

## Local Agencies on the Cutting Edge

# Emerging Challenges to Local Land Use Authority: Proposition 26, the Public Trust Doctrine, RLUIPA, and Takings Law

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*Guggenheim v. City of Goleta*: A Retreat from Judicial Activism

The Ninth Circuit’s en banc decision in *Guggenheim v. City of Goleta* is significant on several levels. It protects a large class of vulnerable home owners in California from loss not only of their homes, but of their life savings. It is yet another precedent supporting a narrow reading of the regulatory takings doctrine; it reserves government compensation for the rare case where regulation imposes an extreme economic impact on property. Finally, the decision reversed a two-to-one panel decision that was the essence of judicial activism. The panel decision would have endorsed judicial intrusion into economic and social policy making on a grand scale. The en banc decision rejected an expanded role for the courts and reaffirmed the separation of powers between the courts and the policy-making branches of government.

### **Background**

Mobile home parks differ from rental apartments insofar as the tenant in the mobile home context owns the mobile home and rents the land and infrastructure, such as roads, lighting, and common areas, from the park owner. In 1979, at the same time that many jurisdictions in California were adopting rent control for apartments and mobile home parks, the County of Santa Barbara adopted a mobile home rent control measure that limited annual rent increases in all mobile home parks in the County. In 1987, the County amended the mobile home rent control law to include “vacancy control,” limiting the rent increase to a new tenant purchasing a mobile home to 10%.<sup>1</sup>

In 1997, when Guggenheim purchased the mobile home park in question, it was still situated in an unincorporated portion of Santa Barbara County and was subject to the mobile home rent control law last amended 10 years previously. When the City of Goleta incorporated

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<sup>1</sup> In the Costa Hawkins Rental Housing Act of 1995, Cal. Civ. Code §§ 1954.50 *et seq.*, California barred vacancy control in rental apartments, but specifically exempted mobile homes due to the unique circumstances of mobile homes. *See* Cal. Civ. Code §§ 1954.51(b).

in 2002, Guggenheim’s mobile home park was located within the new city boundary. Under California law, Cal. Gov’t Code § 57376, at the time a city incorporates, it is required to adopt all ordinances of the county in which the city is located. The city has 120 days to decide whether to retain those ordinances. In the instant case, Goleta adopted the County’s mobile home rent ordinance—the same ordinance in effect when Guggenheim purchased the property in 1997—and readopted it within the 120-day period (RCO).

The RCO “has a complex scheme for setting rents, limiting how fast they rise, and affording landlords a mechanism for disputing the limits.” *Guggenheim v. City of Goleta*, --- F.3d --- (9th Cir. Dec. 22, 2010), Slip Op. at 20424; *see* Goleta, Cal., Mun. Code §§ 08.14.010 *et seq.* It permits landlords to increase rents in proportion to inflation and to pass through the cost of capital improvements. *Id.*, §§ 08.14.040-140. Cumulatively, the RCO’s various provisions for rent increases and administrative remedies allow ample opportunity to mobile home park owners to maintain net operating income, an accepted standard for determining whether rent control is constitutional.<sup>2</sup>

In 2002, Guggenheim challenged the RCO on its face as a taking on the ground that it failed to substantially advance a legitimate government interest. The effect of the vacancy control provision of the RCO, according to Guggenheim, was to transfer 90% of the value of the land rented by the mobile home owner from the park owner to the tenant—a so-called

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<sup>2</sup> Under the United States and California Constitutions, a rent ordinance in California must afford a landlord a fair return on property. *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 165 (1976). Many rent ordinances measure fair return by, among other things, whether the landlord is permitted to charge rents that allow maintenance of net operating income (“MNOI”). Under the MNOI standard, the net annual operating income from a year prior to the imposition of rent controls is fixed as the baseline. To meet the standard, the rent ordinance must permit sufficient rent increases and capital improvement pass throughs to allow the landlord to maintain the baseline level of net operating income adjusted for inflation. California courts have approved MNOI as a valid standard for ensuring that landlords receive a fair return. *See, e.g., Palomar Mobilehome Park Ass’n v. Mobile Home Rent Review Com.*, 16 Cal.App.4<sup>th</sup> 481, 486 (1993).

“premium”—that the tenant would retain when it sold its mobile home. *See Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997). Guggenheim also alleged that the RCO violated due process and equal protection under the U.S. Constitution.

The District Court initially abstained from adjudicating the federal action under *Railroad Comm. of Tex. v. Pullman Co.*, 312 U.S. 496, 501-02 (1941) while the Guggenheims pursued their claims in state court. The parties settled the state action and returned to federal court, where the Guggenheims were awarded summary judgment on the ground that the RCO transferred a premium from the park owner to the mobile home owners. While the City’s appeal was pending, the Supreme Court decided *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) and the parties agreed that *Lingle* required vacating the district court judgment. Accordingly, the City dismissed its appeal and the parties resumed the litigation in District Court. The District Court then granted summary judgment to the City, rejecting Guggenheim’s claim that the RCO failed to “substantially advance” under *Lingle*, and his facial attack on the RCO under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (*Penn Central*) on the basis that Guggenheim purchased the mobile-home park subject to the RCO and paid a reduced price reflecting that regulation. When the City readopted the RCO, Guggenheim lost nothing.

In a 2-1 decision, a three-judge panel of the Ninth Circuit reversed. The majority, in an opinion written by Judge Jay Bybee, found that the RCO effected a taking on its face under *Penn Central*. Judge Andrew Kleinfeld dissented, arguing that Guggenheim bought the mobile home park in 1997 subject to the RCO and lost nothing when the City merely reenacted the RCO upon incorporation in 2002. The Ninth Circuit granted rehearing en banc. The City of Goleta retained our firm, Shute, Mihaly & Weinberger LLP, to represent the City in the appeal after the Ninth Circuit granted rehearing en banc. The City prevailed on rehearing.

## **I. Impact of *Guggenheim* on Mobile Home Owners.**

The Ninth Circuit's decision in *Guggenheim* preserves the homes and life savings of thousands of residents of California mobile home parks. Mobile home owners tend to be low- or moderate-income individuals and families, elderly, or disabled who have struggled to become homeowners. Rent control protects their investment. The court's decision affirms the important role rent control regulations play in providing stability for this vulnerable population, particularly in California's expensive real estate market.

Mobile home owners have a unique relationship with park owners; while the mobile home owner can invest in improvements to her property and surrounding landscaping, she does not own the land itself. Without limits on rent increases, many mobile home owners would be forced out of their homes, in part because mobile homes are, in fact, not mobile. Those forced to sell due to unaffordable rent would be unable to recoup their investment in the property upon the sale because most bought and invested in improvements to their homes when the rent for their pads was capped. As Judge Kleinfeld wrote for the majority, "the owner of the land has the owner of the mobile home over a barrel." *Guggenheim v. City of Goleta*, Slip Op. at 20423. The higher the cost of the rent for the pad on which a mobile home sits, the lower the value of the mobile home itself. Once the rent cap is lifted, a buyer will pay only a fraction of the value of the home if it were still under rent control.

Given the unique circumstances of mobile homes, suddenly eliminating rent control would cause a seismic shift in wealth from mobile home owners to park owners. The *Guggenheim* court expressed keen sensitivity to the vulnerability of mobile home owners:

The people who really do have investment-backed expectations that might be upset by changes in the rent control system are tenants who

bought their mobile homes after rent control went into effect. Ending rent control would be a windfall to the Guggenheims, and a disaster for tenants who bought their mobile homes after rent control was imposed in the 70's and 80's.

*Id.* at 20437. Based on evidence in the record, the relevance of which is questionable given that Guggenheim challenged the RCO on its face, the court concluded that mobile home owners would lose \$100,000 each if the RCO were found to effect a taking and the City repealed the ordinance. “Leaving the ordinance in place impairs no investment-backed expectations of the Guggenheims, but nullifying it would destroy the value these tenants thought they were buying.” *Id.* at 20438.

It is difficult to imagine the devastation of one of California's prime sources of affordable housing if the three-judge panel decision had stood. Because most challenges to mobile home rent control are barred by the statute of limitations, and the mobile home park owners who are motivated to challenge mobile home rent control purchased their parks after mobile home rent control was in place, *Guggenheim* would appear to foreclose further constitutional challenges to mobile home rent control in California, giving a modicum of comfort to mobile home owners.

## **II. Procedural Defenses.**

The City failed to raise, or waived, each of the procedural defenses of standing, state compensation ripeness, and the statute of limitations in the District Court. As a result, the Ninth Circuit, which typically upholds the dismissal of regulatory takings cases on one or more of these procedural grounds, was able to reach the merits of a regulatory takings case. Indeed, this is the first instance of the Ninth Circuit applying *Penn Central* to a takings claim.

These procedural defenses were strong in this case and could have resulted in a disposition of the case without a need to reach the merits of the regulatory takings claim. Some

commentators have suggested, however, that *Guggenheim* signals a new willingness of the Ninth Circuit to brush aside these procedural defenses to reach the merits in takings cases. Were this the case, it would signal a departure from the federal courts' historical conservatism in reviewing the land use regulations of local public agencies. Because the City failed to assert its procedural defenses, however, the District Court and the Ninth Circuit did not have a fair opportunity to analyze them. Accordingly, *Guggenheim* should not be interpreted as a precedent for judicial activism in takings cases.

**A. Standing.**

*Guggenheim* is unusual because neither the party injured by the challenged action, nor the author of that action, were before the Court. As a result, two of the three requisites of Article III standing were missing: (1) the Park Owners had suffered no "injury in fact" that (2) was caused by, or "fairly traceable to," the City's conduct rather than "the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted).

Despite the strength of the standing defense, the City did not raise standing in the trial court. The Ninth Circuit three-judge panel raised the defense *sua sponte*, and proceeded to find standing despite the foregoing precedents. In its opinion, the en banc court also found that *Guggenheim* had standing because they owned the property at the time of the enactment of the challenged regulation and claimed an injury in fact, Slip Op. at 20428, glossing over the Ninth Circuit's authorities that an owner who purchases the property after the challenged regulation had been imposed is not injured.

## 1. Injury In Fact.

The Ninth Circuit's finding that Guggenheim had suffered an injury in fact is belied by the Ninth Circuit's own analysis of the investment-backed expectations factor of *Penn Central* and was arguably erroneous. Any injury caused by the RCO was perfected by its original enactment in 1987, ten years before the Park Owners purchased the property at a reduced price reflecting the impact of the rent control on the prior owners. A facial takings claim assumes that the "mere enactment" of the measure effects a taking. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494-95 (1987); *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (2003); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994), *overruled on other grounds in WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). "[T]he harm is singular and discrete, occurring *only* at the time the statute is enacted." *Carson Harbor*, 37 F.3d at 476 (emphasis in original) (citing *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)).

In *Carson Harbor*, the Ninth Circuit found no injury in fact where a mobile home park owner mounted a facial challenge to a rent control ordinance enacted before the plaintiff purchased the park. 37 F.3d at 476; see also *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1193 (9th Cir. 2008) (relying on *Carson Harbor* to deny standing). Having purchased the park after the RCO was enacted, the Park Owners here likewise suffered no injury.

The City's readoption of the RCO in 2002, without change, caused no new injury to Guggenheim. While "mere enactment" of a measure *can* effect a taking, "[t]he mere existence of a statute . . . is not sufficient to create a case or controversy within the meaning of Article III." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)

(internal quotations omitted). Rather, the plaintiff must show that the challenged measure has a real-world effect on the plaintiff's interests: there must be an injury *in fact*. See *Lujan*, 504 U.S. at 560 (injury must be “concrete and particularized”); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (injury must be “distinct and palpable”); *Carson Harbor*, 37 F.3d at 475 (requiring “actual injury” that is “real and immediate”).

Guggenheim, therefore, suffered no injury *in fact* from the City's ministerial readoption of the RCO. Apart from a brief gap during a single day—of which Guggenheim may not have even been aware—the RCO remained in effect without substantive change after the City incorporated. Accordingly, the Park Owners suffered no new injury from the City's reenactment of the RCO. See *De Anza Props. X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086-87 (9th Cir. 1991) (park owners suffered no new injury when County amended mobilehome rent control ordinance to delete sunset provision because amendment did not alter ordinance's effect on park owners); accord *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1027 (9th Cir. 2007) (applying *De Anza*); see also *Daniel v. County of Santa Barbara*, 288 F.3d 375, 384 (9th Cir. 2002) (city's required dedication of easement perfected any taking before plaintiff acquired property, and city's post-acquisition acceptance of dedication caused no new injury).

## **2. Causation.**

The second standing element demands “a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560 (internal quotation marks and alterations omitted). Assuming *arguendo* a link between Guggenheim's injury and *the RCO*, however, it certainly does not follow that the

injury is “‘fairly traceable’ to *the City’s* actions,” given that any injury caused by the RCO was complete when *the County* enacted the RCO years before the City incorporated.

The City’s reenactment of the RCO without modification—as compelled by state law—did nothing to change the status quo. Any injury flowing from the RCO was the result of “independent action” of the County, a “third party not before the court,” and thus any such injury is not “fairly traceable” to the City. *See Lujan*, 504 U.S. at 560; *see also Duquesne Light Co. v. USEPA*, 166 F.3d 609, 613 (3d Cir. 1999) (injury not fairly traceable to EPA because it had no power to disapprove plan previously adopted by Pennsylvania), *discussed in Pritikin v. Dep’t of Energy*, 254 F.3d 791, 798 (9th Cir. 2001).

Accordingly, local agencies should continue to assert lack of standing as a defense to regulatory takings claims where the claimant acquired the property subject to the challenged regulation and presumably paid a price for the property that reflected the limitations on use imposed by the regulatory scheme.

#### **B. State Compensation.**

A takings claim is not ripe for federal review until after the plaintiff has first sought just compensation under the procedures established by state law for bringing a takings or inverse condemnation claim (the “state compensation requirement”). *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186-95 (1985). Although it is undisputed that Guggenheim did not seek compensation in state court, the Ninth Circuit nonetheless found that the state compensation ripeness is prudential rather than jurisdictional and, in the exercise of prudence, took jurisdiction over Guggenheim’s takings claim.<sup>3</sup>

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<sup>3</sup> The City raised the state compensation requirement in the first round of litigation in the District Court, where Guggenheim alleged that the RCO failed to substantially advance a legitimate state interest. The court rejected that defense because the law at the time contemplated equitable remedies for that claim. The City failed to raise the defense, however, in the second round after *Lingle*, when the defense should have been dispositive.

The *Guggenheim* court’s conclusion that the state compensation requirement is prudential is based on dictum in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) and a misapplication of *Yee v. City of Escondido*, 503 U.S. 519 (1992). Slip Op. at 20429. In *Suitum*, the Supreme Court stated that the state compensation requirement was “prudential” rather than jurisdictional. 520 U.S. at 733-34. That dictum, however, directly conflicts with *Williamson County*, which establishes that the state compensation requirement is jurisdictional. Because “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation,” a federal takings claim does not accrue “until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation.” *Williamson County*, 473 U.S. at 194-95. Accordingly, the ripeness requirement stems from the very language of the Fifth Amendment. It does not appear to lend itself to the exercise of discretion: The takings claimant either obtained a final decision on a takings claim under the procedures provided by the state, or it did not. No federal claim can arise, by definition, until the state compensation remedy has been finally proved inadequate.

Moreover, *Suitum* did not address the state compensation requirement. It only considered whether the property owner’s action was ripe under *Williamson County*’s final decision requirement. 520 U.S. at 734. The Court further expressly acknowledged that it did “not decide whether *Williamson County*’s ‘state procedures’ requirement has been satisfied in this case.” *Id.* at 734 n.8. *Suitum* did not involve a challenge to a state agency action and therefore the state compensation requirement arguably was entirely inapplicable. The Tahoe Regional Planning Agency, a multistate agency created by interstate compact, did not provide its own compensation procedures. *Id.*

The dictum relied on by the Guggenheim Court is also flatly inconsistent with the Supreme Court’s decision in *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005). The plaintiffs there had asserted takings claims in federal court, and the Ninth Circuit abstained as to some of the claims and affirmed dismissal of others based on the state compensation requirement. *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1106 (9th Cir. 1998). In the Supreme Court, the plaintiffs argued that, because *Williamson County* had “forced” them into the state forum to ripen their as-applied takings claims, they should have been able to “reserve” those claims under *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), and then return to litigate them in federal court after the state court denied them compensation. 545 U.S. at 338.

The Supreme Court roundly rejected the argument, holding that because their as-applied takings claims were unripe, they “*were never properly before the District Court*, and there was no reason to expect that they could be relitigated in full [in federal court] if advanced in the state proceedings.” *Id.* at 341 (emphasis added). Because an *England* reservation is limited to cases in which “a plaintiff *properly invokes* federal-court jurisdiction in the first instance on a federal claim,” *San Remo*, 545 U.S. at 340 n.21 (quoting *Allen v. McCurry*, 449 U.S. 90, 101 n.17 (1980)), the Court found *England* did not apply to the plaintiffs’ as-applied takings claims, which “were never properly before the District Court because they were unripe.” *Id.* at 344. This conclusion is squarely inconsistent with the dicta regarding the state compensation requirement in *Suitum* and the Ninth Circuit’s conclusion that the state compensation requirement is only prudential.

Further questioning the weight that the *Suitum* dictum deserves, the Ninth Circuit, before and after *Suitum*, has found that the state compensation requirement is jurisdictional and requires

dismissal where a takings claimant has not sought and been denied compensation in state court. “Ripeness is more than a mere procedural question; it is determinative of jurisdiction.” *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990); accord *W. Linn Corporate Park LLC v. City of West Linn*, 534 F.3d 1091, 1100, 1102-03 (9th Cir. 2008); *Vacation Vill., Inc. v. Clark County*, 497 F.3d 902, 913 (9th Cir. 2007); *Hacienda Valley Mobile Estates*, 353 F.3d at 659; *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320, 323-24 (9th Cir. 1996); see also *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996) (“[N]o constitutional violation occurs until the state refuses to justly compensate the property owner.”).<sup>4</sup> Accordingly, the state compensation requirement compels dismissal on a court’s own motion—regardless of whether the defendant raises a ripeness defense. See *Haw. Newspaper Agency v. Bronster*, 103 F.3d 742, 746 (9th Cir. 1996).

Insofar as the Supreme Court has determined that the state compensation requirement is “prudential,” it constitutes judicial activism. A decade earlier, in *Williamson County*, the Court held that federal courts will not interfere with the state’s process for providing compensation for a regulatory taking. A reading of the dictum in *Suitum* to abandon that judicially conservative position, essentially saying that federal judicial review of local property regulation is first and foremost a state matter—unless the federal court *in its discretion* decides that it needs to intervene before the state process is given the opportunity to resolve the matter under state law—is judicial activism.

The *Guggenheim* Court also relies on *Yee v. City of Escondido* for the proposition that the state compensation requirement is prudential. The difficulty with that reliance is the context in which *Yee* was decided. At the time of that decision in 1992, the substantially advance means-

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<sup>4</sup> Other circuits, in decisions issued after *Suitum*, similarly find a lack of subject matter jurisdiction where plaintiffs fail to satisfy the state compensation requirement. See, e.g., *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 569-71 (6th Cir. 2008); *Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007).

ends test introduced in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) was still understood to be a valid takings test. Because a possible remedy for a facial challenge to regulation on the basis that it failed the substantially advance test was invalidation rather than compensation, the state compensation requirement did not necessarily apply to such claims. In discussing *Yee*, the *Guggenheim* Court recognized that the facial challenge by the mobile home park owner in *Yee* may have been ripe under the state compensation requirement “because it did not depend on the extent to which they were deprived of the economic use of their property or the extent to which they were compensated.” Slip Op. at 20429. After *Lingle*, 544 U.S. at 545, the *Agins* substantially advance test has been eliminated from takings jurisprudence. In stating that a taking is not a regulation that fails a means-ends test, the Supreme Court found it necessary to identify the proper standard for a regulatory taking—where government regulation is tantamount to a direct physical appropriation of private property:

[T]he[] three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.

*Id.* at 539. It follows logically from this equivalency between inverse condemnation and direct condemnation that the only remedy for a taking is monetary compensation. *See also, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987) (finding equitable remedy for taking inadequate, requiring monetary compensation); *see also United States v. 564.54 Acres of Monroe and Pike County Land*, 441 U.S. 506, 510 (1979) (owner must be put “in as good a position pecuniarily as if his property had not been taken”); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893) (“[T]he compensation must be a full and perfect equivalent for the property taken”) . . . . *Ruckleshaus v. Monsanto Co.*, 467

U.S. 986, 1016 (1984) (“Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking.”). Applications of the state compensation requirement in cases such as *Yee* where the claimant alleged that the regulation was invalid under the substantially advance test are no longer relevant because compensation was not an element of those claims. See *Richardson*, 124 F.3d at 1160-61, 1165 (finding takings claim for compensation based on economic impact unripe for adjudication in federal court, but finding substantially advance claim ripe because claimant not seeking compensation).<sup>5</sup>

Despite recently upholding the dismissal of takings cases under the state compensation requirement in *Adam Brothers Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1147-48 (9th Cir. 2010) and *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), the *Guggenheim* Court recognized that those decisions were based on *Suitum*’s dictum and that the Ninth Circuit panels there had assumed that they had jurisdiction, without deciding whether the state compensation requirement was prudential or jurisdictional, and then dismissed the takings claim. Slip Op. at 20429.<sup>6</sup> The court further observed that it is more likely to find an as applied

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<sup>5</sup> Curiously, the Ninth Circuit en banc panel did not cite to *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*, 560 U.S. —, 130 S.Ct. 2592 (June 17, 2010) (“*STBR*”) to support its assumption that the state compensation requirement is prudential. In *STBR*, the Supreme Court rejected a “judicial taking” challenge to the decision of the Florida Supreme Court interpreting the state’s common law to determine the nature and scope of littoral owners’ property interests. In a portion of the four justice plurality opinion that was joined by the four concurring justices (Justice Stevens had recused himself), Justice Scalia also noted that the *Williamson County* state compensation requirement is prudential, without citing authority or analysis. 130 S. Ct. at ---. This passage, like the statement in *Suitum*, is dicta because the state compensation requirement was not at issue. The relevance of *Williamson County*’s holding to the issues in *STBR* is unclear and underscores the uncertainty surrounding this issue.

<sup>6</sup> Moreover, *McClung* fails to show that the state compensation requirement is merely prudential. The plaintiffs there had attempted to seek compensation in state court, but the city removed the case to federal court. *Tapps Brewing, Inc. v. City of Sumner*, 482 F. Supp. 2d 1218 (W.D. Wash. 2007). The District Court found that “[s]ince Plaintiffs have pursued an inverse condemnation action in Washington state court . . . , their takings claim . . . is ripe for adjudication in this Court.” *Id.* at 1227. Whatever the propriety of the District Court’s conclusion, the Ninth Circuit did not address the state compensation requirement on appeal. 548 F.3d at 1224. Moreover, neither *McClung* nor the cases on which it relied—*Suitum*, *Weinberg v. Whatcom County*, 241 F.3d 746, 752 n.4 (9th Cir. 2001), and an unpublished memorandum disposition—included any analysis to support a conclusion that the state

takings claim unripe than a facial claim, citing *Ventura Mobilehome Communities Owners Association v. City of San Buenaventura*, 371 F.3d 1046, 1052-54 (9th Cir. 2004). Slip Op. at 20429-30. It further acknowledged that the question as to whether the state compensation requirement is jurisdictional is confused by the invalidation of the substantially advance test. Without resolving these significant questions, however, the Guggenheim court fell back on *Suitum* to conclude that the state compensation requirement is prudential. Then seeming to contradict itself, the court stated that it merely “assume[s] without deciding” that Guggenheim’s claim is ripe in federal court because it would be a “waste of the parties’ and the courts’ resources to bounce the case through more rounds of litigation.” *Id.* at 20430. And because the case had already been litigated in state court, the court found that “it is hard to see any value in forcing a second trip on [the parties].” *Id.* Query as to whether the District Court would have reached a different conclusion had the City raised the state compensation requirement defense again after the litigation had resumed in the District Court following *Lingle*.

Thus, the *Guggenheim* Court hardly painted a clear picture of the law regarding state compensation ripeness. After reciting the ambiguous and contradictory precedent from the Ninth Circuit, the en banc majority merely assumed ripeness, without analysis of any criteria for taking jurisdiction, and only because the court found the challenged regulation valid and did not wish to prolong the litigation. Moreover, it pronounced that jurisdiction was discretionary, without citing the factors the court should consider in exercising such discretion and without reference to the well-established principle that where jurisdiction is prudential, federal courts should exercise restraint. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). In exercising prudential

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compensation requirement is prudential. See *Weinberg*, 241 F.3d 746, 752 n.4 (9th Cir. 2001) (“We assume without deciding that the Federal takings claim is ripe.”).

jurisdiction, a court should consider (1) the fitness of the issues for judicial review; and (2) the injury or hardship to the parties of withholding judicial consideration. *Id.* The *Guggenheim* court appeared to apply the second factor, but to disregard the first. The predominant rationale underlying prudential ripeness, however, is to avoid becoming embroiled in what may be unnecessary adjudication. *See Simmonds v. Immigration and Naturalization Svc.*, 326 F.3d 351, 357 (2nd Cir. 2003) (prudential ripeness is “a tool that courts may use to . . . avoid . . . premature examination of . . . constitutional issues); *see also Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 940 n.12 (D.C. Cir. 1986) (“Even when the constitutional minimum has been met. . . prudential considerations may still counsel judicial restraint.”) Accordingly, where, as here, the federal claim does not exist until the claimant exhausts state compensation remedies, *Williamson County*, 473 U.S. at 194-95, the federal court should take jurisdiction only in extraordinary circumstances, such as where the state compensation remedy is conclusively demonstrated to be inadequate. *See Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 (9th Cir. 1991); *Austin v. City of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988).

The *Guggenheim* court's assumption of jurisdiction was also based on dicta of the Supreme Court that failed to make the case that the defense is prudential, rather than jurisdictional. The notion that the state compensation requirement is jurisdictional has merely been asserted by the Supreme Court in *Suitum* and *STBR* without citation or analysis. Before the Supreme Court's dicta that state compensation ripeness is prudential becomes a settled and respected precedent, it deserves at least some analysis by the Supreme Court, including an explanation as to how a federal court can assume jurisdiction over a federal takings claim that does not exist until state compensation remedies have been invoked.

Finally, *Guggenheim* should not be read to reduce the burden on takings claimants to show ripeness. The City failed to raise the state compensation requirement in the District Court in the second round of litigation, allowing the District Court to reach the merits without deciding whether the case was ripe. The fact that there had been extensive litigation in the trial court influenced the Ninth Circuit's assumption that the case was ripe. Had the City raised state compensation ripeness timely, the litigation may have been resolved based on that defense.

### **C. Statute of Limitations.**

Unfortunately, the City stipulated in the District Court that the period of a few hours between the City's officially incorporating and the mandated adoption of all County ordinances created a legally significant gap in the application of the RCO. In its opinion, the Ninth Circuit observed that the City may have waived a viable defense:

We say there was a gap because the parties so stipulated, but we do not imply a construction of California law to that effect. The California statute says that the newly incorporated city must "immediately" and "prior to performing any other official act" adopt an ordinance maintaining the effectiveness of all county ordinances, so it may be that, were it not for the stipulation, there would be an arguable question whether there was any gap.

Slip Op. at 20426 n.8.

The City's stipulation resulted in the City's waiver of the statute of limitations defense. Under the law of the Ninth Circuit, the statute of limitations could have been a successful defense for the City. *See, e.g., DeAnza Properties*, 936 F.2d at 1086 (statute of limitations commenced on date of enactment of ordinance, rather than date ordinance amended to remove sunset provision).

### **III. The *Penn Central* Claim.**

The *Guggenheim* decision has implications far beyond mobile home rent control. It is a major victory for government's ability to make land use decisions in furtherance of the public

good. A victory for the plaintiffs could have opened the door to significant challenges to other types of land use and environmental regulations, upending long-standing Supreme Court case law that protects such regulatory activity.

**A. *Penn Central* Partial Takings.**

The regulatory takings doctrine originated with the United States Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922), where the Court first declared that government regulation that deprives the property owner of virtually all value of the property— tantamount to a direct condemnation—could be compensable. Insofar as the takings clause was originally understood to apply only to direct condemnation, *see, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321-22 (2002); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995), *Pennsylvania Coal* itself is a blueprint for judicial activism. The tension in takings jurisprudence since that case has been largely an attempt to determine whether it is a proper role of judges to second-guess economic and social policies made by legislatures and administrative agencies.

Following *Pennsylvania Coal*, the Supreme Court did not significantly elaborate on the regulatory takings doctrine until *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), where the Court established a three-factor test for a taking: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with investment backed expectations; and (3) the character of the governmental action. *Id.* at 124.

In the 25-year period after *Penn Central*, the Court found taking liability in several cases involving physical occupations of property or regulatory deprivation of all value, *e.g., Loretto v.*

*Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27 (1982) (physical taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) (physical taking); *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019 (destruction of all value). The Supreme Court also found that takings liability could be imposed under the three *Penn Central* factors where the regulation effected less than a total deprivation of value or a physical invasion, sometimes referred to as a “partial taking”. *See Lucas*, 505 U.S. at 1019 n.8.

**B. Investment-Backed Expectations Factor “Primary.”**

Because regulatory takings cases are usually resolved in favor of the public agency based on the procedural defenses of ripeness, standing, or the statute of limitations, courts have had few opportunities to apply the three-factor *Penn Central* test. Indeed, *Guggenheim* is the first case in which the Ninth Circuit has applied the *Penn Central* test.<sup>7</sup> While the three-factor test of *Penn Central* has been applied in a handful of cases in the lower federal and state courts, the United States Supreme Court has had only two occasions to apply *Penn Central* since it decided that case in 1978. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the EPA required the submission of trade secrets concerning chemicals marketed by chemical companies as a condition of permission to market their products. During a period where the law did not prevent the EPA from publicly disclosing Monsanto’s trade secrets, the Supreme Court held that Monsanto had no reasonable investment-backed expectation that the data would be kept secret. *Id.* at 1006. After the law was amended to require the EPA to maintain confidentiality of the trade secrets, the Court ruled that Monsanto could state a valid takings claim. 467 U.S. at 1008, 1011, 1013.

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<sup>7</sup> The Ninth Circuit was able to reach the merits because, unfortunately, the City waived or failed to assert its procedural defenses in the District Court.

In *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001), the Rhode Island Supreme Court had adopted a blanket rule that one who acquires title after the challenged regulation had been imposed was barred from asserting a taking under the investment-backed expectation factor of *Penn Central*. The United States Supreme Court reversed, finding that the claimant's acquisition of property after the regulation had been adopted did not automatically bar a regulatory takings claim. 533 U.S. at 630. In neither *Monsanto* nor *Palazzolo*, however, did the Supreme Court provide any clear standards for the application of the investment-backed expectation factor. Indeed, the paucity of Supreme Court precedent applying the *Penn Central* factors has resulted in non-uniformity of decisions in lower courts. Compare, e.g., *Guggenheim v. City of Goleta*, Slip. Op. at 20437-38 (rejecting facial *Penn Central* challenge to rent control) and *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874, 884 (D.C. Cir. 1999) (denying *Penn Central* claim against historic preservation law) with *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1176, 1181-82 (Fed. Cir. 1994) (finding restriction on filling wetlands under Clean Water Act a *Penn Central* taking); and *Action Apartment Ass'n*, 94 Cal.App.4th at 605-07 (applying *Penn Central* factors to hold ordinance requiring landlords to pay interest on tenant security deposits effected a taking).

A notable exception to the Supreme Court's murky pronouncements with regard to the *Penn Central* test is Justice O'Connor's concurring opinion in *Palazzolo*. Joining the majority, Justice O'Connor declared that while the claimant's acquisition of title after the government adopted the challenged regulation was not absolutely dispositive, it could be sufficient to negate a taking under the investment-backed expectations factor of *Penn Central*. See *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring). Notions of fairness, Justice O'Connor wrote, require that a property owner cannot complain of regulatory limits on use of the property that the owner

knew about or should have known about at the time of purchase. *Id.* The owner’s purchase price presumably took into account those regulatory limitations. *Id.* In reliance on Justice O’Connor’s concurring opinion in *Palazzolo*, subsequent Supreme Court decisions on takings have emphasized the investment-backed expectations factor as primary, and potentially dispositive, in the *Penn Central* analysis. *See, e.g., Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321.

**C. Application of Investment-Backed Expectations Factor to a Facial Claim.**

The *Guggenheim* court found that the investment-backed expectations factor of *Penn Central* was “primary” and fatal to Guggenheim’s takings claim. Slip Op. at 20434. The court emphasized that a challenge to legislation on its face amounts to a claim that the mere enactment of the regulation caused the transfer of a property interest from claimant. *Id.* at 20433. Because Guggenheim did not own the property when the RCO was enacted in 1979 and amended in 1987, it suffered no loss:

Whatever unfairness to the mobile home park owner might have been imposed by rent control, it was imposed long ago, on someone earlier in the Guggenheims’ chain of title. The Guggenheims doubtless paid a lot less for the stream of income mostly blocked by the rent control law than they would have for an unblocked stream. The 2002 City of Goleta adoption by reference of the Santa Barbara County ordinance did not transfer wealth from them to their tenants. That transfer occurred in 1979 and 1987, from other landlords, and probably benefitting other tenants.

*Id.* at 20437.

The majority in *Guggenheim* rejected the contention of the property owner and the dissent that *Palazzolo* demands that courts, in analyzing reasonable investment backed expectations, disregard whether the challenged regulation was in place when the claimant acquired the property. Slip. Op. at 20431-32. The court distinguished *Palazzolo*: “In *Palazzolo* the taking was from the first owner and the ‘as applied’ lawsuit was by the second. The transfer

was by operation of law, during the period when the owner was ripening the claim by exhausting state remedies.” *Id.* at 20431. The court emphasized this fact because even though Mr. Palazzolo received title to the property after the regulation was imposed, he did so only as the sole shareholder of a corporation that was dissolved, “not because he bought the property for a low price reflecting the economic effect of the regulation.” *Id.* at 20432.

The court also distinguished *Palazzolo* on the ground that the Guggenheim’s challenge was to the RCO on its face, where Palazzolo’s “as applied challenge necessarily address[ed] the period during which the administrative or judicial proceedings for relief occur, so justice may require that title transfers during the ripening period not bar the action. By contrast, there is no such extended period applicable to a facial challenge, because the only time that matters is the time the ordinance was adopted.” *Id.* at 20432. Guggenheim, unlike Mr. Palazzolo, owned the mobile home park before and after the City adopted the RCO. *Id.* The court rejected the notion that *Palazzolo* could revive a challenge to the County’s 1979 and 1987 adoption of the RCO, noting that Guggenheim did not challenge those ordinances. *Id.*

The court displayed little patience for Guggenheim’s argument that he had a reasonable investment-backed expectation that a court would find the RCO to effect an unconstitutional taking. This argument is circular because the court’s finding of a taking would itself require the court to find that Guggenheim’s investment-backed expectations were frustrated—a logical barbershop mirror. The court dismissed this specious argument:

Since the ordinance was a matter of public record, the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer. . . . The Guggenheims might conceivably have paid a slight speculative premium over the value that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action. But that premium could be no more than a speculative possibility, not an “expectation.” Speculative

possibilities of windfalls do not amount to “distinct investment-backed expectations,” unless they are shown to be probable enough materially to affect the price. The idea, after all, of the constitutional protection we enjoy in the security of our property against confiscation is to protect the property we have, not the property we dream of getting. The Guggenheims bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something much more valuable, because of hoped-for legal changes, than what they had.

*Id.* at 20434-36.

Although it found the investment-backed expectations factor dispositive, the *Guggenheim* court went on to conclude that the other two factors—economic impact and character of the government action—also warranted rejection of the takings claim. For the same reasons that the City’s 2002 enactment of the RCO did not interfere with Guggenheim’s investment-backed expectations, the adoption of the RCO had no economic impact on Guggenheim because the ordinance was already in place when Guggenheim purchased the park. Similarly with respect to the character factor, the court stated: “[T]he character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good . . . does not help the Guggenheims. The City of Goleta did not adjust the benefits and burdens of economic life, it left them as they had been for many years.” *Id.* at 20437.

While the court acknowledged that Guggenheim strategically “limit[ed] their challenge to a facial one, not an as applied challenge,” *id.* at 20433, the court suggested that Guggenheim was not barred from raising an as applied challenge “if at some subsequent time the City of Goleta’s arbitrator denies them a fair rent increase.” *Id.* Guggenheim’s strategy in limiting its challenge to a facial one is transparent: the RCO authorized rent increases and administrative appeals that, should Guggenheim have elected to invoke them, would have ensured that Guggenheim received

a fair return on its investment under a maintenance of net operating income standard. By asserting a facial claim only, Guggenheim could rely solely on its “premium” theory of relief, which, it assumed, would appear to some conservative judges as unfairly redistributive.

*Guggenheim* is now the leading case applying Justice O’Connor’s reasoning in *Palazzolo* to dismiss a regulatory takings claim. This precedent could result in a judgment for the government in a broad class of cases where the takings claimant acquired the property after the regulation in question had been enacted. For example, under *Guggenheim*, a challenge to a historic preservation law would fail in virtually every case where the claimant bought the property with the regulation in place. The outcome of this blanket rule will be less judicial involvement in deciding if regulation of property best serves the interests of the community.

#### **IV. Due Process and Equal Protection.**

Also of importance in the *Guggenheim* en banc opinion is the majority’s rejection of the mobile home park owner’s due process and equal protection claims. *Id.* at 20438-40. The en banc panel applied the rational basis test to the RCO, rather than subject the law to a less deferential review that would permit the court to second guess the policy decisions of an elected legislature. *Guggenheim* and several amici had urged the court to apply a heightened level of scrutiny to the RCO under the United States Supreme Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The en banc panel’s application of rational basis protected the prerogative of government agencies to enact social and economic regulation to protect community interests. The Ninth Circuit’s brief analysis and dismissal of these claims belies the significance of the ruling as illustrated by the following history of heightened scrutiny in regulatory takings.

### **A. The Rational Basis Test.**

Like other forms of social and economic regulation, land use regulation has traditionally enjoyed a presumption of validity. Since the New Deal, the United States Supreme Court has consistently applied the lowest level of scrutiny to determine whether social and economic regulation advances a legitimate government interest. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (legislative acts adjusting burdens and benefits of economic life presumed constitutional; burden is on one complaining of constitutional violation to establish that regulation is arbitrary and irrational).

Generally, courts review land use regulation applying the deferential “rational basis” test. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (if validity of legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (court will not substitute its judgment for that of legislative body charged with primary duty to determine the question); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (court does not sit to determine whether particular housing project is or is not desirable).

Under this test, the courts presume that the government’s decision is supported by the facts. The courts must uphold regulation unless no reason can be conceived to support it. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1973); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962). The burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *Euclid*, 272 U.S. at 395; *see also Pennell v. San Jose*, 485 U.S. 1 (1988) (ordinance controlling rents upheld); *Agins v. City of Tiburon*, 447

U.S. at 261-62 (zoning to prevent ill effects of urbanization upheld); *Penn Central*, 438 U.S. at 129-30 (landmark preservation law upheld as valid exercise of police power).

The rational basis test is firmly rooted in the doctrine of separation of powers between the legislative and administrative branches of government and the judicial branch. *Penn Central*, 438 U.S. at 125; *Gorieb v. Fox*, 274 U.S. 603, 608 (1927). The Constitution vests the legislative and executive branches with the authority to make social and economic policy. As the Supreme Court has consistently recognized in cases involving the powers of the other branches, the Constitution limits the role of the judiciary to restraining the arbitrary exercise of legislative and administrative authority. The Takings Clause is one such limit. A public agency is liable for a regulatory taking of private property *only* where the regulation “goes too far.” *Mahon*, 260 U.S. at 415; *First English*, 482 U.S. at 316.

Two years after *Penn Central*, in *Agins v. City of Tiburon*, without reference to the three-pronged *Penn Central* test, the Supreme Court revised the standard for a taking, known as the two-pronged *Agins* test: “The application of a general zoning law to particular property effects a taking if the ordinance [1] does not substantially advance legitimate state interests, or [2] denies an owner economically viable use of his land.” 447 U.S. at 260 (citations omitted). Heightened scrutiny arises from the first prong of the *Agins* test.

## **B. The Advent of Heightened Scrutiny.**

In *Penn Central*, the Supreme Court first uttered the fateful phrase that a government restriction on the use of private property can constitute a taking if the regulation is “not reasonably necessary to the effectuation of a substantial public purpose.” 438 U.S. at 127. In support of the proposition that the Takings Clause is concerned with the relationship between the means and ends of regulation, the *Penn Central* Court cited only two cases: *Nectow v.*

*Cambridge*, 277 U.S. 183 (1928) and *Moore v. East Cleveland*, 431 U.S. 494 (1977)—both substantive due process cases applying the rational basis test. Ironically, for one of the most significant doctrinal leaps in takings jurisprudence, the Supreme Court did not rely on a single precedent decided under the Takings Clause.

Two years later, in *Agins*, the Court canonized this means-ends test for a taking, once again relying exclusively on a substantive due process case: “The application of a general zoning law to particular property effects a taking if the ordinance [1] *does not substantially advance legitimate state interests*, see *Nectow v. City of Cambridge*, 277 U.S. 83, 188 (1928), or [2] denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n. 35 (1978).” *Agins*, 447 U.S. at 260 (emphasis added). Without elaborating on the origins or meaning of the first prong of the takings standard, the *Agins* Court proceeded to apply the new test by exercising the same restraint and deference to legislative judgment historically applied by the courts since *Euclid*. The Court held that a zoning ordinance limiting density was a proper exercise of a town’s police power to protect its residents from the harmful effects of urbanization. *Id.* at 261-62.

During the seven-year period between *Agins* and 1987, the novel proposition that a regulation that fails a means-ends substantive due process-type test could constitute a taking received no practical application. In 1987 in *Nollan*, the Supreme Court produced a dramatic innovation on the means-ends test. *Nollan* completed the grafting of substantive due process analysis onto the Takings Clause begun in *Penn Central*.

*Nollan* introduced the “essential nexus” takings test. 483 U.S. at 837. Under the ruling in that case, to condition approval of a land use development on the transfer of a possessory interest in land to the public, known as an “exaction,” a governmental entity must show that the

transfer “substantially advance[s] a legitimate state interest.” *Id.* at 834-37. A typical exaction is a condition that a subdivider dedicate a strip of its privately owned land for widening a public street adjoining the proposed development in exchange for approval of the project.

The phrase “substantially advances legitimate state interests” in the context of exactions means that a condition must “serve[] the same governmental purpose as [a] development ban.” *Id.* at 837. The essential nexus test also shifts to the government the burden of justifying the exaction. *Id.* at 835-36; *Dolan*, 512 U.S. at 391 n.8. Thus, in the example above, the public agency would be required to show that additional traffic generated by the new housing development created the need to widen the street.

In *Dolan*, the Court answered “a question left open” by *Nollan*. 512 U.S. at 377. The Court quantified the *degree* of the nexus required by *Nollan* between the impact of a development project and a mitigating condition. The essential nexus test requires “rough proportionality.” *Id.* at 391. Again using the example above, the public agency would bear the burden to show that it did not require the dedication of more private land to widen the street than would be necessary to serve the additional traffic generated by the new development. In sum, *Nollan* and *Dolan* created a new standard of judicial review requiring a court to determine whether the *means* of land use regulation are justified by legitimate *ends*.

In *Nollan*, the Supreme Court characterized the means-ends taking test as a venerable legal precedent: “*We have long recognized* that land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land,’” citing to *Agins* and *Penn Central*. 483 U.S. at 834 (emphasis added). *Agins*, of course, had been decided only seven years earlier, and the “substantially advances legitimate state interests” test in *Agins* had not been applied by any court in a form other than the

traditional rational basis test. Nonetheless, the Court's confused reference to substantive due process in *Penn Central* and *Agins* became a permanent fixture of the nation's jurisprudence. Heightened scrutiny emerged from *Nollan* and *Dolan* as a takings standard co-equal with the three-pronged *Penn Central* test.

The literal text and decisional law of the Takings Clause did not support a means-ends test for a regulatory taking separate and independent from the "impact" tests in *Penn Central* and the second prong of *Agins*. As noted above, the "substantially advances" test for a taking relied entirely on substantive due process authorities. It followed logically that an analysis of a regulation as a taking under the "substantially advances" prong of *Agins* would apply the same rational basis test applied in substantive due process analysis.

In addition, the text of the Takings Clause indicates that the "substantially advances" test is not independent of the impact tests of *Penn Central* and *Agins*. The takings clause provides that compensation must be paid for a taking of private property for a "public use." U.S. Const. Amend V. As the Supreme Court observed in *First English*, the regulatory taking doctrine "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise *proper* interference amounting to a taking." 482 U.S. at 315 (emphasis added). Accordingly, the "substantially advances" test was equivalent to the "public use" finding necessary for a taking. *See Lucas*, 505 U.S. at 1024-26. The government cannot simultaneously act irrationally in regulating property and regulate the property for a "public use." If the regulation is irrational, it cannot constitute a taking. In this event, remedies other than the Takings Clause, such as substantive due process, would be available to the property owner.

**C. *Lingle v. Chevron.***

In what could perhaps be one of the Supreme Court's most significant cases, the Court found that the substantially advance test, or any means-ends test, has no place in takings jurisprudence. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). In *Lingle*, Chevron challenged Act 257, passed by the Hawaii Legislature to promote competition in the retail gasoline market, with the ultimate aim of reducing Hawaii's relatively high price of retail gasoline for consumers. The Act limited to 15% of gross profit the amount of rent oil distributors could charge gasoline retailers who leased company-owned filling stations. The purpose of the rent ceiling is to prevent the oil companies from forcing independent dealers out of business and the resulting consolidation of oil company market power. *Id.* at 533.

In a 2-1 decision, the Ninth Circuit ordered the district court to apply a heightened standard of review to the Act under *Nollan* and *Dolan*. The majority decided that a trial was necessary to “predict” whether the statute would substantially advance the avowed objective of the law, namely to reduce the retail price of gasoline to consumers. The court rejected the State's argument that the validity of a land use ordinance should be evaluated under the traditional, more deferential, rational basis standard of the Due Process Clause. Instead, the court allowed an unelected judge—after hearing evidence from economists predicting the effect of the program—to apply her subjective judgment to determine whether the price controls would be effective.

On remand, the District Court applied the substantially advance standard to determine whether the Act effected a taking. To predict the economic effects of the Act, the court heard testimony from economists representing each side of the issue. The District Court agreed with the theories advanced by Chevron's economist on all issues. The District Court concluded that the Act effects a taking because it “*does not* substantially advance the State's legitimate interest

in lowering gasoline prices.” *Chevron U.S.A., Inc. v. Cayetano*, 198 F.Supp.2d 1182, 1193 (2002).

On appeal, the State argued that the substantially advance standard is not a legitimate test for a taking, and even if it were, that the district court, out of deference to the judgment of the Hawaii Legislature, should have applied a standard of review equivalent to the due process rational basis test. The same panel of the Ninth Circuit affirmed, again in a two-to-one decision. Relying on the law of the case, the majority rejected the State's arguments. The court also addressed the State's arguments on the merits, however, finding that the court's application of heightened review in *Chevron I* was not clearly erroneous.

The Ninth Circuit decision in *Lingle* was the zenith of judicial activism under the cloak of the takings clause. In his dissenting opinion, Judge Fletcher objected to the court's application of heightened scrutiny: “Rent control is often inefficient and sometimes unfair. . . . But we should not confuse inefficiency and unfairness with unconstitutionality.” *Chevron U.S.A., Inc. v. Bronster*, 363 F.3d 346, 361 (2004).

The Supreme Court accepted *Chevron* for hearing on two issues: (1) is the substantially advance standard a legitimate test under the Takings Clause; and (2) if so, is the level of judicial review under the substantially advance test the same deferential standard as the rational basis test applied under due process.

In an historic, unanimous decision, the Supreme Court reversed. The Court did not mince words in overruling *Agins*: “We hold that the ‘substantially advances’ formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence.” 544 U.S. at 548. The Court stressed that a regulatory taking is confined to instances where government regulation is tantamount to a direct physical appropriation of private property: “A

test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.” *Id.* at 543. The Court acknowledged the limited role of courts in matters of economic policy: “[The substantially advances test] would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.” *Id.* at 544. Instead, the Court held, any review of the substantive validity of government regulation must be conducted under the Due Process Clause.

While the Court firmly rejected the means-ends takings test created in *Agins*, it held that *Nollan* and *Dolan* were still good law. The Court limited the application of heightened judicial review from those decisions, however, to the narrow case where as a condition of ad hoc development approval, a local agency exacts a possessory interest in property, tantamount to a physical taking. In all other cases, judicial review must be conducted under the traditional rational basis standard. *Id.* at 546-48.

*Lingle* is a remarkable statement about the American political system. The unanimous decision is without a single footnote. It is written in lucid, sweeping, forceful, and eloquent prose, befitting the gravity of the subject matter. The decision accomplishes nothing less than affirming a bedrock principle of American democracy: that social and economic policy in the United States is made by elected legislatures rather than unelected, life tenured judges—a principle that had been in some jeopardy had the courts continued to entertain means-ends scrutiny of government regulation under the Just Compensation Clause. *Lingle* affirms fundamental tenets of the American democratic system of government—one person one vote and the separation of powers between co-equal branches of government.

#### **D. The Aftermath of *Lingle*.**

*Guggenheim* is the first opportunity since *Lingle* for the Ninth Circuit to address a due process challenge disguised as a heightened scrutiny takings challenge. After *Lingle*, several commentators and litigants, including *Guggenheim*, contended that *Lingle* should be interpreted to allow application of a heightened scrutiny test to regulation under due process. The *Guggenheim* Court disagreed, holding that the due process rational basis test requires deference to legislative judgments. Slip. Op. at 20439. The Court correctly defined its role narrowly: “We are a court, not a tenure committee, and are bound by precedent establishing that [rent control] laws do have a rational basis.” *Id.* The court’s due process holding is a compelling affirmation of separation of powers and the legislative prerogative to impose government economic and social regulation in furtherance of community interests.<sup>8</sup>

Judge Kleinfeld’s majority opinion reaffirms the prerogatives of the legislative and executive branches of government to impose social and economic regulation that reduces the potential profit from property. The opinion is striking insofar as Judge Kleinfeld made the sweeping statement in his dissent in the 3-judge panel: “I agree with the majority that the rent control ordinance would amount to a regulatory taking under *Penn Central* . . . were it not a re-enactment of one already in effect when the Guggenheims purchased the trailer park.” *Guggenheim v. City of Goleta*, 582 F.3d 990, 1035 (9th Cir. 2009), *rehearing granted*, 598 F.3d - 1061 (9th Cir. 2010). Judge Kleinfeld appeared to undergo a change of heart, however, when he did not carry forward that sentiment in the majority opinion on rehearing. To the contrary, Judge

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<sup>8</sup> Since *Lingle*, the Ninth Circuit has repudiated its earlier holdings, which precluded any plaintiff from bringing substantive due process challenges to land use regulations. *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007). The court reasoned that if a property owner’s complaint pleads recognized application of the Takings Clause, then “the claim must be analyzed under the Fifth Amendment whether or not it proves successful.” *Id.* But, if the alleged land use regulation cannot be a taking, “*Lingle* indicate[s] that a due process claim is not precluded.” *Id.*

Kleinfeld wrote that while Guggenheim’s facial challenge failed, the court takes no position on whether the RCO would take Guggenheim’s property as applied. Slip Op. at 20433. If the RCO was a taking on its face as to the owner at the time the regulation was imposed, then it follows that it would effect a taking as applied. Yet, Judge Kleinfeld treated whether the RCO could be a taking as applied as an open question: “If the rent control scheme effects an unconstitutional taking when applied, the challenge will be to that application, not to the ordinance on its face . . . .” *Id.* (emphasis added). Judge Kleinfeld also emphasized in the due process and equal protection part of the majority opinion that courts do not interfere with legislative judgments on matters such as rent control. *Id.* at 20439.

The California courts have not been as willing to acknowledge the impact of *Lingle*. Despite the clear pronouncement in *Lingle* that a means-ends test does not apply to regulation other than ad hoc exactions of possessory interests in land, property owners have continued to assert that *Nollan/Dolan* heightened review applies to regulation of use, where no physical invasion of property is asserted. A California Court of Appeal applied heightened scrutiny to an ad hoc development impact fee imposed to mitigate the loss of beach that would result from construction of a seawall. *Ocean Harbor House Homeowners Ass’n. v. California Coastal Comm’n*, 163 Cal. App. 4th 215, 230 (2008). While *Ocean Harbor* points strongly to the conclusion that heightened scrutiny applies to ad hoc development impact fees in California, it appears that the parties did not raise, and the Court did not address, the arguments for the application of the rational basis under due process, rather than a heightened standard of review of the means and ends of the legislation under the Takings Clause. *See* 163 Cal. App. 4th at 227-31.

Another recent California case addresses the standard of judicial review under the Just Compensation Clause of development impact fees. In *Building Industry Assoc. v. City of Patterson*, 171 Cal. App. 4th 886 (2009), the court found that an inclusionary housing ordinance that imposed an in lieu fee on development of market rate housing, the proceeds of which would be used to subsidize affordable housing, was a taking where the city failed to establish that the construction of market rate housing resulted in an increased demand for affordable housing. *Id.* at 898. Accordingly, the court found that there was no nexus between the development of market rate housing and the fee. The court relied on two California Supreme Court opinions, *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4<sup>th</sup> 643 (2002) and *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), that applied a means-ends test under the Just Compensation Clause to land use exactions. Because the parties did not argue that *Lingle* rejected any means-ends test under the Just Compensation Clause and necessarily overruled these decisions, the California Court of Appeal did not address this issue.

In *West Linn Corporate Park v. City of West Linn*, 240 P.3d 29 (2010), however, the Supreme Court of Oregon correctly distinguished between physical exactions and all other types of regulation in rejecting the application of heightened scrutiny under *Nollan/Dolan* to a condition of development that the developer provide off-site improvements. The court concluded that the requirement was a mere cost to the developer and not an exaction. The court found that because the developer did not allege that the requirement imposed a severe economic burden on the developer, it failed to state a valid takings claim.

### **Conclusion**

The Ninth Circuit's en banc decision in *Guggenheim* is a compelling affirmation of separation of powers and the legislative prerogative to impose government economic and social

regulation in furtherance of community interests. It represents a retreat from the judicial activism that marked the panel decision and decisions prior to *Lingle*.

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