Looking Back: The Full-Time Baseline in Regulatory Takings Analysis

Christine Venezia
LOOKING BACK: THE FULL-TIME BASELINE IN REGULATORY TAKINGS ANALYSIS

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I. INTRODUCTION

The United States Supreme Court has focused an enormous amount of attention on the law of regulatory takings. Beginning in 1922, the United States Supreme Court recognized that a regulation amounts to a taking if the regulation goes “too far” in denying an owner economically viable use of his or her land. Unfortunately, the Court has never precisely defined what constitutes “too far.” Consequently, information on regulatory takings is plentiful and the Court generally has examined takings cases on an ad hoc basis. In doing so, the Court has applied a series of balancing tests in order to determine if a regulation effects a taking. These tests have tended to focus on the pre-regulation and post-regulation effects on the economic value of the land, balancing the burdens suffered by property owners against the public benefits of regulation.

In determining the economic impact of a regulation, the Supreme Court has focused on whether the regulation has frustrated the investment-backed expectations of the landowner. The Court also has attempted to determine the degree to which the regulation diminishes

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1 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
4 Murphy, supra note 3, at 263; see Keystone, 480 U.S. at 495; Agins, 447 U.S. at 260-61.
5 See Keystone, 480 U.S. at 495.
a property's value. This inquiry requires a determination of how much of the landowner's property to take into account and how long a time period to consider.

The United States Supreme Court has addressed repeatedly the physical baseline question: how much of the property to consider when determining the impact of a regulation. The Court, however, has not answered the chronological baseline question: "What period of time should the Court look at to establish the diminution effects of the regulation?" Currently, there are two dominant theories of chronological baseline determination. The "full-time" baseline theory supports beginning a regulatory takings determination by looking back to the original time of the purchase of the property. The "aftermath-time" baseline theory argues for beginning the takings determination at the time the regulation actually comes into effect.

When determining the economic impact of an ordinance on a landowner, the Court has looked at the owner's investment-backed expectations and the extent to which the regulation has diminished the value of the property. The choice of a time baseline greatly affects a court's determination as to how the regulation has diminished both the property value and the investment-backed expectations of the property owner.

Consider the following scenario as to how a time baseline can affect the inquiry in terms of investment-backed expectations:

Jim, a developer, buys for $100,000 fifty acres near a lake for the purpose of building summer homes on the land. Jim develops thirty-five acres, building seventy summer homes, at a cost of $3.6 million. He then sells the homes for $7 million, giving him an overall profit of $3.4 million. A regulation, zoning the land as protected wetlands, then prevents Jim from developing the remaining fifteen acres. Although he could have developed the re-

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6 See id.
7 See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (implying endorsement of conceptual severance and partial physical baseline); Keystone, 480 U.S. at 497 (rejecting conceptual severance and instead looking at parcel of land as whole); Penn Cent., at 130-31 (holding takings jurisprudence does not divide parcel of land into separate segments but rather looks at parcel as whole).
8 Murphy, supra note 3, at 264.
9 Id.
10 Id.
11 Id.
13 Murphy, supra note 3, at 267.
remaining land at a profit of approximately $1.5 million, Jim’s fifteen acres are now valued at a little over $10,000, with no potential for greater profit.

In such a case, if a court were to choose to measure the effect of the regulation against the investor’s expectations on the day before the regulation took effect, the court probably would find that the regulation had “wiped out” Jim’s investment. Before the regulation, Jim had a potential profit of $1.5 million, which the regulation subsequently reduced to the $10,000 remaining value in the land. If, on the other hand, the court shifts its focus to a full-time baseline and begins its inquiry when Jim made his investment, the result is much different. Jim made $3.4 million in profit on a $100,000 investment. He recaptured his entire purchase price and realized almost seventy percent of his potential profit. Although he did not realize all of his potential profit, Jim was able to make what most people would consider a reasonable return on his investment. By providing a more complete picture of the owner’s investment history in the property, the full-time baseline reveals that the owner largely achieved his investment-backed expectations, thereby undercutting arguments about unconstitutional takings and leading to a fairer result.

Although there has been no ruling by the Supreme Court on the time baseline issue in the regulatory takings context, there is a large body of law regarding aesthetic zoning regulation of billboards, and the use of amortization periods for nonconforming uses as a method of compensation. Amortization provides an investor with a limited amount of time to continue a prior existing nonconforming use. Billboard amortization cases support the investment-backed expectations argument for a full-time baseline. Typically, billboard cases focus on

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14 See id. at 265.
15 See Penn Central, 438 U.S. at 136 (stating that no taking occurred because Penn Central not only profited but also earned “reasonable return” on investment, yet never defining “reasonable return”); Murphy, supra note 3, at 265.
16 See Murphy, supra note 3, at 265.
19 See Naegele, 844 F.2d at 177, 178; Major Media, 792 F.2d at 1273, 1274; Suffolk Outdoor Advertising, 455 N.E.2d at 1247–48; Murphy, supra note 3, at 266.
whether a fixed time of recoupment after the regulation is valid, but in doing so, use a full-time baseline in order to determine recoupment. The billboard amortization cases demonstrate that courts generally have looked to profits made before a regulation took effect as well as after. This body of law is compelling support for the rationality of using a full-time baseline that extends to the time of the original purchase of the property.

This Comment examines the issue of the time baseline in regulatory takings analysis. Section II traces the historic development of takings jurisprudence and demonstrates the Supreme Court’s general lack of attention to the time baseline issue. Section III reviews the history of billboard regulation and the use of amortization as a means of compensation. In addition, this section explores the takings analysis as applied to billboard amortization cases and the use of a full-time baseline. Finally, section IV includes a discussion of how the language of several of the Court’s decisions support the rationale of a full-time baseline. Section IV also explores how the billboard amortization takings analysis may be applied to regulatory takings. Section IV concludes with an argument that the full-time baseline approach used in the billboard cases should apply to regulatory takings cases.

II. OVERVIEW OF REGULATORY TAKINGS JURISPRUDENCE

The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not “be taken for public use, without just compensation” by the federal government. The Due Process Clause of the Fourteenth Amendment makes the Takings Clause applicable to the states. Whether a regulation vio-

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20 Murphy, supra note 3, at 266; see Naegele, 844 F.2d at 177, 178; Major Media, 792 F.2d at 1273, 1274; Suffolk Outdoor Advertising, 455 N.E.2d at 1247-48. In deciding whether the property owner has sufficiently recouped his or her original investment, the courts must look back to the date of the original purchase to determine the initial investment. Once the courts know the amount of the initial investment, they must then calculate how much of the investment has been or will be recouped in total, meaning both before the regulation and during the amortization period. In looking at whether the amortization period allows sufficient recoupment, the courts seem to be adding the recoupment made during the amortization period to the recovery of investment achieved before the regulation in order to determine whether the property owner has sufficiently recouped his or her investment as a whole. In other words, the courts look at both the pre-regulation and post-regulation profits of the property owner. By starting at the date of the original purchase and determining the recovery of investment since that date, the courts are using a full-time baseline.

21 U.S. CONST. amend. V.

lates the Fifth Amendment, and therefore constitutes a taking, has been an important issue in land-use regulation.23

Takings generally are classified as either physical or regulatory takings.24 The regulatory takings issue was first addressed in cases concerning harm-prevention rules.25 An early United States Supreme Court case, Mugler v. Kansas,26 best illustrates the Court's initial approach to takings cases.27 Until 1922, the Supreme Court cited Mugler in support of the position that the Takings Clause did not require the federal government to compensate landowners when it exercised its police powers and negatively affected property values.28

In 1922, in Pennsylvania Coal Co. v. Mahon, the United States Supreme Court found that a compensable taking could occur when a regulation, rather than a physical occupation, restricted a landowner's use of property.29 The Court held that the Kohler Act, which prohibited a coal company from mining the coal serving as support for the

v. Chicago, 166 U.S. 226, 239 (1897). For the purposes of clarity, the author will refer to the Fifth Amendment's Takings Clause when discussing federal, state and local government actions.


24 Laura M. Padilla, Reflections on Inclusionary Housing and a Renewed Look at its Viability, 23 Hofstra L. Rev. 539, 589 (1995). Courts always have found physical takings much easier to analyze. Id. Early, strict readings of the Takings Clause held that a compensable taking occurred only through physical encroachment, occupation, or invasion of one's property. See Parsons, supra note 23, at 1584. The physical occupation rule set forth in the early interpretations of the Takings Clause is still adhered to today, as shown by Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Parsons, supra note 23, at 1584–85. In Loretto, the United States Supreme Court found a taking when a New York City ordinance required an apartment-house owner to allow installation of small television cable connections in the units of her apartment building. 458 U.S. at 421. The Court decided that in a physical occupation case, a city must pay compensation to the landowner even if diminution in the property value is minimal. Id. at 434–35.


26 123 U.S. 623 (1887).

27 Padilla, supra note 24, at 591; see also Hadacheck v. Sebastian, 239 U.S. 394, 405–13 (1915) (finding no taking when nuisance regulation of brickworks on clay-rich land reduced value from $800,000 to $60,000). In Mugler, the United States Supreme Court upheld legislation banning the sale and manufacture of alcohol. 123 U.S. at 670, 671. The legislation no longer allowed the property owner to use his property as a brewery, thereby greatly diminishing his property value. Id. at 657. The Court found that the prohibition was a legitimate use of the police power for a public purpose. See id. at 661–62, 668–69. Thus, the Court rejected the property owner's argument that the regulation was a taking under the Fifth Amendment and concluded that no compensation was required. Id. at 668–69, 671; Long, supra note 25, at 222.


surface land, constituted a compensable taking.\textsuperscript{30} Although the Court previously had upheld the government’s aggressive exercise of police power in land-use regulations,\textsuperscript{31} in \textit{Pennsylvania Coal} it decided that if the regulation did not provide a balance of benefit between the regulated property owner and the community at large, the use of the police power could not justify the regulation.\textsuperscript{32} Specifically, the Court, in an opinion by Justice Holmes, weighed the coal company’s valuable property interest threatened with destruction against a limited public interest in a “single private house.”\textsuperscript{33} Justice Holmes stated that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”\textsuperscript{34} In this case, the Court found that the regulation indeed had gone “too far” and therefore concluded that the regulation was unconstitutional.\textsuperscript{35} The Court, however, never articulated what time frame should be used in evaluating the diminution in land value.

Following the 1922 \textit{Pennsylvania Coal} and the 1926 \textit{Village of Euclid v. Ambler Realty Co.}\textsuperscript{36} opinions, more than a half century lapsed before the Supreme Court revisited the land-use regulatory takings issue in \textit{Penn Central Transportation Co. v. New York City.}\textsuperscript{37} Recognizing that it had never adopted a “set formula” for the Takings Clause, the Court in \textit{Penn Central} developed a multi-factor balancing test to determine when a government regulation that diminishes the value of property amounts to a taking.\textsuperscript{38} The three factors the Court evaluated were the economic impact of the regulation, the regulation’s interference with the “investment backed expectations,” and the character of the action.\textsuperscript{39} Using this balancing test, the Court found that the ordinance’s prohibition of the use of air rights above Penn

\textsuperscript{30} \textit{Pennsylvania Coal}, 260 U.S. at 414, 416; Padilla, \textit{supra} note 24, at 591.

\textsuperscript{31} Long, \textit{supra} note 25, at 223.

\textsuperscript{32} \textit{Pennsylvania Coal}, 260 U.S. at 413, 414.

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.} at 415.

\textsuperscript{35} See \textit{id.} at 416.

\textsuperscript{36} 272 U.S. 365 (1926). The United States Supreme Court in \textit{Euclid} upheld the constitutionality of a comprehensive zoning ordinance despite the fact that the ordinance diminished the plaintiff’s property values substantially by prohibiting industrial uses in residential zones. \textit{Id.} at 384, 389–90.

\textsuperscript{37} 438 U.S. 104 (1978). \textit{Penn Central} involved a challenge to New York City’s historic landmark designation of Grand Central Terminal, which effectively deprived the railroad owner of the right to develop the air space above the existing eight-story terminal. \textit{Id.} at 115, 130.

\textsuperscript{38} \textit{Id.} at 124–25; Long, \textit{supra} note 25, at 225.

\textsuperscript{39} \textit{Penn Central}, 438 U.S. at 124–25; Long, \textit{supra} note 25, at 225.
Central station was not a compensable taking. In evaluating the economic impact of the regulation, the Court looked at the effects on the parcel as a whole to determine whether the ordinance was a taking. Furthermore, although the regulation in question interfered with the plaintiff's investment-backed expectations, the Court held that so long as the plaintiff was capable of earning a "reasonable return," there was no compensable taking.

*Penn Central* represents one of the first opinions in which the Court addressed the physical baseline issue. Once again, however, the Court failed to discuss the time baseline. The *Penn Central* decision was the beginning of a period during which the Court continued to uphold land-use regulations despite their impact on individual property owners. Although the multi-factor test set out in *Penn Central* is still influential in the takings analysis, the Court soon modified it with a different two-part test that placed more emphasis on governmental purpose.

The two-part test established by *Agins v. City of Tiburon*, stated that a taking could exist if the regulation (1) did not substantially advance a legitimate state interest, or (2) denied an owner all economically viable use of his or her land. The United States Supreme Court, however, recognized that "no precise rule determines when property has been taken," suggesting that a weighing of public and private interests is required. Although the Court formulated the takings analysis to evaluate whether the regulation denied an owner all economically beneficial use of his or her land, the Court once again neglected to address the issue of what point in time to begin the

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40 *Penn Central*, 438 U.S. at 137, 138.
41 *Id.* at 130. Justice Brennan stated that takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* Rather, Justice Brennan found that the Court must look at "the nature and extent of the interference with the rights in the parcel as a whole." *Id.* at 130–31.
42 *Id.* at 136, 138; Padilla, *supra* note 24, at 593. With respect to the character of the action, the Court held that "the restrictions imposed are substantially related to the promotion of the general welfare." *Penn Central*, 438 U.S. at 138.
47 *Id.* at 260.
evaluation of the diminution in property value—at the time of the original purchase or at the time when the regulation took effect.\textsuperscript{49}

In 1987, the United States Supreme Court decided \textit{Keystone Bituminous Coal Association v. DeBenedictis},\textsuperscript{50} approving the \textit{Agins} two-part takings rule.\textsuperscript{51} In \textit{Keystone}, the Court upheld a subsidence statute quite similar to the one previously invalidated in \textit{Pennsylvania Coal}.\textsuperscript{52} In looking at the character of the regulation, the Court held that the statute in question advanced legitimate state interests in protecting the state's health, environment, and fiscal integrity.\textsuperscript{53} The Court then looked at the economic impact of the regulation on the plaintiff's total property interest.\textsuperscript{54} In doing so, the Court took into account the effect of the statute on all of the plaintiff's mining property from 1966 until 1982.\textsuperscript{55} Careful examination revealed that the regulation forced the plaintiffs to leave a total of twenty-seven million tons of coal unmined, which equaled less than two percent of the total coal in the mines.\textsuperscript{56} In light of this information, the Court upheld the statute, finding that a regulation must render the entire parcel useless, not merely a portion.\textsuperscript{57} Although the Court never explicitly addressed the chronological baseline question, the language and the underlying rationale in \textit{Keystone} appear to support the idea of a full-time baseline.\textsuperscript{58}

In \textit{Nollan v. California Coastal Commission},\textsuperscript{59} also decided in 1987, the United States Supreme Court struck down a building permit condition requiring the owners of beachfront property to grant an easement enabling the public to pass across the landowners' beach.\textsuperscript{60}

\textsuperscript{49} See \textit{Agins}, 447 U.S. at 260–61.

\textsuperscript{50} 480 U.S. 470 (1987).

\textsuperscript{51} Long, supra note 25, at 227; see \textit{Keystone}, 480 U.S. at 495. In 1987, the United States Supreme Court also decided \textit{First English Evangelical Lutheran Church v. County of Los Angeles} in which the Court stated, for the first time, that if a land use regulation is invalidated as a taking, the Fifth Amendment mandates that the government compensate for the temporary taking. 482 U.S. 304, 321 (1987).

\textsuperscript{52} Long, supra note 25, at 227; see \textit{Keystone}, 480 U.S. at 471, 481–85.

\textsuperscript{53} \textit{Keystone}, 480 U.S. at 488; Padilla, supra note 24, at 594.

\textsuperscript{54} See \textit{Keystone}, 487 U.S. at 493, 495, 496.

\textsuperscript{55} See id. at 496.

\textsuperscript{56} Id.

\textsuperscript{57} See id. at 498–99; Padilla, supra note 24, at 594. Justice Rehnquist wrote a dissenting opinion in which Justices Powell, O'Connor, and Scalia joined, arguing that property segmentation can be used to ascertain whether a taking has occurred. Padilla, supra note 24, at 594.

\textsuperscript{58} See infra notes 191–96 and accompanying text.

\textsuperscript{59} 483 U.S. 825 (1987).

\textsuperscript{60} Id. at 841–42.
The Court held the ordinance invalid in spite of the fact that the plaintiff retained considerable value in his land. In its analysis, the Court stated that if the state had required the plaintiff simply to grant a beach easement for public use, the requirement would have represented a "permanent physical occupation" of the property, and thus would have constituted a taking. In *Nollan*, however, one condition of the plaintiff receiving the building permit necessary to rebuild his home was that he grant the Coastal Commission an easement to the beach. Because the easement was a condition of the permit, the issue was whether the land-use regulation "substantially advance[d] legitimate state interests" without denying the owner all economically viable use of his land. The Court reasoned that the state's attempt to obtain the easement was invalid because the Coastal Commission could not establish a sufficient nexus between the condition imposed and the plaintiff's request to build. By requiring a nexus between a land-use regulation enacted under the state's police power and the social harm it was designed to ameliorate, the *Nollan* Court expanded the first prong of the test it used in *Agins v. City of Tiburon*. As in the previous regulatory takings cases, however, the Court again failed to address the time baseline issue.

After announcing the essential nexus requirement in *Nollan*, the Court considered another takings claim in *Lucas v. South Carolina Coastal Council*. The Court's 1992 decision focused specifically on the second prong of the *Agins* test, discussing a *per se* category of

61 Id.
62 Id. at 831, 832.
63 Id. at 828. In other words, if the state had simply told the Nollans that they had to allow the public to use a path across their land in order to get to the beach, this would have been considered a permanent physical occupation of the property and as such would have been a taking. See id. at 831, 832. In *Nollan*, however, the state did not come right out and demand the easement but instead said that it would grant the building permit only if the Nollan family allowed the public to use an easement to the beach. Id. at 828. Because the Coastal Commission had a right to decide the requirements necessary before a building permit would be issued, the easement could be required if it met the conditions laid out by the Court. See id. at 829.
64 Long, *supra* note 25, at 229; see *Nollan*, 483 U.S. at 834.
65 Padilla, *supra* note 24, at 595; see *Nollan*, 483 U.S. at 836–37. The Commission attempted to justify the land-use regulation by claiming that the easement was necessary because of the diminished visual access to the ocean caused by the Nollan's construction. *Nollan*, 483 U.S. at 828. The Court found the nexus to be insufficient because the diminished view of the beach simply was not alleviated by the easement requirement. See id. at 836–37.
66 Padilla, *supra* note 24, at 595–96; see *Nollan*, 483 U.S. at 837.
takings that applies when a regulation deprives an owner of all economically beneficial use of his or her property.68

In *Lucas*, the United States Supreme Court, reversing the South Carolina Supreme Court, held that the ordinance constituted a taking requiring compensation.69 Writing for the majority, Justice Scalia stated that a *per se* taking occurred "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good."70 According to Justice Scalia, regulations that prohibit all economically beneficial use of land require compensation, except where a restriction essentially implements nuisance prohibitions contained in state property law.71 Justice Scalia looked at the owner's investment-backed expectations and theorized that if the ability to engage in the restricted use did not inhere in the landowner's original title, then the government's restriction of that use did not amount to a taking.72

The Court's holding in *Lucas* indicates that regulations that leave property without any economically beneficial use or value will constitute compensable takings.73 In contrast, if a state's common-law nuisance principles allow adjacent landowners or the state to restrict the use then, according to *Lucas*, there is no taking.74 By looking back to the property owner's original title to determine whether the owner had any expectation of being allowed to engage in the restricted use,

68 Id. at 1019; Parsons, *supra* note 23, at 1589. In *Lucas*, the plaintiff was a land developer who had purchased two lots of unimproved beachfront property on South Carolina's Isle of Palms for nearly one million dollars. 505 U.S. at 1008. After Lucas purchased the land, the South Carolina legislature enacted the Beachfront Management Act. *Id.* at 1007–08. The Act prohibited Lucas from building any structures on the environmentally sensitive beachfront lots. *Id.* at 1008–09. Because Lucas's lots fell entirely within the area where the statute had forbidden construction, he filed suit, claiming that the statute's bar on construction effected a taking of his property without just compensation. *Id.*

69 *Lucas*, 505 U.S. at 1009. The South Carolina Court of Common Pleas ruled in Lucas' favor, holding that the ban imposed on Lucas's property denied him any economic use of the property and rendered the parcel valueless. *Id.* The court then ordered the South Carolina Coastal Council to pay just compensation of $1,232,387.50. *Id.* The Supreme Court of South Carolina reversed the trial court, but the United States Supreme Court granted certiorari, reversed again and remanded the case for a determination of actual damages if South Carolina's common law of nuisance could not support the regulation. *Id.* at 1010, 1030–32.

70 Id. at 1019.

71 Id. at 1029.

72 Id. at 1029; Parsons, *supra* note 23, at 1591.


74 Parsons, *supra* note 23, at 1591; *see Lucas*, 505 U.S. at 1029 (requiring South Carolina to prove that existing state property and nuisance law would prohibit Lucas's proposed use of his property).
the Court's language supports the underlying rationale of the full-time baseline.\textsuperscript{75}

The United States Supreme Court soon expanded its takings analysis in \textit{Dolan v. City of Tigard},\textsuperscript{76} to require not only an "essential nexus" as set out in \textit{Nollan}, but also an individual showing of rough proportionality between exactions such as permit conditions and the "legitimate state interest" that the exactions are supposed to advance.\textsuperscript{77} When the owner in \textit{Dolan} requested permission to build within a flood plain, the City of Tigard required, as a condition of the permit, that the owner dedicate the land within the floodway for a "greenway" and an adjacent strip for a pedestrian and bicycle path.\textsuperscript{78}

To evaluate Dolan's claim that the regulation was a taking, the Court first applied the takings test set out in \textit{Nollan}.\textsuperscript{79} The \textit{Dolan} Court initially determined whether an essential nexus existed between the legitimate state interest and the permit exactions the City required.\textsuperscript{80} The Court found that the prevention of flooding and the reduction of traffic congestion were legitimate public purposes as previously upheld by the Court, and therefore satisfied the essential nexus question.\textsuperscript{81}

After the Court found an essential nexus, the Court then determined whether the degree of the exaction the City imposed bore the required relationship to the impact of the proposed development.\textsuperscript{82} In selecting the appropriate test to apply, the Court adopted a "rough proportionality" test rather than the "reasonable relationship" test used by many state courts.\textsuperscript{83} In other words, the condition in question needed to be roughly proportional to the impact of the proposed development.\textsuperscript{84} The Court found that the City did not meet its burden in justifying the floodway and right-of-way dedications as develop-

\begin{itemize}
\item \textsuperscript{75} See \textit{infra} notes 197–201 and accompanying text.
\item \textsuperscript{76} 114 S. Ct. 2309 (1994).
\item \textsuperscript{77} Id. at 2317. Petitioner Dolan owned a plumbing supply store located in the central business district of the city. Id. at 2313. The landowner applied for a permit to expand an existing commercial use and also to pave a portion of the property. Id. at 2313–14.
\item \textsuperscript{78} Id. at 2314.
\item \textsuperscript{79} Id. at 2317; Long, supra note 25, at 234. The \textit{Nollan} court recited the standard; however, once it found that the exaction and the purpose did not relate, it went no further in its analysis. Long, supra note 25, at 234.
\item \textsuperscript{80} Dolan, 114 S. Ct. at 2317.
\item \textsuperscript{81} Id. at 2317–18.
\item \textsuperscript{82} Id. at 2318.
\item \textsuperscript{83} Id. at 2319.
\item \textsuperscript{84} See id. at 2319–20.
\end{itemize}
ment conditions. Thus, the Court ruled that the exaction constituted a compensable taking and struck down the City regulation. Once again, the Court failed to address the issue of the time baseline.

As takings jurisprudence has continued to develop, determining a regulation's economic impact on land and the diminution in property value has led the Court to set forth a number of different theories. Although the Court's tests touch on all areas of the takings analysis, it is apparent throughout the cases that the Court has failed to address explicitly the issue of what time baseline to use in establishing the diminution effects of a regulation. In other words, should a takings determination begin at the time of the original purchase of a property or at the time at which a regulation comes into effect?

III. BILLBOARD AMORTIZATION AND TAKINGS

For several decades both state and federal courts have approved city and town ordinances calling for the removal of billboards, provided that the ordinance allowed for a reasonable amortization or grace period. To determine what constitutes a reasonable period, some courts take into account various factors, such as recoupment of investment and depreciation of investment. The measure of recoupment of investment and the extent of depreciation both support the use of a full-time baseline. Although the time baseline issue has not been addressed in the realm of regulatory takings, the billboard amortization cases successfully have used the full-time baseline in their takings analyses.

A. What is Amortization?

Amortization provides a period of time in which a city or town will not enforce a new land-use ordinance. This grace period allows a

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85 Dolan, 114 S. Ct. at 2321.
86 See id.
88 See Dolan, 114 S. Ct. at 2317–18; Lucas, 505 U.S. at 1019; Nollan, 483 U.S. at 834.
89 See Gerencser, supra note 18, at 913, 914.
91 See infra Section III.B-C.
92 See infra Section III.B-C.
93 Georgia Outdoor Advertising, Inc. v. City of Waynesville, 900 F.2d 783, 785 (4th Cir. 1990).
designated time for a property user either to make the existing use conform to the ordinance, or, if a user cannot or will not conform, to recover all or part of an investment before the municipality requires that the use be discontinued.\(^94\) Although courts have upheld local government ordinances requiring the immediate removal of signs, traditionally, sign ordinances have required that billboard owners remove or bring into conformance all nonconforming off-premise signs within a reasonable time frame.\(^95\)

Courts have allowed a reasonable time frame, rather than immediate removal, because aesthetic regulation lacks the immediacy of a safety regulation.\(^96\) Courts have upheld amortization as a valid alternative to compensation.\(^97\) In effect, amortization periods notify sign owners or users that they must comply with an ordinance within a certain period of time.\(^98\) Consequently, courts have considered amortization periods of different lengths and have approved them as a means of allowing an owner to recoup the original investment or minimize loss.\(^99\)

In the past, courts used precedent to uphold amortization periods as a matter of law.\(^100\) Parties were not required to present economic evidence concerning the value of the removed billboards or the potential loss.\(^101\) Recently however, courts have begun to require economic evidence regarding the value of removed billboards.\(^102\) In addition, courts often conduct an inquiry as to whether amortization periods reasonably allow billboard owners to recoup their investments.\(^103\)

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\(^{94}\) Id.

\(^{95}\) Gerencser, \textit{supra} note 18, at 913.

\(^{96}\) Id.

\(^{97}\) \textit{Id.} When the courts discuss the amortization period being long enough to allow recoupment of investment, this does not always mean full recoupment. \textit{See Georgia Outdoor Advertising, 900 F.2d at 785; Modjeska Sign Studios, Inc. v. Berle, 373 N.E.2d 255, 262 (N.Y. 1977), appeal dismissed, 439 U.S. 809 (1978).} Several courts have stated that the amortization period does not need to be long enough to allow full recoupment of investment but should not result in substantial loss of investment. \textit{See Georgia Outdoor Advertising, 900 F.2d at 785; Modjeska Sign Studios, 373 N.E.2d at 262.}

\(^{98}\) Gerencser, \textit{supra} note 18, at 914.

\(^{99}\) \textit{Id.; see, e.g., Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1274 (4th Cir. 1986) (upholding five-and-one-half-year amortization period), cert. denied, 479 U.S. 1102 (1987); Art Neon Co. v. City & County of Denver, 488 F.2d 118, 122 (10th Cir. 1970) (upholding five-year amortization period), cert. denied, 417 U.S. 932 (1979).}

\(^{100}\) Gerencser, \textit{supra} note 18, at 915.

\(^{101}\) \textit{Id.; see E. B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141, 1155 (5th Cir.), cert. dismissed, 400 U.S. 805 (1970).}

\(^{102}\) Gerencser, \textit{supra} note 18, at 915.

\(^{103}\) \textit{See id.}
Such inquiries, by looking back to the date of the investment, utilize a full-time baseline.\textsuperscript{104}

B. Recoupment of Investment as a Condition of Reasonableness

In deciding whether an amortization period is reasonable, and thus not a taking under the Fifth Amendment, courts increasingly have pointed to recoupment of original investment as a major factor.\textsuperscript{105} \textit{Tahoe Regional Planning Agency v. King}\textsuperscript{106} offers a recent example of this inquiry into recoupment of the owner's original investment.\textsuperscript{107} The ordinance at issue was a Tahoe Regional Planning Agency (TRPA) regulation that prohibited the use of off-premise billboard signs, but provided a five-year pre-removal amortization period for nonconforming uses.\textsuperscript{108} The TRPA sued the owners and lessees of three billboards because the defendants' signs did not comply with the TRPA's sign ordinance.\textsuperscript{109}

\textsuperscript{104} See, e.g., Naegele Outdoor Advertising v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988); Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1274 (4th Cir. 1986); Suffolk Outdoor Advertising Co. v. Town of Southampton, 455 N.E.2d 1245, 1247–48 (N.Y. 1983); Tahoe Regional Planning Agency v. King, 285 Cal. Rptr. 335, 353 (Ct. App. 1991). Use of the full-time baseline theory instructs that any calculation of diminution in value should begin at the time the original purchase took place. The billboard cases, by looking to whether an owner has been able to recoup the original investment, necessarily must look back to the date and cost of the original purchase to determine how much of that investment the buyer has recovered. In beginning with the date of the original purchase, the courts are, by definition, using the full-time baseline. See infra section III.B–C. and accompanying text.


\textsuperscript{106} 285 Cal. Rptr. 335 (Ct. App. 1991).

\textsuperscript{107} See id. at 353, 357; see also \textit{Ryan}, 234 Cal. Rptr. at 623. In \textit{Ryan}, the court ruled that an ordinance prohibiting off-site signs and allowing a five-year amortization period for nonconforming signs was reasonable. 234 Cal. Rptr. at 624. The appellant had challenged the city's ordinance as an unconstitutional taking without just compensation, in violation of the Fifth Amendment. \textit{Id.} at 623. In its decision, the \textit{Ryan} court cited \textit{National Advertising Co. v. County of Monterey} for the proposition that zoning legislation could mandate terminating nonconforming uses if the legislation provided for a reasonable amortization period, considering the investment involved. \textit{Id.} (citing \textit{National Advertising Co. v. County of Monterey}, 83 Cal. Rptr. 577, cert. denied, 398 U.S. 946 (1970)). Furthermore, the court pointed to the fact that by the time of the trial court proceedings, the appellant had had 15 years to recoup its investment in the 19 structures that the ordinance required be removed. \textit{Id.} The court, in upholding the lower court and finding the amortization period reasonable, based its decision on the fact that Ryan's investment in the signs and billboards in question had been recouped. \textit{See id.} at 624.

\textsuperscript{108} \textit{Tahoe}, 285 Cal. Rptr. at 337.

\textsuperscript{109} \textit{Id.} The TRPA brought suit for declaratory and injunctive relief, alleging that the billboards were prohibited off-premise signs that had been fully amortized and were now in violation of the sign ordinance. \textit{Id.}
The California Court of Appeals, in vacating the decision of the lower court, explained that for the purpose of a takings analysis, it would base the value of the signs on the original investment and construction costs, not the fair market value of the signs or their future earning potential. Furthermore, the court emphasized that reasonableness of an amortization period depends on whether the amortization period is commensurate with the original investment involved, thereby allowing an owner to recoup the investment in that time. Factors involved in this analysis included the amount of the investment or original cost (including construction costs), the dates of construction, and the income expected during the grace period. The California Court of Appeals remanded the decision to the lower court, strongly emphasizing that the lower court should take each of these factors into account, with great weight given to the fact that the sign owners had a total of fifteen years (ten years in excess of the amortization period) during which they were able to recapture their original investment. In fact, court records indicated that the parties had stipulated that the advertising or lease income from each sign had exceeded the original cost of the signs.

Likewise, the Court of Appeals of New York, in Modjeska Sign Studios, Inc. v. Berle, also embraced the position that recoupment of an original investment is an important factor in determining whether an amortization period is reasonable. To regulate advertising signs and structures in the Catskill and Adirondack Parks, New York State enacted legislation allowing for a six-and-one-half-year amortization period for all nonconforming signs. At issue in this case was whether the state could require, after expiration of the amortization period, the removal of the nonconforming signs without compensating the owners.

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110 See id. at 341, 352. The lower court decision held that the amortization period was unreasonable because it was not based on the actual value of the defendants' signs and their useful life. Id. at 339.
111 Id. at 353.
112 Id. at 353, 357. The salvage value of the signs and the relative value of affected and remaining signs were other factors considered by the court. Id.
113 See Tahoe, 285 Cal. Rptr. at 357.
114 Id. at 340. Presumably the court was referring to the advertising and lease income made on the signs since the time of the sign's original purchase, meaning that the defendants had recouped their original investment. See id.
116 See id. at 262, 263.
117 Id. at 257.
118 Id.
Modjeska, which owned ninety-six outdoor advertising signs or billboards within Catskill Park, sought to enjoin the removal of the signs, claiming that the removal amounted to an unconstitutional, uncompensated taking. In its analysis of the reasonableness of the amortization period, the court stated that “[n]aturally as the financial investment increases in dimension, the length of amortization period should correspondingly increase.” Moreover, the court went on to state that while an “owner need not be given that period of time necessary to permit him to recoup his investment entirely, the amortization period should not be so short as to result in a substantial loss of his investment.” In determining what constitutes a substantial loss with regard to the prohibition of billboards, the court recognized the importance of the initial capital investment, the investment realized to date, and the life expectancy of the investment. Because the lower court had failed to look at each of these factors and had failed to make a determination of the extent of the sign owner’s recoupment, and thus the reasonableness of the amortization period, the court reversed and remanded the case.

More recently, in *Major Media of the Southeast, Inc. v. City of Raleigh*, the United States Court of Appeals for the Fourth Circuit noted that recoupment of an owner’s investment is an important factor in evaluating the reasonableness of an amortization period. In *Major Media*, the plaintiff sought a declaratory judgment that an October 1983 ordinance prohibiting off-site signs was invalid because it effected a taking of property in violation of the Fifth Amendment. The ordinance restricting off-site signs provided a five-and-one-half-year amortization period for existing nonconforming signs. The court, in affirming the summary judgment of the district court, stated that the five-and-one-half-year amortization period provided an owner of nonconforming signs a time during which the nonconforming

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119 Id. at 258.
120 *Modjeska Sign Studios*, 373 N.E.2d at 262.
121 Id. (citations omitted).
122 Id.
123 See id. at 263.
124 792 F.2d 1269 (4th Cir. 1986).
125 See id. at 1274; cf. Patrick Media Group, Inc. v. City of Clearwater, 836 F. Supp. 833, 837 (M.D. Fla. 1993) (refusing to accept city’s assertion that seven-year amortization period was sufficient to allow Patrick to recoup investment and holding ordinance invalid).
126 *Major Media*, 792 F.2d at 1270. The 1983 ordinance modified a 1979 ordinance by severely restricting the size of off-premise signs and prohibiting replacing, renewing or relocating existing off-premise signs made nonconforming by its terms. Id.
127 Id.
use could continue, thereby allowing the owner to recoup the original investment.\textsuperscript{128}

In evaluating the owner's ability to recoup an investment, the court conceded its inability to say definitively that a five-and-one-half-year amortization period would always be long enough to allow a sign owner to recoup an investment.\textsuperscript{129} However, the court ruled that in the instant case the amortization period was reasonable.\textsuperscript{130} In other words, the amortization period was reasonable because the plaintiffs had not proven that the ordinance did not permit them to recoup their investment.\textsuperscript{131} The evaluation of the recoupment of an owner's original investment as a basis for determining the constitutionality of an amortization period, and the willingness to consider the return obtained throughout the investment holding period, suggests that the court used a full-time baseline.\textsuperscript{132}

In focusing on the extent of a sign owner's recoupment of an original investment as a factor in determining the reasonableness of an amortization period, each of the courts implicitly used a full-time baseline in its analysis.\textsuperscript{133} Although courts never have stated explicitly that they are using a full-time baseline, such a baseline underlies the structure of their analysis of the amortization period and the takings issue. In deciding if an amortization period is reasonable, courts measure the recoupment of the original investment.\textsuperscript{134} Courts never directly require that the inquiry begin at the date of the original purchase; any calculation of total investment and total return, however, necessitates starting at that date.\textsuperscript{135} In deciding whether the property owner has sufficiently recouped his or her original investment, courts would need to look back to the date of the original purchase to determine what the initial investment was.\textsuperscript{136} Once the courts know the amount of the initial investment, they then calculate how much of the

\textsuperscript{128} Id. at 1273.
\textsuperscript{129} Id. at 1274.
\textsuperscript{130} See id. The plaintiff had not presented enough evidence to show that the period was so unreasonable that it constituted a taking. Id.
\textsuperscript{131} See Major Media, 792 F.2d at 1274.
\textsuperscript{132} See id.
\textsuperscript{134} See Major Media, 792 F.2d at 1274; Tahoe, 285 Cal. Rptr. at 352, 353; Modjeska Sign Studios, 373 N.E.2d at 262, 263.
\textsuperscript{135} See Major Media, 792 F.2d at 1274; Tahoe, 285 Cal. Rptr. at 340–41; Modjeska Sign Studios, 373 N.E.2d at 262, 263.
\textsuperscript{136} See Major Media, 792 F.2d at 1274; Tahoe, 285 Cal. Rptr. at 340–41; Modjeska Sign Studios, 373 N.E.2d at 262, 263.
investment has been, or will be, recouped in total—both before the regulation and during the amortization period. In looking at whether the amortization period allows sufficient recoupment, courts seem to be adding the recoupment made during the amortization period to the recovery of investment achieved before the regulation in order to determine whether a property owner has sufficiently recouped an investment. In other words, courts appear to look at both the pre-regulation and post-regulation profits of the property owner. By starting at the date of the original purchase and determining the recovery of investment since that date, courts are using a full-time baseline. There is no way to measure recoupment of investment without looking back to the original date of purchase and determining how much was spent and how much of that original cost the owner has recovered over time.

C. Applying a Full-Time Baseline by Using Depreciation of the Original Investment as a Measure of Recoupment

Although most courts have addressed recoupment of a sign owner's original investment in a discussion of the reasonableness of an amortization period, some courts have gone beyond speaking of recoupment in general terms. Specifically, in deciding the reasonableness of an amortization period, a number of courts have used depreciation for income tax purposes as an important factor in measuring an owner's recoupment of an original investment. Using depreciation is an explicit use of the full-time baseline.

137 See Major Media, 792 F.2d at 1274; Tahoe, 285 Cal. Rptr. at 340–41; Modjeska Sign Studios, 373 N.E.2d at 262, 263.
138 See Major Media, 792 F.2d at 1274; Tahoe, 285 Cal. Rptr. at 340–41; Modjeska Sign Studios, 373 N.E.2d at 262, 263.
139 See Major Media, 792 F.2d at 1274; Tahoe, 285 Cal. Rptr. at 352, 353; Modjeska Sign Studios, 373 N.E.2d at 262, 263.
141 See, e.g., Georgia Outdoor Advertising, Inc. v. City of Waynesville, 900 F.2d 783, 787, 789 (4th Cir. 1990) (vacating lower court decision and remanding for findings of aspects of plaintiff's business affected by ordinance, including depreciation of signs for tax purposes); Naegele, 844 F.2d at 178 (remanding to lower court for determination of reasonableness of amortization period by making findings pertaining to depreciation taken on billboard, actual life expectancy, and income expected during grace period); Art Neon Co. v. City & County of Denver, 488 F.2d 118,
1. Basing Amortization Periods on the Measure of Depreciation

In *Metromedia, Inc. v. City of San Diego*, one of the leading cases on billboard regulation and amortization, the Supreme Court of California held that basing an amortization period on the depreciation of the billboards was reasonable and did not constitute a taking. In *Metromedia*, all existing signs that did not conform to the requirement of the city ordinance were ordered to be removed following expiration of an amortization period ranging from ninety days to four years, depending upon the location and depreciated value of the sign. The relevant amortization period for each sign was computed by determining the original cost of the sign, including the cost of installation, and then deducting ten percent of that cost for each year the sign was standing prior to the effective date of the ordinance. The resulting figure was the “adjusted market value.” The ordinance also provided an abatement schedule, ranging from one year for signs with an adjusted market value of less than $500, to four years for signs with an adjusted market value in excess of $20,000.

The court stated that determining the reasonableness of an amortization period as applied to each billboard required an evaluation of factors such as the billboard’s cost, its depreciated value, and the billboard’s remaining useful life. The court held that the formulation of an amortization period, based on the depreciated value of a sign, was not facially unreasonable and therefore did not constitute a tak-
ing.\textsuperscript{149} Thus, although not implementing the practice of determining recoupment of the sign owner’s investment based on depreciation taken, the court approved the practice for the future and instructed the lower court to make the actual determination.\textsuperscript{150}

Similarly, in \textit{Naegele Outdoor Advertising, Inc. v. City of Durham},\textsuperscript{151} the United States Court of Appeals for the Fourth Circuit required the district court to make findings pertaining to the depreciation of the billboards, the expected useful life of billboards, and the income expected during the grace period.\textsuperscript{152} In \textit{Naegele}, the City of Durham’s billboard ordinance prohibited off-premise advertising signs, except alongside interstate or federally-aided primary highways.\textsuperscript{153} The ordinance provided an amortization period of five-and-one-half years before it prohibited nonconforming signs.\textsuperscript{154} The plaintiff claimed that the life of the billboards far exceeded the amortization period, making the ordinance unconstitutional.\textsuperscript{155}

In determining whether the ordinance constituted a taking, the court in \textit{Naegle}, like the court in \textit{Metromedia, Inc. v. City of San Diego}, did not purport to hold that five-and-one-half years always would be enough time for an owner of a sign to recoup his or her

\textsuperscript{149} \textit{Id.} In using the words “depreciated value,” the court was referring to the depreciation that had been taken for tax purposes, which may not necessarily have reflected the real economic value remaining in the billboard. \textit{See id.} at 427, 428.

\textsuperscript{150} \textit{Id.} at 428.

\textsuperscript{151} 844 F.2d 172 (4th Cir. 1988).

\textsuperscript{152} \textit{Id.} at 178; \textit{see also} \textit{Georgia Outdoor Advertising, Inc. v. City of Waynesville}, 900 F.2d 783, 789 (4th Cir. 1990). In \textit{Georgia Outdoor Advertising}, the United States Court of Appeals for the Fourth Circuit once again remanded the case for further findings. \textit{Id.} The appeals court stated that the lower court had failed to address the issue of whether the ordinance, with its four-year amortization period, constituted a taking of property without just compensation. \textit{Id.} at 784. Recognizing that an amortization period provided a time during which a user could recover all or part of his investment, the court ordered an examination of factors such as the cost of the billboards that could not be used, the depreciation taken on the billboards, and their actual life expectancy in order to determine whether the amortization period had in fact been reasonable and allowed recoupment of investment. \textit{See id.} at 785, 787, 789. The court also stated:

[T]he often stated majority rule that an amortization period for a nonconforming use is valid if it is reasonable, in a sense both overstates and understates the role of amortization. That is, because an ordinance without such a provision may be constitutional, in rare cases even the briefest amortization period would not be unreasonable. Conversely, because an ordinance could accomplish a taking after the expiration of a very long amortization period, in other rare cases an amortization period would not be reasonable. \textit{Id.} at 786 (citation omitted).

\textsuperscript{153} \textit{Naegele}, 844 F.2d at 173.

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{See id.} at 175.
investment. The court wanted more findings regarding the effect of the ordinance on the plaintiff's business and required the lower court to consider the economic impact of regulation on the claimant and the "extent to which the regulation . . . interfered with distinct investment-backed expectations." The court found it necessary to determine the depreciation of the signs, the income expected during the grace period, and the salvage value of the billboards that could not be used, in order to address whether a taking had occurred. In instructing the lower court to consider the depreciation taken on the billboards as a measure of recoupment of investment, the court was using a full-time baseline.

In Metromedia, Inc. v. City of San Diego and Naegele Outdoor Advertising, Inc. v. City of Durham, the courts, by allowing the determination of a proper amortization period to be based on the amount of time necessary to allow full depreciation of the billboard, explicitly were using a full-time baseline. The courts were utilizing a full-time baseline in that they were requiring the takings analysis to begin at the date of the original purchase. In other words, although the courts never made a determination as to the constitutionality of the amortization period, they were directing the lower courts to make just such a determination by calculating how much depreciation had occurred on the property since the date of its original purchase.

2. Using Depreciation as a Basis for Measuring Recoupment of Investment

Although the cases discussed in the previous Section demonstrate that courts are finding that there should be an inquiry into depreciation of a sign owner's property, none of the cases used the measurement of depreciation as a basis for deciding whether the amortization period was actually reasonable as applied. The following cases similarly have endorsed evaluating the extent of an original investment's

156 See id. (citing Major Media of the Southeast v. Raleigh, 792 F.2d 1269, 1274 (4th Cir. 1986)).
157 See id. at 176.
158 See Naegele, 844 F.2d at 178.
159 See infra notes 178–80 and accompanying text.
160 See Naegele, 844 F.2d at 177, 178; Metromedia, 610 P.2d at 428.
161 See Naegele, 844 F.2d at 178; Metromedia, 610 P.2d at 428.
162 See Naegele, 844 F.2d at 178; Metromedia, 610 P.2d at 428.
163 See Georgia Outdoor Advertising, Inc. v. City of Waynesville, 900 F.2d 783, 787, 789 (4th Cir. 1990); Naegele, 844 F.2d at 178; Metromedia, 610 P.2d at 428.
depreciation. \(^{164}\) In addition these cases, rather than only theoretically endorsing the use of a full-time baseline, have gone one step further and actually decided the reasonableness of an amortization period by determining if the depreciation of a billboard was sufficient to support a finding that an owner had recouped his or her investment. \(^{165}\) Courts, in using depreciation as a measure of recoupment, have used a full-time baseline by calculating depreciation since the date of the original purchase of the billboards.

For example, in *Lubbock Poster Co. v. City of Lubbock*, \(^{166}\) the plaintiff alleged that an ordinance with a six-and-one-half-year amortization period was a taking without compensation in violation of both the federal and state constitutions. \(^{167}\) The plaintiff contended that of its 285 billboards, only two conformed to the requirements of the ordinance and that only three of the remaining billboards could be altered to conform to the requirements of the ordinance. \(^{168}\)

The Texas Court of Appeals stated that recoupment of investment was the major consideration in determining the reasonableness of the amortization period. \(^{169}\) The court concluded that reasonableness required only that an owner be afforded a reasonable opportunity to recoup or recover its investment in the structures. \(^{170}\) The court then cited evidence that the plaintiff Lubbock Poster would have depreciated its billboards fully by the end of the amortization period afforded by the ordinance. \(^{171}\) Because the plaintiff could depreciate all of its billboards fully, the court held that the six-and-one-half-year amortization period contained in the city ordinance reasonably afforded the

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\(^{165}\) See, e.g., Hatfield, 647 S.W.2d at 451; Suffolk Outdoor Advertising, 455 N.E.2d at 1247–48 (citation omitted); *Lubbock Poster*, 569 S.W.2d at 942.

\(^{166}\) 569 S.W.2d at 942.

\(^{167}\) Id. at 937, 938.

\(^{168}\) Id. at 940.

\(^{169}\) See id. at 941.

\(^{170}\) See id. The court also concluded that recoupment or recovery of market value was precluded as an essential consideration in determining the question of reasonableness. Id. at 942.

\(^{171}\) *Lubbock Poster*, 569 S.W.2d at 942. Evidence from the lower court proceedings established that the depreciation period customarily followed by Lubbock Poster for billboards for tax purposes ranged from five to ten years. Id. Furthermore, of the 456 billboards listed on Lubbock's 1975 tax return, all but 51 had been fully depreciated prior to the date of the return. Id. In addition, of the remaining 51, 37 were fully depreciated with the 1975 return and the other 14 would be depreciated by January 1, 1982, the conclusion of the amortization period. Id.
plaintiff an opportunity to recoup its investment in its billboards, and thus no taking had occurred.\textsuperscript{172}

Similarly, the New York Court of Appeals in *Suffolk Outdoor Advertising Co. v. Town of Southampton*,\textsuperscript{173} held that an amortization provision of a town building ordinance was reasonable where billboard owners fully had recouped their investments and substantially depreciated their billboards for income tax purposes.\textsuperscript{174} In an ordinance dated May 1972, the Town of Southampton required removal of non-conforming outdoor advertising billboards on or before June 1, 1975, thereby allowing a three-year amortization period.\textsuperscript{175} Although the plaintiff, Suffolk Outdoor Advertising, alleged a taking of its property, the town board determined that the plaintiff had purchased its billboards at an average cost of $610 and that, at a rate of $100 per year, the signs had been depreciated for tax purposes.\textsuperscript{176} Largely in light of the fact that the plaintiff substantially had depreciated its billboards for income tax purposes, the court held that the amortization period was reasonable.\textsuperscript{177}

In using the measure of depreciation as a basis for the validity of an amortization period, the courts in *Lubbock Poster* and *Suffolk Outdoor Advertising* explicitly were applying the full-time baseline by requiring that each inquiry begin with the date of the original

\textsuperscript{172} See id. at 943–44; see also National Advertising Co. v. County of Monterey, 83 Cal. Rptr. 577, 580 (1970) (upholding reasonableness of one-year amortization period as applied to plaintiff’s 31 billboards which had already been fully depreciated for income tax purposes but holding that removal of the other 11 signs not yet fully depreciated should await expiration of “reasonable amortization period” in order to allow plaintiff to recover original cost).

\textsuperscript{173} 455 N.E.2d 1245 (N.Y. 1983).

\textsuperscript{174} See id. at 1247–48.

\textsuperscript{175} Id. at 1246.

\textsuperscript{176} Id. The town board determined that the other petitioner, Collum Signs, Inc., also had been depreciating its signs at a rate of $100 per year, meaning its investment was fully depreciated prior to 1972. Id.; see also Village of Skokie v. Walton on Dempster, Inc., 456 N.E.2d 293, 297 (Ill. App. Ct. 1983) (holding sign ordinance with seven-year amortization period reasonable where defendant’s sign was fully depreciated for federal income tax purposes); Donnelly Advertising Corp. v. Mayor & City Council, 370 A.2d 1127, 1130, 1133 (Md. 1977) (holding ordinance, requiring removal of all nonconforming billboards within five-year amortization period, did not constitute taking entitling plaintiff to compensation where all but one of signs were fully amortized for tax purposes).

\textsuperscript{177} See Suffolk, 455 N.E.2d at 1247–48; see also City of Fayetteville v. McIlroy Bank & Trust Co., 647 S.W.2d 439, 440, 441 (Ark. 1983) (upholding ordinance with seven-year amortization period as reasonable where all billboards had been fully depreciated for income tax purposes); Hatfield v. City of Fayetteville, 647 S.W.2d 450, 451 (Ark. 1983) (upholding constitutionality of ordinance with seven-year amortization period where billboard owners had depreciated the signs significantly for income tax purposes).
investment.178 Depreciation begins once an owner purchases a sign and begins taking deductions for the cost of the sign on his or her income taxes.179 Courts, in looking at whether a sign has been depreciated fully for income tax purposes, necessarily begin the calculation at the original date of purchase.

Although in a number of the billboard amortization cases it is often unclear whether courts implicitly or explicitly are using a full-time baseline, the analysis of the general recoupment of investment, or the specific measurement of the amount of depreciation taken on a billboard since its purchase, necessitates extending the inquiry back to the original date of purchase.180 Only by beginning with the original date of purchase could courts have made determinations as to whether the provided amortization periods were reasonable.181

Courts have looked back to the cost of the original investment and calculated how much of that investment the owner has recouped to date or how much of the cost the owner has deducted for income tax purposes.182 If the amortization period provided by each city ordinance was long enough to allow for sufficient recoupment of investment generally, or to enable a sign owner to depreciate its signs fully for income tax purposes, courts have usually upheld the amortization period as reasonable and have ruled that no taking occurred.183 The full-time baseline theory as applied in the billboard amortization cases supports the rationality of using a full-time baseline in the regulatory takings analysis.

IV. APPLICATION OF THE FULL-TIME BASELINE TO REGULATORY TAKINGS CASES

In the amortization cases, courts have been willing to use the original time of purchase as a baseline when conducting a takings analy-

179 See Cunningham, supra note 143, at 754.
181 See Naegele, 844 F.2d at 172, 178; Major Media, 792 F.2d at 1274; Metromedia, Inc. v. City of San Diego, 610 F.2d 407, 428 (Cal. 1980), rev'd on other grounds, 453 U.S. 490 (1981); Lubbock Poster, 569 S.W.2d at 942-44.
182 See Naegele, 844 F.2d at 177-78; Major Media, 792 F.2d at 1274; Metromedia, 610 F.2d at 428.
183 See, e.g., Naegele, 844 F.2d at 177; Tahoe, 285 Cal. Rptr. at 340-41; Suffolk Outdoor Advertising, 455 N.E.2d at 1247-48; Lubbock Poster, 569 S.W.2d at 942-44.
Although courts have not yet applied this full-time baseline in the regulatory takings realm, there is language in several United States Supreme Court cases that may indicate support for the full-time baseline theory. In light of the precedent of the billboard amortization cases, the Court should adopt the use of the full-time baseline for reasons of fairness and consistency.

A. The Language of United States Supreme Court Decisions Lends Support to the Use of the Full-Time Baseline Theory

Although the United States Supreme Court has yet to address directly the baseline issue in the regulatory takings context, some of the language used in regulatory takings cases offers support for the application of the full-time baseline. Furthermore, the Court's definition of property rights yields possible support for the use of a full-time baseline in its takings analysis.

In both *Penn Central Transportation Co. v. New York City* and *Keystone Bituminous Coal Association v. DeBenedictis*, the Court applied a broad understanding of property interests. In *Penn Central*, by holding that the inquiry of takings jurisprudence must examine a parcel of land as a whole, the Court applied a broad interpretation of property. The Court was unwilling to allow the term "property" to be manipulated narrowly to produce a finding that a taking had occurred when in fact the diminution in value for the property as a whole had been slight. This rationale of interpreting property interests broadly to prevent unnecessary takings determinations is applicable to the full-time baseline.

Similarly, in *Keystone*, the Court was willing to evaluate the economic impact of a regulation by looking at the plaintiff's total property interest. Careful examination and calculation of the value of the plaintiff's mining property from 1966 until 1982 revealed that the total...
coal that the plaintiff had been forced to leave in place was twenty-seven million tons—less than two percent of the coal in the mines.\textsuperscript{192} The Court used an inquiry that reached far back into the ownership of the coal mine in order to determine what fraction of the coal the regulation prevented the owner from mining in comparison to that which the owner had extracted and sold for a profit.\textsuperscript{193} The \textit{Keystone} decision implies that the value of property can be averaged over time as well as space.\textsuperscript{194} While neither of these decisions explicitly endorses a full-time baseline, neither do they exclude one.\textsuperscript{195} In fact, the Court’s continued use of broad definitions of property and methods for determining land value appear to support the idea of a full-time baseline, since the full-time baseline, in looking back to the time of the original purchase, requires using a broad method for determining land value.\textsuperscript{196}

Moreover, while the Court once again did not address explicitly the time baseline question in \textit{Lucas v. South Carolina Coastal Council}, the opinion emphasized the original time of purchase as a critical focal point of the takings analysis.\textsuperscript{197} In determining the legitimacy of state action, Justice Scalia, in \textit{Lucas}, called on the courts to look at the owner’s investment-backed expectations based on the status of both property law and nuisance law at the time the owner originally purchased the property.\textsuperscript{198} Specifically, Justice Scalia looked at the owner’s investment-backed expectations and concluded that if the ability to engage in the restricted use did not inhere in the landowner’s title, the government’s restriction of that use did not amount to a taking.\textsuperscript{199} Whether or not the Court explicitly acknowledged it, its reasoning strongly endorsed a full-time baseline.\textsuperscript{200} The Court focused on the owner’s original title and looked back to what his original expectations were on the date of the investment.\textsuperscript{201}

\textsuperscript{192} Id.
\textsuperscript{193} See id.
\textsuperscript{194} See id.
\textsuperscript{196} See \textit{Keystone}, 480 U.S. at 496; \textit{Penn Central}, 438 U.S. at 130.
\textsuperscript{198} See id.
\textsuperscript{199} See id.
\textsuperscript{200} See id.
Unlike the regulatory takings cases, the billboard amortization cases appear to have addressed more directly the issue of a time baseline for takings analysis. In analyzing the reasonableness of an amortization period and the extent to which the regulation has diminished the value of the billboard, both state and federal courts, whether explicitly or implicitly, have adopted the full-time baseline by beginning their inquiry at the point in time when an owner originally purchased the property.

B. Applying the Full-Time Baseline Theory to Regulatory Takings

Billboard amortization case law demonstrates that courts can use a full-time baseline effectively in conducting a takings analysis. In addition, language in several of the Supreme Court’s decisions indicate support for, if not de facto usage of, the full-time baseline analysis. For reasons of fairness, courts can, and should, apply the full-time baseline theory advanced in billboard amortization cases to the regulatory takings analysis. By using the full-time baseline in regulatory takings analyses, courts could create a modified full-time baseline that focuses on recoupment of the value of property through the life of an investment.

Consideration of the hypothetical discussed previously in this Comment reveals that the choice of a time baseline greatly can affect a court’s decision as to whether the regulation constitutes a taking. In the hypothetical, Jim is able to develop only thirty-five acres of a fifty-acre parcel before an environmental regulation renders the remaining fifteen acres undevelopable. In evaluating any takings claim, the point at which the court begins its calculation of both the diminution in property value and the interference with the owner’s

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203 See, e.g., Naegele, 844 F.2d at 178; Major Media, 792 F.2d at 1274; Suffolk Outdoor Advertising, 455 N.E.2d at 1247-48.

204 See, e.g., Naegele, 844 F.2d at 177, 178; Major Media, 792 F.2d at 1274; Tahoe Regional Planning Agency v. King, 285 Cal. Rptr. 335, 353 (Ct. App. 1991); Suffolk Outdoor Advertising, 455 N.E.2d at 1247-48.


206 See supra notes 12–16 and accompanying text.

207 Murphy, supra note 3, at 267.

208 See supra notes 12–16 and accompanying text.
investment-backed expectations is critical.\textsuperscript{206} If the court chooses to compare the remaining property value on the day after the regulation with the property value as it existed on the day before the regulation, the court probably will see only the loss of a possible $1.5 million profit.\textsuperscript{210} Therefore, the court likely will find that the regulation wiped out Jim's investment and thus effected a taking.\textsuperscript{211}

If, however, the court uses a full-time baseline in its inquiry and looks back to the date of the original purchase, the picture becomes much different.\textsuperscript{212} In that analysis, the court will find that Jim made $3.4 million in profit on a $100,000 investment and thus recaptured his entire purchase price, in addition to realizing almost seventy percent of his potential profit.\textsuperscript{213} In such circumstances, the court likely will find that Jim has made a reasonable return on his investment.\textsuperscript{214} In application, the full-time baseline paints a much fairer picture of Jim's investment-backed expectations and supports the argument that the regulation has not diminished the value of Jim's land unconstitutionally.\textsuperscript{215}

By focusing on recoupment of investment, as courts do in the billboard cases, the inquiry shifts from asking what value remains in a piece of property to testing how much of the value of the property has been recouped.\textsuperscript{216} There is a strong argument grounded in the concept of fairness that an owner formed his or her investment-backed expectations of a return on the investment at the actual time of the original investment.\textsuperscript{217} Stated differently, at the time of the purchase the investor expected to receive a certain limited return.\textsuperscript{218} This return included only the potential for profit that the purchaser estimated at the time of purchase.\textsuperscript{219}

\textsuperscript{206} Murphy, \textit{supra} note 3, at 267; \textit{see supra} notes 12–16 and accompanying text.

\textsuperscript{210} \textit{See} Murphy, \textit{supra} note 3, at 265.

\textsuperscript{211} \textit{See id.; see also} Lucas \textit{v.} South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (holding that a taking occurs when a regulation deprives owner of all economically beneficial uses of land).

\textsuperscript{212} Murphy, \textit{supra} note 3, at 267.

\textsuperscript{213} \textit{See supra} notes 12–16 and accompanying text.


\textsuperscript{215} Murphy, \textit{supra} note 3, at 265.


\textsuperscript{217} Murphy, \textit{supra} note 3, at 266.

\textsuperscript{218} \textit{Id}.

\textsuperscript{219} \textit{Id}.
In light of the drastic differences that result depending on whether courts apply the full-time baseline or the aftermath-time baseline, courts should, for reasons of fairness, adopt the use of the full-time baseline. Jim’s hypothetical situation demonstrates that the use of an aftermath-time baseline frustrates notions of fairness by allowing property owners to supplement their income by recovering damages, even after recouping their original purchase price and a substantial portion of their investment-backed expectations. In addition, an aftermath-time baseline may promote unfairness by favoring the already rich developer over the prospective developer. An aftermath-time baseline would allow for a developer who already has made a generous profit to collect for the diminished value of his regulated land. The developer who already has realized a profit has diminished the remaining amount of potential earnings to be used as a baseline. Therefore, it is more likely that his remaining profit will be diminished substantially, giving the appearance that the value of his land has been destroyed completely.

Moreover, the aftermath-time baseline frustrates fairness by preventing the investor who has not yet made any substantial profit from being compensated for the regulated portion of the land. Because there is still enough unrealized profit remaining in the land, it is unlikely that courts will find that the regulation constituted a taking. Even if the regulation has diminished the value of land somewhat, all economic use has not been lost. Once again, manipulating the facts from the hypothetical, if Jim had not yet made any profit on his investment, the court could find that, although he initially may have had a possible $4.9 million profit, he still has a possible $3.4 million profit. Therefore, Jim is still capable of earning a reasonable return and has not suffered an uncompensated taking of his land.

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220 See supra notes 206-19 and accompanying text.
221 See Murphy, supra note 3, at 266.
222 Id.
223 Id.; see supra notes 12-16 and accompanying text.
224 Murphy, supra note 3, at 266.
225 See supra notes 12-16 and accompanying text. As an illustration of this concept using the facts of the hypothetical, the court would only see that Jim had a possible $1.5 million profit remaining which the regulation then reduced to $10,000. Because Jim had already realized his $3.4 million profit the court, using the aftermath-time baseline, would never compare the initial $4.9 million possible profit with the $3.4 million profit that Jim already had made.
226 Murphy, supra note 3, at 266.
227 Id.
228 See id.
reality, the investor who has not yet made any profit is penalized because the court sees only his possible future profits, while the developer who has already earned a profit is overcompensated because the court sees only the diminution in the remaining value.\textsuperscript{229} A full-time baseline would address these problems and ensure that each piece of land is examined, in its entirety, from the date of purchase until the passage of the regulation in order to determine the true diminution in the value of the land.\textsuperscript{230} If a landowner already has made a substantial profit or recouped an original investment, the court should find that no taking has occurred.\textsuperscript{231}

Furthermore, the use of a full-time baseline would provide a clearer, more uniform standard in regulatory takings analysis. Instead of the uncertainty that currently exists as to how a court will measure the diminution in value and what tests a court will use, a property owner, as well as a regulating agency, will know that a property’s value always will be calculated by starting with the original date of purchase.\textsuperscript{232} In addition, if the United States Supreme Court, in cases such as \textit{Lucas v. South Carolina Coastal Council}, is looking to the understanding of property rights at the time of the original purchase to determine the investment-backed expectations and the legitimacy of state action,\textsuperscript{233} then beginning the inquiry regarding diminution of the value of property at the same time is both fair and fully consistent with that approach. In other words, a court should begin its takings analysis and its inquiry into the economic effect of a regulation on an owner’s property value at the time of the original investment. Historically, courts have addressed questions regarding investment-backed expectations and diminution of value using much of the same

\textsuperscript{229} See id.

\textsuperscript{230} See \textit{Sibson v. State}, 336 A.2d 239, 241 (N.H. 1975), \textit{overruled in part by} \textit{Burrows v. Keene}, 432 A.2d 15 (N.H. 1981). In \textit{Sibson}, the court stated in dicta that the plaintiffs had recovered their total investment and had made some profit before the regulation had prevented further development of the land. 336 A.2d at 241. The court also stated that in light of the past profits the plaintiffs' land was not rendered useless, rather they had only been deprived of speculative profit. \textit{Id.}

\textsuperscript{231} See id.


analysis and evaluation. Thus, if a landowner's investment-backed expectations and the legitimacy of state action depend on the status of the law at the time of an original purchase, calculation of the diminution in the value of a property also should begin at that same point.

C. Effect of Factual Differences Between Billboard Cases and Regulatory Takings on the Applicability of the Full-Time Baseline

The billboard amortization cases appear to answer the questions as to what time baseline the courts should use in takings cases and what is no longer an interference with investment-backed expectations. The courts in billboard case law have looked at amortization as a method for owners to recoup the value of their land and to minimize loss so that an action is not an unconstitutional taking. In looking back to the time of an original investment, courts have said that if an owner has recaptured enough value, there is no taking. Although courts effectively have used the full-time baseline in the amortization period, there may be some concerns in applying it to regulatory takings.

One difference between amortization cases and regulatory takings cases is that amortization allows an investor a continued financial return on an investment after an ordinance is passed. This continued period of financial profit eliminates concerns, like those raised in Lucas v. South Carolina Coastal Council, about individuals suffering immediate and unexpected losses of returns when the law suddenly changes. Thus, one appeal of amortization may be that it creates a transition period which allows a property owner to deal with the

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234 See Keystone, 480 U.S. at 493; Penn Central, 438 U.S. at 130–31.
235 See Lucas, 505 U.S. at 1029.
237 Georgia Outdoor Advertising, Inc. v. City of Waynesville, 900 F.2d 783, 785 (4th Cir. 1990); see Naegele Outdoor Advertising Inc. v. City of Durham, 844 F.2d 172, 177, 178; Major Media, 792 F.2d at 1274.
239 See Murphy, supra note 3, at 266.
240 See Georgia Outdoor Advertising, 900 F.2d at 785.
241 See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992); Murphy, supra note 3, at 266.
financial consequences of an ordinance. While courts necessarily must consider such fairness concerns when evaluating regulatory takings claims, the focus should remain on determining how much of an original investment an owner has recouped and how much of the investment-backed expectations an owner has realized through past profits. One possible reason for providing amortization periods in billboard regulation may be that the aesthetic zoning occurring in billboard cases usually is not considered an extreme public harm. Because aesthetic zoning generally is considered a minor public harm, when analyzing a takings claim courts traditionally have found that allowing continuing nonconforming uses for a specified period provides a balance between concerns of fairness to property owners and public interest concerns. In regulatory takings situations involving more serious public harms, however, courts may find that the public harm outweighs the fairness issues concerning sudden changes of law affecting property owners. Because the regulatory takings cases usually involve a more serious public harm than aesthetic zoning, the factual differences between billboard amortization cases and regulatory takings cases are not significant, and should not hinder the application of the full-time baseline in regulatory takings cases.

The use of the full-time baseline is compatible with the United States Supreme Court's reasoning in the regulatory takings cases. The recoupment test of the full-time baseline would allow the Court's evaluation of the diminution in the value of regulated land to begin at the time of purchase and to encompass the entire life of a property. Moreover, the use of the full-time baseline is fairer than use of the aftermath-time baseline in that the full-time baseline will not allow property owners to be compensated if they have recouped their original investment and made a substantial profit before a regulation diminished the value of the land.

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242 See Georgia Outdoor Advertising, 900 F.2d at 785.
243 Gerencser, supra note 18, at 913.
244 Id.
247 See Murphy, supra note 3, at 266; see supra notes 12–16 and accompanying text.
V. Conclusion

Although the United States Supreme Court has yet to address directly the time baseline issue, several of the Court’s opinions using regulatory takings analysis contain language that supports the underlying rationale of the full-time baseline.248 The Court should look to billboard amortization cases where use of the full-time baseline has allowed courts to look at the recoupment of an investment over the life of the investment.249 Application of the full-time baseline in regulatory takings cases would provide a more uniform standard for evaluating the effects of a regulation on a particular piece of property.250 In addition, the use of a full-time baseline would lead to fairer results by focusing the inquiry on how much of an original investment an owner has recouped, rather than asking what value remains in a piece of property.251

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248 See supra Section IV.A.
249 See supra Section III.B-C.
250 See supra notes 232-35 and accompanying text.
251 See supra notes 204-31 and accompanying text.