



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another episode in our "Listen and Learn" series – this one is on regulatory takings. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast! Today we are going to be talking about regulatory takings. The topic of takings is typically taught as part of the 1L Property curriculum, but a takings claim is actually grounded in constitutional law. For those of you preparing for the bar exam, takings are often tested in crossover essay questions that cover both Property and Constitutional Law issues.

Lee Burgess: So, what is "taking" anyway? Under the Takings Clause of the 5th Amendment, the government may take private property for public use if it provides just compensation. A taking is deemed for public use as long as there is a reasonable belief that it will benefit the public. Just compensation is measured by the fair market value of the property to the owner at the time of the taking.

Lee Burgess: There are two types of takings. The first is called a possessory, or per se taking, which occurs when the government physically takes or occupies the property. This type of taking isn't usually tested because it's so easy – if the government physically invades private property, even just a little, it's a taking. But what if the government doesn't physically take property, but regulates its use to such a degree that it has a substantial impact on its value? That's where regulatory takings come into play.

Lee Burgess: There are two types or degrees of regulatory takings: total and partial. Let's start with total takings, also called "categorical takings", or "per se regulatory takings". Total regulatory takings occur when a regulation leaves the landowner with no "economically beneficial use" of the property. Importantly, the land may still have some limited use or value. But if it has no economically beneficial use, then it's as though the government effected a physical taking. To illustrate this rule, we need to look no further than the case that created it: *Lucas v. South Carolina Coastal Council*. As you may recall, *Lucas* involved an environmental



regulation that prevented certain development to protect coastal habitat. As a result of this regulation, Lucas was unable to build two beachfront houses on his lots, but he could still use his lots for walking, picnicking, or camping. The Supreme Court held that, despite these uses, the regulation denied Lucas all economically beneficial use of his land.

Lee Burgess: Okay, now let's talk about partial takings. In a partial regulatory taking, a property owner is left with some economically viable uses of its property, following application of a regulation. Courts will determine whether a regulatory taking occurred by balancing private and community interests under the three Penn Central factors, derived from the case *Penn Central Transportation Co. v. New York City*. The Penn Central factors are, one, the economic impact of the regulation on the claimant; two, the extent of interference with distinct investment-backed expectations (in other words, the owner's primary expectation of use for the property); and three, the character of the governmental action.

Lee Burgess: That covers the general rules for regulatory takings, but before we move on to our hypos, we just need to address one additional wrinkle known as the "denominator problem". In any regulatory takings case, the court must first define the parcel against which the loss of value is to be measured. This is called the "denominator problem" because in determining loss of value, the entire parcel is the denominator and the impacted portion of the parcel is the numerator. For example, a regulation prohibiting development on one acre of a ten-acre parcel could be considered a deprivation of 100 percent of the impacted acre or merely 10 percent of the entire parcel. Clearly, the closer the denominator is to the numerator, the greater the impact on the parcel as a whole and, consequently, the stronger the takings claim. We're not going to get into how courts determine the relevant denominator today, but it's an important issue to note when you analyze the economic impact of the regulation.

Lee Burgess: Alrighty, let's go to our hypos:

Lee Burgess: "For the past 20 years, Patrick has owned and hunted on two adjoining lots near a State X forest called Greenacres. One of the lots consists of 95 acres and the other lot consists of five acres. A few years ago, Patrick came up with the idea to build a 50-room resort on the five-acre lot, which was closest to Greenacres. Over the next couple of years, Patrick took several preliminary steps toward developing the resort, including incurring substantial costs for economic feasibility and environmental impact studies. Patrick then submitted an application to State X for permission to construct the resort. Last year, while



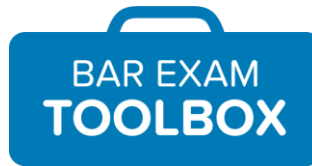
Patrick's application was pending, State X passed a law prohibiting new development within 1,000 feet of any state forest in order to prevent wildfires. While the 95-acre lot was not impacted by the law, the five-acre lot Patrick sought to develop was within 1,000 feet of Greenacres. As a result, State X denied Patrick's application.

Lee Burgess: This year, Patrick filed a lawsuit against State X claiming that its denial of his application constitutes a taking under the 5th Amendment to the Constitution. Both parties have stipulated that the five-acre lot is worth \$1 million if development is permitted, and \$50,000 if it is not, based on the market value of recreational land in the area. Is Patrick likely to succeed on his takings claim? Discuss."

Lee Burgess: Okay, the question here explicitly tells us that Patrick has asserted a takings claim, but we still need to figure out what kind of takings claim we're dealing with. There's no indication here that State X has physically invaded Patrick's land, so we can eliminate a possessory taking and move straight to our regulatory takings analysis.

Lee Burgess: Let's start with total takings. As we know, the question here is whether the State X law leaves Patrick with no economically beneficial use of his property. In order to do that, we need to first address the denominator problem. We know that the numerator here is five because the law prohibited development on the entire five-acre lot. If the relevant denominator here is based on the combined acreage of both lots, then the denominator is 100. On the other hand, if the denominator is only the five-acre lot, then the denominator is five. This would make a big difference here if the value of the five-acre lot was completely wiped out, because then we would have a wipeout of the value of the entire denominator, resulting in a total taking. But we're told that the parties have stipulated that, even after the regulation, the five-acre parcel is worth \$50,000 as recreational land. Therefore, regardless of the denominator, Patrick's land still has some economically beneficial use as recreational land.

Lee Burgess: Now that we've concluded that there has been no total taking, let's move on to partial taking. The analysis requires us to go through the Penn Central factors one-by-one, starting with the economic impact on Patrick. Here, unlike the total takings analysis, the denominator has a big impact. Patrick will argue that the relevant denominator is five, because the regulation impacted the entire five-acre lot but not the separate 95-acre lot. We're told that the five acres are worth \$1 million if development is permitted, and \$50,000 if development is prohibited. That reflects a percentage diminution in value of 95%, which is a substantial economic impact.



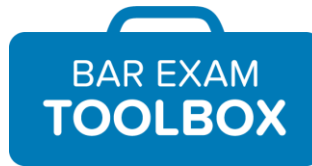
Lee Burgess: In response, State X will argue that the relevant denominator is 100 because the lots are contiguous, and Patrick has historically used both lots as one big hunting ground. While the question does not provide the value of the 95-acre lot, if we assume the same value per acre as the five-acre lot, the 95-acre lot is worth \$950,000. Accordingly, the combined 100 acres would be worth \$1,950,000 if development is permitted on the five-acre lot, and \$1 million if development is prohibited. That reflects a percentage diminution in value of approximately 49%, a much smaller economic impact. Thus, the extent of the economic impact on Patrick will depend on the relevant denominator.

Lee Burgess: The next factor we need to consider is the extent of interference with Patrick's distinct investment-backed expectations. Here, we're told that Patrick took several steps towards developing the resort, including incurring substantial costs for the economic feasibility and environmental impact studies. Patrick will argue that, at the time State X passed the law prohibiting development on his land, Patrick's primary expectation of use for the five-acre lot was a resort. State X will argue that, although Patrick recently decided to develop the five-acre lot, he purchased the land with the primary expectation of using it for recreation and has used it accordingly for most of the last 20 years. State X might also argue that Patrick's expenditures were unreasonable, given that he had not yet obtained State X permission for the project. On balance, given that Patrick had no reason to think he would not be granted the permit, Patrick has a strong argument that it was reasonable to incur typical pre-development costs.

Lee Burgess: Finally, we need to consider the character of State X's action. Here, the law was enacted to protect state forests from wildfires, which is a significant environmental and public safety regulation. Moreover, this regulation does not apply only to Patrick's land or even just to land surrounding Greenacres, but rather to any property within 1,000 feet of any state forest – an area that likely includes thousands of acres of private property. Accordingly, this factor weighs against a partial taking.

Lee Burgess: Given that the second factor weighs in favor of Patrick and the third factor weighs in favor of State X, the outcome of this action would likely depend on the extent of the economic impact to Patrick, which would require resolving the denominator problem.

Lee Burgess: Okay, let's do one more. This one is adapted from the [July 2015 California bar exam](#):



Lee Burgess: “City Council amended its zoning ordinance to rezone a single block from “commercial” to “residential”. City acted after some parents complained about traffic hazards to children walking along the block. The amended ordinance prohibits new commercial uses and requires that existing commercial uses cease within three months.

Lee Burgess: Several property owners on the block brought an action to challenge the amended ordinance. In the action, the court ruled:

1. Property Owner A, who owned a large and popular restaurant, had no right to continue that use, and had time to move in an orderly fashion during the three-month grace period.
2. Property Owner B, who had spent \$1 million on engineering and marketing studies on his undeveloped lot in good faith prior to the amendment, was not entitled to any relief.
3. Property Owner C, whose lot dropped in value by 65% as a result of the amended ordinance, did not suffer a regulatory taking.

Lee Burgess: Was each ruling correct? Discuss.”

Lee Burgess: Okay, this time we’re not explicitly told it’s a takings claim, but the facts tell us that there’s a city ordinance that is economically impacting several property owners. That’s a good sign that we’re dealing with a regulatory taking. But before we move on to our analysis, a quick note about organization. When a question provides a list of claims by separate parties or asks what claims one party can assert against a bunch of other parties, you should organize your answer by party and not by legal issue. For this hypo, we’re going to organize our answer by property owner.

Lee Burgess: Okay, so let’s get into it, starting with Owner A. First, let’s see if we have a denominator problem. We’re told that Owner A owned a large and popular restaurant, but we don’t have any information about any other property they own. For example, we don’t know if the restaurant is on the ground floor of a larger building owned by Owner A. Because the question does not provide that information, it’s not triggering the denominator issue.

Lee Burgess: Next, has there been a total taking of Owner A’s property? Probably not. While they can’t continue to use the property as a commercial property, they can still use the property as a residential property. While we don’t have specific information about the value of commercial versus residential property, it’s highly unlikely the property would have no economically beneficial use as a residential property.



- Lee Burgess: Next, has there been a partial taking? Let's go through our Penn Central factors. The extent of the economic impact on Owner A is unclear, but it's fair to assume that it will be rather costly to find a new restaurant location, build out a new restaurant, move existing equipment, and reestablish the same level of popularity in a new location. Therefore, the economic impact appears to be substantial. Moreover, Owner A's expectation of being able to operate a restaurant was likely backed by substantial investment, including costs of developing and marketing the existing restaurant.
- Lee Burgess: Finally, the nature of the government's action here weighs more heavily in favor of a partial taking than in our first hypo. While the government interest in protecting children is strong, the ordinance in this case is very narrow in its application, changing the zoning on just a single block. In doing so, the owners of commercial property on that block are forced to bear the burden of an ordinance that arguably benefits the community as a whole. Moreover, it's not at all clear that changing one block from commercial to residential would result in any meaningful reduction in traffic hazards to children. Therefore, on balance, the Penn Central factors appear to weigh in favor of Owner A.
- Lee Burgess: Moving on to Owner B, there again does not appear to be a total taking. As with Owner A, it is highly unlikely that Owner B's lot would have absolutely no value as a residentially zoned lot.
- Lee Burgess: As for whether there has been a partial taking, we're given no specific information about the economic impact on Owner B. We know, however, that Owner B spent \$1 million on engineering and marketing studies in good faith prior to the zoning amendment, which demonstrate substantial investment based on the expectation of commercial development.
- Lee Burgess: Finally, the nature of the government action is the same as with Owner A. Therefore, factors 2 and 3 appear to weigh in favor of a partial taking, but we will need more information about the economic impact on Owner B to determine whether the court's ruling was correct.
- Lee Burgess: Moving on to Owner C, there is no total taking because the lot only lost 65% of its value.
- Lee Burgess: With respect to a partial taking, the economic impact on Owner C is a 65% diminution in value. Unlike with the other property owners, however, there is no indication of an investment-backed expectation here. The fact that the property lost value because its potential uses have been limited doesn't mean



that the owner had any expectation of using the property for the now-prohibited purpose.

Lee Burgess: Finally, the nature of the government action is the same as with Owner A. Therefore, while factors 1 and 3 might weigh in favor of a partial taking, the court's ruling was likely correct because Owner C had no investment-backed expectations of commercial use.

Lee Burgess: Well, that's all we have time for today! If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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