

What Are the 3 Types of ‘Takings’ for Eminent Domain Cases in the US?

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About to enter eminent domain proceedings? Chances are your case falls into one of the three main ‘taking’ categories defined by your state’s constitution.

3 Basic ‘Takings’ Categories for Eminent Domain Cases in the U.S.

If you don’t already know, a ‘taking’ [is defined as](#) the occurrence of a local or federal government occupying (or encroaching upon) private land for its own proposed, public use. As such, there are three main types of takings: (1) physical takings, (2) regulatory takings, and (3) pro tanto takings.

1. Physical Takings

Perhaps the simplest to describe, and the most common, **physical takings** are the straightforward process of a government – or another entity with the power of eminent domain (ED) – creating a simple public-use case for all or part of a property. Such an entity would then be obligated to provide compensation to the property owner. (Physical takings can be either partial-type or total-type, which I will expand on in just a moment).

Most ED situations are simple, under-the-radar, and rarely stir up any dust. Usually they involve one party occupying, say, ten feet of an individual’s private property to widen a road, or to put in a sidewalk. Proceedings occur quickly, compensation is distributed, and all parties walk away with little dispute that the taking is necessary for a public use.

2. Regulatory Takings

For **regulatory takings**, on the other hand, there is an exercise of authority involved—in this scenario the government enforces ED power by regulating a property’s use, such as through zoning. There isn’t a physical loss of property, however, your personal (or private) capacity to make use of that property is being limited somewhat.

For many, even experienced litigators, regulatory takings are a nuanced, complex area of law. As with physical takings, you’ll have what is called a **total regulatory taking**, where for others you may experience a **partial regulatory taking**. Depending on which regulatory taking you’re dealing with, you’ll want to reference one of the following U.S. Supreme Court Cases:

- (a) For total regulatory takings, reference [Lucas v. South Carolina Coastal Council](#)

With total regulatory takings, a given set of regulations have deprived a property of all economic value, leaving it useless for productive means. Property owners who have experienced a total regulatory taking must file an inverse condemnation lawsuit against the entity imposing the regulation to seek to recover the pre-taking fair market value of the property. Fairly straightforward.

(a) For partial regulatory, reference the [Penn Central Case](#)

The procedure for a partial regulatory taking is similar, with the property owner filing an inverse condemnation claim, but the analysis is more complicated. When we look at partial regulatory takings, three major factors are balanced to determine whether a taking has occurred. The first is the nature of the governmental regulation. Here, the court balances the liberty interest of said property against the government's need to protect or advance the interests of the public.

This assessment includes determinations about the social value and location of the activity being limited, as well as numerous other factors related to the prohibited activity—i.e. the degree of harm created by said activity, the ease by which harm may be prevented, whether regulations target an individual, and the extent to which the regulation is retroactive.

The second partial regulatory taking measure is the economic input factor, comparing the value that has been taken and the value which remains post-regulatory taking. For cases such as these, the court will ask questions like...

...What did the owner pay for the property?

...What improvements have the owners made over time?

...What cost and benefits have they received from prolonged ownership?

Finally, courts will assess the extent to which the regulation interferes with distinct, investment-backed expectations.

The main idea behind this third assessment is whether the conditions of the land or property-owner were foreseeable. So, you'll see court representatives posing questions about the reasonableness of the owner's choice to rely on the existing regulatory framework, particularly in light of potential ED warning signs. Courts have been known to weigh strongly against those who could have foreseen their regulatory circumstances.

3. Pro Tanto Takings

What industry-people call a **pro tanto taking**, or a "substantial interference" taking, relates to a fundamental property interest tied up in the 'bundle of sticks' of property rights a landowner once held, which are (in essence) being 'taken' away.

In simple terms, pro tanto takings involve a court's assessment of how a public project has interfered with the economic success or accessibility aims of a nearby property or business.

A classic example comes from the Supreme Court where a property was at grade with an abutting road, up until the time when the government elevated the road to build an overpass over nearby railroad tracks. As a result, the property lost its at-grade access, and instead faced a 30-foot retaining wall. Because the owner's fundamental right of access to an abutting road was 'substantially interfered' with, the Supreme Court named the case a Pro Tanto taking