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# U.S. Supreme Court Expands Definition of What Constitutes a Physical Taking

## By Jeremy S. Young

In a boon to property owners, the U.S. Supreme Court recently expanded the definition of what constitutes a **physical** taking (one that takes *possession* of property away from its owner) by including what many practitioners would have classified as a potential **regulatory** taking (one that restricts the *use* of property).

*Cedar Point Nursery v. Hassid* involved a California regulation that granted labor organizations a "right to take access" to an agricultural employer's property to solicit support for unionization. The regulation mandated that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year.

Organizers from the United Farm Workers sought to access properties owned by two California growers—Cedar Point Nursery and Fowler Packing Company. The growers filed suit in Federal District Court seeking to enjoin enforcement of the access regulation on the basis that it appropriated without compensation an easement for union organizers to enter their properties and therefore constituted an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments to the U.S. Constitution.

The District Court dismissed the complaint, holding that the access regulation did not constitute a *per se* physical taking because it did not allow the public to access the growers' property in a permanent and continuous manner. The Court of Appeals affirmed.

In reversing, the Supreme Court held that California's access regulation appropriates a right to invade the growers' property, to "literally 'take access,'" and therefore constitutes a *per se* physical taking. In doing so, the Court reasoned that the regulation did not merely restrain the growers' use of their property, but rather appropriates for the enjoyment of third parties (here union organizers) the owners' right to exclude, which right the Court called "a fundamental element of the property right."

The Supreme Court also rejected the view that the access regulation cannot qualify as a *per se* taking just because the access granted is restricted to union organizers, for a narrow purpose, and for a limited time. Instead, the Court reasoned that a physical appropriation is a taking, regardless of whether it is permanent or temporary, and the duration of the appropriation bears only on the amount of compensation due.

Notably, the Supreme Court was careful to define the limits of its holding. First, the Court pointed out that it was not disturbing its previous decision in *PruneYard Shopping Center v. Robins*, in which the Court recognized a right to engage in leafletting at a privately owned shopping center that was generally open to the public, and held that the shopping center suffered no compensable regulatory taking as a result of leafletting.

The Supreme Court also clarified that:

(1) Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly treated as torts (like trespass), rather than as appropriations of a property right;
(2) Many government-authorized physical invasions will not amount to takings because they are consistent with what the Court called "longstanding background restrictions on property rights" (i.e., pre-existing limitations on a property owner's title, such as the ability to require an owner to abate a nuisance on its property); and

(3) The government may require property owners to give up a right of access as a condition of receiving certain benefits (such as health and safety inspection approval), without causing a taking.

*Hassid* is notable in that it interpreted what many practitioners would have assumed to be a potential regulatory taking as a *per se* physical taking. This is significant because under a regulatory taking analysis, an owner would have to make a detailed factual showing under a somewhat subjective standard to establish a taking had actually occurred. If successful on that showing, the property owner would then have to also establish the amount of compensation it is due. With a *per se* physical taking, however, the finding that there was a taking is automatic, and the compensation analysis is the only real inquiry.

*Hassid* thus removes a significant (and expensive) obstacle faced by property owners in the same position as the growers in that case. But the devil is in the details. With all the limitations the Court placed on its holding, many property owners may find that the imposition they are experiencing does not qualify as a *per se* physical taking.

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