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In the Crosshairs of Condemnation: A Look at Pre-Condemnation Planning and Publicity in Santa Fe Pacific Trust v. City of Albuquerque

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IN THE CROSSHAIRS OF CONDEMNATION: A LOOK AT PRE-CONDEMNATION PLANNING AND PUBLICITY IN *SANTA FE PACIFIC TRUST V. CITY OF ALBUQUERQUE*

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INTRODUCTION

Imagine for a moment that you own a valuable piece of commercial property in a populous downtown city. Within a year of taking ownership, the city's mayor publicly announces that the city wants to condemn your property to build a new public arena. You have a potential lessee in line to rent out a portion of your property, but the uncertainty of the property's status causes the potential lessee to back out. A significant portion of the property remains without tenants for the duration of the city's highly-publicized condemnation planning. Finally, after several years, the city abandons its plan to take the property and the condemnation never occurs. Valuable rent revenue was lost during this time, but the city will not reimburse you because it never actually took the property. You bring a lawsuit claiming inverse condemnation and requesting compensation for the temporary taking, but the court rejects your claim because this is "just an incident of property ownership." You are without rent revenue through no fault of your own, and are afforded no compensation.

This is what happened to Santa Fe Pacific Trust between 1997 and 2014.[1] In 1997, Santa Fe Pacific Trust ("SFPT") purchased property in downtown Albuquerque to be used as both commercial rental property and a location for its in-house data storage business.[2] Between 1998 and 1999, however, the City of Albuquerque ("City") began discussing a plan to build an arena in the downtown area.[3] The City quickly identified SFPT's property as the ideal arena location, and informed SFPT's owners of its intention to condemn the property.[4] Local newspapers picked up on the story, eventually publishing information about the proposed arena and its possible location.[5] Over the next few years, the City attempted to secure

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1. Santa Fe Pac. Tr., Inc. v. City of Albuquerque, 2014-NMCA-093, ¶¶ 10–11, 335 P.3d 232.

2. *Id.* ¶ 3.

3. *Id.* ¶ 4.

4. *Id.*

5. Jim Ludwick, *Chávez Pushes Site For Arena - $1M Would Buy Option to Purchase*, ALBUQUERQUE JOURNAL, Mar. 2, 2006, at C1; Jim Ludwick, *City Council To Discuss Arena Land*

funding and obtain requisite city council approval. The City also held several press conferences to discuss the project and obtain public input.[6] Ultimately, however, the City's plan to take SFPT's property never came to fruition.[7]

SFPT filed suit against the City in 2006, arguing that it suffered damages as a result of the City's highly publicized plan to condemn its property.[8] The district court granted summary judgment in favor of the City, and the New Mexico Court of Appeals affirmed.[9] The Court held that SFPT's inverse condemnation claim failed under both federal and state law because there was no "concrete government action" and because the alleged damages were "mere fluctuations in value during the process of governmental decision-making."[10] Moreover, despite concluding that the City expressed a concrete intent to condemn SFPT's property, the Court found that the City's actions did not substantially interfere with SFPT's use and enjoyment of the property.[11]

This case demonstrates a tension between the need for public participation in governmental planning activities and the potential negative impact on property targeted for condemnation. The outcomes in these situations tend to favor governmental entities over property owners.[12] Notably, courts in New Mexico and other jurisdictions have held that mere planning that does not deprive the property owner of all or substantially all viable use cannot constitute a taking within the meaning of the Fifth Amendment takings clause and similar state constitutional provisions.[13] Unfortunately, such strict adherence to traditional takings frameworks can lead to harsh results for affected property owners. The existing framework should therefore be changed to ensure that important property rights are not infringed without just compensation, while at the same time ensuring that governmental entities are free to plan without unjust liability. By taking a look at the traditional takings analyses and the policy considerations behind them, this Note suggests slight

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Downtown Site to Cost $10M, ALBUQUERQUE JOURNAL, Mar. 6, 2006, at B8; Jim Ludwick, *Chávez Wants To Buy, Not Option, Arena Land*, ALBUQUERQUE JOURNAL, Mar. 7, 2006, at A1.

6. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶¶ 7–8, 10.

7. *See id.* ¶¶ 1, 9.

8. *Id.* ¶ 12. SFPT asserted claims for inverse condemnation, deprivation of due process, tortious interference, and breach of contract. *Id.* This Note focuses only on SFPT's claim for inverse condemnation.

9. *Id.* ¶ 2.

10. *Id.* ¶¶ 24, 42 (quoting Agins v. City of Tiburon, 447 U.S. 255, 263, n.9 (1980), *rev'd in part by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)) (internal punctuation and quotation marks omitted).

11. *Id.* ¶ 39. The New Mexico Supreme Court granted the plaintiff's writ of certiorari on August 29, 2014, Santa Fe Pac. Tr., Inc. v. City of Albuquerque, 2014-NMCERT-008, 334 P.3d 425 (Table) (writ granted), but subsequently quashed the writ on April 3, 2015, Santa Fe Pac. Tr., Inc. v. City of Albuquerque, 2015-NMCERT-004, 348 P.3d 695 (Table) (writ quashed).

12. *See Santa Fe Pac. Tr.*, 2014-NMCA-093; City of Colorado Springs v. Andersen Mahon Enters., LLP, 260 P.3d 29 (Colo. App. 2010); *Agins*, 447 U.S. 255, *rev'd in part by Lingle*, 544 U.S. 528; Joseph M. Jackovich Revocable Tr. v. State Dep't. of Transp., 54 P.3d 294 (Alaska 2002); Lipson v. Colo. State Dep't of Highways, 588 P.2d 390 (Colo. App. 1978); DUWA, Inc. v. City of Tempe, 52 P.3d 213 (Ariz. Ct. App. 2003). *But see* G & A Land, LLC v. City of Brighton, 233 P.3d 701 (Colo. App. 2010); Johnson v. City of Minneapolis, 667 N.W.2d 109 (Minn. 2003); Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972).

13. *See, e.g.*, *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 41; *Agins*, 447 U.S. at 263 n.9; *Joseph M. Jackovich Revocable Tr.*, 54 P.3d at 300–01.

modifications to the New Mexico Court of Appeal's analyses under both federal and state law. The ultimate goal is to provide a balanced and flexible approach that can be applied to a variety of situations common to governmental planning and condemnation activities.

Part I of this Note will begin with a brief summary the relevant federal and state takings law, which provides the foundation for the issues litigated in *Santa Fe Pacific Trust*. With this basic structure in place, Part II will provide a short overview of the facts and procedural history of *Santa Fe Pacific Trust*. Part III will then examine the New Mexico Court of Appeal's takings analysis under federal law. This part will address a perceived deficiency in the Court's analysis, focusing specifically on the Court's decision to bypass the balancing test articulated by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*.[14] Notably, the *Santa Fe Pacific Trust* Court concluded that the *Penn Central* balancing test could not be applied because there was no "concrete government action or acquisition of resources" by the City.[15] This Note argues that the Court's conclusion was in error, as the "character" prong of the *Penn Central* test is designed to address the very issue of whether the type of action in question might constitute a taking. Finally, this part will conclude with a suggested analysis of *Santa Fe Pacific Trust* under the *Penn Central* framework.

Part IV will then examine the Court's takings analysis under New Mexico law. This section argues that there is broader protection under the New Mexico Constitution, as is evident through the "damages provision" of Article II, Section 20.[16] This section goes on to argue that "substantial interference" should not require a near-total loss of the use and enjoyment of the subject property, and that New Mexico courts should also consider unreasonable delay in cases where property is targeted for condemnation but never actually taken. Several examples will be provided to demonstrate how this analysis could be applied. Finally, Part V will consider the implications of the suggested approach and the important balance that should be maintained. Namely, governmental entities must be free to adequately plan for new public projects without fear of automatic liability, but property owners should not have to bear the burden of these planning activities alone. This part will conclude by addressing some likely counter-arguments to the suggested analyses.

While the *Santa Fe Pacific Trust* decision has received modest attention,[17] this Note is the first scholarly critique of the case and the implications of the final decision in New Mexico. Other works have compiled information about similar

14. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978).

15. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 24.

16. N.M. CONST. art. II, § 20 ("Private property shall not be . . . damaged for public use without just compensation.").

17. *See, e.g.*, Dan McKay, *Property Owner's Appeal Rejected in Downtown Arena Case*, ALBUQUERQUE JOURNAL, Dec. 1, 2014, https://www.abqjournal.com/503610/appeal-rejected-in-downtown-arena-case.html; Gary Gerew, *City Wins Case Over Arena Site*, ALBUQUERQUE BUSINESS FIRST, Dec. 1, 2014, http://www.bizjournals.com/albuquerque/blog/morning-edition/2014/12/city-wins-case-over-arena-site.html.

cases[18] and have discussed pre-condemnation law generally.[19] However, because the issue in *Santa Fe Pacific Trust* was the first of its kind before appellate courts in New Mexico,[20] this is the first work to take a look at pre-condemnation planning and publicity in New Mexico specifically.

It is essential that property owners feel secure in their ownership rights. Unfortunately the decisions in *Santa Fe Pacific Trust* and similar cases may cause property owners to question their ability to effectively use, sell, or lease their property, which may negatively impact real estate markets and property values. While governmental entities should certainly be encouraged to gather public input in planning activities, they must also be aware of how their activities affect property owners in their jurisdiction. The goal of this Note is to provide a useful framework that will make it clear when planning activities infringe on individual property rights and warrant compensation.

BACKGROUND

I. Overview of Applicable Takings Law

Federal law protects property owners through the Fifth Amendment of the United States Constitution, [21] which provides that "private property [shall not] be taken for public use, without just compensation." [22] Article II, Section 20 of the New Mexico Constitution affords similar protection, providing that "[p]rivate property shall not be taken or damaged for public use without just compensation." [23] The general policy is that a few should not have to bear a burden that is meant for the public as a whole.[24]

The government or an authorized entity may exercise its takings power by initiating an eminent domain action pursuant to the applicable statute.[25] If, however, a property owner claims that the government has taken his or her property and must provide compensation, the affected property owner may bring an action in inverse condemnation.[26] Generally, a valid exercise of police power will not constitute a compensable taking, such as a regulation that promotes the health, safety, or general welfare of the community.[27] A central question in inverse condemnation actions,

18. Leslie A. Fields & Faegre Baker Daniels, *Condemnor Beware: What Activities Can Make You Liable for Pre-Condemnation Damages*, SU027 A.L.I.-CLE 599 (2013).

19. Gideon Kanner, *What To Do Until The Bulldozers Come? Precondemnation Planning For Landowners*, SD40 A.L.I.-A.B.A.-CLE 1 (1999).

20. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 30.

21. The Fifth Amendment has been incorporated to apply to the states through the Fourteenth Amendment. *See* Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).

22. U.S. CONST. amend. V.

23. N.M. CONST. art. II, § 20.

24. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

25. *See* N.M. STAT. ANN. §§ 42A-1-1 to -34 (1981).

26. *See* N.M. STAT. ANN. § 42A-1-29 (1983).

27. *See, e.g.*, *Penn Cent. Transp. Co.*, 438 U.S. at 125; Temple Baptist Church, Inc. v. City of Albuquerque, 1982-NMSC-055, ¶ 10, 646 P.2d 565.

therefore, is whether the government action or regulation actually constitutes a taking without just compensation.[28]

In general, a taking can be physical or regulatory. A physical taking occurs when there is an actual physical appropriation of private property for public use.[29] In contrast, a regulatory taking occurs when a regulation or government action substantially interferes with private property.[30] That is, there is no physical appropriation of the private property, but the property owner's rights are affected as if there was a physical taking. Because the City did not physically take the property for which SFPT is seeking damages, the issue in *Santa Fe Pacific Trust* best falls under a regulatory takings analysis.

A. Takings Under Federal Law

A regulatory takings analysis under the Fifth Amendment of the United States Constitution generally looks to whether a restriction on the use of private property goes "too far."[31] There exists a small class of regulations that inherently goes too far, thus constituting a "per se" taking.[32] A per se taking occurs when either a regulation prohibits all economically beneficial or productive use of private property,[33] or when a regulation allows a permanent physical occupation or invasion on private property by the government or a third party.[34] In the latter case, it does not matter how inconsequential the intrusion.[35] In *Loretto v. Teleprompter Manhattan CATV Corp.*, for example, a regulation that permitted a third party to permanently affix cable equipment to private property was enough to constitute a taking.[36] Many times, however, a claim for inverse condemnation does not fit within the traditional confines of a per se taking as just described. Recognizing the need for an ad hoc analysis in unique situations, the United States Supreme Court in *Penn Central Transportation Co. v. New York City* provided a three-factor framework for analyzing regulatory takings.[37] Under what is commonly referred to as the *Penn Central* balancing test, the relevant factors in determining whether a taking has occurred are (1) the extent of economic loss, (2) the frustration with the owner's distinct investment-backed expectations, and (3) the character of the government action.[38] The *Penn Central* Court focused on these factors as they relate to the property interest in its entirety, rejecting the argument that a taking can occur in

28. *See* E.SPIRE Commc'ns, Inc. v. New Mexico Pub. Regulation Comm'n, 392 F.3d 1204, 1210 (10th Cir. 2004).

29. *See* Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002).

30. *See* Penn. Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978).

31. *Penn. Coal Co.*, 260 U.S. at 415.

32. Lucas v. S. Coastal Council, 505 U.S. 1003, 1030 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

33. *Lucas*, 505 U.S. at 1030.

34. *Loretto*, 458 U.S. at 441.

35. *Id.* at 434–35.

36. *Id.* at 423, 438, 441.

37. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

38. *Id.*

relation to a specific portion of the property by itself.[39] Although the Court rejected a takings analysis that focuses on a parcel of property instead of the property as a whole,[40] the Court did recognize the possibility of a partial regulatory taking.[41] A partial regulatory taking may occur when a temporary regulation interferes with a property owner's rights, such as a regulation that suspends development.[42] In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, for example, the United States Supreme Court dealt with the question of whether a temporary moratorium on land development might constitute a taking.[43] Like most regulatory takings, the Court concluded that an alleged partial regulatory taking should be analyzed under the *Penn Central* framework[44] and is highly dependent on the specific facts of the case.[45] In so holding, the Court expressly rejected a categorical rule for partial regulatory takings.[46]

In *Agins v. City of Tiburon*,[47] the United States Supreme Court reviewed a case with some facts similar to those presented in *Santa Fe Pacific Trust*. In *Agins*, the City of Tiburon initiated eminent domain proceedings to obtain land owned by the appellants, but subsequently abandoned the proceedings before a physical taking actually occurred.[48] The Court held that the planning activities did not constitute a taking because the proceedings did not "burden[] the appellants' enjoyment of their property as to constitute a taking."[49] Moreover, the Court explained that even if there was a limited ability to sell or develop the property during the pending condemnation proceedings, these limitations were lifted once the proceedings ended.[50] The Court

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39. *Id.* at 130–31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole* . . . .") (emphasis added). *See also* City of Coeur d'Alene v. Simpson, 136 P.3d 310, 319 (Idaho 2006) ("Courts typically reject the so-called 'conceptual severance' theory-the notion that whole units of property may be divided for the purpose of a takings claim.").

40. *Penn Cent. Transp. Co.*, 438 U.S. at 130–31.

41. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326–27 (2002) (when considering a partial regulatory taking, however, the Court must still consider the parcel as a whole).

42. *Id.* at 306.

43. *Id.*

44. *Id.* at 342. In so holding, the Court expressly rejected a formulation of a new categorical rule that would trigger a "per se" taking in certain situations, such as when a moratorium lasts longer than a year. The Court was concerned that such strict rules could have a negative impact on necessary planning processes, and concluded that these situations are best considered under the ad hoc *Penn Central* factors. *Id.* However, in rejecting a per se rule, the Court's holding did not preclude the possibility that a temporary land-use restriction could result in a taking. *See id.* at 337.

45. *Id.* at 321. *See also Penn Central Transp. Co.*, 438 U.S. 104, 124 ("[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958))).

46. *Tahoe-Sierra Pres. Council, Inc.* 535 U.S. 302, 326.

47. Agins v. City of Tiburon, 447 U.S. 255 (1980), *rev'd in part by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005).

48. *Id.* at 257 n.1.

49. *Id.* at 263 n.9.

50. *Id.*

further stated that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered a 'taking' in the constitutional sense."[51]

B. Takings Under New Mexico Law

Article II, Section 20 of the New Mexico Constitution protects property owners from the government taking or damaging their private property for a public purpose without just compensation.[52] The Takings Clause of the New Mexico Constitution has been interpreted to provide similar protection as the Takings Clause of Fifth Amendment of the United States Constitution.[53] In New Mexico, these protections have been further codified in NMSA 1978, Section 42A-1-29 (1983), which provides in relevant part that

> [a] person authorized to exercise the right of eminent domain who has taken or damaged or who may take or damage any property for public use without making just compensation or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation is liable to the condemnee, or any subsequent grantee thereof, for the value thereof or the damage thereto at the time the property is or was taken or damaged . . . .

Although the federal Takings Clause and the New Mexico Takings Clause have been construed to provide similar protections, the structural difference does warrant slightly different interpretation.[54] The New Mexico Supreme Court noted the difference between the two clauses, and explained that "[f]or inverse condemnation to be based upon a 'damage,' a property owner must suffer some compensable injury that is not suffered by the public in general."[55] An actual physical taking is not required.[56] Although there is no prior case law concerning pre-condemnation planning and publicity damages in New Mexico, other takings cases can provide some useful background that guide this issue. With respect to regulatory takings, the New Mexico Supreme Court has explained that

> a regulation which imposes a reasonable restriction on the use of private property will not constitute a "taking" of that property if the regulation is (1) reasonably related to a proper purpose and (2)

51. *Id.* (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)) (internal citations and punctuation omitted).

52. N.M. CONST. art. II, § 20.

53. Moriarty School Dist. Bd. of Educ. v. Thunder Mountain Water Co., 2007-NMSC-031, ¶ 8, 161 P.3d 869; New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 52, 126 P.3d 1149 (stating that "[New Mexico's] jurisprudence in this area does not materially vary from federal jurisprudence.").

54. *Compare* N.M. CONST. art. II, § 20, *with* U.S. CONST. amend. V.

55. Estate and Heirs of Sanchez v. Cty. of Bernalillo, 1995-NMSC-058, ¶ 14, 902 P.2d 550.

56. Bd. of Cty. Comm'rs v. Harris, 1961-NMSC-165, ¶ 5, 366 P.2d 710.

> does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his [or her] property.[57]

Estate and Heirs of Sanchez v. County of Bernalillo[58] provides a great illustration of this rule at work. In *Sanchez*, the plaintiff landowner sought damages for inverse condemnation when it was denied a special permit to develop a mobile home park.[59] The Court concluded that the plaintiff was not entitled to damages, as the regulation affected the public generally[60] and did not deprive the owner of all or substantially all of the beneficial use of the property.[61] Presumably, the plaintiff was not using the property as a mobile home park prior to the permit denial, thus the denial did not affect the beneficial use of the property.[62]

New Mexico courts acknowledge that many sources can lead to compensable damage to property. In *City of Santa Fe v. Komis*, for example, the New Mexico Supreme Court recognized that negative public perception can cause compensable damages when there is a diminution in property value, specifically in the context of a partial physical taking affecting the untaken adjacent property.[63] In *Komis*, part of the landowner's property was taken for the purpose of building a road for the transport of nuclear waste to the Waste Isolation Pilot Project site.[64] The owner sought damages for the diminution in value to the adjacent, untaken property, based upon the negative public perception of the government's intended use of the taken property.[65] The Court held that such damages are compensable,[66] reasoning that "if loss of value can be proven, it should be compensable regardless of its source."[67]

When damages are compensable under Article II, Section 20, the next question involves the proper measure of damages. Generally, this will include some "before and after" measurement. In *County of Bernalillo v. Morris*,[68] for example, the County sought to condemn the landowner's property, but abandoned the proceeding before it was finalized.[69] In holding that the County was permitted to abandon its condemnation proceeding, the New Mexico Court of Appeals also held

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57. Moongate Water Co., Inc. v. City of Las Cruces, 2013-NMSC-018, ¶ 18, 302 P.3d 405 (quoting Temple Baptist Church, Inc. v. City of Albuquerque, 1982-NMSC-055, ¶ 27, 646 P.2d 565).

58. *Estate and Heirs of Sanchez*, 1995-NMSC-058.

59. *Id.* ¶ 1.

60. *Id.* ¶ 16.

61. *Id.* ¶ 11.

62. *See id.* ¶ 1.

63. City of Santa Fe v. Komis, 1992-NMSC-051, ¶¶ 7, 11, 845 P.2d 753.

64. *Id.* ¶ 4.

65. *See id.* ¶¶ 4–5.

66. *Id.* ¶ 2.

67. *Id.* ¶ 11. However, when the exercise of proper police power results in damage to property, there is generally no compensable taking. *See* Temple Baptist Church, Inc. v. City of Albuquerque, 1982-NMSC-055, ¶ 27, 646 P.2d 565. Such police powers include "promoting the health, safety, morals or the general welfare" of a community. *Id.* ¶ 10. The requisite authority derives from statutory authority granted by the New Mexico Legislature. *Id.*

68. County of Bernalillo v. Morris, 1994-NMCA-038, 872 P.2d 371.

69. *Id.* ¶¶ 2–3.

that the County must compensate the landowner for the temporary taking.[70] Damages were to be assessed based on what was necessary to return the landowner "to its position before the condemnation proceeding was commenced against it."[71] In certain situations, lost profits can be factored into the damages equation. In *Primetime Hospitality, Inc. v. City of Albuquerque*, the City's encroaching waterline damaged the plaintiff's property, requiring extra construction costs and delaying the opening of the plaintiff's business.[72] The New Mexico Supreme Court held that lost profits directly related to the City's temporary total taking were recoverable as just compensation.[73] The Court noted that "property" includes several rights, including the "right to possess, use and dispose of it."[74] The Court reasoned that lost profits, including those derived from rental value of the property, were an appropriate measure of damages in that case.[75] However, the Court noted that lost profits are not ordinarily compensable when related to a temporary *regulatory* taking as opposed to a temporary *total* taking.[76] In the event of a temporary regulatory taking, "the proper measure of damages would be based on the property's fair market value before the restriction compared to the fair market value with the restriction."[77]

II. *Santa Fe Pacific Trust* Factual Background and Procedural History

In 1997, Santa Fe Pacific Trust ("SFPT") purchased property in downtown Albuquerque to be used as both commercial rental property and a location for its in-house data storage business.[78] In 1998, not long after SFPT acquired the property, Mayor Jim Baca announced his plan to build a public arena in the downtown area.[79] Shortly thereafter, a local newspaper published a diagram and photograph of the potential arena site, which prominently revealed SFPT's property as the prime arena location.[80] Then in August 1999, SFPT's property was confirmed as the target location when Mayor Baca directly informed SFPT's owners of the City's intent to condemn their property.[81]

The City and the Downtown Action Team then began public discussions concerning the proposed development, and in 2000 the city council adopted the

70. *Id.* ¶ 15.

71. *Id.* ¶ 16.

72. Primetime Hosp., Inc. v. City of Albuquerque, 2009-NMSC-011, ¶ 1, 206 P.3d 112.

73. *Id.* ¶ 13.

74. *Id.* ¶ 19 (quoting U.S. v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)) (internal quotations omitted).

75. *Id.* ("We agree that all of these interests are protected by the just compensation provision of the New Mexico Constitution, and that rental value is a reasonable—if perhaps necessarily vague—measure of the value of temporary use and possession denied [to the plaintiff] in this case.").

76. *See id.* ¶¶ 16-17 (referring to PDR Dev. Corp. v. City of Santa Fe, 1995-NMCA-074, 900 P.2d 973, which held that lost profits from contingent sales contracts are not the proper measure of damages in a temporary regulatory taking).

77. *PDR Dev. Corp.*, 1995-NMCA-074, ¶ 11.

78. Santa Fe Pac. Tr., Inc. v. City of Albuquerque, 2014-NMCA-093, ¶ 3, 335 P.3d 232, 234.

79. Brief in Chief at 4*, Santa Fe Pac. Tr.*, 2014-NMCA-093 (No. 30,930).

80. *Id.*

81. *Id.*

"2010 Sector Development Plan."[82] The plan clearly identified SFPT's property as the location for the new arena, and even labeled the arena as a "Priority I Catalytic Project."[83] Starting in 2004, the City attempted to secure funding and obtain city council approval for the project.[84] Ultimately, however, the City was unable to get the requisite funding or city council approval.[85] Then on October 4, 2006, many years after the proposed arena project was announced, SFPT filed suit against the City for inverse condemnation. SFPT asserted, among other things, that it could not sell or effectively lease the property as a result of the City's lengthy project planning and publicity.[86]

The district court considered SFPT's inverse condemnation claim under both federal and state law,[87] and ultimately entered summary judgment in favor of the City.[88] Under federal law, the district court relied on *Agins v. City of Tiburon*[89] and *First English Evangelical Lutheran Church v. County of Los Angeles*,[90] which as the Court of Appeals pointed out, "stand for the unexceptional proposition that depreciation in value of the condemned property by reason of preliminary activity is not chargeable to the government."[91] Because of the unique nature of the case, the district court looked to other jurisdictions to provide guidance in deciding the state law claim.[92] In rejecting SFPT's state law claim, the district court relied on the Alaska case of *Joseph M. Jackovich Revocable Trust v. State Department of Transportation*,[93] which supplied a two-part inquiry for analyzing pre-condemnation takings claims.[94] Under this analysis, a pre-condemnation taking may be found if "[1] the government . . . publicly announced a present intention to condemn

82. *Id.*

83. *Id.* In 2003, during this planning phase, the City and SFPT also entered into an agreement in which SFPT and the City would eventually exchange small tracts of land and would share in costs of certain improvements. Santa Fe Pac. Tr., Inc. v. City of Albuquerque, 2014-NMCA-093, ¶ 5, 335 P.3d 232. This exchange forms a small part of the issue in *Santa Fe Pacific Trust*, but it will not be discussed in this Note. This Note focuses only on the separate land that was not part of the exchange agreement, which the Court refers to as "the Property" throughout its opinion. *See id.*

84. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶¶ 6–9; Answer Brief of the City of Albuquerque at 7–8, *Santa Fe Pac. Tr.*, 2014-NMCA-093 (No. 30,930).

85. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶¶ 7, 10; Answer Brief of the City of Albuquerque at 8, *Santa Fe Pac. Tr.*, 2014-NMCA-093 (No. 30,930).

86. Brief in Chief at 1, *Santa Fe Pac. Tr.*, 2014-NMCA-093 (No. 30,930). SFPT also asserted claims for deprivation of due process, tortious interference with contractual relations, and breach of contract. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 12. However, this Note focuses only on the inverse condemnation claim.

87. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 20.

88. *Id.* ¶ 14.

89. Agins v. City of Tiburon 447 U.S. 255 (1980), *rev'd in part by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

90. First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal., 482 U.S. 304 (1987).

91. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 21 (citing *First English Evangelical Lutheran Church*, 482 U.S. 304, 320 (1987)) (internal quotations and punctuation omitted).

92. *See id.* ¶ 18.

93. Joseph M. Jackovich Revocable Tr. v. State Dep't of Transp., 54 P.3d 294 (Alaska 2002); *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶¶ 18, 25.

94. *Joseph M. Jackovich Revocable Tr.*, 54 P.3d 294, 300–01.

specific properties, and [2] it [did] something that substantially interfere[d] with the landowners' use and enjoyment of their properties."[95] The district court concluded that SFPT did not establish either that the City intended to condemn its property or that the City substantially interfered with the use and enjoyment of its property.[96]

In reviewing the district court's holding, the New Mexico Court of Appeals similarly considered SFPT's inverse condemnation claim under both federal and state law.[97] The Court ultimately affirmed summary judgment in favor of the City.[98] In rejecting SFPT's takings claim under federal law, the Court agreed with the district court's reliance on the United States Supreme Court's decision in *Agins v. City of Tiburon*.[99] Although *Agins* was partially overruled by *Lingle v. Chevron U.S.A.*,[100] the Court noted that "the undisturbed portion of *Agins* is persuasive authority for the proposition that federal law would not recognize the City's planning and publicity in the present case as a taking under the United States Constitution."[101] SFPT, on the other hand, argued that the Court should have applied the balancing test from *Penn Central*.[102] The Court ultimately declined to apply the *Penn Central* balancing test, reasoning that the factors articulated in *Penn Central* were based on situations where there was "concrete government action . . . or the acquisition of resources . . . ."[103] Because SFPT did not prove the existence of concrete government action or acquisition of resources, the Court reasoned that applying the *Penn Central* test was problematic and would therefore not support SFPT's claim.[104] Rather, SFPT had only demonstrated that it suffered fluctuations in value during the City's planning process.[105] Under *Agins*, any such value fluctuations are "incidents of ownership" and are not enough to constitute a taking under federal law.[106]

The New Mexico Court of Appeals then analyzed SFPT's state law claim, paying careful attention to the district court's reliance on *Jackovich*.[107] The Court ultimately concluded that the lower court's reliance on this case was appropriate, as its reasoning is consistent with both New Mexico law and leading eminent domain authorities.[108] The Court then expressly adopted *Jackovich's* two-part inquiry for pre-condemnation planning and publicity cases[109] and applied it to the facts presented.[110] Under this analysis, the Court concluded that SFPT's state law claim

95. *Id.*

96. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 18.

97. *Id.* ¶ 20.

98. *Id.* ¶¶ 24, 42.

99. Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980), *rev'd in part by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 23.

100. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005).

101. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 23.

102. *Id.* ¶ 22.

103. *Id.* ¶ 24.

104. *Id.*

105. *Id.*

106. *Id.*; Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980), *rev'd in part by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

107. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 25.

108. *Id.* ¶ 37.

109. *Id.*

110. *Id.* ¶¶ 39–42.

failed because SFPT did not establish one part of the two-part test.[111] First, and in contrast with the district court's holding,[112] the Court concluded that SFPT did establish that the City expressed a present concrete intent to condemn SFPT's property.[113] However, under the second part of the test, SFPT's claim was unsuccessful because it had "failed to establish that the City's actions substantially interfered with SFPT's use and enjoyment of [its] [p]roperty."[114]

ARGUMENT

The Court in *Santa Fe Pacific Trust* considered the question of whether the City's pre-condemnation planning constituted a taking under both federal and New Mexico law.[115] This Note takes a critical look at the Court's analyses under both systems. First, under the federal law analysis, this Note argues that the Court should have applied a more thorough analysis using the ad hoc *Penn Central* balancing test. Then, under the state law analysis, this Note argues that the Court should have included unreasonable delay as a relevant factor, and that the court's interpretation of "substantial interference" was too narrow.

III. Pre-Condemnation Planning and Publicity Under Federal Law

The alleged taking in *Santa Fe Pacific Trust* is best classified as a partial regulatory taking. Like the temporary moratorium in *Tahoe-Sierra*,[116] the alleged interference in this case was not permanent and was eventually lifted when the City shifted its focus to a different location.[117] The United States Supreme Court expressly concluded that a per se takings analysis is not appropriate in a partial regulatory takings case, and instead endorsed the use of the *Penn Central* factors.[118] Courts applying the *Penn Central* test consider the following three factors: (1) the economic impact of the regulation, (2) its interference with reasonable investment-backed expectations, and (3) the character of the government action.[119]

In citing the *Penn Central* factors, the *Santa Fe Pacific Trust* Court departed slightly from the traditional analysis, instead identifying the three factors as "(1) the economic impact of the government regulation on both the claimant and investment-backed expectations, (2) the character of the government action . . . , and (3) whether the government action acquires resources to permit or facilitate uniquely public functions."[120] Specifically, the court combined the first two *Penn Central*

111. *Id.* ¶ 39.

112. *See id.* ¶ 18.

113. *Id.* ¶ 39.

114. *Id.*

115. *Id.* ¶ 20.

116. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342 (2002).

117. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 9.

118. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 342.

119. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (quoting the three ad hoc factors from *Penn Central Transp. Co.*, 438 U.S. 104, 124). *See also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538-39 (2005); Kaiser Aetna v. U.S., 444 U.S. 164, 175 (1979).

120. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 24 (internal citations and marks omitted).

factors and then added an extra consideration.[121] Despite the minor discrepancy between the three factors traditionally gleaned from *Penn Central*, the Court ultimately declined to apply a thorough *Penn Central* analysis.[122] The Court reasoned that because the *Penn Central* test "drew the factors from cases where there was either a concrete government action . . . or the acquisition of resources," the application of the test to SFPT's facts was problematic.[123] The Court concluded that because "SFPT has not shown the existence of such concrete government action or acquisition of resources[,] it has shown nothing more than mere fluctuations in value during the process of governmental decision-making."[124]

This Note argues that the Court erred in failing to apply a thorough *Penn Central* analysis under federal law. This section will begin by discussing the well-recognized support for using this test, and will then provide a suggested analysis under *Penn Central*. Although the outcome would probably not change under *Penn Central*, SFPT should nevertheless have been afforded consideration under this quintessential ad hoc analysis.

A. Penn Central *is the Appropriate Analysis*

The *Santa Fe Pacific Trust* Court's refusal to provide a thorough *Penn Central* analysis goes against substantial authority that endorses the three-factor test. First, as articulated in *Tahoe-Sierra*, temporary regulatory takings are best analyzed under the *Penn Central* framework.[125] *Tahoe-Sierra* involved a moratorium on land development,[126] which the United States Supreme Court recognized as a possible temporary regulatory taking.[127] The Court remanded for consideration under the *Penn Central* analysis, stating that "the interest in 'fairness and justice' will be best served by relying on the familiar Penn Central approach when deciding cases like this . . . ."[128]

Second, the Court's reliance on *Agins* does not preclude a *Penn Central* analysis. While *Agins* is somewhat analogous to *Santa Fe Pacific Trust*, as both dealt with physical takings that never came to fruition, the majority of the *Agins* opinion focused on whether certain municipal zoning ordinances constituted a taking without just compensation.[129] The portion of the *Agins* opinion that was analogous to *Santa Fe Pacific Trust* was not the main issue before the *Agins* Court, and was consequently not afforded a thorough analysis.[130] It is also important to note that *Tahoe-Sierra* was decided more than 20 years after *Agins*, and it expressly endorsed the use of the *Penn Central* test when a temporary regulatory taking is alleged.[131] In rejecting a

121. *Compare Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 24, *with Palazzolo*, 533 U.S. at 617.

122. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 24.

123. *Id.*

124. *Id.* (internal quotations and marks omitted).

125. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 342 (2002).

126. *Id.* at 306.

127. *See id.* at 321.

128. *Id.* at 342.

129. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980), *rev'd in part by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

130. *See id.* at 263 n.9.

131. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. 302, 342.

categorical rule[132] and instead endorsing the use of the *Penn Central* factors,[133] the United States Supreme Court's decision in *Tahoe-Sierra* helps ensure a balance between a property owner's rights and reasonable public planning.[134] But by relying on the earlier decision in *Agins* and dismissing the *Penn Central* test, the *Santa Fe Pacific Trust* Court did not adequately consider the competing interests between SFPT and the City. The *Agins* decision certainly contained persuasive authority for the issue at hand, but it should not have been the only consideration or the final word.

Finally, the way that the Court dismissed the *Penn Central* test circumvented the actual purpose of the ad hoc analysis. *Penn Central* is generally used when the rigid per se regulatory takings rules do not apply and thus a more fact-specific inquiry must be considered.[135] However, by rejecting the analysis merely because the SFPT did not demonstrate "the existence of concrete government action or the acquisition of resources," the Court essentially dismissed the test because *one prong* of the *Penn Central* test did not support SFPT's position. In particular, the existence (or non-existence) of "concrete government action" should be a relevant consideration under the "character of government action" prong of the *Penn Central* analysis. Because the three-factor test is often described as a "balancing test,"[136] each factor should be considered in conjunction with the other two. Namely, one factor that goes against the plaintiff's position may not be dispositive if the other two factors weigh in favor of the plaintiff. For this reason, the *Santa Fe Pacific Trust* Court should have considered the other two factors—the economic impact of the regulation and its interference with the owner's investment-backed expectations—in conjunction with the character of the government action. The dismissal of the *Penn Central* test was premature, thus it did not afford SFPT's takings claim adequate consideration under federal law.

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132. *Id.* at 339 ("The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a per se rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether.").

133. *Id.* at 342.

134. *See id.* ("The interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule.").

135. *See id.* at 323–24 ("[W]e do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.").

136. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2437 (2015) (Sotomayor, J., dissenting) ("Most takings cases therefore proceed under the fact-specific *balancing test* set out in Penn Central Transp. Co. v. New York City, 438 U.S. 104[.]") (emphasis added); Rose Acre Farms, Inc. v. U.S., 559 F.3d 1260, 1282 (Fed. Cir. 2009) ("When *balancing* the factors adduced through the *Penn Central* analysis . . . .") (emphasis added). *But see* Jill S. Gelineau, *When is a Temporary Taking Not a Temporary Taking? New Cases Reshape an Old Concept*, SU027 ALI-CLE 771 ("Academics mostly treat the test as a balancing test; however, courts tend to do little balancing.").

B. Applying Penn Central *to* Santa Fe Pacific Trust

The hallmark of the *Penn Central* test appears to be a balancing of competing interests, as analyzed using an ad hoc approach.[137] As such, it should not be constrained by previous applications of the test or other per se rules, so long as the general purpose of the test is not disturbed. In keeping with the overarching principle of *Penn Central*, this Note provides a suggested analysis of *Santa Fe Pacific Trust* under *Penn Central*, which ideally would have been provided by the Court.

1. Character of Government Action

The character prong has been long considered one of the more confusing and troublesome aspects of the *Penn Central* test.[138] Nevertheless, several cases have helped shape the proper use of this factor. Starting with the source, the *Penn Central* Court stated that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[139] While this suggests that government action is more likely to be considered a taking when there is physical appropriation, it does not preclude the possibility that other government action could constitute a taking. Other cases confirm this notion. For example, a California Court of Appeal held that a county's indecisiveness in applying a new development prohibition to the plaintiff's project amounted to the type of "character" that weighs in favor of a taking under *Penn Central*.[140] In that case, the County encouraged the plaintiff to continue developing his property even in light of the new development regulation, and then changed its position and announced that the plaintiff's development could not continue due to the regulation's development prohibition.[141] It was eventually determined that the prohibition did not apply to the plaintiff's property, and thus the County was responsible for compensating the plaintiff for the temporary regulatory taking.[142] There was no physical appropriation of the property, but the County's "about face" in applying the regulation to the plaintiff's project weighed in favor of finding that the action was a taking under the character prong of the *Penn Central* analysis.[143]

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137. *Rose Acre Farms, Inc.*, 559 F.3d at 1282 ("When balancing the factors adduced through the *Penn Central* analysis, our objective is to ascertain whether, in light of those factors, it is unfair to force the property owner to bear the cost of the regulatory action.").

138. *See* John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 186 (2005) ("the definition of the term 'character' is a veritable mess."); Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L. J. 525, 547–47 (2009) (noting that the *Penn Central* Court's explanation of the character factor "points in two directions at once.").

139. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

140. Lockaway Storage v. Cty. of Alameda, 156 Cal. Rptr. 3d 607, 626 (Cal. App. 1st Dist. 2013).

141. *Id.* ("The County did not take any action to shut down the [plaintiff's] project in December 2000 when [the regulation] went into effect. Instead, it encouraged [the plaintiff] to continue its development efforts for 18 months. Then, in September 2002 the County changed its position and announced that the project had been doomed since December 2000 because [the plaintiff] had not obtained all permits and commenced construction before [the regulation's] effective date.").

142. *Id.* at 622, 627.

143. *Id.* at 625–26.

Extraordinary delay in commencing an eminent domain action may also be of the type of character that weighs in favor of a taking under *Penn Central*.[144] In general, as noted in *Agins*, some delay that has a negative impact on the property does not usually constitute a taking.[145] However, the District of Columbia Court of Appeals noted that "[t]he general rule that post-announcement delay does not ordinarily result in a taking, however, is not absolute, and the character of the government's delay may give rise to a taking claim under *Penn Central*."[146] The Court went on to explain that the existence of extraordinary delay "depends on its length and the reasons for it."[147] The Court rejected a pure numerical calculation for determining whether there was an extraordinary delay, and instead emphasized that such an inquiry must take into account the nature of the planning process, the reasons for the delay, and "whether the government acted in good faith."[148]

In *Santa Fe Pacific Trust*, the government action in question involved pre-condemnation activities, such as public meetings, announcements, and negotiations with SFPT and the City's funding providers.[149] These actions were in furtherance of a distinct plan to build a public arena, which would be for the benefit of the public. The Court's conclusion that such actions were not "concrete" is perplexing, as the City took substantial steps over several years to obtain the property. Not only did the City publicly announce the proposed new project and the location,[150] but it sought independent funding, negotiated a proposed purchase agreement, and submitted its proposals to the city council.[151] It is true that these actions were not as significant as an actual regulation or physical appropriation, but that does not mean that the actions were any less concrete. Nevertheless, the character prong probably does not weigh in favor of SFPT's inverse condemnation claim. While it can be argued that the government action was clear and concrete, it was still preliminary in nature and was a necessary element of public planning. Like the Court noted, "[g]overnmental entities, like the City, must be encouraged to air their planning ideas in public so that they can be fully vetted, challenged, improved, or rejected."[152] Moreover, although there is an argument that the character of the City's actions constituted an extraordinary delay,[153] the City's actions appeared to be ongoing, consistent, and in good faith. The City was actively trying to obtain the necessary funding and approval, and was using appropriate measures in doing so. Unfortunately it was denied the necessary funding and approval, and thus had to consider new approaches

144. *See* Potomac Dev. Corp. v. D.C., 28 A.3d 531, 540 (D.C. App. 2011).

145. Agins v. City of Tiburon, 447 U.S. 255 at n.9 (1980), *rev'd in part by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

146. *Potomac Dev. Corp.*, 28 A.3d at 540. The Court went on to note that "'Delay in the regulatory process cannot give rise to takings liability unless the delay is extraordinary' and '[i]f the delay is extraordinary, the question of temporary regulatory takings liability is to be determined using the *Penn Central* factors.'" *Id.* (quoting Appolo Fuels, Inc. v. U.S., 381 F.3d 1338, 1352 (Fed. Cir. 2004)).

147. *Id.*

148. *Id.* at 540–41.

149. Santa Fe Pac. Tr., Inc. v. City of Albuquerque, 2014-NMCA-093, ¶¶ 6–8, 10, 335 P.3d 232.

150. *Id.* ¶ 10.

151. *Id.* ¶ 6–9. *See also* Answer Brief of the City of Albuquerque at 7–8, *Santa Fe Pac. Tr.*, 2014-NMCA-093 (No. 30,930).

152. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 42.

153. *See infra* Section IV.C.3.

to the arena project. This understandably takes time. Because the City's actions were necessary to its planning and were generally consistent over the years, the character prong probably weighs in favor of the City.

2. Economic Impact

The economic impact of the government action is generally the easiest of the *Penn Central* factors to apply.[154] It is also likely the easiest for the plaintiff to prove. After all, the plaintiff would not have reason to initiate an inverse condemnation action if they suffered no economic impact. The relevant inquiry is the extent of the regulation's economic impact.[155] In general, a very high economic impact is required for the regulation to be considered a taking.[156] In this case, SFPT claimed that as a result of the decade-long condemnation threat, it was unable to sell, lease, or operate its property as planned.[157] SFPT argued that the impact of the City's actions was severe, claiming that its "investment of over $600,000 went for naught."[158] For SFPT, and probably any similarly situated property owner, the economic impact of the City's actions was significant. While the City can probably argue that this economic impact was not sufficient, as it did not deprive SFPT of all economic use, it can still be said that SFPT suffered significant economic impact as a result of the very specific and very public condemnation threat. Thus, the economic impact prong might weigh in favor of SFPT.

3. Interference with Investment-Backed Expectations

The final factor considers the relationship between the property and the owner. Namely, it considers to what extent the regulation interfered with the owner's reasonable investment-backed expectations. This factor tends to focus on when and for what purpose the property was purchased, and also whether the regulation in question was foreseeable.[159] In this case, SFPT purchased the property to use as both a commercial rental property and a location for its data-storage business. At the time of the purchase, neither of these expectations was frustrated either through a threat of condemnation or other regulation. SFPT had no reason to believe that it could not use the property for its intended purposes at the time it purchased the property, nor should it expect interference by way of a condemnation threat. As a result of the City's subsequent actions, however, SFPT claimed that the planned condemnation interfered with both its expectations, as it was "not able to sell, lease or operate its Property for the planned data center."[160] Despite this claim, SFPT conceded that "it operated at a loss but for the lease to [its subsidiary business]."[161] This suggests that SFPT's expectation of using the property for its data-storage business was not

154. John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 178 (2005).

155. *Id.* at 178 ("Generally speaking, the greater the economic impact of a government action the greater the likelihood of a taking.").

156. *Id.* at 178–79.

157. Brief in Chief at 9–10, *Santa Fe Pac. Tr.*, 2014-NMCA-093, (No. 30,930).

158. *Id.* at 9.

159. *See* Echeverria, *supra* note 138, at 183–85.

160. Brief in Chief at 9–10, *Santa Fe Pac. Tr.*, 2014-NMCA-093, (No. 30,930).

161. *Id.* at 9.

significantly affected, but its expectation of renting out the remaining property was frustrated. Because the *Penn Central* analysis focuses on the property as a whole and does not consider severance damages,[162] interference with partial investment-backed expectations may not be enough. Therefore, the final prong probably weighs in favor of the City, as only a portion of SFPT's investment-backed expectations were negatively affected by the City.

Despite the Court's refusal to apply a thorough *Penn Central* analysis, such an analysis probably would not have changed the result under federal law. The character of the government action was preliminary in nature and public input should be encouraged. While the economic impact for SFPT was arguably significant, the City's interference with its investment-backed expectations was not substantial. Prior to the City's announcements, SFPT had already been using the property for its in-house subsidiary business.[163] It does not appear that SFPT intended to use the *entire* property for commercial leasing to third parties, so the City's actions only interfered with a portion of SFPT's investment-backed expectations. *Penn Central* denounced conceptual severance and emphasized that a takings analysis must consider the property as a whole.[164] The combination of the preliminary nature of the City's actions and only a partial interference with SFPT's investment-backed expectations would likely support a finding of no taking under federal law. Despite SFPT's unlikely success under *Penn Central*, the Court should nevertheless have applied a thorough analysis. *Penn Central* is the quintessential balancing test that is widely recognized as a proper, ad hoc test in unusual regulatory taking situations.[165] The cursory consideration and ultimate dismissal of the test was in error, as it did not afford SFPT's case adequate consideration under federal law. Such an error is not harmless, as future litigants' claims may also be easily dismissed under similar reasoning.

C. Penn Central *Concerns*

The *Penn Central* balancing test has been criticized as vague and confusing,[166] and the character prong of the test has been considered particularly contentious.[167] Despite such criticism, this test is widely recognized as the appropriate test when an alleged taking does not fit under a physical or categorical takings analysis.[168] In quoting Justice O'Connor's concurrence in *Palazzolo v. Rhode Island*, the United States Supreme Court stated that "[o]ur polestar instead remains

162. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

163. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 3.

164. *Penn Cent. Transp. Co.*, 438 U.S. 104, 130–31.

165. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) ("Outside these two relatively narrow categories [of per se takings] . . . , regulatory takings challenges are governed by the standards set forth in Penn Central Transp. Co. v. New York City, 438 U.S. 104[.]"); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336, 327–28 n.23 (2002).

166. R.S. Radford, Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 ECOLOGY L.Q. 731, 735–36 (2011); John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 171–72 (2005); Gelineau, *supra* note 136 ("The legal community also lacks a general consensus on how the test should be applied.").

167. Echeverria, *supra* note 138, at 186 ("the definition of the term 'character' is a veritable mess.").

168. *See, e.g.*, *Lingle*, 544 U.S. at 538; *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 336, 327–28 n.23.

the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."[169] Although the test is somewhat ambiguous, some commentators have argued that the vagueness is appropriate, as the rigid rules in takings are rarely applicable and an ad hoc approach is better suited for most taking situations.[170] There are compelling reasons to use the *Penn Central* test when faced with a distinctive issue such as pre-condemnation planning and publicity in *Santa Fe Pacific Trust*. Per se rules or strict criteria for determination in regulatory takings cases would lead to inequitable results. Often, property owners would be disparately affected, as strict rules would only apply in narrow situations and would be inapplicable in unique or unforeseen takings situations. A flexible, ad hoc analysis provides a bare-bones framework that can be adjusted and applied to these unique situations. It is designed to take both sides into account, thus it affords the best chance of a balanced examination.

IV. Pre-Condemnation Planning and Publicity in New Mexico

Because the New Mexico Constitution provides for compensation when property is "taken *or damaged*,"[171] the New Mexico Takings Provision should provide broader protection than the Fifth Amendment of the United States Constitution.[172] The decision in *Santa Fe Pacific Trust*, however, does not afford property owners adequate protection and applies the relevant precedent too narrowly. This Note argues (1) that the Court should have considered unreasonable delay in its pre-condemnation takings analysis, and (2) that "substantial interference" should not require a near-complete loss of beneficial use. This Note then supplies a suggested analysis for a pre-condemnation planning and publicity cases in New Mexico.

A. New Mexico Courts Should Consider Unreasonable Delay in Pre-Condemnation Takings Cases

Prior to *Santa Fe Pacific Trust*, New Mexico appellate courts never before considered the issue of whether pre-condemnation planning and publicity can

169. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 336, 327–28 n.23 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor J., concurring)); Echeverria, *supra* note 138, at 173. *See also* Horne v. Dep't of Agric., 135 S.Ct. 2419, 2438 (2015) (Sotomayor J., dissenting) ("in the mine run of cases where governmental action impacts property rights in ways that do not chop through the bundle entirely, we have declined to apply per se rules and have instead opted for the more nuanced *Penn Central* test.").

170. *See generally* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002). *See also* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 615 (arguing that takings formalism does not make doctrinal and regulatory sense, as supported through an analysis of the rule-like principles supplied in regulatory exactions cases). Professor Fenster further provides that "[n]o single vision of property and takings law can suffice to produce sufficiently flexible, contextualized responses to the regulatory needs and political and social circumstances of land use disputes." *Id.* at 653.

171. N.M. CONST. art. II, § 20 (emphasis added).

172. Although courts have interpreted the protections to be similar under the Fifth Amendment of the United States Constitution and Article II, Section 20 of the New Mexico Constitution, *see* cases cited *supra* note 53, the underlying case law interpreting these provisions is quite distinct and warrants separate analyses.

constitute a taking.[173] Understandably, the lower court in *Santa Fe Pacific Trust* looked to other jurisdictions for guidance, and the Court of Appeals agreed with the lower court's reasoning.[174] The Court ultimately adopted the two-part test articulated in *Joseph M. Jackovich Revocable Trust v. State Department of Transportation*,[175] which considers "(1) whether the government had publicly announced a present intention to condemn the property in question and (2) whether the government had done something that substantially interferes with the landowners use and enjoyment of its property."[176]

While intent and substantial interference are important for analyzing pre-condemnation planning activities in inverse condemnation cases, these should not be the only considerations. The Court acknowledged that other jurisdictions provide guidance in this issue,[177] but then appeared to simply adopt the *Jackovich* factors without consideration of other jurisdictions' analyses.[178] That is, the Court appeared to be quite deferential to the trial court's reliance on the two *Jackovich* factors. Several other jurisdictions, however, provide a similar analysis but with an additional factor: unreasonable delay.[179] The Supreme Court of California, for example, stated that "when the condemner acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated."[180] Similarly, the Supreme Court of Nevada considered delay an important consideration in pre-condemnation situations, reasoning that "[e]xtraordinary delay or oppressive conduct following an announcement of intent to condemn certain property conceivably reduces the market value of that property—especially when the government fails to retract its announcement to mitigate its detrimental effects."[181] The Nevada Court further explained that "[b]y allowing a cause of action for precondemnation damages, public agencies will be dissuaded from prematurely announcing their intent to condemn private property."[182] This

173. Santa Fe Pac. Tr., Inc. v. City of Albuquerque, 2014-NMCA-093, ¶ 30, 335 P.3d 232.

174. *Id.* ¶¶ 25, 37.

175. *Id.* ¶ 37.

176. *Id.* ¶ 25 (quoting Joseph M. Jackovich Revocable Tr. v. State Dep't of Transp. 54 P.3d 294, 300–01 (Alaska 2002) (internal quotations and punctuation omitted)).

177. *Id.* ¶ 30 ("Courts in other jurisdictions have considered similar situations, and their reasoning is consistent with the general principles of New Mexico's law regarding inverse condemnation.").

178. *See id.* ¶¶ 31–42. The only other jurisdiction that the Court cites is Alaska.

179. *See, e.g.*, Buzz Stew, LLC v. City of N. Las Vegas, 181 P.3d 670, 673–74 (Nev. 2008) (permitting a cause of action for pre-condemnation damages separate from the takings claim when (1) the public agency expresses an intent to condemn and (2) the public agency acts improperly through unreasonable delay); Klopping v. City of Whittier, 500 P.2d 1345, 1355 (Cal. 1972) (holding that "a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value."); Clay Cty. Realty Co. v. City of Gladstone, 254 S.W.3d 859, 868 (Mo. 2008) (suggesting that "property owners can prevail against condemning authorities for claims relating to condemnation blight where they provide specific evidence demonstrating aggravated delay, bad faith, or untoward activity by the condemning authority.").

180. *Klopping*, 500 P.2d at 1355.

181. *Buzz Stew*, 181 P.3d at 673.

182. *Id.*

additional consideration exists for good reason. Sometimes pre-condemnation planning can continue for many years, causing property owners to bear the burden of possible condemnation for a very long time. The damages incurred may not be enough to constitute "substantial interference" at any one point, such as when considered over the course of an individual year. However, when the damages are considered over many years and aggregated, the interference is much more substantial. It can be tantamount to "a death by a thousand cuts." If a property owner uses the property for a commercial business that operates on tight margins, for example, these small but incremental damages could be devastating to the business. By considering undue delay in a pre-condemnation planning case, the court would provide a more balanced approach that better considers the long-term interests of property owners.

B. "Substantial Interference" Should Not Require a Near-Total Loss

This Note argues that the Court in *Santa Fe Pacific Trust* applied the damages provision too narrowly. Specifically, the Court acknowledged that Article II, Section 20 affords compensation when property is damaged but not actually taken,[183] but then denied SFPT's inverse condemnation claim because its property was not rendered entirely useless.[184] By limiting permissible damages to instances where the city has deprived the property owner of nearly all beneficial use of the property, the Court has essentially read out the damages provision of Article II, Section 20, and instead applies a strict per se takings analysis similar to the categorical rule under the federal counterpart.[185] This does not afford property owners the protection they deserve under the New Mexico Constitution.

First, in concluding that SFPT's inverse condemnation claim failed, the court reasoned that not all consequential damage to property is compensable.[186] However, to support its reasoning, the Court relied on cases where the alleged damages were tangential to the owner's primary use of the property. For example, the Court cited *Public Service Co. of New Mexico v. Catron*,[187] which involved alleged damage to adjacent property following the installation of a high voltage transmission line.[188] The plaintiff argued that the transmission line damaged the property because it would "destroy the peaceful, unobstructed, rural nature of the property, will obstruct their panoramic and scenic view, will interfere with television and radio reception and will emit a loud noise and hum."[189] Although an understandable inconvenience, it is unlikely that the alleged interference would significantly affect the property owner's *primary* use of the property, whether it be for a residential or commercial purpose. In *Estate and Heirs of Sanchez v. County of*

183. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 27 (quoting Bd. of Cty. Comm'rs v. Harris, 1961-NMSC-165, ¶ 5, 366 P.2d 710).

184. *See id.* ¶ 41.

185. *See* Lucas v. S. Coastal Council, 505 U.S. 1003, 1030 (1992).

186. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 28.

187. Pub. Serv. Co. of New Mexico v. Catron, 1982-NMSC-050; *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 28.

188. *Catron*, 1982-NMSC-050, ¶ 6.

189. *Id.*

Bernalillo,[190] also cited by the *Santa Fe Pacific Trust* Court,[191] the plaintiff claimed a taking because it was denied a permit for the development of a mobile home park.[192] However, because the plaintiff was presumably not already using the land as a mobile home park,[193] the permit denial did not affect the current use of the plaintiff's property; it only affected the owner's possible future use. This is similar to the investment-backed expectations prong of the *Penn Central* test. In contrast, SFPT actually used the property as a commercial rental property *before* the City began discussing its intent to condemn the property. Arguably, the City's condemnation discussions directly affected SFPT's ability to use the property as it had previously experienced, thus it directly interfered with a primary use of the property.[194] This scenario is distinguishable from *Catron* and *Sanchez*, where the interference was more remotely related to the plaintiffs' primary property uses. The proper focus should be on the property owner's principal use of the property.

Second, the Court appears to be suggesting that substantial interference requires a near-total loss of the property's use and enjoyment.[195] As discussed earlier, the Court in *Santa Fe Pacific Trust* adopted the two-part *Jackovich* takings test that requires (1) intent to condemn and (2) substantial interference. As applied to SFPT, the Court concluded that there was a concrete present intent to condemn SFPT's property, but that the City did not substantially interfere with SFPT's use and enjoyment of the property.[196] The operative word here is "substantial." Black's Law Dictionary defines "substantial" as "relating to, or involving substance; material" or "[c]onsiderable in amount or value."[197] A federal case involving a similar takings situation is also helpful in determining what constitutes "substantial interference." In *Richmond Elks Hall Association v. Richmond Redevelopment Agency*,[198] the plaintiff's property was targeted as part of a redevelopment plan and was slated for condemnation.[199] The plaintiff used the property as commercial rental property.[200] Because the plaintiff reasonably believed that its property would soon be condemned, it only offered month-to-month leases once the prior leases expired,[201] and many of the tenants vacated the property as a result of the redevelopment plan.[202] Consequently, the plaintiff's rental income was reduced to one-third of what it had experienced prior to commencement of the redevelopment plan and was rendered

190. Estate & Heirs of Sanchez v. Cty. of Bernalillo, 1995-NMSC-058, 902 P.2d 550.

191. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 29.

192. *Sanchez*, 1995-NMSC-058, ¶ 1.

193. *See id.* ("Bernalillo County denied the Estate's application for a special use permit *to develop* a mobile home park." (emphasis added)).

194. However, as will be discussed, this is complicated by the fact that SFPT also used the property to operate its subsidiary business.

195. *Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 41.

196. *Id.* ¶ 39.

197. *Substantial*, BLACK'S LAW DICTIONARY (10th ed. 2014).

198. Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977).

199. *Id.* at 1329.

200. *Id.*

201. *Id.*

202. *Id.*

un-saleable.[203] The Ninth Circuit held that the interference was substantial, as it resulted in "a significant reduction in value of the subject property."[204] It appears, however, that the *Santa Fe Pacific Trust* Court interpreted "substantial" as "absolute" rather than "significant." In supporting its conclusion that the City's actions did not substantially interfere with SFPT's use and enjoyment of its property,[205] the Court first pointed out that SFPT conceded that it was not claiming that the property was rendered "totally useless."[206] The Court then cited *Catron*, which stated that "merely rendering private property less desirable for certain purposes will not constitute the damage[,] but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use."[207] This makes sense, but then to further support its reasoning, the Court cited *Sanchez* to explain "that a taking is not unconstitutional unless the government's action 'deprives the [property] owner of *all beneficial use* of [the subject] property.'"[208] In applying the "substantial interference" prong, the Court appears to be requiring a "complete interference." This not only goes against the *Jackovich* test, but also against the New Mexico precedent that includes "substantial deprivation" as a criterion for a compensable regulatory taking.[209] By reasoning that SFPT failed to meet the substantial interference prong because its property was not rendered totally useless, the Court essentially read out "substantial" and interpreted this factor as requiring complete interference.

Although it is argued that the Court applied the "substantial interference" factor too narrowly, the ultimate conclusion was reasonable. The City's actions undoubtedly had some impact on SFPT's ability to rent out some of its rental space, but SFPT's in-house business continued to operate within the property without significant issue.[210] Similar to how the federal analysis requires that the court focus on the property as a whole, here too the court must consider how SFPT used the entire property. Because a portion of the property remained mostly unaffected, it cannot be said that SFPT suffered a substantial interference with the use and enjoyment of its property, even under the more relaxed application suggested in this Note. It probably can, however, be said that SFPT suffered moderate interference. This is where unreasonable delay should become relevant, as will be discussed in the suggested analysis next.

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203. *Id.* at 1329–31.

204. *Id.* at 1331.

205. Santa Fe Pac. Tr., Inc. v. City of Albuquerque, 2014-NMCA-093, ¶ 39, 335 P.3d 232.

206. *Id.* ¶ 41.

207. *Id.* (quoting Pub. Serv. Co. of New Mexico v. Catron, 1982-NMSC-050, ¶ 7, 646 P.2d 561) (internal quotations omitted).

208. *Id.* (quoting Estate and Heirs of Sanchez v. Cty. of Bernalillo, 1995-NMSC-058, ¶ 10, 902 P.2d 550) (emphasis added).

209. *See Sanchez*, 1995-NMSC-058, ¶ 7 ("To constitute a taking, a regulation must deprive a property owner of all *or substantially all* beneficial use of the subject property.") (emphasis added).

210. *See Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 11 ("SFPT would have operated at a loss if not for leases to related companies, such as [its in-house data storage company].").

C. Suggested Analysis for Pre-Condemnation Planning and Publicity Under New Mexico Law

By adopting the *Jackovich* factors, the *Santa Fe Pacific Trust* Court recognized that pre-condemnation planning and publicity can give rise to compensable takings in limited situations. The Court's adoption of the two *Jackovich* factors was a great step to protect property owners from pre-condemnation planning and publicity damages, but it should go one step further. This Note argues for a slight variation to the adopted analysis by including a provision for unreasonable delay. Specifically, an inverse condemnation claim for pre-condemnation planning and publicity should be analyzed by considering the following: first, whether the government publicly announced its intention to condemn the targeted property; and second, whether (a) the government's planning and publicity substantially interfered with the property owner's ability to sell, use, or rent the property as it did before the condemnation announcement, *or* (b) the government's planning and publicity moderately interfered with the property owner's ability to sell, use, or rent the property as it did before the condemnation announcement, and the threat of condemnation persisted for an unreasonably long period of time.

This suggested analysis includes two factors similar to those adopted by the *Santa Fe Pacific Trust* Court, and then provides an alternate consideration of unreasonable delay. Unreasonable delay would be a consideration in cases where the property suffered damages over a significant period of time, but where damages do not rise to the level of "substantial interference" as required by the *Jackovich* factors alone. If the delay is considered unreasonable, then that property owner may be afforded compensation. Of course compensation cannot be awarded to the affected landowner unless actual damages can be proven and are directly related to the government's actions. Therefore, if a taking has occurred under this suggested analysis, the amount of damages would be dependent on losses incurred during the government's planning phase, such as loss of beneficial use or rental income. The relevant time period would be the time the intended condemnation is publicly announced through the time when the intended condemnation is publicly abandoned.[211] The following sections provide suggested guidance for each element of the proposed analysis.

1. Intent to Condemn

First, the property owner *must* demonstrate that the government intended to condemn its property.[212] This will generally require that the property owner prove that the government specifically targeted the property in question rather than generally target a possible location. For example, when a government entity targets property somewhere "downtown" or in the "northeast heights," it will be very difficult for a single property owner to prove that his or her property was specifically targeted for condemnation. Ideally, a government entity *should* seek to target property broadly until it gets further along in the planning process. The nature of the

211. The actual date of the taking was a point of contention in *Santa Fe Pacific Trust*. This Note recognizes that establishing a date of a taking in these pre-condemnation planning cases is an important consideration, but it is outside the scope of this Note.

212. *See Santa Fe Pac. Tr.*, 2014-NMCA-093, ¶ 33.

"general target" allows the government entity to publicly discuss its plan and receive input without specifically harming one piece of property. The generally-targeted area may see some value fluctuation, but this is more consistent with a broad condemnation cloud than specific interference. Because the burden is distributed more broadly, it is less likely that any one property owner will suffer significant damages, and it is also unlikely that the "intent" element will be established. This is not to say, however, that a property owner can never prove the government's specific intent to condemn his or her property when the government generally targets an area for condemnation. There may be instances where the government seeks to broadly describe a general area for condemnation in order to insulate itself from liability during the pre-condemnation planning phase. If the property owner can demonstrate that its property was indeed the primary target, then this element might be established. For example, perhaps the property owner could prove that the government entity sought funding and obtained construction plans that focused on a specific plot of property. In that case, the intent to condemn that property owner's specific piece of property may still be established even though the government broadly announced its plans.

If, on the other hand, a government entity explicitly targets an identifiable piece of property, it is more likely that this intent element is met. This requires not only that the government identifies the specific piece of property, but also that the government entity expressed an actual intent to condemn the property. Like in *Santa Fe Pacific Trust*, this can be as simple as an explicit project plan and statement to the media. When property is specifically targeted, the government has approached the taking in a way that is most detrimental to the property owner. It has singled out a property owner to bear the burden of the condemnation threat, and it has opened the door to liability if it either substantially interferes with the property owner's use and enjoyment of the property, or takes an unreasonably long time to remove this burden from the property owner.

2. Substantial Interference

As described earlier, this Note argues that substantial interference should not require a near-total loss of use and enjoyment of the property. However, it is recommended that the interference be measured by the property owner's use of the property *prior* to the condemnation threat. For example, suppose a property owner was using the property as a retail shop prior to the condemnation announcement. Following the announcement, the property owner decides that it wants to discontinue the retail shop and lease the property. Even if the owner can prove that it could not lease the space due to the condemnation threat, the government's action would not constitute substantial interference because it did not interfere with the owner's primary use of the property. If, on the other hand, the property was used as rental property *before* the condemnation announcement and subsequently suffered a substantial decline in rental income, then substantial interference might be present. For further discussion on substantial interference, see *supra* Section IV.B and *infra* Section IV.D.2.

3. Unreasonable Delay

Like the other elements, the existence of unreasonable delay is a very fact-specific inquiry. Nevertheless, there are some general considerations that could be useful. First, it is recommended that the government's progress towards actual condemnation in combination with the overall length of time be considered. For example, the more consistent the decision-making process, the less likely the government's actions are undue. The more steadily the government is working toward acquiring the property, the less it is acting improperly because it is working toward removing the burden that it placed upon the property. Even in light of consistent planning, however, the overall length of time must also be considered. Consistent governmental planning that spans a few years can certainly be deemed reasonable, but even consistent planning spanning twenty years may not.

Next, it is recommended that the unreasonable delay element be considered when the government entity expresses an actual intent to condemn, but the interference with the property does not rise to the level of "substantial." Specifically, when moderate interference can be shown, then unreasonable delay would allow the claim to rise the level of a compensable taking. *Santa Fe Pacific Trust* would best fall under this suggested application. The City expressed an actual intent to condemn SFPT's property, but then SFPT could not prove that the City's interference was substantial.[213] However, SFPT could argue that the City acted unreasonably by dragging the plan on even as it incurred significant funding and approval obstacles.[214] The first sign that SFPT's property was subject to condemnation was in 1999 when Mayor Baca informed SFPT of the proposed project.[215] The plan gained some momentum in 2000,[216] but then the more intricate planning did not begin until 2004.[217] When City encountered funding and approval issues, it did not abandon its plan or shift its focus to an alternate location until 2008.[218] Thus SFPT was the target property for almost ten years. Although not substantial, SFPT did experience moderate interference because it was unable to lease a portion of its property for several of these years.[219] Accordingly, SFPT might be able to prove that it experienced moderate interference that, when aggregated, was significant, and that the interference was a result of the City's unreasonable delay after its condemnation announcement. However, this factor could easily go the other way. While there were some disruptions and obstacles during the planning phase, the City's actions generally appeared to be ongoing, consistent, and in good faith. The City probably should not have targeted the property so early on in the planning process, but it did work toward its ultimate goal of condemning the property and removing this burden from SFPT. Public projects are not quick endeavors, and the City certainly should not make rash decisions in obtaining subject property. Consequently, under this suggested analysis, SFPT would have a better chance of convincing the court that it

213. *Id.* ¶ 39.
214. *See id.* ¶¶ 6–9.
215. *Id.* ¶ 4.
216. *Id.* ¶ 5.
217. *Id.* ¶ 6.
218. *Id.* ¶ 9.
219. *Id.* ¶ 11.

was due compensation because of the City's long planning process, but it would be a very close call as to whether this delay was actually unreasonable. More facts would probably be needed to adequately determine whether the City's actions were undue, including what the City did between 2000 and 2004.

D. Applying the Suggested Analysis

This section provides several additional scenarios that seek to demonstrate how the elements of the suggested analysis work together and might be applied.

Scenario 1. Intent to condemn, substantial interference with current use

Consider the following variation on the facts of *Santa Fe Pacific Trust*. Suppose that the city expresses an actual intent to condemn the plaintiff's property, and there is no question that the plaintiff's property is the target. For the past five years, the plaintiff has been using its entire property as a commercial rental property. Following the city's announcement, two-thirds of the plaintiff's tenants discontinue their leases, and that portion of the property remains vacant for two years before the plaintiff commences its action for inverse condemnation. In this case, there is no claim that the city has been unreasonably delaying the formal condemnation, but rather that the city's actions constitute a substantial interference with the property owner's use and enjoyment of its property. While there is no hardline measure of "substantial interference," a two-thirds decline in rental income probably meets this criterion. So long as the property owner can prove that the decline is directly related to the city's actions—and that the property owner put forth a good faith effort to lease the vacant property—the property owner is likely entitled to compensation.

Scenario 2. Intent to condemn, substantial interference with future plans

Next, consider similar facts as Scenario 1, but with one significant difference. In this scenario, the property owner has been using the property for its own in-house business, but plans to move the business elsewhere and begin leasing out the office space. The city has announced its intent to condemn the property, and subsequently the property owner moves its business and seeks tenants. The property owner is only able to lease one-third of the property, and commences an action in inverse condemnation due to the inability to lease the other two-thirds. In this situation, although the property owner is suffering the same vacancy as Scenario 1, the interference here does not affect how the owner was using the property *prior* to the condemnation threat. That is, the property owner did not establish that the city interfered with the owner's ability to use the property for its in-house business, as it had been using the property for the past five years. As such, the property owner has not established substantial interference with the property, and is therefore not entitled to compensation.

Scenario 3. Intent to condemn, moderate interference, twelve years of planning

This scenario presents facts similar to those in *Santa Fe Pacific Trust* but over a longer period of time. Consider a case where the city announces an intent to condemn a specific piece of property, and then proceeds over the next twelve years to plan the project and obtain the requisite funding. The property owner has been using the property for commercial leasing, and is unable to lease one-third of the property as a result of the government's threat of condemnation. The rental decline is not substantial, but it is certainly significant. Despite continued efforts to lease the remaining space, the property owner is unable to find suitable tenants. It is now year twelve and the property owner has operated at a loss due to the inability to fully lease its property. In this situation, if the damages in the aggregate are significant, then the twelve-year delay probably warrants compensation. Of course the court should also take into account the nature of the city's planning and whether it was consistent and in good faith. However, even good faith planning can become unreasonable if it persists for such a long period of time. Excessive delays speak to poor planning and premature targeting of the subject property. The property owner should not have to bear this burden alone, and thus should be compensated for the extraordinary delay.

Scenario 4. Intent to condemn, moderate interference, two years of planning

Finally, consider facts similar to Scenario 3, except that the property owner seeks compensation just two years following the condemnation announcement. The city is still working toward its plan to condemn the property, but no formal condemnation actions have been initiated. The property owner sues in inverse condemnation, seeking damages for lost rental income of the vacant one-third of the property. In this case, the city's planning is still within a reasonable timeframe and would not warrant compensation in the absence of substantial interference. Because the interference is moderate and the delay is not yet unreasonable, the property owner's inverse condemnation action would likely fail.

Although the above scenarios are on the extreme end of the spectrum, they seek to provide insight on how the suggested framework might work. When the facts presented are somewhere in the middle, such as in *Santa Fe Pacific Trust*, then the outcome will be less clear and may go either way. This is understandable, as there are two important competing interests at play. The interests of both sides must be adequately considered, and the outcome will be highly dependent on the facts of the case. The final part of this Note will address these competing interests and some important counter-arguments that should be considered.

V. Implications and Counter-Arguments

There are two very important interests at odds in these pre-condemnation planning and publicity cases. The need for public input in planning activities is on one end, while the security of individual property rights is on the other. Government entities should not have to worry that every public announcement of possible condemnation is going to result in liability to every potential condemnee, but at the same time property owners should not have to suffer significant losses in property

value or expected revenue because of possible condemnation. While this Note aims to provide more balanced analyses under federal and state law, there are some concerns that must be addressed.

This Note has argued that under federal law, the court should have applied a thorough *Penn Central* analysis to determine whether the City's actions rose to the level of a compensable taking. It is true that *Penn Central* has been criticized as ambiguous and confusing,[220] but it is nevertheless the "go to" analysis for unique taking situations. This Note does not suggest that *Penn Central* should be the only consideration under federal law. Courts should look elsewhere for guidance in these unique situations, such as how the *Santa Fe Pacific Trust* Court looked to *Agins v. City of Tiburon*[221] for guidance.

Next, this Note has argued that the New Mexico Constitution provides greater protection to property owners, and thus courts should also consider unreasonable delay as an additional factor in pre-condemnation takings analyses. Some may consider this factor to be too favorable to property owners and detrimental to governmental decision-making. As discussed earlier, however, a long delay is not dispositive of the issue, as an express intent to condemn and some interference must also be established to find a taking. The intent to condemn must be specifically tied to the property in question, and the property owner must have established some measurable damage related to the threat of condemnation.

Some might also contend that any added protection for property owners will chill public decision-making, possibly taking decision-making out of the public realm. However, the suggested analysis attempts to balance the need for public input by encouraging public entities to discuss their plans broadly at first, and then move toward more specific targeting as the plans become more defined. Ideally, this would discourage a public entity from prematurely targeting a specific property before it can reasonably conclude that the project is feasible.

Introducing unreasonable delay as an element of pre-condemnation planning and publicity takings may also raise concerns over the statute of limitations. Particularly, the issue concerns when the statute of limitations would begin to run.[222] This is outside the scope of this Note, but because the unreasonable delay factor may arise after many years of governmental planning, it is recommended that the statute begin to run at the point that the "taking" occurs as a result of the unreasonable delay. Determining this date may be problematic, as it is directly tied to the integrity of the plaintiff's claim. Nevertheless, it makes more sense to establish the beginning of the statute of limitations as the date of the alleged taking (i.e., once the delay in planning became unreasonable) rather than the date that the planning began.[223]

Finally, it can also be argued that government entities might make rash decisions in an attempt to shield the entity from undue delay liability. Like previously mentioned, the suggested analysis still seeks to encourage public input and planning,

220. *See supra* Section III.C.

221. Agins v. City of Tiburon, 447 U.S. 255 (1980), *rev'd in part by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

222. *See* Townsend v. State ex rel. State Highway Dep't, 1994-NMSC-014, ¶¶ 8–9, 871 P.2d 958.

223. *See* N.M. STAT. ANN., § 42A-1-31(B) (1981) ("No action or proceeding shall be commenced pursuant to Section 42-1-23 NMSA 1978 against any state agency or political subdivision by any person unless such action or proceeding is brought within three years from the date of the taking or damaging.").

it just attempts to limit specific targeting until the project is more concrete and the plans are further along in the process. It is understandable that at a certain point, specific property must be identified, such as when soliciting bids for architectural designs and construction estimates. Ideally, however, these bids will be necessary once the public entity is reasonably sure that it can obtain the requisite approval and funding such that it can begin the more particular aspects of the project planning. Moreover, the delay must be *unreasonable* for potential liability to kick in. While there is no hardline measure of what is unreasonable, it is likely that many years must pass before unreasonable delay may even be considered.

CONCLUSION

The current state of New Mexico takings jurisprudence is inadequate for property owners because it does not afford owners the protection they need to feel secure in their property ownership. This Note aimed to provide suggested analyses that better balance governmental planning needs and private property rights, as applied to both federal and state takings claims. First, when presented with an issue of pre-condemnation planning and publicity argued under the Fifth Amendment of the United States Constitution, courts should look to the *Penn Central* factors to ensure a balanced analysis. As the "go to" approach for unusual regulatory takings situations, the *Penn Central* test provides a more complete analysis because it takes into account the unique facts of the case at hand. Second, when argued under New Mexico law, this Note suggests a slight modification to the adopted approach by including a provision for unreasonable delay. This would ideally provide compensation to property owners who might experience "a death by a thousand cuts." Finally, this Note contends that "substantial interference" should not be read so narrowly so as to only apply to cases where the subject property is rendered entirely useless. By relaxing the standard, New Mexico courts would give proper weight to the important damages provision of Article II, Section 20 of the New Mexico Constitution.

When property is targeted for condemnation, some economic losses may be expected. But when these losses are substantial or persist for an unreasonably long period of time, property owners should not be forced to bear the burden alone. Regulatory takings remain a very ambiguous area of takings law, and much is yet to be clarified. Nevertheless, this Note advocates that certain safeguards can and should be adopted to ensure that property owners remain secure in their property ownership, especially when they find themselves in the crosshairs of condemnation.