

The Takings Clause

Fifth Amendment, U.S. Constitution



“No person shall be....deprived of...property with due process of law; nor shall private property be taken for public use, without just compensation.”

Article I, Section 7 of the State of Delaware Constitution contains a similar prohibition:



“nor shall he or she be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land.”

When a state directly appropriates private property, it is considered a *per se* taking, and the state has a duty to compensate the owner.



Though the classic taking is a transfer of property to the State or to another private party by **eminent domain**, the Takings Clause applies to other state actions that achieve the same thing.



The constitutionally-protected right of a property owner to do as he or she sees fit with his or her own property is **not absolute**; but is subject to such reasonable restraints and regulations established by law as the legislature, under power vested in it by the Constitution, may think necessary and expedient, including **zoning, eminent domain, and the police power**. 16B Am.Jur.2d Constitutional Law §631.



A taking of private property under the government's **eminent domain power** must serve a genuine "**public purpose**". *Kelo v. City of New London*, 545 US. 469, 480 (2005) (Condemnation and compensation pursuant to urban development plan was a valid public use of eminent domain power and not an unconstitutional taking).

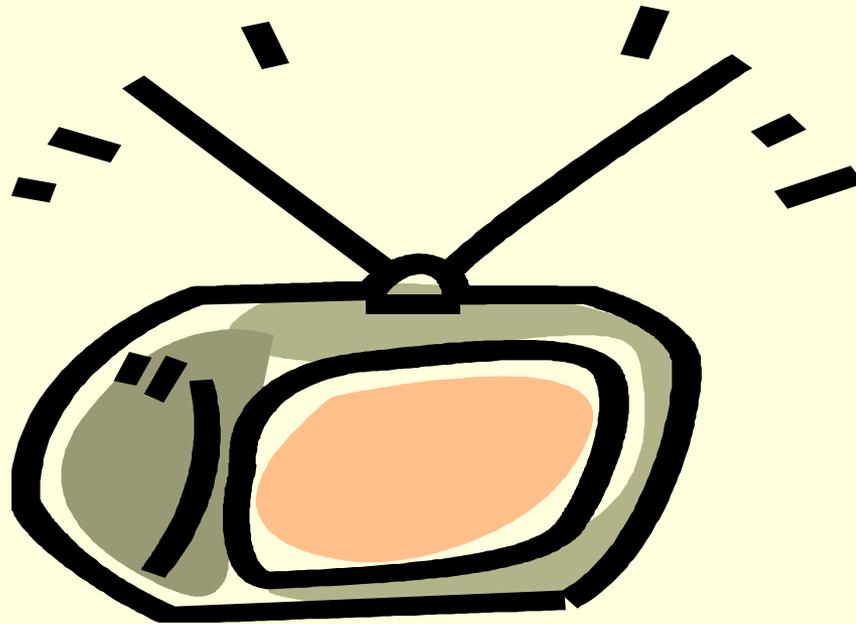


When the government uses its own property in such a way that it interferes with the use of private property, it has taken that property. *United States v. Causby*, 328 U.S. 256, 261–262 (1946). (Heavy military aircraft flying 83 feet above plaintiffs' chicken farm, where barn was 2,220 feet from runway.) "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."



In the case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178, (1872), the United States Supreme Court dealt with a plaintiff whose land had been submerged by a dam erected for navigation and flood control purposes, with the approval of the State of Wisconsin. The Court held that “... where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution”.

It is a taking when a state regulation forces a property owner to submit to a permanent physical occupation, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425–426, (1982) (CATV cables in rental housing by city franchise).

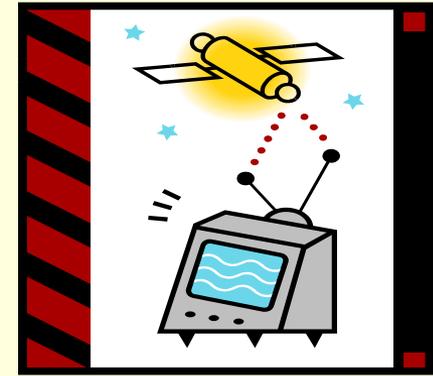
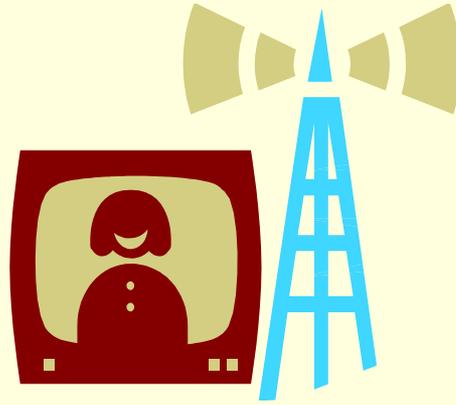
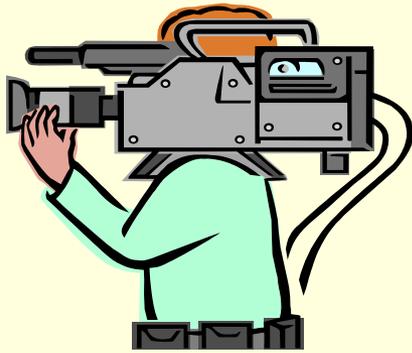




Finally, States effect a taking if they recharacterize as **public** property what was previously **private** property. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163–165, (1980) (county claiming interest on funds held in escrow as “public funds” despite collecting fee for filing).

The doctrine of **regulatory takings** aims to identify regulatory actions that are functionally equivalent to the classic taking. Thus, it is a taking when a state regulation forces a property owner to submit to a **permanent physical occupation**, or deprives him of **all economically beneficial use** of his property. “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).





To succeed on a takings claim, a citizen would have to show that the State's action affected a “legally cognizable property interest.” *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 428 (3d Cir.2004) (upholding FCC regulation of airwaves).



Unlike a physical invasion of land, a **public program** adjusting the benefits and burdens of economic life to promote the **common good** ordinarily will not be compensable. *American Exp. Travel Related Services, Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 371 (3rd Cir.2012) (issuer of travelers checks challenged constitutionality of amendment to New Jersey's unclaimed property statute that retroactively reduced presumptive abandonment period for travelers checks from 15 to three years). Thus, that a regulation “adversely affect[s] recognized economic values” is not enough to constitute a taking.

Even a regulation that prohibits the most beneficial use of property does not necessarily violate the Takings Clause. *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 122 (1978) (refusal of New York City Landmarks Preservation Commission to approve plans for construction of 50-story office building over Grand Central Terminal, which had been designated a landmark, did **not** prevent reasonable return on investment, and thus **not** an unconstitutional taking of air rights) .



In reviewing the constitutionality of a zoning ordinance, courts balance landowners' rights against the public interest sought to be protected by an exercise of the police power. *Township of Exeter v. Zoning Hearing Bd. of Exeter Tp.*, 962 A.2d 653, 659 (2009) (ordinance restricting billboards to **25 square feet** struck down as a *de facto* exclusion of all billboards).





There is, for instance, **no** general constitutional right to be free from all changes in **land use laws**, *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1090 (11th Cir.1996) (rezoning of breakwater property for airport use upheld).



There is no constitutionally protected right to the most profitable or the most desirable use of real property. *Edgewater Inv. Assoc. v. Borough of Edgewater*, 510 A.2d 1178, 1185-86 (1986) (upholding act protecting seniors and disabled from eviction through conversion of housing to condominiums).



The United States Supreme Court has held that the right to fair compensation applies as fully to the taking of a landowner's **riparian rights** as it does to the taking of an estate in land, **if** there has been an actual “taking” of those rights.



Amendment to state's beachfront management act that prohibited landowner from building on oceanfront lots deprived him of all economically beneficial use of his property, and thus was an **unconstitutional taking**. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, (1992).



Terminology

- “**Accretion**” is the gradual increase or acquisition of land by the imperceptible action of natural forces washing up sand, soil, or silt from the water course. The new deposit is referred to as “**alluvion**”.
- “**Erosion**” means a gradual eroding or washing away of the shoreline by operation of water. It is the direct opposite of **accretion**.
- “**Avulsion**” refers to the sudden and perceptible change formed by nature in the boundary between water and fast land.

And More Terminology...

- A **riparian owner** is one who owns property along the bank of a watercourse, including a lake, river, bay, or ocean, and whose property boundary is the shoreline of that body of water. He/she enjoys various “**riparian rights**” with respect to the water.
- A **littoral owner** owns land abutting a sea or ocean, where the tide regularly rises and falls. The rights are the same as those of a riparian owner, and the terms are now considered interchangeable.

Legal Consequences

- Any increase of soil or sand to littoral or riparian land adjacent or contiguous to a water course formed by **accretion** normally becomes the possession of the riparian or littoral owner. Thus, riparian land remains riparian, in terms of water access.
- Likewise, any loss of land or soil through **erosion** due to the gradual actions of nature become lands lost by the riparian or littoral owner.
- Unlike with **accretion**, land so divided by **avulsion** remains the property of the original owner as if the water course had not been moved.

The Foreshore

In most states, the region between the high and low-tide lines (the “foreshore”) of such waters is in public ownership. Delaware, however, follows a different rule. In Delaware the foreshore is capable of private ownership, subject to a public navigational trust over the area when it is covered by the tide. *Buckson v. Pennsylvania Railroad Co.*, 228 A.2d 587, 597 (Del.Super.1967); *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435 (1882); *Bickel v. Polk*, 4 Harr. 325 (Del.Super.1851).

Scureman v. Judge, 747 A.2d 62 (Del.Ch.1999)

In this case, the Court of Chancery eventually held that Lake Drive, a public right of way surrounding the original Silver Lake shoreline, did not shift inland, when submerged beneath the Lake waters. When the riparian property is submerged, title is lost. A fixed right of way does not move with the shoreline.

Owners of adjacent non-riparian lots (the plaintiffs) would not gain or lose land as a result of the shoreline changes, but could gain riparian access.

Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U.S. 702 (2010).



In this case, the United States Supreme Court denied a legal challenge by **beachfront landowners** to a **beach replenishment project** undertaken by the City of Destin and Walton County, Florida to restore beach eroded by a series of hurricanes. The Court held that the creation of **public beach** on **State land** did not constitute an unconstitutional “taking” of the property rights of beachfront landowners.

Facts of the Case

- The planned beach replenishment would add 75 feet of sand seaward of the average high-water line.
- The State owned the foreshore to the high water line under Florida law.
- The “littoral” owners have rights to access, use, and unobstructed view, and to “accretion” of beach.
- “Avulsion” is a sudden change to the beach, whereas “accretion” is gradual and imperceptible.
- With “avulsion” the seaward property line remains at the high-water line.

Florida's Beach Preservation Act

- Florida's Beach and Shore Preservation Act establishes procedures for depositing sand on eroded beaches (**restoration**) and maintaining the deposited sand (**nourishment**).
- When such a project is undertaken, the State sets a fixed “**erosion control line**” to replace the fluctuating mean high-water line as the boundary between littoral and state property.
- Once the new line is recorded, the common law ceases to apply, and, when accretion moves the mean high-water line seaward, the littoral property remains bounded by the erosion-control line.

Holding

1. The landowners' rights to accretion and contact with the water were not superior to the State's right to fill its submerged land.
2. The State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and of littoral landowners.
3. If an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water.

Harvey Cedars v. Karan
New Jersey Supreme Court (2013)

- Karan owned beachfront property that was affected by post-Sandy dune replenishment, which afforded protection but partially blocked the ocean view.
- After Karan could not agree with the town on “just compensation”, a hearing was held, and Karan was awarded \$375,000.
- The trial court declined to consider evidence of enhancement in value due to dune protection as a set-off to the loss of view.

“We now conclude that when a public project requires the partial taking of property, “just compensation” to the owner must be based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either **decrease** or **increase** the value of the remaining property. In a partial-takings case, homeowners are entitled to the **fair market value** of their loss, not to a **windfall**, not to a pay out that disregards the **home's enhanced value** resulting from a public project. To calculate that loss, we must look to the **difference** between the **fair market value** of the property before the partial taking and after the taking.”
70 A.3d 524, 526 (N.J.Supr.2013).

Summary

- Regulations intended to promote the common good by facilitating beach preservation and protecting the shoreline environment will **not** violate the federal or state constitution due to some **incidental** impact on private property rights.
- Beachfront landowners cannot claim compensation for the taking of private property rights where there has not been a loss of all **market value** (or a significant portion thereof).