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Property—Regulatory Takings and the Expansion of Burdens on Common Citizens

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PROPERTY—REGULATORY TAKINGS AND THE EXPANSION OF BURDENS ON COMMON CITIZENS

Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996)

I. INTRODUCTION

On July 9, 1997, the City of Minneapolis demolished a ten-unit apartment building located at 1030 Morgan Avenue North.[1] The notorious north Minneapolis rental property had received hundreds of police calls as the scene of drug deals, murders, shootings, prostitution and other criminal activity.[2] Robert Zeman, the former owner and landlord of the rental property, lost his residential dwelling license as a result of criminal activity that occurred on the property.[3] The City of Minneapolis revoked Zeman's rental dwelling license under a city housing ordinance that required landlords to prevent criminal activity occurring on their premises.[4] The license revocation eventually forced Zeman to sell the property to the city at a significant loss.[5] Thereafter, Zeman unsuccessfully sued the city, claiming that his license revocation constituted an illegal taking for which he had not been compensated.[6] Ultimately, the Minnesota Supreme Court, in *Zeman v. City of Minneapolis*,[7] allowed Minneapolis city officials to demolish Zeman's property without compensating Zeman for the taking of his property.

The Takings Clause of the Minnesota Constitution intends to protect property owners from excessive regulatory burdens imposed by the government.[8] In *Zeman*, the court considered whether the temporary revocation of a residential dwelling license constitutes a taking requiring just compensation under the United States and Minnesota Constitutions.[9] The court reversed the appellate court's decision, holding that the ordinance at issue did not constitute a taking.[10]

The *Zeman* court ruled that the City of Minneapolis may temporarily revoke a landlord's rental license for failing to address violations of disor-

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1. *See* Steve Brandt, *Neighbors Cheer Building's Demise; After Years of Problems, 1030 Morgan is Demolished*, STAR TRIB. (Minneapolis), July 10, 1997, at 1A [hereinafter *Neighbors Cheer Building's Demise*].

2. *See* Steve Brandt, *Landlord is Sued Under Nuisance Law: Minneapolis Building Has Been Site of Drug Deals, Two Killings*, STAR TRIB. (Minneapolis), August 16, 1996, at 1B [hereinafter *Landlord Sued Under Nuisance Law*]. *See also* Steve Brandt, *Three Offers Reported for Troubled Apartment Building*, STAR TRIB. (Minneapolis), October 10, 1996, at 2B.

3. *See* Zeman v. City of Minneapolis, 552 N.W.2d 548, 550 (Minn. 1996).

4. *See id.*

5. *See* Steve Brandt, *Landlord Sells Troubled North Side Building*, STAR TRIB. (Minneapolis), April 3, 1997, at 3B [hereinafter *Landlord Sells Building*].

6. *See Zeman*, 552 N.W.2d at 550.

7. 552 N.W.2d 548 (Minn. 1996).

8. *See* MINN. CONST. art. I, § 13 (providing that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.").

9. *See Zeman*, 552 N.W.2d at 549.

10. *See id.* at 555.

derly use such as on-site drug dealing and associated violence within a depressed urban neighborhood.[11] The disorderly use ordinance at issue requires landlords to respond to criminal activity on their property, particularly when incidents involve police intervention.[12] As a result, urban landlords in high crime areas must risk their own safety by responding to drug trafficking, assaults, gambling, prostitution, weapons violations and other disorderly conduct occurring on the licensed property.[13] The *Zeman* court justified the housing ordinance as a cooperative harm prevention measure that "will likely be advantageous to all."[14] Unfortunately, *Zeman* places a unique burden on landlords who must either take steps to prevent criminal activity on their property or face an uncompensated taking.[15]

Part II of this Case Note discusses the background of regulatory takings tests commonly applied by the courts. Specifically, it reviews the historical tests, modern tests, and Minnesota tests. Part III discusses the facts of the *Zeman* decision and the court's analysis of the takings issue. Part IV examines *Zeman's* impact on regulatory takings law and criticizes the alarming governmental mandates imposed on rental property owners. Finally, Part V concludes that the *Zeman* court has forced common citizens to bear the expanding burdens of governmental regulation by failing to clarify regulatory takings tests.

This Case Note will demonstrate that the *Zeman* court based its decision on a variety of takings tests, drawing analogies from previous takings cases.[16] Using this haphazard approach, the *Zeman* court refused to announce a useful regulatory takings test and perpetuated confusing takings

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11. *See id.* at 554. The property at issue was located in an "area of crime, falling property values, lost investments and decay." Kevin Diaz, *Landlords Tough it Out in the 'War Zone': From City Condemnation Practices to Tenants With Myriad Social Problems, Many Landlords Who Serve the Poor Find That Simply Staying Afloat Can be an Uphill Battle*, STAR TRIB. (Minneapolis), August 25, 1997, at 1A. A group of landlords refer to inner-city Minneapolis as the "war zone" due to the area crime and decreasing property values. *See id.*

12. *See Zeman*, 552 N.W.2d at 550.

13. *See* MINNEAPOLIS MINN., CODE OF ORDINANCES § 244.2020(a)(1)-(7) (1995) (listing examples of specific conduct landlords must address, conduct which Minnesota has criminalized by statute). The *Zeman* court deemed such landlord responsibility as "incidental to operating rental dwellings in an urban area." *Zeman*, 552 N.W.2d at 554.

14. *Zeman*, 552 N.W.2d at 555.

15. Zeman sold his 10-unit apartment building to three non-profit agencies for approximately $75,000. The agencies resold it to the city for one dollar. *See Neighbors Cheer Building's Demise*, *supra* note 1, at 1A. After twenty-one years of ownership, Zeman netted only about one-half of his original purchase price. *See Landlord Sells Building*, *supra* note 5, at 3B.

16. *See Zeman*, 552 N.W.2d at 552. The court focused on the underlying facts, but drew "themes" from earlier takings cases. *See id.*

case law.[17] Moreover, the *Zeman* court created a new problem by requiring common citizens, landlords of rental properties, to act as community police officers.[18]

II. BACKGROUND

A. *Police Power Rights and Takings Clause Limits*

State governments, by virtue of their sovereignty, may exercise their established police powers to restrict property use when promoting public safety, health, morality or the general public welfare.[19] The power of "eminent domain" allows the government to take private property for public use.[20] The Fifth Amendment's Just Compensation Clause limits states' police power by guaranteeing that private property shall not "be taken for public use, without just compensation."[21]

The purpose of the Takings Clause is to prevent the government from forcing burdens on individual people, when the entire public should share the burden.[22] Article I, section 13 of the Minnesota Constitution

17. *See id.* The *Zeman* court acknowledged that recent case law does not clarify regulatory takings law. *See id.* The court stated that "[u]nfortunately, the law does not become clearer with later cases." *Id.*

18. *See id.* at 554. The *Zeman* court stated that "[t]he city's decision to engage landlords and the police department in a cooperative effort to protect residential neighborhoods [was] well within its publicly-bestowed power and mandate." *Id.*

19. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (upholding zoning restrictions in the interest of the public). The states' police power is a difficult concept to define because the United States Constitution does not expressly enumerate it. Judges and legal scholars have long debated its scope. *See* Brian D. Lee, *Constitutional Law–Fifth Amendment—Regulatory Takings Depriving All Economically Viable Use of a Property Owner's Land Require Just Compensation Unless the Government Can Identify Common Law Nuisance or Property Principles Furthered by the Regulation-Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992)*, 23 SETON HALL L. REV 1840, 1845 n.26 (1993) (examining the scope of the state's police power in connection with property owners' rights).

20. *See* BLACK'S LAW DICTIONARY, 523 (6th ed. 1990) (defining eminent domain as "[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character).

21. U.S. CONST. amend. V. *See* United States v. Willow River Co., 324 U.S. 499, 502 (1945) (stating that the Fifth Amendment requires just compensation where private property is taken for public use).

22. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (finding a taking where the Government required a shipbuilder to turn over uncompleted ships after defaulting on its construction contract); *see also* Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Courts: Adjusting the Burdens that in Fairness and Equity Ought to be Borne By Society as a Whole*, 40 CATH. U. L. REV. 549 (1991) (presenting a fairness and equity analysis about regulatory takings cases).

provides a similar, yet broader, Takings Clause.[23] In addition, takings provisions exist "expressly or by interpretation" in all state constitutions.[24]

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23. *See* MINN. CONST. art. I, § 13. The Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed or damaged for a public use without just compensation therefor, first paid or secured." *Id.* The Minnesota Constitution is broader than the federal constitution due to the added language "destroyed or damaged" referencing the property at issue. *See* State v. Strom, 493 N.W.2d 554, 558 (Minn. 1992) (construing MINN. CONST. art. I, § 13). The *Strom* court recognized that Minnesota law clearly intends to compensate citizens for property right losses due to state action. *Strom*, 493 N.W. 2d at 558. The *Strom* court stressed the extent of full compensation set forth in MINN. STAT. § 160.08, subd. 5. Section 160.08 requires compensation of landowners for "any elimination of existing access, air, view, light or other compensable property rights." *Strom*, 493 N.W.2d at 558 n.2.

24. *See* ALA. CONST. art. 1, § 23 ([P]rivate property shall not be taken for, or applied to public use, unless just compensation be first made therefor. . . .); ALASKA CONST. art. 1, § 18 (Private property shall not be taken or damaged for public use without just compensation.); ARIZ. CONST. art. 2, § 17 (No private property shall be taken or damaged for public or private use without just compensation having first been made. . . .); ARK. CONST. art. 2, § 22 ([P]rivate property shall not be taken, appropriated or damaged for public use, without just compensation therefor.); CAL. CONST. art. 1 § 19 (Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner.); COLO. CONST. art. 2, § 15 (Private property shall not be taken or damaged, for public or private use, without just compensation.); CONN. CONST. art. 1, § 11 (The property of no person shall be taken for public use, without just compensation therefor.); DEL. CONST. art. 1, § 8 ([N]or shall any man's property be taken or applied to public use . . . without compensation being made.); FLA. CONST. art. 10, § 6 (No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . .); GA. CONST. art. 1, § 3 ([P]rivate property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.); HAW. CONST. art. 1, § 20 (Private property shall not be taken or damaged for public use without just compensation.); IDAHO CONST. art. 1, § 14 (Private property may be taken for public use, but not until a just compensation . . . shall be paid therefor.); ILL. CONST. art. 1, § 15 (Private property shall not be taken or damaged for public use without just compensation. . . .); IND. CONST. art. 1, § 21 (No person's property shall be taken by law, without just compensation. . . .); IOWA CONST. art. 1, § 18 (Private property shall not be taken for public use without just compensation first being made. . . .); KAN. STAT. ANN. § 26-513 (1996) (Private property shall not be taken or damaged for public use without just compensation.); KY. CONST. § 13 [N]or shall any man's property be taken or applied to public use without . . . just compensation being previously made to him.); LA. CONST. art. 1, § 4 (Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner. . . .); ME. CONST. art. 1, § 21 (Private property shall not be taken for public uses without just compensation. . . .); MD. CONST. art. 3, § 40 (The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation . . . being first paid. . . .); MASS. CONST. pt. 1, art. 10 ([W]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.); MICH. CONST. art. 10, § 2 (Private property shall not be taken for public use without just compensation there-

B. *Landowner Remedy*

The inverse condemnation proceeding provides judicial remedy to

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for. . . .); MINN. CONST. art. 1, § 13 (Private property shall not be taken, destroyed or damaged for public use without just compensation therefor. . . .); MISS. CONST. art. 3, § 17 (Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof.); MO. CONST. art. 1, § 26 ([P]rivate property shall not be taken or damaged for public use without just compensation.); MONT. CONST. art. 2, § 29 (Private property shall not be taken or damaged for public use without just compensation. . . .); NEB. CONST. art. 1, § 21 (The property of no person shall be taken or damaged for public use without just compensation therefor.); NEV. CONST. art. 1, § 8 ([N]or shall private property be taken for public use without just compensation having been first made. . . .); N.H. CONST. pt. 1, art. 12 ([N]o part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.); N.J. CONST. art. 1, §. 20 (Private property shall not be taken for public use without just compensation.); N.M. CONST. art. 2, § 20 (Private property shall not be taken or damaged for public use without just compensation.); N.Y. CONST. art. 1, § 7 (Private property shall not be taken for public use without just compensation.); N.C. CONST. art. 1, § 19 (No person shall be . . . deprived of his life, liberty, or property, but by the law of the land.); N.D. CONST. art. 1, § 16 (Private property shall not be taken or damaged for public use without just compensation having first been made. . . .) OHIO CONST. art. 1, § 19 ([W]here private property shall be taken for public use, a compensation therefor shall first be made. . . .); OKLA. CONST. art. 2, § 23 (No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except . . . in such manner as may be prescribed by law.); OR. CONST. art. 1, § 18 (Private property shall not be taken for public use . . . without just compensation.); PA. CONST. art. 1, § 10 ([N]or shall private property be taken or applied to public use, without . . . just compensation being first made. . . .); R.I. CONST. art. 1, § 16 (Private property shall not be taken for public uses, without just compensation.); S.C. CONST. art. 1, § 13 ([P]rivate property shall not be taken . . . for public use without just compensation being first made therefor.); S.D. CONST. art. 6, § 13 (Private property shall not be taken for public use . . . without just compensation. . . .); TENN. CONST. art. 1, § 21 (That no man's particular services shall be demanded, or property taken, . . . without just compensation being made therefor.); TEX. CONST. art. 1, § 17 (No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. . . .); UTAH CONST. art. 1, § 22 (Private property shall not be taken or damaged for public use without just compensation.); VT. CONST. ch. 1, art. 2nd ([W]henever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.); VA. CONST. art. 1, § 11 ([T]he General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation. . . .); WASH. CONST. art. 1, § 16 (No private property shall be taken or damaged for public or private use without just compensation having been first made. . . .); W. VA. CONST. art. 3, § 9 (Private property shall not be taken or damaged for public use, without just compensation. . . .); WIS. CONST. art. 1, § 13 (The property of no person shall be taken for public use without just compensation therefor.); WYO. CONST. art. 1, § 33 (Private property shall not be taken or damaged for public or private use without just compensation.).

landowners who oppose governmental erosion of private property rights.[25] When the government does not initiate a formal eminent domain proceeding, a property owner may bring an inverse condemnation action against the government to recover property value allegedly lost through government actions.[26] As such, the landowner sues the governmental entity that restricted the use of the property. If the plaintiff proves a taking occurred, the government then pays just compensation.[27]

C. *Development of the Regulatory Takings Concept*

The concept of regulatory takings developed in the late 1800s.[28]

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25. *See* Alevizos v. Metro. Airport Comm'n, 298 Minn. 471, 477, 216 N.W.2d 651, 657 (1974). The *Alevizos* court described an inverse condemnation proceeding as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Id. See also* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981). The pertinent language informs:

> The phrase "inverse condemnation" generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a "taking" of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity. In the typical condemnation proceeding, the government brings a judicial or administrative action against the property owner to "take" the fee simple or an interest in his property; the judicial or administrative body enters a decree of condemnation and just compensation is awarded. In an "inverse condemnation" action, the condemnation is "inverse" because it is the landowner, not the government entity who institutes the proceeding (citations omitted).

Id.

26. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315-16 (1987).

27. *See* Rockler v. Minneapolis Community Dev. Agency, 866 F. Supp. 415, 417 (D. Minn. 1994). In Minnesota, a plaintiff must bring a petition for writ of mandamus to assert an inverse condemnation action. *See id.*

28. *See generally*, Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" From Mugler to Keystone Bituminous Coal*, 14 B. C. ENVTL. AFF. L. REV. 653, 660 (1987) (discussing the history of the Takings Clause and leading regulatory takings cases from 1879 to 1987). Hippler cites Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) as the "first comprehensive analysis" in this area. *Id.* In 1887, *Mugler* held that regulations designed to protect the public from harm do not constitute a taking of property under the state's power of eminent domain. *See Mugler*, 123 U.S. at 668-69. One author suggests that *Mugler* recognized a new property use interest completely separate from the specific physical land parcel. *See* Maureen Straub Kordesh, *"I Will Build My House with Sticks": The Splintering of Property Interests under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 413-14 (1996) (proposing a proper framework to resolve the tension between police power and the Takings

Nineteenth century courts recognized that the government could regulate the use of private property to protect the public's morals, health, and safety.[29] This early interpretation demanded a direct physical invasion of the plaintiff's property to constitute a taking that required just compensation.[30] Later interpretations of the Takings Clause expanded takings to include nonphysical regulatory burdens.[31]

Cases interpreting the Fifth Amendment Takings Clause have generally distinguished between physical occupations authorized by the government and governmental regulations of property use.[32] Where the government authorizes a physical invasion or occupation of private property, a taking occurs even if the action does not serve the public interest.[33]

In *Pennsylvania Coal v. Mahon*, the United States Supreme Court first held that regulation of private property is a taking if it "goes too far."[34] The Court held that enforcement of a Pennsylvania coal-mining statute constituted a taking.[35] Specifically, the Court determined that the stat-

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Clause).

29. *See Mugler*, 123 U.S. at 661. The court recognized the importance of states' police powers in protecting society. *See id.* at 661-63. The court described this community protection concept as "essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *See id.* at 665.

30. *See id.* at 668.

31. *See* Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings: When Should Compensation be Paid?*, 23 J. LEGAL STUD. 749, 751-53 (1994) (analyzing the limits and theories of government regulation of private property prior to 1992).

32. *See* Yee v. City of Escondido, 503 U.S. 519, 522-23 (1992) (holding that a local rent control ordinance viewed in conjunction with a mobile home residency law did not constitute a taking). The *Yee* court found that the ordinance at issue did not constitute a physical taking and deferred to the California courts to address regulatory takings claims, upholding appropriate state property use restrictions. *See id.* at 538-39. *See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-25 (1978).

33. *See Loretto*, 458 U.S. at 434-35 (finding a taking where a landlord was required to allow a cable company to install cables on the side of her apartment building); *see also*, Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1872) (holding that a taking occurred when a state-authorized dam construction project caused permanent flooding of private land).

34. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) (finding a taking where a land use regulation prohibited certain coal mining). This decision is noted as one which "marked a watershed in takings law." Miceli & Segerson, *supra* note 31, at 751-52. One commentator labeled *Pennsylvania Coal* "one of the most famous cases in the regulatory takings pantheon." *See* Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1124 n.23 (1996) (reviewing WILLIAM A. FISCHEL, NORMS REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995)). *Pennsylvania Coal* is noted as the first case to require compensation for a regulatory taking. *See* STEVEN J. EAGLE, REGULATORY TAKINGS, § 3-6(m)(1)(i), at 119 (1996).

35. *See Pennsylvania Coal*, 260 U.S. at 415-16. The statute provided that it was

ute's prohibitions went "too far" because they destroyed the coal company's mineral rights.[36] In the seventy-five years since *Pennsylvania Coal*, courts have avoided further defining the phrase "too far" as it applies to regulatory takings.[37]

With no definitive takings standard, the courts, private landowners, and land developers struggle with unpredictability and tension between land use regulations and private property rights.[38] Unsurprisingly, many still debate when governmental regulation should be considered a taking requiring compensation.[39] Over the years, courts have tried to develop a definitive regulatory takings standard, but have been unable to articulate more than a series of unpredictable tests.[40]

1. *Historical Takings Tests*

a. *Nuisance Test*

For over a century, the United States Supreme Court has developed a series of regulatory takings tests.[41] Two of the most notable tests articulated in the late nineteenth and early twentieth centuries are the nuisance

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unlawful "to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of (a) Any public building . . .; (b) Any street, road, bridge . . .; (c) Any track, roadbed, right of way . . .;(d) Any dwelling or other structure used as a human habitation . . . ." *See id.* at 393-94.

36. *See id.* at 415.

37. *See Penn Central*, 438 U.S. at 124 (commenting that there is no "set formula" for determining how far is "too far" as courts have preferred instead to "engag[e] in . . . essentially ad hoc, factual inquiries") (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

38. *See* Kordesh, *supra* note 28, at 460. Takings law has evolved into a random splintering of narrow property interests. Such splintering has created a trend in protecting property, which, in turn, has perpetuated the erosion of police powers. Kordesh prefers to see courts recognize the beneficial impact that police powers have on private property. *See id.* at 462-64.

39. Numerous law review articles discuss the lack of a definitive regulatory takings standard. *See* Rose, *supra* note 34, at 1121 (reviewing Fischel's book, which acknowledges the elusiveness of the regulatory takings concept); *see also* Hippler, *supra* note 28, at 654 (discussing the confusion surrounding government regulation and the multitude of scholarly theories used to evaluate regulatory takings issues).

40. *See Penn Central*, 438 U.S. at 124 (stating that the Court has been unable to establish a fixed takings standard). Bruce Ackerman, author of PRIVATE PROPERTY AND THE CONSTITUTION (1977), wrote that he has "not encountered a single lawyer, judge, or scholar who views existing case-law as anything but a chaos of confused argument which ought to be set right if one only knew how." *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993).

41. *See* Floyd B. Olson, *The Enigma of Regulatory Takings*, 20 WM. MITCHELL L. REV. 433, 435 (1994) (discussing the variety of both state and federal standards for determining regulatory takings).

test[42] and the diminution in value test.[43] These tests promote social and economic considerations in justifying the state's exercise of its police power.[44]

The nuisance test[45] focuses on protecting the public from harmful activities.[46] Under this test, non-arbitrary, non-discriminatory legislation that protects the public from harmful activities is a proper exercise of police power and does not effect a taking.[47] In *Mugler v. Kansas*,[48] the Supreme Court first applied common law nuisance principles to land use regulations.[49] In *Mugler*, the court held that a state statute which prohibited the sale or manufacture of alcohol did not constitute a taking of a brewery owner's property.[50] The court reasoned that even though the statute clearly deprived a brewery owner of property, the regulation rightfully protected the surrounding community from the "evils" of alcohol.[51] Thus, if a regulation affecting certain property use promotes the public health, morals, and safety of the community, there will be no taking.[52]

In another nuisance case, *Hadacheck v. Sebastian*,[53] the United States Supreme Court upheld a zoning ordinance that made it unlawful to oper-

42. *See* Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (finding that where a regulation is a nuisance control measure which protects the public from harm, there is no taking).

43. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Under the diminution in value test, where the value of the property has diminished to a certain level due to the regulation, a taking has occurred. *See id.*

44. *See, e.g., Pennsylvania Coal*, 260 U.S. at 414 (shielding company from financial loss, an economic concern); *Hadacheck*, 239 U.S. at 409 (controlling a brickyard nuisance, a societal concern); Mugler v. Kansas, 123 U.S. 623, 671 (1887) (protecting the public from harmful activities of breweries, a societal concern).

45. The nuisance test has also been referred to as the "harmful or noxious use" principle. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1023 (1992) (stating that earlier opinions suggested that governments may regulate "harmful or noxious use" of property without compensation).

46. *See Mugler*, 123 U.S. at 668-69 (holding that there is no taking if a regulation prohibits property use that is harmful to the public health, morals or safety).

47. *See id.* (stating that it is "essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community").

48. 123 U.S. 623 (1887).

49. *See* William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 27 (1995) (identifying *Mugler* as the "leading case on prevention of harm"); *see also* Rubenfeld, *supra* note 40, at 1085 n.47 (naming several state court decisions that previously adopted the noxious use principle).

50. *See Mugler*, 123 U.S. at 668-69.

51. *See id.* at 662.

52. *See id.* at 668-69. Later cases regard the nuisance control rationale as an attempt to explain why government could affect landowner property values and not compensate for them. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022-23 (1992).

53. 239 U.S. 394 (1915).

ate a brickyard in a residential neighborhood.[54] The brickyard was deemed a harmful nuisance under the ordinance.[55] There too, the Court sought to protect the public from potential harm to health and safety.

Thus, early case law used the nuisance test to balance the public benefit of a particular land use against the extent of harm suffered by the landowner.[56] If the benefit to the public outweighed the harm to the landowner, courts found no taking even if the landowner's property was significantly damaged or impaired.[57] Valid nuisance control measures continue in use today, particularly in the area of environmental litigation.[58]

b. Diminution in Value Test

The "diminution in value" test measures a claimant's economic loss.[59] Under this test, a taking occurs when a government regulation, which is not a nuisance control measure, places too large of a burden on a landowner.[60] In other words, where damage to a landowner's property exceeds a certain monetary level, there is a taking.[61] In *Pennsylvania Coal Co.*

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54. *See id.* at 409-10.

55. *See id.* at 410-11.

56. *See, e.g.*, L'Hote v. City of New Orleans, 177 U.S. 587, 600 (1900) (allowing prostitution restrictions); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (holding that a regulation banning the manufacture and sale of alcohol did not constitute a taking of a landowner's breweries); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 678 (1878) (finding no taking where regulations restrict transportation of noxious waste).

57. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 596 (1962) (determining no taking based on prevention of noxious use where regulation prohibited excavation below the water table); Miller v. Schoene, 276 U.S. 272, 280 (1928) (finding no taking where a landowner was forced to cut down his red cedar trees that were considered a nuisance because they threatened to spread disease to nearby apple orchards).

58. *See* Zeman v. City of Minneapolis, 552 N.W.2d 548, 552 n.3 (Minn. 1996) (stating that the nuisance prevention cases have been "kept alive"). Environmental regulation is an area that continues to rely on the nuisance test. *See* EAGLE, *supra* note 34, § 13, at 531-75 (providing a recent analysis of environmental regulations in conjunction with the takings concept). For the landmark case on this topic, see Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) (holding that a wetlands ordinance does not constitute a taking on the basis of the nuisance test).

59. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). This theory determines police power limits by considering the diminution in value of the property. *See id.* Under this approach, a large amount of damage may require compensation while a small amount would not. *See id.*

60. *See id.* at 413-14. *See also* Miceli & Segerson, *supra* note 31, at 751 (setting forth an economic rationale for the nuisance test).

61. *See Pennsylvania Coal*, 260 U.S. at 413. The facts in a particular case determine whether the monetary value is sufficient to amount to a taking. *See id. See also* Kordesh, *supra* note 28, at 437-38 (stating that the *Pennsylvania Coal* test bal-

v. Mahon,[62] for example, the Court distinguished between a taking based on economic loss and a valid exercise of the police power.[63] In *Pennsylvania Coal*, the plaintiff company owned the contract rights to mine coal under the surface of Mahon's house.[64] The Pennsylvania legislature later enacted a statute that essentially restricted Pennsylvania Coal from exercising its right to mine coal underneath Mahon's property.[65] Pennsylvania Coal sued the State of Pennsylvania, claiming a taking.[66] The court held that the statute went "too far," because it seized commercially valuable mining rights.[67] In its reasoning, the court emphasized that the protection of a single private home did not constitute a significant public interest sufficient to take the coal company's property rights.[68]

Unfortunately, this test does not provide a simple mechanical equation to solve takings questions.[69] Even though later cases cite this test extensively, economic loss is currently used as only a single factor, among many, in determining whether a regulation constitutes a taking.[70]

2. *Modern Tests*

After struggling for fifty-six years with the standards set forth in previous takings cases, the United States Supreme Court developed the following tests: the three-factor test,[71] the extinguished economic loss test,[72]

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ances the decrease in property value with the regulation's importance to the public).

62. 260 U.S. 393 (1922).

63. *See id.* at 413.

64. *See id.* at 412. The Coal Company had previously sold the property's surface rights to the Mahons or their ancestors, but reserved the right to mine all coal underneath the property. *See id. See also* EAGLE, *supra* note 34, § 13-6, at 119-20 (discussing the role of the contract in the court's determination).

65. *See Pennsylvania Coal*, 260 U.S. at 412.

66. *See id.* at 412.

67. *See id.* at 414-15.

68. *See id.* 413-14. The *Pennsylvania Coal* Court hesitated to give the Mahons more rights than they had purchased, stating that private landowners assume the risks associated with purchasing only surface rights. *See id.* at 416.

69. Different holdings from three prominent coal mining cases with similar facts demonstrate the inadequacy or shortcomings of the economic loss test. *Compare* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493 (1987) (finding no taking where the landowner did not show a significant deprivation) and Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 138 (1977) (stating that no taking occurs where a restriction does not prevent a reasonable beneficial use) *with Pennsylvania Coal*, 260 U.S. at 393 (holding that a taking occurred where a regulation prohibited coal mining, which caused subsidence under certain structures).

70. *See* Kordesh, *supra* note 28, at 437-38.

71. *See Penn Central*, 438 U.S. at 124.

72. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

the essential nexus test,[73] and the temporary takings test.[74]

a. Three-Factor Test

In *Penn Central Transportation Co. v. City of New York*,[75] the Supreme Court adopted the "three-factor test."[76] The Court sought to simplify some of the older takings tests by concentrating on the regulation's financial burden on private property owners.[77] This takings approach has been referred to as the "economic viability" standard.[78] The Court developed three factors to determine whether a taking has occurred: (1) the severity of the regulation's economic impact on the claimant;[79] (2) the extent of the regulation's interference with the property owner's investment backed expectations;[80] and (3) the character of the governmental action.[81]

In *Penn Central*, the Court considered whether a New York City landmarks preservation ordinance restricting historic landmark development constituted a taking requiring compensation.[82] The private owners of Grand Central Station Terminal,[83] an historic landmark, were denied permission from the Landmarks Preservation Commission[84] to construct a

73. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987). *See also* Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (applying the "essential nexus" test).

74. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

75. 438 U.S. 104 (1977).

76. *See id.* at 138 (finding no taking for government regulation of a historic landmark based on a three-factor test).

77. *See id.* at 124. The Court's analysis provided three general principles to determine whether a taking occurred; the Court, however, concluded that takings decisions rely on "essentially ad hoc, factual inquiries." *See id.*

78. *See* Rubenfeld, *supra* note 40, at 1087; *see also Penn Central*, 438 U.S. at 138 n.36 (emphasizing that if the property's economic viability ceases, relief may be obtained). This test does not simply rely on lost property value to determine a taking. *See* Kordesh, *supra* note 28, at 437-38.

79. *See Penn Central*, 438 U.S. at 124.

80. *See id.* The court referred to economic value in determining reasonableness of police power. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

81. *See Penn Central*, 438 U.S. at 124. Under this factor, a taking is more likely when interference can readily be characterized as a physical invasion than when the interference merely adjusts economic benefits and burdens to promote the common good. *See id.*

82. *See id.* at 107. The Landmarks Preservation Law sought preservation of historic buildings in addition to the applicable zoning restrictions. *See id.*

83. This terminal is "one of New York City's most famous buildings. Opened in 1913, it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style." *Id.* at 115.

84. The Landmarks Preservation Commission is a city planning agency responsible for the legal administration under the Landmarks Preservation Law. *See*

high-rise office building over the Terminal.[85] The property owners sued, claiming they had been deprived of a valuable property interest, namely the air space above the Terminal.[86] The owners also claimed that the New York City law diminished the value of the Terminal site.[87] Finally, the owners argued that the law did not place the same burden on all structures.[88]

In applying the first factor, the severity of the economic impact on the claimant, the Court assessed whether the ordinance deprived the owners of the Terminal's existing real property uses.[89] The Court held the historic landmarks law does not affect the present uses of the Terminal because the owners could still use the property as a railroad station with leased office space and concessions.[90]

In applying the second factor, the Court reasoned that because the owners still had a property interest in the present use of the Terminal, the law did not interfere with the owner's reasonable expectations of gaining a profit.[91] In addition, the Court identified two additional property rights under which the claimant could profit from the investment.[92] First, Penn Central still maintained the right to submit new development plans.[93] Second, the owners held transferable development rights to construct office buildings in the area surrounding the terminal.[94]

Finally, in reviewing the third factor, the regulation's character, the Court considered the purpose of the law and whether that purpose was achieved.[95] The Court relied on nuisance test principles, stating that gov-

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id. at 110.

85. *See id.* at 116-18. The owners proposed to build a 55-story office building on top of the terminal. *See id.* One commentator noted that "[a]lthough technically the terminal would survive, the aesthetic effect of surmounting it with a tall modern building would have been profound, and civic leaders, including Jacqueline Kennedy Onassis, mounted a defense of both the landmark and the law that protected it." *See* RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW AND PUBLIC POLICY 316 (1996).

86. *See Penn Central*, 438 U.S. at 130 (quoting United States v. Causby, 328 U.S. 256 (1946) (finding a taking where military airplanes flying in the airspace above a chicken farm destroyed the property's use)).

87. *See Penn Central*, 438 U.S. at 131.

88. *See id.* at 133.

89. *See id.* at 136.

90. *See id.* at 136. According to the Court, the terminal's "designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions." *Id.*

91. *See id.* at 136.

92. *See id.* at 136-37.

93. *See id.* The commission only denied plans for the 55 story high-rise and did not intend to deny all development plans. *See id.* at 137.

94. *See id.*

95. *See id.* at 131-32. The Court determined that the purpose of the regula-

ernment action may curtail individual property use in order to prevent harm.[96] Under this analysis, the Court recognized that regulations permitting preservation of historically significant structures "is an entirely permissible government goal."[97] Thus, in applying the three-factor test, the Court determined that a taking had not occurred.[98]

b. Extinguished Economic Value Test

Fourteen years after *Penn Central*, the Court, in *Lucas v. South Carolina Coastal Council*[99] identified a new takings test.[100] The *Lucas* court held that a regulation that "denies all economically beneficial or productive use of the land" is a taking.[101] Under this "total taking"[102] test, a property owner suffers a taking when he or she sacrifices *all* economically beneficial use of property for the common good.[103] This standard operates under the premise that total regulatory takings deserve compensation.[104]

In *Lucas*, a real estate developer ("Lucas") purchased two oceanfront residential lots in Charlestown, South Carolina, intending to build single-family homes.[105] Before Lucas started constructing the homes, South Carolina passed the Beachfront Management Act,[106] which effectively

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tion was to preserve historic structures. *See id.* Penn Central did not dispute the regulation or its purpose. *See id.* at 129. Rather, Penn Central argued that it received disparate treatment under the regulation and was being "singled out." *See id.* at 131.

96. *See id.* at 125-26. *See also* Miller v. Schoene, 276 U.S. 272, 279 (1928) (holding that a state has not exceeded "its constitutional powers by deciding upon the destruction of one class of property in order to save another which . . . is of greater value to the public."); Hadacheck v. Sebastian, 239 U.S. 394, 441 (1915) (upholding a statute prohibiting brickyard operation in a residential neighborhood to protect the community from harm); Goldblatt v. Town of Hempstead, 369 U.S. 590, 595-97 (1962) (determining that the safety provided by the ordinance, which banned sand and gravel excavation, outweighed the property's beneficial use).

97. *See Penn Central*, 438 U.S. at 129.

98. *See id.* at 138.

99. 505 U.S. 1003 (1992).

100. *See id.* at 1019. *See also* Lee, *supra* note 19, at 1847 (analyzing regulatory takings where a regulation denies a property owner the economically beneficial use of the land).

101. *See Lucas*, 505 U.S. at 1019.

102. *See id.* at 1030.

103. *See id.* at 1019.

104. *See* Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COM. 7, 36 (1996) (analogizing property rights to other constitutionally recognized personal liberty interests inherent in our constitutional culture).

105. *See Lucas*, 508 U.S. at 1006-07.

106. *See id.* at 1008-09. The Beachfront Management Act established a baseline for historical erosion, barring construction along the designated oceanfront property. *See id.*

barred Lucas from building any structures on the lots.[107] The Supreme Court held that the regulation constituted a taking, in part because the property owner was denied all economically viable use of his property.[108] In so holding, the Court precluded states from eliminating all economically valuable use of private property.[109]

An exception to this rule applies when the prohibited land use is considered a nuisance under the appropriate state common law.[110] Under this exception, government action does not constitute a taking if it prevents harm to the public.[111] The *Lucas* test basically redefined the nuisance test.[112] The Court, however, found it unlikely that state common law principles could prohibit residential home construction for harm prevention purposes.[113] Since *Lucas*, courts have not overwhelmingly responded to this exception.[114]

c. Essential Nexus Test

Recently, the United States Supreme Court has applied an "essential nexus test."[115] The essential nexus test applies in cases where a governmental entity conditions the issuance of a land use permit on the property owner's compliance with some condition.[116] Under the essential nexus

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107. *See id.*
108. *See id.* at 1030.
109. *See id.* at 1028.
110. *See id.* at 1030-31.
111. *See id.*
112. *See id.* at 1019. The Court stated that the harmful, noxious use analysis was the "progenitor of our more contemporary statements" regarding the requirement that land use regulations advance a legitimate interest to justify a taking. *Id.* at 1023-24. The justification for a rule based on the denial of all economically feasible use is that such a denial is equal to a physical appropriation. *See generally,* Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches,* 19 HARV. ENVTL. L. REV. 1 (1995) (discussing the *Lucas* decision and its reliance on common law guidelines for measuring the constitutionality of government regulations).
113. *See Lucas,* 505 U.S. at 1031. Such productive improvements to land are considered essential land use. *See id.*
114. *See* Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title,* 70 S. CAL. L. REV. 1, 11-12 (1996) (describing a clear pattern used by the courts since *Lucas* justifying no compensation only when the nuisance exception "replicates" a common law exception).
115. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987). Under the essential nexus test courts may find a taking where a regulation imposes an unrelated condition on the development of a landowner's property. *See id.* However, courts will find no taking if a nexus exists between a legitimate state interest and the condition. *See id. See also* Olson, *supra* note 41, at 448 (discussing the *Nollan* decision).
116. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).

test, a takings issue is resolved by determining (1) whether there is an essential nexus between the legitimate state interest and the permit condition imposed by the city;[117] and (2) whether the degree of exactions bears the required relationship or rough proportionality to the proposed development.[118] The Supreme Court applied the "essential nexus" analysis in *Nollan v. California Coastal Commission*[119] and *Dolan v. City of Tigard.*[120] Prior to these cases, municipal governments possessed broad discretion to grant or deny permission to private landowners for residential or commercial land development.[121]

In *Nollan*, the state refused to grant the plaintiffs permission to build a home on their land unless they granted a public easement to the state.[122] The Court found no taking because there was no sufficient connection between the permit and the required easement, despite the legitimate state interest involved.[123] The landowner wanted to demolish a bungalow on a beachfront lot and replace it with a three bedroom house.[124] The court determined that a legitimate state interest existed in the public's right to view the ocean.[125] However, visual access was not considered a sufficient connection to a permit condition that required an easement across Nollan's beachfront property.[126]

In *Dolan*, the Supreme Court also held that a taking occurred where the state conditioned the issuance of a building permit on the landowner's agreement to establish a pedestrian and bike path on a portion of her property.[127] The Court found that the state had a legitimate interest in preventing flooding and reducing traffic congestion.[128] However, the essential nexus was not met because a public walkway would take Dolan's

117. *See id.* at 386 (citing the essential nexus test addressed in *Nollan*, 483 U.S. at 837).

118. *See Dolan*, 512 U.S. at 386 (stating that this question was not addressed in *Nollan* because "the connection did not meet even the loosest standard").

119. *See* 483 U.S. at 841-42 (finding a taking where the California Coastal Commission conditioned the grant of a building permit on the dedication of a public easement).

120. *See* 512 U.S. at 395 (finding a taking where the City Planning Commission conditioned approval of a landowner's store expansion on establishing a bike/pedestrian pathway on the landowner's property to relieve traffic congestion and to minimize flooding).

121. *See* David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1244 (1997) (stating that "[F]or many years, the United States Supreme Court chose not to interfere with state and local regulation of new residential and commercial development").

122. *See* 483 U.S. at 828.

123. *See id.* at 837.

124. *See id.* at 828.

125. *See id.* at 835-36.

126. *See id.* at 837.

127. *See* Dolan v. City of Tigard, 512 U.S. 374, 396 (1994).

128. *See id.* at 387.

right to exclude others from the property.[129] Simply offsetting some of the traffic congestion was not considered sufficient to justify such a burden on the landowner.[130]

Both *Nollan* and *Dolan* indicate that the essential nexus test limits the government's power to impose conditions on grants for land development.[131] As a result, this test suggests that it may now be easier for private landlords to prove a taking.

d. Temporary Takings Test

The Supreme Court also recognizes temporary takings.[132] In *First English Evangelical Lutheran Church v. County of Los Angeles*,[133] the Court held that, like permanent takings, temporary takings require just compensation.[134] A temporary taking occurs when governmental activity or regulation denies a landowner all property use for a period of time and the regulation is later invalidated.[135] In *First English*, a church purchased land to operate a campground and recreation area for handicapped children.[136] A county ordinance designated the land as an interim flood protection area.[137] In February 1978, a storm had dropped eleven inches of rain in the area, flooding the church's retreat center and destroying its buildings.[138] The church sued Los Angeles County on a theory of inverse condemnation.[139] The Court held that the county must compensate the church for the loss of property use during the time the regulation was in effect.[140] *First English* has been criticized because it failed to provide guidance in determining the appropriate amount of damages due to a property owner for a temporary taking.[141]

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129. *See id.* at 394.

130. *See id.* at 395.

131. *See* Dana, *supra* note 121, at 1274-86 (stressing that a lack of judicial scrutiny coupled with the essential nexus test will decrease land development efficiency).

132. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987) (finding a temporary taking for the loss of value for the time period between the land-use regulation's effective date and the date it was later invalidated).

133. *See id.*

134. *See id.* (finding that an ordinance temporarily prohibited construction by a church in an interim flood protection area).

135. *See id.* at 321. The justification for this rule is that the government has a duty to compensate the owner for any economic loss in the interim. *See id.*

136. *See id.* at 307.

137. *See id.*

138. *See id.*

139. *See id.* at 308.

140. *See id.*

141. *See* Joseph LaRusso, *"Paying for the Change": First English Evangelical Church of Glendale v. County of Los Angeles and the Calculation of Interim Damages for Regula-*

3. *Minnesota Tests*

Minnesota law intends to fully compensate citizens for any property right losses,[142] including temporary or partial takings.[143] To establish a taking, a landowner must show a direct or substantial invasion of property rights, resulting in a definite and measurable market value diminution.[144] Clearly, regulations reasonably related to the health, safety, welfare, and morals of citizens serve as valid exercises of police power.[145]

a. *Reasonable Use Test*

The Minnesota Supreme Court employs a reasonable use test in determining whether takings have occurred.[146] The reasonable use test provides that a taking occurs when the landowner's property no longer has a reasonable use as a result of government regulation.[147] A taking does not occur if the regulation has a legitimate objective, unless all reasonable use is eliminated.[148] The test allows governments to make reasonable regulations while protecting landowners' lawful use and enjoyment of their property.[149] Under the reasonable use test, mere inconvenience to a

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tory Takings, 17 B.C. ENVTL. AFF. L. REV. 551 (1990) (discussing the inadequacy of the court's decision in determining damages for a temporary taking and proposing a damage formula based on fairness and predictability).

142. *See* State v. Strom, 493 N.W.2d 554, 558 (Minn. 1992) (citing MINN. STAT. § 117.025, subd. 1 (1986)). Minnesota currently defines a taking as "every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property." MINN. STAT. § 117.025, subd. 1 (1996).

143. *See Strom*, 493 N.W.2d at 560.

144. *See* Alevizos v. Metro. Airport Comm'n, 298 Minn. 471, 486-87, 216 N.W.2d 651, 662 (1974).

145. *See* Collis v. City of Bloomington, 310 Minn. 5, 18, 264 N.W.2d 19, 25 (1976) (holding that a zoning ordinance that dedicated certain property for park purposes was not a taking because of the reasonable relationship between the dedication and the public benefits); *see also* Olson, *supra* note 41, at 442 (discussing four similar standards relying on some form of reasonable relationship analysis involving governmental purposes and public needs).

146. *See* McShane v. City of Faribault, 292 N.W.2d 253, 257 (Minn. 1980) (relying on the United States Supreme Court's decision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

147. *See, e.g.*, Czech v. City of Blaine, 312 Minn. 535, 539, 253 N.W.2d 272, 274 (1977) (finding a taking where the government refused to rezone an area to accommodate a mobile home park); Pearce v. Village of Edina, 263 Minn. 553, 572-73, 118 N.W.2d 659, 672 (1962) (holding that a zoning ordinance was unconstitutional because it rendered some property useless or valueless).

148. *See* Holaway v. City of Pipestone, 269 N.W.2d 28, 30 (Minn. 1979) (stating that a zoning regulation merely causing a diminution in value does not result in a taking). The court recognized a similar result under the federal Constitution (referencing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)). *See id.*

149. *See* Johnson v. City of Plymouth, 263 N.W.2d 603, 606-7 (Minn. 1978) (finding no taking where curb and gutters were installed consistent with a public

landowner does not constitute a taking.[150]

For example, in *McShane v. City of Faribault*,[151] the court considered whether an airport zoning regulation restricted all reasonable uses of the plaintiff's property.[152] The relevant zoning ordinance designated specific land near an airport as a safety zone, permitting only limited land uses and height restrictions for structures.[153] The court held that the ordinance constituted a taking because of the measurable loss in market value of the property due to the limitations placed upon land use.[154]

b. Extinguished Economic Value Test

Minnesota courts also apply the economic test set forth in *Lucas v. South Carolina Coastal Council*,[155] a test based on economically productive or beneficial land use.[156] As noted above, *Lucas* held that a taking occurs where government regulation denies a landowner of all economically beneficial land use.[157] In *614 Co. v. Minneapolis Community Dev. Agency*,[158] the Minnesota Court of Appeals recognized the possibility of an economic productivity taking based on precondemnation planning action by the city and its development agency.[159] A landowner claimed the city's activities deprived him of rental income and other development possibilities.[160] The city development agency publicly targeted the landowner's property for condemnation over a three-year period but ultimately abandoned the project.[161] The landowner argued that these actions reduced his commercial occupancy, interfered with his ability to market to new tenants, and prevented him from further developing and improving his property.[162] The court concluded these allegations could "permit proof that the city's

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improvement project).

150. *See McShane*, 292 N.W.2d at 258-59 (finding that an airport zoning ordinance constitutes a taking due to the significant safety interests involved and substantial decline in market value).

151. 292 N.W.2d 253 (Minn. 1980).

152. *See id.* at 257.

153. *See id.* at 255-56.

154. *See id.* at 258-59.

155. *See* 505 U.S. 1003, 1019 (1992).

156. *See* 614 Co. v. Minneapolis Community Dev. Agency, 547 N.W.2d 400, 405-06 (Minn. Ct. App. 1996) (holding that a taking occurs when a landowner is deprived of all economically viable land use, even if temporarily). The Minnesota Court of Appeals recognized that the Supreme Court has not developed a precise standard for distinguishing temporary takings from permanent takings. *See id.* at 407.

157. *See* 505 U.S. at 1019.

158. 547 N.W.2d 400 (Minn. Ct. App. 1996).

159. *See id.* at 407-08.

160. *See id.* at 406.

161. *See id.* at 403-04.

162. *See id.* at 406-07.

and [its development agency's] actions left [the landowner] without economically viable rental and development use," permitting a cause of action for a taking.[163]

c. De Facto Test

Minnesota courts have created a "de facto" taking standard based on the amount of control that a government has over a private party's land use.[164] The test recognizes a taking when a government abuses its eminent domain powers and directs its regulation at a particular parcel of property.[165] There is no taking when the state does not physically or legally prevent the landowner's use of the property.[166]

In *Fitger Brewing Co. v. State*,[167] the Minnesota Court of Appeals applied the de facto test to facts involving a state decision to consider condemnation and the impact of that decision on the landowner involved.[168] Minnesota considered plans to condemn some or all of the Fitger Brewing Company property for highway expansion.[169] Although the state eventually chose to reroute the highway, Fitger had already decided to close in lieu of investing in needed improvements.[170] The court ruled that the inability of the state to assure Fitger that a condemnation would certainly occur did not rise to the level of a de facto taking.[171]

d. Rough Proportionality Test

Another test used by Minnesota courts focuses on the "rough proportionality" of governmental conditions.[172] Under this test, the government must establish that the nature and extent of the government condition

163. *See id.* at 407-08.

164. *See* Fitger Brewing Co. v. State, 416 N.W.2d 200, 208 (Minn. Ct. App. 1987).

165. *See id.* at 207.

166. *See id. See also* Orfield v. Hous. and Redev. Auth. of City of St. Paul, 305 Minn. 336, 342, 232 N.W.2d 923,927 (1975) (holding that economic loss due to normal activities associated with an urban renewal project does not constitute a de facto taking).

167. 416 N.W.2d 200 (Minn. Ct. App. 1988).

168. *See id.* at 201-08.

169. *See id.* at 201-03.

170. *See id.* at 203-04. Fitger was under pressure from the Minnesota Pollution Control Agency (PCA) to install pollution control devices at the brewery at an estimated cost of $100,000. *See id.* at 201-02. The deadline set by the PCA did not allow Fitger to wait until the state made its final decision. *See id.* at 202-04.

171. *See id.* at 208. The court noted that the state was careful to explain to Fitger that the state's plans could change, making condemnation unnecessary. *See id.*

172. *See* Arcadia Dev. Corp. v. City of Bloomington, 552 N.W.2d 281, 286 (Minn. Ct. App 1996) (citing Dolan v. City of Tigard, 512 U.S. 374 (1994)).

bears a "rough proportionality" to the condition's impact.[173] The court, in applying this test, analyzes a takings issue under the United States Constitution and under the Minnesota Constitution.[174] Under the United States Constitution, the takings determination is based on whether the ordinance at issue is rationally related to a legitimate governmental purpose.[175] Essentially the same analysis occurs under the Minnesota Constitution, although three factors are considered: (i) whether the ordinance promotes a public purpose; (ii) whether the ordinance is an unreasonable, arbitrary or capricious interference with private interests; and (iii) whether the means chosen are rationally related to the public purpose sought to be served.[176]

The Minnesota Court of Appeals, in *Arcadia Dev. Corp. v. City of Bloomington*,[177] found no taking where an ordinance was specifically designed to advance a governmental interest.[178] The ordinance required mobile home park owners who close or change the use of their parks to pay relocation costs to the park residents.[179] The court recognized a rough proportionality between the ordinance requiring payment of relocation costs and the reduced economic devastation on park residents.[180]

e. Public Necessity Doctrine

The public necessity doctrine allows one to enter another's land for the purpose of averting a public disaster.[181] The test reasons that the interest of public welfare supersedes the rights of the private property landowner.[182] As such, the state can use its police powers to act in the interest of public safety.[183] In *McDonald v. City of Red Wing*,[184] for example, the

173. *See id.*

174. *See id.* at 285-87 (quoting Thompson v. City of Red Wing, 455 N.W.2d 512, 516 (Minn. Ct. App. 1990).

175. *See id.* at 286.

176. *See id.* at 288 (citing Grussing v. Kvam Implement Co., 478 N.W.2d 200, 202 (Minn. Ct. App. 1991)).

177. 552 N.W.2d 281 (Minn. Ct. App. 1996).

178. *See id.* at 287.

179. *See id.* at 284.

180. *See id.*

181. *See* Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 42 (Minn. 1991) (quoting RESTATEMENT (SECOND) OF TORTS § 196 (1965)). The doctrine provides that "[o]ne is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster." *Id.*

182. *See id.*

183. *See* City of Duluth v. State, 390 N.W.2d 757, 762 (Minn. 1986) (quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) in stating, "the public use requirement of the Fifth Amendment is coterminous with the scope of a sovereign's police powers.").

184. 13 Minn. 38, 40 (1868).

court found no taking and excused the city from paying compensation where a building was destroyed to prevent the spread of fire in the interest of public safety.[185]

However, a state's actions in the interest of public safety could still constitute a taking.[186] For example, in *Wegner v. Milwaukee Mut. Ins. Co.*, the Minnesota Supreme Court found a taking when police officers caused private property damage to an innocent third party's home while trying to apprehend an armed criminal suspect.[187] Even though the apprehension of a criminal suspect benefits the entire community, the court reasoned that an innocent third party should not carry the entire cost of the benefit.[188] This recent case narrowed the public necessity doctrine in the interest of fairness to avoid burdening innocent citizens.[189]

III. THE *ZEMAN* DECISION

A. *The Facts*

Robert Zeman owned and operated a multi-unit residential apartment building in Minneapolis, Minnesota.[190] The City of Minneapolis requires rental property operators to comply with the housing ordinance, including rental licensure requirements.[191] Because Zeman owned rental property within the city limits, he was required to comply with the ordinance.[192]

In 1991, Minneapolis added a new provision to the housing ordinance. The new provision required rental property licensees to curtail disorderly conduct by tenants or their guests on the licensed property.[193]

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185. *See id.*

186. *See Wegner*, 479 N.W.2d at 42.

187. *See id.* Minneapolis police officers staked out a home in north Minneapolis, in attempts to apprehend two suspected felons believed to be dealing stolen narcotics. *See id.* at 39. The suspects fled and after a high speed chase, one suspect barricaded himself in Harriet Wegner's home. *See id.* Tear gas and "flash-bang" grenades were fired into the home, causing extensive property damage to the home. *See id.*

188. *See id.* at 42.

189. *See id.*

190. *See* Zeman v. City of Minneapolis, 552 N.W.2d 548, 550 (Minn. 1996).

191. *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 1810 (1995) (requiring that landlords obtain licenses in order to rent residential housing to tenants); *see also* Appellant's brief at 1, Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996) (No. CX-95-429). Zeman renewed his rental license annually. *See id.*

192. *See Zeman*, 552 N.W.2d at 550.

193. *See id.* (citing MINNEAPOLIS, MINN., CODE OF ORDINANCES § 244.20 (1995)). The Minneapolis Housing Code defines a "disorderly use" as:

> a violation, on the licensed premises, of any of the following:
>
> (1) Minnesota Statutes, Sections 609.75 through 609.76, which prohibit

The Minneapolis police department's community service bureau is responsible for the enforcement of the provision.[194] Once the bureau makes a determination of disorderly use, it notifies the rental licensee by mail.[195] The notification specifies the appropriate action the licensee must take to remedy the problem.[196] A second notification letter is sent to the licensee if another incident of "disorderly use" occurs within twelve months after the first reported violation.[197] This second notice requires a written response to the bureau disclosing any actions taken or proposed to remedy the situation.[198] Finally, a third disorderly use incident within twelve months may result in the landlord's rental license being "denied, revoked, suspended or not renewed."[199]

Zeman received three notices of disorderly use.[200] Zeman's three disorderly use notices involved a threatened assault, a police controlled crack cocaine deal, and a drug arrest.[201] With the third notice, Zeman also received a recommendation that the city revoke his license.[202] Zeman ap-

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gambling;

(2) Minnesota Statutes, Sections 609.321 through 609.324, which prohibits prostitution and acts relating thereto;

(3) Minnesota Statutes, Sections 152.01 through 152.025, and Section 152.027, Subdivisions 1 and 2, which prohibit the unlawful sale or possession of controlled substances;

(4) Minnesota Statutes, Section 340A.401, which prohibits the unlawful sale of alcoholic beverages;

(5) Section 385.110 of this Code, which prohibits noisy assemblies;

(6) Minnesota Statutes, Sections 97B.021, 97B.045, 609.66 through 609.67 and 624.712 through 624.716, and section 393.40, 393.50, 393.70, 393.80, 393.90, and 393.150 of this Code, which prohibit the unlawful possession, transportation, sale or use of a weapon; or

(7) Minnesota Statutes, Sections 609.72 and Section 385.90 of this Code, which prohibit disorderly conduct, when the violation disturbs the peace and quiet of the occupants of at least two (2) units on the licensed premises or other premises, other than the unit occupied by the person(s) committing the violation.

See Zeman, 552 N.W.2d at 549-550 n.1 (quoting MINNEAPOLIS, MINN. CODE OF ORDINANCES § 244.2020(a) (1995)).

194. *See id.* at 550. The bureau consists of Minneapolis police officers who work in the Community Crime Prevention SAFE program. *See* Appellant's brief at 2, Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996) (No. CX-95-429).

195. *See id.* (citing MINNEAPOLIS, MINN. CODE OF ORDINANCES § 244.2020(c) (1995)).

196. *See id.*

197. *See id.* (citing § 244.2020(d)).

198. *See id.*

199. *See id.* (citing § 244.2020(e)).

200. *See id.* Zeman received notices of disorderly use on June 30, 1992, March 12, 1993, and April 21, 1993. *See id.*

201. *See* Zeman v. City of Minneapolis, 540 N.W.2d 532, 534 (Minn. Ct. App. 1995).

202. *See Zeman*, 552 N.W.2d at 550.

pealed the revocation recommendation to the Rental Dwelling License Board of Appeals.[203] The Board concluded that Zeman failed to take the appropriate action necessary under section 244.2020 of the housing ordinance to resolve the disorderly use.[204] Following the Board's decision, the City of Minneapolis voted to revoke Zeman's license.[205] Zeman sued the City seeking reinstatement of his rental license and damages for an alleged taking.[206]

The trial court held that Zeman's license was revoked in error because the alleged disorderly conduct did not involve occupants of the premises.[207] The ordinance, the court noted, specifically referred to "disorderly use" by occupants of the rental property.[208] Zeman asserted that the housing ordinance and the subsequent revocation eliminated all economic value in the property use, constituting a regulatory taking.[209] The trial court reinstated Zeman's license and granted partial summary judgment in favor of the City on the takings claim.[210] The trial court granted partial summary judgment because Zeman failed to establish that the property lost all of its economic value or that there was no alternative use for the property.[211]

The Minnesota Court of Appeals reversed on the grounds that the trial court applied the wrong takings analysis.[212] The case was remanded to the trial court for analysis under the *Penn Central* test.[213] The City appealed to the Minnesota Supreme Court.[214]

B. The Court's Analysis

The Minnesota Supreme Court, finding no taking, reversed the decision of the appellate court.[215] The issue presented to the *Zeman* court was

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203. *See id.*
204. *See id.*
205. *See id.*
206. *See id.* Zeman also brought other claims not at issue in *Zeman*. *See id.*
207. *See id.* at 550-51. Two of the three disorderly use incidents involved persons who did not occupy Zeman's property. *See* 540 N.W.2d at 534 n.1.
208. *See* 552 N.W.2d at 550-51.
209. *See id.* at 551. The appraiser valued the building and lot at a negative $20,000 to $25,000 if sold. *See id.* The appraiser further noted that the property was only valuable because Zeman owned it and it was not economically feasible for a new party to start a rental venture in such a depressed neighborhood. *See id.*
210. *See id.* at 550-51.
211. *See id.* at 551. Zeman's expert witness, a real estate appraiser, testified that the economic value of the 1030 Morgan Avenue property was "very close to zero" due to the residential zoning restrictions and the economically depressed neighborhood. *See id.*
212. *See id.* (stating that the *Penn Central* analysis is the proper takings test).
213. *See id.*
214. *See id* at 550.
215. *See id.* at 555. The court reasoned that, while citizens are naturally bur-

whether a rental license revocation by the City constituted a regulatory taking under the United States and Minnesota Constitutions.[216] The court acknowledged that current regulatory takings law "stems from a nebulous notion" and that cases have not established a clear test for determining takings.[217] Lacking a defined takings test, the court used a case by case analysis relying on the specific facts of *Zeman*.[218]

Zeman's rental license was eventually reinstated by the trial court. Therefore, the supreme court first considered whether a temporary taking, if one actually occurred, should be treated differently from a permanent taking.[219] Basing its decision on *First English Evangelical Lutheran Church*, the court held that the status of the taking, temporary or permanent, did not impact its analysis.[220]

The court next applied the *Penn Central* three factor test.[221] In so doing, the court considered the housing ordinance's economic impact, its interference with investment backed expectations, and the character of the government action.[222]

First, the court assessed the ordinance's economic impact on Zeman's property use.[223] The court found that Zeman suffered a significant economic impact since a rental apartment building was the best use of the property.[224] Without the rental license, Zeman was unable to operate his apartment.[225] In addition, both rezoning the property or finding a new buyer were unlikely due to the economically depressed nature of the

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dened by legislative restrictions, they also benefit from the restrictions placed on others. *See id.* at 554-55.

216. *See id.* at 551. Since a regulatory ordinance was involved, the court determined there was no physical appropriation constituting a taking. *See id.*

217. *See id.* at 552.

218. *See id.* "[T]akings law turns largely on the particular facts underlying each case." *See id.* (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

219. *See id.* at 553.

220. The United States Supreme Court has held that temporary takings are not treated differently than permanent takings. *See id.* (citing First English Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

221. *See id.* at 552 n.3. The *Zeman* court stated that *Penn Central* "provides the best formulation of the factors the Supreme Court deems important to takings analysis." *Id.* (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 463 (5th ed. 1995); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1184 (1967).

222. *See Zeman*, 552 N.W.2d at 552.

223. *See id.* at 553. The *Zeman* court supported the use of police power as a means for nuisance prevention. *See id.* Citing *Lucas*, 505 U.S. at 1019 as an exception, the court stated that the regulation only caused a reduction in property value and not a complete denial of economically beneficial use. *See id.* at 553 n.4.

224. *See id.* at 553.

225. *See id.*

neighborhood.[226]

Second, the court determined whether the housing ordinance interfered with Zeman's investment backed expectations.[227] The court found that since Zeman operated the apartment building since 1975, he expected a reasonable economic return.[228] The court quickly disposed of the first two factors, admitting that the decision was leaning in Zeman's favor.[229]

Third, the court used nuisance test principles to apply the final factor relating to the government regulation's character.[230] The court analyzed the regulation, its purpose and its likelihood of success.[231] The *Zeman* court stated that the housing ordinance intended to protect residential neighborhoods from criminal activity.[232] The court justified the ordinance as a harm prevention measure stating that governments traditionally avoided paying compensation when the regulation prevents public harm.[233] The court explained that the ordinance achieves a legitimate public interest in deterring criminal activity.[234] In conclusion, the court stated that the City was justified in revoking the rental licenses of landlords who refuse to cooperate with attempts to curb criminal activities on their properties.[235]

IV. ANALYSIS OF THE *ZEMAN* DECISION

The Minnesota Supreme Court in *Zeman* perpetuated one problem and created another. First, the court failed to identify the appropriate regulatory takings test to apply with respect to temporary regulatory takings.[236] Second, the court clearly expanded the burden of government

226. *See id.*

227. *See id.* at 551, 553.

228. *See id.*

229. *See id.* at 553-54. Witnesses for Zeman testified at trial that the economic value of the property was "very close to zero." *See id.* at 551.

230. *See id.* The court found this factor to be similar to a "*Mugler*-based analysis." *Id.*

231. *See id.* at 554.

232. *See id.*

233. *See id.* The court stated that harm prevention is the "preeminent theory by which the state has traditionally been able to avoid paying compensation." *Id.* (citing Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 ORE. L. REV. 603, 617-18 (1993)).

234. *See id.*

235. *See id.*

236. The *Zeman* court stated that the temporary revocation of Zeman's license did not impact the takings analysis. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) (holding that temporary takings are "not different from permanent takings"). In addition, the *Zeman* court stated that the regulation was not a severe responsibility for landlords. *Zeman*, 552 N.W.2d at 554.

regulations on common citizens.

A. *An Old Problem*

In *Zeman*, the court focused on the three-factor test dealing with economic impact, interference with investment backed expectations, and the character of the governmental action.[237] The *Zeman* court determined that the first two factors of the test clearly favored a taking.[238] The *Zeman* court manipulated the third factor to justify the ordinance as a harm prevention measure, citing a list of common nuisance test cases.[239] The court relied on this nuisance prevention analysis to declare that the state's exercise of police power was constitutional.[240] The court avoided any temporary takings analysis. Indeed, it simply stated that a taking may have occurred,[241] but Zeman should not be compensated because the ordinance served as a significant harm-prevention measure.

Admittedly, the government would have a nearly impossible task regulating private property use if a precise takings test existed.[242] However, landowners also face the impossible task of defending their land use without knowing the takings test that applies. Courts presently subject landowners to a variety of takings tests. As a result, these landowners sacrifice their land use to maintain the ad hoc approach to takings law. In *Zeman*, the court failed to provide reasons for using the three-factor test. In so doing, the court only muddied the already murky waters of takings law in Minnesota.

B. *A New Problem*

In addition to failing to pinpoint a clear and straightforward takings test, the *Zeman* court expanded the regulatory burden on common citizens who own property, particularly rental property owners. By upholding the disorderly conduct ordinance, the court forced landlords to curtail all potentially violative behavior that occurs on their property, even if the

237. *See id.* at 552 n.3 (citing scholarly agreement that the three-factor test is the best test to use in a takings analysis).

238. *See id.* at 553.

239. *See id.* at 554-55 (considering the character of the government action and the likelihood of its preventing injury to the community's health, morals or safety).

240. See *id.* at 554. The court stated that the ordinance is "designed to serve a legitimate public interest, deterring criminal activity in residential neighborhoods, by enlisting the aid of landlords." *Id.*

241. *See id.* at 553.

242. *See* John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771, 778 (1993) (stating that regulations are not "inherently wrong," even if private property values or uses are affected).

conduct does not involve occupants of the property.[243] As a result, the regulation provides a disincentive for common people to purchase and rent property.[244]

Unfortunately for landlords in Minneapolis, the *Zeman* court in effect imposed "police responsibilities" on rental property owners.[245] In doing so, the court determined that policing property should be an incidental part of operating rental dwellings.[246] However, such a broad crime control measure clearly burdens a small segment of the population—owners of residential rental property.[247] As such, the revocation of Zeman's rental license should have constituted a taking and required payment of just compensation.

The United States Supreme Court recognizes the broad governmental powers available to regulate housing conditions, particularly landlord and tenant relationships.[248] The *Zeman* court, as well, deferred to the legislature in relying on the public health and safety rationale,[249] but did so at a significant cost. Currently, the Minneapolis ordinance requires landlords to police the activities of persons who reside in, visit, or trespass on their rental properties. For inner city landlords in high-crime areas, the task may be overwhelming.

American cities constantly struggle with inner-city housing problems. For example, poor residents of Minneapolis and St. Paul face difficult problems obtaining quality low-income housing.[250] Approximately one-half of all low-income renters devote more than half of their income to housing costs.[251] Unfortunately the number of low-income housing op-

243. *See* Zeman, 552 N.W.2d at 554. Not all of the disorderly conduct incidents resulting in Zeman's license revocation dealt with tenants of his building. *See id.* at 550-51. The ordinance clearly states, however, that a rental dwelling license may be revoked after three disorderly use violations involving occupants. *See id.* at 550.

244. *See generally*, B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679 (1992) (concluding that the costs of policing tenants may be enough for many landowners to leave the rental property business).

245. *See Zeman*, 552 N.W.2d at 555.

246. *See id.* at 554.

247. *See generally* Glesner, *supra* note 244. Glesner concludes that imposing penalties on landlords for the crimes of their tenants is an ineffective means of controlling crime. *See id.*

248. *See* Yee v. City of Escondido, 503 U.S. 519, 527-28 (1992) (holding that a local rent control ordinance viewed in conjunction with a mobile home residency law did not constitute a taking).

249. *See Zeman*, 552 N.W.2d 554. The court relied on broad definitions of the regulation and its public protection purposes. *See id.*

250. *See* Diaz, *supra* note 11, at 1A.

251. *See* Peter Dreier, *The New Politics of Housing: How to Rebuild the Constituency for a Progressive Federal Housing Policy*, 63 J. AM. PLANNING ASS'N, 5 (1997) (addressing the importance of the nation's housing, specifically the decline of

tions steadily decreases as a result of urban renewal, condominium conversion and gentrification.[252] The current housing crisis requires cities to encourage landlords to purchase and develop low income housing. The *Zeman* legacy will only discourage rather than encourage such needed development.

Clearly, there is a need for landlords, as well as the general public, to engage in crime control and crime prevention measures. However, the *Zeman* court's decision goes too far. Admittedly, crime control regulations benefit the public as a whole, including the burdened landlord.[253] But, the *Zeman* decision allows the government to avoid compensating private landlords and imposes significant burdens on these select citizens.[254]

To balance the competing goals of social welfare and landowner protection, local governments should offer property investment incentives to assist local governments in crime control or to participate in community safety programs.[255] In addition, tenants and community residents, not landlords, should be held responsible for their own actions. Understandably, the government has a significant interest in achieving crime control objectives. However, the *Zeman* court's approach thrusts too severe a blow on the common citizen.[256]

V. CONCLUSION

Unfortunately, the *Zeman* decision failed to clarify regulatory takings law in Minnesota. First, the *Zeman* court refused to define when courts should employ the various tests in determining takings issues. Second, the *Zeman* court forced landlords to police all potentially violative behavior on their property, even if the conduct does not involve tenants of the property. The court has essentially perpetuated one takings problem and created another. Absent clarification of these issues, common citizens will be

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America's low income housing market).

252. *See id.*

253. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) (stating that certain restrictions are "properly treated as part of the burden of common citizenship") (citing Kimball Laundry Co. v. U.S., 338 U.S. 1, 5 (1949)). *Compare* Marzulla & Marzulla, *supra* note 22 (supporting the necessity of legislative deference relative to private land use regulations) *with* Glesner, *supra* note 244 (concluding that the legislative deference afforded certain crime control regulations has penalized private property owners).

254. *See* Burton, *supra* note 233. The author promotes the idea that current takings law tempts governments to impose regulations on private property owners and avoid compensating the burdened landowner. *See id.*

255. *See generally,* Glesner, *supra* note 244 (analyzing the penalties currently imposed on landlords for crime on their premises and suggesting alternative methods to control crime).

256. *See id.* at 791 (discussing the undesirable shift that the law has taken towards requiring landlords to police the community).

required to challenge society's burdens without obtaining appropriate and just compensation from the government.

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