CAN ERRONEOUS PERMITTING DELAYS BE TEMPORARY TAKINGS?

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INTRODUCTION

This Article explores the following question: When a governmental entity denies a property owner's request for a permit, and a court then determines that controlling law required the entity to grant the permit, can the entity be liable for a temporary taking?[1]

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[1] The Takings Clause in the Fifth Amendment of the U.S. Constitution states: "nor shall private property be taken for public use, without just

Governments at all levels make an enormous number of permitting decisions. Tens of thousands of local governments, along with regional, state, and federal entities, issue untold numbers of permits allowing property owners to develop land, discharge pollutants into waterways and the air, fill wetlands, take protected species, and engage in many other activities.[2] Given such a large volume, governments will inevitably make mistakes. And many property owners have sued for temporary taking damages.[3] One current example involves federal and state regulatory takings claims based on the allegation that a North Carolina town unlawfully denied owners a permit to repair their beachfront cottage.[4] The town asserted that the cottage could not be rebuilt

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compensation." U.S. CONST. amend. V. Although the classic taking involves the government acquiring property, the courts have held that a regulatory restriction can amount to a taking if it is "so onerous that its effect is tantamount to a direct appropriation or ouster." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005).

[2] *See, e.g.*, Craig Anthony Arnold, *Clean-Water Land Use: Connecting Scale and Function*, 23 PACE ENVTL. L. REV. 291, 302–03 (2006) (explaining that land-use decisions are made by approximately 39,000 local units of government). These governmental units issue large numbers of permits. For example, on average, governments issue permits to build over one million housing units per year. *See* U.S. CENSUS BUREAU, NEW PRIVATELY OWNED HOUSING UNITS AUTHORIZED UNADJUSTED DATA FOR UNITED STATES (Aug. 2013), *available at* http://www.census.gov/construction/bps/uspermits.html. Just one federal agency alone, the Army Corps of Engineers, issues over 6,000 individual permits per year and authorizes approximately 74,000 activities per year through its general permits. CLAUDIA COPELAND, CONG. RESEARCH SERV., RL97-223, THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS 2, 14 (2012). Moreover, permits cover a wide range of activities. *See*, *e.g.*, N.C. GEN. STAT. ANN. § 113A-118 (West 2010) (coastal development); CAL. GOV'T CODE §§ 66410–66499.38 (West 2009) (subdivisions); OR. REV. STAT. §§ 92.010–92.179 (2013) (subdivisions); CAL. PUB. RES. CODE § 25500 (West 2007) (power plants); ME. REV. STAT. ANN. tit. 38, § 490-PP (2013) (effective June 1, 2014) (mining); CAL. FISH & GAME CODE § 1602 (West 2013) (lake and streambed alteration); MICH. COMP. LAWS ANN. § 324.30102 (West 2013) (lake and streambed alteration); CAL. WATER CODE § 8710 (West 1992) (encroachment on waterways and levees); CONN. GEN. STAT. ANN. § 22a-342 (West 2006) (encroachment on waterways and levees); CAL. FISH & GAME CODE § 2080 (West 2013) (incidental taking of endangered species); ME. REV. STAT. ANN. tit. 12, § 12808 (2005) (incidental taking of endangered species); CAL. HEALTH & SAFETY CODE § 25200 (West 2006) (hazardous waste facilities); N.Y. ENVTL. CONSERV. LAW §§ 270101, 27-0707 (McKinney 2007) (hazardous waste facilities); Clean Water Act § 402, 33 U.S.C. § 1342(b) (2006) (activities that potentially pollute waters).

[3] *See, e.g.*, Town of Nags Head v. Toloczko, 728 F.3d 391, 398–99 (4th Cir. 2013); Lockaway Storage v. Cnty. of Alameda, 156 Cal. Rptr. 3d 607, 611 (Cal. Ct. App. 2013).

[4] *Town of Nags Head*, 728 F.3d 391.

because it was on public land under the public trust doctrine, but the Fourth Circuit determined that only the State could enforce North Carolina's public trust doctrine, and it remanded the case to the district court to address the merits of the takings claims.[5] In another recent case, a California county, acting on incorrect advice from its county counsel, determined that a voter-approved growth control measure prevented a developer from building a recreational vehicle storage facility on a particular parcel.[6] The developer sued, a court reversed the county's decision, and the state appellate court ultimately upheld a "temporary taking" award of almost $1 million in damages, plus nearly $750 thousand in attorneys fees, for a thirty-month delay in development.[7]

This Article reviews the different analyses that can be applied to these temporary takings claims. It shows why taken together, the analyses should preclude takings for erroneous permitting delays. In essence, when government in good faith misinterprets controlling law, the resulting delay is a normal permitting delay and therefore not a temporary taking. However, if the delay is made by the permitting authority in bad faith, it is implicitly unauthorized by the legislature as beyond the scope of the governing statute and therefore cannot be a taking. And in either case, if controlling law required government to issue a permit, then its temporary refusal to do so was not for a "public use" and therefore cannot be a taking, which by its terms requires a public use. Finally, this Article concludes that, while the Takings Clause is not designed to address these delays, property owners may obtain relief through other constitutional, statutory, and common law provisions.

I. AFTER *LINGLE* AN ERRONEOUS PERMITTING DELAY, WITHOUT MORE, CANNOT ESTABLISH A TAKING

Before discussing whether governments are shielded from takings liability for their erroneous permitting delays, we need to address the other side of the coin: judicial suggestions that such delays might be used as per se swords automatically establishing takings. Prior to the United States Supreme Court's decision in *Lingle v. Chevron U.S.A., Inc*.,[8] a number of lower court decisions

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5 *Id.* at 398–99.
6 *Lockaway Storage*, 156 Cal. Rptr. 3d 607.
7 *Id.* at 611.
8 544 U.S. 528 (2005).

included language that might be interpreted as suggesting that a delay could in and of itself amount to a taking simply because the delay was not normal. The Federal Circuit's decision in *Wyatt v. United States*,[9] for example, includes the following statement: "[W]e hold that any delay in processing the permit application was not sufficiently 'extraordinary' to constitute a taking."[10] The court's use of the phrase "constitute a taking" seems to indicate that extraordinary delay would be a taking, although the court did not discuss or analyze this issue.[11] The California Supreme Court's decision in *Landgate, Inc. v. California Coastal Commission*[12] similarly contains language arguably suggesting that a delay could be a temporary taking. *Landgate* held that a court's erroneous delay determination looks at "whether the [mistaken] development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit."[13]

Lingle, however, undercut the suggestion that a permitting delay could amount to a per se taking. *Lingle* explained that courts are to analyze claims that governmental regulatory actions impose takings by using one of four tests.[14] Most actions are "governed by the standards set forth in *Penn Central Transp. Co. v. New York City*."[15] Those standards primarily focus on the regulation's economic impact on the owner and require a very large impact to suggest a taking. Others come within the "two relatively narrow categories" exemplified by *Loretto v. Teleprompter Manhattan CATV Corp.*[16] (regulation requires a permanent physical

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[9] 271 F.3d 1090 (Fed. Cir. 2001).

[10] *Id.* at 1097.

[11] Rather, the court's discussion of delay focused on the elements needed to establish that a delay was not normal and why the plaintiff failed to make its case. *Id.* at 1097–1100. The court was even more ambiguous three years later in *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004). Like *Wyatt*, *Bass Enterprises*' extraordinary-delay discussion almost exclusively addressed the elements of such a delay and why the plaintiff did not make its case. *Id.* at 1366–68. The court did, however, include one sentence indicating that an extraordinary delay "may result" in a taking. *Id.* at 1366. On the other hand, the court seemed to suggest that even if an extraordinary delay exists, *Penn Central* factors must still be satisfied. *Id.* at 1366 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[12] 953 P.2d 1188, 1190 (Cal. 1998).

[13] *Id.* at 1198.

[14] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539–42 (2005).

[15] *Id.* at 538 (citing *Penn Cent.*, 438 U.S. at 124).

[16] *Lingle*, 544 U.S. at 538 (citing Loretto v. Teleprompter Manhattan CATV

occupation) and *Lucas v. South Carolina Coastal Council*[17] (regulation denies owner's property of all economic value). Finally, there is "the special context of land-use exactions."[18] Exactions "condition approval of a permit on the dedication of property to the public."[19]

Prior to *Lingle*, the Court also endorsed a fifth takings formula under which "government regulation of private property 'effects a taking if [such regulation] does not substantially advance legitimate state interests.'"[20] *Lingle* repudiated that formula. It explained that whether a regulation amounts to a taking turns on whether it is "so onerous that its effect is tantamount to a direct appropriation or ouster."[21] Regulatory takings tests thus attempt to identify restrictions "that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[22] *Lingle* discarded the "substantially advances" formula because it did not "help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property."[23]

If an extraordinary delay only caused a minor economic impact, however, it should not meet those requirements. Extraordinary delay itself, therefore, should not constitute a per se taking. Thus cases such as *Landgate* cannot be interpreted as holding that erroneous governmental decisions are takings if they fail to substantially advance a legitimate public purpose. But what about the converse: are governments shielded from takings liability where they initially denied a permit, but subsequently issued a permit pursuant to a court order?

II. CAN ERRONEOUS PERMITTING DELAYS SHIELD GOVERNMENT FROM TAKINGS LIABILITY?

Courts and commentators have generally identified three

Corp., 458 U.S. 419 (1982)).

17 *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

18 *Id.*

19 Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013).

20 *Lingle*, 544 U.S. at 531 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

21 *Id.* at 537.

22 *Id.* at 539.

23 *Id.* at 542.

broad bases for shielding erroneous permitting delays from takings claims. The first is that these delays are part of the normal permitting process and, as such, cannot impose a taking. The second is that, where an agency or official makes a mistake in applying legislation, the mistake is not authorized and therefore cannot impose liability on the government. The third is that erroneous delays by their nature do not meet the Taking Clause's "public use" requirement and therefore cannot be takings. This Article will now explore each theory.

A. *Normal Delay*

1. *Creation of the Normal Delay Rule*

Until 1987, the Supreme Court had not resolved whether a regulation limiting a property's uses could impose a temporary taking.[24] Some state courts, such as those in California, New York, and Pennsylvania, had interpreted federal and state constitutions as not requiring compensation when a regulation amounted to a taking; the only remedy was injunctive-type relief.[25] Compensation was only available where, after a court determined that the regulation was excessive, the government nevertheless decided to maintain the regulation.[26]

In 1987, the United States Supreme Court resolved this issue in *First English Evangelical Lutheran Church v. County of Los Angeles*, holding that property owners had the right to be

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[24] First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 310 (1987) ("Appellant asks us to hold that the California Supreme Court erred in *Agins v. Tiburon* in determining that the Fifth Amendment . . . does not require compensation as a remedy for 'temporary' regulatory takings . . . . Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the *Agins* rule.").

[25] *See* Agins v. City of Tiburon, 598 P.2d 25, 32 (Cal. 1979) (holding that inverse condemnation is inappropriate for a landowner challenging a zoning ordinance), *aff'd on other grounds*, 447 U.S. 255 (1980); Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 386 (N.Y. 1976); Kraiser v. Horsham Twp., 455 A.2d 782, 784 (Pa. Commw. Ct. 1983). *See also* Robert I. McMurry, Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711, 711 (1982) ("Courts disagree about whether to invalidate the government action as unconstitutional or to invalidate it by ordering requisite compensation.").

[26] *See* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 312 (1987) (explaining that California decisions did not allow a plaintiff to recover damages for a temporary regulatory taking).

compensated for temporary regulatory takings.[27] The Court subsequently described *First English* as endorsing the following rule: "[O]nce a court finds that a police power regulation has effected a taking, the government entity must pay just compensation for the period commencing on the date the regulation first effected the taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[28]

Although *First English* affirmed the right to compensation for a temporary regulatory taking, it left open the question of how to identify such a taking.[29] The Court did, however, go out of its way to explain that its temporary takings decision does not apply to the time that property owners spend seeking permits. It therefore distinguished the facts before it—under which government allegedly adopted an ordinance that temporarily prohibited all use of the owner's property—from "the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[30] This "normal delay" principle is consistent with the Court's prior statements to the effect that permitting systems and similar governmental decision-making in and of itself does not impose a taking.[31]

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[27] *Id.* at 321.

[28] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328 (2002) (Brennan, J., dissenting) (quoting San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658 (1981)) (internal quotation marks omitted).

[29] *Id.* at 328 (explaining that *First English* only decided the remedy question).

[30] *First English*, 482 U.S. at 321.

[31] For example, in *United States v. Riverside Bayview Homes, Inc.,* the Court explained:

> The mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking . . . . A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

474 U.S. 121, 126–27 (1985) (internal citation omitted). More generally, in *Agins v. City of Tiburon*, the Court rejected the property owners' claim that the city's precondemnation activities constituted a taking, explaining in a footnote that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They

The Court subsequently reinforced the normal delay principle in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[32] *Tahoe-Sierra* held that a building moratorium could not impose a per se taking under *Lucas* for its denial of a parcel's economically viable use because the parcel retained value due to its potential use after the moratorium.[33] As part of its reasoning, the six-justice *Tahoe-Sierra* majority explained that *First English* "implicitly rejected" a rule that a normal delay "temporarily denying an owner all use of her property" might be a taking.[34] Similarly, while Chief Justice Rehnquist's dissent, joined by Justices Scalia and Thomas, concluded that the moratorium in question did amount to a taking, it notably agreed with the majority that "normal delays" do not impose takings.[35] The dissent explained that "background principles of state property law" preclude takings because "the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations."[36]

2. *Application of the Normal Delay Rule to Legal Errors*

A number of courts have applied the "normal delay" concept to the subject of this Article: permitting delays that are due, in part, to government's erroneous interpretation of applicable law. The leading case is *Landgate, Inc. v. California Coastal Commission*,[37] where California's Supreme Court held that a two-year delay caused by a commission's "mistaken assertion of jurisdiction" that was corrected on appeal is "in the nature of a 'normal delay' that does not constitute a taking."[38] The court indicated, however, that a different case would be presented if the Commission's "position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the

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cannot be considered a taking in the constitutional sense." 447 U.S. 255, 263 n.9 (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)).

[32] 535 U.S. 302 (2002).

[33] *Id*. at 332.

[34] *Id.* at 329. The Court did, however, suggest that extraordinary delays could help support a taking, explaining that the length and justification of a delay could be considered in a *Penn Central* analysis. *Id*. at 342.

[35] *Id.* at 352 (Rehnquist, C.J., dissenting) (quoting First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 321 (1987)).

[36] *Id.* at 351–52 (Rehnquist, C.J., dissenting).

[37] 953 P.2d 1188 (Cal. 1998).

[38] *Id.* at 1190.

development project before it."[39]

Landgate is consistent with the Federal Circuit's "extraordinary delay" jurisprudence. Although most of those decisions do not involve delays due to legal errors, they do more generally provide that a takings claim based on a permit delay is not ripe unless and until the delay is extraordinary.[40] Moreover, they almost never find extraordinary delay unless the agency-caused delay was both unreasonable and the result of bad faith.[41] Further, a few of those cases did involve delays due to agency positions that courts later held were erroneous and reversed. The most notable such case is *Tabb Lakes, Ltd. v. United States*,[42] which was also the first Federal Circuit decision to address the concept of extraordinary delay.

In *Tabb Lakes*, the United States Army Corps of Engineers ordered the developer to cease and desist from filling its wetlands before receiving a Clean Water Act permit.[43] Three years later, the Court of Appeals for the Fourth Circuit ruled that the Corps's order was erroneous because the agency had no jurisdiction over these wetlands.[44] The developer then proceeded with its project.[45] It also sought compensation from the Corps, asserting that the three-year delay imposed a temporary taking.[46] The Federal Circuit rejected the claim. It explained that "only after the delay becomes unreasonable, would the taking begin," although it stated that because the developer never suggested a date after the

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[39] *Id.* at 1199. Subsequently, relying on *Landgate*, one California appellate court rejected a takings claim where it found that a city's action "was not objectively unreasonable because it was not taken solely to delay the proposed project." Lowenstein v. City of Lafayette, 127 Cal. Rptr. 2d 79, 87 (Cal. Ct. App. 2002). Another found a taking where it concluded that a city's permit denial was "arbitrary and unreasonable" in light of a state statute and existing case law that required the issuance of the permit. Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458, 464 (Cal. Ct. App. 1999).

[40] *See generally* Riviera Drilling & Exploration Co. v. United States, 61 Fed. Cl. 395, 405 (2004) (quoting Boise Cascade Corp. v. United States, 296 F.3d 1339, 1352 (Fed. Cir. 2002)) (finding that the facts of the case presented no extraordinary delay).

[41] Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1366–67 (Fed. Cir. 2004); *see also* Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 499 (2009) (noting the Federal Circuit's "admonition that extraordinary delay rarely travels without bad faith . . . .").

[42] 10 F.3d 796, 798 (Fed. Cir. 1993).

[43] *Id.*

[44] *Id.* at 798–99.

[45] *Id.* at 799.

[46] *Id.*

issuance of the cease and desist order as the starting point for a taking, the court did not need to decide whether at some point the Corps's action became unreasonable.[47]

In addition, at least one other circuit court has addressed this issue, holding that delays due to litigation that overturns a permit denial are not extraordinary if government acted in good faith. In *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*,[48] the Fourth Circuit reviewed the property owners' temporary takings claim, which was based on the City's denial of their permit. The owners had challenged the denial in state court, which deemed the denial "arbitrary," resulting in the City's issuance of the permit.[49] The Fourth Circuit subsequently held that the delay was "a non-compensable incident of ownership."[50] Absent the City's bad faith or deliberate delay of the judicial process, "any delay was nothing more than the law's delay as lamented for some 400 years, and not an extraordinary delay that could give rise to constitutional implications."[51]

One federal court has directly endorsed California's approach. Citing *Landgate*, the district court in *North Pacifica, L.L.C. v. City of Pacifica* held that California provides an adequate remedy for temporary takings based upon allegedly improper delays in processing development applications, and consequently that remedy must be pursued prior to bringing a federal court action.[52]

3. *The Normal Delay Rule Questioned*

In 1999 the Wisconsin Supreme Court rejected California's *Landgate* approach.[53] In *Eberle v. Dane County Board of Adjustment*, property owners alleged that a county improperly denied a permit for a driveway needed to access their property.[54] A

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47 *Id.* (emphasis omitted).

48 420 F.3d 322, 327 (4th Cir. 2005).

49 *Id.* at 326.

50 *Id.* at 330 (citing Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980)).

51 *Id.*

52 N. Pacifica, Ltd. Liab. Co. v. City of Pacifica, 234 F. Supp. 2d 1053, 1064–65 (N.D. Cal. 2002). Under *Williamson County Regional Planning Commission v. Hamilton Bank*, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 473 U.S. 172, 195 (1985).

53 Eberle v. Dane Cnty. Bd. of Adjustment, 595 N.W.2d 730, 742 n.25 (Wis. 1999).

54 *Id.* at 734.

trial court subsequently ordered the county to issue the permit.[55] Over the strong dissent of its chief justice, Wisconsin's high court held that these facts stated a temporary taking claim under the Wisconsin Constitution.[56] In doing so, the majority expressly rejected *Landgate's* reasoning.[57] It pointed to the statement in *First English* that where an "ordinance . . . had deprived the landowner of all use of its property for a 'considerable number of years . . . invalidation of the ordinance without payment of fair value'" is an inadequate remedy.[58] The Court did not, however, address *First English's* "normal delay" language. Further, after the state court decided *Eberle*, the United States Supreme Court emphasized in *Tahoe-Sierra* that *First English* only addressed the remedy for a temporary taking (compensation); it did not determine the merits. In other words, the Court did not determine what constitutes a temporary taking.[59]

More recently, a number of California lower courts have questioned whether *Landgate* is still good law, given its use of the "substantially advance legitimate governmental interest" formula that the Supreme Court rejected in *Lingle*.[60] But those cases fail to recognize that there are two very different interpretations of how *Landgate* used the substantially advances concept. As outlined in Section II, above, *Landgate* and similar decisions in other jurisdictions are not valid if they are viewed as using the substantially advances formula as a "sword," that is, to establish a per se taking. In light of *Lingle*, the *Landgate* line of cases cannot

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[55] *Id.* at 735.

[56] *Id.* at 739. The Chief Justice asserted that where an administrative body refuses to allow a particular land use, and a court subsequently overturns the denial and allows the use, there is no temporary taking. *Id.* at 748–49 (Abrahamson, C.J., dissenting). In support, she cited—in addition to Landgate, Inc. v. California Coastal Commission, 953 P.2d 1188 (Cal. 1998)—decisions from Vermont, New Hampshire, Pennsylvania, and New York. *Eberle*, 595 N.W.2d at 748.

[57] *Eberle*, 595 N.W.2d at 742 n.25.

[58] *Id.* at 743 (quoting First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 322 (1987)).

[59] *Tahoe-Sierra* affirmed the Ninth Circuit's decision, including its reasoning, that "*First English* concerned the question whether compensation is an appropriate remedy for a temporary taking and not whether or when such a taking has occurred." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 319 (2002) (characterizing the Ninth Circuit's decision); *id.* at 328–29 (adopting the Ninth Circuit's reasoning).

[60] *See, e.g.*, Lockaway Storage v. Cnty. of Alameda, 156 Cal. Rptr. 3d 607, 627–28 (Cal. Ct. App. 2013); Shaw v. County of Santa Cruz, 88 Cal. Rptr. 3d 186, 216 (Cal. Ct. App. 2008).

provide an independent theory for finding a taking. A delay for arbitrary reasons is not a per se taking. On the other hand, *Landgate* is harmonious with *Lingle* if it is seen as a "shield"; that is, even where a delay imposes impacts that would ordinarily amount to a taking, no taking occurs for delays that are legitimate.[61] In that situation, courts are merely using a "substantially advances" concept to help determine whether a delay comes within the "normal delays" that cannot constitute temporary takings under *First English*.[62] The lower court decisions did not recognize that *Landgate* is valid when viewed as being based on the normal delay concept.

There is also one federal decision that includes some, albeit weak, support for having courts apply a takings analysis even where a permitting delay is due to the normal permitting process. In *Bass Enterprises Production Co. v. United States*,[63] the Federal Circuit applied the *Penn Central* factors to a permitting delay without having first determined whether the delay was normal and therefore shielded from takings liability irrespective of the *Penn Central* analysis. Although this seems to imply that normal delays can result in takings, the support is minimal because the court did not squarely address the issue. In addition, the government may not have raised it as a defense, and the court found no taking. *Bass Enterprises* does not, therefore, provide significant support for discarding the normal delay rule.[64]

In contrast to *Eberle, Bass Enterprises*, and the intermediate California appellate decisions, one commentator does directly address this question. He concludes that "[i]t is time to . . . jettison extraordinary delay from the takings arena once and for all . . . "[65]

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[61] *See* Landgate, Inc. v. California Coastal Commission, 953 P.2d 1188, 1190 (Cal. 1998).

[62] First English, 482 U.S. at 321.

[63] 381 F.3d 1360 (Fed. Cir. 2004).

[64] Bass Enters. Prod. Co., v. United States, 54 Fed. Cl. 400 (2002), *aff'd*, 381 F.3d 1360 (Fed. Cir. 2004). The lower court initially held that the government's forty-five month permitting delay imposed a temporary taking because "[t]heir loss during that period was absolute." *Bass Enters.*, 54 Fed. Cl. at 402. Following the *Tahoe-Sierra* decision, however, the government moved for reconsideration on the ground that the delay should not have been considered a categorical taking under *Lucas*, but instead should have been analyzed utilizing the factors outlined in *Penn Central. Bass Enters.*, 54 Fed. Cl. at 402. The court agreed, and went on to apply those factors in rejecting the takings claim. *Id.* at 402–04. On appeal, the Federal Circuit affirmed. *Bass Enters.*, 381 F.3d at 1371.

[65] David W. Spohr, *Cleaning Up the Rest of* Agins*: Bringing Coherence to Temporary Takings Jurisprudence and Jettisoning "Extraordinary Delay,"* 41

He suggests that, post-*Lingle*, courts should solely focus on the impacts of regulatory actions, including delays, on property owners.[66] But, as we shall see, both doctrinal and policy considerations call for maintaining the normal delay rule and applying it to erroneous delays.

4. *Basis for Maintaining the Normal Delay Rule and Applying It to Good Faith Errors*

a. *Background Principles and Investment Backed Expectations*

In *Lucas,* the Supreme Court explained that even if a regulation deprives a property owner of all economically viable use of her property, the regulation cannot be a taking if "background principles of the State's law of property and nuisance" justify the property restriction.[67] And *Penn Central* held that courts reviewing takings claims should analyze "the extent to which the regulation has interfered with distinct investment-backed expectations."[68] Both concepts provide a strong doctrinal foundation for the normal delay rule and for applying it to legal errors made in good faith.

As previously noted, Chief Justice Rehnquist pointed to those principles in his *Tahoe-Sierra* dissent. He explained that the normal delay rule is based upon "background principles of state property law," under which property owners have "reasonable investment-backed expectations" that they will face these permitting delays.[69] A California court of appeals similarly based the normal delay rule upon expectations and gave a strong justification for applying it to good faith errors:

> A landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits. Sometimes the application process must detour to the court process to resolve a genuine disagreement. Because such delay comes within the *Landgate* category of normal delays in the development approval process, there is no taking even if the value of the

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ENVTL. L. REP. NEWS & ANALYSIS 10,435, 10,454 (2011).

[66] *Id.*

[67] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[68] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[69] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 351–52 (2002) (Rehnquist, C.J., dissenting).

subject property is diminished in some way.[70]

b. *Ripeness*

The normal delay rule, and its application to legal errors, also has a ripeness component. A court cannot determine the final use of a property, and thereby engage in an analysis of whether the regulation's economic impact and other factors amount to a taking, until it knows the permitted uses. In *United States v. Riverside Bayview Homes, Inc.*,[71] the Court's explanation of why permitting delays are not takings is thus based on a ripeness concept. (In addition, the opinion is a predicate for the position that, at least, good faith legal errors corrected by a court do not impose takings.) *Riverside Bayview Homes* explained:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.[72]

When looking at the larger question of normal delays (as opposed to our subset of legal errors), the Court of Federal Claims and the Federal Circuit also indirectly suggest that this is a ripeness issue. But those cases have focused on whether at some point a delay can be so unjustified that a property owner has a ripe claim even though no final decision is reached.[73] In contrast, with

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[70] Loewenstein v. City of Lafayette, 127 Cal. Rptr. 2d 79, 93 (Cal. Ct. App. 2002) (citing Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1196–97 (Cal. 1998)).

[71] 474 U.S. 121 (1985).

[72] *Id.* at 127.

[73] In *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004), for example, the Federal Circuit suggested, but did not expressly state, that this is a ripeness matter. The court explained that "[d]elay in the regulatory process cannot give rise to takings liability unless the delay is extraordinary. If the delay is extraordinary, the question of temporary regulatory takings liability is to be determined using the *Penn Central* factors." *Id.* And the Court of Federal Claims explained that:

> [a]n extraordinary delay in permit processing by an agency can give rise to a ripe takings claim notwithstanding the failure to deny the permit . . . . If the court determines that there is an extraordinary delay by the government, the question of temporary regulatory takings liability is then determined using the Supreme Court's three-part

legal errors, the issue is whether the legal process needs to be concluded in order to finally determine the permissible uses of property.

In *Landgate*, the California Supreme Court did look at the relationship between the finality requirement and delays due to legal errors and partially based its holding on finality:

> As the United States Supreme Court has stated, an essential prerequisite to the assertion of a takings claim is "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." (*MacDonald, Sommer & Frates v. Yolo County, supra,* 477 U.S. at p. 348 [106 S.Ct. at p. 2566].) If a would-be developer fails to meet legitimate conditions for obtaining a development permit, then a government agency's refusal to issue such a permit would by no means be a "final and authoritative determination of the intensity of development legally permitted on the subject property," but merely a conditional denial. And, as reviewed in the preceding part of this opinion, the imposition of a development condition is not a constitutional violation merely because that condition is subsequently shown to have been erroneously imposed.[74]

Where government denies a permit based upon its bad faith failure to properly interpret a law, the denial may be all that is required to ripen a claim. In that case, the government's permit denial and its defense of the denial in court is not based upon a legitimate decision-making process. Because the legitimate process has ended, a court can base its takings analysis on the available property uses without the permit. Where, however, government's interpretation is made in good faith, but a court nevertheless ultimately determines that government misinterpreted the law, the judicial decision was needed to reach a final determination of allowable property uses.

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analysis in *Penn Central* . . . .

Aloisi v. United States, 85 Fed. Cl. 84, 93 (2008).

[74] *Landgate*, 953 P.2d at 1201–02. The Vermont Supreme Court has similarly indicated that the normal delay rule applies to erroneous delays at least partly due to ripeness considerations. In applying the rule to a temporary-taking claim based upon the delay caused by a city's permit denial that a court subsequently reversed, the Vermont Supreme Court thus explained that, "[p]ut another way, there can be no taking until the nature and extent of the restriction on land are finally determined." Chioffi v. City of Winooski, 676 A.2d 786, 789 (Vt. 1996).

c. *Realism*

Finally, the normal delay rule reflects common sense. In creating the regulatory takings doctrine,[75] Justice Holmes famously cautioned that courts need to be pragmatic lest they undermine the government's ability to protect the public, explaining that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[76] This need for realism is particularly important in the case of cash-strapped local governments. If they are exposed to major damage claims when they make permitting mistakes in good faith, they will be deterred from protecting public values.

Local governments in particular are risk adverse, which "results in their discounting the benefits and placing a premium on the costs of their actions."[77] And takings lawsuits can be intimidating. The former chief lobbyist for the National Association of Home Builders went so far as to characterize a proposal to increase developers' ability to bring takings lawsuits in federal court as "a hammer to the head" of state and local officials.[78] Moreover, a small town threatened with a takings lawsuit would not only need to assess the cost of losing, but also the cost of winning—such as having to absorb potentially crushing attorneys' fees incurred for its successful defense.[79] Shielding governments from suits seeking compensation where their delays

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[75] Justice Scalia underscored the Takings Clause's judicial origins by explaining, in *Lucas v. South Carolina Coastal Council*, that "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" 505 U.S. 1003, 1014 (1992) (citing Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922)) (quoting Knox v. Lee (Legal Tender Cases), 79 U.S. 457, 551 (1871) and Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879)). For a review of other Supreme Court decisions explaining that regulatory takings are a judicial creation, as well as how most, but not all, scholars agree, see Daniel L. Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 VT. L. REV. 603, 615–17 (2012).

[76] *Pennsylvania Coal*, 260 U.S. at, 413.

[77] Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1666 (2006).

[78] Timothy J. Dowling, *On History, Takings Jurisprudence, and* Palazzolo*: A Reply to James Burling*, 30 B.C. ENVTL. AFF. L. REV. 65, 83 (2002).

[79] *See*, *e.g.*, William C. Smith, *The Brawl Over Sprawl,* A.B.A. J., Dec. 2000, at 52 (describing how Hudson, Ohio, had to spend $250,000 to successfully defeat a takings lawsuit).

are based upon good faith performance of their duties, while allowing various challenges of bad faith actions, promotes an appropriate balance of checking abuses while protecting public values.

B. *No Authority*

Besides the normal delay rule, another possible ground for not applying the Takings Clause to erroneous governmental permitting decisions is that those decisions are not authorized. The concept that governmental acts must be authorized before they can violate the Takings Clause goes back at least to 1910. In *Hooe v. United States*, the Court rejected a landlord's claim for additional rent for offices leased by a federal agency on the ground that Congress had not authorized the higher payment.[80] According to that decision:

> The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government.[81]

Three years later, in *Hughes v. United States*,[82] the Court affirmed the need for authorization before a governmental action can amount to a taking. In *Hughes*, a federal officer dynamited open a portion of a levee during a flood, and the plaintiff sought takings damages for the resulting harm to her property.[83] The Court seemed to indicate that the officer's action would not be a taking if needed to address an emergency, but that the facts were "difficult to understand."[84] Nevertheless, the Court concluded that it did not need to resolve the facts. It concluded that even absent an emergency there would not be a taking, because in that case the officer's act was not authorized. The officer's "wrongful act, cannot be held to be the act of the United States, and therefore it affords no ground for holding that the United States had taken the property for public use."[85] Similarly, in *Regional Rail*

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[80] 218 U.S. 322, 335–36 (1910).
[81] *Id.*
[82] 230 U.S. 24 (1913).
[83] *Id.* at 35.
[84] *Id.*
[85] *Id.*

Reorganization Act Cases,[86] the Court cited *Hooe* in reiterating that "[g]overnment action must be authorized."[87] And more recently, in *Arkansas Game and Fish Commission v. United States*,[88] the Court's unanimous 8-0 decision qualified the types of governmental actions that can be takings by indicating that they must be "authorized."[89]

In a long line of decisions, the Federal Circuit, which hears most takings claims against the United States,[90] has held that unauthorized governmental actions are not takings. That would appear to shield erroneous permitting delays from takings claims, as the delays would not be authorized. But the Federal Circuit has developed a nuanced—and in this author's opinion, confusing—concept of "authorized," under which illegal acts can be authorized. The Court of Federal Claims recently summarized the Circuit's approach as follows in *Starr International Co., Inc. v. United States*:

> Regarding the lawfulness of a governmental action in the takings context, the Federal Circuit has been careful to emphasize two related points. As an initial matter, a plaintiff is not barred from advancing a takings claim simply because it alleges that the government conduct was unlawful on other grounds. In *Del–Rio,* the Federal Circuit noted that in the takings context, courts have distinguished between unauthorized conduct and conduct that is authorized but nonetheless unlawful. The court noted that "a government official may act within his authority even if his conduct is later determined to have been contrary to law" and held that it is no

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[86] 419 U.S. 102 (1974).

[87] *Id.* at 127 n.16.

[88] 133 S.Ct. 511 (2012).

[89] The Court thus stated as follows: "True, we have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking." *Id.* at 518. The Court subsequently stated that "[a]lso relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Id.* at 522. However, at least one state court has interpreted a state takings provision as applying even if an agency's actions exceed its statutory authority. *See* Harris Cnty. Flood Control Dist. v. Adam, 56 S.W.3d 665, 668–69 (Tex. Ct. App. 2001) ("[W]e interpret the Texas Constitution to protect citizens against takings by the State, whether authorized or not.").

[90] Litigants must file actions in the Court of Federal Claims when they seek more than $10,000 from the federal government. 28 U.S.C. § 1491(a)(1) (2006) (Court of Federal Claims jurisdiction for monetary claims under federal law); 28 U.S.C. § 1346(a)(2) (2006) (concurrent jurisdiction in district court for cases not exceeding $10,000).

> barrier to a takings claim that "the government's action was legally flawed in some respect."[91]

The Federal Circuit's concept of illegal but authorized acts stems from *Portsmouth Harbor Land & Hotel Co. v. United States*.[92] In *Florida Rock Indus., Inc. v. United States*, the Circuit Court explained:

> What is meant by authority in these premises [sic] is aptly illustrated by *Portsmouth Harbor Land & Hotel Co. v. United States*, where Army ordnance officers fired heavy coast defense guns over the plaintiff's hotel land. Justice Brandeis, dissenting, denied that the officers had authority to acquire an interest in hotel land, but Holmes, for the majority, held that whether they had authority to fire the guns was the decisive authority question.[93]

In fact, however, *Portsmouth* suggested that more was needed to establish authority. *Portsmouth* reviewed a resort owner's complaint asserting that the United States repeatedly fired heavy artillery over the resort and thereby took an interest in the property. The Supreme Court held that the owner stated a takings claim. The Court indicated that, at trial, the owner would need to establish authority, and that the owner had a good chance of doing so.[94] But in making that latter point, Justice Holmes not only relied on the officers' authority to fire the guns, but more significantly on the fact that "the United States built the fort and put in the guns and the men."[95] Moreover, the Court was reviewing a demurrer to a complaint that alleged that the United States set up "heavy coast defence guns" in a manner that could only be fired over the claimant's land.[96] Thus, Justice Holmes essentially stated that the

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[91] Starr Int'l Co., v. United States, 106 Fed. Cl. 50, 70 (2012) (citations omitted), *reconsideration denied,* 107 Fed. Cl. 374 (2012).

[92] 260 U.S. 327 (1922).

[93] 791 F.2d 893, 898 (Fed. Cir. 1986) (citation omitted).

[94] *See* Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 330 (1922).

[95] *Portsmouth Harbor Land*, 260 U.S. at 330. Specifically, Justice Holmes stated:

> It very well may be that the claimants will be unable to establish authority on the part of those who did the acts to bind the Government by taking the land. But as the allegation is that the United States did the acts in question, we are not prepared to pronounce it impossible upon demurrer. As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen.

[96] *Id.* at 328–29 (citing United States v. N. Am. Transp. & Trading Co., 253

United States, at least implicitly, authorized the firing of heavy artillery over the resort property by setting up the fort, with its guns and soldiers, next to the property.

In addition to going beyond its *Portsmouth* foundation, the Federal Circuit's approach is confusing, as seen by its decision in *Cienega Gardens v. United States*.[97] In that case, officials in essence improperly refused to release owners of low-income housing projects from rent control requirements. The project owners sued for a temporary regulatory taking.[98] Although the officials were engaged in their normal activities, the court rejected the takings claim for this delay period.[99] It explained that, because Congress had repealed the law allowing the refusal, the officials were not authorized to refuse the release, and their actions therefore could not amount to a taking.[100] Yet all erroneous delay challenges involve governments or their officials failing to follow controlling law.

Cienega Gardens can be explained by the Federal Circuit's indication that government's "legally flawed" acts still need to be made in "good faith" to be authorized. *Del–Rio*, the major precedent guiding *Starr International* above, stated that acts must either be the "natural consequence of Congressionally approved measures [or] pursuant to the good faith implementation of a Congressional Act."[101] The *Del-Rio* court therefore held that the acts of the officials in question were authorized because they were "a good faith effort to apply the statutes and regulations as they understood them."[102] This good faith requirement is consistent with the Supreme Court's takings determination, back in the late 1800s, that an official's acts were authorized because he "honestly and reasonably exercise[ed] the discretion with which he was

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U. S. 330 (1920)).

97 503 F.3d 1266 (Fed. Cir. 2007).

98 *Id*. at 1277.

99 *Id*. at 1287 n.18.

100 *Id*.

101 Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1362 (Fed. Cir. 1998) (internal citations and quotation marks omitted); *see also* Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336, 343 (2001) (where the Court of Federal Claims subsequently determined that an agency's action was authorized for Takings Clause purposes, in part because there was no "reason to question the agency's good faith determination that the playa provided habitat for migratory birds, and that it, in good faith[,] interpreted its duties under the [Clean Water Act] as extending to isolated playas.").

102 *Del-Rio Drilling*, 146 F.3d at 1363.

invested" by Congress.[103]

But the requirement that an agency's erroneous interpretation of a law can only potentially amount to a taking if the agency acted in good faith is the inverse of California's normal delay approach, under which only bad faith delays are potential takings. The conclusion of this Article will suggest a means of harmonizing these approaches.

C. *No Public Use*

A closely related reason for excluding takings claims for erroneous delays stems from the Takings Clause's public use requirement. Prior to *Lingle*, a number of scholars suggested that, where a governmental entity denies a permit because it misinterpreted controlling law, erroneous denial by its nature is not for a public use.[104] Also prior to *Lingle*, two courts mentioned this concept, although neither ended up addressing it. In *Custer County Action Association v. Garvey*,[105] the Tenth Circuit called the position "intriguing," but it went on to reject the takings claim before it on other grounds.[106] The California Supreme Court also acknowledged this argument in *Landgate*, although, like the Tenth Circuit, it ruled on other grounds.[107]

Lingle, however, adds significant heft to this argument. *Lingle* indicates that no governmental misinterpretation of a law can be a taking,—even if the governmental action is "arbitrary." The Court explained that while arbitrary actions might violate the Due Process Clause, the Takings Clause only applies to takings "for

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[103] Great Falls Mfg. Co. v. Garland, 124 U.S. 581, 597 (1888). The Court noted:

> It is sufficient to say that the record discloses nothing showing that he has taken more land than was reasonably necessary for the purposes described in the act of congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the government is under a constitutional obligation to make compensation for any property or property right taken, used, and held by him for the purposes indicated in the act of congress, whether it is embraced or described in said survey or map or not.

Id.

[104] *See* John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1087 (2000); Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 260–73 (1998).

[105] 256 F.3d 1024 (10th Cir. 2001).

[106] *Id.* at 1042.

[107] Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1201 n.7 (Cal. 1998).

public use," and arbitrary actions would not be for a public use.[108] *Lingle* emphasized that the Takings Clause "does not bar" government actions. Rather, it requires compensation "in the event of *otherwise proper interference* amounting to a taking."[109] But if the governmental action is not proper, it cannot be a taking. As the Court explained, "if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."[110]

In the North Carolina example presented in this Article's introduction, for example, assuming that the town had no right to enforce the public trust doctrine, it had no right to bar the repair of the cottage on the ground that the cottage was on public lands (and the town apparently did not cite any other ground for preventing the repair).[111] Town officials could not have stopped the project by paying compensation because they had no right to stop the project. Under *Lingle*, no amount of compensation could authorize town officials to stop a permissible project.

Since the Court decided *Lingle*, a number of courts have addressed this issue outside of the permitting context and indicated that improper governmental actions, by their nature, cannot be takings because they fail to meet that clause's public use requirement. For example, in *Miranda v. Bonner*,[112] the United States District Court for the Central District of California relied upon this reasoning in rejecting a taking claim involving City of Los Angeles police officers, where plaintiffs asserted that state law did not authorize the officers to impound their vehicles.[113] The court explained that "[e]ven if the LAPD did impound Giron's vehicle in violation of Section 14602.6, such a seizure would not constitute a public use because it would not be an 'otherwise proper interference amounting to a taking.'"[114] Other federal district courts have reached the same conclusion.[115]

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[108] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005).

[109] *Id.* (citation omitted).

[110] *Id.*

[111] *See supra* note 3 and accompanying text.

[112] No. CV 08-03178 SJO (VBKx), 2013 WL 794059 (C.D. Cal. Mar. 4, 2013).

[113] *Id.* at *10.

[114] *Id.* (quoting *Lingle*, 544 U.S. at 543).

[115] The United States District Court for the Northern District of California, for

At least one commentator, however, asserts that the Court's broad interpretation of the public use requirement—most recently in *Kelo v. City of New London*[116]—means that almost any governmental action amounts to a public use, even if it is illegal.[117] As long as the use serves the public in some way it meets the constitutional requirement. But that argument is inconsistent with *Lingle's* emphasis that the Takings Clause is limited to an "*otherwise proper interference*."[118] It is also inconsistent with the Court's separation of powers approach to public use. In essence, the Court has determined that the legislature, not the judiciary, establishes public use. The judiciary should only step in where the legislative determination is extreme. The Court has therefore repeatedly emphasized the legislature's central role. For example, in *Kelo* itself, the Court explained as

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example, relied upon this reasoning in rejecting a takings claim against a county in *Mateos-Sandoval v. County of Sonoma*, 942 F. Supp. 2d 890, 908–09 (N.D. Cal. 2013). In that case, a Sonoma County deputy sheriff had impounded a driver's vehicle pursuant to California Vehicle Code section 14602.6 on the grounds that the driver did not have a valid California driver's license. The court, however, ruled that that provision did not authorize the deputy's action, and that the action may have therefore amounted to an unlawful seizure under the Fourth Amendment of the United States Constitution. The court then turned to the taking claim. Citing *Lingle*, the court explained that an unlawful seizure could not be a taking because it would not be "for public use." *Id*. at 912. Similarly, in *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1079 (E.D. Cal. 2012), the United States District Court for the Eastern District of California reviewed takings and other claims by a homeless individual against a city after its employees seized and destroyed his property. Pointing to the Northern District's reasoning in *Mateos-Sandoval v. County. of Sonoma*, No. C11–5817 TEH, 2012 WL 6086225 (N.D. Cal. Dec. 6, 2012), *amended in other respects and superseded*, 942 F. Supp. 2d 890 (2013)), the Eastern District held that if the plaintiff prevails on any of his claims that his property was unlawfully seized and destroyed, then "he will have demonstrated that the destruction was *unlawful,* and therefore could not possibly be a taking because the conduct was not a 'proper interference' with his property rights." *Id.* at 1106. And the United States District Court for Hawaii adopted the same reasoning in rejecting protestors' takings claims based on their assertion that city personnel seized and destroyed the protesters' property. In *De-Occupy Honolulu v. City & County of Honolulu*, the court held that the protestors' complaint "fails to allege a plausible claim for failure to allege that the 'taking' was for 'public use.'" No. CIV. 12-00668 JMS, 2013 WL 2284942 at *9 (D. Haw. May 21, 2013), The court cited both *Sanchez* and *Lingle* in explaining that an "*unlawful* interference with Plaintiffs' property is not the proper subject of a Takings Clause claim." *Id.* at *10.

[116] 545 U.S. 469 (2005).

[117] David W. Spohr, "*What Shall We Do with the Drunken Sailor?": The Intersection of the Takings Clause and the Character, Merit, or Impropriety of Regulatory Action*, 17 SOUTHEASTERN ENVTL. L.J. 1, 58–59 (2008).

[118] *Lingle*, 544 U.S. at 543 (citation omitted).

follows: "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[119]

Before *Kelo*, the Court was equally emphatic in stating that the legislature, not the courts, determine "public use." After reviewing a series of its prior decisions making that point, the Court in *Hawaii Housing Authority v. Midkiff*[120] thus concluded: "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[121]

Moreover, the Court has indicated that the legislature's discretion is a two-way street. It can define public use broadly. Or it can define it narrowly, and thereby bar a taking because an action is not for a public use. Thus, in *United States ex rel. Tennessee Valley Authority v. Welch*,[122] the Court explained that the judiciary can determine that an action lacks public use because the legislature did not authorize the action.[123] The Court stressed that, in that situation, the judiciary is basing its determination on the legislatures' decision to limit public use.[124]

CONCLUSION: PUTTING IT ALL TOGETHER

The judicial approaches to erroneous delays and the doctrinal underpinnings of the Takings Clause both indicate that a permit

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[119] Kelo v. City of New London, 545 U.S. 469, 483 (2005)..

[120] 467 U.S. 229 (1984).

[121] *Id.* at 241 (quoting United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896)).

[122] 327 U.S. 546 (1946).

[123] *Id.* at 551–52.

[124] Specifically, the Court characterized its prior decision in *City of Cincinnati v. Vester*, 281 U.S. 439 (1930), as the judiciary's determination that an expropriation did not meet the public-use requirement because it was not authorized by state law:

> It is true that this Court did say in *City of Cincinnati v. Vester*, that "It is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." But the Court's judgment in that case denied the power to condemn "excess" property on the ground that the state law had not authorized it.

Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946) (quoting *Vester*, 281 U.S. at 446).

denial reversed by a court cannot impose a taking. Where an agency misinterpreted the applicable law in good faith, the resulting delay is merely part of the normal permitting process and therefore cannot impose a taking. And where the agency acted in bad faith, its action cannot be a taking because it was not authorized by law. Finally, whether or not the agency acted in good faith, the legislature determines public use, and if the agency did not follow the law, then its action was not for a public use.

This result may not be satisfying, but it tracks the Takings Clause. As the California Supreme Court explained in denying takings damages where police destroyed property when they pursued a criminal hiding in a store:

> Although in many circumstances it may appear "fair" to require the government to compensate innocent persons for damage resulting, for example, from routine efforts to enforce the criminal laws, inverse condemnation is an inappropriate vehicle for achieving this goal because it was not designed for such a purpose. Thus, for example, inverse condemnation is limited to damage to property and does not apply to damage involving personal injury.[125]

While the Takings Clause's reach is limited, other constitutional, statutory, and common law provisions might provide relief where the Takings Clause does not. For example, erroneous permitting delays could violate due process protections, at least where government acts in bad faith. The federal Due Process Clause protects landowners from arbitrary governmental actions. As the court explained in *County of Sacramento v. Lewis*:

> We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," . . . [including] the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . . . (internal citations omitted.)[126]

Lingle itself pointed out that, while illegitimate governmental actions do not give rise to takings claims, the actions can violate due process.[127] Moreover, government can violate the Equal

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[125] Customer Co. v. City of Sacramento, 895 P.2d 900, 913–14 (Cal. 1995).

[126] 523 U.S. 833, 845–46 (1998).

[127] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540, 543 (2005). For the proposition that a permitting delay can be challenged on substantive due process grounds, *see also* North Pacifica Ltd. Liab. Co. v. City of Pacifica, 526 F.3d 478, 484–86 (9th Cir. 2008); Torromeo v. Town of Fremont, 438 F.3d 113, 118 (1st

Protection Clause if, as part of its permitting process, it singles out an individual for differential treatment without a rational basis.[128] Further, state and federal statutes give property owners the right to overturn invalid permit denials.[129] Damages may also be available under statutes or common law tort theories.[130] Thus, while the Takings Clause is not designed to provide compensation for erroneous permitting delays, landowners have various potential sources of relief where governments deny permits due to their erroneous interpretations of controlling law.

Cir. 2006).

[128] Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

[129] State laws typically allow aggrieved parties to seek judicial review of administrative actions as arbitrary and capricious. *See, e.g.*, ALA. CODE § 41-22-20 (2013); ALASKA STAT. ANN. § 44.62.570 (West 1993) ("reasonable and not arbitrary" standard); ARK. CODE ANN. § 25-15-212 (2002); CONN. GEN. STAT. ANN. § 4-183 (West 2007); DEL. CODE ANN. tit. 29, § 10142 (2003) ("substantial evidence" standard); IOWA CODE ANN. § 17A.19 (West 2011); KAN. STAT. ANN. § 77-621 (2012); KY. REV. STAT. ANN. § 13B.150 (LexisNexis 2013); LA. REV. STAT. ANN. § 49:964 (2003); MASS. GEN. LAWS ANN. ch. 30A, § 14 (West 2013); MICH. COMP. LAWS ANN. § 24.306 (West 2004); MO. ANN. STAT. § 536.140 (West 2008); NEB. REV. STAT. § 84-917 (2008); N.Y. C.P.L.R. § 7803 (McKinney 2008); OKLA. STAT. ANN. tit. 75, § 322 (West 2002); S.D. CODIFIED LAWS § 1-26-36 (2012); TENN. CODE ANN. § 4-5-322 (2011); WYO. STAT. ANN. § 16-3- 114 (2013). The federal Administrative Procedure Act allows similar review of federal agency actions. *See* 5 U.S.C. §§ 702, 706 (2006).

[130] *See, e.g.,* Maurice A. Nernberg & Assocs. v. Coyne, 920 A.2d 967, 970 (Pa. Commw. Ct. 2007) (citing a 1991 permit denial case for the proposition that "[d]amages are generally appropriate [under Pennsylvania's mandamus statute] when a defendant fails to perform a ministerial duty, even when such failure results from an erroneous legal interpretation."); Westmark Dev. Corp. v. City of Burien, 166 P.3d 813, 819 (Wash. Ct. App. 2007) (damages for permitting delay available under Washington State's statutory and common law tort provisions).