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by James E. Haupt, III

INTRODUCTION

Whether a governmental action is a taking depends upon which taking test is applied to a case. There is no set taking standard by which an alleged taking is to be judged because the United States Supreme Court has not yet established one. This paper will attempt to trace the history of the taking issue. This paper will also focus on Maryland's Chesapeake Bay Critical Area Legislation and its relationship to the takings question.

A HISTORY OF THE SUPREME COURT'S TAKING THEORIES

In order to properly evaluate the effect of governmental action as it relates to private property, a brief historical overview is necessary to explain the United States Supreme Court's approach to the question of what constitutes a taking of property.

Eminent domain is the power of the government to take privately owned property, upon the payment of adequate compensation, to the use of the public benefit. This is different from the police power which refers to the inherent power of the government to take action in order to prevent harm to the public health, safety, welfare or morals (known as inverse condemnation).[1] A problem arises when governmental action via police power regulation is claimed to violate the Just Compensation Clause of the Fifth Amendment.[2]

The early test for a taking was formulated in *Mugler v. Kansas*,[3] wherein the government action must have been deemed an actual, physical, appropriation of the property. In *Mugler*, a state statute prohibited the sale and manufacture of liquor for purposes other than medical, scientific and mechanical uses. The breweries argued that their businesses were erected prior to the passage of the statute and, if the statute were to be applied to them, then their breweries would have little or no value. This argument did not sway the Court.

The Court drew the distinction between the appropriation of property for the public benefit (eminent domain) and the prevention of a public harm (police power):

> The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not [,] and ... cannot be [,] burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.[4]

The modern approach to takings was set forth in *Pennsylvania Coal Co. v. Mahon*.[5] In that case a coal company conveyed a tract of land to grantees yet reserved its right to remove coal from under the tract. Pennsylvania subsequently enacted a statute that prohibited the mining of coal in any manner that would cause subsidence of any structure used for human habitation. The Supreme Court, in an opinion written by Justice Holmes, declared the statute to be an unconstitutional taking of the company's property. Holmes wrote:

> As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.[6]

Thus emerged the general rule that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."[7] As a result of *Mahon*, the distinction between the state's exercise of eminent domain and the police power became blurred.[8]

Since 1978, the Supreme Court has had an increasing number of opportunities to rule on regulatory takings dealing with

land use regulations. The first opportunity arose in *Penn Central Transportation Co. v. New York City*[9] where the owners of Grand Central Terminal challenged the New York City Landmark Preservation Law because of the Commission's rejection of plans for a 55-story highrise office building above the terminal. The Court held that the landmark designation did not constitute a taking because of the existence of transferable development rights.[10] The decision, set forth factors that bear significance regarding the taking question:

> [t]he economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations...[and] the character of the governmental action. 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.[11]

A taking cannot be claimed merely by showing that the landowner has been denied the ability to use his property in a manner that he had anticipated regarding its development.[12] In making the taking determination, the property is not analyzed by segments in order to ascertain whether a particular segment was taken, but rather, the governmental action is scrutinized according to "the nature and extent of the interference with rights in the parcel as a whole...."[13]

The next major taking issue addressed by the Supreme Court was in *Kaiser Aetna v. United States*.[14] In *Kaiser,* privately owned Kaupa pond was physically separated from a navigable bay and the Pacific Ocean by a barrier beach. The owners were advised by the Army Corps of Engineers that no permit was needed to convert the pond into a marina and connect it with the bay. As a result, the United States filed suit to determine if the Corps of Engineers' authority would include regulation of future improvements to the marina, and whether the owners could deny public access to the pond since the Corps considered the pond a "navigable water of the United States."[15]

The Court held that the pond was a navigable water and, therefore, subject to regulation by the Corps for any future improvements.[16] However, the pond through the navigable servitude did not automatically become a public aquatic park. "[T]he 'right to exclude' is universally held to be a fundamental element of the property right, ... [and requires] that the Government cannot take without [just] compensation."[17] If the Corps' use of the navigational servitude was to create a public park then it would "result in an actual physical invasion of the privately owned marina,"[18] and hence be equivalent to a taking.

The consequences of downgrading property by a zoning ordinance which created open space preservation was at issue in *Agins v. City of Tiburon*.[19] The property owners bought five acres of unimproved land for residential development. Subsequently a zoning change permitted development of one to five houses on the tract of land. The Court affirmed the Supreme Court of California's holding that the zoning ordinance on its face did not constitute a taking.[20] The Court found that the zoning ordinances substantially advanced legitimate governmental goals while focusing on protecting residents from the adverse affects of urbanization.[21] Finding the ordinance constitutional because it allowed the best use of the property, the Court noted that the Agins could "pursue their reasonable investment expectations...."[22]

"all procedural and adminstrative remedies must be exhausted ..."

The dicta in the *Agins* opinion later became a major procedural hurdle for future petitioners to overcome before determining how an ordinance should be applied in a particular case. "Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions."[23] Thus, *all* procedural and administrative remedies must be exhausted before asserting a valid takings claim.

Without doubt, however, the most controversial takings issue was decided in *San Diego Gas & Electric Co. v. San Diego*.[24] This case also involved the downzoning of property. The city of San Diego changed local zoning, for part of the subject property, from industrial to agricultural and established an "open-space" plan. The takings issue was never reached because the Court, in a 5 to 4 decision, concluded that the California Court of Appeals had not decided whether any taking had in fact occurred. Therefore, since there was no final decision, the Court did not have jurisdiction to review the appeal.[25]

The controversy surrounding *San Diego Gas & Electric Co.* stems from Justice Brennan's dissent, wherein he stated that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property to promote the public good just as effectively as formal condemnation or physical invasion of property."[26] Justice Brennan concluded that a de facto exercise of the power of eminent domain could result where the effects of the government action "completely deprive the owner of all or most of his interest in the property."[27]

Under Brennan's proposed rule, monetary damages would be constitutionally required once a court established that there was a regulatory taking. According to Justice Brennan, the Constitution demands that the government pay just compensation for the period commencing on the date the regulation first effects the taking and ending on the date the government chooses to rescind or otherwise amend the regulation.[28] Not only did Justice Brennan make it clear that those harmed by a regulatory taking could receive monetary damages, he also proposed that even though a regulatory taking may be temporary it still would amount to a constitutional taking.[29]

After *San Diego Gas & Electric Co.,* the Court seemed to return to its more traditional theory of an actual physical intrusion as a result of government action. In *Loretto v. Teleprompter Manhattan CATV Corp.,*[30] the Court again held that a statute authorizing a permanent physical occupation of private property constituted a taking.[31]

Some recent decisions by the Supreme Court have focused on procedural or jurisdictional holdings regarding finality of the case rather than confronting the constitutional question of whether a taking has occurred. In *Williamson County Regional Planning Commission v. Hamilton Bank,*[32] "[b]ecause respondent ha[d] not yet obtained a final decision regarding application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provide[d] for obtaining just compensation,"[33] the Court reversed and remanded, holding that the claim was not ripe for appeal.

Respondent did submit a plan for developing the property and the planning commission rejected the proposal, but instead of following through with other remedies (seeking variances from either the Board of Zoning Appeals or the Commission) respondent filed suit. There had not been any determination that respondent had been "denied all reasonable beneficial use of its property, and therefore..." there was no final decision.[34]

In *United States v. Riverside Bayview Homes, Inc.,* [35] the Corps of Engineers filed suit alleging that the disputed property constituted wetlands. The issue centered on the 1977 Federal Water Pollution Control Act amendment's, definition of 'waters of the United States,' (*See* 33 U.S.C. 1, 1344). The Supreme Court held that neither the requirement for nor the denial of a dredge and fill permit in and of itself is a taking, since "there may be other viable uses available to the owner."[36] In a footnote the Court indicated that respondent may have a temporary taking claim as a result of the Corps' denial of the fill permit, but, under the Tucker Act, 28 U.S.C. § 1491, the property owner should "initiate a suit for compensation in the Claims Court."[37]

In *MacDonald, Sommer & Frates v. Yolo County,*[38] Appellant sought to subdivide property into 159 single-family and multi-family residential lots. The Yolo County Planning Commission rejected this plan on grounds that the proposal failed to provide adequate public street access, sewer services, water supplies, and police protection. Finding that all administrative procedures had not been exhausted and holding that the complaint failed to state cause of action upon which relief could be granted,[39] the Court declined to reach the taking issue, because the "appellant has submitted one subdivision proposal and has received the Board's response thereto. Nevertheless, appellant still has yet to receive the Board's final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[40] There thus exists the possibility that some development may be permitted, but until a final determination is reached as to whether a taking has occurred, the taking issue will not be addressed.[41]

In 1987, the Supreme Court decided three taking cases. Controversy surrounded two of the cases because of the Court's vacillation as to which taking test the Court would apply in a given case. The least controversial taking issue was addressed in *Keystone Bituminous Coal Ass'n v. DeBenedictis.*[42] In *Keystone,* Section 4 of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (Act) was challenged.[43] The Act prohibited mining that causes subsidence damage[44] to public buildings, dwellings, and cemeteries.[45] The statute was analyzed by deciding whether it substantially advanced a legitimate state interest and whether it denied the owner an economically viable use of his land.[46]

In deciding the first issue, the Court analyzed the legislative purpose as specifically stated in Section 2 of the Subsidence Act. The Act is "for the protection of the health, safety and general welfare...by providing for the conservation of surface lands areas which may be affected in the mining of bituminous coal," to preserve water drainage and supplies, and "generally to improve the use and enjoyment of such lands...."[47] Where the public interest is to prevent an activity which is similar to a public nuisance, then compensation is precluded. In this case, "[t]he Subsidence Act ... plainly seeks to further such an interest."[48]

"compensation for a temporary taking was addressed in First English ..."

Turning to the second issue, the Court in *Keystone* found that Petitioner failed to prove any substantial economic loss. Petitioner's suit was based on the theory that the Act, on its face, was a taking. However, no evidence was produced concerning the effect of the Act on Petitioner's mining operation. The Court applied both a diminution of value and reasonable beneficial use test, and found under each analysis that there was no taking because Keystone was not deprived of enough of its property to prove a taking.[49] In reaching this conclusion, the Court looked at the amount of coal that petitioners could not mine in relation to the amount of coal it could mine. The coal amounted to 27 million tons, representing only 2% of the entire coal deposit.[50]

The question of compensation for a temporary taking was addressed in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.*[51] In *First English,* the church had a campground known as Lutherglen which was destroyed by a flood. As a result of the flood damage, Los Angeles County adopted Ordinance No. 11,855 in order to preserve the public health and safety.[52] The ordinance prohibited any type of construction, reconstruction or enlargement of any building located within the interim flood protection area.[53] Petitioner filed suit claiming it lost all use of Lutherglen and sought damages as relief. Both the trial court and the California Court of Appeals struck this allegation holding that the California Supreme Court's decision in *Agins v. Tiburon*[54] precluded compensation for a temporary taking of property until after the issue was decided by way of declaratory relief or mandamus.[55]

The Court made only a limited holding because two questions, whether the questioned ordinance actually denied appellant all of its property and whether any denial of such use may be allowed under the State's authority to enact safety regulations, remained unanswered.[56] According to the Court, the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution requires compensation to run from the time a regulation takes effect and "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[57]

In *First English,* the allegations in the complaint were treated as true for the purpose of Supreme Court review. Thus, it was "assume[d] that the Los Angeles County ordinances ... denied appellant all use of its property for a considerable period of years and . . . invalidation . . . without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy."[58]

As a result of the Court's decision, the church had to prove that either the ordinance deprived it of all reasonable use during the time period, causing more than a mere diminution of value[59] or the restrictions on its property were such that the general public enjoyed a benefit greater than the burden placed on the property owner.[60] On the other hand, the county could defeat the church's taking allegation by proving that the church did not lose all reasonable uses of the property[61] or the effect of the statute was to prevent a public harm which outweighed any inconvenience to the property owner.[62]

Nollan v. California Coastal Commission,[63] involved a request for a building permit by the Nollans to replace their

small beachfront bungalow with a much larger structure. The permit was granted by the Commission upon the condition that an easement be granted to the state which would allow the public lateral access across Nollan's beachfront property along the shoreline.[64] Because of the "lack of [a] nexus between the condition and the original purpose of the building restriction[,] ... the permit condition ... [was] not a valid regulation of land use...."[65] The majority rejected the Commission's finding that the new house would interfere with "visual access to the beach."[66] Instead, the Court held that any asserted public interest in a strip of beach must be accomplished by eminent domain and not by use of a permit system.[67]

Justice Brennan, writing for the dissent, argued that the majority erroneously analyzed the case. Brennan believed that this was not a case of physical intrusion by the state, but instead a rational exercise of a state's police power.[68] Even if a more exacting match is required, Brennan argued "the impression that the beach is not open to the public - is thus directly alleviated by the provision for public access over the dry sand."[69]

The *Nollan* case is similar to *First English* in that the petitioner may have won the battle, but not the war. Despite the Court's holding that the permit may not be conditioned with the easement requirement, Nollan may still lose control over the beach if a later trial court determines that the public has obtained a prescriptive right to the beach.[70]

TESTS APPLIED BY THE COURTS

What has evolved over the years as a result of the preceeding Supreme Court decisions seems to be a general state of confusion regarding the applicable test in a taking case. While this may be true in that the Court has not stated "this will be the test," what has evolved are various standards which the Court can apply, depending upon the facts of a particular case. The Court has not strayed from the general distinctions between eminent domain and police power regulations in that any physical entry will be subject to eminent domain rules and analysis and thus could require just compensation.[71] Essentially, four tests have evolved to decide taking by regulation cases: (1) diminution in value; (2) reasonable beneficial use; (3) creation or prevention of harm; and (4) burden and benefit.

DIMINUTION OF VALUE

The diminution of value test was established in *Mahon* and "requires compensation only if the value of the land is excessively diminished...."[72]

The analysis focuses on two points. First, does the statute or regulation serve a valid public purpose? Second, if there is a valid public purpose, what is its effect on this particular property? Thus, under this first test a property owner must lose all use of the property in order to prevail.

REASONABLE BENEFICIAL USE

The reasonable beneficial use test analyzes the facts of a particular case so as to ascertain if the property owner has any other use of the property under the regulation. Generally, if some other use can be found, the court will often find no taking.[73]

Therefore, under the reasonable beneficial use test, if a property owner is seeking to use the property to the fullest extent possible, a court can find no taking. Additionally, as long as a property owner has some reasonable use no taking will be found.

CREATION OR PREVENTION OF HARM

Consideration of the statute's or regulation's effect is the focus of the second test. If the statute has the intended purpose of preventing a public danger, or harm to the public interest then it is seen as a police power regulation.[74]

"four tests have evolved to decide taking by regulation ..."

The third test embraces the prevention of environmental degradation as a basis of its reasoning. If a property owner's plan would detrimentally change the natural environment then the request would be denied. Thus, the state would be using the police power to prevent a harm to the entire society.

BURDEN AND BENEFIT

The last test considers whether the restrictions imposed upon the property owner allow the general public to enjoy the benefits of the protected resource.[75] In order for a plaintiff to succeed in this type of case, he has the responsibility of showing that the burden on his property exceeds the normal requirements of a zoning regulation.

Thus, the fourth test has more of a balancing formula as its focus. Both property owners and society must balance their respective rights. When one party attempts to place too great a burden on the other party, then this extra benefit accruing to the other party will be disallowed.

SUMMARY

What then do these tests mean? How are they to be applied in a possible taking case? Perhaps, the four tests could be consolidated into two. First, the diminution of value and reasonable beneficial use tests are both very similar in that for a plaintiff to succeed under the diminution of value test he must prove that he has lost all possible use of his property. Under the reasonable beneficial use test, the court, in order not to find a taking, need only recognize that the property has some minimal use. Therefore, using the above reasoning, a taking under the police powers would only occur when the regulation deprives the landowner of all reasonable use of his property. This theory is very anti-property owner because some minimal use could probably be found in every case.

Second, the last two tests could also be combined. The harm test looks at the property in its natural character and any drastic change to that natural state is considered harmful to the environment and the surrounding ecosystem. The burden and benefit test has as its basis a balancing of the burden the regulation places on the owner versus the benefit the state or general public receives by leaving the property in its natural state. Consequently, a taking would not occur where the purpose of the regulation is to preserve the land in its natural state, unless the regulation puts too great a burden on the owner to keep the land in its organic form. Therefore, some form of tax credits or other benefits accruing to the property owner could help to lessen this burden and avoid a taking without just compensation problem.

CHESAPEAKE BAY CRITICAL AREA LEGISLATION AND THE TAKING TESTS

In 1984, the Maryland General Assembly added to Maryland National Resources Code Annotated Title 8, Water and Water Resources subtitle 18, Chesapeake Bay Critical Area Protection Program §§ 8-1801 *et. seq.* The stated purpose was to "[e]stablish a Resource Protection Program ... by fostering more sen-

sitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats; and [i]mplement the ... [p]rogram on a cooperative basis between the State and affected local governments...."[76]

The Chesapeake Bay Critical Area consists of:

> (1) [a]ll waters of land under the Chesapeake Bay and its tributaries to the head of tide as indicated on the State wetlands maps, and all State and private wetlands designated under Title 9 of this article; and
> (2) [a]ll land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides designated under Title 9 of this article.[77]

With the enactment of this legislation, landowners who wished to develop their property were faced with another predevelopment requirement which stated that:

> [T]he approving authority of the local jurisdiction in rendering its decision to approve an application shall make findings that:
> (1) [t]he proposed development will minimize adverse impact on water quality ... and;
> (2) ... has identified fish, wildlife, and plant habitat which may be adversely affected ... and has designed the development ... to protect those identified habitats ....[78]

As a result of this section, the Act would seem to be open for a challenge that it is a taking on its face. Maryland case law does not give a prospective plaintiff much hope. In *Potomac Sand*,[79] plaintiff was denied the ability to dredge, take and carry away sand and gravel from the tidal waters or marshes of Charles County. The Court of Appeals of Maryland held that the Act was not an unconstitutional taking on its face because "Chapter 792 has an ecological purpose. As has been shown, the protection of exhaustible natural resources is a valid exercise of the police powers."[80]

In light of a possible suit under a taking theory, the Critical Areas legislation should be analyzed under the four generally accepted tests used by the Supreme Court. According to the diminution of value test, a plaintiff must prove that the land has lost all valuable use. Section 8-1813,[81] comes closest to possibly depriving a landowner of all possible use. This is not necessarily the case since a property owner might be denied the highest and best use, but not all use.

The reasonable beneficial use test which requires analysis directed to whether or not the owner has any other use for the property would apply to two sections of the Act. The first section (8-1808(c) Elements of Program), does not disallow all uses because zoning could be changed that would allow for other economic uses.[82] The second section (8-1809(g) Proposed Amendments) allows the local jurisdictions to propose amendments, which must be approved by the Commission according to the standards set forth by the legislation.[83] Thus, the restrictions on development would not be permanent.

The best argument the state could use in a taking suit would be under the third test, prevention of harm. The title of the legislation speaks for itself as to the intent of the Act, "Chesapeake Bay Critical Area *Protection* Program." (emphasis added). Section 8-1801 (Declaration of Public Policy) includes findings by the General Assembly which in essence declare that the Chesapeake Bay and its tributaries have been and continue to be harmed by human activity. As a result of the deterioration of the Chesapeake Bay, the intent of the Act is to minimize any future adverse impacts.[84]

"the restrictions on development would not be permanent."

The burden and benefit test could also be used by the state because "[t]he quality of life for the citizens of Maryland is enhanced through the restoration of the quality and productivity of the waters of the Chesapeake Bay and its tributaries."[85] Continuing under subsection nine, the Act recites that "[t]here is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development activity ... so as to minimize damage to water quality and natural habitats."[86]

There is no doubt that all the citizens of Maryland will benefit in the prevention of future damage to the Chesapeake Bay and its tributaries. Looking at the law on its face, there does not seem to be any extra burden on a landowner since the program anticipates "policies for development in the Chesapeake Bay Critical Area which accomodates growth...."[87]

Therefore, the probability that the Act on its face would be declared unconstitutional as a taking without just compensation seems very remote. However, that does not rule out the possibility of individual law suits challenging the Act as applied to a specific situation. Estimating the possible success of such a suit without specific facts would be very presumptuous at this stage. The Act appears to have an answer for each of the taking theories, however, any final interpretation rests with the Maryland Court of Appeals and possibly the United States Supreme Court.

CONCLUSION

Since the Supreme Court decided, in *Mahon* that a "regulation that goes too far will be recognized as a taking," the courts and the legal community have not yet been able to define what constitutes unreasonable infringement of property rights. The police power of the state is used to protect and prevent harm to the public health, safety, welfare and morals of society. Environmental regulation is the most recent extension of the police power. Since the 1970's, the judiciary has been more willing to uphold police power regulatory legislation because of newly cultivated public concern with the environment and man's interrelationship with nature.

Maryland's Chesapeake Bay Critical Area legislation is another attempt to assuage the damage caused by man's past greed and disregard for natural resources. Unless the Act denies a property owner of total use of his land, the Critical Area program will *probably* not be considered a taking without just compensation.

NOTES

[1] *See generally* J. Nowak, R. Rotunda & J. Young, Constitutional Law 480-496; *see also*, V. Yannacone, B. Cohen & S. Davison, Environmental Rights and Remedies § 13:1; *Cf.* Annot., 76 A.L.R.3d 388; *see also*, Annot., 19 A.L.R.4th 756.

[2] "[N]or shall private property be taken for public use, without just compensation." The Fifth Amendment's prohibition applies against the States through the Fourteenth Amendment. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

[3] 12 U.S. 623 (1887).

[4] *Id.* at 669.

[5] 260 U.S. 393 (1922).

[6] *Id.* at 413.

[7] *Id.* at 415.

[8] Comment, *Eminent Domain, the Police*

Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis, 1986 U. Pitt. L. Rev. 491, 494-505.

[9] 438 U.S. 104 (1978).

[10] A transferable development right in *Penn Central* was the right of an owner to transfer unused 'development rights' from restricted development areas to nearby property which had not been restricted by the Commission. The effect was to allow an owner to exceed existing zoning regulations in the development of his non-historic property to the extent that development had been curtailed on the historic property.

[11] *Id.* at 124 (citations omitted).

[12] *Id.* at 130.

[13] *Id.* at 130-31.

[14] 444 U.S. 164 (1979).

[15] *Id.* at 170.

[16] *Id.* at 172.

[17] *Id.* at 179-80 (footnote omitted).

[18] *Id.* at 180.

[19] 447 U.S. 255 (1980).

[20] *Id.* at 259

[21] *Id.* at 261 (footnote omitted).

[22] *Id.* at 262.

[23] *Id.* at 260 (dictum).

[24] 450 U.S. 621 (1981) (5-4 decision).

[25] *Id.* at 633. 28 U.S.C. § 1257 provides:
"[f]inal judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

[26] *San Diego Gas & Elec. Co.*, 450 U.S. at 652 (Brennan, J., dissenting) (footnote omitted).

[27] *Id.* at 653 (citing *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

[28] 450 U.S. at 654 (Brennan, J., dissenting).

[29] *Id.* at 657.

[30] 458 U.S. 419 (1982), on remand 58 N.Y.2d 143, 459 N.Y.S.2d 743, 446 N.E.2d 428 (1983) (holding that a television cable which was attached to plaintiff's apartment building was a taking by physical intrusion); *see generally* Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. Rev. 465 (1983).

[31] *Loretto*, 458 U.S. at 426.

[32] 105 S. Ct. 3108 (1985).

[33] *Id.* at 3117.

[34] *Id.* at 3121.

[35] 106 S. Ct. 455 (1985).

[36] *Id.* at 459.

[37] *Id.* at 460 n.6.

[38] 106 S. Ct. 2561 (1986).

[39] *Id.* at 2566.

[40] *Id.* at 2568.

[41] *Id.*

[42] 107 S. Ct. 1232 (1987).

[43] *Id.* at 1237.

[44] *Id.* at 1236.

[45] *Id.* at 1237.

[46] *Id.* at 1242.

[47] *Id.*

[48] *Id.* at 1246.

[49] *Id.* at 1249.

[50] *Id.*

[51] 107 S. Ct. 2378 (1987).

[52] *Id.* at 2381.

[53] *Id.* at 2382.

[54] 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); *See supra* notes 19-23 and accompanying text.

[55] 107 S. Ct. at 2384.

[56] *Id.* at 2384-85.

[57] *Id.* at 2389.

[58] *Id.*

[59] *See infra* note 72 and accompanying text.

[60] *See infra* note 75 and accompanying text.

[61] *See infra* note 73 and accompanying text.

[62] *See infra* note 74 and accompanying text.

[63] 107 S. Ct. 3141 (1987).

[64] *Id.* at 3143.

[65] *Id.* at 3148.

[66] *Id.* at 3149.

[67] *Id.* at 3150.

[68] *Id.* at 3151 (Brennan, J., dissenting).

[69] *Id.* at 3155.

[70] *Id.* at 3161.

[71] *See supra* notes 14-18, 30-31; *but see supra* notes 63-67 and accompanying text.

[72] 3 Rohan at 17-28 to 17-29, see also *Hadacheck v. Sebastian*, *supra* note 5 (87.5% decrease—no compensation).

[73] *See supra* notes 9-13 and 19-23 and accompanying text.

[74] *See supra* notes 3-4, 42-50 and accompanying text; *cf. Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *see generally* 3 Rohan at 17-31 to 17-32; 7 Rohan at 52A-11 to 52A-12.

[75] *See supra* notes 9-23 and accompanying text; *see generally* 3 Rohan at 17-32.

[76] Md. Nat. Res. Code Ann. § 8-1801(b)(1)(2) (1984, ch. 794).

[77] *Id.* at § 8-1807(a)(1)(2).

[78] *Id.* at § 8-1813(a)(1)(2).

[79] 266 Md. 358, 293 A.2d 241 (per curiam), *cert. denied*, 409 U.S. 1040 (1972).

[80] 293 A.2d at 251; *see also Bureau of Mines of Maryland v. George's Creek Coal & Land Co.*, 272 Md. 143, 321 A.2d 748.

[81] *See supra* note 77 and accompanying text.

[82] Subsection (c) in pertinent part states: "At a minimum, a program sufficient to meet the goals stated in subsection (b) includes:
(3) As necessary, new or amended provisions of the jurisdiction's;
(4) Provisions as appropriate relating to grandfathering of development at the time the program is adopted...;
(5) [E]ncourage cluster development...;
(6) Establishment of buffer areas along shorelines within which agriculture will be permitted...;
(7) [S]etback for structures and septic fields along shorelines;
(8) Designation of shoreline areas if any that are suitable for parks, hiking, biking, wildlife refuges, scenic drives, public access or assembly, and water-related recreation such as boat slips, piers, and beaches;
(9) [S]horeline areas...that are suitable for ports, marinas, and industries that...derive economic benefits from shore access."

[83] § 8-1809 in pertinent part states:
"(g) Proposed amendments. — Each local jurisdiction shall review and propse any necessary amendments to its program, including local zoning maps, at least every 4 years.
(h) Program not to be amended without approval of Commission. — A program may not be amended except with the approval of the Commission.
(i) Standards for approval by Commission. — the Commission shall approve programs and amendments that meet:
(1) the standards set forth in § 8-1808(b)(1) through (3) of this subtitle; and
(2) the criteria adopted by the Commission under § 8-1808 of this subtitle."

[84] § 8-1801 in pertinent part states:
"(a) Findings. — The General Assembly finds and declares that: (1) The Chesapeake Bay and its tributaries are natural resources of great significance to the State and the nation;
(2) [C]onstitute a valuable, fragile, and sensitive part of this estuarine system...;
(3) The capacity...to withstand the continuing demands upon them, without further degradation to water quality and natural habitats is limited;
(4) National studies have documented that the quality and productivity of the waters...and its tributaries have declined...;
(5) Those portions of the Chesapeake Bay and its tributaries within Maryland are particularly stressed by the continuing population growth and development...;
(7) The restoration of the Chesapeake Bay and its tributaries is dependent, in part, on minimizing further adverse impacts...;
(8) The cumulative impact of current development in [sic] inimical to these purposes...."

[85] Md. Nat. Res. Code Ann. § 8-1801(a)(6).

[86] *Id.* at § 8-1801(a)(9).

[87] *Id.* at § 8-1808(b)(3).

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