CONSTITUTIONAL LAW–INVERSE CONDEMNATION: DECISION THAT A TEMPORARY MORATORIUM DOES NOT AMOUNT TO A COMPENSABLE TAKING SIGNIFIES A VICTORY FOR LAND-USE PLANNERS

Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, 705 N.W.2d 850

I. FACTS

Wild Rice River Estates, Inc. (Wild Rice) is the owner and developer of a rural residential subdivision located along the Wild Rice River approximately three miles south of Fargo, North Dakota.[1] Anton Rutten (Rutten) owned Wild Rice and acquired the farmland in 1947 in anticipation that it would one day become a part of Fargo.[2] In addition to the possible annexation, Rutten hoped to develop a subdivision on the property.[3]

In 1993, the subdivision was platted and contained thirty-eight lots, sixteen of which were located on an oxbow of the Wild Rice River.[4] In 1994, the subdivision was incorporated as Wild Rice River Estates, Inc. in order to continue its development.[5] From 1994 to 1997, Wild Rice invested approximately $500,000 to "develop and promote the subdivision."[6]

In April 1997, the Wild Rice River and the nearby Red River flooded the region.[7] All of the undeveloped lots in the Wild Rice subdivision were underwater.[8] After the flood, Fargo worked with the Federal Emergency

---

1. Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 2, 705 N.W.2d 850, 852.

2. *Id.*

3. *Id.*

4. *Id.* An oxbow is "a U-shaped bend in a river." THE MERRIAM-WEBSTER DICTIONARY 517 (New ed. 2004).

5. *Wild Rice*, ¶ 2, 705 N.W.2d at 852. Anton Rutten was the sole shareholder and only officer and director of Wild Rice until his death in 2002. Appellee's Brief at 6, Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, 705 N.W.2d 850 (No. 20050074). Upon his death, his widow, Frederica Rutten, became the sole stockholder and their daughter, Bonnie Rutten, became the president, secretary, treasurer, and manager of Wild Rice. *Id.*

6. *Wild Rice*, ¶ 2, 705 N.W.2d at 853.

7. *Id.* ¶ 3. Prior to the flooding, the City of Fargo experienced a "record snowfall of 140 inches" beginning in February of 1997. Appellee's Brief, *supra* note 5, at 8. Although the Red River Valley, encompassing both the Wild Rice and Red River, has a history of flooding, the April 1997 flood was unique to the area in that "[c]ity officials had never before experienced flooding from the Wild Rice River in addition to flood waters from the Red River." *Id.* As a result, the flood waters "inundated the City of Fargo and surrounding areas causing unprecedented damage." *Id.*

8. *Wild Rice*, ¶ 3, 705 N.W.2d at 853. Rutten's partially constructed home, which was on one of the lots, was also partly damaged. *Id.* The flood waters came within one foot of the

Management Agency (FEMA) to develop a plan for future floods.[9] The Wild Rice subdivision was subsumed within Fargo's extraterritorial jurisdiction on August 1, 1997.[10] On June 15, 1998, FEMA created a preliminary flood insurance rate-map for the area, which included several of the Wild Rice lots in the preliminary floodway.[11] The City determined that the FEMA map was the best information to use in developing a floodway along the Wild Rice River.[12]

While FEMA was completing its study of the area, the City continued to receive requests for building permits in Wild Rice and other areas.[13] These requests concerned city officials, due to the areas' location within the initial FEMA floodway plan.[14] Therefore, the City had to consider the necessity of allowing construction in the preliminary floodway against the FEMA regulations.[15] On August 10, 1998, the Fargo City Commission placed a moratorium "on the issuance of all building permits for new construction in the floodway within the City of Fargo and its four-mile extraterritorial zone."[16] The City intended the moratorium to remain in effect until

---

foundation of Rutten's home and ground water seeped into the home through a window. Appellee's Brief, *supra* note 5, at 9. However, the other existing homes were not harmed. *Wild Rice*, ¶ 3, 705 N.W.2d at 853.

9. *Wild Rice*, ¶ 4, 705 N.W.2d at 853. FEMA had begun to study the Wild Rice River prior to the 1997 flood, at which time the river had a designated floodplain but no floodway. Appellee's Brief, *supra* note 5, at 10. The main difference between a floodplain and a floodway is that "[a] person can build in the floodplain assuming he or she otherwise meets floodproofing requirements, but FEMA does not ever allow a person to build in the floodway." *Id*. (internal citations omitted). "The floodplain is the land that would be inundated by a hundred-year flood event[,] [while] [t]he floodway is the area where the water of the river actually flows to the hundred–year discharge point." *Id*. When the 1997 flood occurred, FEMA was in the initial stages of developing a floodway and updating a flood insurance rate-map. *Id*. Following the unprecedented flood in 1997, however, FEMA recommenced the process in order to comprehensively review the area. *Id*.

10. *Wild Rice*, ¶ 4, 705 N.W.2d at 853. The City of Fargo's extraterritorial jurisdiction amounted to a four mile zone, which surrounded the preliminary floodway and was covered by the imposition of the temporary moratorium. Appellee's Brief, *supra* note 5, at 11.

11. *Wild Rice*, ¶ 4, 705 N.W.2d at 853. The flood insurance rate-map designated a preliminary floodway for many of the areas in the Red River Valley as well as areas along the Wild Rice River. Appellee's Brief, *supra* note 5, at 10.

12. Appellee's Brief, *supra* note 5, at 10.

13. *Id*.

14. *Id*.

15. *Id*. at 10-11.

16. *Wild Rice*, ¶ 4, 705 N.W.2d at 853. A moratorium is defined as "a suspension of activity." THE MERRIAM-WEBSTER DICTIONARY 470 (New ed. 2004). "Regulatory agencies across the country have used temporary moratoria and interim development controls as a legitimate means of creating breathing space while necessary background data is gathered, analyses conducted, and policies assessed." Robert H. Freilich, *Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis*, 24 U. HAW. L. REV. 589, 601 (2002). In general, four main principles underlie the imposition and need for temporary moratoria. *Id*. at 602.

both the Fargo City Ordinances passed, and FEMA made a final determination on the floodplain map.[17] Consequently, the moratorium affected several Wild Rice lots during the twenty-one months it remained in effect.[18]

Rutten's daughter, Bonnie Rutten, applied for a building permit in May of 1999 to construct a home on one of Wild Rice's lots.[19] The City of Fargo denied the permit because the lot was located in FEMA's preliminary designated floodway and was covered by the moratorium.[20] While the moratorium was in effect, several buyers also showed an interest in purchasing Wild Rice lots.[21] In fact, "one potential buyer signed two purchase agreements and another [buyer] signed a lot-hold agreement."[22] However, the moratorium's constraint on the ability to attain permits for construction prevented the sale of any Wild Rice lots.[23]

Subsequently, Wild Rice initiated an inverse condemnation action on March 30, 2000, claiming that the moratorium constituted a taking of its property.[24] In response, the City of Fargo filed an answer on April 21, 2000.[25] Fargo's city engineer recommended, in writing, that the city commissioners lift the moratorium and that FEMA's June 15, 1998 "preliminary

---

> First, reasonable moratoria allow the regulating body the necessary time to study and formulate solutions to significant land use and environmental problems affecting society. . . .
>
> . . . .
>
> Second, temporary moratoria also constitute a valid response to imminent public health and safety threats. . . .
>
> . . . .
>
> The third principle underlying the need for temporary planning moratoria is the prevention of nonconforming uses or development inconsistent with the purposes and policies of the planning legislation being formulated. . . .
>
> . . . .
>
> [Finally,] [t]he fourth principle underlying temporary planning moratoria is the facilitation of public debate and input into the legislative process.

Id. at 602-05.

17. *Wild Rice*, ¶ 4, 705 N.W.2d at 853.

18. *Id*. Several of the Wild Rice lots were affected by the moratorium due to their location within the preliminary floodway developed by FEMA in June of 1998. Appellee's Brief, *supra* note 5, at 11. FEMA's floodway approval process generally takes eighteen months. *Id*. at 10. Therefore, the City believed the floodway designation process would be complete within a similar amount of time, during which time, city, state, and federal officials met to discuss "flood plan mitigation issues." *Wild Rice*, ¶ 4, 705 N.W.2d at 853.

19. *Wild Rice*, ¶ 5, 705 N.W.2d at 853.

20. *Id*.

21. *Id*.

22. *Id*.

23. *Id*.

24. *Id*. ¶ 6. Rutten also based his suit against the City of Fargo on a claim of tortious interference. *Id*.

25. *Id*.

flood insurance rate-map panel [serve] as the governing panel for all flood-prone areas."[26] Therefore, the city commission voted to lift the moratorium during a public hearing on May 1, 2000.[27]

After the City of Fargo lifted the moratorium, Wild Rice sold five of its lots.[28] A potential buyer who signed a purchase agreement while the moratorium was in place, purchased a lot for $32,900 in May of 2000.[29] "Lots were also purchased in March 2002 for $39,000, in November 2002 for $39,000, in July 2003 for $55,900, and in April 2004 for $59,900."[30] Other sales were also pending during these proceedings.[31]

Wild Rice's inverse condemnation lawsuit appeared before Judge Douglas R. Herman in the District Court of Cass County, East Central Judicial District, North Dakota on October 25-28, 2004.[32] Wild Rice challenged the moratorium, alleging that the government exceeded its power to restrict land use by limiting Wild Rice's property rights, which effectively amounted to a taking.[33] Wild Rice asserted its inverse condemnation claim under both the federal and state constitutions.[34]

The district court dismissed the claim after a bench trial.[35] The court concluded that the twenty-one month moratorium imposed by the City of Fargo did not constitute a taking of Wild Rice's property.[36] Wild Rice appealed the dismissal to the North Dakota Supreme Court.[37] Wild Rice asserted that the "[trial] court erred in dismissing its claim for inverse condemnation because Fargo's [twenty-one]-month moratorium constituted a 'taking' of its property."[38] The North Dakota Supreme Court disagreed and affirmed the trial court's decision.[39]

---

26. *Id*.
27. *Id*.
28. *Id*. ¶ 7.
29. *Id*.
30. *Id*.
31. *Id*.
32. Appellee's Brief, *supra* note 5, at 5.
33. *Wild Rice*, ¶ 9, 705 N.W.2d at 854.
34. *Id*. ¶ 11.
35. *Id*. ¶ 8, 705 N.W.2d at 853-54.
36. *Id*. at 853. Additionally, the trial court ruled in favor of Fargo by determining that "no malicious interference with third-party contracts" had occurred. *Id*. at 853-54. The court also denied Wild Rice's post-trial motions. *Id*. at 854.
37. *Id*. ¶ 1, 705 N.W.2d at 852.
38. *Id*. ¶ 9, 705 N.W.2d at 854.
39. *Id*. ¶ 1, 705 N.W.2d at 852.

II. LEGAL BACKGROUND

Property plays a crucial role in American society.[40] Although property is not defined in the United States Constitution, the opportunity to acquire and possess property is a right recognized as one of the foundations of our political system.[41] In fact, "'[t]he protection of property ownership is a fundamental theme' in the Constitution" at both the federal and state levels.[42] Therefore, to adequately address the importance of property ownership in the United States, this section will focus on the role that property has played through a presentation of both the federal and state takings jurisprudence.

A. FEDERAL TAKINGS JURISPRUDENCE

In general, the United States Supreme Court has defined real property broadly.[43] Conversely, the Takings Clause in the Fifth Amendment of the United States Constitution has been narrowly applied.[44] The Takings Clause provides that private property shall not "be taken for public use, without just compensation."[45] In this context, the term "takings" refers to situations where property owners are compelled to transfer their interests in real or personal property to governmental entities.[46]

However, the Takings Clause does not automatically prohibit governmental interference with property rights.[47] Instead, the Clause's purpose is to ensure that property owners are compensated when the government takes

---

40. *See* Brian J. Nolan, Note, *The Metaphysics of Property: Looking Beneath the Surface of Regulatory Takings Law After* Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 48 ST. LOUIS U. L.J. 703, 708 (2004) ("Property rights hold a unique place in the American system.").

41. *Id.*

42. Akke Levin, Note, *Camping in Lake Tahoe: Does a Temporary Deprivation of All Beneficial Use of Land Justify Rejection of the Categorical* Lucas *Rule?*, 4 NEV. L.J. 448, 449 (2004) (quoting Kimberly Horsely, Comment, *The Abnormalcy of Normal Delay*, 28 PEPP. L. REV. 415, 415 (2001)).

43. *Inversely Yours: Substantive Issues in Inverse Condemnation*, Continuing Legal Education at Vinson & Elkins L.L.P., Houston, Tex. (Jan. 5-7, 2006) *available at* SL049 ALI-ABA 623, 628. Property has been held to include not only real estate and personal property, but also such things as easements, trade secret rights, valid contracts, franchises, and trade routes. *Id.* at 628-29.

44. *Id.* at 628.

45. U.S. CONST. amend. V, cl. 4. "While the Fifth Amendment's requirement that the government must pay just compensation for any land taken for public purpose is straightforward, it has proven difficult in application." Martin J. Foncello, Comment, *Adverse Possession and Takings Seldom Compensation for Chance Happenings*, 35 SETON HALL L. REV. 667, 668 (2005). As a result, federal takings law is relatively unsettled. *Id.* at 667-68.

46. Brent L. Slipka, Case Comment, *Constitutional Law—Inverse Condemnation: Supreme Court Gives Property Owners New Rights,* Palazzolo v. Rhode Island, *533 U.S. 606 (2001)*, 78 N.D. L. REV. 177, 179 (2002).

47. Levin, *supra* note 42, at 449.

their property for public use.[48] The Takings Clause effectively serves as a guarantee "designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[49] This section explains the progression of the Takings Clause through the United States' Supreme Court's decisions regarding: (1) regulatory takings; (2) a per se categorical rule for regulatory takings; (3) an ad hoc factual inquiry for regulatory takings; and (4) temporary regulatory takings.

1. *Regulatory Takings*

The Fourteenth Amendment's Due Process Clause incorporated the Takings Clause, thereby making it applicable to the states.[50] Nonetheless, when a state seeks to deprive a private property owner of their property, the Due Process Clause only affords the state the right to do so through preexisting laws and other forms of fair adjudication.[51] One such way that a state may regulate private property is through an exercise of its police power.[52]

---

48. *Id.* Under the Takings Clause, "[t]he 'public use' limitation prescribes that the government may not take land for whatever purpose it pleases, but may only take for a public purpose." Foncello, *supra* note 45, at 672. Additionally, this limitation requires that for a taking to be considered for public use, it must bear a rational relationship to a conceivable public purpose. *Id.* When making this determination, reviewing courts show deference to the decisions of the legislature regarding what constitutes a public use and it is generally believed that few takings fail to meet this standard. *Id.* at 673. "The second limitation, the payment of 'just compensation,' is a fundamental limitation on the actions of the state." *Id.* It basically provides that property owners should be "fully indemnified for the loss sustained when his property is taken for public use." *Id.* However, private property owners are only compensated for the losses that they actually suffer, not for benefits gained by the government. *Id.*

49. Levin, *supra* note 42, at 449-50 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). This principle was first recognized in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), and later enshrined as the "*Armstrong* principle" in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 320-21 (2002). Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 442 (2004); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) (restating the principle set forth in *Armstrong*); *Armstrong*, 364 U.S. at 49 (establishing the principle that governments should not be allowed to force individual landowners to bear public burdens alone and stressing the importance of the quest for fairness and justice in takings determinations); "*Character of the Governmental Action" in Takings Law: Past, Present, and Future*, Continuing Legal Education at George Mason University School of Law, Arlington, Virginia (Apr. 22-24, 2004) *available at* SJ052 ALI-ABA 459, 464-65 (discussing the decision in *Armstrong* and reiterating the importance of the concepts of fairness and justice in takings determinations).

50. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005). The Fourteenth Amendment was made applicable to the states when it was adopted in 1868. Carl Kirk, Note, *First Church Decides Compensation is Remedy for Temporary Regulatory Takings—Local Governments are 'Singing the Blues,'* 21 IND. L. REV. 901, 904 (1988).

51. Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 196 (2004) [hereinafter Claeys, *Takings on the Rehnquist Court*]. On its own, the Due Process Clause does not guarantee any substantive rights. *Id.* *See also* U.S. CONST. amend. XIV,

State and local governments have broad authority to enact land use regulations through their police power.[53] This authority essentially enables governments to impose regulations without having to compensate the landowners whose property is restricted.[54] Initially, these land use regulations were not subject to scrutiny under the Takings Clause.[55] Instead, only situations of direct government appropriation or actual physical invasion of a person's private property were deemed to be Fifth Amendment Takings.[56] However, over time, the United States Supreme Court began to classify certain government regulations of private property as compensable Fifth Amendment Takings because the regulations were so substantial that the effect created a "regulatory taking."[57]

In *Pennsylvania Coal Co. v. Mahon*,[58] the United States Supreme Court first recognized the concept of "regulatory takings."[59] In *Mahon*, the Pennsylvania Coal Company sold surface rights to specific parcels of property while reserving the right to mine the coal beneath.[60] The company's property and contract rights were subsequently affected by a statute which forbade "the mining of anthracite coal in such way as to cause the subsidence of . . . any structure used as a human habitation."[61]

---

§ 1, cl. 3 (providing through the Due Process Clause no state shall "deprive any person of life, liberty, or property, without due process of law").

52. David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 499 (2004).

53. Rippley v. City of Lincoln, 330 N.W.2d 505, 507 (N.D. 1983). The concept of police power has been understood as the authority through which state or local governments regulate property and land use for an appropriate public purpose. Thomas, *supra* note 52, at 499. Appropriate public purposes under the police power involve "land use regulations that preserve or protect the public health, safety, morals, or welfare." *Id.* at 544.

54. *Rippley*, 330 N.W.2d at 507. Generally, the Fifth Amendment requires just compensation for a taking of private property for public use. Thomas, *supra* note 52, at 544. When enacting land use regulations under the police power, however, a requirement for compensation under the Fifth Amendment is not presumed. *Id.* This lack of compensation is likely related to the fact that the use of the police power comprises a much narrower category than that of general public uses under the Takings Clause. *Id.* Historically, police power regulations have generally been limited to "regulating conduct to which the landowner had no right anyway," primarily as a means to prevent landowners from using their land in a manner which amounted to a nuisance. *Id.* at 545. No landowner has a right to use their land in this way; therefore, no loss or "taking" of anything was caused by the regulation. *Id.* at 543-44.

55. *Lingle*, 544 U.S. at 537.

56. *Id.* Prior to the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, "it was generally thought that the Takings Clause reached *only* a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (emphasis in original)).

57. *Id.*

58. 260 U.S. 393 (1922).

59. *Mahon*, 260 U.S. at 415; *see also Lingle*, 544 U.S. at 537 (discussing the *Mahon* Court's decision that certain "regulatory takings" are compensable under the Fifth Amendment).

60. *Mahon*, 260 U.S. at 412.

61. *Id.* at 412-13.

In its decision, the *Mahon* Court focused on whether the statute constituted a legitimate exercise of police power in regulating a potential safety threat to surface owners.[62] The *Mahon* Court determined that the statute's prohibition made it impossible for the company to mine coal and, in essence, completely destroyed all of the rights that the company had reserved from the surface landowners.[63] As a result, the Court found the statute to be invalid because the prohibition amounted to a "taking," for which just compensation had not been paid.[64]

The Court recognized that the United States Constitution protects private property ownership from physical appropriation.[65] This protection is afforded by the limits placed on the government's power to define a property owner's interests.[66] These limitations serve as a fundamental check on the government's ability to restrict the rights of private property owners.[67] Without these limits, human nature itself would naturally cause the unchecked restriction of property and ultimately the disappearance of all private property.[68]

These considerations led to the adoption of a general rule that "while property may be regulated to a certain extent, if [a] regulation goes too far it will be recognized as a taking."[69] However, the decision in *Mahon* offered little guidance as to when, and under which circumstances, a given regulation would be seen as having gone "too far" under the Takings

---

62. *Id*. at 413-14.

63. *Id*. at 414. The Pennsylvania Coal Company could not be forbidden from mining the coal through the state's exercise of its police power, because the company reserved the right to mine it through the deed maintained by the homeowners. *Id*. Therefore, the homeowners had waived their claims to damages from this mining. *Id*. Damage to a single house also does not constitute a public nuisance justifying the use of the state's police power because it is not common to all homeowners of the area or public in nature. *Id*. at 413. However, even if it was common to all homeowners in the area, the homeowners still deeded away their right to claim damages of this sort by allowing the company to reserve its right to mine the coal. *Id*. at 416.

64. *Id*. at 414-15; *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127-28 (1978) (discussing the Court's holding in *Mahon*).

65. *Mahon*, 260 U.S. at 415-16; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (discussing Justice Holmes' reasoning in *Mahon*).

66. *Mahon*, 260 U.S. at 415-16.

67. *Id*. at 415.

68. *See id*. (providing that when the "seemingly absolute protection [of the Fifth and Fourteenth Amendments] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears").

69. *Id*. Generally, a taking has been determined to likely occur "when a regulation concentrates economic injuries disproportionately on a few individuals." Charles V. Dumas, III, Note, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency: *The Supreme Court Reaffirms the Importance of Land-Use Planning and Wisely Refuses to Set Concrete Outer Limits*, 53 CATH. U. L. REV. 209, 211 (2003). When making determinations of this sort, the law specifically seeks to find a "middle ground between avoiding individualized economic burdens and meeting the goals of necessary land-use planning." *Id*. In essence it strives to "strike a balance between the rights of individual property owners and the public." *Id*.

Clause.[70] As a result, the determination of what constitutes a "taking" for purposes of the Fifth Amendment has been met with considerable difficulty.[71]

2. *Per Se Categorical Rule of Regulatory Takings*

In an effort to clarify the uncertainty surrounding the determination of when a regulation goes "too far," the United States Supreme Court has established two bright-line rules.[72] These bright-line rules are applicable when a physical invasion has occurred and where a regulation denies all economic use of property.[73] The bright-line, or categorical per se rule, was first recognized in *Lucas v. South Carolina Coastal Council*[74] and applied to regulations denying all economic use of property.[75]

In *Lucas*, a takings claim was alleged in response to a ban placed on coastal development.[76] A property owner purchased beachfront lots and had planned to build single-family homes.[77] Two years after his purchase, the state of South Carolina enacted legislation that established an erosion line and barred all new development within twenty feet of the erosion line.[78] This legislation prevented the property owner from building on his lots due to their location within twenty feet of the erosion line.[79] The Court determined that a regulatory taking had occurred because the legislation essentially deprived the property owner of all reasonable economic use of his property, thereby rendering the property valueless.[80]

The *Lucas* Court reiterated the now famous passage from *Mahon*: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[81] The *Lucas* Court determined

---

70. *Lucas*, 505 U.S. at 1015.

71. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978).

72. *A Short History of Regulatory Takings—Where We Have Been and What are the Hot Issues of Today*, Continuing Legal Education at Pacific Legal Foundation, Sacramento, California (Sept. 29-Oct. 1, 2005) *available at* SL012 ALI-ABA 1, 25.

73. *Id.* at 25.

74. 505 U.S. 1003 (1992).

75. *Lucas*, 505 U.S. at 1016.

76. *Id.* at 1009.

77. *Id.* at 1006-07.

78. *Id.* at 1007.

79. *Id.*

80. *Id.* at 1029-30; *see also* Claeys, *Takings on the Rehnquist Court*, *supra* note 51, at 206 (discussing the Court's holding in *Lucas*).

81. *Lucas*, 505 U.S. at 1014 (quoting Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). In his explanation of the distinction between total and partial restraints, Justice Scalia, who wrote the majority opinion, stated that:

> [I]n the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the

that property owners have suffered takings when they are required to sacrifice all economically beneficial uses of their property by leaving the property economically idle.[82] In these instances, the property owners do not receive any benefit in return for giving up specific rights or uses to their property as required by and set forth in the regulation to aid the common good.[83] As a result, property owners are forced to bear public burdens alone, while not receiving any benefit in return for their property.[84] Also, the State can avoid compensating a property owner only if the proscribed uses were not part of the property owner's title when it was acquired.[85] In essence, the *Lucas* per se rule seeks to prevent private property from being "pressed into some form of public service under the guise of mitigating serious public harm" through the government's exercise of its police power.[86] The *Lucas* decision resulted in a major victory for property owners because it provided that regulations, which deprive landowners of all economic use of their land, amount to takings that require compensation.[87] This principle holds true regardless of whether important governmental interests are served by the regulations.[88]

However, the Court stressed that this per se rule only applies in those cases where a regulation denies a property owner all beneficial use of his or

---

> legislature is simply 'adjusting the benefits and burdens of economic life.' [Rather, such regulations] carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Id. at 1017-18 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (cited in Claeys, *Takings on the Rehnquist Court*, *supra* note 51, at 206)).

82. *Id*. at 1019; *see also* Claeys, *Takings on the Rehnquist Court*, *supra* note 51, at 206 ("[A]n owner suffers a per se taking when his economic losses reach 100%.").

83. *Lucas*, 505 U.S. at 1017-18; *see also* Levin, *supra* note 42, at 455 (discussing the application and effect of the categorical rule created by the *Lucas* court).

84. *Lucas*, 505 U.S. at 1018.

85. *Id*. at 1027; *see also* Dumas, *supra* note 69, at 215 (reiterating the principle set forth in *Lucas*).

86. *Lucas*, 505 U.S. at 1018; *see also* Kimberly A. Selemba, *The Interplay Between Property Law and Constitutional Law: How the Government (Un)Constitutionally "Takes" Land Dirt Cheap*, 108 PENN ST. L. REV. 657, 662 (2003) (discussing the categorical per se rule recognized in *Lucas*). The *Lucas* Court proffered three reasons in support of its determination that a deprivation of all economically beneficial use of land amounts to a taking. Ann Oshiro, Note, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: *A Significant Ripple in Takings Jurisprudence*, 41 HOUS. L. REV. 167, 186 (2004). First, the Court reasoned that it is unrealistic to simply assume that the government has adjusted the benefits and burdens of economic life in order to secure an average reciprocity of advantage to all property owners and parties concerned. *Id*. Second, the Court determined that requiring the government to compensate property owners will not have a negative impact on the government's power and ability to regulate because the *Lucas* rule only applies in rare situations. *Id*. Third and finally, the Court reiterated the belief that if compensation is not required in situations where the categorical *Lucas* rule applies, it creates a risk of forcing property into the realm of public service. *Id*.

87. Oshiro, *supra* note 86, at 178-79.

88. *Id*. at 179.

her property.[89] As a result, even when a regulation diminishes the value of a landowner's property by ninety-five percent, the *Lucas* framework does not apply.[90] Therefore, anything less than a total taking must be analyzed under a partial taking analysis.[91]

3. *Ad Hoc Factual Inquiry for Regulatory Takings*

State and federal governments regularly impose regulations which do not deprive landowners of all economically beneficial use of their property.[92] Nevertheless, regulations still restrict the ability of property owners to use their property.[93] Therefore, under certain circumstances a regulation can amount to a "partial regulatory taking."[94] The United States Supreme Court has not developed a bright-line formula to determine when justice and fairness require the government to compensate landowners' economic injuries.[95] In turn, this determination is often made on a case-by-case basis, taking into account the particular circumstances involved.[96]

In *Penn Central Transportation Co. v. City of New York*,[97] the United States Supreme Court recognized that when engaging in these case-by-case determinations, or "ad hoc factual inquiries," several factors are particularly significant.[98] These factors are "[(1)] [t]he economic impact of the regulation on the claimant[;] . . . [(2)] the extent to which the regulation has

89. *Lucas*, 505 U.S. at 1019, n.8. Additionally, the categorical *Lucas* rule does not apply when a regulation only amounts to a prohibition of a use that has been recognized as a common nuisance. Levin, *supra* note 42, at 455.

90. *Lucas*, 505 U.S. at 1019, n.8.

91. Levin, *supra* note 42, at 455.

92. Dumas, *supra* note 69, at 216. Zoning laws provide an example of regulations that do not deny a landowner of all economically beneficial use of their property. *Id.* at 216 n.47. A specific example of a zoning regulation would be that of "[a] landmark preservation ordinance . . . that prohibits certain types of property development [and] may affect the value of that property without rendering it valueless to the owner." *Id.* at 216. "While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting) (emphasis in original). Therefore, zoning laws have been consistently viewed as permissible governmental actions even when the laws prohibit the most beneficial use of the property. Dumas, *supra* note 69, at 218.

93. Dumas, *supra* note 69, at 216.

94. *Id.* A "partial regulatory taking" has been defined as a deprivation which is less than the entire use or value of the property or interest therein. Eagle, *supra* note 49, at 461.

95. *Penn Cent.*, 438 U.S. at 124.

96. *Id.*

97. 438 U.S. 104 (1978).

98. *Penn Cent.*, 438 U.S. at 124.

interfered with distinct investment-backed expectations[;] . . . [and] [(3)] the character of the governmental action."[99]

In *Penn Central*, a property owner brought a takings claim against the City of New York after the city refused to approve construction plans for a fifty-story office building over Grand Central Terminal.[100] The construction was not approved due to the City's designation of Grand Central Terminal as a landmark under New York City's Landmarks Preservation Law.[101] The Supreme Court ruled that a taking may occur under a land regulation even where that regulation falls short of eliminating all economically beneficial use.[102] Moreover, when analyzing potential takings, the parcel of property in question must be viewed as a whole and not divided into segments to determine if the rights of one segment were completely extinguished.[103]

"There are practical planning and administrative reasons for considering the entire property when determining whether regulatory impact amounts to a taking."[104] After all, if courts based their takings analysis only upon the affected parcels, serious consequences would likely result.[105] Specifically, the government would have to compensate property owners

---

99. *Id*. These factors have been referred to as the "*Penn Central* analysis." Slipka, *supra* note 46, at 181. Based on these factors, "[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." *Penn Cent*., 438 U.S. at 124 (internal citations omitted).

For discussions of the economic impact factor, see, e.g., Cane Tenn., Inc. v. United States, 57 Fed. Cl. 115, 123 (Fed. Cl. 2003) ("[T]he proper measure of economic impact is the comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action."); Leon County v. Gluesenkamp, 873 So. 2d 460, 467 (Fla. Dist. Ct. App. 2004) (stating that the economic impact criterion of the *Penn Central* analysis requires a plaintiff to establish a serious financial loss as a result of the regulation).

For discussions of the character of governmental action factor, see, e.g., Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1366 (Fed. Cir. 2004) (recognizing that a taking can result when an extraordinary delay, which the Supreme Court and other courts have defined as requiring a "substantial length of time," occurs in the governmental decisionmaking process); Appollo Fuels, Inc. v. United States, 54 Fed. Cl. 717, 737 (Fed. Cl. 2002) (relying on the *Wyatt* decision's determination that takings can result from extraordinary delays in the governmental decisionmaking process only upon a finding of extreme circumstances); Wyatt v. United States, 271 F.3d 1090, 1098 (Fed. Cir. 2001) (recognizing that takings may occur through an extraordinary delay in the governmental decisionmaking process, however, acknowledging that a delay must be substantial and that delays lasting up to eight years have been condoned by the Supreme Court); Byrd v. City of Hartsville, 620 S.E.2d 76, 82 (S.C. 2005) (holding that a two-month delay did not amount to a taking and that the City's zoning regulation was not unreasonable).

100. *Penn Cent*., 438 U.S. at 115-19.

101. *Id*. at 115-16.

102. *Id*. at 124 (outlining the pertinent factors for analysis).

103. *Id*. at 130-31.

104. Freilich, *supra* note 16, at 616.

105. *Id*.

for de minimis impacts caused by regulations, regardless of the remaining usefulness of the parcels as a whole.[106]

Ultimately, the Court held that Penn Central did not suffer a taking.[107] The Court found that the property owners retained beneficial use of their property, including the opportunity to enhance and develop additional properties in their possession.[108] Also, the Court determined that the company based its claim primarily on development potential, which was a dimension of property not recognized under the factors set forth by the Court.[109]

Penn Central serves as the main guide in the resolution of regulatory takings claims falling outside the scope of physical takings or those depriving owners of all economically beneficial use of their property.[110] When the Court decides regulatory takings claims, it balances an owner's lost economic value and expectations against the social value the government hopes to gain through the regulation.[111] Instead of supplying precise variables, this balancing test provides important guideposts to use in the final determination of whether just compensation is required.[112] *Penn Central* essentially refined the holding of *Mahon* to conform it to modern sensibilities and firmly established a basic interest balancing test for regulatory takings.[113]

As a whole, this analysis favors the government.[114] It presumes that regulations have high social value if they are reasonably related to the promotion of general welfare.[115] Nevertheless, when a regulation causes a property owner to experience a concrete economic loss, the analysis favors

---

106. *Id*.

107. *Penn Cent*., 438 U.S. at 138. The Court determined that "[t]he restrictions imposed are substantially related to the promotion of the general welfare." *Id*.

108. *Id*.

109. Claeys, *Takings on the Rehnquist Court*, *supra* note 51, at 197.

110. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

111. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1556 (2003) [hereinafter Claeys, *Takings*].

112. Dumas, *supra* note 69, at 220.

113. Oshiro, *supra* note 86, at 176; *see also* Claeys, *Takings on the Rehnquist Court*, *supra* note 51, at 192 (stating that the *Penn Central* decision "announced a utilitarian interest-balancing formula").

114. Claeys, *Takings*, *supra* note 111, at 1557.

115. *Id*. The social gains expected by the regulation are "concrete, immediate, and substantial" whenever it is found to be "'reasonably related to the promotion of the general welfare.'" Claeys, *Takings on the Rehnquist Court*, *supra* note 51, at 193 (quoting Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 131 (1978)). "On the other side, any social gains from protecting the institution of property rights seem diffuse and remote." *Id*. The deferential nature of this analysis places it at odds with other balancing tests in property law. Claeys, *Takings*, *supra* note 111, at 1557. These other tests have a tendency to discount the social value of given land uses if they interfere with an owner's ability to exercise free action over his or her property. *Id*. For example, nuisance law stresses that "it is in the general public interest to permit the free play of individual initiative within limits." *Id*.

the property owner.[116] In general, however, the decision in *Penn Central* further provides support for the government.[117] After all, in *Penn Central's* wake, property owners, in essence, relinquished their right to complain about their inability to develop undeveloped property or to use their property for other purposes.[118] As long as the owner retains some use of their property, the law discourages complaints based on the potential to develop other uses.[119]

4. *Temporary Regulatory Takings*

In the case of temporary regulatory takings, all reasonable use of the property has not been destroyed because future uses remain.[120] When temporary regulations restrict the use of property, it is only the temporal aspect of the property that is affected, not all of the rights and uses associated with it.[121] As a result, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[122] the Supreme Court decided that *Lucas's* per se rule is inapplicable in cases involving temporary takings.[123]

In *Tahoe-Sierra*, the Tahoe Regional Planning Agency imposed a thirty-two month moratorium to protect the water clarity of Lake Tahoe by barring the development of specific zones surrounding the lake.[124] The main issue in *Tahoe-Sierra* involved a determination of whether a temporary taking of this nature sufficiently impeded all economically viable uses of the property so as to constitute a taking under the *Lucas* standard.[125] The *Tahoe-Sierra* Court found that if a regulation is temporary in nature, or if any value or use remains with the property, the *Lucas* per se standard is inapplicable.[126]

---

116. Claeys, *Takings on the Rehnquist Court*, *supra* note 51, at 193.

117. *Id.*

118. *See id.* (explaining that as long as owners are left with some use of their property, the law discourages complaints about their potential to develop other uses).

119. *Id.*

120. Freilich, *supra* note 16, at 615.

121. *Id.* at 614.

122. 535 U.S. 302 (2002).

123. *Tahoe-Sierra*, 535 U.S. at 333. The *Tahoe-Sierra* Court recognized that the categorical *Lucas* rule was carved out for the "'extraordinary circumstance' in which the government deprives a property owner of all economic use." *Id.* at 337 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992)).

124. *Id.* at 306-07.

125. *Id.* at 306; *see also* Freilich, *supra* note 16, at 592-93 (discussing the factual background and issues presented in *Tahoe-Sierra*).

126. *Tahoe-Sierra*, 535 U.S. at 331-32. "No court has yet held that a temporary moratorium can result in a *Lucas*-type taking. Indeed, all the decisions are to the contrary." Freilich, *supra* note 16, at 613. Additionally, in its determination that the *Lucas* standard does not apply to temporary takings of this sort, the Court has confirmed that *Penn Central* continues to remain the

In *Tahoe-Sierra*, the moratorium only placed a ban on the property for a limited period of time and, therefore, the future developmental use of the property was preserved.[127] Future developmental use has substantial present value, which differentiates it from a permanent ban on the development of property.[128] The *Tahoe-Sierra* Court further explained, "[g]iven the importance and long-standing use [of] temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism."[129]

In *Tahoe-Sierra*, the Court also determined that delays in the sale or development of property during the imposition of a temporary land use regulation may result in fluctuations in value.[130] Nonetheless, these are simply incidents of ownership and do not justify compensation.[131] The United States Supreme Court's decision in *Palazzolo v. Rhode Island*[132] further evidenced this reasoning.[133]

---

dominant case in the field of regulatory takings. Claeys, *Takings on the Rehnquist Court*, *supra* note 51, at 214.

127. *Tahoe-Sierra*, 535 U.S. at 331-32.

128. Freilich, *supra* note 16, at 594.

129. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 777 (9th Cir. 2000), *cert. granted*, 533 U.S. 948 (2001) (cited in Freilich, *supra* note 16, at 594). Freilich explains that:

> Interim development controls and moratoria are fundamental to a rational, defensible, planning process. . . . [Courts] since that time have recognized that a temporary halt on development activity during a period of study is not only reasonable, but also ensures that [a] government acts in a manner that is thoughtful and deliberate, not arbitrary and capricious.
>
> . . . .
>
> The reasonableness of a moratorium is measured by both the length of its duration and its relation to the underlying studies supporting change in the regulations. Thus, an enacting authority must diligently pursue completion of the planning process, including studies, analyses, public participation, and the drafting of legislation. The need for the moratorium is justified by the need to pursue further study of the matter at hand. If, however, having established a legitimate need, the government fails to pursue the necessary studies or to work diligently toward resolution of the matter, the substantive validity of the moratorium can be called into question.
>
> Moratoria have been set aside under substantive due process grounds when the restraint has been determined to be accompanied by studies unreasonable in scope, adopted in bad faith, or otherwise arbitrary or capricious. Where the government enacts a moratorium with the intent of blocking a specific development, with no legitimate, good faith interest in addressing a larger planning or environmental concern, unlawful discrimination may be found.

Freilich, *supra* note 16, at 600-01.

130. *Tahoe-Sierra*, 535 U.S. at 332 (citing Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980)).

131. *Id.*

132. 533 U.S. 606 (2001).

133. *Palazzolo*, 533 U.S. at 632.

In *Palazzolo*, a landowner brought an inverse condemnation action against the Rhode Island Coastal Resources Management Program (CRMP), following the enactment of a regulation that protected coastal wetlands.[134] The landowner claimed that the regulation resulted in a taking of the landowner's property without compensation and thereby violated the Fifth Amendment's Takings Clause.[135] The landowner further asserted that the regulation deprived him of all economically beneficial use of his property.[136]

In *Palazzolo*, the Court found that the landowner had not been deprived of all economic value because the property retained significant worth in its future developmental value.[137] The Court specifically reasoned that "[a] regulation permitting a landowner to build a substantial residence . . . does not leave the property 'economically idle.'"[138] As a result, the *Palazzolo* Court ultimately held that a reduction in the value of property due to a governmental regulation is not sufficient to amount to a taking.[139] Instead, a property owner must show that the regulation resulted in a deprivation of all economically beneficial value.[140] Therefore, the Fifth Amendment's Takings Clause had not been violated, and the property owner was not entitled to just compensation.[141]

The Takings Clause has played a critical role in the development of federal takings jurisprudence.[142] However, since this clause was made applicable to the states by incorporation through the Fourteenth Amendment's Due Process Clause, it has also greatly affected state takings jurisprudence.[143] Therefore, it is crucial to pay attention to the effect the Takings Clause and its state counterpart have had on the development of North Dakota's takings jurisprudence.

---

134. *Id.* at 614-15.
135. *Id.* at 615.
136. *Id.* at 615-16.
137. *Id.* at 616.
138. *Id.* at 631 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).
139. *Id.*
140. *Id.* at 631-32.
141. *Id.*
142. *See generally* Foncello, *supra* note 45, at 667-68 ("The Takings Clause has become a hotbed of the Constitution, with its panoply of precedent stretching and twisting to fit into the year's new litigation, potentially as numerous as the regulations that invade every aspect of our modern life.").
143. *See* Kirk, *supra* note 50, at 904 (discussing the effect of the application of the Takings Clause to the states).

B. NORTH DAKOTA TAKINGS JURISPRUDENCE

The North Dakota Constitution, similar to the Fifth Amendment's Takings Clause, provides a guarantee that "[p]rivate property shall not be taken or damaged for public use without just compensation."[144] The North Dakota Supreme Court determined that the state constitution provides an even broader protection for property owners against takings than the federal constitution.[145] The North Dakota Constitution was intended to afford landowners the right to possess property in addition to those rights which make property valuable.[146] As with the United States Supreme Court, the North Dakota Supreme Court has not created a set formula or clear guidelines in its takings jurisprudence.[147] Therefore, to explain North Dakota's takings jurisprudence, this section examines the progression of property ownership through an analysis of the state's police power and eminent domain and inverse condemnation actions.

1. *North Dakota's State Police Power*

Under the North Dakota State Constitution, the police power provides state and local governments broad authority to enact land-use regulations without having to compensate landowners for restrictions placed upon the use of their property.[148] More specifically, government regulations and ordinances do not constitute takings of property for public use simply because they diminish property value or disallow the best and highest use of property.[149] Instead, government regulations only constitute takings for

144. N.D. CONST. art. I, § 16.

145. Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987).

146. *Id.*

147. Minch v. City of Fargo, 332 N.W.2d 71, 72-73 (N.D. 1983).

148. L.A. Braunagel v. City of Devils Lake, 2001 ND 118, ¶ 16, 629 N.W.2d 567, 572; *see, e.g.*, *Hjelle*, 413 N.W.2d at 346 (acknowledging the North Dakota Supreme Court's recognition of the state's authority to enact land use regulations under its police power); Rippley v. City of Lincoln, 330 N.W.2d 505, 507 (N.D. 1983) (providing that the state has broad authority to enact land use regulations under its police power without having to compensate landowners for the restrictions placed on their property); Kraft v. Malone, 313 N.W.2d 758, 761 (1981), *overruled on other grounds by* Shark v. Thompson, 373 N.W.2d 859 (N.D. 1985) (recognizing the broad authority of the state to enact land use regulations through an exercise of its police power); Eck v. City of Bismarck, 283 N.W.2d 193, 197 (N.D. 1979) (acknowledging the state's broad authority under its police power to enact land use regulations without having to compensate property owners whose land has been restricted).

149. *See, e.g.*, *L.A. Braunagel*, ¶ 16, 629 N.W.2d at 572 ("A zoning ordinance does not constitute a taking of property for public use merely because it diminishes the value of the regulated property or disallows the best and highest use of the property."); *Rippley*, 330 N.W.2d at 507 ("[A] zoning ordinance . . . does not constitute a taking for which compensation must be paid merely because it diminishes the value of the regulated property or disallows the best and highest use of the property."); *Eck*, 283 N.W.2d at 197 ("A zoning ordinance . . . will withstand constitutional scrutiny even though it diminishes the value of the regulated property or disallows a

public use when they deprive a landowner of all or substantially all reasonable uses of their property.[150] Additionally, when determining if a restriction amounts to a taking, the court looks to the effect that it has on property as a whole, rather than the effect on individual interests.[151]

The state's power to impose land use regulations under its police power is not without limits.[152] Regulations must bear a reasonable relationship to a legitimate governmental purpose.[153] Moreover, these regulations must not be arbitrary or deprive a property owner of all, or substantially all, reasonable uses of his land.[154] Despite these limitations, the state's police power remains an important method of internal regulation.[155] The police power affords the state the ability to preserve public order and insures to property owners the uninterrupted enjoyment and use of their property so long as this use does not interfere with the identical rights of other property owners.[156] In addition to the police power, both federal and state governments also possess the power to take private property for public use through their inherent power of eminent domain.[157]

2. *Eminent Domain and Inverse Condemnation Actions*

The North Dakota Supreme Court has experienced difficulty distinguishing the State's police power from its power of eminent domain.[158] In fact, the court has specifically stated that:

> The characterization of the State's action as a noncompensable regulation under the police power as opposed to a compensable

---

use that the property owner considers to be the most valuable use of his property.") (internal citations omitted).

150. *See L.A. Braunagel*, ¶ 16, 629 N.W.2d at 572 (reiterating the above stated principle); *Rippley*, 330 N.W.2d at 507 (providing that takings of this sort entitle a landowner to just compensation through claims of inverse condemnation); *Kraft*, 313 N.W.2d at 761 (stating that land use regulations must not "deprive a property owner of all or substantially all reasonable uses" of their land).

151. *Hjelle*, 413 N.W.2d at 346-47. In its application of this rule, otherwise known as the "parcel-as-a-whole rule," the North Dakota Supreme Court has specifically relied upon *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). *Id*. *Keystone* asserted that a property owner possesses a bundle of property rights and "[t]he destruction of one 'strand' of the bundle [of property rights] is not a taking because the aggregate must be viewed in its entirety." *Keystone*, 480 U.S. at 480 (quoting Andrus v. Allard, 444 U.S. 51, 65 (1979)); *see also Hjelle*, 413 N.W.2d at 347 (holding that a regulation, which deprived a property owner of one particular future use of their property, did not diminish the value or usefulness of the premises as a whole).

152. *Eck*, 283 N.W.2d at 197.

153. *Id*.

154. *Id*.

155. Thomas, *supra* note 52, at 501.

156. *Id*.

157. Slipka, *supra* note 46, at 179.

158. *Eck*, 283 N.W.2d at 198.

> taking under the power of eminent domain is not susceptible to any easy formulation, but, rather, often turns on difference of degree. [After all,] [b]oth involve some curtailment of private property rights.[159]

The State's power of eminent domain provides the state the authority to "take" or "damage" private property for public use if the private property owner is compensated for the taking or damaging.[160] To enforce this power, the State effectuates a taking of private property through eminent-domain proceedings.[161]

In addition to eminent domain proceedings, inverse condemnation actions can be applied to situations in which private property has been taken or damaged without an owner's consent and where condemnation proceedings have not occurred.[162] In these situations, an inverse condemnation claim may be brought to afford a property owner the constitutional guarantee of just compensation in the occurrence of a property taking.[163] However, the North Dakota Supreme Court has explained that "[a] landowner cannot force a permanent taking upon [a] governmental body if the taking is reversible and the government wants to halt [it]."[164]

---

159. *Id.* (quoting Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 755 (N.D. 1978), *appeal dismissed,* 440 U.S. 901 (1979)) (internal citations omitted).

160. *Eck*, 283 N.W.2d at 197. "Just compensation in eminent domain [actions] has come to mean a fair market value standard of what a willing buyer would pay to a willing seller." Kirk, *supra* note 50, at 905.

161. *Eck*, 283 N.W.2d at 197. The power of eminent domain is believed to be of political necessity. Foncello, *supra* note 45, at 672.

> The sovereign would find it difficult, if not impossible, to construct highways, bridges, sewers, waterlines, or any other public necessities that may arise, without the power of eminent domain. It would be difficult for the government to piece together enough voluntary transactions to complete one of these projects. The high transaction costs associated with trying to find the landowners and then to successfully negotiate a fair price may deter progress and frustrate public goals. The government can bypass these difficulties by exercising the right of eminent domain.

Id.

162. *Eck*, 283 N.W.2d at 198.

163. *Id.* at 198-99 (quoting Donaldson v. City of Bismarck, 3 N.W.2d 808, 817 (1942)). "Inverse condemnation is defined 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.'" Foncello, *supra* note 45, at 673-74 (quoting United States v. Clarke, 445 U.S. 253, 257 (1980)). Inverse condemnation claims are deemed to be inverse "because the landowner rather than the government institutes the proceedings for condemnation." Kirk, *supra* note 49, at 906.

164. Rippley v. City of Lincoln, 330 N.W.2d 505, 511 (N.D. 1983). Instead, under its police power, a governmental body can choose to rescind a regulation. *Id.* However, under these circumstances, the governmental body is still required to compensate the property owner for a temporary taking which is "measured by the time period between the date the regulation took effect and the date it was rescinded." *Id.* On the other hand, if the government should choose to retain the regulation, the landowner is entitled to compensation for a permanent taking of this property. *Id.*

Additionally, in *Eck v. City of Bismarck*,[165] the North Dakota Supreme Court determined that an action of inverse condemnation must have substantial support.[166] A property owner may not rely entirely on a mere reduction in their property's market value to support his or her claim.[167] In general, a property owner's damage can be characterized as the special damage sustained in excess of that experienced by the general public.[168]

In *Eck*, a property owner brought an inverse condemnation suit against the City of Bismarck for limiting the owner's land uses by the city's enactment of, and later refusal to amend, a zoning ordinance.[169] The court recognized that "in every North Dakota case concerning an action for inverse condemnation . . . the alleged taking or damaging resulted from a [d]irect physical disturbance of a right, either public or private, that the property owner enjoyed in connection with his property."[170] In these cases, the government went beyond merely regulating private property use and

165. 283 N.W.2d 193 (N.D. 1979).

166. *Eck*, 283 N.W.2d at 197-98.

167. *Id.*; *see also* L.A. Braunagel v. City of Devil's Lake, 2001 ND 118, ¶ 19, 629 N.W.2d 567, 573 ("[A] mere reduction in the market value of property cannot serve as the basis for an inverse condemnation claim.").

168. *Eck*, 283 N.W.2d at 199.

169. *Id.* at 195.

170. *Id.* at 199; *see* Filler v. City of Minot, 281 N.W.2d 237, 244 (N.D. 1979) (finding damages in the form of a loss of visibility between traffic on the highway and the landowner's property); Guerard v. State, 220 N.W.2d 525, 529 (N.D. 1974) ("[A] [d]iversion of public traffic does not create a right to compensation."); Maragos v. City of Minot, 191 N.W.2d 570, 572 (N.D. 1971) (holding that the six year statute of limitations barred the plaintiffs' inverse condemnation action); Jamestown Plumbing & Heating Co. v. City of Jamestown, 164 N.W.2d 355, 362 (N.D. 1969) ("[N]o legal damage results where traffic is diverted by authorities and incidental loss ensues."); Wilson v. City of Fargo, 141 N.W.2d 727, 732 (N.D. 1965) (holding that a municipal corporation is liable for any consequential damages that result during an exercise of its eminent domain power); N. Pac. Ry. Co. v. Morton County, 131 N.W.2d 557, 568 (N.D. 1964) (finding that the state may be sued in cases arising under contract for damages resulting from the public use of private property); Kenner v. City of Minot, 98 N.W.2d 901, 907 (N.D. 1959) (determining that a landowner cannot recover damages for a public improvement unless it could not have been reasonably anticipated by the landowner); Little v. Burleigh County, 82 N.W.2d 603, 614 (N.D. 1957) (holding that the relocation of a highway grade resulted in a taking warranting compensation); Kinnischtzke v. City of Glenn Ullin, 57 N.W.2d 588, 596-97 (N.D. 1953) (determining that a municipality is liable for the damages that occur as a result of its negligence); Conlon v. City of Dickinson, 5 N.W.2d 411, 414-15 (N.D. 1942) (finding that a landowner deserved to be compensated for damage to property that was both extensive and resulted in a reduction of the property's rental value); Messer v. City of Dickinson, 3 N.W.2d 241, 252 (N.D. 1942) (affirming the trial court's decision which granted damages to a property owner as compensation for a nuisance maintained on the property); Hamilton v. City of Bismarck, 300 N.W. 631, 634 (N.D. 1941) (holding that the City of Bismarck was not liable to the plaintiff for damages resulting from an unusual and unanticipated incident); King v. Stark County, 271 N.W. 771, 774-75 (N.D. 1937) (applying the rule of reasonableness when determining if just compensation is required); Mayer v. Studer & Manion Co., 262 N.W. 925, 927 (N.D. 1935) (concluding that because the property owner's claim was based on negligence, no "obligation to compensate for private property taken or damaged for public use" existed).

instead disturbed the owner's property rights.[171] The North Dakota Supreme Court hesitated to significantly extend the reach of inverse condemnation.[172] Accordingly, the court refused to compensate the property owner for the City of Bismarck's mere enactment of and refusal to amend an ordinance.[173]

North Dakota courts are hesitant to support inverse condemnation actions because these actions can have severe consequences.[174] For example, inverse condemnation actions can prevent or inhibit land-use planning and cause a community to suffer staggering financial burdens.[175] However, claims of inverse condemnation can be useful and appropriate in certain instances.[176] Specifically, these claims are appropriate when a governmental entity has prohibited all, or substantially all, reasonable uses of property and thereby displaced the property owner's interest.[177]

In *Rippley v. City of Lincoln*,[178] a property owner brought a claim of inverse condemnation against the City of Lincoln following the enactment of a comprehensive zoning ordinance.[179] This zoning ordinance rezoned twenty acres of the property owner's land from residential use to public use in order to accommodate future construction plans.[180] Following the enactment of this ordinance, the City of Lincoln failed to initiate eminent domain proceedings or to compensate the property owners for the taking.[181] As a result, the property owners began an inverse condemnation claim and asserted that the zoning ordinance constituted a taking of their land through its deprivation of all reasonable uses.[182]

The North Dakota Supreme Court found that the property owner's inverse condemnation claim for just compensation was appropriate because the property owner had been deprived of all reasonable use of his property.[183] The *Rippley* court reiterated the United States Constitution's demand for just compensation when regulatory takings, and takings in

171. *Eck*, 283 N.W.2d at 199.
172. *Id*.
173. *Id*.
174. *Id*. at 200-01.
175. *Id*.
176. *Id*. at 201.
177. Rippley v. City of Lincoln, 330 N.W.2d 505, 507 (N.D. 1983).
178. 330 N.W.2d 505 (N.D. 1983).
179. *Rippley*, 330 N.W.2d at 506.
180. *Id*. This zoning ordinance placed the property owner's land in a public use zone, which was to be used solely for governmental purposes and prohibited all residential, commercial, and industrial uses. *Id*.
181. *Id*.
182. *Id*.
183. *Id*. at 509.

general, occur.[184] This demand requires that compensation be paid for the duration of the regulation from the moment that it first amounted to a taking until the date that it is rescinded or otherwise amended.[185] A regulation is not rendered any less of a constitutional taking simply because the government is able to rescind or amend the regulation and make it temporary in nature.[186] Furthermore, in its decision, the court acknowledged that the Takings Clause does not require that a taking be both permanent and irrevocable.[187]

Ultimately, the *Rippley* court determined that a taking can be temporary in nature and entitle a landowner to just compensation.[188] As long as landowners are able to prove that a government regulation deprived them of all reasonable use of their property, landowners are justified in being compensated.[189] Nevertheless, the court stressed that landowners cannot force a permanent taking on the government if the taking is reversible and the government chooses to end the taking.[190]

Takings jurisprudence at both the state and federal levels has evolved significantly yet continues to remain relatively unsettled.[191] The Fifth Amendment's Takings Clause requirement that the government pay just compensation for any private land taken for a public purpose appears straightforward.[192] In application, however, the question of what actually constitutes a taking under the Fifth Amendment has proven to be a question of considerable difficulty.[193] As a result, the Takings Clause has become a source of frequent discussion under the Constitution as its precedent evolves due to the unending litigation that arises as regulations continue to invade many aspects of modern life.[194]

---

184. *Id.* at 510.

185. *Id.*

186. *Id.* (citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., concurring)).

187. *Id.*

188. *Id.* at 511.

189. *Id.*

190. *Id.*

191. Foncello, *supra* note 45, at 667.

192. *Id.*

193. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.").

194. Foncello, *supra* note 45, at 667-68.

III. ANALYSIS

The decision in *Wild Rice River Estates, Inc. v. City of Fargo*,[195] written by Chief Justice VandeWalle, unanimously affirmed the district court's holding that the City of Fargo's moratorium on building permits did not amount to a taking of Wild Rice's property under either the federal or state constitution.[196] Three arguments were presented by Wild Rice as a basis for its takings claim.[197] First, Wild Rice claimed that the moratorium amounted to a per se categorical taking.[198] Next, Wild Rice claimed that even if the moratorium was not a per se categorical taking, a taking still occurred under the *Penn Central* analysis.[199] Finally, based on the principles presented in *Rippley v. City of Lincoln*, Wild Rice claimed that the City of Fargo was required to provide just compensation for the alleged taking.[200]

Additionally, Wild Rice argued that the trial court erred in adopting the proposed findings, conclusions and order presented by the City of Fargo without affording notice to Wild Rice.[201] Wild Rice also argued that the trial court erred when it allowed the city to include certain facts and case law in its findings and conclusions, which had not originally been determined by the trial court.[202] The North Dakota Supreme Court found the argument to be without merit and ultimately held that "Fargo's [twenty-one]-month moratorium on building permits did not constitute a taking of Wild Rice's property under the federal and state constitutions."[203]

A. CATEGORICAL TAKING

Wild Rice argued that the moratorium imposed by Fargo amounted to a per se categorical taking of its development property because it denied all economically viable use of the property.[204] Wild Rice relied upon the Supreme Court's decision in *Lucas*, which provided that when a property owner is required to sacrifice all economically beneficial uses of their land

195. 2005 ND 193, 705 N.W.2d 850.
196. *Wild Rice*, ¶¶ 1, 35, 705 N.W.2d at 852, 861-62.
197. *Id.* ¶¶ 18, 21, 28, 705 N.W.2d at 856-57, 859-60.
198. *Id.* ¶ 18, 705 N.W.2d at 856.
199. *Id.* ¶ 21, 705 N.W.2d at 857.
200. *Id.* ¶ 28, 705 N.W.2d at 859-60.
201. *Id.* ¶ 34, 705 N.W.2d at 861.
202. *Id.*
203. *Id.* ¶¶ 34-35. In addition to the trial court's dismissal of Wild Rice's inverse condemnation claim, the trial court also issued an order that denied Wild Rice's post-trial motions. *Id.* ¶ 1, 705 N.W.2d at 852.
204. *Id.* ¶ 18, 705 N.W.2d at 856.

for the common good, a taking has occurred.[205] However, the North Dakota Supreme Court did not accept Wild Rice's argument.[206] Through its reliance on the decision in *Tahoe-Sierra*, the court determined that the taking in *Lucas* was materially different than the one alleged due to Fargo's moratorium.[207]

The moratorium imposed by the City of Fargo was merely temporary in nature, lasting only twenty-one months, and preserved the future value of Wild Rice's lots.[208] Distinguishing this situation from that in *Lucas*, the North Dakota Supreme Court stressed that the *Lucas* decision was carved out only for those "'extraordinary case[s]' in which a regulation permanently deprives property of all value[.]"[209] In all other cases, the North Dakota Supreme Court found that *Penn Central* provided the appropriate default rule.[210]

B. *PENN CENTRAL* ANALYSIS

The analysis presented in *Penn Central* has been recognized as a default takings rule requiring a fact specific inquiry.[211] The three factors involved in the *Penn Central* analysis are: (1) the economic impact of the regulation; (2) the interference with distinct investment-backed expectations; and (3) the character of the government's action.[212] Relying on this analysis, Wild Rice argued that Fargo's moratorium resulted in a taking.[213]

1. *Economic Impact*

Wild Rice argued that the first factor in the *Penn Central* analysis was met because it suffered an economic impact of approximately $500,000.[214] This economic impact resulted from the monetary investment placed in the

---

205. *Id.* at 856-57; *see* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (determining that when regulations result in a deprivation of this magnitude a taking has likely occurred because it is less likely that the benefits and burdens of economic life are merely being readjusted by the legislature).

206. *Wild Rice*, ¶ 19, 705 N.W.2d at 857.

207. *Id.* In *Lucas*, the property owner was barred from erecting any permanent habitable structures on his land which ultimately rendered his property valueless for both present and future purposes. *Lucas*, 505 U.S. at 1007.

208. *Wild Rice*, ¶ 19, 705 N.W.2d at 857.

209. *Id.* (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330-31 (2002)).

210. *Id.*

211. *Id.*

212. *Id.* ¶ 13, 705 N.W.2d at 855.

213. *Id.* ¶ 21, 705 N.W.2d at 857.

214. *Id.* ¶ 22.

property from 1992 through 1999.[215] The trial court found that Wild Rice did not suffer an economic impact because it retained economically viable use of its property during the twenty-one months that the moratorium was in place.[216] The court based this reasoning on the principle that "mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership . . . [and] cannot be considered a taking in the constitutional sense."[217]

Furthermore, Wild Rice retained future economic value in its property.[218] Because the moratorium was only temporary in nature, Wild Rice still preserved its ability to sell and develop the property when the moratorium was removed.[219] The North Dakota Supreme Court also acknowledged that:

> [T]he focus of the economic impact criterion is the change in fair market value of the subject property caused by the regulatory imposition measured by comparing the market value of the property immediately before the governmental action with the market value of the same property immediately after the action is terminated.[220]

In this case, the trial court found that Wild Rice could sell its lots for higher prices post-moratorium than pre-moratorium.[221] Where the property owner experiences a profit following application of a regulation, it is unlikely that a court will find that a taking has resulted.[222] Therefore, the North Dakota Supreme Court held that the trial court correctly found that

---

215. *Id.* These investments were primarily in response to governmental mandates such as the requirement of a public sewer system and road infrastructure, which the governmental entities required for development. *Id.*

216. *Id.* ¶ 23.

217. *Id.* at 858 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002)).

218. *See id.* ¶ 25, 705 N.W.2d at 859 ("Wild Rice sold more lots at higher prices after the moratorium was lifted than it did before the moratorium became effective.").

219. *Id.*

220. *Id.* "The focus of [the economic impact] factor is on the change in fair market value of the subject property caused by the regulatory imposition. In other words, the court must compare the value that has been taken away from the property with the value that remains in the property." Leon County v. Gluesenkamp, 873 So. 2d 460, 467 (Fla. Dist. Ct. App. 2004) (internal citations omitted). *See, e.g.*, Cane Tenn., Inc. v. United States, 57 Fed. Cl. 115, 123 (Fed. Cl. 2003) (stating that the economic impact factor is to be measured by comparing the property's market value immediately before the governmental action with the property's market value immediately after the action); *Leon County*, 873 So. 2d at 467 (providing that the economic impact factor requires a plaintiff to establish that the regulation in question caused a serious financial loss).

221. *Wild Rice*, ¶ 25, 705 N.W.2d at 859.

222. *Id.*; *see Leon County*, 873 So. 2d at 467 (holding that no taking had occurred where a landowner sold their property for a profit of $500,000 following the removal of a temporary moratorium).

the temporary reduction in value suffered by Wild Rice was not sufficient to amount to an economic impact under the *Penn Central* analysis.[223] The court then proceeded to analyze Wild Rice's claim under the second factor of the *Penn Central* analysis, an interference with investment-backed expectations.[224]

2. *Interference with Investment-Backed Expectations*

Wild Rice argued that the moratorium interfered with investment-backed expectations because it had invested $500,000 into the property but was unable to sell residential lots due to the City of Fargo's imposition of the moratorium.[225] Based on its findings, the trial court determined that although Wild Rice had projected it would sell four lots per year, it had experienced difficulty doing so since its creation.[226] In fact, the trial court specifically found that many factors in addition to the moratorium affected Wild Rice's investment over the years.[227] As a result, the North Dakota Supreme Court concluded that "Wild Rice's investment-backed expectations were unreasonable."[228] Following this determination, the court began its analysis of the third and final factor under the *Penn Central* analysis, the character of the governmental action.[229]

3. *Character of the Governmental Action*

Wild Rice argued that the City of Fargo's governmental action was "characterized by bad faith."[230] Specifically, it claimed that the city used the moratorium to prevent construction on Wild Rice's property.[231] Wild Rice also asserted that the City of Fargo was attempting to obtain federal funding to purchase the property at a lesser price without the need for

---

223. *Wild Rice*, ¶ 23, 705 N.W.2d at 858.

224. *Id.* ¶ 24.

225. *Id.* ¶ 22, 705 N.W.2d at 857.

226. *Id.* ¶ 24, 705 N.W.2d at 858. During the period of 1994 through 1998, which was prior to the imposition of the moratorium, Wild Rice had only sold one lot to an outside party even though it had enlisted a realtor experienced in river developments and had benefited from a two-year tax exemption offer. *Id.*

227. *Id.* at 858-59. The property where the lots were located was prone to flooding and all but two of the lots were covered by water as a result of the 1997 flood. *Id.* at 858. The lots also experienced additional flooding in 2001, and prospective buyers expressed concern regarding the potential for future flooding or water issues. *Id.*

228. *Id.* ¶ 24, 705 N.W.2d at 859.

229. *Id.* ¶ 26.

230. *Id.* ¶ 22, 705 N.W.2d at 857. Wild Rice claimed that the city had not conducted any reviews or studies in order to create new ordinances that would be applicable to its property while the moratorium was in place. *Id.* Additionally, it claimed that the moratorium was lifted only after the impacted landowners brought claims of inverse condemnation. *Id.*

231. *Id.*

compensation.[232] The North Dakota Supreme Court explained that "[a]n extraordinary delay in governmental decisionmaking coupled with bad faith on the part of the governmental body may result in a compensable taking of property."[233] The trial court determined, however, that the City's moratorium was a reasonable and appropriate land use regulation based on the devastation and damage caused by the flood.[234]

The City contended that it was necessary to use the moratorium to maintain the status quo.[235] Moreover, the moratorium afforded the City an opportunity to prepare and review plans to correct problems caused by the flood and to prevent similar devastation from reoccurring.[236] Additionally, the moratorium applied to all of the land located within the preliminary designated floodway, not only the lands belonging to Wild Rice.[237] As a result, the North Dakota Supreme Court concluded, in accordance with the trial court's decision, that the moratorium bore a reasonable or rational basis to a legitimate government purpose and that the City of Fargo had acted with proper diligence and good faith.[238] Additionally, based on its application of the *Penn Central* analysis as a whole, the North Dakota Supreme Court ultimately determined that the City of Fargo's temporary moratorium did not result in an unconstitutional taking of Wild Rice's property.[239] Following its decision that Wild Rice's claim did not amount to a taking under the *Penn Central* analysis, the court proceeded to address Wild Rice's final argument that it was entitled to compensation for the alleged taking of its property.[240]

---

232. *Id.*

233. *Id.* ¶ 26, 705 N.W.2d at 859; *see* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1366 (Fed. Cir. 2004) (determining that a taking can result when an extraordinary delay occurs in the governmental decisionmaking process); Appollo Fuels, Inc. v. United States, 54 Fed. Cl. 717, 737 (Fed. Cl. 2002) (recognizing that takings can result from extraordinary delays in the governmental decisionmaking process only upon a finding of extreme circumstances); Wyatt v. United States, 271 F.3d 1090, 1098 (Fed. Cir. 2001) (providing that takings may occur through extraordinary delays in the governmental decisionmaking process, but acknowledging that a delay must be substantial and that delays lasting up to eight years have been condoned by the Supreme Court); Byrd v. City of Hartsville, 620 S.E.2d 76, 82 (S.C. 2005) (holding that a two-month delay did not amount to a taking).

234. *Wild Rice*, ¶ 23, 705 N.W.2d at 858.

235. *Id.*

236. *Id.* ¶ 26, 705 N.W.2d at 859. The City of Fargo claimed to apply the moratorium in an effort to "determine if it was safe to build in flood prone areas." *Id.*

237. *Id.*

238. *Id.* ¶¶ 23, 26, 705 N.W.2d at 858-59.

239. *Id.* ¶ 27, 705 N.W.2d at 859.

240. *Id.* ¶ 28, 705 N.W.2d at 859-60.

C. COMPENSATION

In its final argument, Wild Rice claimed, based on the principles set forth in *Rippley v. City of Lincoln*, that it was entitled to compensation for the temporary taking of its property by the City of Fargo.[241] Wild Rice argued that it was entitled to compensation from the City of Fargo "for the interim period between the enactment of the moratorium and the date the moratorium was lifted."[242] However, the North Dakota Supreme Court determined that the reasoning employed in *Rippley* was not appropriate in this case.[243] Unlike the property owners in *Rippley* who experienced a permanent taking and were deprived of all reasonable use of their property, the moratorium was only temporary in nature and did not deprive Wild Rice of all economically beneficial use.[244]

Additionally, Wild Rice claimed that the City of Fargo failed to properly plead abandonment of the moratorium because the City did not allege in its answer or amend it to state that the moratorium had been removed.[245] Wild Rice once again based its claim on the reasoning in *Rippley*, which the court found to be inappropriate because it did not specifically address pleading requirements in an inverse condemnation claim.[246] Also, the North Dakota Supreme Court determined that all parties were aware of the moratorium's termination well before the beginning of the trial because the City had alleged in its answer that the moratorium was only temporary.[247] As a result, the North Dakota Supreme Court determined that Wild Rice's claim for compensation was meritless.[248]

IV. IMPACT

The likely consequence of the court's decision in *Wild Rice* is that in situations of temporary regulatory takings, the appropriate method of analysis will be an ad hoc factual inquiry, instead of a per se categorical rule.[249] A balancing test of this kind provides an accurate way to balance the interests of individual property owners against the importance of land use planning in our modern system.[250] This balancing of expectations is the

241. *Id.*
242. *Id.* ¶ 32, 705 N.W.2d at 861.
243. *Id.*
244. *Id.*
245. *Id.* ¶ 31, 705 N.W.2d at 860.
246. *Id.*
247. *Id.* at 860-61.
248. *Id.* at 861.
249. Nolan, *supra* note 40, at 749.
250. *Id.* at 749-50.

best way to determine the role that property should play in our society.[251] After all, this test is the sole means by which courts are able to take into consideration the notion of fairness and justice and produce a just outcome in takings litigation.[252]

Although it is important to reach a fair and just outcome in takings cases, the court's decision in *Wild Rice* also acknowledges the importance of land use planning devices.[253] The court specifically discusses the importance of moratoria, which are recognized as "fundamental to a rational, defensible, planning process."[254] The decision is also highly supportive of the ability of governments to engage in land use planning and appears to epitomize the deference afforded to governments in their enactment of land use regulations through their police power.[255] However, notions of fairness also reinforce the need for the moratorium power to be limited to prevent governments from exercising their power arbitrarily and in a way that inhibits public involvement.[256]

The court's decision in *Wild Rice*, like that in *Tahoe-Sierra*, failed to put a precise limit on, or to define circumstances under which a moratorium could amount to a taking.[257] Instead, the court relied on the trial court's determination that the moratorium was "reasonable" and "appropriate."[258] The vagueness and ambiguity surrounding these terms will likely result in significant future litigation because the court will be forced to define what constitutes an appropriate and reasonable moratorium under the facts of each case.[259]

---

251. *Id*. at 748.

252. *Id*. at 749-50. "Fairness and justice might suggest that the individual claim of right should be protected to the utmost extent as the foundation upon which the American system is built." *Id*. at 749. However, "while land-use planning becomes more important in modern society, the desire for a practical arrangement and a conception of property that will work efficiently, and promote fairness and justice, must be the desired end of the Court." *Id*. at 749-50.

253. *Wild Rice*, ¶ 23, 705 N.W.2d at 858 (referencing the trial court's determination that the moratorium imposed by the City of Fargo was "a reasonable, appropriate land-use regulation").

254. Freilich, *supra* note 16, at 600; *see also* Dumas, *supra* note 69, at 236 (recognizing "the importance of temporary prohibitions on development for successful land-use planning").

255. *See* Oshiro, *supra* note 86, at 181 (discussing how the Supreme Court's decision in *Tahoe-Sierra*, which involved a temporary moratorium and was not found to be a taking entitling the property owner to compensation, represented a "shift from a pro-property rights direction to one supporting land use planning").

256. Nolan, *supra* note 40, at 750.

257. *Id*.

258. *Wild Rice*, ¶ 23, 705 N.W.2d at 858.

259. *See* Freilich, *supra* note 16, at 601 (discussing how the reasonableness of moratoriums is measured).

Also similar to *Tahoe-Sierra*, the *Wild Rice* decision appears to evidence the North Dakota Supreme Court's support of land use planning.[260] The decision could specifically harm property owners by enabling governments to simply label any prohibition or regulation as "temporary" or to place a set amount of time on a regulation to maintain its constitutionality.[261] By allowing governmental units this luxury, the ability of North Dakota landowners to bring claims of inverse condemnation, and to obtain compensation for temporary takings, appears to have been significantly reduced.[262] After all, courts are already hesitant to support inverse condemnation claims because these claims can have severe consequences through their ability to prevent or inhibit land use planning.[263] Additionally, these claims can cause communities to suffer staggering financial burdens.[264]

In 2006, the North Dakota Supreme Court's decision in *Knutson v. City of Fargo*[265] further limited the ability of property owners to bring claims of inverse condemnation.[266] The court's decision requires a property owner to prove that an alleged taking or damage occurred as the result of a deliberate act on the part of the governing body.[267] The *Knutson* and *Wild Rice* decisions reduce the remedies available to property owners and reveal the North Dakota Supreme Court's support of land use planning.[268]

As a whole, the *Wild Rice* decision is representative of the ever present debate regarding the meaning of property and the government's role in both regulating and protecting private property.[269] Moreover, although it appears to demonstrate a modern trend in support of land use planners, "private property has been in existence for a very long time and . . . successful societies and governments tend to protect rights in private property."[270]

---

260. *See* Oshiro, *supra* note 86, at 181 (discussing the fact that the *Tahoe-Sierra* decision represented the United States Supreme Court's "shift from a pro-property rights direction to one supporting land use planning"). In *Tahoe-Sierra*, "[t]he pro-property rights trend seemingly halted when Justices O'Connor and Kennedy, who typically sided with the conservative faction, changed sides and held in favor of the land use planners." *Id.*

261. Nolan, *supra* note 40, at 750.

262. *See* Knutson v. City of Fargo, 2006 ND 97, ¶ 15, 714 N.W.2d 44, 50 (requiring a landowner to prove that a taking is the result of a deliberate act).

263. Eck v. City of Bismarck, 283 N.W.2d 193, 200-01 (N.D. 1979).

264. *Id.*

265. 2006 ND 97, 714 N.W.2d 44.

266. *Knutson*, ¶ 15, 714 N.W.2d at 50.

267. *Id.*

268. *See id.* ¶ 15 (denying a property owner's inverse condemnation claim); Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 27, 705 N.W.2d 850, 859 (denying a property owner's inverse condemnation claim).

269. *A Short History of Regulatory Takings*, *supra* note 72, at 43.

270. *Id.*

Therefore, it is doubtful that *Wild Rice* serves to foreshadow a "long term abandonment of either individual rights or individual property rights."[271]

V. CONCLUSION

In *Wild Rice*, the North Dakota Supreme Court held that a temporary taking in the form of a twenty-one month moratorium did not constitute a taking under the federal and North Dakota constitutions.[272] In this case, Wild Rice claimed that it was deprived of all economically beneficial use of its property during the twenty-one months that the moratorium was in place, and therefore, it was entitled to compensation for that time.[273] The court determined that although a property owner may not possess a present ability to use his property when land use regulations such as moratoriums are imposed, future use and potential remains with the property.[274] Therefore, the court's decision ultimately determined that temporary takings do not render property valueless, and, subsequently, takings of this kind do not entitle property owners to just compensation.[275]

Elizabeth K.H. Krogstad[*]

271. *Id.*
272. *Wild Rice*, ¶ 35, 705 N.W.2d at 861.
273. *Id.* ¶ 32.
274. *Id.* ¶ 30, 32, 705 N.W.2d at 860-61.
275. *Id.* ¶ 32, 705 N.W.2d at 861.

[*]J.D. Candidate at the University of North Dakota School of Law. Special thanks to my husband Craig and my son Owen for their endless support, patience, and encouragement in both the writing of this article and the completion of my academic pursuits.