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CONSTITUTIONAL LAW—DEPRIVATION OF PROPERTY—WHEN POLICE POWER REGULATIONS CONSTITUTE A TAKING REQUIRING JUST COMPENSATION

In 1972 the State of Maryland enacted legislation prohibiting surface mining on land owned by the State.[1] Shortly thereafter, the Bureau of Mines of Maryland directed Buffalo Coal Company to terminate strip mining operations that were being conducted in the Savage River State Forest. Buffalo and its lessor, George's Creek Coal and Land Company, sought declaratory relief, contending the legislation did not require that all strip mining operations cease, but in the alternative if it did a taking of property would occur for which just compensation would have to be paid.[2] The trial court concluded that possessors of strip mining permits could continue operations permitted by existing permits.[3] Further, they concluded that the legislature under the police power had the authority to restrict strip mining,[4] but that as to holders of mineral

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1. MD. ANN. CODE, Natural Resources § 7-705 (1974), *amending* MD. ANN. CODE art. 66c § 662(a) (1973). Natural Resources § 7-505(b) reads as follows:

> (b) Bureau prohibited to issue, extend or renew permit for state owned land. The bureau may not issue, extend or renew any permit to mine coal by the open-pit or strip method on any land the state owns whether or not the ownership includes mineral rights incident to the land. If the Bureau's failure to issue, extend or renew a permit involves taking a property right without just compensation in violation of the Constitution of the United States or the Constitution of Maryland and the General Assembly has not appropriated sufficient funds to pay the compensation, the state may use available funds under Program Open Space to purchase or otherwise pay for the property rights.

2. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, ——, 321 A.2d 748, 751 (1974). In 1931, George's Creek Coal Co. conveyed 8,621 acres to T. H. and F. B. McMillen, reserving to George's Creek all the mineral rights. In 1937, the McMillens conveyed 5,685 acres (the McMillen tract) to the United States, subject to the mineral rights exception and reservation in favor of George's Creek. In 1954, the United States conveyed the McMillen tract to the state of Maryland, subject to the exception and reservation of mineral rights. That property is now the Savage River State Forest. *Id.* at ——, 321 A.2d at 750.

In Department of Forests and Parks v. George's Creek Coal & Land Co., 250 Md 125, 242 A.2d 165 (1968), the Maryland Court of Appeals held that the State of Maryland acquired the McMillen tract subject to the terms and provisions of the 1931 deed, and thus the reservation of mineral rights included the right to remove the coal by strip mining. In 1969, George's Creek leased its coal rights reserved in the 1931 deed to Buffalo Coal Company. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, 321 A.2d 748, 749 (1974).

3. In order to mine coal by the open-pit or strip method, Article 66C, § 661(a) required that Buffalo obtain a permit from the Bureau of Mines. A permit was subsequently issued to Buffalo, which included the McMillen tract. This permit was the only existing permit at the time MD. ANN. CODE Natural Resources, § 7-SOS(b) (1974), became effective.

4. For a statement of the traditional concept of state police power, see A. RUSSELL, THE POLICE POWER OF THE STATE 85-100 (1900).

> Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.

Id. at 100, *quoting* Beer Co. v. Mass., 97 U.S. 25, 33 (1877).

Under the police power, the use of land has long been regulated for the advancement of some acknowledged public interest. It has been customarily established that this "advancement" consists of preventing an activity which is injurious to health, safety, or

rights which could be realized only by strip mining, prohibition resulted in a taking requiring just compensation.[5] The taking was found to be total. The Court of Appeals remanded the case for further proceedings to determine if the taking was of such magnitude as to constitute a taking of property for which just compensation had to be paid.[6] The matter was settled without returning to court, and the State paid the plaintiffs $400,000. *Bureau of Mines of Maryland v. George's Creek Coal & Land, Co.*, 272 MD. 143, 321 A.2d 748 (Ct. App. 1974).

The significance of this case revolves around the determination of what constitutes a taking within the context of the police power. This must be distinguished from the power of eminent domain[7] under which property may not be taken for public use without just

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morals of the community, and in a more obscure standard, the general welfare. S. WEAVER, CONSTITUTIONAL LAW AND ITS ADMINISTRATION § 329 (1946).

The court in the instant case stated:

> That strip mining leads to the "scarification and uglification" of the land is a matter of which we took cognizance in Department of Forests and Parks v. George's Creek Coal & Land Co. (250 Md. 125, 242 A.2d 165 (1968). . . a widely known and well-understood method of recovering coal in Maryland at least since 1918. Equally well understood is the fact that strip mining destroys the surface of the land, causes soil erosion, stream pollution, destruction of wildlife and vegetation.

Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, ——, 321 A.2d 748, 752 n.1 (1974).

> We think the statutory prohibition of the open-pit or strip method of mining coal constitutes reasonable regulation under the State's police power calculated to protect the environment and to preserve State owned land for public use for present and future generations of citizens.

Id. at ——, 321 A.2d at 765.

5. The opinion of the trial court was based on evidence showing that the only feasible way to exercise coal rights was by strip mining, and that deep mine rights had no value if the right to strip mine did not exist. Finally, evidence showed that there were no other minerals of value beneath the surface, but if there were, strip mining would first have to take place before their value could be realized. In other words, the court considered the taking total, requiring just compensation. George's Creek Coal & Land Co. v. Buckley, No. 6349 Equity (C. Md., filed Nov. 28, 1973).

6. The case was remanded for the purpose of additional evidence and testimony to determine whether or not the order by the Bureau of Mines requiring George's Creek and Buffalo to discontinue all mining operations constituted a total taking or a partial taking under the police powers of the State of Maryland. In other words, a further study of the land was required to determine if there were any other minerals or things of value in the land which the State was not taking from George's Creek and Buffalo. If upon further evidence and testimony it was determined that the State was taking everything owned by George's Creek and Buffalo, therefore constituting a total taking, the State would be required to compensate George's Creek and Buffalo.

On the other hand, if something of value remained (e.g., fire clay, iron ore or other minerals), the taking would not be a total taking and the State would not be required to compensate the plaintiffs. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, ——, 321 A.2d 748, 766-67 (1974).

7. The Supreme Court of the United States recognized a distinction in kind between regulation under the police power and the exercise of eminent domain. In Mugler v. Kansas, 123 U.S. 623 (1887), it was contended that the fourteenth amendment required just compensation if regulation materially diminished the value of property. The Court said, "It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community." *Id.* at 664.

The Court continued:

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is

compensation.[8] Under the police power, property is not taken for public use, but rather, the use of property is regulated for the public benefit and welfare.[9] Thus, due process is afforded and no compensation is required.[10] Yet, the police power is not unlimited. The United States Supreme Court has said that although the protection against takings of private property for public use without compensation is qualified by the proper exercise of the police power, that qualification cannot be extended "until at last private property disappears."[11]

The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[12] The extent to which such regulation can properly be exercised is unclear, and has long provided a source of difficulty.[13] Although there have been numerous attempts[14] to determine when a regulation ends and a taking begins, courts have failed to formulate a concise theory capable of consistent application.[15] Thus, difficulties result when courts attempt to apply various "takings" con-

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abated; in the other, unoffending property is taken away from an innocent owner." *Id.* at 669.

For a detailed survey of the power of eminent domain, see P. NICHOLS, THE LAW OF EMINENT DOMAIN (3d rev. ed. 1970). For a good discussion of state law concerning eminent domain, *see* Guy, LAND CONDEMNATION: A COMPARATIVE SURVEY OF NORTH DAKOTA STATUTORY LAW, N.D.L. REV. 387 (1974).

8. The fifth amendment to the United States Constitution states that private property shall not be taken for public use, without just compensation. U.S. Const. amend V.

This protection provided by the fifth amendment has been made applicable to the states by its incorporation through the due process clause of the fourteenth amendment. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

See also, 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN §§ 1.3, 4 (3d rev. ed. 1970).

9. *See* S. WEAVER, *supra* note 4, at § 329.

A great deal has been written regarding the police powers of the states. "Much of this writing encourages a belief that the police power is a malleable thing, capable of being extended or molded into different shapes in response to the pressure of circumstances, so that one generation's power to regulated land uses may differ from that of its predecessors and its successors." Netherton, *Implementation of Land Use Policy: Police Power v. Eminent Domain*, 3 LAND AND WATER L. REV. 33, 34 (1968). Justice Holmes would support such a view. In Noble State Bank v. Haskell, 219 U.S. 104 (1911), he foresaw that "the police power extends to all great public needs." "Great public needs" are defined as what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. *Id.* at 107.

10. Mugler v. Kansas, 123 U.S. 623 (1887). The individual landowner who suffers a loss is not entitled to compensation for prohibition of a use which conflicts with the health, safety, morals, or general welfare of society. *Id.* at 658.

11. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The Court concluded: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a short cut than the constitutional way of paying for the change." *Id.* at 416.

12. *Id.* at 415.

13. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 148, ——, 321 A.2d 748, 765 (1974).

14. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power, Eminent Domain*, 74 YALE L.J. 36 (1964).

15. The uncertainty of an underlying doctrine has effectively been acknowledged by the United States Supreme Court itself, which has stated that no rigid rules or set formulas are available to determine where regulation ends and taking begins. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); United States v. Caltex, Inc., 344 U.S. 149, 156 (1952).

cepts to relatively new areas of the law such as environmental regulations.[16] This dilemma is important to North Dakota because the state is on the threshhold of extensive future coal development, and regulation of lands to be strip mined could play a significant role.

The instant case discusses *Pennsylvania Coal Co. v. Mahon*[17] in length for two reasons.[18] First, *Mahon* sets out the basic premise on which further analysis is grounded.[19] Second, it provides the Court with a starting point in determining when there is a taking under police power regulation.[20] Mr. Justice Holmes, speaking for the Supreme Court in *Mahon*, is quoted as saying:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized,

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16. There are two recent environmental regulation cases which could prove to be of landmark significance in the future. In Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the Supreme Court of Wisconsin ruled that governmental regulation restricting the use of land to "indigenous and natural" uses is not a taking which requires compensation. Izaak Walton League v. St. Clair, 353 F. Supp. 698 (D. Minn. 1973), upheld the authority of Congress to ban all mineral activities in a national forest wilderness area, because in view of the public purpose of keeping the forest virginal and untrammeled, such a regulation is reasonable, has a rational basis, and bears a substantial relation to a public purpose.

In these two cases, the substantive merits of an environmental controversy were decided in a definite manner, quite favorable to the use of police power for environmental regulation. Yet, they were not unmindful of the warning in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922): "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

The court in *Just, supra*, in reference to that warning, stated:

> This observation refers to the improvement of the public condition, the securing of a benefit not presently enjoyed and to which the public is not entitled. The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans.

Id. at ——, 201 N.W.2d at 771.

17. 260 U.S. 393 (1922). There, the plaintiffs brought an action to enjoin the coal company from mining under their residence in such a way as to cause a subsidence of its surface. The company had conveyed the tract to the plaintiffs, reserving the right to remove all the coal under that tract, and the grantees agreed to take the risk and waive all claims for damage that might arise from the mining of the coal. The plaintiffs maintained that because a Pennsylvania statute subsequently enacted prohibited the mining of coal in any manner that would cause subsidence of any structure used for human habitation, any public structure, public street or passage way, the coal company's right to mine under their residence had been nullified. The Pennsylvana court held that the statute as applied to the company's right to mine coal was a valid exercise of the police power. The Supreme Court reversed that judgement, holding that the statute amounted to an unconstitutional taking of the company's property without payment of compensation in violation of the fourteenth amendment.

While the court emphasized the dimunition in value of property in their decision, it may have turned on the fact that the party who bought and paid for only surface rights would by statute be given benefit of the subterranean rights also.

18. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, ——, 321 A.2d 748, 758-59 (1974).

19. The basic premise, that police power regulation is not unlimited in that if it goes too far it will constitute a taking, is presented in several cases. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. General Motors Corp., 323 U.S. 373 (1945). *See generally*, 16 AM. JUR. 2d, *Constitutional Law* § 301 (1964).

20. See discussion in note 31 *infra*.

> some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.[21]

Thus, *Bureau of Mines of Maryland* sets out its first basic premise. After a regulation under the police power has been declared otherwise constitutional,[22] it still must be determined whether it constitutes a taking for which compensation must be paid.[23] In other words, although regulation for the public welfare is a valid exercise of the police power, the general rule is that such regulation is limited.[24]

The question left open, however, is how to determine whether a regulation has gone beyond its limit and constitutes a taking. Several tests have been applied by the United States Supreme Court in previous cases. The oldest and most traditional test provides that when governmental action constitutes a physical encroachment, there is a compensable taking.[25] The concept developed that a "taking" under the federal and state constitutions was found only if there was a "taking altogether."[26] Thus taking meant appropriation and dispossession of the owner, and compensation was limited accordingly.[27] A second test balances the burden of the individual against

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21. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). This is opposed to some opinions that suggest that the police power of the states should not be limited in regard to compensation, the only restraint being that the legislation must not be arbitrary nor unreasonable. Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887). These are cases where the use being prohibited was considered noxious. The idea suggested is usually fostered in such cases.

A valid exercise of the police power generally does not require the state to compensate the individual owner who sustains merely a pecuniary loss resulting from the prohibition of a use which conflicts with the good of society. Comment, *An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Governmental Action—With a Proposal for Return*, 33 ALBANY L. REV. 537, 546-51 (1969).

22. In order to be declared unconstitutional, the use of the police power by a state must not be unreasonable or arbitrary, and it must have substantial relation to the objective of the seizure. H. ROTTSCHAEFER, CONSTITUTIONAL LAW §§ 82-88 (1939). *See also*, 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.42 (3d rev. ed. 1970).

23. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, ——, 321 A.2d 748, 760 (1974). *See* note 19 *supra*, 369 U.S. 590 (1962).

24 Goldblatt v. Town of Hempstead, would support this position. There, a town ordinance prohibited any excavation below the level of the water table, the result being that the petitioner could no longer mine sand and gravel from his property. The petitioner claimed that the ordinance was not a regulation of his business but rather a confiscation in that it entirely prohibited him from conducting business on that property. The United States Supreme Court rejected that view, but went on to say, "[t]his is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." *Id.* at 594.

25. Mugler v. Kansas, 123 U.S. 623 (1887); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871). *Cf.* Hadacheck v. Sebastian, 239 U.S. 394 (1915).

26. Hadacheck v. Sebastian, 239 U.S. 394 (1915); Hyde v. Minn. D. & P. R.R. Co., 29 S.D. 220, 136 N.W. 92 (1912).

27. One problem inherent in this theory is that it does not explain cases where compensation for physical destruction is denied. *E.g.*, Miller v. Schoene, 276 U.S. 272 (1928) (destruction of cedar trees to protect apple orchards from cedar rust); Lawton v. Steele, 152 U.S. 133 (1894) (destruction of fishnets, which could not lawfully be used). Neither does it explain the distinction on the one hand where government affirmatively acquires interest in the property, or on the other where the government by its regulation requires the landowners to forbear, such as a scenic easement in conjunction with some public pro-

the benefits running to the public.[28] As long as the interest to society outweighs the loss to the individual there is no taking. However, it is difficult to compare the values of benefits to the public with the loss to a particular individual.[29]

The court in the instant case turned to a third test in determining whether the prohibition of strip mining constituted a taking.[30] Under this approach, the magnitude of the property owner's loss is the controlling factor.[31] The court again quoted Mr. Justice Holmes, in *Mahon*, where he said: "One fact for consideration in determining such limits is the extent of the dimunition. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."[32]

Since the primary concern in the present case was the damage and degree of interference to the individual landowner, the court examined a number of Maryland zoning cases to determine

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ject. City of St. Paul v. Chicago, St. Paul, Minneapolis and Omaha R.R. Co., 413 F.2d 762 (8th Cir. 1969). The physical encroachment requirement is seldom invoked today, as courts seem to realize that some regulatory actions can affect a compensable taking of property without a physical invasion. Sax, *supra* note 14, at 46. *See* 2 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 6.3 (3d rev. ed. 1970).

28. Michelman, *supra* note 14, at 1193-96, 1234-35. So long as the social gains resulting from government encroachment on property rights "outweigh" the private detriment, no compensation need be provided. With this approach, courts and juries become involved in making quantitative comparisons between essentially dissimilar factors of public interest and private detriment. Whether reasonably accurate comparisons can be made is doubtful. Without solid criteria, balancing seems ethically indefensable and constitutionally questionable. *Id.*

29. As for environmental regulations, how can unquantified environmental amenities and values be given appropriate consideration? Cost-Benefit analysis has been given attention as an applicable method of determining environmental value. Note, *Cost-Benefit Analysis and the National Environmental Policy Act of* 1969, 24 STAN. L. REV. 1092 (1972). The matter has received congressional attention by the United States Water Resources Council, 36 Fed. Reg. 24144 (1971); 38 Fed. Reg. 24778 (1973). *See also*, United States Water Resources Council, *Procedures for Evaluation of Water and Related Land Resource Projects*, 92d Cong., 1st Sess. (Comm. Print 1971); *Hearings on Administration of the National Environmental Policy Act Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92 Cong., 2d Sess., ser. 92-25, pt. 2, at 35-180 (1972).

30. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, ——, 321 A.2d 748, 758 (1974).

31. Michelman, *supra* note 14, at 1190-93, 1229-34. While this test puts proper emphasis on the extent of the property owner's loss, it is important to note the distinction between regulations directed against "innocent" property uses, and non-trespassory devaluation, brought about by public development, and regulations directed against uses considered noxious or a nuisance. It appears that restrictions of noxious uses are given far more leeway. *E.g.*, Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

Thus, it is important to remember that while a test such as dimunition in value lends itself towards proper emphasis, it is only one of the many important considerations. To rely solely on a particular test or definition of taking is to pick only one of the many important considerations. For example, in Y.M.C.A. v. United States, 395 U.S. 85 (1969), the court's conclusion was based on broad concepts of fairness and justice. Mr. Justice Brennan stated:

> But where, as here, the private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity "be borne by the public as a whole," even though the activity may also be intended incidentally to benefit the public.

Id. at 92.

32. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

at which point the dimunition became a taking.[33] One case relied on extensively by the court provided important considerations to determine whether a zoning restriction amounted to an unconstitutional taking.[34] In that case the court said:

> If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of *all* beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the zoning action results in substantial loss or hardships. (emphasis added)[35]

Borinsky emphasized the preeminence of economic value in determining whether all reasonable use has been taken, recognizing that substantial dimunition in value is constitutionally permissible.[36] As the trial court in the instant case expressed in its opinion, the regulation was a total taking requiring just compensation, because strip mining was essential to realizing coal in the area, and other minerals of value were practically non-existent.[37]

But *Borinsky* set forth an additional requirement that must be met to justify compensation. The burden is on the plaintiff to show that the regulation deprives him of all reasonable use of the property.[38] To meet this burden, expert testimony must be substantiated by fact. If it is not, general claims of economic infeasibility are insufficient proof that there has been an unconstitutional taking.[39] The court in the instant case felt the legislature could constitutionally conclude that the interest of the public generally required the regulatory interference, and that the means chosen were reasonably necessary to accomplish the legislative purpose.[40] But it did not feel it could determine, on the record before it, whether Chapter 355 was confiscatory according to the principles heretofore set forth. Thus, the case was remanded.[41]

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33. City of Baltimore v. Borinsky, 239 Md. 611, 212 A.2d 508 (1965) (discussed in note 33, *supra*); Stevens v. City of Salisbury, 240 Md. 556, 214 A.2d 775 (1965) where regulation limited barriers along streets to a height of three feet; Potomac Sand & Gravel v. Governor of Maryland, 266 Md. 358, 293 A.2d 241 (1972), (where a statute made it unlawful to dredge for sand, gravel, or other aggregates of minerals in any of the tidal waters or marshlands of a county in Maryland).

34. City of Baltimore v. Borinsky, 239 Md. 611, 212 A.2d 508 (1965). In that case the Zoning Board denied the appellee's application to construct a warehouse on her property. That property was situated in a residential zone and was improved by 43 garages of which nine or ten were rented for storage of miscellaneous items from time to time. The application was denied. *Id.*

35. *Id.* at ——, 212 A.2d at 514.

36. *Id.*

37. George's Creek Coal & Land Co. v. Buckley, No. 6349 Equity (C. Md., filed Nov. 28, 1973).

38. City of Baltimore v. Borinsky, 239 Md. 611, ——, 212 A.2d 508, 515 (1965).

39. *Id.*

40. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, 321 A.2d 748, 765 (1973). Refer to note 4, *supra*.

41. *Id.* at ——, 321 A.2d at 765.

Bureau of Mines of Maryland has set out a step by step analysis of factors that must be considered in cases alleging taking without compensation.[42] The first consideration is whether the statute is a taking by eminent domain requiring compensation, or a regulation of use under the State police powers.[43] If the statute regulates and thereby limits the use of property, it must be determined whether the limitation is a valid exercise of the police power. In view of the general rule that the regulation may be a taking if it goes too far, three requirements must be met. First, the interest of the general public as distinguished from that of a particular class must require the regulatory interference. Second, the means chosen must be reasonably necessary for the accomplishment of the purpose. And third, the means must not be unduly oppressive to the individual.[44] To determine whether the means are unduly oppressive, the burden is on the plaintiff to show that all reasonable use has been taken, and that conclusion must be supported by substantial factual evidence.[45]

It appears that North Dakota has not decided the question of when police power regulation constitutes a taking.[46] When it does, the basic considerations of the instant case should be reviewed

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42. With this case, Maryland has made a positive contribution toward analyzing factors that are essential to every case that deals with takings under the police power. Unlike other tests that have been developed and applied but have only met a limited number of circumstances, this case outlines the basic and essential considerations. However, here it was determined that the taking was total. Thus, a question remains as to whether attacks on regulations will ever be upheld if the taking is only partial, even though under the circumstances it may appear to force an individual to bear a loss which should be borne by the community as a whole. Recent Supreme Court opinions have stated that the just compensation or the taking clause was designed to bar the government from forcing a single individual to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *E.g.*, Y.M.C.A. v. United States, 395 U.S. 85 (1969); Armstrong v. United States, 364 U.S. 40 (1960).

Thus, a "taking" is a broad concept based on principles of fairness and justice. It was intended to protect the individual against government, and should not be used unreasonably or construed narrowly. In Pearsall v. Board of Supervisors, 74 Mich. 558, 42 N.W. 77 (1889), the Michigan Supreme Court stated:

> . . . the term 'taking' should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto.

Id. at ——, 42 N.W. at 77-78.

The suggestion is that a taking in any situation occurs where the reallocation and redistribution of value between the individual and government is unfair or unjust under the circumstances. Of primary concern is who should bear the loss under the circumstances.

43. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, ——, 321 A.2d 748, 756-57, 765 (1974).

44. *Id.* at ——, 321 A.2d at 765. The court in the instant case used the test articulated by the United States Supreme Court in Lawton v. Steele, 152 U.S. 133 (1894), to determine that the regulation was a valid exercise of the police power.

45. Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, ——, 321 A.2d 748, 762-63 (1974).

46. The North Dakota cases are generally concerned with whether the regulation has been a valid exercise of the police power, in terms of the objective sought and the reason-

carefully. Whether the concept of "taking" will be construed in a reasonable and broad sense, based on principles of fairness and justice, is up to the courts. However, the need to conserve our natural resources and preserve our natural beauty as part of the health and welfare of our citizens is increasingly important. Thus, it must be considered a significant factor when the issue of "taking" arises.[47]

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ableness of the regulation. Bob Rosen Water Conditioning Co. v. City of Bismarck, 181 N.W.2d 722 (N.D. 1970); Wilson v. City of Fargo, 141 N.W.2d 727 (N.D. 1965); State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914 (1943).

47. For a pertinent discussion of two recent environmental regulation cases placing significant emphasis on the environment, refer to note 16, *supra*.