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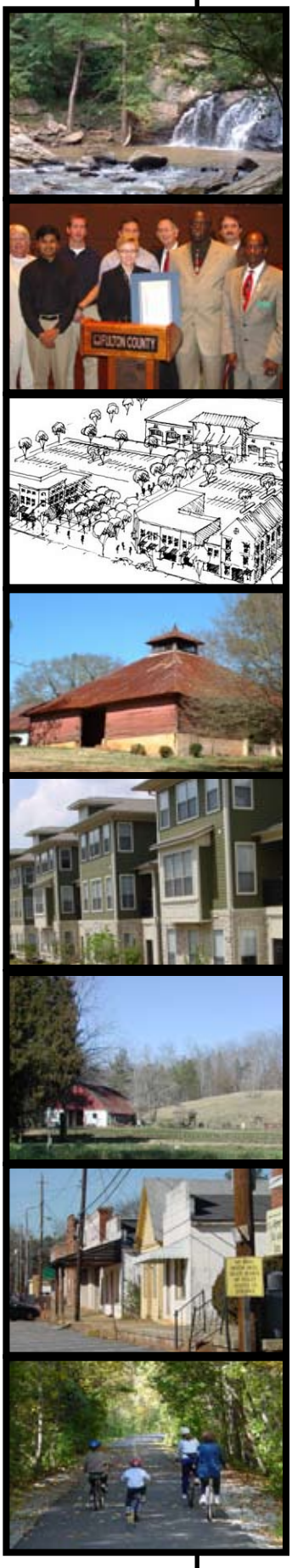

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Introduction

The United States Supreme Court and other federal and state courts have consistently dismissed challenges against open space requirements and reductions in minimum lot sizes similar to those that exist within ordinances regulating conservation subdivisions. Although some precedent exists for finding open space requirements and minimum lot sizes unconstitutional, courts have only reached such conclusions in limited situations where the challenged regulations destroy the entire economic value of a plaintiff's property, where there is no rational basis for the regulations, or where the land use regulation is found to substantially interfere with the property owner's use and enjoyment of their property.

General Grant of Deference to Local Governments for Land Use Issues

Courts have provided significant deference to local governments in zoning matters, recognizing that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[1] Consequently, municipalities may control residential growth to promote the public good under their police powers as long as those powers are not being used in a discriminatory manner.[2] With these concerns in mind, courts have limited the types of government actions that constitute a taking and have refused to find unconstitutional takings solely based on a decrease in an individual's property value.[3]

Zoning Regulations and the Takings Clause

Open Space Requirements

Developers and property owners frequently attempt to challenge local open space requirements by alleging that the prohibition of development on private property constitutes either a regulatory taking or an exaction.[4] Developers argue that the Fifth Amendment to the Constitution, which states that "private property [shall not] be taken for public use, without just compensation," renders open space requirements unconstitutional where they fail to compensate land owners for property that cannot be developed based on those land use regulations.[5]

Open space requirements can be viewed in two ways, depending on the purpose of the open space requirement. If a locality requires an open space requirement for public use, courts have engaged in the analysis traditionally used for exactions.[6] If, however, the open space requirement is not put to any public use but rather serves as a mere restriction on the property owner's right to develop their property, it is analyzed under the regulatory takings jurisprudence that has evolved through the Supreme Court's decisions in *Lucas v. South Carolina Coastal*

1 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

2 See *e.g. Eastampton Center L.L.C. v. City of Eastampton*, 155 F.Supp.2d 102, 119 (D.N.J. 2001) (finding that land use ordinance that is restrictive but not discriminatory falls within local government's police power).

3 *Steele Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972). *See also Manor Dev. Corp. v. Conservation Comm'n*, 433 A.2d 999 (1980).

4 *See e.g. Norman v. U.S.*, 63 Fed. Cl. 231 (Fed. Cl. 2004) (assessing open space requirement as regulatory taking); *Watt v. Planning & Zoning Commission of the Town of Kent* , No. CV 990080594S, 2000 WL 1342560 (Conn. Super. Ct. Sept. 5, 2000) (assessing open space requirement as an exaction).

5 U.S. Const. amend. V. The Constitution's Fifth Amendment has subsequently been incorporated to state and local governments. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

6 *Dolan v. City of Tigard*, 512 U.S. at 386-91 (explaining current test for determining whether conditions on development constitute exactions requiring just compensation).

Council and *Penn Central Transportation Co. v. City of New York*.[7]

Open Space Requirements as Unconstitutional Conditions/Exactions

Where an open space requirement serves as a basis for requiring that the open space be put to public use, the Supreme Court, in *Dolan v. City of Tigard*, established a two-part analysis through which to assess the constitutionality of the regulation.[8] As the first step, the court must decide "whether [an] essential nexus exists between [a] legitimate state interest and the…condition exacted by the city."[9] The Court has recognized such things as the prevention of flooding and the reduction of traffic congestion as legitimate public purposes for which an exaction may be imposed.[10]

Once an essential nexus has been established, it becomes the court's responsibility to determine whether there is a "required degree of connection between the exactions and the projected impact of the proposed development."[11] The existence of a reasonable relationship between the property's use and the exaction demanded by the local government distinguishes appropriate exercises of the police power from unconstitutional takings.[12] The Supreme Court has used the term "rough proportionality" to describe the reasonable relationship required to sustain such exactions.[13] To establish the rough proportionality between the property's use and the challenged exaction, the Court refuses to require a mathematical calculation. The Court, however, does require some type of individualized determination that "the required dedication is related both in nature and extent to the impact of the proposed development."[14] An individualized determination, however, is not necessary where the local government can show that an ordinance was adopted before the filing of a plat application and the ordinance's requirements are reasonably related to the projected impact of a proposed development.[15]

Numerous state courts have applied *Dolan* to open space requirements enacted by cities since the holding in *Dolan* was reached by the Court in 1994.[16] State courts are deferential to local governments in determining whether there is an "essential nexus" between the exaction demanded and a legitimate state interest. However, when assessing whether the exaction is not excessive in light of the impact of a proposed development, courts are less deferential and will require local governments to establish that their open space requirement is "roughly proportional" to the projected impact.

In Connecticut, for example, a superior court has noted that the test for determining whether a local government may condition the development of a subdivision on the set aside of open space for public use as parks and playgrounds is "whether the burden cast upon the [subdivision developer] is specifically and uniquely attributable to his own activity."[17]

Applying this test in *Watt v. Planning & Zoning Commission of the Town of Kent*, the court upheld Kent's open space requirement under Part I of the *Dolan* analysis, noting that the burden imposed upon the developer is "uniquely attributable" to the development of the subdivision because the subdivision would cause a population increase, necessitating more open space.[18]

7 *See Norman*, 63 Fed. Cl. at 252-87 (analyzing land use prohibition as regulatory taking).

8 *C.f. Dolan*, 512 U.S. at 384 ("the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city").

9 *Id.* at 386.

10 *Id.* Even though the Supreme Court invalidated the requirement from *Agins v. City of Tiburon*, 477 U.S. 255 (1980), that any government regulation of private property "substantially advance" a legitimate state interest, the Court explicitly stated that it did not overturn the analysis used in *Dolan*, arguing that the test in that case and *Nollan v. California Coastal Commission* assessed the specific situation where the government attempted to condition an individual's constitutional right to receive just compensation for the taking of their property in exchange for "a discretionary benefit that has little or no relation to the property." *Lingle v. Chevron*, 544 U.S. 528, 530 (2005).

11 *Dolan*, 512 U.S. at 386.

12 *Id.* at 390.

13 *Id.*

14 *Id.* The Supreme Court struck down the zoning ordinance in question in *Dolan* as applied to the property in question because the city failed to show a reasonable relationship between its exaction of a floodplain easement and a proposed building under the second part of the Court's analysis. *Id.* at 395.

15 *Trimen Dev. Co. v. King Cnty.*, 877 P.2d 187 (1994).

16 See *e.g. Watt*, 2000 WL 1342560; *Hartman v. The Twp. of the City of Readington*, No. 02-2017(SRC), 2006 WL 2353223 (D.N.J. Aug. 15, 2006).

17 *Watt*, 2000 WL 1342560, at *8.

18 *Id.* Courts in other states have found the maintenance of open space and the preservation of the historical character of

The courts' more stringent analysis of the "rough proportionality" of an exaction in the second part of the *Dolan* inquiry is exemplified by *Isla Verde International Holdings v. City of Camas*. In *Isla Verde* the Camas Planning Commission sought to impose a thirty percent set aside for open space based on its power under the Camas Municipal Code.[19] Because the Camas Municipal Code defined open space as "areas set aside and suitable for active or passive recreation," the Washington Court of Appeals evaluated the plaintiff's takings challenge under the exactions inquiry laid out in *Dolan*.[20]

In assessing the takings claim, the court decided to use the *Dolan* two-part exactions analysis despite arguments that no physical taking had occurred because title had never been transferred away from the property owner. The court dismissed this argument, noting that "alienation of title is not a necessary predicate to a taking; the essence of the harm is the government's unconstitutional interference with one's right to use and enjoy property."[21] Because the city ordinance required a set-aside of land for wildlife preservation, which the court considered a "public benefit," the court viewed the ordinance as an exaction that interfered with the plaintiffs' fundamental right to improve their property.[22]

Having decided to analyze the ordinance as an exaction, the court applied the *Dolan* inquiry. Part I of the *Dolan* test was easily satisfied because the court found that there was an essential nexus between the open space requirement and the proposed subdivision's destruction of thirteen acres of preexisting open space. The court, however, determined that the city's evidentiary showing was insufficient to establish "rough proportionality" between the thirty percent set aside and plaintiff's proposed 32 lot development.[23] Specifically, the court noted the absence of studies or formulas establishing why a thirty percent set aside was necessary for the construction of the subdivision.[24] Because the city failed to meet its minimal required showing that its exaction was proportional to the impact of the development, the court determined that the thirty percent set aside violated the Takings Clause of the Fifth Amendment.[25]

The Washington Court of Appeals' assessment of the Camas Open Space Ordinance under the *Dolan* exactions analysis rather than under the *Penn Central* regulatory takings analysis has been explained on a number of grounds. The appellate court itself explained that the language from *City of Monterey v. Del Monte Dunes* relied upon by the City of Camas, which limited the *Dolan* exactions analysis to situations where the government had actually taken a portion of private property for a public use, was merely non-binding dicta.[26] Further, the court noted that notwithstanding the language from *Del Monte Dunes*, the open space requirement in the present case was an exaction because the property owner was required to turn over possession of the property to "a permanent protective mechanism acceptable to the City."[27] Therefore, the city's requirement in this case that the open space be turned over to a neighborhood homeowners' association led the court to determine that the open space requirement was an exaction that required just compensation.[28] In addition to the city ordinance's requirement that landowners turn over the open space to a protective mechanism, the ordinance had other language that suggested that a primary purpose of the open space requirement was public use of the property. Specifically, the ordinance required that the open space be suitable for "active or passive recreation"[29] and provided that half of

a community to satisfy the "essential nexus" required by the Court in *Dolan*. *See e.g. Hartman v. The Township of Readington*, 2006 WL 2353223 (finding essential nexus and rough proportionality requirements met for ordinance imposing open space requirement on new residential developments).

19 990 P.2d 429, 432 (Wash. Ct. App. 1999).

20 *Id.* at 432 n.1 (citing Camas, Wash., Code § 18.62.020(B) (1999)).

21 *Id.* at 435.

22 *Id.* at 436.

23 *Id.* at 436-37.

24 *Id.*

25 *Id.* at 437.

26 *Id.* at 436 n.3.

27 *Id. See also* CMC § 18.62.020(B) (specifying separate tracts, protective easements, and dedication to public agencies or private land trusts as protective mechanisms that would be acceptable to city).

28 *Isla Verde Int'l Holdings*, 990 P.2d at 436 n. 3. The Washington Court of Appeals, in a departure from most accepted case law on the topic, determined that any set-aside which required the preservation of land by turning it over to a private homeowners' association constituted a dedication of the land for public use. Telephone Interview with W. Dale Kamerrer, Senior Partner, Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S., in Olympia, Wash. (Sep. 14, 2007).

29 *Isla Verde Int'l Holdings*, 990 P.2d at 432 n. 1 (citing CMC § 18.62.020(B)).

the open space on a given property could be credited towards the city's "Open Space Network."[30]

Other literature has looked to other considerations in assessing the Washington Court of Appeals' decision to classify the Camas Open Space ordinance as an exaction. Some have argued that the ordinance was found to be an unconstitutional exaction because it provided the city's zoning board with significant permitting authority, vesting in it "a large amount of discretion and the [consequent] opportunity to abuse that discretion."[31] Still others have sided with the Washington Court of Appeals by noting that *Del Monte Dune's* discussion of when to use exactions was merely a statement of historical fact that the Court had not previously applied the *Dolan* exactions inquiry to cases involving permit denials rather than a pronouncement that the *Dolan* inquiry could never be used in the future to assess such permit denials absent some form of dedication, easement, or conveyance of land to the government.[32]

While courts will frequently require local planning and zoning commissions to engage in individual inquiries when imposing open space requirements exacting property as conditions of particular developments, courts have afforded a higher level of deference when the open space requirements are created as part of generally-applicable ordinances.

One case in which courts assessed a facial challenge to an open space requirement was *Dunham v. Planning Commission of the Town of New Milford*. In *Dunham* the town of New Milford sought to impose a fifteen percent open space requirement for public use.[33] The plaintiff, a property owner in New Milford, contended that the city had imposed a taking because it had not engaged in an individual determination of whether the fifteen percent open space requirement bore a sufficient relationship to the impact of the proposed subdivision.[34]

In its analysis of the plaintiff's claim, the court concluded that legislatively imposed open space requirements were distinct from adjudicatively imposed open space requirements because they did not require the individualized determinations referenced in *Dolan*.[35] Rather, where entire open space requirement ordinances were challenged on their face, they enjoyed "a presumption of constitutionality" because the burden rested with the party challenging the regulation.[36]

Open Space Requirements as Regulatory Takings

Even though open space requirements are frequently analyzed as exactions, open space requirements placed on conservation subdivisions, or "cluster developments," would likely not be considered exactions subject to the analysis used in *Dolan* or *Nollan v. California Coastal Commission*. Whereas open space requirements that are classified as exactions often require public use of the open space, in conservation subdivisions the principal alleged harm of an open space requirement is that the property owner is denied the ability to develop a certain portion of their property. Accordingly, "the rule applied in *Dolan*…[is] not designed to address, and is not readily applicable to…questions arising where…the landowner's challenge is based not on excessive exactions but on denial of development."[37] Therefore, considerations of "rough proportionality"

30 *C.f. id.* at 432 n. 1 (citing CMC § 18.62.020(C)) (acknowledging that, at times, open space could be developed for "active recreation").

31 Jane C. Needleman, *Exactions: Exploring Exactly When* Nollan *and* Dolan *Should Be Triggered*, 28 Cardozo L. Rev. 1563, 1578-79 (2006); *see also id.* at 1581 (noting that Washington Court of Appeals addressed "head-on" potential for City of Camas to abuse its power in permitting context).

32 John J. Delaney, *Applicability of* Nollan-Dolan *Rough Proportionality Requirements to Non-Possessory Exactions and Exactions Imposed by Legislative Enactment*, *in* ALI-ABA Course of Study 2000, at 639, 647 (ALI-ABA Land Use Institute Aug. 19, 2000), *available at* http://law.wustl.edu/landuse-law/delaneyI.html.

33 *Dunham v. Planning Comm'n of the Town of New Milford*, No. CV010085538, 2002 WL 31124552, at *7 (Conn. Super. Ct. Aug 20, 2002). The open space requirement was viewed as an exaction of property for public use based on accompanying regulatory language that required "open space to have direct access to a public street." *Dunham* at *1 (citing New Milford, Conn., Rev. Ordinances § 2.9.2)

34 *Id.*

35 *Id.* at *8.

36 *Dolan*, 512 U.S. at 391 n.8. *See also Hardy Farm Ltd. P'ship v. Southbury Planning Comm'n*, No. CV990363908, 2001 WL 548919 (Conn. Super. Ct. May 4, 2001) (finding that city acted within its police power in amending zoning ordinance to increase open space requirement from ten percent to fifteen percent).

37 *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 703 (1999).

and whether there is a "substantial nexus" between the proposed development and the open space requirement are not applicable to an analysis of whether an open space requirement within a conservation subdivision constitutes a regulatory taking.[38]

In situations where individuals allege that a government regulation has interfered with their ability to make productive economic use of their property, courts have classified the government action as a traditional taking, requiring an analysis entirely distinct from the *Dolan* exactions inquiry, which assesses the physical taking of property as a condition for a government benefit.[39] Once the court has established that a physical taking has not occurred, the court then assesses whether a government's regulation constitutes a regulatory taking. Under the Supreme Court's regulatory takings jurisprudence, the first question asked is "whether a particular claimed taking [is] 'categorical' or not."[40] A property owner can demonstrate that the government, through regulation, has caused a 'categorical taking' if the regulation has denied the property owner "all economically beneficial or productive use of [their] land."[41] If no categorical taking is found, the court must analyze whether there has been a regulatory taking through the three-part balancing test established by the Supreme Court in *Penn Central Transportation Co. v. City of New York*.[42]

Even though there is limited case law on whether conservation subdivision open space requirements violate the Fifth Amendment Takings Clause, other cases have considered instances in which the government has placed restrictions on the use of an individual's property in much the same way that a city or county would restrict the use of a portion of a property owners' property under a conservation subdivision open space requirement. In *Norman v. United States*, for example, a property owner wanted to develop commercial and industrial office space on a 2,425 acre parcel of land.[43] Development of the property was conditioned upon submitting the development plans to the Army Corps of Engineers to grant a Section 404 permit under the Clean Water Act.[44] Under the permit ultimately issued by the Army Corps of Engineers, the property owners were required to preserve 220.85 acres of the property as wetlands with a deed of restrictions that "prohibited all development on the wetlands areas…and required that the wetlands area be maintained as open space."[45] The plaintiffs challenged the permitting requirements, arguing that the condition that they maintain the wetlands acreage as open space constituted a taking of their property without just compensation.[46]

In its assessment of how to analyze the plaintiffs' takings claim, the Court of Federal Claims first determined that a requirement to preserve a portion of property for conservation did not constitute a physical taking. Noting that a physical taking of property required an "exclusive and permanent occupation by the government that destroys the owner's right to possession, use and disposal of the property,"[47] the court determined that no physical taking had occurred in the present case because the government did not occupy or physically possess the property.[48] Rather, the court determined that the plaintiffs alleged "a classic regulatory taking."[49]

Restricting a portion of a parcel of land from development also does not constitute a categorical taking, which only occurs in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted."[50] Because courts look at the entire parcel of land owned by the property owner, anything short of a 100% open space requirement would not be classified as a categorical taking.[51] Therefore, any open space requirement imposed for conservation purposes would be analyzed under the specific factors set forth by the Supreme Court in *Penn Central*.[52] The Court of Federal

38 *Id.*

39 *See e.g. Norman*, 63 Fed. Cl. at 243 ("The longstanding distinction between acquisitions of property for public use and regulations prohibiting private use makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking.").

40 *Rith Energy, Inc. v. U.S.*, 247 F.3d 1355, 1362 (Fed. Cir. 2001).

41 *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

42 438 U.S. 104 (1978).

43 63 Fed. Cl. at 234.

44 *Id.*

45 *Id.* at 240.

46 *Id.* at 233-34.

47 *Id.* at 246.

48 *Id.* at 248.

49 *Id.*

50 *Lucas*, 505 U.S. at 1017.

51 *Walcek v. United States*, 303 F.3d 1349 (Fed. Cir. 2002).

52 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional*

Claims reached this conclusion in *Norman*, where it determined that the required set aside for wetlands preservation only decreased the amount of property available for usage by 10%.[53]

Under the *Penn Central* analysis for regulatory takings, courts look to three factors when deciding whether a government action requires just compensation: "(1) the extent to which the regulation has interfered with the property owner's reasonable investment-backed expectations; (2) the economic impact of the regulation on the claimant; and (3) the character of the governmental action at issue."[54]

The "reasonable investment-backed expectations" segment of the analysis questions whether the land use restriction was in place prior to the plaintiff's acquisition of the property, based on the principal that "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss."[55] If an open space requirement was passed after individuals had already purchased the affected property, this factor would weigh in favor of finding a regulatory taking.

In the second part of the analysis, assessing the "economic impact of the regulation," a court generally looks to the change in the fair market value of the property caused by the challenged regulation.[56] What constitutes a sufficiently severe economic impact to justify compensation has been a topic of debate among courts. While it is clear that there will be no compensation in cases like *Norman*, where the court found that the open space requirement actually *increased* the value of the property, how much of a diminution in property is necessary to establish a regulatory taking is subject to the discretion of the individual court. Courts have frequently found an insufficient diminution in the value of property to justify a taking even where the property suffered a decrease in value of close to 50%.[57] Notwithstanding the wide discretion afforded to courts, they generally require a showing of a "serious financial loss" to establish the basis for a taking.[58] Accordingly, even though a determination of the economic impact would be highly fact-specific, unless a developer suffers a serious financial loss from an open space requirement, it is unlikely that this factor would weigh in favor of finding a regulatory taking.

The final factor considered under *Penn Central* is the "character of the government action" that causes the diminution in the value of the plaintiff's property. Here, the court is required to balance "the liberty interest of the private property owner against the government's need to protect the public interest through imposition of a restraint."[59] Finally, even when the government purpose is legitimate, courts must determine whether the government action is unfair to the plaintiff because it places the burden of remedying a larger societal problem disproportionately on the plaintiff's shoulders.[60]

It is likely that courts would find that the character of the government action imposing an open space requirement on conservation subdivisions supports a finding that there has not been a taking. Federal courts have previously found that societal concerns for ecological preservation supersede plaintiffs' interest in having the liberty to use their property as they wish. In *Norman*, for example, the court determined that the preservation of wetlands was a "legitimate public welfare obligation."[61] Similarly, in *Krahl v. Nine Mile Creek Watershed District*, the Supreme Court of Minnesota determined that a land use

Planning Agency, 535 U.S. 302, 330 (2002).

53 *Norman*, 63 Fed. Cl. at 261.

54 *Id.* at 261 (citing *Penn Central*, 438 U.S. at 124).

55 *Creppel v. U.S.*, 41 F.3d 627, 632 (Fed. Cir. 1994). Even though the regulatory status of property upon acquisition is highly persuasive in determining investment-backed expectations, it is not decisive. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

56 *Walcek v. U.S.*, 49 Fed. Cl. at 258. *See also U.S. v. Cartwright*, 411 U.S. 546, 551 (1973) (defining fair market value as "the price at which the property would change hands between a willing buyer and a willing seller…both having reasonable knowledge of the relevant facts.").

57 *See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (Supreme Court found that 46% diminution of value did not constitute regulatory taking); *Cane Tennessee, Inc. v. U.S.*, 57 Fed. Cl. 115, 125, 129 (2003) (finding 49.6% decrease in value did not constitute "severe economic impact").

58 *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1340 (Fed. Cir. 2003).

59 *Walcek*, 49 Fed. Cl. at 270.

60 *Chenega Gardens*, 331 F.3d at 1340.

61 *Norman*, 63 Fed. Cl. at 282. The court in *Norman* specifically stated that the preservation of wetlands was a necessary government function because of the role that wetlands play in "water purification and water quality enhancement…and erosion and sedimentation control functions." *Id.*

ordinance prohibiting development of the lower level of a floodplain was justified in light of the public interests it was intended to serve.[62] Additionally, if an open space requirement is applied uniformly to all areas designated as conservation subdivisions, courts would be unlikely to find that the governmental action disproportionately imposes a burden on any single plaintiff.[63]

Even though any judicial assessment of the constitutionality of an open space requirement that does not provide just compensation will be very fact-specific, under the *Penn Central* factors, most open space ordinances are not likely to be classified as unconstitutional takings. Even though an argument can be made that a property owner's investment-backed expectations support finding a taking where a land use ordinance is enacted after their purchase of the property, because an open space requirement's economic impact would likely not be substantial and because an open space requirement serves valid government purposes and generally does not impose a disproportionate burden on any single plaintiff, when taken as a whole the *Penn Central* factors weigh against finding a regulatory taking.

Minimum Lot Size Ordinances

As with minimum open space requirements, courts are hesitant to get involved in local zoning and land use disputes involving minimum lot size ordinances lest they assume the role of a "super zoning board."[64] Despite this hesitancy, however, courts are willing to award compensation in those circumstances where a minimum lot requirement either completely deprives property of its economic value [65] or is supported by all three elements of the *Penn Central* analysis.[66]

City of Mayhew v. Town of Sunnyvale provides an example of the deference that courts provide to local governments in crafting land use planning ordinances.[67] In that case, Sunnyvale, Texas enacted a minimum lot size requirement of one acre for all residences.[68] A major landowner in the city sought to create a residential development with a density of three units per acre.[69] Ultimately, the property owner sued the town when the Zoning Commission rejected his application for the development.[70]

On appeal, the Supreme Court of Texas found the city's explanation for its denial, a desire to preserve the overall character of the community and to protect it from the effects of urbanization, to be a legitimate state interest. Similarly, the court found that a minimum lot size did not totally destroy the economic value of the property.[71] The court noted that, even after the minimum lot size ordinance, the value of the property was still $2.4 million.[72] Finally, the court found that the minimum lot-size ordinance did not interfere with the plaintiff's reasonable investment-backed expectations because the town had maintained the same one acre minimum lot size requirement for twelve years prior to the plaintiff's proposal to build 3,600 units on its 1,200 acres of property. Accordingly, the court concluded, any expectation of building such a development could not have been "reasonable."[73]

Similarly, in *LaSalle National Bank v. City of Highland Park* a plaintiff purchased two lots in Highland Park, Illinois.[74] Subsequently, the city reduced the permitted minimum lot size of the property from 40,000 square feet to 12,000 square feet and granted permits for the development of two subdivisions. [75] Before the plaintiff's subdivision was approved, however, the city increased the minimum lot size to 20,000 square feet. The plaintiff sued alleging that the action constituted a

62 *See Krahl v. Nine Mile Creek Watershed Dist.*, 283 N.W.2d 538, 543 (Minn. 1979) (adding that "floodplain and wetlands regulations…have generally been held not to constitute takings of private property").
63 *See Id.* at 287 (finding no disproportionate burden where plaintiff was treated by Army Corps in fair and even-handed manner).
64 *Id.* at 933 (citing *Goss v. City of Little Rock*, 90 F.3d 306, 308 (8th Cir. 1996)).
65 *Lucas*, 505 U.S. at 1030-31.
66 *Penn Central Transp. Co.*, 438 U.S. at 124.
67 *Mayhew v. Town of Sunnydale*, 964 S.W.2d 922 (Tex. 1998).
68 *Id.* at 925.
69 *Id.* at 926.
70 *Id.*
71 *Id.* at 938.
72 *Compare Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (finding that regulatory taking based on elimination of all property value only occurs where the property is left "economically idle").
73 *Mayhew*, 964 S.W.2d at 937-38.
74 799 N.E.2d 781 (Ill. App. 2003).
75 *Id.* at 785-86.

taking without just compensation.[76]

The Illinois Court of Appeals quickly identified a legitimate government interest, noting "a sufficient nexus…between reducing density and…prevent[ing the] construction of lots of substandard size."[77] Further, because the minimum lot size at the time of the plaintiff's purchase of the property was 40,000 square feet, the court determined that the subsequent effective decrease of the minimum lot size to 20,000 square feet did not interfere with the plaintiff's investment-backed expectations.[78] Finally, the court determined that the increase of the minimum lot-size from 12,000 to 20,000 square feet merely diminished the value of the plaintiff's property but did not completely destroy its economic value, suggesting a minimal economic impact under the *Penn Central* analysis.[79] Accordingly, the court concluded that the fact that the minimum lot size ordinance deprived the property of its most profitable use was an insufficient basis for finding that a regulatory taking had occurred.[80]

Even where it appears that a city has altered its land use regulations in a way that significantly impacts a property owner's investment-backed expectations, some case law suggests that the judicial presumption in favor of local zoning regulations will lead courts to require very significant harm to those expectations before they are willing to find a regulatory taking.

This presumption was seen in *Marshall v. Board of County Commissioners*, where the United States District Court for the District of Wyoming found that a plaintiff's investment-backed expectations were not sufficiently diminished to establish a regulatory taking where the county imposed a five acre minimum lot requirement when the plaintiff sought a permit to develop a subdivision.[81] Notwithstanding the plaintiff's claims that the county undermined his investment-backed expectations by reducing the number of lots he could place on the subdivision from twenty-three to seven, the Court, applying the factors from *Penn Central*, determined that no regulatory taking had occurred because there had not been a "*complete* destruction of [the] plaintiff's investment backed expectations."[82] Accordingly, absent a complete diminution of the plaintiff's reasonable investment backed expectations, the court was unwilling to find a regulatory taking. *Marshall* evidences courts' general hesitancy to construe minimum lot size requirements as regulatory takings when applying the factors from *Penn Central*.

Regulatory Takings Under the Georgia Constitution

Like the United States Constitution, the Constitution of the State of Georgia provides a basis for just compensation when the government takes private property.[83] When assessing whether the government has affected a regulatory taking, the Georgia Supreme Court has determined "that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable."[84] Accordingly, "if the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, such regulation is confiscatory and void."[85] In *Guhl v. Holcomb Bridge Road Corp.*, the Supreme Court of Georgia adopted six specific factors to use when conducting a regulatory takings analysis.

> (1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area

76 *Id.*
77 *Id.* at 797.
78 *Id.* (noting that plaintiffs had "plaintiffs had full knowledge of the land use regulation when they purchased the property").
79 *Id.* at 798 (citing *Penn Central*, 438 U.S. at 131).
80 *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962).
81 *Marshall v. Board of County Commissioners*, 912 F.Supp. 1456, 1459-60 (D. Wyo. 1996).
82 *Id.* at 1474 (emphasis added).
83 Ga. Const. art. I, § III, ¶ 1 ("private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid").
84 *Barrett v. Hamby*, 235t Ga. 262 (Ga. 1975).
85 *Id.*

in the vicinity of the property."[86]

Georgia courts have placed the burden on the plaintiff to establish, by clear and convincing evidence, that a zoning ordinance creates a significant detriment for a landowner and is simultaneously unrelated to the public health, safety, morality, and welfare.[87] Absent this showing, a zoning ordinance's presumption of validity will prevail.[88]

Under the balancing test that the Georgia Supreme Court established in *Barrett v. Hamby* and elaborated on in *Guhl*, the government has consistently upheld regulations that impose a prohibition on the development of a portion of an individual's property.[89] The court imposed a high standard for finding a substantial burden on the plaintiff to justify compensation, noting that "[m]any regulations restrict the use of property, diminish its value or cut off certain property rights, but no compensation for the property owner is required."[90] Alternatively, the Supreme Court of Georgia has construed the public interest liberally, noting that "the concept of public welfare is broad and inclusive" incorporating values that are spiritual, physical, aesthetic, and monetary.[91]

The court's narrow construction of private burdens and broad construction of public interest suggest that it would not find land use restrictions in conservation subdivisions to be regulatory takings. The court has reached this holding previously for regulations that similarly restricted the use of portions of private property. For example, in *Pope v. City of Atlanta*, the Supreme Court of Georgia upheld standards imposed by the Atlanta Regional Commission pursuant to the Metropolitan River Protection Act that limited the impervious cover in a fifty-year floodplain to 20%.[92] A property owner within the floodplain challenged the impervious surface standard as an unconstitutional taking. The court, noting the State of Georgia's constitutional authority to restrict land use for the protection of natural resources and the environment, concluded that the impervious surface coverage limitation related to the public health and safety because it prevented surface water run-off and soil erosion.[93] Because the plaintiff's property value was only partially diminished and the impervious surface limit served an important public interest, the court found that the City of Atlanta was acting within its police power and, therefore, had not affected a regulatory taking.[94] The court's holding in *Pope* might be even more persuasive in the context of an open space requirement within a conservation subdivision, as there would likely be no decrease in the property value of a development due to the fact that that the number of lots on the property would not decrease.[95]

Similarly, in *Parking Association of Georgia v. City of Atlanta*, the City of Atlanta imposed an ordinance that required parking lots to have landscaped areas equal to at least ten percent of the paved area of the parking lot.[96] The Parking Association of Georgia filed suit alleging that the ordinance was an unconstitutional taking.[97] After determining that such a regulation required assessment under the court's regulatory takings jurisprudence,[98] the Supreme Court of Georgia found that the ordinance was not an unconstitutional taking merely because it deprived the plaintiff of its most profitable economic use of the property when the ordinance furthered the valid public interest of beautifying the city.[99] Accordingly, the Supreme Court of Georgia would likely also determine that the state constitution's prohibition on uncompensated takings does not require compensation for individuals impacted by open space or minimum lot size requirements within conservation subdivisions.

86 *Guhl v. Holcomb Bridge Road Corp.*, 238 Ga. 322, 323-24 (Ga. 1994) (quoting *LaSalle Nat'l Bank v. Cnty. of Cook*, 208 N.E.2d 430 (Ill. 1965)).
87 *Gradous v. Bd. of Comm'rs of Richmond Cnty*, 256 Ga. 469 (1986).
88 *Parking Ass'n of Ga. v. Cty. of Atlanta*, 264 Ga. 764 (Ga. 1994).
89 See *e.g. Parking Ass'n of Ga.*, 264 Ga. at 765; *Pope v. Cty. of Atlanta*, 242 Ga. 331, 335 (Ga. 1978).
90 *Pope*, 242 Ga. at 334.
91 *Parking Ass'n*, 264 Ga. at 766.
92 *Pope*, 242 Ga. at 332-33.
93 *Id.* at 335.
94 *Id*.
95 *C.f. Norman*, 63 Fed. Cl. at 275 (noting that wetlands mitigation set-aside had effect of increasing value of plaintiff's property).
96 *Parking Ass'n of Ga.*, 264 Ga. at 764.
97 *Id.*
98 *Id.* ("The zoning ordinance does not authorize a permanent physical taking or occupation of plaintiffs' property by another; it merely regulates the use of plaintiff's' property.")
99 *Id.* at 765-66.

Zoning and the Equal Protection Clause

In addition to challenging open space requirements under the Fifth Amendment's Takings Clause, developers and property owners have sought to challenge zoning regulations under the Fourteenth Amendment's Equal Protection Clause.[100] In such claims, plaintiffs allege that because an open space requirement is not imposed uniformly upon an entire jurisdiction, but rather is distinct to specified zones within a city or county or to specified developments, the local government does not afford all of its citizens equal protection under the law.[101]

Courts have been hesitant to find equal protection violations based on land use ordinances and, accordingly, have required very specific showings to establish violations of the Equal Protection Clause.[102] Courts have acknowledged that in the area of land use planning it is frequently impossible to provide any definite reason for why one zone has particular land use specifications while another zone does not.[103] Therefore, because "[l]and use regulations typically do not implicate any protected class or fundamental right,"[104] zoning authorities must only provide a rational basis for their land use decisions.

Although a "rational basis" does not require a significant showing on the part of a local government, the local government must be able to offer at least *some* justification for its land use decisions to show that its actions are not arbitrary. Accordingly, where land use restrictions such as open space or minimum lot size requirements cannot be found to bear some relationship to the public health, safety or welfare, they may be struck down under the Equal Protection Clause.[105] However, even where there is no legislative history or express findings, so long as there would be a legitimate state interest under *any* conceivable circumstance, a zoning ordinance will be upheld.[106] Therefore, for a plaintiff to prevail on an Equal Protection Clause challenge, they must establish that they have been treated differently than similarly situated persons and that the local government has no conceivable rational basis for the disparate treatment.[107]

Based on the highly deferential equal protection analysis that almost always upholds a challenged land use ordinance, courts have struck down equal protection challenges to minimum lot size requirements based on finding either a lack of disparate treatment or the presence of a rational basis for the disparate treatment. For example, in *Mayhew*, the plaintiffs alleged an Equal Protection Clause violation where the town of Sunnyvale, Texas rejected their application for a development with a density three times that permitted by the minimum lot size ordinance.[108] The plaintiffs claimed that other developments with higher densities had previously been approved by the same zoning commission.[109] The Supreme Court of Texas determined that the Equal Protection claim failed because the plaintiff was not similarly situated to those other parties whose developments had been approved by the city. Specifically, the court noted that the plaintiff's proposed 1200 acre development would have a much greater impact on the community than other landowners who sought to construct buildings on much smaller parcels of land.[110] By contrast, in *LaSalle National Bank*, plaintiffs

100 *See e.g.*, *Board of Sup'rs of James Cty. Cnty. v. Rowe*, 216 S.E.2d 199, 206-07 (Va. 1975) (plaintiff alleged Equal Protection Clause violation based on different zoning classifications on adjacent properties).
101 *See id.* at 203-04 (discussing plaintiff's claim that variation in open space requirements with adjoining property denied them equal protection under the law).
102 *See id.* at 206 (requiring evidence of discrimination against the plaintiff to overcome presumption of validity carried by zoning regulations in adjacent areas).
103 *Id.* (quoting *W. Bros. Brick Co. v. Cty. of Alexandria*, 192 S.E.2d 881, 886 (1937) ("It is seldom that there is any definite reason for holding that a lot on one side of a line should be devoted to one purpose and that just across it to anther.")
104 *LaSalle Nat. Bank v. Cty. of Highland Park*, 799 N.E.2d 781, 798 (Ill. Ct. App. 2003).
105 *Rowe,* 216 S.E.2d at 211 (finding landowners overcame legislative presumption to invalidate twenty-nine percent open space requirement because requirement would have left no space for parking at commercial buildings and requirement was not justified by local government under any of its police powers).
106 *Central States, Southeast, & Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 806 (7th Cir. 1999). *See also Marshall*, 912 F.Supp. at 1474 (noting that state does not have to articulate actual objective of regulation as long as court can conceive of facts that justify state-imposed classification).
107 *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).
108 *Mayhew*, 964 S.W.2d at 926.
109 *Id.* at 939.
110 *Id.*

alleged Equal Protection violations when their proposal to develop two homes was denied because it violated the city's minimum lot size requirements even though other proposals that violated the minimum lot size ordinance had already been approved.[111] In assessing the claim, the court determined that the City of Highland Park's concern for protecting the character of the neighborhood from the use proposed by the plaintiff in that particular instance served as a sufficiently rational basis for rejecting the plaintiff's use variance notwithstanding the fact that similar use variances had already been approved by the city.[112]

While it is not impossible for a developer to press a claim alleging a violation of the Equal Protection Clause, courts' deference to local governments' exercise of their land use and zoning powers under the rational basis standard suggests that only in the most egregious circumstances will a court strike down an open space or a minimum lot size requirement based on the disparate treatment of similarly situated individuals.

Conclusion

A developer who seeks to challenge an open space requirement or a minimum lot size ordinance as either an unconstitutional taking or a violation of the United States Constitution's guarantee of equal protection will inevitably face an uphill battle. While a developer might succeed in establishing that an open space requirement is unconstitutional as an exaction if they can prove that the condition on development imposed by the city either does not bear a "substantial nexus" to the problem that the city seeks to address or is not "roughly proportional" to the development's contribution to that problem, it is more likely that a court would consider any open space requirement under a regulatory taking analysis. Under this categorization, the developer would have to establish that, on balance, the interest pursued by the government is not sufficiently important to justify the economic impact inflicted upon the property owner or the damage done to the property owner's investment-backed expectations. Similarly, if the developer sought to challenge a land use regulation under the equal protection clause, they would have to overcome the heavy presumption favoring the ordinance's constitutionality by establishing that the framers of the land use restriction had a discriminatory intent and that the ordinance bore no rational relation to any aspect of the local government's police powers. Accordingly, it is likely, but not certain, that constitutional challenges would not prevail against open space requirements or minimum lot size ordinances.

111 *LaSalle Nat'l Bank*, 799 N.E.2d at 798.

112 *Id.* at 799. *See also Marshall*, 912 F.Supp. at 1474 (concern for having sufficient number of wells, aquifers, and septic systems was legitimate state interest justifying minimum lot size and other restrictions on proposed development).

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