysis under *Lucas*.[151] However, the court in *In re City of New York* utilized an ad hoc approach, pursuant to *Penn Central*, because the Plaintiffs' property value was not completely destroyed, like the property in *Lucas*.[152] Both the Plaintiffs and the City agreed

[145] *Id.*; *De St. Aubin*, 496 N.E.2d at 885 (pointing out that the landowner has the burden of showing the regulation prohibited any use of the land that would be "capable of producing a reasonable return").

[146] *In re City of New York*, 2012 WL 1676889, at *6.

[147] *Id.* at *3.

[148] *Id.* at *4.

[149] *Id.* at *6.

[150] *Id.* at *1, *11.

[151] *In re City of New York*, 2012 WL 1676889, at *2.

[152] *Id.* at *3.

that the land retained economic value because they found "comparable sales [where] local Staten Island market investors [were] willing to purchase properties that [prohibited development] because of wetlands regulations."[153] When the court reached its discussion on the regulation's economic impact on the Paollelas, it provided a lengthy analysis of the remaining economic use of the property and the property value diminution as a percentage. Once the court found that there was an 82% reduction in value, this value was taken together with the other factors to find that a regulatory taking existed.[154]

Regulatory takings permit both federal and state courts to apply the appropriate factors in determining whether a regulation should be invalidated. Federal courts employ the proper factors for the per se approach and ad hoc approach, respectively. A regulatory taking per se requires the regulation to have caused the landowner to be deprived of all economically beneficial use of the subject property. Under the ad hoc approach, the court balances the economic impact of the regulation on the claimant, the regulation's interference with distinct investment-backed expectations, and the character of the governmental action, to determine the degree of interference the regulation has on the landowner's use of the subject property.

State courts have the freedom to interpret the precedents set forth by the U.S. Supreme Court. Because there is no bright-line rule as to how to balance the regulation's economic impact on the landowner's property, state courts can factor in the reduction of the property value in terms of a given percentage. The absence of a bright-line rule may have policy benefits and detriments. In *Florida Rock Industries, Inc. v. United States*,[155] the United States Court of Appeals examined some of these pros and cons.[156] First, the need for a specified rule stems from the difficulty in determining whether a particular reduced value in property should justify compensation for a taking.[157] The problem with establishing such a rule would be that the government would have to make a payment every time it exercised its police power.[158] While courts have the power to manipulate the magnitude

[153] *Id.* at *2.
[154] *Id.* at *6.
[155] 18 F.3d 1560 (Fed. Cir. 1994).
[156] *Id.* at 1569.
[157] *Id.*
[158] *Id.*

of the regulation's economic impact on the property owner, both the U.S. Constitution and New York State Constitution require that if there is a regulatory taking, just compensation must be paid to the landowner.

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