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I'm in the Pursuit of Your Property: How the Government Disguises a Taking

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**I'M IN THE PURSUIT OF YOUR PROPERTY: HOW THE
GOVERNMENT DISGUISES A TAKING**

**SUPREME COURT OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT**

Matter of Nelson v. City of New York¹
(decided May 8, 2014)

I. INTRODUCTION

In the United States an individual's right to property is considered a bundle of rights.² These rights are not absolute and may be limited or removed under certain circumstances. To protect the property owner under such circumstances, the United States Constitution provides that, "private property shall not be taken for public use, without just compensation."³ A taking is defined as a governmental encroachment on an individual's property.⁴ A physical encroachment on one's property does not normally present an issue. However, issues arise when laws or regulation interfere with a property owner's use and enjoyment of his or her realty.⁵ A regulatory or de facto taking is defined as a governmental encroachment which imposes conditions and regulations on the land that limit its use.⁶

Paula Nelson, a property owner, alleged a violation of her Fifth Amendment rights due to the de facto taking of her property by the enactment of the 1997 Watershed Memorandum Agreement

¹ 985 N.Y.S.2d 329 (2014).

² 63C AM. JUR. 2D *Property* § 1 (2015) ("The legal definition of property most often refers not to a particular physical object, but rather to the legal bundle of rights recognized in that object, which bundle of rights includes the rights to possess, use, and dispose of a particular article.").

³ U.S. CONST. amend. V.

⁴ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-38 (1982); *see Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

⁵ *Loretto*, 458 U.S. at 426-27.

⁶ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-16 (1922).

(“MOA”).⁷ A watershed is an “area that drains to a common waterway, such as a stream, lake, estuary, wetland, aquifer, or even the ocean” and can be directly affected by our actions.⁸ The MOA gave the City of New York (“the City”) the ability to acquire an interest in an individual’s property via an easement.⁹ Nelson’s property is included in the watershed and within the area affected by the MOA.¹⁰ The petitioner’s contention concerned a resolution that was added to the Agreement, which provided that the municipality could exclude certain properties from being acquired through easement.¹¹ Petitioner’s property was designated as an area that was excluded;¹² as a result, Nelson was denied the opportunity to sell an easement to the Watershed Agricultural Council and sued the City of New York.¹³

The Appellate Division, Third Department, reached two conclusions.¹⁴ First, relying on the right of towns to enact regulations and resolutions, the court held that the enacted resolution was not an abuse of power and did not violate Nelson’s due process rights.¹⁵ The court then examined three factors: (1) the economic effect; (2) the interference with reasonable investment-backed expectations; and (3) the character of the governmental action in order to determine if a *de facto* taking occurred.¹⁶ After a fact based inquiry, the court concluded that Nelson did not satisfy the required economic deprivation to succeed on a takings claim.¹⁷

Case law establishes that the character of the governmental regulation is presumptively legitimate, thus creating only one factor to prove: the amount of economic loss the property owner sustained. After examining the financial loss it is likely that a limitation on the transferability of an interest in one’s property will not rise to the required loss necessary to prevail on a takings claim. Thus, a property owner will unlikely prevail on a regulatory takings claim when there

⁷ 985 N.Y.S.2d at 330-31.

⁸ *Watersheds*, EPA, <http://water.epa.gov/type/watersheds/> (last visited Mar. 13, 2015) (stating that the purpose of imposing regulations on the watershed is to preserve our country’s water resources).

⁹ *Nelson*, 985 N.Y.S.2d at 330-31.

¹⁰ *Id.*

¹¹ *Id.* at 331.

¹² *Id.*

¹³ *Id.*

¹⁴ *Nelson*, 985 N.Y.S.2d at 332-33.

¹⁵ *Id.*

¹⁶ *Id.* at 333; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

¹⁷ *Nelson*, 985 N.Y.S.2d at 333.

is an elimination of just one potential purchaser.

Over time, the United States Supreme Court and various New York State courts have set the stage for an expansion of the government's ability to disguise a "taking" as a regulation. This Case Note will explore how federal and New York State courts have approached allegations of de facto takings resulting from the implementation of regulations. This analysis will begin with an examination of federal case law. This Note will then discuss New York's implementation of the federal approach, followed by how New York has specifically addressed claims of regulatory takings. Lastly, the federal and New York State approaches to the issue will be compared.

II. NELSON AND THE WATERSHED MEMORANDUM AGREEMENT

In 2001, petitioner, Paula Nelson, purchased a farm in the watershed in the Village of Andes, Delaware County.¹⁸ Prior to Nelson's purchase, the City of New York, the Environmental Protection Agency, the Department of Environmental Conservation ("DEC"), the New York City Department of Environmental Protection ("DEP"), and the Coalition of Watershed Towns executed the 1997 Watershed Memorandum Agreement¹⁹ ("MOA").²⁰ The New York City Watershed provides drinking water to about nine million people and covers 2,000 square miles in parts of eight counties north of the city.²¹ Ninety percent of the water comes from the Catskill/Delaware system located west of the Hudson River.²² DEP has authority, subject to the Department of Health's approval, to enforce regulations to

¹⁸ *Id.* at 330; *supra* note 9.

¹⁹ *Conservation Easements: About the CE Program*, WATERSHED AGRIC. COUNCIL, http://www.nycwatershed.org/ce_about.html (last visited Mar. 13, 2015) ("WAC's Conservation Easement Program was initially prescribed in the 1997 New York City Watershed Memorandum of Agreement as part of the Land Acquisition Program (LAP). The LAP seeks to acquire land and conservation easements in the West of Hudson watershed for the purposes of protecting New York City's drinking water supply. The LAP includes programs managed by the New York City Department of Environmental Protection (DEP) for the acquisition of fee land and conservation easements as well as WAC's program, which acquires conservation easements (CEs) on qualified agricultural properties in the New York City watershed.").

²⁰ *Nelson*, 985 N.Y.S.2d at 330.

²¹ *Worchester Creameries Corp. v. City of New York*, 861 N.Y.S.2d 198, 200 (App. Div. 3d Dep't 2008).

²² *Id.*

protect the water supply within the watershed.²³ Under the MOA, the City could acquire land in specified upstate New York counties for the purpose of protecting the watershed.”²⁴ Nelson’s property was excluded from absolute acquisition.²⁵ However, the Agreement did allow the City to acquire a conservation easement.²⁶ In 2006, Nelson attempted to sell a conservation easement to the Watershed Agricultural Council; however, these efforts were unsuccessful and did not result in a sale.²⁷

In 2010, a permit was issued that allowed the City to continue the land and easement acquisitions within the watershed.²⁸ The permit included a condition, which would exclude certain geographical areas from acquisition by the City if the municipality designated such areas as hamlets.²⁹ The Andes Town Board and the Town Supervisor (“respondents”) adopted Resolution No. 31³⁰ (“the Resolution”), which excluded acquisition by the City, as per condition No. 10,³¹ of specified property, including Nelson’s farm.³² Following the Resolution, Nelson sought to annul Resolution No. 31 and commenced an action against the City of New York.³³ Nelson alleged that the respondents failed to give appropriate notice, denied the public an ade-

²³ *Id.*

²⁴ *Nelson*, 985 N.Y.S.2d at 330-33; *What Is a Conservation Easement*, WATERSHED AGRIC. COUNCIL, http://www.nycwatershed.org/ce_whatisce.html (last visited Mar. 13, 2015) (“Generally, conservation easements are either sold or donated by a landowner to a qualified conservation organization and constitute a legally binding agreement that may limit or condition certain types of uses or activities from occurring on a property in perpetuity or prevent development from taking place on a property in perpetuity in order to fulfill the conservation purposes of the easement. Conservation easements function as non-possessory, legal covenants on a property. As such, land owners still possess the property and may sell or transfer a property encumbered by an easement.”).

²⁵ *Nelson*, 985 N.Y.S.2d at 331.

²⁶ *Id.*; see 9A N.Y. PRAC., ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 12:5 (2d ed.).

²⁷ *Nelson*, 985 N.Y.S.2d at 331.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (pursuant to the regulation, the “DEC issued a 15-year water supply permit to NYCDEP authorizing continued land and easement acquisitions by the City within the watershed”).

³¹ *Id.* at 331-32 (“Special condition No. 10 of the DEC permit required municipalities that were considering adopting a resolution that excluded certain areas from acquisition by the City to, among other things, give appropriate forms of notice and allow a public comment period of at least 30 days following such notice.”).

³² *Nelson*, 985 N.Y.S.2d. at 331.

³³ *Id.*

quate comment period,³⁴ and acted arbitrarily in adopting Resolution No. 31, and that the resolution resulted in a de facto taking of her property.³⁵ The Delaware County Supreme Court dismissed the petition and Nelson appealed.³⁶

III. NELSON DECIDED

On appeal, the Appellate Division, Third Department affirmed the Delaware County Supreme Court's decision.³⁷ The Appellate Court held that Resolution No. 31 did not exceed respondents' authority nor was the implementation of Resolution No. 31 "arbitrary, unreasonable or otherwise unlawful."³⁸ The Appellate Court cited three specific reasons for its decision. First, municipalities within their borders have the authority to regulate how land is used.³⁹ Second, the court found that the regulation served a legitimate purpose, which was to protect the watershed and to preserve the City's economic interest.⁴⁰ Third, the resolution was not found to be "an improper attempt by a local municipality to regulate who owns or occupies property, but in essence, the withdrawal of one potential purchaser who received a significant benefit."⁴¹ The court concluded that the Resolution, denying Nelson the opportunity to sell an interest in her property to the City through an easement, was not unlawful and did not violate Nelson's Due Process Rights.⁴²

³⁴ *Id.* at 332.

³⁵ *Id.* at 331.

³⁶ *Id.*

³⁷ *Nelson*, 985 N.Y.S.2d at 332-33.

³⁸ *Id.* at 332; *see Rotterdam Ventures, Inc. v. Town Bd. of Rotterdam*, 935 N.Y.S.2d 698, 700 (App. Div. 3d Dep't 2011) ("Generally, zoning determinations enjoy a strong presumption of validity and will only be overcome by a showing, beyond a reasonable doubt, that the determination was arbitrary and unreasonable or otherwise unlawful.")

³⁹ *Nelson*, 985 N.Y.S.2d at 332; *see O'Mara v. Town of Wappinger*, 879 N.E.2d 148, 152 (N.Y. 2007) (concluding that a town has an ability to impose reasonable conditions pursuant to the approval of petitioner's subdivision).

⁴⁰ *Nelson*, 985 N.Y.S.2d at 332; *see Worcester Creameries Corp.*, 861 N.Y.S.2d at 200 (reasoning that the purpose in enacting the Watershed MOA permitted regulations that went beyond state and federal law).

⁴¹ *Nelson*, 985 N.Y.S.2d at 332; *see Dexter v. Town Bd. of the Town of Gates*, 324 N.E.2d 870, 871-72 (N.Y. 1957) (concluding that when the town accepted the petitioner's request for rezoning, but instead implemented a regulation, it does not normally amount to a taking, unless it specifically targets the petitioner).

⁴² *Nelson*, 985 N.Y.S.2d at 332 (reasoning that respondents complied with the requirements of special condition No. 10, "[n]otice was duly given in mid-April 2011, a public hearing was held on May 10, 2011 and written comments were permitted until May 20,

The second conclusion reached by the appellate court was that the Resolution did not effect a de facto taking.⁴³ When the government takes private property for public use it is required to justly compensate individuals.⁴⁴ An action is considered a regulatory taking when a governmental encroachment does not physically occupy the property but instead governmental conditions and regulations are imposed on the land to limit its use.⁴⁵ If a regulatory taking is found to exist, the property owner is entitled to just compensation.⁴⁶

The court examined three factors to determine if a regulatory taking occurred.⁴⁷ These factors included “the [resolution’s] economic effect on the landowner, the extent to which the [resolution] interferes with reasonable investment-backed expectations, and the character of the government action.”⁴⁸ The court found that the resolution did not eliminate all economic uses of the property.⁴⁹ The result of the Resolution was that one potential purchaser no longer had the option to purchase.⁵⁰ Furthermore, Nelson’s investment backed expectations were not adversely affected because the Resolution did not hinder the property’s function as a farm.⁵¹ Lastly, the court emphasized the purpose behind the Resolution, which was to protect the watershed.⁵² The appellate court held that Nelson failed to “meet [the] heavy burden of showing that the [resolution] resulted in a regulatory taking.”⁵³

2011”).

⁴³ *Id.* at 333.

⁴⁴ *Id.*

⁴⁵ *Mahon*, 260 U.S. at 415.

⁴⁶ *Id.* at 415-16.

⁴⁷ *Nelson*, 985 N.Y.S.2d at 333; *Penn Central*, 438 U.S. at 124.

⁴⁸ *Nelson*, 985 N.Y.S.2d at 333; *Penn Central*, 438 U.S. at 124; *see* *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1217 (N.Y. 2004).

⁴⁹ *Nelson*, 985 N.Y.S.2d at 333; *see also Palazzolo*, 533 U.S. at 616.

⁵⁰ *Nelson*, 985 N.Y.S.2d at 332.

⁵¹ *Id.* at 333 (indicating that Nelson failed to balance the “investment back expectation” factor in her favor).

⁵² *Nelson*, 985 N.Y.S.2d at 333 (“The purpose of the resolution was to protect the Town’s potential for growth and economic sustainability, which was one of the many goals of the . . . watershed MOA and consistent with an overriding purpose of maintaining a safe, ample and relatively inexpensive drinking water supply for the City.”); *id.* at 332 (“This was part of a delicate balance designed to protect the watershed and save the City significant money while safeguarding the economic vitality of upstate communities.”).

⁵³ *Id.* at 333; *see VTR FV, LLC v. Town of Guilderland*, 957 N.Y.S.2d 454, 457-58 (App. Div. 3d Dep’t 2012) (holding that a taking had not occurred because under the circumstances the “amendment served a legitimate governmental interest in expanding affordable housing options for seniors in the area, in addition to ‘increasing the tax base and creating jobs.’ Pe-

IV. FEDERAL APPROACH TO THE ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not “be taken for public use, without just compensation.”⁵⁴ In examining the plain language and purpose behind the Fifth Amendment, case law establishes that a physical encroachment on an individual’s property is a violation of an individual’s right as a property owner.⁵⁵ However, the Supreme Court in *Pennsylvania Coal Co. v. Mahon*⁵⁶ recognized that, even if the government does not seize or occupy an individual’s property, a governmental regulation can amount to a taking if it “goes too far.”⁵⁷ In striking down a statute which prevented Pennsylvania Coal Company from mining coal from a property that it had acquired, the Court reasoned that the statute failed to further the public interest and destroyed all of Pennsylvania Coal’s “existing property and contract rights” in that piece of property.⁵⁸

The United States Supreme Court further elaborated on this “goes too far” premise in *Lucas v. South Carolina Coastal Council*.⁵⁹ Lucas commenced an action claiming that South Carolina’s Beachfront Management Act effected a taking.⁶⁰ The Act required property owners to obtain a permit before building any permanent structures on the designated lots.⁶¹ Lucas had acquired the property prior to the

titioners have not established that the amendment interfered with their investment-backed expectations, particularly in light of the fact that there have apparently been no plans to build a skilled nursing facility on the phase IV site for over 17 years.”).

⁵⁴ U.S. CONST. amend. V; *Armstrong v. United States* 364 U.S. 40, 49 (1960) (“Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

⁵⁵ *Loretto*, 458 U.S. at 435-38; *supra* note 2 (the right to exclude is included in one’s bundle of property rights).

⁵⁶ 260 U.S. 393 (1922).

⁵⁷ *Id.* at 415-16 (emphasizing that holding otherwise would put the country “in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change”); *see also Armstrong*, 364 U.S. at 49 (concluding a taking could be found when a property owner is “alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”).

⁵⁸ *Mahon*, 260 U.S. at 413-14 (“The extent of the public interest shown by the statute is limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal.”).

⁵⁹ 505 U.S. 1003 (1992).

⁶⁰ *Id.* at 1009.

⁶¹ *Id.* at 1008.

enactment of the Act with the intention to construct single-family residences.⁶² The passage of the Act ended Lucas's construction.⁶³ Lucas filed suit, claiming that the Act resulted in a complete diminishment of his property's value.⁶⁴ The trial court found that the Act effected a taking and Lucas was entitled to just compensation because of the loss in value to the property.⁶⁵ The South Carolina Supreme Court reversed the decision and concluded that no compensation was owed, no matter the economic effect on the property, when a regulation is designed "to prevent serious public harm."⁶⁶ However, the United States Supreme Court agreed with the trial court and held that a regulation which "declares 'off-limits' all economically productive or beneficial uses of land," requires compensation under the Takings Clause.⁶⁷

Issues arise in instances when the economic loss does not amount to a complete diminishment in value to the property owner. In these cases, once a claim is deemed ripe,⁶⁸ the court will then examine and balance the following factors to determine if there was a regulatory taking: (1) the economic impact on the property owner; (2) the interference with distinct investment-backed expectations; and (3) the character of the governmental regulation. These factors derive from *Penn Central Transportation Co. v. City of New York*,⁶⁹ the pivotal case on the issue of regulatory takings. In *Penn Central*, New York City's Landmark Preservation Law⁷⁰ required Penn Central to

⁶² *Id.* (like much of his neighbors).

⁶³ *Id.*

⁶⁴ *Lucas*, 505 U.S. at 1009.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1009-10.

⁶⁷ *Id.* at 1030.

⁶⁸ *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.").

⁶⁹ 438 U.S. 104 (1978).

⁷⁰ The Court noted two reasons behind such laws:

[T]he first is recognition that, in recent years, large number of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all.

keep its property in good condition and required the Landmark Commission's approval prior to any proposed construction.⁷¹ Penn Central desired to build an office building above the already existing railroad terminal.⁷² Pursuant to the requirement of the Landmark Preservation Law, Penn Central applied to the Commission for permission to do so.⁷³ The Commission denied Penn Central's proposal.⁷⁴ Penn Central claimed that it was entitled to just compensation due to the impediment to construction of the property as a result of the Landmark Preservation Law.⁷⁵ The New York appellate court held that the law did not effect a regulatory taking,⁷⁶ a decision affirmed by the New York Court of Appeals.⁷⁷ After granting certiorari, the Supreme Court decided "whether the restrictions imposed by New York City's law upon appellants' exploitation of the terminal site effect a 'taking' of the appellants' property for public use within the meaning of the Fifth Amendment."⁷⁸ The Court adopted a balancing approach and established three factors to be examined when engaging in a factual inquiry to determine whether a regulation has "gone too far" to amount to a taking.⁷⁹

The first factor examined was the economic impact of the government's regulation on the claimant.⁸⁰ Prior to addressing this factor the Court rejected Penn Central's argument that a taking occurred simply because it no longer had the ability to "exploit a property interest that they . . . believed was available for development."⁸¹ On this point, the Court concluded that the property is looked at as a whole to determine if a taking had occurred.⁸² The Court found that

Id. at 107-09.

⁷¹ *Id.* at 110-12 ("[D]ecisions concerning construction on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property.").

⁷² *Id.* at 116.

⁷³ *Id.*

⁷⁴ *Penn Central*, 438 U.S. at 117.

⁷⁵ *Id.* at 119.

⁷⁶ *Id.* (concluding that "the restrictions on the development of the Terminal site were necessary to promote the legitimate public purpose of protecting landmarks and therefore that [Penn Central] could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property").

⁷⁷ *Id.* at 120-21.

⁷⁸ *Id.* at 122.

⁷⁹ *Penn Central*, 438 U.S. at 124.

⁸⁰ *Id.* at 129-31.

⁸¹ *Id.* at 130.

⁸² *Id.* at 130-31.

the New York City law did not impede any of the current uses of the Terminal.⁸³

The second factor focused on the extent to which the regulation interfered with Penn Central's distinct investment backed expectations. The Court found that the New York City law did not impede Penn Central's investment backed expectations because Penn Central still had the ability to profit from the property because it continued to function as a terminal.⁸⁴ Furthermore, the Court concluded that under the circumstances, Penn Central failed to seek approval for the construction of a smaller structure.⁸⁵ Lastly, the Court rationalized that it was unknown if Penn Central "will be denied any use of any portion of the airspace above the Terminal."⁸⁶

The last factor is the character of the governmental action.⁸⁷ "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."⁸⁸ Furthermore, when the state concludes that, " 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," the governmental interest is likely to be deemed acceptable.⁸⁹

The Supreme Court concluded that the implementation of New York City's Landmarks Law did not constitute a "taking."⁹⁰ Penn Central failed to swing any of the three factors in its favor.⁹¹ The *Penn Central* holding simply created a template of factors to be examined by a reviewing court.⁹² The Supreme Court failed to clear-

⁸³ *Id.* at 136 (noting that the "New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment").

⁸⁴ *Penn Central*, 438 U.S. at 136.

⁸⁵ *Id.* at 136-37 (Specifically denied the ability to construct an office building in excess of 50-stories).

⁸⁶ *Id.*

⁸⁷ *Id.* at 124-25; *see also* Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590, 595-96 (1962) (finding that "[t]o evaluate [the law's] reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance").

⁸⁸ *Penn Central*, 438 U.S. at 124.

⁸⁹ *Id.* at 125.

⁹⁰ *Id.* at 138.

⁹¹ *Id.*

⁹² *Id.* at 124.

ly define each factor in a way that it may be applied to different circumstances, and as a result both federal and state courts have been flooded with cases concerning losses of different dollar amounts and a variety of different regulations. To apply the factors to Nelson's claim it is necessary to establish how the federal case law elaborated on each factor in a wide variety of different circumstances.

A. First Factor: The Economic Impact

The Supreme Court frequently analyzes the first factor by inquiring in depth into the economic deprivation the property owner sustained as a result of the imposed regulation. This is evident in *Palazzolo v. Rhode Island*,⁹³ in which the petitioner, Palazzolo, owned property that was designated as a coastal wetland under Rhode Island law.⁹⁴ Pursuant to the law, Palazzolo was required to submit development plans for acceptance prior to undertaking any construction.⁹⁵ The Rhode Island Coastal Resources Management Council rejected Palazzolo's development proposals.⁹⁶ As a result, Palazzolo sued in Rhode Island Superior Court, asserting that the Council's application of its wetlands regulations took his property without just compensation in violation of the Takings Clause of the Fifth Amendment.⁹⁷ The Superior Court ruled against Palazzolo.⁹⁸

On appeal, the Rhode Island Supreme Court affirmed the decision.⁹⁹ The Rhode Island Supreme Court found that Palazzolo failed to demonstrate that he was deprived of all economically beneficial use of his land.¹⁰⁰ This conclusion was supported by the fact that Palazzolo had \$200,000 in development value remaining on a portion of the realty.¹⁰¹ The Supreme Court of the United States agreed with the Rhode Island Supreme Court and held that the "owner is not deprived of all economic use of his property because the

⁹³ 533 U.S. 606 (2001).

⁹⁴ *Id.* at 611.

⁹⁵ *Id.* at 614-15.

⁹⁶ *Id.* at 611.

⁹⁷ *Id.* (the Fifth Amendment is binding upon the State through the Due Process Clause of the Fourteenth Amendment).

⁹⁸ *Palazzolo*, 533 U.S. at 616.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

value of upland portions is substantial.”¹⁰² Specifically, Palazzolo was still able to build a residence on 18-acres of the property.¹⁰³

B. Second Factor: Interference with Distinct Investment-Backed Expectations

The economic expectation factor of the property owner was addressed in *Hodel v. Irving*,¹⁰⁴ in which the Supreme Court clearly defined when a regulation poses an unacceptable regulation on property owners.¹⁰⁵ Hodel, the petitioner, claimed that a provision of the Indian Land Consolidation Act effected a taking because it denied the property owner the ability to freely pass the property to another at death.¹⁰⁶ The congressional purpose of the Act was to promote consolidation of the Indians’ land.¹⁰⁷ The South Dakota District Court held that the Act did not effect an unconstitutional taking because Congress has the authority to regulate the intestate passage of property.¹⁰⁸ On appeal, the Eighth Circuit reversed and held that the descendants had a right to control the property after a decedent’s death and, thus, had standing to allege a takings claim.¹⁰⁹ The Supreme Court affirmed the Eighth Circuit’s decision and concluded that the regulation “goes too far.”¹¹⁰ The Court reasoned that abolishing the right to devise one’s property interests deemed the restriction on alienation unconstitutional.¹¹¹

C. Third Factor: The Character of the Governmental Action

The third *Penn Central* factor is elaborated on in a series of cases in which the Supreme Court examined the connection between the regulation and the promotion of a legitimate state interest.¹¹² The

¹⁰² *Id.* at 616, 631-32 (The Court rejected Palazzolo’s argument that the property should be looked at as separately instead of as a whole).

¹⁰³ *Palazzolo*, 533 U.S. at 631.

¹⁰⁴ 481 U.S. 704 (1987).

¹⁰⁵ *Id.* at 718.

¹⁰⁶ *Id.* at 709.

¹⁰⁷ *Id.* at 712.

¹⁰⁸ *Id.* at 710.

¹⁰⁹ *Hodel*, 481 U.S. at 710.

¹¹⁰ *Id.* at 718.

¹¹¹ *Id.*

¹¹² *Penn Central*, 438 U.S. at 124-25.

inconsistencies in the tests used to determine whether the character of the governmental action is legitimate cannot be ignored when examining this factor. For instance, in *Agins v. City of Tiburon*,¹¹³ the Supreme Court addressed the issue and developed the “substantially advances” inquiry.¹¹⁴ The Court found that “[t]he application of general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”¹¹⁵

However, in *Lingle v. Chevron U.S.A. Inc.*,¹¹⁶ the Supreme Court rejected the standard established in *Agins* and held that the substantially advances inquiry is not appropriate for a takings cause of action because the “the Takings Clause presupposes that the government has acted pursuant to a valid public purpose.”¹¹⁷ In essence, *Lingle* made it easier for a court to rule in favor of the government because the “rationally related” language means rational basis is the standard of review, resulting in a very low threshold for the government to satisfy.¹¹⁸

V. ANALYSIS OF NELSON’S “TAKING”

The court’s application of the *Penn Central* balancing test begins with an inquiry into the economic loss the property owner sustained. If the regulation resulted in a complete financial deprivation, the *Lucas* analysis leads to the conclusion that there was a per se taking which requires just compensation and the analysis is over. If the financial loss is not a total deprivation and there is some beneficial use of the property, then the court continues with an examination of *Penn Central*’s other two factors. Under the circumstances, the argument is very persuasive in that an application of the approach in *Lucas* is not appropriate to determine whether Nelson’s property was unjustly taken. *Lucas* concerned a regulatory taking in which all

¹¹³ 447 U.S. 255 (1980).

¹¹⁴ *Id.* at 260-61.

¹¹⁵ *Id.* at 260.

¹¹⁶ 544 U.S. 528 (2005). The Court in *Lingle* was faced with the issue of what is the appropriate test for determining whether a regulation effects a Fifth Amendment taking. *Id.* at 532. The Hawaii Legislature implemented a law limiting the rent that oil companies may charge to dealers who lease services stations owned by the companies. *Id.* The lower courts used the “substantially advances” analysis and concluded there was a taking because the regulation did not advance Hawaii’s interest with respect to controlling gas prices. *Id.*

¹¹⁷ *Id.* at 543.

¹¹⁸ *Lingle*, 544 U.S. at 543.

economic uses of the property were affected.¹¹⁹ Nelson was not deprived of all economic use of her property.¹²⁰ Although Nelson was unable to sell an easement to the City, she still had the ability to sell the property to other buyers.¹²¹

Using the balancing test, the court must determine whether the removal of one potential buyer is a sufficient economic burden to entitle Nelson to compensation. Nelson still had the ability to use the property for the purpose for which it was acquired and maintained the ability to sell it, just to one less potential purchaser.¹²² The Court found that the inability to sell an interest in one's property to whomever he or she pleases does not demonstrate an interference with a property owner's expectation. Nelson was only unable to sell an interest to the City; however, Nelson retained the ability to sell an interest in her property to any other purchaser.¹²³

Lastly, Nelson failed to establish the lack of a governmental interest. Under the rational basis analysis, the MOA could reasonably be found to further a legitimate state interest. The MOA is not excessive and does not impose a condition that would be deemed unreasonable.¹²⁴ Although case law provides that the *Lucas* analysis should only be used when the property owner is completely denied economic use of the property, the inconsistency in the application of the takings test provides that there could be a possibility to extend the test to less severe economic claims.

VI. NEW YORK STATE APPROACH TO THE REGULATORY TAKINGS ISSUE

Due Process requires that the states guarantee to all individuals the rights associated with the Fifth Amendment.¹²⁵ Further, article I of the New York Constitution mirrors the United States Constitution provision that protects an individual's property rights.¹²⁶ The New

¹¹⁹ *Lucas*, 505 U.S. at 1030.

¹²⁰ *Nelson*, 985 N.Y.S.2d at 332-33.

¹²¹ *Id.* at 333.

¹²² *Id.*

¹²³ *Id.* at 332.

¹²⁴ See *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety").

¹²⁵ *Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

¹²⁶ N.Y. CONST. art. I, § 7.

York Constitution specifically states, “[p]rivate property shall not be taken for public use without just compensation.”¹²⁷ Nevertheless, the federal courts’ inconsistency on how to approach the regulatory taking issue is not mirrored in the New York case law. New York State has implemented a variation on the *Penn Central* factors test to determine if a regulatory taking has occurred. The New York courts have balanced the factors slightly differently than the federal courts have. Consequently, this variation leaves just one factor for the court to consider: the amount of economic deprivation.

A. The Only Factor that Counts—Economic Loss

Although the New York courts have applied the *Penn Central* balancing test to claims of regulatory takings, the weight given to each factor is different from the weight given by federal courts. The case specific inquiry into the economic effect of a regulation is evidence of the greater weight the economic loss is given over the basically one remaining factor, character of the governmental action.

This uneven balancing scheme is evident in *Chase Manhattan Bank, N.A. v. State*.¹²⁸ In *Chase Manhattan Bank*, the State of New York imposed the Tidal Wetlands Act, which denied the petitioner the ability to develop its property for residential purposes.¹²⁹ The Appellate Division applied the *Penn Central* test and concluded that a wetland regulation, which deprived the property owner of all financially rewarding uses of the property and reduced the property’s value by 86%, could potentially effect a de facto taking.¹³⁰ The court also examined the character of the regulation, and although the petitioner still had the option to develop the property for environmental and recreational purposes, found the diminution in the property’s value was considered to be too great and, therefore, amounted to a taking requiring the State to compensate the plaintiff.¹³¹

Using a similar analysis in *In re City of New York*,¹³² the Richmond County, Supreme Court held that a wetlands regulation did

¹²⁷ *Id.* § 7(a).

¹²⁸ 479 N.Y.S.2d 983 (App. Div. 2d Dep’t 1984).

¹²⁹ *Id.* at 985-86.

¹³⁰ *Id.* at 992.

¹³¹ *Id.* at 989-90.

¹³² No. 4018/07, 2012 WL 1676889 (Sup. Ct. Richmond County May 7, 2007).

in fact result in a taking.¹³³ The court acknowledged that just because “regulations may prohibit any development or economic use of a property does not necessarily mean that the regulations have destroyed all or all but a residue of the property’s economic value.”¹³⁴ However, an “82% [sic] reduction in value, when taken together with the character of the regulations, which require the property to remain vacant, and do not allow any productive use of the property” was considered a severe enough economic loss to be considered a regulatory taking.¹³⁵

On the other hand, in *Putnam County National Bank v. City of New York*,¹³⁶ the Appellate Division, Second Department concluded that even if a regulation is found to substantially reduce the property’s value or deny the owner the most beneficial use of the property it does not effect a taking.¹³⁷ Putnam County National Bank, the petitioner, as a result of the regulation, incurred a 20% diminution in the property’s value.¹³⁸ The Bank claimed that the enforcement of a Watershed Act constituted a regulatory taking and demanded just compensation.¹³⁹ The Appellate Division affirmed the New York Supreme Court and granted the City’s motion to dismiss.¹⁴⁰

The trend in examining the financial loss of the property owner in the New York case law continued in *Worcester Creameries Corp. v. City of New York*.¹⁴¹ The petitioner, Worcester Creameries Corp., challenged the same Watershed Act that Nelson challenged, under slightly different circumstances.¹⁴² The New York City Watershed regulations required Worcester Creameries Corp. to finance upgrades to its private watershed water treatment plant.¹⁴³ The issue before the court was the “extent to which defendant City of New York is obligated to pay costs incurred by owners of private watershed treatment plants for the expense of complying with regulations that apply only in the New York City Watershed and exceed all state

¹³³ *Id.* at *6.

¹³⁴ *Id.* at *2.

¹³⁵ *Id.* at *6.

¹³⁶ 829 N.Y.S.2d 661 (2007).

¹³⁷ *Id.* at 663; *see also* *Gazza*, 679 N.E.2d at 1042-43.

¹³⁸ *Putnam Cnty. Nat’l Bank*, 829 N.Y.S.2d at 662.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 663.

¹⁴¹ 861 N.Y.S.2d 198 (App. Div. 3d Dep’t 2008).

¹⁴² *Id.* at 199.

¹⁴³ *Id.*

and federal regulations.”¹⁴⁴ The City argued that pursuant to the contract entered into the City was not responsible to pay the costs for upgrades beyond 30 years and for the costs of expansion of Waterwaste Treatment Plants.¹⁴⁵ The trial court granted Worcester Creameries summary judgment motion, thus holding that the City was to pay the cost to update the system so it complied with the imposed conditions.¹⁴⁶ On appeal, the Appellate Division, Third Department agreed with the lower court’s decision.¹⁴⁷ The appellate court examined the intent of the Watershed MOA and determined that the desire to ensure economic vitality could not be achieved if the property owner were to finance the upgrades that exceeded both state and federal law.¹⁴⁸

The New York case law, in contrast to the federal case law, created a preliminary test that is required prior to implementing the *Penn Central* balancing test. The “diminution in value” test is used to determine whether the property owner has experienced an economic loss. To succeed on the factor concerning economic loss, the diminution of the property’s value must be great or the additional expenses incurred by the property owner, in order to adhere to a regulation, must be unreasonable.

B. Investment-Backed Expectations

New York case law has examined the investment-backed expectation and established that it is not easy for a property owner to prevail on this factor. For example, in *Gazza v. New York State Department of Environmental Conservation*,¹⁴⁹ the Court of Appeals addressed an allegation that a regulation protecting the wetlands resulted in a regulatory taking.¹⁵⁰ *Gazza* had petitioned to the DEC seeking a variance in order to construct two structures on his property.¹⁵¹ The DEC concluded that such variances would have a negative impact

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 200-02.

¹⁴⁶ *Worcester Creameries Corp.*, 861 N.Y.S.2d at 201.

¹⁴⁷ *Id.* at 203.

¹⁴⁸ *Id.* at 201-03 (Section 141 of the MOA provides: “The City further agrees to pay the annual costs of operating and maintaining such Regulatory Upgrades. . . .” The court interprets the term “Regulatory Upgrades” to intend to be construed expansively.).

¹⁴⁹ 679 N.E.2d 1035 (1997).

¹⁵⁰ *Id.* at 1036.

¹⁵¹ *Id.* at 1036-37.

and denied Gazza's petition.¹⁵² The New York Court of Appeals used the *Penn Central* factors and found that Gazza was not deprived of any investment-backed interest, reasoning that the regulation was in place prior to Gazza's purchase of the property; therefore, his reasonable economic expectations were not denied.¹⁵³ Further, the court found that the property had other uses that were not prohibited, such as developing the property for recreational use.¹⁵⁴ In doing so, the court concluded that no taking occurred.¹⁵⁵

The New York court's interpretation of an investment-backed expectation established that the denial of the most beneficial use of the land alone does not constitute a taking. For the factor to swing in favor of the property owner, the impediment of an economic expectation must be grave. The removal of the opportunity to sell an easement to one purchaser will unlikely be found as a diminishment to one's investment-backed expectations.

C. The Character Examined

The character of the governmental action in virtually every case seems to promote a governmental interest, thus balancing the character of the action adversely to the property owner in favor of the governmental action. For instance, in *de St. Aubin v. Flacke*,¹⁵⁶ the petitioner's property was deemed tidal wetlands.¹⁵⁷ The petitioner was denied a permit to develop the wetland portion of the land by the Commissioner of Environmental Conservation.¹⁵⁸ A property owner who claims a regulatory taking must triumph over two obstacles in order to demonstrate the unreasonableness of the imposed regulation.¹⁵⁹ The first obstacle is "overcoming the presumption of constitutionality" of the regulation.¹⁶⁰ The second obstacle is the requirement that all the elements of the cause of action are proved "beyond a

¹⁵² *Id.* at 1036.

¹⁵³ *Id.* at 1043.

¹⁵⁴ *Gazza*, 679 N.E.2d at 1043.

¹⁵⁵ *Id.*

¹⁵⁶ 496 N.E.2d 879 (N.Y. 1986).

¹⁵⁷ *Id.* at 881 (the Tidal Wetlands Act provides that "properties designated by the Commissioner of Environmental Conservation as tidal wetlands of the State . . . are subject to 'rigorous regulation'").

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 885.

¹⁶⁰ *Id.*

reasonable doubt.”¹⁶¹ That being said, the court goes on to define when restrictions are acceptable “if they are reasonably related to the public health, safety and welfare and are not confiscatory.”¹⁶² Consequently, the landowner “must establish that the regulation attacked so restricts his property that he is precluded from using it for any purpose for which it is reasonably adapted” in order to be successful.¹⁶³ The petitioner in this case failed to meet that heavy burden and did not prevail on a takings claim.¹⁶⁴

Further elaboration of this factor is demonstrated in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*.¹⁶⁵ The plaintiff alleged that a regulatory taking had occurred when her property had been zoned for solely recreational use.¹⁶⁶ The New York Court of Appeals cited to federal case law, and adopted the premise that “the regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose if the action bears a reasonable relationship to that objective.”¹⁶⁷ After a careful analysis of the circumstances surrounding both the regulation and the petitioner’s property the court held that the zoning has “reasonable relation to the legitimate objectives stated within that law (to further open space, recreational opportunities and flood control), the regulatory action here substantially advances those purposes.”¹⁶⁸

A property owner rarely succeeds on the claim that a governmental regulation does not promote a state’s interest. The character of the regulation is presumed to be in furtherance of the interest of the government. As a result, a property owner is unlikely to prevail on this factor when the courts apply the *Penn Central* balancing test.

VII. COMPARING THE FEDERAL APPROACH AND THE NEW YORK STATE APPROACH

The New York courts have approached the issue of regulatory takings by balancing the *Penn Central* factors. After examining the New York implementation of the *Penn Central* approach, it is evident

¹⁶¹ *de St. Aubin*, 496 N.E.2d at 885.

¹⁶² *Id.*

¹⁶³ *Id.* at 885.

¹⁶⁴ *Id.* at 881-82.

¹⁶⁵ 721 N.E.2d 971 (N.Y. 1999).

¹⁶⁶ *Id.* at 972 (the plaintiff’s property was being used as a golf course).

¹⁶⁷ *Id.* at 975-76.

¹⁶⁸ *Id.* at 976.

that New York's balancing of the factors is distinct from that of the federal court's approach. For instance, a feature of New York State's case law is the heavier emphasis the courts put on the economic effects a regulation poses. New York courts have also approached the character of the governmental action factor more concisely than the federal courts. This approach has made it almost impossible for a property owner to prevail on this factor.

VIII. CONCLUSION

An important caveat of the case law demonstrates that litigation in this area is likely to continue because the courts insist upon a fact specific, case-by-case, inquiry into each taking allegation. The Supreme Court has recognized that there is no "set-formula" in determining whether a regulation amounts to an injury that requires compensation.¹⁶⁹ Each claim of a regulatory taking is unique, and as a result, a lack of consistency among the federal and state courts has developed. That being said, environmental regulations pose a unique circumstance in which the application of the *Penn Central* factors is skewed. The only factor the court considers, when a challenged regulation is environmental, is the economic loss to the property owner. The Court has never explicitly overturned *Penn Central*; however, the development of specific per se approaches has contorted the balancing scheme. The *Penn Central* factors test may be inappropriate under the circumstances because, the reality is, the factors are not being balanced. For the great majority of cases, the court's analysis turns on the economic impact that the regulation has on the claimant.

The New York appellate court, without a doubt, adds to the case law setting the stage for an expansion of regulations, as a result transforming what the definition of an actual taking is. On November 20, 2014, the New York Court of Appeals denied Nelson's motion for leave to appeal.¹⁷⁰ If the case were decided on appeal, it is unlikely Nelson's "taking" claim will succeed. The courts have created an uphill battle for property owners claiming de facto takings that do not result in a grave loss of economic value. As a result, it is unlikely that Nelson's loss will be considered great enough to rise to the economic deprivation required for a successful takings claim.

¹⁶⁹ *Penn Central*, 438 U.S. at 124.

¹⁷⁰ 23 N.E.3d 153 (2014).

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891

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