



## **Land use and the Takings Clause of the United States Constitution - by Aaron Gershonowitz and Brian Kennedy**

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The Takings Clause of the United States Constitution prohibits the government from “taking” property without compensating the owner. At the same time, it is generally understood that the government can regulate the use of property without compensating the owner. A land use regulation will not be a “taking” unless the regulation takes away virtually all the value of the property.

The Supreme Court issued a decision this past June that changes the line between per se takings

(when the government takes title) and regulatory takings (when the government imposes restrictions on the owner's use of property). In a strongly worded dissenting opinion, Justice Breyer, joined by Justices Sotomayor and Kagan, warned that this decision threatens numerous land use regulations.

The case, *Cedar Point Nursery v Hassid*, arose out of a California regulation that required agricultural employers to provide union organizers access to their property for several hours per day up to 120 days per year. Employers challenged the law, arguing that the state was "taking" their property without providing compensation. The federal district court dismissed the complaint, viewing the claim as a regulatory taking claim and reasoning that the regulation did not affect the owner's ability to use their property for agricultural purposes.

The Supreme Court reversed, holding that this was a *per se* taking. Significantly, what was taken away from the property owner was a property right and not physical possession of property. The Supreme Court said that a significant element of property ownership is the right to exclude others from the property and the state has taken that right from the owners by forcing them to allow union organizers on their property. The court explained that the takings clause does not distinguish between physical takings and regulatory takings – it requires compensation for takings. The proper distinction, the court explained, is between cases where the government has taken something for itself and those cases where the government has merely restricted a property owner's use of property. In this case, although on its face, the state was regulating use of the property, the court said it is a taking because the impact was to take away from the owner the right to exclude others.

A significant portion of the court's opinion is spent explaining why the dissent is wrong about this decision threatening existing land use regulations. Many regulations, the Court reasoned, are based on a traditional understanding of property rights. At common law, one did not have a right to use their property in a manner that was harmful to others. Therefore, most health and safety regulations are not at risk. Similarly, the common law included a distinction between trespass and takings. Thus, "isolated invasions" such as government inspections would ordinarily not arise to the level of a taking requiring compensation. And, the government can still, when issuing a permit, require as a condition of the permit, that the property owner waive certain rights.

The new line between taking property and regulating the use of property needs further definition, but is complicated by the fact that state law determines what one's property rights are. Thus, in theory, different state definitions of property could mean that a regulation is a taking of property in one state and not another.

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